



2018

The Legal Fate of Internet Ad-Blocking

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Recommended Citation

Russell A. Miller, *The Legal Fate of Internet Ad-Blocking*, 24 B.U. J. Sci. & Tech. L. 299 (2018).

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ARTICLE

THE LEGAL FATE OF INTERNET AD-BLOCKING

RUSSELL A. MILLER*

ABSTRACT

Ad-blocking services allow individual users to avoid the obtrusive advertising that both clutters and finances most Internet publishing. Ad-blocking's immense—and growing—popularity suggests the depth of Internet users' frustration with Internet advertising. But its potential to disrupt publishers' traditional Internet revenue model makes ad-blocking one of the most significant recent Internet phenomena. Unsurprisingly, publishers are not inclined to accept ad-blocking without a legal fight. While publishers are threatening suits in the United States, the issues presented by ad-blocking have been extensively litigated in German courts where ad-blocking consistently has triumphed over claims that it represents a form of unfair competition. In this article, I survey the recent German ad-blocking cases and consider the claims publishers are likely to raise against ad-blocking in the imminent American litigation. I conclude that, when the American ad-blocking cases come, they are bound to meet with the fate they suffered in Germany. I argue that the relevant German and American legal frameworks reinforce a similar set of values, including respect for individual autonomy, recognition of the broad social benefits ad-blocking can generate, and an insistence that publishers accept ad-blocking as part of the free market in which they must evolve and innovate in order to compete.

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INTRODUCTION

Dominated by a photo of a lion surveying the grassy savannah for prey, the home page for the Internet browser Brave leaves little to a consumer's imagination. The accompanying caption resolves any lingering ambiguity: "Browse the web faster by blocking ads and trackers that violate your privacy and cost you time and money."¹ Brave's introductory video boasts that the browser's built-in ad-blocking function protects users from "sneaky, annoying ads," "trackers that follow your habits," and "cookies that build profiles."² The website promises that the browser dramatically cuts load times.³ Such improvement, the video explains, comes from excluding malware that "anxiously tr[ies] to learn more about you."⁴

But the "Internet crud" that Brave and other ad-blocking services occlude forms the basis of free-to-access websites and the foundation of an immense and exponentially expanding segment of the American economy.⁵ *The Economist* reported that "[t]he total market value of a basket of a dozen American firms that depend on ad revenue, or are devising their strategies around it, has risen by 126% to \$2.1 trillion over the past five years. The part of America's economy that is ad-centric has become systemically important, with a market value that is larger than the banking industry."⁶ New kinds of advertising, born out of the ubiquitously wired and digitally enabled modern world, have likely caused most of this growth.⁷ Brave insists that, rather than hurting publishers by wringing the neck of Internet advertising's golden goose, its browser helps publishers recoup revenue by "allow[ing] [users] to support [their] favorite publishers with automatic micropayments."⁸ In any case, by empowering users to avoid Internet

¹ BRAVE, <https://brave.com> [<https://perma.cc/FUG5-FU5L>] (last visited Feb. 24, 2018) (providing download for Brave browser).

² Brave, *This is Brave*, VIMEO (Aug. 4, 2017), <https://vimeo.com/228418113> [<https://perma.cc/XCE6-7RKZ>] (introducing the Brave browser and its capabilities).

³ BRAVE, *supra* note 1 (identifying reduced load times as compared to other browsers).

⁴ Brave, *supra* note 2.

⁵ *Id.*; see Andrew Saluke, *Ad Blocking Software as Third-Party Tortious Interference with Advertising Contracts*, 7 FLA. ST. U. BUS. REV. 87, 98 (2008) ("[Ad-blocking software] has the potential to bring into question the economic underpinnings of vast portions of the Internet—users that access 'free' content in exchange for having to view advertisements.").

⁶ Joseph Schumpeter, *Something Doesn't Ad Up About America's Advertising Market*, ECONOMIST (Jan. 18, 2018), <https://www.economist.com/news/business/21735029-stockmarket-investors-are-wrong-expect-enormous-surge-advertising-revenues-something> [<https://perma.cc/8QJQ-FJLV>] (tracing trends in advertising revenue).

⁷ See *Google's ad revenue from 2001 to 2017 (in billion U.S. dollars)*, STATISTA, <https://www.statista.com/statistics/266249/advertising-revenue-of-google/> [<https://perma.cc/3LHZ-9SZB>] (last visited May 15, 2018) (reporting Google's digital ad revenue for 2016 reaching \$79.38 billion).

⁸ Brave, *supra* note 2.

advertising and intrusive data-collection software, ad-blocking services represent a dramatic disruption of the Internet's established and immensely valuable economic model.⁹

Unsurprisingly, the Newspaper Association of America served Brave's founder with a cease-and-desist letter threatening a lawsuit shortly after a preview version of the browser launched.¹⁰ The widely reported letter, endorsed by some of America's largest media companies—including Dow Jones, Gannett, the McClatchy Group, the New York Times, Newsday, and the Washington Post—insisted that Brave's "plan to use *our content* to sell *[its] advertising* is indistinguishable from a plan to steal our content to publish on *[its] own website*."¹¹ This particular complaint points to the possibility that Brave might sell advertisements and substitute that profitable marketing content for the publishers' blocked advertising. The publishers promised to "enforce all legal rights to protect *[their] trademarks and copyrighted content* and to prevent *[Brave]* from deceiving consumers and unlawfully appropriating *[their] work* in the service of *[its] business*."¹²

The stakes in this emerging struggle have only grown in the months since Brave came to market. Conceding the general success and immense popularity of ad-blocking services, others in the information technology, digital media, and marketing sectors have begun experimenting with ways to circumvent or co-opt ad-blocking in order to mitigate its impact on their bottom-line.¹³ By way of

⁹ Saluke, *supra* note 5.

¹⁰ Klint Finley, *Publishers Strike Back at Browser That Replaces Their Ads*, WIRE (Apr. 11, 2016), <https://www.wired.com/2016/04/brave-software-publishers-respond/> [<https://perma.cc/66HK-FYM3>] (describing publishers' reactions to Brave's ad-blocking software); see Lukas I. Alpert, *Publishers Seek to Stop Brave Browser Ad-Blocking Tool*, WALL ST. J. (Apr. 7, 2016), <https://www.wsj.com/articles/publishers-seek-to-stop-brave-browser-ad-blocking-tool-1400065209>.

¹¹ Letter from Scott Searl, Senior Vice President & Gen. Couns., BH Media Grp., et al, to Brendan Eich, Founder, President & Chief Executive Officer, Brave Software, Inc., Apr. 7, 2016 (emphasis in original) (on file with author). Searl was referring to Brave's "ad replacement" program, wherein the Internet browser substitutes advertisements that would have otherwise appeared with advertisements the company has made itself. See *infra* notes 115-17 and accompanying text.

¹² *Id.*

¹³ See Shitong Zhu et al., *Measuring and Disrupting Anti-Adblockers Using Differential Execution Analysis*, in NETWORK AND DISTRIBUTED SYSTEMS SECURITY (NDSS) SYMPOSIUM 2018 (Feb. 2018) (analyzing the escalating arms race between ad-blockers and anti-ad-blockers); see also Klint Finley, *Google's New Ad Blocker Changed the Web Before It Even Switched On*, WIRE (Feb. 16, 2018), <https://www.wired.com/story/google-chrome-ad-blocker-change-web/> [<https://perma.cc/CH35-B83U>] (reporting on the effects of Google's ad-blocking integrated browser); see also Forbes Commc'ns Council, *14 Non-Intrusive Marketing Strategies to Beat the Ad Blocker Trend*, FORBES (Feb. 12, 2018) <https://www.forbes.com/sites/forbescommunicationscouncil/2018/02/12/14-non-intrusive-marketing-strategies-to-beat-the-ad-blocker-trend/#1e773b7769d6> [<https://perma.cc/9Z2G-R3MT>] (describing marketing strategies that circumvent ad blocking technology).

illustration, the giants of the Internet – including, among others, Facebook, Google, News Corp, the *Washington Post*, and Microsoft¹⁴ – formed the “Coalition for Better Ads,”¹⁵ with the goal of improving Internet users’ experiences by setting standards for minimally tolerable advertisements.¹⁶ Furthermore, some of the companies participating in the Coalition provide ad-blocking services of their own.¹⁷ Starting in February 2018, for example, Google’s world-beating browser, Chrome,¹⁸ featured a built-in “ad-filtering” function,¹⁹ which relies on the standards developed by the Coalition.²⁰ One commentator remarked that “[t]he feature is certain to be controversial. On one hand, there are huge benefits for both consumers and publishers. But on the other, it gives Google immense power over what the web looks like, partly in the name of protecting its own revenue.”²¹

These are only the pecuniary implications of ad-blocking. The technology also might save our democracy. We are only beginning to understand the scope and effect of Russian sponsored advertisements and social media posts on the 2016 United States presidential election.²² Facebook alone displayed more than

¹⁴ *Id.*

¹⁵ *Members*, COAL. FOR BETTER ADS, <https://www.betterads.org/members/> [<https://perma.cc/RK6P-VZUF>] (last visited Jan. 26, 2018).

¹⁶ *See The Initial Better Ads Standards*, COAL. FOR BETTER ADS, <https://www.betterads.org/standards/> [<https://perma.cc/UK7L-KMSC>] (last visited May 15, 2018).

¹⁷ Finley, *supra* note 13.

¹⁸ *Global Maker Share Held By the Leading Web Browser Versions as of February 2018*, STATISTA, <https://www.statista.com/statistics/268299/most-popular-internet-browsers/> [<https://perma.cc/SKK7-9452>] (identifying Google Chrome as the most used web browser) (last visited May 15, 2018).

¹⁹ Finley, *supra* note 13.

²⁰ *See* COAL. FOR BETTER ADS, *supra* note 16.

²¹ Jacob Kastrenakes, *Google Plans to Clean up the Web with Chrome Ad Blocker Next Year*, THE VERGE (June 1, 2017), <https://www.theverge.com/2017/6/1/15726778/chrome-ad-blocker-early-2018-announced-google> [<https://perma.cc/G53N-59M3>]; *see* Fred Campbell, *Is Google’s Chrome Browser Ad Blocking Anticompetitive?*, FORBES (Feb. 22, 2018), <https://www.forbes.com/sites/fredcampbell/2018/02/22/is-google-chrome-browser-ad-blocking-anticompetitive/#7140a2215cb6> [<https://perma.cc/3AU4-G7VL>] (“[S]ome in the ad industry believe Chrome’s blocking is self-serving and that Google had too much influence over the coalition process that chose the unacceptable ad types.”).

²² *See* Craig Timberg et al., *Russian Ads, Now Publicly Released, Show Sophistication of Influence Campaign*, WASH. POST (Nov. 1, 2017), https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb_story.html?utm_term=.b2b8de52aa98 [<https://perma.cc/LWT4-WWCN>].

3,000 ads placed by 470 accounts attributable to Russians.²³ The company estimates that 140 million users saw those ads.²⁴ The most recent presidential campaign demonstrated distressing competence for how best to use social media to manipulate American political discourse.²⁵ For example, Facebook users linked to Russia exploited the social media platform's ad-targeting software to deliver advertisements calculated to trigger strong emotions in some users as a way of enhancing divisions in the American electorate.²⁶ Social media firms are searching for ways to contain the problem.²⁷

The government also might intervene.

Most dramatically, Special Counsel Robert Mueller issued an indictment identifying thirteen Russian nationals for their role in these events.²⁸

²³ *Id.*

²⁴ Tony Romm & Kurt Wagner, *Here's How to Check If You Interacted with Russian Propaganda on Facebook During the 2016 Election*, RECODE (Dec. 22, 2017), <https://www.recode.net/2017/12/22/16811558/facebook-russia-trolls-how-to-find-propaganda-2016-election-trump-clinton> [<https://perma.cc/ZT9L-ASQQ>].

²⁵ See Timberg et al., *supra* note 22.

²⁶ See Laura Sydell, *How Russian Propaganda Spreads on Social Media*, NPR (Oct. 29, 2017), <https://www.npr.org/sections/alltechconsidered/2017/10/29/560461835/how-russian-propaganda-spreads-on-social-media>.

²⁷ See Sheera Frankel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html> (describing the different steps social media firms have taken in the wake of the Russia scandal); Farhad Manjoo, *Tackling the Internet's Central Villain: The Advertising Business*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/technology/internet-advertising-business.html> (identifying the complexities associated with regulating digital ads); Michael McFaul, *Enough is Enough: How to Stop Russia's Cyber-Interference*, WASH. POST, Sept. 28, 2017, at https://www.washingtonpost.com/news/global-opinions/wp/2017/09/28/enough-is-enough-how-to-stop-russias-cyber-interference/?utm_term=.60511a8ea295. (Sept. 28, 2017), https://www.washingtonpost.com/news/global-opinions/wp/2017/09/28/enough-is-enough-how-to-stop-russias-cyber-interference/?utm_term=.60511a8ea295 [<https://perma.cc/B4XV-5FBF>]. Facebook has doubled its staff working on safety and security, and the company will generally pursue greater ad transparency for its platform. See Haley Draznin, *Facebook Exec on Russian Election Meddling: "We Need More Ad Transparency"*, CNN MONEY, at <http://money.cnn.com/video/technology/business/2017/12/11/naomi-gleit-facebook-russia.cnnmoney/index.html> [<https://perma.cc/MB7G-9HX3>] (interviewing Facebook VP of Social Good Naomi Gleit).

²⁸ *United States v. Internet Research Agency LLC et al.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2018); Press Release, U.S. Dep't of Justice, Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018), <https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere> [<https://perma.cc/2XBP-N2QA>] (reporting the indictment against the perpetrators of the Russian ads Facebook scandal); see also Natasha Bertrand, *Mueller's Indictment Puts Details*

Congress might respond as well. If enacted, the Honest Ads Act would regulate online political advertising just as it is regulated in more traditional media, such as television, radio, and print.²⁹ But the law's focus on the open Internet ecosystem, as opposed to closed social media applications such as Facebook, misses the mark.³⁰ Further, despite outward support from industry leaders for greater political ad transparency online, the bill's prognosis remains poor.³¹

It seems that user-defined and user-initiated responses such as ad-blocking will have to be part of the solution. Ad-blocking software has enjoyed some success in the context of closed social media platforms, which are notoriously resistant to ad-blocking technology.³² Software engineers at AdBlock Plus, one of the world's most widely-subscribed ad-blocking services, recently succeeded in preventing many sponsored ads from appearing in Facebook News Feeds on desktop computers.³³ If it can be more widely deployed, this service would enable Facebook users to curate—or block altogether—the advertising that litters their social media environment, including suspicious or questionable political ads.

This is ad-blocking's moment. But, as the cease-and-desist letter sent to Brave demonstrates, ad-blocking's legal standing remains uncertain. Within the United States the legal issues involved remain somewhat novel. Comparatively, in Germany, nearly all the courts considering the technology have declared ad-

Behind Claims of Russian Interference, ATLANTIC (Feb. 16, 2018), <https://www.theatlantic.com/politics/archive/2018/02/muellers-indictment-reveals-details-of-russian-election-interference/553625/> [<https://perma.cc/D8A7-6JKP>].

²⁹ Honest Ads Act, S. 1989, 115th Cong. (2017); see *All Things Considered: What You Need to Know About the Honest Ads Act*, NPR (Oct. 19, 2017), <https://www.npr.org/2017/10/19/558847414/what-you-need-to-know-about-the-honest-ads-act> (transcribing a conversation between NPR's Mary Louise Kelly and Democratic Senator Mark Warner regarding the Honest Ads Act). The law would require companies to maintain public databases of online political ads and provide information about the funding sources for ad campaigns.

³⁰ See Manjoo, *supra* note 27; Editorial Board, *After Russia's Election Interference, Pulling Back the Curtain on Online Ads*, WASH. POST (Nov. 23, 2017), https://www.washingtonpost.com/opinions/whos-paying-for-online-ads/2017/11/23/493cc11c-ce44-11e7-9d3a-bcbe2af58c3a_story.html?utm_term=.91f72ef0bf68 [<https://perma.cc/EA6E-7XCU>].

³¹ See *Positions: Election Advertising*, INTERNET ASS'N, <https://internetassociation.org/positions/election-advertising/> [<https://perma.cc/8LCG-44DP>] (last visited Mar. 23, 2018) (reporting the official public policy position of members of the Internet Association); *H.R. 4077: Honest Ads Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr4077> [<https://perma.cc/TL4A-YKG9>] (last visited Mar. 23, 2018) (identifying a 5% chance of the bill being enacted).

³² See Garrett Sloane, *Ad Blocker's Successful Assault on Facebook Enters its Second Month*, AD AGE (Oct. 31, 2017) <http://adage.com/article/digital/blockrace-adbloc/311103/> [<https://perma.cc/23MT-3P66>].

³³ *Id.*

blocking legal.³⁴ This critical mass of German jurisprudence partly results from the fact that Eyeo, the parent company of AdBlock Plus, is based in Germany.

When the American ad-blocking lawsuits come, they will likely meet the fate suffered by similar lawsuits in Germany. This Article argues that the relevant German and American norms reinforce a similar set of values, including respect for individual autonomy, recognition of the broad social benefits ad-blocking can generate, and an insistence that publishers accept ad-blocking as part of the free market in which they must evolve and innovate to compete. This Article advances in three steps. It starts with a general introduction to ad-blocking. For two reasons the focus here is on Eyeo's AdBlock Plus service. On one hand, it is the most widely-used ad-blocking service in the United States.³⁵ On the other hand, its unique functionality and technological character served as the factual basis for the relevant German judgements. The second step surveys the ill-fated legal challenges to ad-blocking services in Germany, including the most recent, ground-breaking judgements issued by the respected Munich Higher Regional Court. Finally, the third step surveys and assesses some of the claims likely to be asserted against ad-blocking under American law.

I. AD-BLOCKING: A PRIMER

A. *Digital Advertising—Revenue and Resentment*

Advertising is one of the major streams of revenue for the publishing, entertainment, and information-technology industries.³⁶ The Internet, as a converged platform for acquiring information, completing tasks, and entertaining users, is no exception to this rule.³⁷ In fact, Internet advertising has become a massive industry. The Interactive Advertising Bureau's (IAB) reports tell a breathtaking story.³⁸ The most recent full-year report describes year-on-year growth for Internet advertising revenues of more than 20%.³⁹ In 2016, Internet advertising

³⁴ See *infra*, Part II. C.

³⁵ See *Leading Adblockers Used by Consumers in the United States as of May 2017*, STATISTA, <https://www.statista.com/statistics/721315/us-adblockers-used/> [<https://perma.cc/GVQ7-HTWN>] (last visited Mar. 23, 2018) (identifying AdBlock Plus as the most-used ad-blocker).

³⁶ See *Statistics & Facts on the U.S. Advertising Industry*, STATISTA, <https://www.statista.com/topics/979/advertising-in-the-us/> [<https://perma.cc/9NSH-8Q33>] (last visited Mar. 23, 2018).

³⁷ See generally ANDREW MCSTAY, *DIGITAL ADVERTISING 2* (2d ed. 2016) (exploring trends in online advertisements).

³⁸ See INTERNET ADVERTISING BUREAU, *IAB INTERNET ADVERTISING REVENUE REPORT: 2017 FIRST SIX MONTHS RESULTS 2* (2017) [hereinafter *IAB 2017 HALF-YEAR REPORT*]; INTERNET ADVERTISING BUREAU, *IAB INTERNET ADVERTISING REVENUE REPORT: 2016 FULL-YEAR RESULTS 2* (2017) [hereinafter *IAB 2016 FULL-YEAR REPORT*].

³⁹ INTERNET ADVERTISING BUREAU, *supra* note 38, at 3.

revenues totaled \$72.5 billion in the U.S. alone.⁴⁰ Ten advertising publishers took nearly three quarters of this haul.⁴¹ Four advertising formats dominated the industry: mobile advertisements (51%), search-based advertising (24%), banner advertisements (12%), and video-based advertising (7%).⁴² Advertising placed on social media platforms amounted to \$16.3 billion in 2016—an increase of nearly 50% from 2015.⁴³ An impressive range of industries were involved in this advertising bender: retail, financial services, automotive, telecommunications, leisure travel, consumer packaged goods, consumer electronics, pharmaceuticals and health care, media, and entertainment.⁴⁴ The half-year numbers from 2017 show continued, mind-boggling growth for Internet advertising revenue.⁴⁵

Two qualities have made Internet advertising the darling of producers, retailers, service providers, and marketers. First, digital ads can strategically target consumers in ways that ads in traditional media cannot.⁴⁶ Second, advertisers can document and assess an advertisement's effectiveness.⁴⁷ Indeed, these qualities have led advertisers to develop increasingly effective online advertising strategies. Studies demonstrate that Internet ads executed alongside traditional offline media "consistently drives greater lift than traditional offline media alone."⁴⁸ Depending on the product, Internet ads alone may be sufficient to produce the results.⁴⁹ Publishers may further optimize Internet ad campaign effec-

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 9.

⁴² *Id.* at 11.

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 2 (reporting a 22.6% increase in revenue for the half year).

⁴⁶ See Heather Shoenberger, *Targeted Digital Advertising and Privacy*, in *DIGITAL ADVERTISING: THEORY AND RESEARCH* 300 (Shelly Rodgers & Esther Thorson eds., Routledge 3d ed. 2017).

⁴⁷ See Susan Athey & Joshua S. Gans, *The Impact of Targeting Technology on Advertising Markets and Media Competition*, 100 *AM. ECON. REV.* 608, 608 (2010) (arguing online advertising allows for increased advertising effectiveness, which allows for direct targeting of consumers); David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 *J. ECON. PERSPECTIVES* 37, 42 (2009) (explaining that online advertising allows advertisers to know "for certain whether an individual is viewing their site at a certain time," unlike traditional advertising); Avi Goldfarb, *What is Different About Online Advertising?*, 44 *REV. INDUS. ORG.* 115, 119-120 (2014) (arguing online advertising allows for better analysis of advertising effectiveness); Stephen B. Wicker & Kolbeinn Karlsson, *Internet Advertising: Technology, Ethics, and a Serious Difference of Opinion*, 60 *COMM. ACM* 70, 72-73 (2017) (explaining how demand-side platforms "build a strikingly detailed simulacrum whose accuracy drives the advertisers' return on investment . . .").

⁴⁸ See INTERNET ADVERTISING BUREAU, *CROSS-MEDIA AD EFFECTIVENESS STUDY* 36 (2017).

⁴⁹ *Id.*

tiveness by targeting consumers at certain times and within certain environments.⁵⁰ Finally, and most dramatically, behaviorally-targeted online ads may go so far as to change the way consumers think about themselves and their needs.⁵¹

Others are less sanguine about the impact of Internet advertising.⁵² The advertising industry journal *AdWeek*, in a fit of self-reflection, recently reported on a study that confirms the fact that “consumers seem consistently unhappy with digital advertising.”⁵³ The study found that “[m]ore than one-half of the survey participants were neutral about seeing ads, and only 7 percent viewed online ads positively,” while “more than 30 percent disliked online ads.”⁵⁴ Respondents to the survey were put off by ads that slowed page-load times, irrelevant ads that repeat, and ads that take up too much screen real estate.⁵⁵ This survey is not anomalous. For years, Internet users have consistently reported distaste for ads, with concerns ranging from the misuse of personal information to the effective

⁵⁰ See Michelle Andrews et al., *Mobile Ad Effectiveness: Hyper-Contextual Targeting with Crowdedness*, 35 *MARKETING SCI.* 218, 218 (2016) (identifying crowdedness of a consumer’s environment as a way to boost effectiveness of hyper-contextual mobile advertising).

⁵¹ See Christopher A. Summers et al., *An Audience of One: Behaviorally Targeted Ads as Implied Social Labels*, 43 *J. CONSUMER RES.* 156, 157 (2016) (exploring the unique psychological consequences of behaviorally-targeted ads).

⁵² See, e.g., Tom Blake et al., *Consumer Heterogeneity and Paid Search Effectiveness: A Large Scale Field Experiment* 21–22 (Nat’l Bureau of Econ. Research, Working Paper No. 20171, 2014); Megan McArdle, *Online Journalism Is Suffering Print’s Fate*, *BLOOMBERG* (June 12, 2014), <https://www.bloomberg.com/view/articles/2014-06-12/online-journalism-is-suffering-print-s-fate> [<https://perma.cc/A956-53TD>]; Jordan Weissmann, *We Have No Idea If Online Ads Work*, *SLATE* (June 17, 2014, 5:17 PM), http://www.slate.com/articles/technology/technology/2014/06/online_advertising_effectiveness_for_large_brands_online_ads_may_be_worthless.html [<https://perma.cc/N57C-PUR7>].

⁵³ Kimberlee Morrison, *Consumers Don’t Like and Don’t Trust Digital Advertising*, *ADWEEK: SOCIAL PRO DAILY* (May 5, 2017), <http://www.adweek.com/digital/consumers-dont-like-and-dont-trust-digital-advertising-infographic/> [<https://perma.cc/A8HW-QEUY>].

⁵⁴ *Id.*

⁵⁵ *Id.*

performance of their computers.⁵⁶ By 2015, online user experience had so deteriorated that the head of the technological arm of the IAB publicly apologized for the online advertising industry's standards.⁵⁷

Users' disdain for Internet advertising should not surprise us. As a starting point, it must be acknowledged that people generally do not trust advertisements of any kind, traditional or digital.⁵⁸ Consumers see advertising as "more manipulative than informative."⁵⁹ They feel that products do not live up to an advertisement's promises or presentation.⁶⁰ Starting from that low status, online advertising faces distinct challenges. For example, people resent advertising because they see the Internet as "a tool or task-performing medium rather than an entertainment medium . . ."⁶¹ This may cause them to avoid online ads because they are at work or because they are searching "for specific information in a limited amount of time. . ."⁶² Also, many users are concerned with access speed and may try to avoid ads that they think are slowing down the functionality of their information technology system.⁶³

PageFair, a startup that helps publishers mitigate the effects of ad-blocking on their marketing and revenue strategies, has reported that what was once a

⁵⁶ See Chang-Hoan Cho & Hongsik John Cheon, *Why Do People Avoid Advertising on the Internet?*, 33 J. ADVERT. 89, 91–92 (2004) (describing user ad-avoidance as stemming from three psychological sources: perceived goal impediment, perceived ad clutter, and prior negative experiences); Saluke, *supra* note 5, at 112 (identifying ad annoyance, lack of perceived control over one's own computer, and invasion of privacy as user concerns against Internet ads). To be clear, perceived goal impediment refers to the ads' obstruction of a user's "goal-directed" use of the Internet. Cho & Cheon, *supra* at 90. Perceived ad clutter relates to ad oversaturation in the Internet. *Id.* Finally, prior negative experiences contribute to users' previous exposure to deceptive, exaggerated, or otherwise misleading ads. *See id.*

⁵⁷ See Johnny Ryan, *Scott Cunningham, IAB TechLab Founder, on Advertising in Crisis*, PAGEFAIR (Mar. 21, 2017), <https://pagefair.com/blog/2017/scott-cunningham-iab-techlab/> [<https://perma.cc/GS9S-WR7D>] (providing a transcript of Scott Cunningham's 2015 interview with Dr. Johnny Ryan).

⁵⁸ See Louise Kelly, Gayle Kerr & Judy Drennan, *Avoidance of Advertising in Social Networking Sites: The Teenage Perspective*, 10 J. INTERACTIVE ADVERT. 16, 16 (2010) (exploring teenagers' attitudes toward advertising in the context of online social networking sites).

⁵⁹ *Id.*

⁶⁰ *Id.* ("[T]hey perceive that products fail to perform as well as portrayed in advertising . . .").

⁶¹ Cho & Cheon, *supra* note 56, at 90; see PAYAM HANAFIZADEH & MEHDI BEHBOUDI, *ONLINE ADVERTISING AND PROMOTION: MODERN TECHNOLOGIES FOR MARKETING* 148 (Heather A. Probst ed., 2012) (identifying some Internet users as goal-oriented); Kelly, Kerr & Drennan, *supra* note 58, at 18 (also identifying some Internet users as goal-orientated).

⁶² Cho & Cheon, *supra* note 56, at 94.

⁶³ See Mimi An, *Why People Block Ads (And What It Means for Marketers and Advertisers)*, HUBSPOT (July 13, 2016), <https://research.hubspot.com/why-people-block-ads-and-what-it-means-for-marketers-and-advertisers> [<https://perma.cc/FK5X-PQJR>] (explaining why Internet users use ad-blockers).

niche service used by technology enthusiasts has now gone “mainstream.”⁶⁴ Ad-blocking already has hit publishers’ and advertisers’ bottom lines. PageFair estimated that ad-blocking software cost website publishers almost \$22 billion in advertising revenue in 2015.⁶⁵ Global projections for 2016 placed this amount at over \$41 billion, with approximately \$20 billion in the United States alone.⁶⁶ Some suggest that ad-blocking’s impact on website revenues has been more modest.⁶⁷ PageFair’s numbers, for example, do not adequately account for the diverse approaches to ad-blocking, some of which actually aim to grow advertisers’ and publishers’ advertising revenue.⁶⁸ Still, the latest numbers give advertisers and publishers cause for alarm. Current users that employ ad-blocking software represent only a small fraction of the global Internet population.⁶⁹ Further, the declining percentage of blocked ads in some countries⁷⁰ may be a result of new ad standards rather than changing user attitudes with regard to disruptive or annoying ads.⁷¹

⁶⁴ See PAGEFAIR, <https://pagefair.com> (last visited Feb. 25, 2018); see also PAGEFAIR, THE STATE OF THE BLOCKED WEB: 2017 GLOBAL ADBLOCK REPORT 10 (2017), <https://pagefair.com/downloads/2017/01/PageFair-2017-Adblock-Report.pdf> [<https://perma.cc/6UF2-D75L>] [hereinafter PAGEFAIR 2017 REPORT]; PAGEFAIR, ADBLOCKING GOES MAINSTREAM: PAGEFAIR AND ADOBE 2014 REPORT 4 (2014), <https://downloads.pagefair.com/downloads/2016/05/Adblocking-Goes-Mainstream.pdf> [<https://perma.cc/V89R-A9VG>] [hereinafter PAGEFAIR 2014 REPORT].

⁶⁵ PAGEFAIR, THE COST OF AD BLOCKING: PAGEFAIR AND ADOBE 2015 AD BLOCKING REPORT 3 (2015), https://downloads.pagefair.com/wp-content/uploads/2016/05/2015_report_the_cost_of_ad_blocking.pdf [<https://perma.cc/8SSE-3LDM>] [hereinafter PAGEFAIR 2015 REPORT].

⁶⁶ *Id.* at 7.

⁶⁷ See Jessica Davies, *Lies, Damned Lies and Ad Blocking Statistics*, DIGIDAY (June 2, 2016), <https://digiday.com/uk/lies-damned-lies-ad-blocking-statistics/> [<https://perma.cc/MT4F-M3T7>] (noting how differences in methodologies and sample sizes skew statistics); Alex Kantrowitz, *Widely Cited Ad Blocking Study Finding \$21.8 Billion Loss Is Incorrect*, BUZZFEED (Sept. 6, 2015), https://www.buzzfeed.com/alexkantrowitz/widely-cited-ad-blocking-study-finding-218-billion-loss-is-i?utm_term=.evZZyRDEY#.od-mEyQNzP [<https://perma.cc/VDS7-VAT8>] (identifying a methodological error in PageFair’s 2015 report charting the costs of ad-blocking).

⁶⁸ See, e.g., *About AdBlock Plus*, ADBLOCK PLUS, <https://adblockplus.org/en/about> [<https://perma.cc/7RF5-ZMCB>] (last visited Feb. 25, 2018).

⁶⁹ See PAGEFAIR 2017 REPORT, *supra* note 64, at 4.

⁷⁰ See Ulrike App, *BVDW: Die Adblock-Nutzung geht deutlich zurück*, W&V (Mar. 17, 2017), https://www.wuv.de/digital/bvdw_die_adblock_nutzung_geht_deutlich_zurueck (identifying a drop in the amount of blocked online advertising).

⁷¹ See PAGEFAIR 2017 REPORT, *supra* note 64, at 12.

B. *The Technology and Economics of Ad-Blocking*

Emerging from the primordial muck of the Internet's chaotic advertising ecosystem, ad-blocking services promise to end the scourge of unwanted and unloved digital advertisements. But how do these services function as a technical matter? And what are the economics associated with these services? Before answering these questions it is necessary to acknowledge that there are many different varieties of ad-blocking services.⁷² Some of the fundamental distinctions in the market involve the following: ad-blockers tailored for desktop/laptop computers or ad-blockers keyed to mobile devices; ad-blockers that are built into a browser or ad-blockers that must be added as a browser extension; ad-blockers that charge for their use or ad-blockers that are freely available to users; ad-blockers that provide a comprehensive shield against ads or ad-blockers that merely filter advertisements.⁷³ Each of these ad-blocking services would present unique legal questions. For this article, I will focus exclusively on the Adblock Plus service offered by the German-based company Eyeo.⁷⁴ I narrow my analysis in this way for two reasons. First, Adblock Plus is often identified as the world's "most popular" ad-blocking service.⁷⁵ Second, Adblock Plus' prominence in Germany meant that its unique structure and status served as the factual foundation for the many challenges resolved by the German courts that I will discuss later in this article. In any case, the nature and character of Eyeo's ad-blocking services are representative enough to stand-in as a proxy for ad-blocking technology in general.

1. Ad-blocking Technology

Adblock Plus is an open source browser extension⁷⁶ that is available to users at no cost.⁷⁷ Once added to a user's browser, the browser extension allows a user to instruct his or her browser to refrain from loading some—or all—of a

⁷² See Christopher Elliott, *Yes, There Are Too Many Ads Online. Yes, You Can Stop Them. Here's How.*, HUFFINGTON POST (Feb. 9, 2017), https://www.huffingtonpost.com/entry/yes-there-are-too-many-ads-online-yes-you-can-stop_us_589b888de4b02bbb1816c297 [<https://perma.cc/VA3U-BJRV>] (identifying the different types of ad blocker services available).

⁷³ *Id.*

⁷⁴ See *About Adblock Plus*, *supra* note 67.

⁷⁵ See *Popular Ad Blockers*, ADGUARD, <https://adguard.com/en/article/top-adblock.html> [<https://perma.cc/L53B-ALPC>] (last visited Feb. 25, 2018).

⁷⁶ See Bruce Perens, *The Open Source Definition*, in *OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION* 171, 172 (Chris DiBona et al. eds., 1999) (describing freely distributed and accessible source code that users may then update, modify, or integrate into different settings or functions).

⁷⁷ See *About Adblock Plus*, *supra* note 68.

webpage's ad elements to his or her computer.⁷⁸ It does so by relying on a set of rules ("filter lists") to direct content requests by a user's computer to a publisher's site.⁷⁹ Filter lists come in two basic variations: filters that "block" advertisements from being displayed on a user's computer (so called "blacklists") and filters that overrule the blacklists and allow the display of particular ads despite the parallel use of a blacklist (so called "whitelists").⁸⁰ In the case of Adblock Plus, individual users can tailor the filter lists themselves, select existing filter lists that other users have developed, or embrace default filter lists offered with the ad-blocking browser extension.⁸¹

As an example of the latter option, Adblock Plus offers a default blacklist called EasyList.⁸² Adblock Plus' global community of Internet users developed and maintains this list on a voluntary basis.⁸³ Similarly, Adblock Plus offers a default whitelist known as the Acceptable Ads list.⁸⁴ Eyeo developed the Acceptable Ads list with input from users⁸⁵ and, unlike the EasyList blacklist, initially maintained the Acceptable Ads whitelist.⁸⁶ In 2017, however, Eyeo transferred control of the Acceptable Ads initiative to an independent Acceptable Ads Committee, which is "made up of eleven stakeholders who represent three distinct coalitions: User Advocates Coalition (digital rights organization, ad-block user), For Profit Coalition (advertiser, advertising agency, ad-tech company, publisher / content creator), and the Expert Coalition (user agent, creative agent, researcher / academia)."⁸⁷

⁷⁸ See *id.*; *Adblock Plus Filters Explained*, ADBLOCK PLUS, <https://adblockplus.org/filter-cheatsheet#options> [<https://perma.cc/5YMS-94RQ>] (last visited Feb. 25, 2018); *Writing Adblock Plus Filters*, ADBLOCK PLUS, <https://adblockplus.org/filters> [<https://perma.cc/JS6N-UXN5>] (last visited Feb. 25, 2018).

⁷⁹ See *Adblock Filters Explained*, *supra* note 78.

⁸⁰ *Id.*

⁸¹ See *About Adblock Plus*, *supra* note 68; *Writing Adblock Plus Filters*, *supra* note 78.

⁸² See *Overview*, EASYLIST, <https://easylist.to/> [<https://perma.cc/L5EW-QA8J>] (last visited Feb. 25, 2018).

⁸³ *Id.*

⁸⁴ *Allowing Acceptable Ads in Adblock Plus*, ADBLOCK PLUS, <https://adblockplus.org/en/acceptable-ads> [<https://perma.cc/QC8K-FQAS>] (last visited Feb. 25, 2018).

⁸⁵ *Users*, ACCEPTABLE ADS, <https://acceptableads.com/en/users> [<https://perma.cc/KZ9Q-H8WM>] (last visited Feb. 25, 2018).

⁸⁶ *Allowing Acceptable Ads in Adblock Plus*, *supra* note 84.

⁸⁷ See *Acceptable Ads Committee*, ACCEPTABLE ADS, <https://acceptableads.com/en/committee/> [<https://perma.cc/23TG-SX7N>] (last visited Feb. 25, 2018); *Members*, ACCEPTABLE ADS, <https://acceptableads.com/en/committee/members> [<https://perma.cc/28GA-GH3G>] (last visited Feb. 25, 2018) (providing a list of current Representatives and supporting members, broken down by Coalition).

The website access process that triggers intervening filter lists involves a complex technological dance that takes place in milliseconds and may go unremarked by Internet users.⁸⁸ Typically, when a user accesses a website, the browser sends an HTML “get-request” to the site’s host server, which in turn responds with an HTML-Document providing the relevant website’s basic infrastructure.⁸⁹ The first HTML-Document is always the same and is delivered without adaptation or modification.⁹⁰ Publishers typically embed secondary get-requests for advertising into the initial HTML-Document.⁹¹ The user’s browser responds to these secondary get-requests by calling for the delivery of subsidiary content, such as advertising.⁹² All of this happens nearly instantaneously and goes unnoticed by the user unless some interference (such as a slow Internet connection) slows the process.⁹³

It is at the point of the secondary get-requests that Adblock Plus does its work. Normally, the browser automatically and unquestioningly loads all the secondary content identified by the first HTML-Document.⁹⁴ But the Adblock Plus extension modifies the browser’s behavior causing it to first confirm whether the summoned subsidiary content is desired by the user by checking it against the designated filter lists.⁹⁵ In essence the browser now “asks” the ad-blocking extension: “Shall I request this subsidiary content from the server ‘yes’ or ‘no?’” On one hand, Adblock Plus matches the nature of the requested subsidiary content with keywords or other indicators associated with undesirable advertising content (which are lodged on the enabled blacklist) and, if there is a match, it

⁸⁸ Tali Garsiel & Paul Irish, *How Browsers Work: Behind the Scenes of Modern Web Browsers*, HTML5 ROCKS (Aug. 5, 2011), <https://www.html5rocks.com/en/tutorials/internals/howbrowserswork/> [<https://perma.cc/D33G-96NM>].

⁸⁹ *Id.*; Wicker & Karlsson, *supra* note 47, at 72; Kristofer Gafvert, *How the Webbrowser Communicates with the Webserver (Simplified)*, IT-NOTEBOOK.ORG (Jan. 6, 2005), www.it-notebook.org/uncategorized/article/client_to_server.htm [<https://perma.cc/H8R7-9C2F>].

⁹⁰ Gafvert, *supra* note 89.

⁹¹ Patrick Sexton, *How a Webpage is Loaded and Displayed*, VARVY (Oct. 26, 2015), <https://varvy.com/pagespeed/display.html> [<https://perma.cc/6NBN-RZZN>]; Wicker & Karlsson, *supra* note 47, at 72.

⁹² Sexton, *supra* note 91; Wicker & Karlsson, *supra* note 47, at 72 (noting that websites generally do not own their own advertising content).

⁹³ See Garsiel & Irish, *supra* note 88.

⁹⁴ See, e.g., Sexton, *supra* note 91.

⁹⁵ See Robert J. Walls et al., *Measuring the Impact and Perception of Acceptable Advertisements*, PROC. 2015 INTERNET MEASUREMENT CONF. 107, 108 (2015); Wladimir Palant, *Filtering HTML Code in Adblock Plus*, ADBLOCK PLUS (Sept. 11, 2008), <https://adblock-plus.org/blog/filtering-html-code-in-adblock-plus> [<https://perma.cc/9WUV-H9NE>]; ADBLOCK PLUS, *FAQ – Adblock Plus Internals*, https://adblockplus.org/faq_internal [<https://perma.cc/WLA3-ZEJZ>] (last visited May 15, 2018) (describing how Adblock Plus configures built-in content policies to determine what data should be loaded).

blocks the get-request.⁹⁶ On the other hand, Adblock Plus matches the nature of the requested secondary content with keywords or other indicators associated with “acceptable” advertising (which are lodged on the enabled whitelist) and, if there is a match, permits the get-request and the subsequent delivery of the subsidiary content.⁹⁷ In the first of these scenarios (involving ad-blocking via the blacklist), after learning that it should refuse to communicate the secondary get-request, the browser will skip that discrete get-request and move on to the next action ordered by the first HTML-Document.⁹⁸ Of course, if the next action in the first HTML-Document’s queue is another secondary get-request, the browser—obeying the ad-blocking extension—repeats these steps.⁹⁹

Adblock Plus does not interact directly with the website in question. Instead, the extension engages in a third-party “dialogue” with the browser, which is responsible for delivering a website’s content to the user from the servers identified by the website’s first HTML-Document.¹⁰⁰ The website’s scripts (including the first HTML-Document and all secondary get-requests), and basically everything downloaded to the user’s computer, are executed as normal by the website.¹⁰¹ Rather than a filter fending off content already on its way from the servers,¹⁰² Adblock Plus operates as a kind of firewall that prevents unwanted secondary get-requests from leaving the user’s computer in the first place.¹⁰³ If an ad-blocking service works well, then the browser simply never communicates the website programmer’s command (“please load this banner or advertisement”) to the relevant host servers.¹⁰⁴ There is no outgoing “signal” for black-listed content. Theoretically, a user could achieve the functions of the Adblock Plus extension by selectively pulling the network cable from his or her router before a browser executes secondary get-requests from a website.

Ad-blocking services using these technical methods are now so effective that they can potentially prevent all of a website’s advertisements from being delivered to a user’s computer (desktop or laptop).¹⁰⁵ On mobile platforms, however, ad-blockers have caused less dramatic effects because ad-blockers interact with browsers and mobile users spend less than a quarter of their time accessing the

⁹⁶ See Wicker & Karlsson, *supra* note 47, at 72–73; *Adblock Plus Filters Explained*, *supra* note 78; *Allowing Acceptable Ads in Adblock Plus*, *supra* note 84.

⁹⁷ Walls et al., *supra* note 95.

⁹⁸ See, e.g., Garsiel & Irish, *supra* note 88.

⁹⁹ *Id.*

¹⁰⁰ Walls et al., *supra* note 95, at 108; see Garsiel & Irish, *supra* note 88.

¹⁰¹ See Garsiel & Irish, *supra* note 88.

¹⁰² See Saluke, *supra* note 5, at 96.

¹⁰³ See Wicker & Karlsson, *supra* note 47, at 73.

¹⁰⁴ See *id.*; Tyler Barbacovi, *Blocking Ad Blockers*, 16 J. MARSHALL REV. INTELL. PROP. L. 272, 273 (2017) (noting that ad-blockers prevent website elements from loading).

¹⁰⁵ Louise Neale, *How Ad Blockers Work – And How to Beat Them*, SPRINKLR (May 23, 2016), <https://blog.sprinklr.com/how-ad-blockers-work-and-how-to-beat-them/> [<https://perma.cc/G762-48JB>] (explaining the ad identification mechanism of ad blockers).

Internet through a web browser.¹⁰⁶ Instead, mobile users access content via mobile software applications (“apps”).¹⁰⁷ These apps are closed environments in which advertisements can operate unhindered by ad-blocking browser extensions.¹⁰⁸

2. The Economics of Ad-Blocking

Ad-blocking represents a profound benefit, even as it seems to recalibrate the free-access philosophy that has characterized the Internet from its inception, thereby potentially disrupting the status quo concerning one of the great public goods in human history.

First, ad-blocking empower users by giving them control over the files downloaded and executed from their computers. A user is now positioned to grant permission before such an action takes place. Website developers use the benefit of a decentralized web structure to organize a webpage’s loading to a user’s computer as a puzzle of various resources from various servers.¹⁰⁹ The initial attempt to access a website represents the user’s volitional choice (and thereby his or her implicit permission) to retrieve the website’s first HTML-Document. After this initial document is served, however, the user is not given an opportunity to give his or her permission to execute the website’s secondary get-requests. Ad-blocking services capitalize on these unseen, but discrete, steps to allow the user to decide, from among all the website’s content, which elements he or she wants to download. As a consequence of the user’s newly empowered posture, he or she is free to access Internet content without having to endure obtrusive and disruptive advertising.¹¹⁰ This is nothing short of a significant form of liberation for the digital age.

¹⁰⁶ *Id.*

¹⁰⁷ Cathy Boyle, *US Time Spent with Mobile: A Deep Dive into Mobile App and Web Time*, EMARKETER (Jan. 26, 2017), <https://www.emarketer.com/Report/US-Time-Spent-with-Mobile-Deep-Dive-Mobile-App-Web-Time/2001835> [<https://perma.cc/56PD-YJ8S>]; Dave Chaffey, *Mobile Marketing Statistics Compilation*, SMART INSIGHTS (Apr. 24, 2018), www.smartinsights.com/mobile-marketing/mobile-marketing-analytics/mobile-marketing-statistics/ [<https://perma.cc/PEV#-GD5R>]; Ewan Spence, *The Mobile Browser Is Dead, Long Live the App*, FORBES (Apr. 2, 2014) <https://www.forbes.com/sites/ewanspence/2014/04/02/the-mobile-browser-is-dead-long-live-the-app/#43c6f6c1614d> [<https://perma.cc/8U7E-UL5E>]; *Smartphone Apps Crushing Mobile Web Time: App Time Swells to 86% of Smartphone Time*, EMARKETER (Sept. 20, 2016), <https://www.emarketer.com/Articles/Print.aspx?R=1014498> [<https://perma.cc/P5LY-TCVG>].

¹⁰⁸ Neale, *supra* note 105.

¹⁰⁹ See, e.g., DAVID KARLINS & DOUG SAHLIN, *BUILDING WEBSITES ALL-IN-ONE FOR DUMMIES* (3d ed. 2012) (describing the process of embedding elements from external sources into a webpage).

¹¹⁰ DIGITAL ADVERTISING: THEORY AND RESEARCH 253 (Shelly Rodgers & Esther Thorson eds., 3d ed. 2017).

Second, it must be acknowledged that ad-blocking services also can be profitable. Some ad-blocking services have monetized users' desire to reclaim their Internet freedom.

To begin, some ad-blocking services charge a fee to download the necessary browser-extension.¹¹¹ Eyeo's popular AdBlock Plus service has rejected this approach and is instead offered for free.¹¹²

Other ad-blocking services collect "anonymized data" that targeted advertising programs would normally track.¹¹³ This data can be sold to companies that "use the information to help improve the speed, privacy, and performance of their sites."¹¹⁴

Alternatively, and perhaps ironically, an ad-blocking service might allow some advertising to reach a website.¹¹⁵ In the case of Brave, for example, the browser might populate the real estate left vacant by the workings of the built-in ad-blocking service with advertisements it has commissioned itself.¹¹⁶ Of course, Brave collects revenue for delivering its advertising in lieu of the advertising originally commissioned by the publisher.¹¹⁷ Brave then divides this revenue between itself, Brave users, and ad publishers.¹¹⁸

AdBlock Plus has adopted another model as a middle-way between the current framework of unrestricted and obtrusive advertising saturation, on one hand, and the risk that the Internet's current free-access framework might collapse, on the other hand. This approach empowers the user to selectively permit some advertising, which is delivered in conformity with a designated whitelist that promotes tolerable advertising form and function.¹¹⁹ The user can identify standards for this approved advertising by assembling a tailored whitelist or

¹¹¹ Julia Greenberg, *Ad Blockers Are Making Money Off Ads (And Tracking Too)* WIREFID (Mar. 2, 2016), <https://www.wired.com/2016/03/heres-how-that-adblocker-youre-using-makes-money/> [<https://perma.cc/CP9S-KT54>] ("Disconnect and 1Blocker operate under a 'freemium' model, which allow you to download the service, but then charges for certain options like being able to block more than one irritant at a time. [Others] just charge you a few bucks when you download them on your phone.")

¹¹² *About AdBlock Plus*, *supra* note 68.

¹¹³ Greenberg, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ See Shona Ghosh, *Adblock Plus: Google's New Chrome Ad Blocker Will Only Block 17% of Online Ads*, BUS. INSIDER (Jan. 24, 2018), <http://www.businessinsider.com/google-new-chrome-ad-blocker-will-only-block-17-of-ads-2018-1> [<https://perma.cc/XD6W-YQ6Q>] (describing how Google's Chrome ad blocker blocks only a small percentage of ads).

¹¹⁶ See *About Ad Replacement*, BRAVE, <https://www.brave.com/about-ad-replacement/> [<https://perma.cc/PA9P=YRKQ>] (last visited Feb. 26, 2018) (describing the Brave Ad Replacement program).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *AdBlock Filters Explained*, *supra* note 78.

adopting a third party's whitelist.¹²⁰ Alternatively, the user can enable the Acceptable Ads list offered as a default by AdBlock Plus.¹²¹ Eyeo originally curated and maintained this list in consultation with stakeholders to allow "advertisers and publishers who have agreed to make ads that abide by user-generated criteria to be whitelisted."¹²² These criteria emphasize unobtrusive ad placement, clear identification of ads, and the advertisements' size relative to the adjacent primary content.¹²³

Some advertisers pay Eyeo a licensing fee to have their ads certified as "acceptable" and cleared for inclusion in the Acceptable Ads whitelist.¹²⁴ But Eyeo only collects this fee from "larger entities," which it defines as advertising publishers that "gain more than 10 million additional ad impressions per month due to participation in the Acceptable Ads initiative."¹²⁵ This whitelisting revenue model anticipates that publishers and advertisers will have greater success with their "acceptable" whitelisted ads than they do with their disruptive, unrestricted, and unwanted advertising.¹²⁶ Applied to a mere ten percent of advertising publishers, the whitelist fee represents around 30 percent of the publishers' enhanced revenue.¹²⁷

The Acceptable Ads initiative requires Eyeo to continuously monitor individual whitelisted ads to determine if and in what form their content will be regarded as "acceptable."¹²⁸ This means that Eyeo helps users to block some advertising and then accepts a fee from some online publishers to facilitate the presentation of tolerable ads. It might be obvious why the challengers to AdBlock Plus in the German lawsuits characterized Eyeo's model as a form of "extortion."¹²⁹ Eyeo has been accused of "raping and pillaging content creators," and has been compared to the Mafia.¹³⁰

¹²⁰ See *About AdBlock Plus*, *supra* note 68; *Allowing Acceptable Ads in AdBlock Plus*, *supra* note 84.

¹²¹ *Allowing Acceptable Ads in AdBlock Plus*, *supra* note 84.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *About AdBlock Plus*, *supra* note 68.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Michael Rosenwald, *The Digital Media Industry Needs to React to Ad Blockers . . . or Else*, COLUM. JOURNALISM REV. (Sept./Oct. 2015), http://www.cjr.org/business_of_news/will_ad_blockers_kill_the_digital_media_industry.php [<https://perma.cc/WZ4T-36VX>]; see Greenberg, *supra* note 111.

¹³⁰ Brian Sheehan, *More Effective Native Advertising Is a Solution to Ad Blockers*, ADAGE (Feb. 3, 2016) <http://adage.com/article/digitalnext/effective-native-ads-a-solution-ad-blockers/302476> [<https://perma.cc/8KB8-BCDL>].

In fact, the Acceptable Ads initiative yielded significant profits for Eyeo.¹³¹ If AdBlock Plus produces a windfall for Eyeo, then the opposite has proven true for publishers and advertisers who continue to rely on obtrusive and disruptive (unacceptable) advertisements. These publishers are feeling the pinch from users' decision to use ad-blocking services to avoid irritating ads.¹³² Before choosing to launch its own ad-filtering function on its Chrome browser, Google expressed concern about ad-blocking services,¹³³ most likely because Google's ad revenue accounted for the bulk of the total revenue for Alphabet—Google's parent company—in 2017.¹³⁴ Yet, even while they complain about ad-blocking services, major information-technology firms have paid massive premiums for the benefits provided by ad-blocking whitelists such as Eyeo's.¹³⁵

The publishers that have resisted that response have attempted to develop technical means that will defeat ad-blocking software. They can, for example, implement an "ad-block gate" that denies access to the website to a user running an ad-blocking extension.¹³⁶ This can be very successful. The German publisher Axel Springer, for example, deployed an ad-blocking gate for its prominent and highly-successful *Bild* website.¹³⁷ That ad-blocking gate saw more than two thirds of the visitors who were running ad-blockers deactivate those services so

¹³¹ See Jörgen Camrath, *Google's Questionable Deal With Adblock Plus*, WALL ST. J. GER. (Feb. 1, 2014), <https://www.welt.de/wall-street-journal/article124441049/Googles-fragwuerdiger-Deal-mit-Adblock-Plus.html> [<https://perma.cc/WDS3-UVTZ>] (reporting a large payment from Google to AdBlock Plus); Lara O'Reilly, *Google Is Preparing Its Big Response to the Ad Blocking Problem (But It Probably Won't Be Positioned As Coming From Google)*, BUS. INSIDER (May 11, 2016), <http://www.businessinsider.com/how-google-is-responding-to-ad-blocking-2016-5> [<https://perma.cc/L6HC-VVJ9>].

¹³² PAGEFAIR 2015 REPORT, *supra* note 64, at 7 (reporting an estimated \$20.3 billion loss in the United States due to ad blocking services).

¹³³ Jillian D'Onfro, *Google Ad Boss: Ad Blockers Are "A Blunt Instrument and We Need to Be Worried,"* BUS. INSIDER (Oct. 23, 2015) <http://www.businessinsider.com/google-ad-boss-sridhar-ramaswamy-on-ad-blockers-2015-10> [<https://perma.cc/8QDS-ESUW>].

¹³⁴ *Compare Annual Revenue of Alphabet from 2011 to 2017 (In Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/507742/alphabet-annual-global-revenue/> [<https://perma.cc/JBA2-ZFS3>] (last visited Feb. 28, 2018) (reporting Alphabet's total annual revenue in 2017 as \$110.9 billion) *with Google's Ad Revenue From 2001 to 2017 (In Billion U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/266249/advertising-revenue-of-google/> [<https://perma.cc/2EQZ-C5HB>] (last visited Feb. 27, 2018) (reporting Google's total ad revenue in 2017 as \$95.4 billion).

¹³⁵ Lara O'Reilly, *Google, Microsoft, and Amazon Are Paying Adlock Plus Huge Fees to Get Their Ads Unblocked*, BUS. INSIDER (Feb. 3, 2015), <http://www.businessinsider.com/google-microsoft-amazon-taboola-pay-adblock-plus-to-stop-blocking-their-ads-2015-2> [<https://perma.cc/WZ2Y-GW77>].

¹³⁶ See Neale, *supra* note 105; see also Barbacovi, *supra* note 104, at 276-277.

¹³⁷ *Axel Springer Bans Adblock Users from Bild Online*, GUARDIAN (Oct. 13, 2015), <https://www.theguardian.com/media/2015/oct/13/axel-springer-bans-adblock-users-from-bild-online> [<https://perma.cc/5U3U-G4U3>].

that they could regain access to the website.¹³⁸ Other sites, such as the British newspaper *CityA.M.* claim to have seen “no perceivable drop in traffic” after putting an ad-blocking gate in place.¹³⁹ This suggests that some of the apocalyptic scenarios threatened by media firms and advertisers as a result of the rise of ad-blocking may be exaggerated.¹⁴⁰

Another technical workaround that publishers might use is the “ad-blocker-blocker,” which can actually circumvent the ad-blocking service and display advertisements to the user despite his or her use of an ad-blocking extension.¹⁴¹ This type of software can also be used in a softer manner by requesting that users disable their ad-blocker or by offering a pay-per-view option.¹⁴²

In addition to the technological means of defeating ad-blockers, firms can also shift marketing strategies. Publishers and advertisers consider the widespread adoption of ad-blocking to be an existential crisis that can threaten the entire model of free Internet access and their significant revenue streams.¹⁴³ But a number of alternative revenue strategies exist, including a pay-per-view or pay-wall model, premium access options, and so-called “native” advertising.¹⁴⁴ Pay-per-view allows users to pay for a single unit of content.¹⁴⁵ Paywall access gives users a right to all content under particular circumstances.¹⁴⁶ Premium access is generally employed by sites that offer a basic level of free access that is accompanied by advertising and various other levels of exclusive access without advertising for which the user must pay a premium.¹⁴⁷

¹³⁸ Mathew Ingram, *Is Blocking Readers Who Use Ad Blockers the Best Strategy?*, FORTUNE (Dec. 22, 2015), <http://fortune.com/2015/12/22/blocking-ad-blockers/> [<http://perma.cc/D255-UEJQ>].

¹³⁹ Daniel Thomas, *Ad Blockers: How Online Publishing is Fighting Back*, BBC (Feb. 19, 2016), <http://www.bbc.com/news/business-35602332> [<https://perma.cc/Q5NC-Z98Y>].

¹⁴⁰ See, e.g., Morrison, *supra* note 53.

¹⁴¹ Lisa Vaas, *Former Googler Fights Adblockers With Adblocker Blocker*, NAKED SEC. (June 19, 2015), <https://nakedsecurity.sophos.com/2015/06/19/former-googler-fights-ad-blockers-with-adblocker-blocker/> [<https://perma.cc/EWV2-4P45>].

¹⁴² *Id.*

¹⁴³ Rosenwald, *supra* note 129.

¹⁴⁴ Alexis Ulrich, *Ad Blockers: Don't Fight Them; Understand Them*, SITEPOINT (Dec. 15, 2014), <https://www.sitepoint.com/ad-blockers-dont-fight-understand/> [<https://perma.cc/H63V-EAHA>].

¹⁴⁵ Dave Thier, *You Can Finally Buy 'Game of Thrones' A La Carte: HBO Comes to Google Play*, FORBES (Oct. 8, 2013), <https://www.forbes.com/sites/davidthier/2013/10/08/you-can-finally-buy-game-of-thrones-a-la-carte-hbo-comes-to-google-play/#33ac56de549b> [<http://perma.cc/DZ9E-TD9F>].

¹⁴⁶ Ulrich, *supra* note 144.

¹⁴⁷ *Id.*

Users seem to be resistant to these alternative revenue models.¹⁴⁸ So far, Internet users generally have been unwilling to pay to access content on the Internet. Still, there are a number of examples of fee-based websites that have successfully broken the Internet's advertising trap.¹⁴⁹

Another response has come in the form of a change in the nature of Internet advertising. "Native" advertising is now widely regarded as the future of online advertising.¹⁵⁰ These advertisements are readily visible on social media platforms such as Facebook. Their strength lies in the fact that users voluntarily access the advertisement. For example, the popular "feedsite" *BuzzFeed* provides users with news and entertainment content, including a discrete category of "promoted" content. This content looks just like any other *BuzzFeed* article, except that it is created by a "brand publisher."¹⁵¹ This type of content may be frowned upon, but it is now the most widely-adopted form of "native" advertising.¹⁵² And it is not limited to new or marginal media sources. The *Wall Street Journal* and the *New York Times* have run very effective "native" advertising campaigns.¹⁵³

¹⁴⁸ Rosenwald, *supra* note 128; PAGEFAIR 2017 REPORT, *supra* note 64, at 4 ("The vast majority of users state that they abandon websites that require them to disable their ad-block software.").

¹⁴⁹ Vineet Kumar, *Making "Freemium" Work*, HARV. BUS. REV., May 2014, <https://hbr.org/2014/05/making-freemium-work> ("Over the past decade 'freemium'—a combination of 'free' and 'premium'—has become the dominant business model among Internet start-ups and smartphone app developers.") Kumar cites Internet giants such as LinkedIn, Dropbox, Hulu, and Match.Com as examples of firms succeeding with a fee-based revenue model. *Id.*

¹⁵⁰ Greenberg, *supra* note 111 ("The advertising industry is already finding more value in a different kind of ad: so-called native advertising, which looks more like the content consumers are coming to websites to see in the first place.").

¹⁵¹ See, e.g., Keebler, *Definitive Proof Parents Should Never Use Social Media*, BUZZFEED (May 17, 2016), https://www.buzzfeed.com/keebler/proof-parents-should-never-use-social-media?utm_term=qhJp24baO#.mcAgWabyn [<https://perma.cc/NNK4-E5QC>] (presenting a Keebler native ad); The Roaming Gnome, *10 Quirky U.S. Destinations Every Wanderer Should Discover*, BUZZFEED (May 23, 2016), https://www.buzzfeed.com/travelocity/quirky-us-destinations-every-wanderer-should-discover?utm_term=bb21MxQJb#.ydzARLOYE [<https://perma.cc/EPT9-FTCX>] (displaying a Travelocity native ad).

¹⁵² See Sheehan, *supra* note 130 ("Most native advertising today is thinly veiled advertorial, or worse, advertising dressed up like content.").

¹⁵³ See e.g. Melanie Deziel, *Women Inmates: Why the Male Model Doesn't Work*, N.Y. TIMES, <http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html> [<https://perma.cc/7MZ6-JTVC>] (last visited Feb. 26, 2018) (providing native ad for the Netflix series *Orange is the New Black*); *Cocaineomics*, WALL ST. J., <http://www.wsj.com/ad/cocainenomics> [<https://perma.cc/9NUZ-TA2U>] (last visited Feb. 27, 2018) (demonstrating a native ad for the Netflix series *Narcos*).

Another successful method employed by advertising companies has been to make ads that users actually want to view.¹⁵⁴ These advertising campaigns are undoubtedly more costly than the cruder prevailing approach to Internet marketing, but they rely on the same strength (and therefore, have the same advantage) as “native” marketing: consumers actively seek-out these ads and voluntarily view them.¹⁵⁵ These advertising campaigns ride the crest of the wave of viral marketing.¹⁵⁶ Interestingly, they capitalize on some of the factors that enable ad-avoidance in the first place and turn those factors against ad-blocking: the consumer’s ability to choose to avoid advertising depends on the same freedom that enables the consumer to choose to access an enticing advertisement and “pull” information on a brand off of the Internet voluntarily.¹⁵⁷

Publishers and advertisers have a broad range of options available to respond to ad-blocking that does not involve using the law to deny individuals the freedom to determine how they use and experience the Internet. Some options are technological. Others involve adopting new marketing styles or revenue models. Evolved marketing and revenue models have distinct merits. First, they embrace the logic of the free market in which firms must adapt to meet the needs and desires of consumers. Second, they credit the individual user’s autonomy by empowering him or her to choose to access the publisher’s content or to expose himself or herself to the marketer’s advertisements.

C. *Resumé*

The clash of personal and pecuniary interests implicated by ad-blocking has produced the current, extremely dynamic state of affairs. Users dislike digital advertising. Some dislike it enough to use software to block online ads. Enough people use ad-blocking software that ad-blocking services are becoming an integral and standard aspect in Internet browsers and social media platforms.¹⁵⁸ The increasing use of ad-blocking software concerns publishers and advertisers because it reduces their revenue and market exposure. But ad-blocking appeals

¹⁵⁴ Sheehan, *supra* note 130; Ethan Wolf-Mann, *Why Dos Equis’ ‘Most Interesting Man’ Ad Campaign Was So Successful*, TIME (Mar. 9, 2016), <http://time.com/money/4252403/success-most-interesting-man-in-the-world-ad/> [<https://perma.cc/C6MH-LLNZ>] (explaining the success of the Dos Equis campaign).

¹⁵⁵ Sheehan, *supra* note 130 (“But when it is done with as much flair, relevance and journalistic integrity as the WSJ/Netflix effort, it is a beautiful thing to see, which readers want to read and which ad blockers have no interest in blocking.”).

¹⁵⁶ *Id.* (“I don’t care how many times an ad blocker blocks Extra Gum’s ‘Story of Sarah and Juan,’ it will still get millions of views (18 million and counting to date on YouTube alone).”).

¹⁵⁷ *Id.* (“Smarter advertisers figured out a long time ago that it’s more important, and much more effective, to engage with consumers rather than interrupt them. The best campaigns today give consumers a compelling reason to want to watch or listen.”(quoting Mike Cooper, C.E.O. of PHD Media)).

¹⁵⁸ PAGEFAIR 2017 REPORT, *supra* note 64, at 5 (reporting a global total of 615 million ad-blocking integrated devices).

to many individuals because they want to be able to choose how they use and experience the Internet. To complicate matters, some advertisers have welcomed ad-blocking's existence because it reduces the costs involved with presenting advertising content to consumers who are not open to advertising. For now, there is an asphyxiating amount of Internet advertising, and blocking it has presented significant economic consequences. Users may be happy with that arrangement, but publishers and advertisers are not. They have taken their concerns to court, nowhere more vigorously than in Germany.

II. GERMAN AD-BLOCKING LITIGATION

In the jurisdiction that has most thoroughly considered the issue, German law largely has vindicated ad-blocking services, even when it is combined with whitelisting functions. Ad-blocking's success in the German courts involves the endorsement and embrace of values that are likely to resonate in American law, including individual autonomy, on one hand, and the logic of the market, on the other hand. In reflecting on the American law issues raised by ad-blocking, it will be useful to cast a comparative side-glance at the pioneering work the German courts have done on this complex issue.

Ad-blocking seemed to present questions of first-impression under German law.¹⁵⁹ There has been a flurry of judgements from first-instance and second-instance courts across the country. These private law disputes were shadowed by constitutional law questions involving, in particular, the basic rights to information and occupational freedom. Still, they primarily involved publishers' challenges to ad-blocking services under provisions of Germany's *Gesetz gegen unlauteren Wettbewerb* (Unfair Competition Act – UWG).¹⁶⁰ Some of the complaints also have pointed to—or prompted the courts' consideration of—other laws, including the *Gesetz gegen Wettbewerbsbeschränkung* (Act Against Constraints on Competition – GWB) and the *Urhebergesetz* (Copyright Act – UrhG).¹⁶¹ Yet, the key to these cases has been the challenges raised under the

¹⁵⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] June 24, 2004, I ZR 26/02, <http://www.iww.de/quellenmaterial/id/9400> [<https://perma.cc/LT8Y-V7UK>]; see Thomas Hoeren, *Werberechtliche Grenzen des Einsatzes von Adblockern – am Beispiel von “AdBlock Plus”*, 15 KOMMUNIKATION & RECHT 757 (2013); Helmut Köhler, *Internet-Werbeblocker als Geschäftsmodell*, 61 WETTBEWERB IN RECHT UND PRAXIS 1017 (2014); Ulrich Luckhaus, *Keine Werbung bitte – zur Zulässigkeit von Werbeblockern*, 18 KOMMUNIKATION & RECHT 313 (2016); Karl-Nikolaus Peifer, *Wer ist Herr im Haus? – Adblocker, Framing, Linking und Signalintegritätsschutz*, 46 AFP - ZEITSCHRIFT FÜR MEDIEN- UND KOMMUNIKATIONSRECHT 5 (2016).

¹⁶⁰ Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBl I] at 1414, last amended by Gesetz, Feb. 17, 2016, BGBl. I at 233, *translation at* https://www.gesetze-im-internet.de/englisch_uwg/index.html [<https://perma.cc/V574-6ENQ>].

¹⁶¹ See Gesetz gegen Wettbewerbsbeschränkung [GWB] [Act Against Restraints of Competition], June 26, 2013, BUNDESGESETZBLATT, Teil I [BGBl I] at 1750, last amended by Ge-

Unfair Competition Act (UWG). This has been complicated by the fact that the UWG, in the meantime, has been amended and reformed.¹⁶² My survey of these cases will account for these changes.

A. Constitutional Law Issues

Before turning to the private law claims implicated by the German ad-blocking litigation I want to address the constitutional law facets of the cases. Due to the “state action” doctrine,¹⁶³ Americans take it for granted that constitutional norms do not apply to private law matters.¹⁶⁴ But it is well-established that the objective values of the German *Grundgesetz* (Basic Law or Constitution)¹⁶⁵ have radiating, indirect horizontal effect across the German legal system, including in private law disputes similar to those involved in the ad-blocking cases.¹⁶⁶ The *Bundesverfassungsgericht* (German Federal Constitutional Court) established the doctrine in its seminal *Lüth Case* (1958) in which it characterized the constitution’s basic rights as “objective values” applicable across the entire so-

setz [G], July 21, 2014, BGBl. I at 1066, translation at https://www.gesetze-im-internet.de/englisch_gwb/index.html [<https://perma.cc/C8HL-84GN>]; see also Urhebergesetz [UrhG] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBl I] at 1273, last amended by Gesetz [G], Dec. 20, 2016, BGBl I at 3037, translation at https://www.gesetze-im-internet.de/englisch_urhg/index.html [<https://perma.cc/YUZ9-XC4B>].

¹⁶² See Zweites Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb [2. UWGÄndG] [Second Law for the Amendment of The Act Against Unfair Competition], Dec. 2, 2015, BUNDESGESETZBLATT, Teil I [BGBl I] at 2158; FRITZ RITTNER *ET AL.*, WETTBEWERBS- UND KARTELLRECHT 23 (9th ed. 2016); Manuela Finger & Sandra Schmieder, *The New Law Against Unfair Competition: An Assessment*, 6 GER. L.J. 201, 201 (2005); Jan Peter Heidenreich, *The New German Act Against Unfair Competition*, GER. L. ARCHIVE (2005), <https://germanlawarchive.iuscomp.org/?p=349> [<https://perma.cc/TU4T-49VS>].

¹⁶³ See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997).

¹⁶⁴ See, e.g., Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003); Stephen Gardbaum, *Where the (State) Action Is*, 4 INT’L J. CONST. L. 760 (2006); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT’L J. CONST. L. 79, 88-89 (2003) (linking the United States’ weak commitment to social democracy to its resistance to recognizing the “horizontal effect” of constitutional rights).

¹⁶⁵ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], translation at https://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/VQ75-LWH3>].

¹⁶⁶ See THORSTEN KINGREEN & RALF POSCHER, GRUNDRECHTE STAATSRECHT II 52-55 (32d ed. 2016); DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 60-61 (3d ed. 2012); Hans D. Jarass, *Art. 1*, in GG – GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND – KOMMENTAR 37, 56-57 (Hans D. Jarass & Bodo Pieroth eds., 10th ed. 2009); Horst Drier, *Vorbemerkungen vor Artikel 1 GG*, in I GRUNDGESETZ KOMMENTAR 33, 67-75 (Horst Drier ed., 1996).

ciety—and not merely as a set of negative limits on the state’s interactions invoked by subjective citizens.¹⁶⁷ Flowing inevitably from this innovation, the Constitutional Court concluded that the Basic Law’s objective values must be applied horizontally—albeit indirectly—across all of German law, even in private legal disputes that do not involve state action.¹⁶⁸ The Federal Constitutional Court explained that an ordinary court judge, when interpreting and applying the private law, must adapt his or her interpretation to ensure respect for constitutionally enshrined basic rights. The constitutional basic rights do not have direct application as rules-of-decision in these private law cases. But they have *indirect* effect in that the ordinary courts are obliged to provide for their “radiating” relevance as they interpret and apply the private law. “If the judge does not apply these standards and ignores the influence of constitutional law on the rules of private law,” the Court explained, “then he or she violates objective constitutional law by failing to recognize the content of the basic right (as an objective norm).”¹⁶⁹

The doctrine of horizontal effect obliged the German courts to consider a number of constitutional rights when resolving the private law elements of the ad-blocking cases. The basic rights that attracted the Courts’ attention included the Basic Law’s commitment to objective constitutional values such as the freedom of the press,¹⁷⁰ freedom of information,¹⁷¹ and occupational freedom.¹⁷²

Article 5(1) of the Basic Law had at least two applications to the ad-blocking cases.¹⁷³ On one hand, publishers demanded that the more straightforward guarantees for the “free dissemination of opinions” and “freedom of the press” be counted against the ad-blocking firms in the private law disputes. On the other hand, the ad-blocking firms urged the courts’ consideration of individuals’ *negatives Informationsfreiheit* (negative informational freedom). The latter doctrine—largely the product of academic theory—is the implied, inverse of the

¹⁶⁷ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198, 205.

¹⁶⁸ *Id.* at 205-07; see Kommers & Miller, *supra* note 166; Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711, 718 (1993) (“The Court found that because fundamental rights had importance not only as subjective rights of citizens against the state, but also as society’s most important values, they governed the entire legal order, including civil laws that regulated the relationship of citizens to each other.”).

¹⁶⁹ 7 BVERFGE 198 (205).

¹⁷⁰ GRUNDGESETZ [GG] [BASIC LAW], art. 5(1).

¹⁷¹ *Id.*; *id.* art. 2(1) (working in conjunction, arts. 5(1) and 2(1) establish freedom of information).

¹⁷² *Id.* art. 12(1).

¹⁷³ “Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.” GRUNDGESETZ [GG] [BASIC LAW], art. 5, abs. 1.

explicit right to informational freedom that is secured by Article 5(1). One commentator explained the right to negative informational freedom in these terms: “A basic right that encompasses the freedom to engage in certain conduct usually also contains a negative component. For informational freedom [as secured by Article 5(1) of the Basic Law] this would mean not having to be confronted with undesired information.”¹⁷⁴ At the risk of suggesting little more than a tautology, negative informational freedom might be understood as a “right of the individual to be let alone.”¹⁷⁵ In line with the ad-blocking firms’ arguments in these cases, this negative liberty interest has been given special application in private law via the basic rights’ horizontal effect.¹⁷⁶ Article 5 (in both of these forms) applies to natural persons as well as to the legal persons (publishers and ad-blocking firms) involved in the ad-blocking cases.¹⁷⁷ The publishers’ activities clearly qualify as the expression of opinions and, in some circumstances, have a profound nexus with the news media and press freedom.¹⁷⁸ The same information, however, represents information that is subject to the Basic Law’s protection against unwanted information.¹⁷⁹ Thus, the concerns of the publishers and the ad-blocking firms are within the scope of Article 5.

The publishers and the ad-blocking firms also could point to Article 12 in the context of the ad-blocking private law disputes. Article 12 provides, in part, that “all Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training.”¹⁸⁰ The complainants and defendants in the cases were German legal persons.¹⁸¹ Their activities in the Internet—publication of content (the publishers) and providing Internet technology

¹⁷⁴ Dieter Dörr, *Informationsfreiheit*, in IV HANDBUCH DER GRUNDRECHTE 965, 991 (Detlef Merten & Hans-Jürgen Papier eds., 2011) (author’s translation). Detlef Merten has written generally about negative freedoms. See Detlef Merten, *Negative Grundrechte*, in II HANDBUCH DER GRUNDRECHTE (Detlef Merten & Hans-Jürgen Papier eds., 2006). The negative right to informational freedom has been acknowledged by many scholars. See, e.g., Fikenscher & Möllers, *Die (negative) Informationsfreiheit als Grenze von Werbung und Kunstdarbietung*, 51 NEUE JURISTISCHE WOCHENSCHRIFT 1337 (1998); JÖRG FENCHEL, *NEGATIVE INFORMATIONSFREIHEIT* (1997); Helmuth Schulze-Fielitz, *Art. 5 I, II*, in I GRUNDGESETZ KOMMENTAR 344, 371 (Horst Dreier ed., 1996). Negative informational freedom also is given extensive consideration in ordinary court judgments. One representative, lengthy example is found in a district court decision resolving a challenge to the use SPAM-Mail. See Amtsgericht Kiel [AG] [Kiel District Court], Sept. 30, 1999, 110 C 243/99 <http://www.aufrecht.de/urteile/datenschutzrecht/zulaessigkeit-von-e-mail-werbung-ag-kiel-urteil-vom-30-september-1999-az-110-c-24399.html> [<https://perma.cc/N53J-3LFL>].

¹⁷⁵ See, e.g., Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

¹⁷⁶ Dörr, *supra* note 174, at 994.

¹⁷⁷ See Jarass, *supra* note 166, at 181.

¹⁷⁸ See Schulze-Fielitz, *supra* note 174, at 364–69, 372–75.

¹⁷⁹ See *id.* at 371.

¹⁸⁰ GRUNDGESETZ [GG] [BASIC LAW], art. 12 (1).

¹⁸¹ See Jarass, *supra* note 166, at 311, 317–18.

services (the ad-blocking firms)—clearly fit within the scope of Article 12, which the Constitutional Court has defined as “permissible, non-transitory activities that promote the establishment or maintenance of the essentials of life.”¹⁸²

In several of the cases that I will more thoroughly describe in my survey of the German ad-blocking litigation, the German courts addressed these objective constitutional values and found that, on balance, the basic rights did little to boost the publishers’ private law claims. To the contrary, the courts concluded that the constitutional elements of challenges to ad-blocking reinforced the ad-blocking firms’ legal position.

In one of the more comprehensive constitutional assessments, for example, the Munich Court of First Instance considered both constitutional elements of the challenges to ad-blocking.¹⁸³ The Court accepted that publishers’ online activities, including the presentation of advertisements, fall within the scope of press freedom and are protected by the constitution (Article 5 of the Basic Law).¹⁸⁴ The Court also acknowledged that the publishers’ activities fall within the scope of occupational freedom (Article 12 of the Basic Law).¹⁸⁵ At the same time, the Court credited Eyeo’s (the provider of the Adblock Plus ad-blocking service) conflicting constitutional interests, including the right to occupational freedom but also negative informational freedom.¹⁸⁶ Significantly, the Court insisted that Eyeo’s constitutional interests are not subordinate to the publisher’s constitutional interests.¹⁸⁷

The Court focused on the Article 5 issues and concluded that, even when taking the plaintiff-publisher’s constitutional concerns at face value, Eyeo’s ad-blocking services do not violate the publisher’s press freedom.¹⁸⁸ The Court explained that constitutional press freedom does not insulate the publisher from permissible competition and does not grant the publisher the right to unhindered commercial activity.¹⁸⁹ The constitution, the Court stressed, does not exempt the publisher from having to grapple with a changing market. To that end, the Court identified a number of reasonable competitive measures, short of constitutional intervention in the market, which the publisher could take to respond to

¹⁸² See, e.g., Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] July 19, 2000, 102 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 197, 212; Jarass, *supra* note 166, at 315.

¹⁸³ Landgericht München [LG] [Munich Court of First Instance], Mar. 22, 2016, 33 O 5017/15, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2016-N-06816?hl=true&AspxAutoDetectCookieSupport=1> [https://perma.cc/ZL63-ALQG].

¹⁸⁴ *Id.* at 35.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 36–37.

¹⁸⁸ *Id.* at 36.

¹⁸⁹ *Id.*

ad-blocking. These alternatives included paywalls and other revenue models.¹⁹⁰ The Court even suggested that the publisher should consider whether it would be better-off financially if it merely entered into a whitelisting agreement with Eyeo because that service would require a licensing fee only if the publisher's advertising revenues increased.¹⁹¹ The Court also found that the publisher's choice—between adapting to users' resort to ad-blocking or subscribing to Eyeo's whitelisting service—could not be characterized as a constitutional "exigency" as long as Eyeo does not have a monopoly in the market for ad-blocking services.¹⁹²

Considering the Article 5 implications of the case from Eyeo's perspective, the Munich Court was convinced that the ad-blocking firm's activities did consumers and the general public more constitutional good than harm.¹⁹³ When weighing the totality of the circumstances the Court acknowledged the negative effects Internet advertising can have, especially on the functionality of users' technology systems.¹⁹⁴ Even more significant was the court's conclusion that Eyeo's services only worked to block advertising indirectly because it was the Internet user who, in the first instance, must decide to use the ad-blocking service and whose interests are prioritized in the operation of the ad-blocking technology.¹⁹⁵ The Court credited this facet of the Eyeo's services as a tool for empowering users to avoid unwanted advertisements.¹⁹⁶ Seen in this light, the Court explained that the defendants' ad-blocking services enable users to realize and enjoy their constitutional right to negative informational freedom.¹⁹⁷

In its assessment of the Article 5 facets of the challenges to ad-blocking the Cologne Court of Second Instance reached a result similar to the Munich first instance Court's judgement.¹⁹⁸ The Cologne Court found that there are constitutional interests at stake in the dynamic between the publisher and the ad-blocking firm.¹⁹⁹ The publisher, for example, enjoys press freedom (under Article 5(1)[2] of the Basic Law), and this extends to the right to finance its publication activities (in this case this consisted in journalism and news reporting) through

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 37.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 35.

¹⁹⁸ Oberlandesgericht Köln [OLG] [Cologne Court of Second Instance], June 24, 2016, 6 U 149/15, https://www.justiz.nrw.de/nrwe/olgs/koeln/j2016/6_U_149_15_Urteil_20160624.html [<https://perma.cc/U754-WEMQ>]; see *Springer erringt Teil-er-folg gegen Adblock Plus*, LEGAL TRIBUNE ONLINE, June 24, 2016, <https://www.lto.de/recht/nachrichten/n/olg-koeln-6u14915-adblock-plus-werbung-teilerfolg-springer-whiteliste-aggressive-praktik-uwg> [<https://perma.cc/H774-Z9KB>].

¹⁹⁹ OLG June 24, 2016, 6 U 149/15, 22.

advertisements.²⁰⁰ The Court even was prepared to entertain the possibility that a “silent agreement” may exist between publishers and Internet users that includes the users’ concession to publishers’ reliance on advertising.²⁰¹ Yet, the Court was not willing to accept that this “agreement” would negate the user’s constitutionally protected negative informational freedom (secured by Article 5(1)[1] of the Basic Law), which is actualized by the user’s decision to avail himself or herself of ad-blocking services.²⁰² The Court reached the same result on the constitutional conflict in the case even when considering the ad-blocking firm’s profit-making interests that are part of the combination of blacklisting and whitelisting services.²⁰³

In a separate case decided by the Munich Court of First Instance, the Court focused on the Article 12 issues raised by the ad-blocking challenges and summarily concluded that any interests the publishers may have had in constitutionally protected occupational freedom would be offset by the ad-blocking firms’ conflicting interests in occupational freedom.²⁰⁴

Finally, in a seminal appellate judgment issued in August, 2017, the Munich Court of Second Instance affirmed the futility of publishers’ constitutional claims in the ad-blocking context.²⁰⁵ As had the Munich Court of First Instance, the appeals Court acknowledged the constitutional relevance of the dispute, which it said implicated protections under Articles 5 and 12 of the Basic Law.²⁰⁶ The Munich Court of Second Instance insisted, however, that media firms’ constitutional interests do not exempt them from the caprices and conditions of the

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 13.

²⁰⁴ Landgericht München I [LG] [Munich Court of First Instance] May 21, 2015, 31 O 11843/14, <http://www.gesetze-bayern.de/Content/Document/JURE150008989?hl=true> [https://perma.cc/2Y8T-2SQP]. See Oliver Schmidt, *Adblock Plus: Sieg gegen TV-Branche und neue Entwicklungen*, TELEMEDICUS (May 30, 2015), <https://www.telemedicus.info/article/2957-Adblock-Plus-Sieg-gegen-TV-Branche-und-neue-Entwicklungen.html>.

²⁰⁵ See Oberlandesgericht München [OLG] [Munich Court of Second Instance] Aug. 17, 2017, U 2184/15 Kart, at 29-30, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-122817?hl=true> [https://perma.cc/NBM8-NXSJ]; Andrew J. Lu, *Ad-blocking Software Not Illegal “Aggressive Business Practice,” Says German Appellate Court*, HARV. J.L. & TECH. DIGEST (Oct. 6, 2017), <http://jolt.law.harvard.edu/digest/adblocking-software-not-illegal-aggressive-business-practice-says-german-appellate-court> [https://perma.cc/H7XK-WPZZ]; David Meyer, *Adblock Plus Wins Again: New Court Ruling Backs Ad Blocker Against Media Firms*, ZDNET (Aug. 18, 2017), <http://www.zdnet.com/article/adblock-plus-wins-again-new-court-ruling-backs-ad-blocker-against-media-firms/> [https://perma.cc/WC7A-4CW2]; Christoph Steitz, *German Court Says Eyeo’s Ad-Blocking Software Legal*, REUTERS (Aug. 17, 2017), <https://www.reuters.com/article/us-germany-ad-blocking-court/german-court-says-eyeos-ad-blocking-software-legal-idUSKCN1AX27E> [https://perma.cc/E4RP-VYVL].

²⁰⁶ OLG Aug. 17, 2017, U 2184/15, at 29-30.

market, where they must compete in the same manner as other economic actors. “There is no entitlement to undisturbed business activity that can be derived from the freedom of the press,” the Court explained.²⁰⁷ “Companies in the media sector also have to address the challenges of the market, which is driven by the freedom of economic activity and the power of innovation.”²⁰⁸ In any event, the Munich Court of Second Instance concluded that the publisher’s constitutional concerns would be countered by Eyeo’s right to occupational freedom (Article 12 of the Basic Law) and Internet users’ right to negative informational freedom (Article 5 of the Basic Law). The appellate Court concluded, just as the other courts before it had, that “[t]he constitutional protection to which the Claimant is entitled also does not provide for any further protection under unfair competition law in the present circumstances.”²⁰⁹

As unusual as the jurisprudence may seem to American jurists, the German courts’ horizontal consideration of constitutional issues as part of the private law challenges to ad-blocking services nevertheless provides useful insight. First, the courts refused to find that the constitution enhanced the publisher’s private law claims. To the contrary, the courts found that the basic rights had equal—if not greater—resonance for the interests of the ad-blocking firms and Internet users. Second, the courts’ assessment of Articles 5 and 12 of the Basic Law in these cases tapped into the broad values that would animate the ad-blocking firms’ success with the private law claims in these cases: the publishers’ opportunities to address their concerns in the market and ad-blocking’s potential to empower individuals as free and autonomous Internet users and consumers.

B. Private Law Issues – Unfair Competition Act

Before surveying the German ad-blocking litigation it will be helpful to offer a brief, general introduction to the relevant provisions of the Unfair Competition Act (UWG), which proved to be the most prominent legal framework for resolving these disputes.²¹⁰

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BGBL. I at 1414, last amended by Gesetz [G], Feb. 17, 2016, BGBL. I at 233.

Germany's Unfair Competition Act (UWG) dates from 1909.²¹¹ In recent years the UWG, which does not apply to anti-trust issues,²¹² has been amended and overhauled in response to Germany's obligations to align its economy with the European Union's single market.²¹³ The law was comprehensively rewritten and enacted anew in 2004.²¹⁴ The German *Bundestag* (Federal Parliament) again revisited the law in 2015 to fulfill the terms of the EU's Unfair Commercial Practices Directive.²¹⁵ The reforms of the last decade, in the view of one set of commentators, strike a "careful balance between entrepreneurial flexibility and protection for consumers and other competitors."²¹⁶ The former interest is the clear impulse of Europe's neoliberal open market policies. The latter interest has a distinctly German, paternalist pedigree. The 1909 law, for example, prohibited business practices that offended "*guten Sitten*" (good morals).²¹⁷ For decades this meant, as just one illustration of the UWG's regulatory orientation, that German retailers were strictly limited in the number of days and the times of year when they could hold deep-discount sales.²¹⁸ David Gerber attributed Germans' suspicion toward wide-open competition to three historic factors: the

²¹¹ See Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], June 7, 1909, REICHSGESETZBLATT [RGL] at 499, as amended by Gesetz [G], July 3, 2004, BGBL I at 1414.; FINGER & SCHMEIDER, *supra* note 162; RITTNER *ET AL.*, *supra* note 162; SABINE WIECZOREK-SCHWARZ, ANALYSE DER ÄNDERUNG DES GESETZES GEGEN DEN UNLAUTEREN WETTBEWERB SOWIE DESSEN ANWENDUNGSGEBIETE UND ERSCHENUNGSFORMEN [Page] (2010).

²¹² See Gesetz gegen Wettbewerbsbeschränkung [GWB] [Act Against Restraints on Competition], June 26, 2013, BUNDESGESETZBLATT, Teil I [BGBL I] at 1750, last amended by Gesetz [G], July 21, 2014, BGBL I at 1066.

²¹³ See FINGER & SCHMEIDER, *supra* note 162, at 202 ("European demands also fueled the amendment of the UWG. While the European Union had not yet enacted competition legislation, it had demonstrated the desire to harmonize European laws against unfair competition."); Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT'L L. 474, 474 (2005);

David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25, 25 (1994); Joachim Zekoll, *European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective*, 24 VAND. J. TRANSNAT'L L. 75, 77-78 (1991).

²¹⁴ See Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 1414; FINGER & SCHMEIDER, *supra* note 162.

²¹⁵ See Council Directive 2005/29, 2005 O.J. (L 149) 22 (EC); see also BRAM B. DUIVENVOORDE, THE CONSUMER BENCHMARKS IN THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE 14 (2015); RITTNER *ET AL.*, *supra* note 162.

²¹⁶ See FINGER & SCHMEIDER, *supra* note 162, at 213.

²¹⁷ See Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], June 7, 1909, REICHSGESETZBLATT [RGL] at 499, § 1.

²¹⁸ See *id.* at §§ 7 and 8; see also FINGER & SCHMEIDER, *supra* note 162, at 202.

brutal nature of the country's rapid, late-19th Century industrialization; the frequency and intensity of macro-economic downturns the country suffered at the turn of the last century; and the deep tradition of a managed economy in Germany (with both public and private features of control).²¹⁹ "By the end of the century," Gerber concluded, "competition as a basis for social organization had few friends and many enemies" in Germany.²²⁰ Drafted and enacted in this period, the UWG responded to these concerns about the potential danger of competition by subjecting it to community controls.

This tradition, despite liberal pressures emanating from Europe and Germany's business community, survives in the present UWG and plays a fundamental role in the ad-blocking dispute. Repeatedly the German courts have condoned ad-blocking because of the benefits it bestows on consumers, who are seen as needing some form of protection in the market. The UWG's paternalism can be seen in the broad scope of its application, which extends its general prohibition of "unfair competition" to the actions and interests of competitors, consumers, and others participating in the market.²²¹ "Competition" also is broadly construed. It is understood to involve marketing, distribution, and the purchase of goods or services.²²² Activities will be regarded as "unfair" if they are capable of materially distorting competition by harming competitors, consumers, or others participating in the market.²²³ The general provision prohibiting unfair competition is supplemented by several non-exclusive lists of specifically prohibited activities, including the now superseded §4, which identified a number of "unfair commercial practices" (as opposed to "misleading commercial practices" in §5; limits on "comparative advertisements" in §6; and a prohibition on "unconscionable harassment" in §7).

All but the two most recent cases summarized here involved challenges to ad-blocking under superseded §4(10) of the UWG, which recognized "deliberate obstruction of competitors" as a form of "unfair commercial practice."²²⁴ In the more recent ad-blocking cases the courts applied §4(4) of the revised UWG.²²⁵ That provision provides that prohibited unfair business activities include those that "deliberately impede a fellow competitor."²²⁶ The courts have so far given new §4(4) the same interpretation and application as the old §4(10). The most

²¹⁹ DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE 76-80 (1998).

²²⁰ *Id.* at 80.

²²¹ Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 1414, last amended by Gesetz [G], Feb. 17, 2016, BGBL I at 233, §§ 1 and 2(1)(2).

²²² *Id.* at §§ 4(3)(a), 5(1)(2), 5(2) and 8(3)(2).

²²³ FINGER & SCHMIEDER, *supra* note 162, at 206.

²²⁴ See Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 1414, § 4(10).

²²⁵ See *id.* at 233, § 4(4).

²²⁶ *Id.*

recent cases also have applied the newly introduced §4a. This provision, added to the UWG with the reforms enacted in 2015, prohibits “aggressive business practices.”²²⁷ The law defines “aggressive business practices” as those economic activities “that are likely to induce consumers or other market participants to take a business decision that he or she otherwise would not have taken.”²²⁸ The totality of the circumstances in a concrete case are to be assessed to determine if the challenged business practices were likely to affect a person’s *Entscheidungsfreiheit* (freedom to choose) in his or her business activities.²²⁹

Violations of the UWG can result in civil and criminal penalties, including injunctive relief, damages, claims for the defendant’s profits, and imprisonment or fines for deceptive advertising.²³⁰

C. German Ad-Blocking Cases

The following is a survey of the recent private law decisions issued by the German courts in suits challenging the legality of ad-blocking services. The cases have been decided in the last three years and are provisional in the sense that none (as yet) involves a decision of the country’s highest private law court, the *Bundesgerichtshof* (Federal Court of Justice), or of Germany’s supreme constitutional tribunal, the *Bundesverfassungsgericht* (Federal Constitutional Court). But, in ruling in favor of ad-blocking services, the ordinary courts supported their decisions with careful assessments of comparable judgements from the higher courts. A radical reversal of the deepening jurisprudential trend in favor of ad-blocking that has emerged from these German cases seems increasingly unlikely. The challenges have been raised by some of Germany’s most prominent and powerful publishers, who sought to have ad-blocking services—particularly Eyeo’s AdBlock Plus—enjoined and declared illegal. The ad-blocking services have prevailed on most elements of most of these cases, producing a string of victories that has attracted media attention from around the world and established secure precedent for the legality of ad-blocking and white-listing.²³¹

²²⁷ See *Zweites Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb* [2. UWGÄndG] [Second Law for the Amendment of the Act Against Unfair Competition], Dec. 12, 2015, BUNDESGESETZBLATT, Teil I [BGBL I] at 2158.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *Gesetz gegen den unlauteren Wettbewerb* [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 1414, last amended by *Gesetz* [G], Feb. 17, 2016, BGBL I at 233, §§ 8, 9, 10 and 17(4).

²³¹ Leo Kelion, *AdBlock Plus Defeats German Publishers in Court*, BBC NEWS (Apr. 22, 2015), <http://www.bbc.com/news/technology-32409952> [<https://perma.cc/FSF5-3LVF>]; Leo Kelion, *AdBlock Plus Secures Another Court Victory in Germany*, BBC NEWS (May 27, 2015), <http://www.bbc.com/news/technology-32903235> [<https://perma.cc/7ZC6-7GQR>]; David Meyer, *German Court Smacks Down Publishers Over Ad-Blocking*, POLITICO (Apr. 22, 2015), <http://www.politico.eu/article/german-court-smacks-down-publishers-over-ad-blocking/> [<https://perma.cc/NQ4S-7UA7>]; Joe Mullin, *Adblock Plus Wins Its 6th Court Case*,

The cases can be divided into two categories. The first involves several separate judgements in which first instance regional courts (*Landgerichte* – LG) granted the ad-blocking firms categorical and unqualified victories. Among these is the lengthy, thorough, and influential judgement of the Munich Court of First Instance from May 27, 2015, which featured prominently in the preceding discussion of the constitutional law facets of these cases.²³² The second category involves second instance appellate judgments concerning two of the first instance cases. The second instance courts (*Oberlandesgerichte* – OLG) reached the same conclusion as the first instance courts with respect to the provisions of the UWG concerned with the “deliberate obstruction of competitors” (superseded §4(10)) or the “deliberate impediment of a competitor” (current §4(4)).²³³ The Cologne Court of Second Instance nevertheless credited the publisher’s challenge to Eyeo’s whitelisting service as an “aggressive business practice” (current §4a).²³⁴ This ruling is an outlier. For example, in a seminal judgment from August 17, 2017, the Munich Court of Second Instance confirmed the Munich Court of First Instances’ influential ruling in favor of ad-blocking services.²³⁵ Significantly, the appellate Court found that whitelisting is not an “aggressive business practice.”²³⁶

Following the established practice under the UWG, the courts typically resolved several determinative elements in turn. First, they considered whether offering ad-blocking services, in any form, constitutes *geschäftliche Handlung* (commercial activity) under §2(1)[1] of the UWG. Second, they considered whether a *Wettbewerbsverhältnis* (competitive relationship) exists between the

Brought by Der Spiegel, ARS TECHNICA (Nov. 29, 2016), <https://arstechnica.com/tech-policy/2016/11/adbloc-plus-wins-its-6th-court-case-brought-by-der-spiegel/> [<https://perma.cc/TFJ5-5YKB>]; Joe Mullin, *German Judges Explain Why Adblock Plus Is Legal*, ARS TECHNICA (Dec. 9, 2016), <https://arstechnica.com/tech-policy/2016/12/german-judges-explain-why-adblock-plus-is-legal/> [<https://perma.cc/G2ZB-P3DD>]; Lara O’Reilly, *Adblock Plus Is Victorious Again in Court Versus Publishers Arguing Users Should Not Be Allowed to Block Ads and Deprive Them of Revenue*, BUS. INSIDER AUSTRALIA (May 27, 2015), <http://www.businessinsider.com.au/adbloc-plus-wins-in-court-versus-rtl-interactive-and-pro-7sat-1-2015-5>; Jeevan Vasagar & Henry Mance, *Adblocking Group Wins Fresh Legal Round in Media Fight*, FIN. TIMES (May 27, 2015), <https://www.ft.com/content/ef6fe54e-046d-11e5-a5c3-00144feabdc0> [<https://perma.cc/XL8E-ZFM2>]; *Online Advertising – Block Shock*, ECONOMIST (June 4, 2015), <http://www.economist.com/news/business/21653644-internet-users-are-increasingly-blocking-ads-including-their-mobiles-block-shock> [<https://perma.cc/3HZG-6W9A>].

²³² See Landgericht München [LG] [Munich Court of First Instance] Mar. 22, 2016, 33 O 5017/15.

²³³ See Oberlandesgericht Köln [OLG] [Cologne Court of Second Instance], June 24, 2016, 6 U 149/15.

²³⁴ *Id.* at 23–27.

²³⁵ See Oberlandesgericht München [OLG] [Munich Court of Second Instance], Aug. 17, 2017, U 2184/15 Kart.

²³⁶ *Id.*

parties (publishers and ad-blocking firms) under §2(1)[3] of the UWG. Third, if the preceding issues were resolved in the affirmative, then the courts considered whether the ad-blocking firms' conduct constitutes a *gezielte Behinderung* (deliberate obstruction) of a competitor under the superseded §4(10) or the current §4(4) of the UWG.

1. First Instance Judgements

a) Zeit Online GmbH et al. v. Eyeo GmbH et al. (Hamburg Court of First Instance, April 21, 2015)

The plaintiffs (publishers Zeit Online GmbH and Handelsblatt GmbH) sought relief against the defendants' (Eyeo GmbH and its managing directors) AdBlock Plus ad-blocking service, including Eyeo's whitelisting service.²³⁷ The publishers pressed their complaint along two lines. First, they sought relief from the simple use of the ad-blocking service (blacklisting) offered by Eyeo.²³⁸ Second, the publishers sought relief from the ad-blocking services that are integrated with whitelisting services and produce revenue, as do Eyeo's ad-blocking services.²³⁹

The Court dismissed both facets of the publishers' complaint.

With respect to the publisher's discrete challenge to Eyeo's ad-blocking services, the Court concluded that neither of the first two threshold elements under the UWG existed in the case. First, as a general function, ad-blocking is not a commercial activity under §2(1) of the UWG.²⁴⁰ The Court found that the ad-blocking firm offers AdBlock Plus as an open-source program to all potential adopters free of charge.²⁴¹ For this reason the Court ruled that the ad-blocking service (standing alone) does not qualify as a commercial activity as long as it is provided for free and generates no revenue or other benefit for the ad-blocking firm.²⁴² Second, the Court found that it follows logically that the publishers and Eyeo are not in a competitive relationship.²⁴³ With these threshold elements missing in the case the Court rejected the publishers' discrete challenge to Eyeo's blacklisting service.

²³⁷ See Landgericht Hamburg [LG] [Hamburg Court of First Instance], Apr. 21, 2015, 416 HKO 159/14, <http://www.landesrecht-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE150011562&st=ent> [<https://perma.cc/L8QV-CGZR>].

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Under § 2(1) of the Act Against Unfair Competition, the phrase "commercial activity" includes any conduct for the benefit of a person or third party that is objectively tied to the purpose of increasing the sale of goods or services, or a contract with the purpose of increasing the sale of goods and services. See Landgericht Hamburg [LG] [Hamburg Court of First Instance], Apr. 21, 2015, 416 HKO 159/14, at 6.

²⁴¹ See *id.* at 5.

²⁴² *Id.* at 6.

²⁴³ *Id.*

With respect to the publishers' challenge to the combination of ad-blocking and whitelisting, the Court's analysis was more involved. The Court found that Eyeo had engaged in commercial activity, namely the acquisition of fees through its whitelisting service.²⁴⁴ The Court found that this conduct qualifies as *entgeltliche Tätigkeit* (activity for consideration) under the UWG.²⁴⁵ The Court also used this analysis to conclude that the parties were *Mitbewerber* (competitors).²⁴⁶ Parties are competitors, the Court explained, when they attempt to market the same or similar goods or services to the same group of end users.²⁴⁷

Despite having found the UWG's threshold elements satisfied in the context of the challenge to the integrated blacklisting and whitelisting services, the Court concluded that the publishers' challenge nevertheless failed under the third part of the usual UWG analysis (a step the Court had avoided when rejecting the plaintiffs' discrete challenge to ad-blocking). Even as the Court found that the defendants' activities harmed the publishers' business, it rejected the claim that the combination of blacklisting and whitelisting constituted "deliberate obstruction of a competitor" under §4(10) of the UWG.²⁴⁸ The Court distinguished between *general* obstruction and *deliberate* obstruction²⁴⁹ and identified two scenarios in which deliberate obstruction occurs, neither of which was present in this case.²⁵⁰

²⁴⁴ *Id.*

²⁴⁵ The Court defined "activity for consideration" as an independent and planned activity aimed at receiving consideration for performance rendered in the market for a certain period of time. *See id.*

²⁴⁶ Section 2(1)[3] of the Act Against Unfair Competition defines "competitor" as "any *Unternehmer* (businessperson) who is in direct competition with another businessman as buyer or seller of goods or services." A "businessperson" is defined in § 2(1)[6] Unfair Competition Act as "any natural or legal person who engages in commercial activities in the framework of commercial, technical, or occupational undertakings." *Id.*

²⁴⁷ *See id.* at 6–7.

²⁴⁸ *See id.* at 8. Section 4(10) of the Act Against Unfair Competition from 2004 has since been replaced by a more general provision. But §4(10) was still in force at the time of the judgment. The old paragraph provided that a competitor engages in unfair competition (*unlauterer Wettbewerb*) when he or she engages in, *inter alia*, obstruction of advertising. Section 4(10) no longer exists in this form, having been replaced by new § 4(4)). *See Gesetz gegen den unlauteren Wettbewerb [UWG]* [Act Against Unfair Competition], July 3, 2004, BGBl. I at 1414, last amended by Gesetz [G], Feb. 17, 2016, BGBl. I at 233, §4(4); Andreas Böhm, *Übersicht Behinderungswettbewerb*, BÖHM ANWALTSKANZLEI, (Apr. 14, 2014), <https://boehmanwaltskanzlei.de/kompetenzen/gewerblicher-rechtsschutz/wettbewerbsrecht/beispiele-unlauterer-geschaeflicher-handlungen/allgemeine-beispiele-unlauterer-geschaeflicher-handlungen/447-unlauterer-behinderungswettbewerb-s-4-nr-10-uwg> [<https://perma.cc/K6S6-RMVT>].

²⁴⁹ *See* Landgericht Hamburg [LG] [Hamburg Court of First Instance], Apr. 21, 2015, 416 HKO 159/14, at 9.

²⁵⁰ *Id.*

The first scenario involves *Unlauterkeit aufgrund Behinderungsabsicht* (un-fairness based on the intention to obstruct).²⁵¹ Here, the Court identified the primary purpose of Eyeo's activities as the establishment of a market for its products and not the obstruction of another's business.²⁵² The Court noted that the emergence of any new competitor inevitably leads to a decrease in revenue for other competitors in the market, a consequence that is true even for *lauteren Wettbewerbs* (fair competition).²⁵³ Additionally, the Court did not find any *produktbezogene Behinderung* (product specific obstruction).²⁵⁴ "On the contrary," the Court reasoned, "by completely removing advertisements, the user's attention can now be focused solely on the editorial content of the website, the publishers' main product."²⁵⁵

The second scenario the Court considered is whether publishers have any alternatives to operate in the market. The Court strongly rejected the publishers' claim that no alternatives existed, finding instead that there are a multitude of ways the publishers could overcome the revenue losses resulting from the use of ad-blocking services.²⁵⁶ The Court showed little sympathy for the publishers' loss of advertising revenue, insisting instead that there is no constitutional guarantee to uninterrupted commercial activity for publishers and that such companies must face the challenges of the market, which thrives on innovation and dynamism.²⁵⁷ Its consideration of the alternatives available to publishers also allowed the Court to note the benefits Eyeo's services bestow on users. The Court emphasized that it is the user who should decide whether he or she wants to download advertisements (and other content) to his or her computer.²⁵⁸ In this regard, the Court found that Adblock Plus merely provided the individual user with the tools to exercise this freedom and the ability to protect himself or herself from malware, tracking, and other undesirable forces almost invariably associated with Internet advertising.²⁵⁹ These significant benefits weighed strongly in Eyeo's favor.²⁶⁰

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See id.* at 10–12 (suggesting that plaintiffs could use a range of alternatives, such as denying free access altogether, technical changes to block users using Adblock Plus from their websites, running ads via their own servers instead of ad servers, notices to users urging them to disable ad-blockers to maintain the free nature of the website, or paywalls).

²⁵⁷ *See id.* at 10–11 (quoting BGH June 24, 2004, I ZR 26/02).

²⁵⁸ *Id.* at 12.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

In its analysis, the Court focused on the specific purpose of Eyeo's conduct. Even though the Court found "obstruction" (*Behinderung*) in general, the obstruction did not rise above the actionable threshold under the UWG.²⁶¹ At the same time, the publishers' lack of initiative to explore alternatives to its advertising-based revenue model was a deciding factor in the Court's decision.²⁶² Another decisive factor was the potential that ad-blocking services had to contribute to the empowerment and protection of individual consumers.²⁶³

b) IP Deutschland GmbH & RTL Interactive GmbH v. Eyeo GmbH
(Munich Court of First Instance, May 27, 2015)

The plaintiffs (units of the RTL media group) sought relief against the defendants' (Eyeo GmbH and its managing directors) AdBlock Plus service, including the firm's whitelisting service.²⁶⁴ Among other charges, the publishers argued that Eyeo was engaged in unfair competition. The publishers insisted that Eyeo's "mafia business model" enabled it to coerce others to pay "protection money," conditions the publishers regarded as the deliberate obstruction of a competitor under §4(10) of the UWG.²⁶⁵

In an uncharacteristically lengthy and thorough judgement the Court rejected the publishers' complaint.

Similar to the Hamburg Court of First Instance's April 21, 2015 judgement, the Court found that, at least with respect to the combination of the blacklisting and whitelisting services, Eyeo was engaged in commercial activity.²⁶⁶ The Court defined this as conduct that can be objectively viewed as a means of promoting sales or other interests (such as the reputation) of a firm.²⁶⁷ While this may not be the case for discrete ad-blocking services that are offered for free as open-source software,²⁶⁸ the Court concluded that commercial activity occurs when ad-blocking is combined with a whitelisting function.²⁶⁹

The Court concluded, however, that the second of the UWG's two threshold elements had not been satisfied: the publishers and Eyeo were not in a competitive relationship. For this condition to exist, the Court explained, the parties must offer the same goods or services within the same consumer sphere so that their actions in that sphere have the ability to influence the competitive posture

²⁶¹ *Id.* at 8–14.

²⁶² *Id.* at 10–11.

²⁶³ *Id.* at 12.

²⁶⁴ See Landgericht München [LG] [Munich Court of First Instance], May 27, 2015, 37 O 11843/14.

²⁶⁵ *Id.* at 10–11.

²⁶⁶ *Id.* at 25.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 25–26.

of the other.²⁷⁰ This was not the case for the publishers and Eyeo, whose commercial activities aimed at two distinct groups of end users.²⁷¹ To state it in the plainest possible terms, the Court concluded that Eyeo is interested in blocking advertisements while the publishers are interested in producing content and attracting attention to advertisements.²⁷² In an ironic turn, the Court noted that the publishers are better understood as Eyeo's potential business partners rather than its competitors.²⁷³ The Court conceded that this potential business collaboration, taking the form of the publishers' paying a premium for the benefit of Eyeo's whitelisting services, is artificially compelled by the effects of Eyeo's ad-blocking services.²⁷⁴ But the Court concluded that this scenario would be more appropriately reviewed under anti-trust law and not the UWG.²⁷⁵

The Court also ruled that Eyeo's activities did not constitute a deliberate obstruction under §4(10) of the UWG.²⁷⁶ The Court resolved this question, despite the opportunity to avoid it due to its finding that the parties were not competitors, because it allowed the Court to consider the totality of the effects of Eyeo's activities, including those relating to consumers, other market participants, and the general public.²⁷⁷ Where it addressed the interests of Internet users and consumers, it seems that the Hamburg Court of First Instance's April 21, 2015 judgment also engaged in a broad assessment of the totality of the circumstances. In fact, this is the point in the Courts' usual §4(10) UWG analysis at which the plaintiffs' challenges to ad-blocking has consistently failed.

The Munich Court explained that "deliberate obstruction" occurs when, in the first instance, Eyeo's activities are not focused on promoting its business but are instead focused on impairing the competitive scope and ability of another.²⁷⁸

Even without considering the interests of consumers and the general public, the Court rejected the assertion that Eyeo had engaged in deliberate obstruction. The Court found that Eyeo's intention—its primary concern—was to advance its business interests and enhance its competitive scope.²⁷⁹ The ad-blocking firm, the Court concluded, was not trying to drive publishers from the market. In fact, the Court noted that Eyeo needs publishers to thrive so that it has potential clients for the whitelisting component of its business model.²⁸⁰

²⁷⁰ *Id.* at 26.

²⁷¹ *Id.* at 27.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 27–28.

²⁷⁶ *Id.* at 28.

²⁷⁷ *Id.* at 28–37.

²⁷⁸ *Id.* at 36.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

The Court did not doubt that Eyeo's activities have a significant negative effect on the publishers' advertising-based business model.²⁸¹ But the Court did not accept the claim that the resulting disadvantages would drive the publishers from the market. The Court concluded that the losses suffered by the publishers were acceptable and, contrary to their claims of helplessness, could be mitigated or avoided altogether by pursuing innovative responses, such as giving those users with ad-blocking systems in place access to a lower quality version of the website or by erecting pay-walls.²⁸²

Similar to the Hamburg Court of First Instance's April 21, 2015 judgement, the Munich Court's decision largely was shaped by the Court's conclusion that ad-blocking does more good (especially for users and the general public) than it harms the publishers. The Court insisted that Eyeo's services operate at the intersection of a number of choices taken by users that, in turn, actualize human autonomy, including the choice to use an ad-blocker and the choice of which ad-blocker to use.²⁸³ Against these benefits, the Court insisted that the burden is on publishers to avail themselves of technological or business alternatives in the market that will allow them to attract users willing to tolerate their advertising.²⁸⁴

c) *Axel Springer v. Eyeo GmbH (Cologne Court of First Instance, September 29, 2015)*

The plaintiff (publisher Axel Springer AG) initially sought relief against the defendant's (Eyeo GmbH) AdBlock Plus software on the basis that the software helps users to block ads. Later, at the trial, the publisher added a supplemental claim arguing that if the Court would not prohibit the use of blacklisting as a discrete service, then at least the Court should rule against Eyeo's integrated services (involving the combination of blacklisting and whitelisting).²⁸⁵ Among other charges, the publisher argued that Eyeo's activities amounted to unfair competition.

The Court dismissed the publisher's claim in full.²⁸⁶ The Court's reasoning focused solely on whether the ad-blocking firm's actions violated the UWG. And, while the Court found that a competitive relationship existed between the publisher and Eyeo, the Court did not find a violation of §4(10) of the UWG.²⁸⁷ In a minimalist judgement, the Court concluded that the use of AdBlock Plus neither impairs publishers directly nor constitutes a general market disruption.²⁸⁸

²⁸¹ *Id.*

²⁸² *Id.* at 35.

²⁸³ *Id.* at 37–38.

²⁸⁴ *Id.* at 36.

²⁸⁵ See Landgericht Köln [LG] [Cologne Court of First Instance], Sept. 29, 2015, 33 O 132/14, https://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2015/33_O_132_14_Urteil_20150929.html [<https://perma.cc/8QWR-GLD5>].

²⁸⁶ *Id.* at 20.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 21.

But, rather than elaborating on why this is the case, the Court merely embraced the reasoning of the Munich Court of First Instance's thorough and comprehensive May 27, 2015 judgment.²⁸⁹

d) WeltN24 GmbH v. Pollert et al. / Injunction (Stuttgart Court of First Instance, December 10, 2015)

The plaintiffs (WeltN24 GmbH a subsidiary of Axel Springer) sought relief against the defendants' (Tim Pollert and Arno Appenzeller) distribution of their ad-blocking software "Blockr," which enables users to block advertisements from appearing when accessing a website.²⁹⁰ The ad-blocking services in this case differ from those challenged in the previously discussed cases (involving Eyeo's AdBlock Plus service) in that Pollert and Appenzeller do not offer Blockr for free as an open-source system. Instead, the defendants charged users € 0.99 to download the application as an extension to the mobile Apple-browser "Safari" that is used on the mobile operating system iOS. At the time of the suit Blockr had been downloaded 42,000 times. Due to lost advertising revenue the publisher challenged the Blockr blacklisting service as a "deliberate obstruction of a competitor" under §4(10) of the UWG.²⁹¹

The Court dismissed the publisher's complaint.²⁹²

The Court found that Pollert's and Appenzeller's actions constituted a commercial activity because, unlike the cases involving Eyeo's AdBlock Plus, Blockr is sold for a premium.²⁹³

The Court also found that a competitive relationship existed between the publisher and the defendants.²⁹⁴ The Court explained that it is not necessary that both parties are in the same industry or provide the same product.²⁹⁵ It is sufficient, the Court reasoned, that the parties target the same end users or potential

²⁸⁹ *Id.*

²⁹⁰ See Landgericht Stuttgart [LG] [Stuttgart Court of First Instance] Dec. 10, 2015, 11 O 238/15, <https://www.lhr-law.de/wp-content/uploads/2015/12/Urteil-blockr.pdf> [<https://perma.cc/SP7B-XEA4>].

²⁹¹ *Id.* Section 4(10) of the Act Against Unfair Competition from 2004 has since been replaced by a more general provision. But §4(10) was still in force at the time of the judgment. The old paragraph provided that a competitor engages in unfair competition (*unlauterer Wettbewerb*) when he or she engages in, *inter alia*, obstruction of advertising. Section 4(10) no longer exists in this form, having been replaced by new § 4(4). See Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBl I] at 1414, last amended by Gesetz, Feb. 17, 2016, BGBl. I at 233, §4(4). See Böhm, *supra* note 248.

²⁹² See Landgericht Stuttgart [LG] [Stuttgart Court of First Instance] Dec. 10, 2015, 11 O 238/15, 6, <https://www.lhr-law.de/wp-content/uploads/2015/12/Urteil-blockr.pdf> [<https://perma.cc/SP7B-XEA4>].

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

Werbekunden (advertisement customers), and that an obstruction of the publisher's business due to the reduced revenue from advertisements is a possible consequence of Pollert's and Appenzeller's business activities.²⁹⁶

Yet, similar to the other judgements in this category of cases, the Court found that Pollert's and Appenzeller's actions did not constitute a deliberate obstruction of a competitor under §4(10) UWG.²⁹⁷ The Court explained that the UWG aims to prohibit an obstruction that qualifies as an interference with one's ability to pursue his or her competitive endeavors.²⁹⁸ A *bloße Behinderung* (simple obstruction), however, is not sufficient. The Court insisted that various other factors must be considered to establish "unfairness."²⁹⁹ This, in turn, requires the Court to weigh the totality of the circumstances, including the interests of consumers and other market participants.³⁰⁰ The Court further noted that such a broad assessment is necessary in order for it to determine whether the alleged obstruction is *Unmittelbar* (direct).³⁰¹

Its assessment of all the circumstances led the Court to conclude that the publisher's claim was unfounded. The Court accepted that Blockr's ad-blocking service constituted an unfair commercial practice.³⁰² But, under the specific facts of the case, the Court did not find a deliberate obstruction.³⁰³ The primary purpose of the ad-blocking service offered by Pollert and Appenzeller, the Court concluded, is not to obstruct competition but to pursue distinct economic goals, namely generating profit.³⁰⁴ Even as Pollert's and Appenzeller's product might lead to a decline of the plaintiff's revenue, the Court viewed this as a natural side-effect of Pollert's and Appenzeller's activities and not the deliberate aim of their commercial undertakings.³⁰⁵ Additionally, the Court was persuaded that the link between the publisher, on one side, and Pollert and Appenzeller, on the other side, was broken by the fact that the choice to use the Blockr blacklisting service ultimately lay with individual users, including the choice to block advertisements at websites selected by the user.³⁰⁶ The Court found it necessary to credit the way in which Blockr empowered users to block obtrusive advertisements.³⁰⁷ Finally, the Court rejected the publisher's argument that Pollert's and Appenzeller's ad-blocking service prevented the publisher from accessing the

²⁹⁶ *Id.* (emphasis in original).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 7.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 8.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

market on its own terms.³⁰⁸ The Court found that the publisher need not passively accept the operation of ad-blocking on its websites. Instead a number of responses and alternatives existed.³⁰⁹ From a technological perspective, the Court suggested that the publisher had multiple ways to restrict users with ad-blockers from accessing its content, including paywalls, restricting content, or excluding access altogether.³¹⁰

After assessing the totality of the circumstances, the Court ruled that Blockr's ad-blocking service did not qualify as an unfair commercial activity. That evaluation, especially highlighted the fact that resorting to ad-blocking is a choice made by the users that serves to enhance their autonomy.

e) Süddeutsche Zeitung Digitale medien GmbH v. Eyeo GmbH (Munich Court of First Instance, March 22, 2016)

The plaintiff (Süddeutsche Zeitung Digitale Medien GmbH) sought relief against the defendant's (Eyeo GmbH) AdBlock Plus service, including the program's whitelist service.³¹¹ Among other charges, the publisher argued that Eyeo was engaged in unfair competition.

Unsurprisingly, because it is the same court (albeit involving a different judge) that rejected similar claims with a lengthy judgment in another case,³¹² the Court dismissed the complaint as unfounded. Significantly, the Court rejected the publisher's claims under the superseded §4(10) of the UWG as well as the updated §4(4) of the UWG. The preceding judgement of the Munich Court had not considered the latter statutory provision. Despite the statutory change, the Court applied the same UWG analysis as the other courts.

First, the Court found that Eyeo's distribution of the AdBlock Plus service, especially when combined with the whitelisting service, constitutes a commercial activity.³¹³ The Court defined a commercial activity as an act by a person for his or her benefit, or for the benefit of third persons, which objectively aims to promote the distribution of goods or services.³¹⁴ The court, treating the ad-blocking and whitelisting system as a single coherent business activity, found that the blacklisting function of AdBlock Plus directly contributes to the success

³⁰⁸ *Id.* at 10.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See Landgericht München I [LG] [Munich Court of First Instance] March 22, 2016, 33 O 5017/15, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2016-N-06816?view> [<https://perma.cc/6TLK-YX4Z>].

³¹² See Landgericht München [LG] [Munich Court of First Instance], May 27, 2015, 37 O 11843/14.

³¹³ *Id.* at 25.

³¹⁴ *Id.*

and facilitates the purpose of the whitelisting function.³¹⁵ Through this combination of integrated services, the Court reasoned, Eyeo promotes its business goals and influences the market to its benefit.³¹⁶

Second, the Court found that the parties are in a direct competitive relationship.³¹⁷ A competitive relationship is present, the Court explained, when the parties market similar goods and services to the same group of end users, and when the possibility of altering or impairing the competitor's endeavors in the market exists.³¹⁸ It will be enough, the Court explained, if one party's success impairs the other party's success.³¹⁹ With this definition in mind, the Court found that the parties are in a direct competitive relationship because Eyeo's services clearly impair the publisher's business.³²⁰ Moreover, the parties both target the same group of end users, namely Internet users.³²¹ The Court reasoned that the fact that the ad-blocking service is offered free of charge does nothing to diminish the competitive relationship that exists between the parties.³²²

Third, the Court found that Eyeo's services do not constitute a deliberate obstruction under the UWG (applying both superseded §4(10) and updated §4(4)).³²³ Deliberate obstruction requires an interference with a competitor's *geschäftliche Entfaltungsmöglichkeiten* (commercial scope) as determined by an evaluation of the totality of the circumstances.³²⁴ Obstruction must be the offending actor's main purpose, that is, the ad-blocking firm must have aimed at impairing the publisher's possibility to act freely in the market with no motive at all to promote its commercial interests.³²⁵ The Court found that Eyeo, taking into account both the blacklisting and whitelisting functions, is not primarily interested in obstructing the publisher's business.³²⁶ Instead, the Court found that the ad-blocking firm is interested in promoting its business interests, which incidentally involves sustaining the publisher's commercial viability because the whitelisting service is dependent on the existence of functioning (but "acceptable") advertisements on publishers' websites.³²⁷ Additionally, the Court found that Eyeo's services, including the whitelisting function, do not result in an impairment of the publisher's means to act freely in the market.³²⁸ The Court noted

³¹⁵ *Id.* at 26.

³¹⁶ *Id.* at 26–27.

³¹⁷ *Id.* at 27.

³¹⁸ *Id.*

³¹⁹ *Id.* at 28.

³²⁰ *Id.*

³²¹ *Id.* at 28–29.

³²² *Id.* at 29.

³²³ *Id.*

³²⁴ *Id.* at 30.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

that the publisher has a range of options available to respond to the use of ad-blocking.

Finally, the Court acknowledged that it is the individual Internet user's decision whether or not to use Eyeo's services to block advertisements.³²⁹

2. Second Instance Judgements

a) *Axel Springer v. Eyeo GmbH (Cologne Court of Second Instance, June 24, 2016)*

This judgement resulted from the *de novo* review conducted by the Cologne Second Instance Court in the same case that had originally been considered by the Cologne First Instance Court in a September 29, 2015 judgment.³³⁰ In the preceding judgement, the first instance Court dismissed the publisher's complaint. In these proceedings, the Cologne Second Instance Court reconsidered the complaint brought by the plaintiff (Axel Springer AG) seeking relief against the defendant's (Eyeo GmbH and its managing directors) Adblock Plus service.³³¹ Initially the publisher only challenged the blacklisting service. Later in these second instance proceedings, the plaintiff raised a supplementary challenge to the combination of the firm's blacklisting and whitelisting services. Among other charges, the plaintiffs argued that the defendant was engaged in unfair competition.

Similar to the first instance court's judgement, the second instance Court rejected the publisher's claims asserting unfair commercial practices under the UWG (including the superseded §4(10) and the updated §4(4)). But the Court departed from the first instance judgement by granting the plaintiff relief under the newly adopted UWG §4a, which prohibits aggressive business practices. This was a first-of-its kind ruling under the new law. Because the second instance Court sustained the earlier ruling under UWG §§4(10) 4(4), this article will focus here on the court's novel reasoning in relation to the new UWG §4a.

The Court found that Eyeo's services amounted to aggressive business practices, which are prohibited by the newly adopted §4a of the UWG.³³² This new

³²⁹ *Id.*

³³⁰ See Landgericht Köln [LG] [Cologne Court of First Instance] Sept. 29, 2015, 33 O 132/14,

http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2015/33_O_132_14_Urteil_20150929.html [<https://perma.cc/N65T-RAGY>].

³³¹ Oberlandesgericht Köln [OLG] [Cologne Court of Second Instance] June 24, 2016, 6 U 149/15,

http://www.justiz.nrw.de/nrwe/olgs/koeln/j2016/6_U_149_15_Urteil_20160624.html [<https://perma.cc/AE3P-RAAY>].

³³² Section 4a Act Against Unfair Competition (2015) was implemented after the judgment of the Court of First Instance. This new law formed part of the basis for the publisher's challenge before the Court of Second Instance. See OLG June 24, 2016, 6 U 149/15, at 15.

dimension of the case was possible, the Court explained, because the publisher requested injunctive relief against Eyeo's future activities (assessed under the reformed UWG) as well as relief in the form of damages for the ad-blocking firm's past activities (assessed under the superseded UWG).³³³

As it had done with respect to the unfair commercial practices claim, the Court concluded that the parties were in a competitive relationship for the purposes of the aggressive business practices claim. The distribution of software containing a whitelisting function, the Court concluded, may lead to a *Wechselwirkung* (interdependence) between the advantages Eyeo enjoys and the corresponding disadvantages suffered by the publisher.³³⁴

The Court explained that, in order to find an aggressive business practice, the defendant must "induce a market competitor to undertake a commercial activity he or she otherwise would not have undertaken."³³⁵ This requires: (1) the use of a qualified *Einflussmittel* (means of influence), including coercion, or harassment; and (2) direct and severe influence impairing the competitor's choices.³³⁶ Significantly, the Court concluded that its assessment under §4a of the UWG (contrary to its evaluation under §4(10) (old) and §4(4) (new), does not require a consideration of the totality of the circumstances. This excluded from the court's analysis under §4a of the UWG any consideration of the interests of consumers and other market participants. Yet, this broader perspective on the issues involved in these cases played a central role in the judgements in the other cases surveyed here.³³⁷

The Court found that the ad-blocking firm's activities do not rise to the level of harassment or coercion.³³⁸ However, the Court found that the ad-blocking firm's services do amount to an *unzulässige Beeinflussung* (impermissible influence) under § 4a(1)[2]{3} of the UWG.³³⁹ Impermissible influence occurs when a competitor pressures another market participant, even without any threat of physical force.³⁴⁰ Factors influencing a finding of impermissible influence include intensity, method and duration of influence, and encroachment in regard to the exercise of rights.³⁴¹ In this case the Court was troubled by the effects the ad-blocking services had on the publisher's contractual relationship with its advertising partners.³⁴² The Court found that the publisher could only correct these effects by agreeing to the terms of Eyeo's fee-based whitelisting service. The Court found that the publisher was impermissibly influenced—pressured—by

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 26–27.

³³⁸ *Id.* at 27.

³³⁹ *Id.* at 27.

³⁴⁰ *Id.* at 25.

³⁴¹ *Id.*

³⁴² *Id.* at 26.

these circumstances to enter into a paid whitelisting agreement, which would not have been the case if Eyeo had not offered its services to individual Internet users.³⁴³

b) *IP Deutschland GmbH & RTL interactive GmbH v. Eyeo GmbH*
(Munich Court of Second Instance, August 17 2017)

The Munich Court of Second Instance categorically and summarily disagreed with the Cologne Court of Second Instance's interpretation and application of the new UWG §4a to the issues raised by ad-blocking.³⁴⁴ Without extensive reasoning, the Munich Court found that Eyeo had not engaged in aggressive business practices.

First, the Munich Court found that Eyeo's AdBlock Plus blacklisting service, even in combination with the accompanying whitelisting service, had not induced the publishers to make a market decision they otherwise would not have made but for the ad-blocking firm's exercise of its *Machtposition* (position of power in the market).³⁴⁵ The Munich Court doubted that Eyeo's activities even amounted to a statutorily recognized *Machtposition*. The Court explained that Eyeo had not applied pressure on the publishers by giving the impression that they would have to confront consequences outside the commercial context if they refused to enter into a whitelisting agreement.³⁴⁶ In any case, the Munich Court found that, in order to establish the requisite pressure, it would not be enough to show that Eyeo would persist in offering its blacklisting services if the publishers refused to enter into a whitelisting agreement with the ad-blocking firm. The Court explained that absent more, a finding of aggressive business practices would impinge on the fundamental principle of contractual freedom.³⁴⁷ Finally, the Munich Court concluded that the application of UWG §4a would be unjustified because Eyeo had not imposed burdensome or disproportionate obstacles of a non-contractual character on the publishers.³⁴⁸ This possible interpretation of the new statutory provision, the Court explained, applies only with respect to the fulfillment of rights and duties between contracting parties.³⁴⁹ Of course, this was not the case between Eyeo and the publishers, at least in the absence of a whitelisting agreement between the publishers and the ad-blocking firm.³⁵⁰

³⁴³ *Id.*

³⁴⁴ Oberlandesgericht München [OLG] [Munich Court of Second Instance] Aug. 17, 2017, U 2184/15 Kart, at 33-34,

<http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-122817?view> [<https://perma.cc/S7BZ-5HCF>].

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

D. Lessons from the German Ad-blocking Litigation

The cases cited above indicate that little more can be said about the sum of the German jurisprudence, except that ad-blocking is widely regarded as legal. Except in two very narrow or exceptional holdings of the German courts,³⁵¹ neither the UWG nor the constitutional interests of media firms prohibit ad-blocking, including integrated blacklisting and whitelisting services similar to those offered by Eyeo.³⁵²

There are several reasons why the UWG has not proven to be a barrier to ad-blocking. First, ad-blocking (even in combination with a whitelisting function) has purposes other than the obstruction or impediment of media firms' business activities. For those firms who create and administer ad-blocking services, the purpose of their activities is to promote their independent business interests.³⁵³

The German courts have acknowledged that the effects of ad-blocking on publishers are real and consequential.³⁵⁴ But the courts have consistently concluded that those effects are collateral, representing the kinds of challenges to a secure revenue stream that one should expect to face in the market.³⁵⁵ Moreover, when courts weigh the totality of the circumstances—as was the case in nearly all the German judgments—the courts largely found that ad-blocking does more good than harm.³⁵⁶ This is especially true for individual Internet users and the general public.

Second, and most profoundly, the German courts have credited ad-blocking for empowering individual users to exercise choice in their use and experience of the Internet. Several courts emphasized this because it reveals that it is individual users—and not the ad-blocking firms—who ultimately act in ways that impact publishers' advertising-revenue strategies.³⁵⁷ From this perspective, publishers' problem with ad-blocking is really a problem with individual Internet users whose use of ad-blocking software reflects their categorical rejection of advertising-based online business models. Ironically, through their strenuous litigation in these cases, the publishers seem determined to ignore the interests of the very users they hope to attract to their websites. In any event, the courts found that publishers have a broad range of alternatives available to counteract the effects of ad-blocking.³⁵⁸

Third, with respect to the constitutional elements of these cases, the courts largely found that publishers' valid constitutional interests in freedom of the

³⁵¹ OLG June 24, 2016, 6 U 149/15; LG Apr. 21, 2015, 416 HKO 159/14.

³⁵² See *supra* Part II. C.

³⁵³ See LG May 27, 2015, 37 O 11843/14, at 26-27.

³⁵⁴ See OLG June 24, 2016, 6 U 149/15, at 26.

³⁵⁵ See, e.g., LG Mar. 22, 2016, 33 O 5017/15, at 36; LG Dec. 10, 2015, 11 O 238/15.

³⁵⁶ OLG June 24, 2016, 6 U 149/15, at 26-27; LG Mar. 22, 2016, 33 O 5017/15, at 37.

³⁵⁷ See, e.g., LG Dec. 10, 2015, 11 O 238/15, at 8; LG May 27, 2015, 37 O 11843/14, at 36-38.

³⁵⁸ LG Mar. 22, 2016, 33 O 5017/15, at 37; LG, May 27, 2015, 37 O 11843/14, at 36; LG Apr. 21, 2015, 416 HKO 159/14, at 10-12.

press (Article 5 of the Basic Law) and occupational freedom (Article 12 of the Basic Law) are offset by the equally valid constitutional interests of the ad-blocking firms (especially occupational freedom under Article 12 of the Basic Law) and individual Internet users (including the right to negative informational freedom secured by Article 5(1) of the Basic Law).³⁵⁹

German Courts' acceptance of ad-blocking is the product of the discrete application of German code provisions and articles of the German constitution. Still, German jurisprudence on the matter produced some insights that may prove valuable for the resolution of these questions in other jurisdictions, especially in light of the way these results suggest a solution to the conflict that seems to strongly favor market dynamics and reject both regulatory and judicial interference.

The German courts have clearly signaled their understanding of and alignment with the public's mood by repeatedly finding that Internet users are horribly fed-up with obtrusive and obnoxious advertising. This is the basis of the courts' conclusion that, more than an invidious harm to Internet publishers, ad-blocking provides a valuable market-based response to a widespread problem.³⁶⁰ This is significant given German law's general paternalism when it comes to competition. In these cases, German courts were often willing to credit ad-blocking for making a free-market contribution (and eschewing regulatory intervention) to the public good.³⁶¹

Moreover, the German courts repeatedly found that it was not the ad-blocking firms that imposed on the publishers' interests. Instead, the courts found that individual Internet users freely chose to make use of ad-blocking services to advance their interests in the market.

Finally, the German courts repeatedly found that publishers had utterly failed to consider and pursue alternatives—other than seeking legal sanctions against ad-blocking services—to adapt to or mitigate the loss of revenue that had resulted from the increased use of ad-blocking services. German courts have identified a number of self-help remedies. These include both existing remedies, such as entering into whitelisting agreements with ad-blocking firms—a path already taken by many information-technology firms. While some might consider whitelisting distasteful, the German courts have properly acknowledged that it might actually serve to improve a publisher's advertising revenue by virtue of the reputational and market enhancements it delivers. Additionally, publishers can employ emerging technological responses to the effects of ad-blocking, such as blocking the ad-blockers themselves, or seeking to off-set lost revenue via the use of pay-walls, subscription-based access, and calibrating access to a website depending on a user's willingness to tolerate advertising.

³⁵⁹ 102 BVERFG 197 (212); OLG Aug. 17, 2017, U 2184/15 Kart, at 29-30; OLG June 24, 2016, 6 U 149/15, at 22; LG May 27, 2015, 37 O 11843/14; LG Mar. 22, 2016, 33 O 5017/15, at 35-37.

³⁶⁰ *See, e.g.*, OLG Aug. 17, 2017, U 2184/15 Kart, at 33-34

³⁶¹ *See, e.g.*, LG Apr. 21, 2015, 416 HKO 159/14, at 6.

A more obvious and inspired reaction, however, might be for publishers to simply insist that advertising on their websites be adapted to meet users' standards of acceptability. It is not difficult to read a degree of disappointment in publishers' apparent unwillingness to pursue this nobler path into the victories awarded to the ad-blocking services by the German courts. At the very least, advertising—no matter how obtrusive or disruptive—is already evolving to empower the user to choose whether he or she wants to engage with the advertisement. This alternative is represented by the trend toward “native” advertising on the Internet.³⁶² All of these alternatives share the profound merit that they leave these issues to be resolved by the autonomous, empowered individuals who make up the marketplace.

Perhaps surprisingly, the German courts have preferred this approach over the state's heavy regulatory hand. This is significant because it embraces and animates individual autonomy—both for publishers, who are urged to take the fate of their business model into their own hands, and the individual Internet users, who are empowered to experience the Internet as they choose by their adoption of ad-blocking services. That aligns with the best hopes for a free and more-or-less unregulated Internet.

III. AMERICAN LAW IMPLICATIONS OF AD-BLOCKING

Following the lead of their German peers, American publishers are now threatening to challenge ad-blocking under U.S. law in the American courts.³⁶³ When those cases come they will be confounded by the fact that they will likely involve a mix of federal-state norms as well as statutory and common law remedies. This survey does not seek to untangle all of the legal issues implicated by these complexities, but rather to identify three legal issues that seem most likely to arise in the American challenges to ad-blocking services. The first two are state common law remedies: tortious interference and misappropriation. The third, copyright infringement, is a federal statutory remedy. It is my view that publishers' assertions of these remedies under American law will be just as futile as they have been in Germany. As in Germany, ad-blocking is likely to be found a legal, if not a commendable, consumer service.

³⁶² See, Sheehan, *supra* note 130.

³⁶³ See, e.g., Elizabeth Dwoskin, *Newspapers Escalate Their Fight Against Ad-Blockers*, WASH. POST: THE SWITCH (May 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/05/27/newspapers-escalate-their-fight-against-ad-blockers/?utm_term=.54b216b786ff [<https://perma.cc/3X6L-9GJA>]; Finley, *supra* note 13; O'Reilly, *supra* note 231 [<https://perma.cc/9ZMU-CPZD>]; Gregg Keizer, *U.S. Newspapers Threaten to Sue Brave Browser Maker Over Ad-Blocking Scheme*, COMPUTER WORLD, (Apr. 8, 2015), <http://www.computerworld.com/article/3054032/web-browsers/us-newspapers-threaten-to-sue-brave-browser-maker-over-ad-blocking-scheme.html> [<https://perma.cc/5TYY-A4B3>]; Joe Pompeo, *Newspaper Group Takes Ad-Blocking Fight to Federal Trade Commission*, POLITICO, (May 26, 2016, 9:04 AM), <http://www.politico.com/media/story/2016/05/newspaper-group-takes-ad-blocking-fight-to-federal-trade-commission-004543> [<https://perma.cc/A7YS-WWWG>].

Notably, this survey of American private rights of action does not require consideration of the Constitutional dimension that played a substantial role in German ad-blocking jurisprudence. This is due to America's well-settled "state action doctrine," which makes those constitutional possibilities exceedingly remote—arguably even impossible.³⁶⁴ With that in mind, it is sensible to turn directly to a survey of some of the private law claims ad-blocking is likely to face in the United States.

A. Private Law Tort and Statutory Claims

When the American-based challenges to ad-blocking begin to materialize they will likely involve a mix of private tort and statutory claims. I discuss some of the possible claims here, including tortious interference, misappropriation, and copyright infringement. Surely there are other possible claims.³⁶⁵ Yet, from

³⁶⁴ See, e.g., ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (Aspen Publishers 3rd ed. 2006) (1997) ("The Constitution's protections of individual liberties and its requirements for equal protection apply only to the government."); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 507 (1985). I say "near-impossibility" because the Supreme Court has acknowledged a complex web of exceptions to the state action doctrine recognizing that the Constitution's protections might apply if the state is deeply entangled with private conduct or if private actors have assumed traditional public functions. See *id.* at 517-39. Further complicating the matter, the Supreme Court has applied a limited form of the doctrine of indirect horizontal effect in rarefied circumstances involving free speech rights that are exercised in respect of public officials and public figures, or speech involving subjects of interest to the general political discourse. See Gardbaum, *supra* note 164, at 434; see also *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (reaffirming the notion that speech relating to matters of public discourse is given special protection under the First Amendment); *N.Y. Times v. Sullivan*, 376 U.S. 254, 272-73 (1964) (holding that absent actual malice, "criticism of [government officials'] official conduct does not lose its [First Amendment] protection merely because it is effective criticism and hence diminishes their official reputations"). Despite all this, the Supreme Court has not come close to giving the constitution the kind of far-reaching, indirect horizontal significance that the basic rights enjoy in Germany. Summing up this difference, Mark Tushnet concluded that "[t]he state action issue has been . . . controversial and difficult in the U.S.," while other nations such as Germany merely "give the constitution indirect horizontal effect." Tushnet, *supra* note 164, at 88.

³⁶⁵ At least two other claims might have merited attention here, but now must await others' assessment of their potential application to ad-blocking: initial interest confusion and breach of an implied-in-fact contract. Regarding the former, initial interest confusion doctrine "recognizes that a trademark . . . may be used to lure visitors to a location that is not sponsored or endorsed by or affiliated with the brand owner or its mark." Initial Interest Confusion, 1 E-Commerce & Internet Law (Thomson Reuters) 7.08 [2] (2017). The doctrine also has a statutory parallel in the Lanham Act. 15 U.S.C. § 1125(a); *Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 n.2 (2d Cir. 2005) (noting the Lanham Act as protecting against several types of consumer confusion including point-of-sale confusion, initial interest confusion, and post-sale confusion). When determining whether the defendant fostered harmful confusion, the courts typically consider the totality of the circumstances with the guidance of eight factors identified by the Second Circuit. See *Lois Sportswear, U.S.A., Inc. v. Levi*

among the more obvious potential challenges, none constitutes an obvious or straightforward triumph for the publishers and advertisers opposed to ad-blocking. To the contrary, as was the case in the jurisprudence in Germany, the harms forming the basis for these claims will be subservient to the private interests implicated by market economics and individual autonomy—both of which heavily favor ad-blocking.

1. Tortious Interference

Tortious interference is defined as “[a] third party’s intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties.”³⁶⁶ Generally speaking, those raising a legal theory of tortious interference in the context of ad-blocking will argue that, by blocking paid advertisements, ad-blocking firms intentionally intrude on the contractual relationship between advertisers, who have paid for their content to be displayed, and publishers, who have received consideration in exchange for displaying said content.

Although tortious interference varies between states, the Restatement (Second) of Torts (“Restatement”) provides a detailed account of the doctrine’s essential elements.³⁶⁷ Notably, the Restatement describes three distinct types of tortious interference that may be applicable to ad-blocking.³⁶⁸ Sections 766 and 766A deal with intentional interference of existing contracts, while Section

Strauss & Co., 799 F.2d 867, 872 (2d Cir. 1986); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). In the Internet context, the doctrine has typically been applied to disputes related to probable user confusion caused by similar domain names, unauthorized use of metatags, and the resulting effects of these two on keyword searches. Note, *Confusion in Cyberspace: Defending and Recalibrating the Initial Interest Confusion Doctrine*, 117 HARV. L. REV. 2387, 2395 n.48 (2004) (classifying initial interest confusion cases relating to the Internet into three principal categories). Regarding the latter, one potential contract claim might involve an alleged breach of an implied-in-fact contract. See, e.g., Wicker & Karlsson, *supra* note 47, at 70, 74-75. Wicker & Karlsson dismiss the applicability of this legal theory, relying on the classic Supreme Court precedent announced in *Baltimore & Ohio R.R. Co. v. United States* to argue that the publishers’ presentation of content in exchange for the users’ duty to view advertisements fails the Court’s demands for a strictly construed “meeting of the minds.” *Id.* at 75. They assert that neither the publishers’ offer nor the users’ acceptance would qualify as “unambiguous.” *Id.* Mathew Ingram echoed skepticism towards this possible claim in an article published in *Fortune*. Mathew Ingram, *You Shouldn’t Feel Bad About Using an Ad Blocker, and Here’s Why*, FORTUNE (Sept. 17, 2015), <http://fortune.com/2015/09/17/ad-blocking-ethics/> [https://perma.cc/DS4N-ZANU]. He paraphrased a statement made by Tumblr co-founder Marco Arment, concluding that “readers aren’t given enough information about what a site is doing to make an informed choice” about the terms of an implied contract. *Id.*

³⁶⁶ *Tortious Interference with Contractual Relations*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁶⁷ See RESTATEMENT (SECOND) OF TORTS §§ 766, 766A, 766B (AM. LAW. INST. 1979).

³⁶⁸ *Id.*

766B covers intentional interference with a prospective contractual relationship.³⁶⁹ These three Restatement sections warrant discussion in concert due to the similarities that exist between them. The sole material difference between sections 766 and 766A and section 766B is that the former only applies where there is an existing contract.

Some might argue that the latter—tortious interference claims under Section 766B—would be applicable in the case of ad-blocking because widespread use of blacklisting services could discourage advertisers from entering into mutually beneficial agreements with publishers to display their advertisements. The combination of blacklisting and whitelisting services, however, undermines this argument because publishers and advertisers have the opportunity to continue with their traditional, commercial collaboration if they meet the terms of “acceptable ads” established by the relevant whitelist.³⁷⁰ With this in mind, and for the sake of convenience, my summary will focus on sections 766 and 766A.

a) *Elements of Tortious Interference*

Sections 766 and 766A are concerned with interference with an existing contract.³⁷¹ The fundamental difference between the two claims involves the target of the defendant’s conduct.³⁷² Section 766 describes a situation wherein the defendant directly interferes with the plaintiff’s interests in obtaining performance of a contract with another.³⁷³ Section 766A refers to indirect interference whereby the defendant prevents the plaintiff from “obtain[ing] performance of the contract by a third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the benefits of obtaining performance by the third person.”³⁷⁴ In other words, while section 766 focuses on conduct directed at a third party that causes him or her to breach a contract with the plaintiff, section 766A focuses on “conduct targeted at the plaintiff which hinders [the] plaintiff’s own performance or renders [the] plaintiff’s performance more burdensome or costly.”³⁷⁵

Both of these legal interests have potential relevance to ad-blocking. For example, claims alleging that ad-blocking services prompted Internet users to breach their “terms of use” agreements with websites might be advanced as tortious interference under section 766. Claims that ad-blocking services disrupted contracts between publishers and advertisers, however, might be advanced under

³⁶⁹ *Id.*

³⁷⁰ *See About AdBlock Plus, supra* note 68.

³⁷¹ RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (AM. LAW INST. 1979).

³⁷² *Wilspec Techs., Inc. v. DunAn Holding Grp., Co.*, 204 P.3d 69, 72 (Okla. 2009). *See* RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (AM. LAW INST. 1979) (clarifying that voidable contracts can be the basis of a tortious interference claim so long as the contract has not been voided).

³⁷³ *Wilspec*, 204 P.3d at 72.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

section 766A.³⁷⁶ Section 766A presents a further advantage to publishers in that it anticipates claims despite the fact that the alleged intentional interference only resulted in “more burdensome or expensive performance.”³⁷⁷ That is, while section 766 requires the claimant to prove that a contract was breached, section 766A does not.³⁷⁸

Whatever their differences, sections 766 and 766A feature the same core elements.³⁷⁹ These include: the existence of a contract; a showing that the defendant knew about the contract; evidence establishing the defendant’s intentional and improper interference; and a resulting harm or breach.³⁸⁰ Accordingly, before anything else, a claim for tortious interference must be based on “the existence of a valid contract between plaintiff and a third party.”³⁸¹ In the context of ad-blocking this is likely to be an agreement between the plaintiff publisher and advertisers or Internet users. Whitelisting agreements between the publisher and ad-blocking firms are not likely to be relevant here “as it is not possible for a party to a contract to interfere tortiously with a contract to which it is a party.”³⁸² Additionally, an expired or terminated contract between publishers and third parties cannot be the basis of a tortious interference claim.³⁸³

The second element of a tortious interference claim involves the defendant’s knowledge of the contract. Section 766 states that a defendant is subject to liability only if he or she has knowledge of the contract and knows that the he or she is interfering with its performance.³⁸⁴ Section 766A shares section 766’s requirement that the defendant, at the very least, know that his or her actions are certain or substantially certain to result in interfering with the performance of an existing contract.³⁸⁵ Especially in relation to the combination of ad-blocking and whitelisting services, it is inconceivable that an ad-blocking firm would be ignorant of the contracts that exist between publishers and advertisers; it is precisely and fundamentally this arrangement at which ad-blocking services aim.

³⁷⁶ Saluke, *supra* note 5, at 100–01.

³⁷⁷ *See id.* at 101 (citing RESTATEMENT (SECOND) OF TORTS § 766A (AM. LAW INST. 1979)).

³⁷⁸ *Lawton v. Weiner*, 882 A.2d 151, 159 (Conn. App. Ct. 2005).

³⁷⁹ *Compare King v. Sioux City Radiological Grp., P.C.*, 985 F. Supp. 869, 881–82 (N.D. Iowa 1997) (describing section 766 elements as a valid contract, knowledge of the contract, intentional and improper interference with the contract, resulting nonperformance of the contract, and amount of damages) *with GE Capital Mortg. Servs., Inc. v. Pinnacle Mortg. Inv. Corp.*, 897 F. Supp. 854, 869 (E.D. Pa. 1995) (describing 766A elements as a contractual relationship, the defendant’s intent to interfere with contractual relations, the impropriety of the interference, and harm resulting from the conduct).

³⁸⁰ *See* RESTATEMENT (SECOND) OF TORTS §§ 766, 766A (AM. LAW INST. 1979).

³⁸¹ 44B AM. JUR. 2D Interference § 4 (2018).

³⁸² *Id.* at § 6.

³⁸³ *See, e.g., Optivision, Inc. v. Syracuse Shopping Ctr. Assocs.*, 472 F. Supp. 665, 685 (N.D.N.Y. 1979) (applying New York law); *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 142–43 (S.D. Ohio 1974).

³⁸⁴ RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (AM. LAW INST. 1979).

³⁸⁵ *Compare id.* § 766 cmt. j *with id.* §766A cmt. e.

Thus, a finding of tortious interference will largely depend on the third element—whether the defendant’s actions constitute improper interference. A party claiming tortious, improper interference must prove that the defendant acted with “malice.”³⁸⁶ “Malice,” as required for a claim of tortious interference with a contract, is defined as “intentionally inflicted harm without justification or excuse.”³⁸⁷ One commentary explained this requirement in these terms:

[T]he plaintiff must show the intentional doing of a *per se* wrongful act or the doing of a lawful act with malice, which is unjustified in law and for the purpose of invading the contractual or business relationship of another. A *per se* wrongful act is one that is inherently wrongful or one that is never justified under any circumstances. When a defendant is motivated by legitimate personal and business reasons, there can be no *per se* wrongful act.³⁸⁸

Courts must determine the presence of malice “on an individualized basis, and the standard used by the court must be flexible, viewing the defendants’ actions in the context of the case presented.”³⁸⁹

Courts consider a number of factors,³⁹⁰ and section 767 urges that they be weighed against each other in order to arrive at a determination of improper interference:

- (a) the nature of the actor’s conduct,
- (b) the actor’s motive,
- (c) the interests of the other with which the actor’s conduct interferes,
- (d) the interest sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interest of the other,
- (f) the proximity or remoteness of the actor’s conduct to the interference and
- (g) the relations between the parties.³⁹¹

This list of factors, assessed on a case-by-case basis, seems to point towards the kind of holistic, totality of the circumstances analysis that led the German

³⁸⁶ Most, but not all, jurisdictions require malice in their analysis. *Johnson v. Baylor Univ.*, 188 S.W.3d 296 (Tex. App. 2006); *ABB Daimler-Benz Transp. v. Nat’l R.R. Passenger*, 14 F. Supp. 2d 75, 91 (D.D.C. 1998).

³⁸⁷ *Century 21 Real Estate LLC v. All Prof’l Realty, Inc.*, 889 F. Supp. 2d 1198, 1239 (E.D. Cal. 2012). See *RESTATEMENT (SECOND) OF TORTS* § 766 cmt. s (AM. LAW INST. 1979) (describing malice as “intentional interference without justification”).

³⁸⁸ 62B AM. JUR. 2D *Private Franchise Contracts* § 267 (2018).

³⁸⁹ *Singer v. Beach Trading Co.*, 876 A.2d 885, 895 (N.J. Super. Ct. App. Div. 2005).

³⁹⁰ *RESTATEMENT (SECOND) OF TORTS* § 767 (AM. LAW INST. 1979). Notably, the factors identified by the Restatement apply to all three types of tortious interference claims. *Id.* at cmt. a.

³⁹¹ *Id.* § 767.

courts to rule in favor of ad-blocking under the UWG. Such a sweeping perspective on the dispute allowed the German courts to take account of the interests of individual users as well as the general public. Those concerns also seem to be animated by the wide-ranging factors to be considered by American courts when deciding whether an ad-blocking defendant acted with malice in a tortious interference case. Significantly, this already broad range of acceptable justifications for interference expand when the defendant's conduct interferes with economic advantage as opposed to an existing contract.³⁹²

b) Tortious Interference Jurisprudence

Courts have not yet considered tortious interference claims in the context of ad-blocking services. But they have applied the tort to actions involving advertising. In *Penthouse International, Ltd. v. Koch*, for example, an adult magazine, *Penthouse*, sued for tortious interference when the New York City transit system removed its advertising even though *Penthouse* had a contract with the transit system's advertising concessionaire to display the ads.³⁹³ The Court did not reach the merits of the tortious interference claim because the case could be dismissed due to a term in the contract that provided that governmental action leading to a failure to perform could not constitute a breach.³⁹⁴ But, in *Daisy Outdoor Advertising Co., Inc. v. Abbott* the South Carolina Supreme Court found that the defendant willfully (that is to say "maliciously") interfered with advertising contracts when he blocked the view of billboards with "for sale" signs.³⁹⁵ Similarly, in *Chhina Family Partnerships v. S-K Group of Motels, Inc.*, the Georgia Court of Appeals found tortious interference where an individual cut power to advertising signs and painted over others.³⁹⁶

These cases are instructive because they provide insight into the factors courts will consider when finding tortious interference. The Court in *Daisy Outdoor Advertising*, for example, concluded that the defendant's conduct constituted tortious interference because his actions adversely affected the public interest.³⁹⁷ In *Chhina Family Partnerships* the appellate Court affirmed a finding of tortious interference noting that the defendant exhibited a pattern of wrongful behavior

³⁹² *Env'tl. Planning and Info. Council v. Superior Court*, 680 P.2d 1086, 1090 (Cal. 1984) ("[A] competitor's stake in advancing his own economic interest will not justify the intentional inducement of a contract breach... whereas such interests will suffice where contractual relations are merely contemplated or potential").

³⁹³ 599 F. Supp. 1338 (S.D.N.Y. 1984).

³⁹⁴ *Id.* at 1343.

³⁹⁵ 473 S.E.2d 47 (S.C. 1996).

³⁹⁶ 622 S.E.2d 40 (Ga. Ct. App. 2005).

³⁹⁷ 473 S.E.2d at 52.

specifically directed at the plaintiff's business.³⁹⁸ Significantly, as urged by section 767, in both cases the courts paid special attention to the particular circumstances of the dispute.

The approach taken in *Chhina Family Partnerships* and *Daisy Outdoor Advertising* suggests that ad-blocking services would survive a tortious interference claim. In the ad-blocking context, special consideration should be given to ad-blocking firms' motives and interests as those motives and interests relate to broader social concerns. It is true that, in combination with whitelisting services, ad-blocking firms are motivated by pecuniary business interests. But they also are clearly animated by Internet users' general interest in avoiding obtrusive advertising. The Adblock Plus website clearly states that, by blocking annoying ads, Eyeo hopes to help Internet users safeguard their privacy and online security by allowing them to disable tracking mechanisms and block malware domains.³⁹⁹

Fruitful echoes of the "intent" analysis are present in the German courts consideration of the totality of the circumstances as part of their application of the UWG to ad-blocking. Most of the German courts attributed considerable weight to the ad-blocking firms' benevolent aims concerning individual autonomy and privacy. The German courts noted that ad-blocking firms were motivated by their own legitimate business interests. Yet, these courts found that, ultimately, it was the user and not the ad-blocking service itself, who acted to block the advertisements, albeit by making use of the defendants' ad-blocking technology. In framing the issues the German courts explained that the ad-blocking firms' intent was to serve individual Internet users (who, in turn, were interested in privacy and online security) and not to block all advertising. After all, the defendants need acceptable forms of advertising to sustain their own business model. Regardless, the lessons for the question of impropriety that is posed by a claim of tortious interference under U.S. law seem clear: there are sound reasons to conclude that ad-blocking firms have not intentionally inflicted harm on publishers *without justification or excuse*.

This application of tortious interference to ad-blocking services is reinforced by the cases involving anti-malware services. The striking similarities between those cases and ad-blocking sheds valuable light on the likely fate of tortious interference claims leveled against ad-blocking services. One of these cases, *Zango, Inc. v. PC Tools PTY LTD*, concerned a media content website that brought an action for injunctive relief against a provider of "spyware" detection software.⁴⁰⁰ The media company, Zango, "provide[s] consumers free [online]

³⁹⁸ 622 S.E.2d at 45. The wrongful conduct included: turning off the electricity to an advertising sign and refusing to allow the plaintiff to use it; painting over billboards advertising the plaintiff's motel; causing frequent diesel fuel spills onto the plaintiff's property; diverting away water from the plaintiff's motel for use in its business. *Id.*

³⁹⁹ *About Adblock Plus*, *supra* note 68.

⁴⁰⁰ 494 F. Supp. 2d 1189 (W.D. Wash. 2007).

access to a large catalog of [media content]...sponsored by advertisements.”⁴⁰¹ For a fee, Zango also offered a premium version of its platform that provided the same content without advertisements.⁴⁰² The defendant, PC Tools, offered users software that detected and deleted potentially harmful software from their computers.⁴⁰³ Millions of users downloaded PC Tool’s free software from Google.⁴⁰⁴ This software prevented the display of advertisements from Zango and disrupted the functioning of the Zango application in a way that Zango regarded as potentially harmful.⁴⁰⁵ Consequently, Zango brought a claim for injunctive relief against PC Tools based *inter alia* on an underlying claim for tortious interference with a contract.⁴⁰⁶ To obtain injunctive relief Zango had to demonstrate that: (1) it would suffer an irreparable injury if the relief were to be denied, (2) it would likely prevail on the merits of the tortious interference claim, (3) the balance of potential harm was attributable to PC Tools, and (4) the public interest favored granting injunctive relief.⁴⁰⁷

The court, in denying Zango the requested injunction, ruled that the plaintiff was unlikely “to demonstrate that [the] Defendant’s conduct in attempting to protect its customers from what it perceive[d] to be potentially harmful or annoying software stems from an ‘improper’ motive or uses any ‘wrongful means.’”⁴⁰⁸ The Court found that users knowingly downloaded PC Tools’ software to avoid potential malware.⁴⁰⁹ In doing so, the Court credited the importance of the individual user’s decision to rely on PC Tool’s expertise in identifying and blocking malware.⁴¹⁰ PC Tools’ assistance in helping users block malware, the Court reasoned, also served a broad public interest.⁴¹¹ The Court further reinforced its positive view of PC Tools’ services by noting that it had taken action to significantly mitigate the amount of irreparable harm done to Zango.⁴¹² With all of this in mind the Court concluded that it would be a greater hardship to impose liability upon PC Tools and that “it is in the public interest to allow companies similar to [PC Tools] to be able to exercise their judgment and block potential malware applications.”⁴¹³

The role of anti-malware services in the relationship between website publishers and individual users—and their general circumstances as described in

⁴⁰¹ *Id.* at 1192.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 1195.

⁴⁰⁷ *Id.* at 1194.

⁴⁰⁸ *Id.* at 1195.

⁴⁰⁹ *Id.* at 1196.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 1195.

⁴¹³ *Id.* at 1196.

Zango—are nearly identical to those of ad-blocking services. Similar to PC Tools’ anti-malware services, Eyeo’s AdBlock Plus provides software at no cost to individual users who choose to make use of the ad-blocking service of their own volition. Users make this choice based on a desire to use and experience the Internet free from annoying and disruptive advertising content. Similar to PC Tools’ anti-malware services, many ad-blocking firms also have taken steps to mitigate the harm that their services may cause to publishers. Eyeo’s Acceptable Ads initiative is just one example.⁴¹⁴ The program is a compromise that encourages publishers and advertisers to employ less intrusive ads and simultaneously allows websites to continue to generate advertising revenue by meeting user-generated criteria for tolerable advertisements.⁴¹⁵ On the basis of this framework it is possible for ad-blocking services to fairly claim that they are aiding, and not harming, the publishers. At the very least, when structured this way, the combination of blacklisting and whitelisting services can be viewed as an attempt to reconcile the needs of individual users with the interests of publishers and advertisers. As such, ad-blocking services similar to AdBlock Plus are bound to be a position as strong as or stronger than PC Tools was in the *Zango* case when it comes to weighing opposing interests as part of a determination of propriety in the framework of a tortious interference claim.

c) Good Samaritan Defenses to Tortious Interference

Online publishers may resist changes that affect their traditional business models. But ad-blocking services promote a far-reaching public good: a better user experience of the Internet by enhancing users’ privacy and reducing users’ exposure to obtrusive advertising. Nor is it far-fetched to see the developments promoted by ad-blocking services as beneficial to publishers, not the least because users who visit their websites will be more satisfied with those websites and will more enthusiastically embrace the “acceptable ads” that come to appear at the publishers’ websites if the publisher participates in a whitelisting scheme. In fact, the core features of ad-blocking services (features that should weigh heavily in favor of ad-blocking firms in a propriety analysis as part of a tortious interference claim) are promoted by U.S. law.⁴¹⁶ These features include enhancing individual users’ autonomy and advancing the functionality and effectiveness of the Internet. For example, U.S. law offers protection for “Good Samaritan” blocking and screening of offensive material. 47 U.S.C. § 230(c)(2) provides:

No provider or user of an interactive computer service shall be held liable on account of –

⁴¹⁴ See *Allowing Acceptable Ads in AdBlock Plus*, *supra* note 84.

⁴¹⁵ *Id.*

⁴¹⁶ See 47 U.S.C. §230(b) (2012) (explaining the United States’ policy on protecting private blocking and screening of offensive material on the Internet).

(A) any action voluntary taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [(A)].⁴¹⁷

This might exempt ad-blocking services from tortious interference claims.⁴¹⁸ At the very least, statutory commitments of this nature reinforce ad-blocking firms' position in the balancing of interests that takes place as part of a propriety determination in a tortious interference case.

The Court reached a similar result with respect to Zango's challenge to Kaspersky's anti-malware services.⁴¹⁹ Zango again alleged tortious interference with a contract, among other claims. The Ninth Circuit affirmed that 47 U.S.C. §230(c) "plainly immunizes from suit a provider of interactive computer services that makes available software that filters or screens material that the user or *the provider* deems objectionable."⁴²⁰ The Court reached this conclusion by noting that services that provide users with filtering tools and require regular updates meet the literal provisions of §230.⁴²¹

Ad-blocking firms also should qualify for protection under §230(c)(2). First, an ad-blocking firm is an "access service provider" because it "provides software . . . or enabling tools . . . that filter, screen, allow, or disallow content."⁴²² Second, a "provider of an interactive computer services" includes those offering access services that provide or enable computer access by multiple users to a computer server.⁴²³ Over Zango's protests, the Court concluded that software firms "provide or enable access by multiple users to [its] computer server" if users can automatically or manually update their software.⁴²⁴ Eyeo's Adblock Plus features both automatic and manual updates and clearly qualifies as an interactive computer service for purposes of §230(c)(2) protection.

But it should further be noted that the concurring opinion in *Kaspersky* warned that "under the generous coverage of §230(c)(2)(B)'s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material 'otherwise objectionable.'"⁴²⁵ *Sherman v. Yahoo! Inc.*

⁴¹⁷ *Id.* §230(c)(2).

⁴¹⁸ *See id.* § 230(c).

⁴¹⁹ *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

⁴²⁰ *Id.* at 1173.

⁴²¹ *Id.* at 1175.

⁴²² *Id.* (referencing 47 U.S.C. §§230(f)(4), (f)(4)(A)).

⁴²³ *Id.* (referencing 47 U.S.C. §230(f)(2)).

⁴²⁴ *Id.* at 1175–76.

⁴²⁵ *Id.* at 1178 (Fisher, J., concurring).

sought to address this concern.⁴²⁶ There, the Court added that a software provider should engage in some form of analysis to identify whether material is offensive or harmful prior to receiving “Good Samaritan” protection.⁴²⁷ Ad-blocking services such as Eyeo’s AdBlock Plus satisfy this added requirement. In the case of AdBlock Plus, its software blocks content that fails to meet criteria with respect to user preferences and known security concerns.⁴²⁸

d) *Tortious Interference and Terms-of-Service Agreements*

A finding of improper interference on the part of ad-blocking services seems unlikely, even with respect to a website’s “terms-of-use” agreement with users. Generally, “ad-blockers don’t target specific websites, and therefore aren’t interfering with any specific publishers’ terms of use.”⁴²⁹ Nor do ad-blocking services function without the individual user configuring the filters. For example, Eyeo’s AdBlock Plus “doesn’t block anything until [users] ‘tell’ it what to block by adding external filter lists.”⁴³⁰ Because the individual user installs ad-blocking services as a generally applicable add-on or extension to a browser, it is hard to see how this could be construed as a malicious or intentional act on the part of the ad-blocking firm aimed at any specific publisher’s website. Even if an ad-blocking firm is put on notice that it is interfering with a terms of use agreement and must stop offering its services relative to that particular website, it will be difficult for publishers to advance their tortious interference claim on this basis. Ultimately, it is the user who is informed of and responsible for respecting a publisher’s terms-of-use policy prohibiting ad-blockers. By extension, and as the German courts repeatedly insisted, it is the individual user and not the ad-blocking firm who flouts this duty.

2. Misappropriation

In their campaign against ad-blocking services publishers may be tempted to latch onto the hazily-defined tort of misappropriation. This common law doctrine has found extremely narrow and dwindling relevance, leading Judge Richard Posner to conclude that he was “hard-pressed to find a case in which a claim of misappropriation should have succeeded.”⁴³¹ Today, claims of misappropriation are usually preempted by federal copyright law. But, even if a misappropriation claim survives federal preemption, it seems unlikely that ad-blocking services would be subject to the misappropriation doctrine as it exists today.

⁴²⁶ See 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).

⁴²⁷ *Id.*

⁴²⁸ *AdBlock Plus*, *supra* note 68.

⁴²⁹ Richard S. Eisert & Truan Savage, *Expect Lawsuits Against Ad Blockers*, LAW360, (Nov. 13, 2015), <http://www.law360.com/articles/726505/expect-lawsuits-against-ad-blockers>.

⁴³⁰ *About AdBlock Plus*, *supra* note 68.

⁴³¹ Richard Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 633 (2003-04).

a) *Misappropriation Jurisprudence*

Any argument related to ad-blocking would begin with reference to the seminal misappropriation case, *International News Service v. Associated Press* (the “*INS Case*”).⁴³² In the *INS Case* the Supreme Court found that one subscription news service (INS) had “misappropriated” the news reports written and produced by another subscription news service (AP) and, after modestly reworking them, passed them off to its customers as the original content for which they had paid their subscription fees.⁴³³ The Court’s majority colorfully insisted that the defendant’s actions amounted to “an unauthorized interference with the normal operation of the complainant’s legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not”⁴³⁴ The Court framed its holding in terms of unfair competition, stating that “the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property”⁴³⁵ In other words, the reproduction of editorial content was considered misappropriation. But the *INS Case* involved two publishers trying to sell similar products in the same market sector. This differs significantly from the circumstances of publishers and ad-blocking firms, who operate in separate and distinct markets. From this perspective, the *INS Case* largely treated misappropriation as a form of free-riding that unfairly put a direct competitor in the same commercial sector at a disadvantage.

Following the *INS Case* the Court abrogated all “federal common law” in *Erie Railroad Co. v. Tompkins*.⁴³⁶ Still, the doctrine of misappropriation resurfaced as part of New York’s state common law in *National Basketball Association v. Motorola, Inc.* (the “*NBA Case*”).⁴³⁷ The *NBA Case* involved a media firm gathering and offering, as its own product, the information generated by the NBA’s games (including live game news and updated scores).⁴³⁸ The NBA contended that this conduct constituted misappropriation under the *INS Case* and caused a detrimental effect to similar services being offered (or soon to be offered) by the NBA.⁴³⁹ At the time of the suit federal copyright law preempted state law claims “that enforced rights ‘equivalent’ to exclusive copyright protections when the work to which the state claim was being applied fell within the area of copyright

⁴³² 248 U.S. 215 (1918) (concerning the unauthorized retransmission of plaintiff’s news publishing by defendant) [hereinafter *INS*].

⁴³³ *Id.* at 241–42.

⁴³⁴ *Id.* at 240.

⁴³⁵ *Id.* at 236.

⁴³⁶ 304 U.S. 64, 79–80 (1938).

⁴³⁷ 105 F.3d 841 (2d Cir. 1997) [hereinafter *NBA*].

⁴³⁸ *Id.* at 843–44.

⁴³⁹ *Id.* at 843, 853.

protection.”⁴⁴⁰ Accordingly, the Second Circuit introduced a five-part test to determine when *INS*-like misappropriation cases would survive federal preemption.⁴⁴¹ Deep in its analysis the Second Circuit also used this five-part test for the substantive elements of the surviving, narrow, state-law “hot news” misappropriation claim:

- (i) the plaintiff generates or collects information at some cost or expense;
- (ii) the value of the information is highly time-sensitive; (iii) the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect it; (iv) the defendant’s use of the information is in direct competition with a product offered by the plaintiff; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.⁴⁴²

Through these elements, the Second Circuit emphasized that the doctrine of misappropriation in the *INS Case* was not about ethics, but rather about “the protection of property rights in time-sensitive information so that . . . [profit seeking entrepreneurs] would [not] cease to collect it.”⁴⁴³ In doing so, the Second Circuit emphasized that misappropriation, as conceived by the Court in the *INS Case*, aims to solve a collective action problem.⁴⁴⁴ In the *INS Case*, the Second Circuit reasoned, the Supreme Court had objected to the way that free-riding enabled the defendant’s unjust enrichment at the expense of the plaintiff’s efforts.⁴⁴⁵ The Second Circuit concluded that the defendant did not meet some elements of the tort and held that the “transmission of ‘real-time’ NBA game scores and information tabulated from television and radio broadcasts of games in progress does not constitute a misappropriation of ‘hot news’ that is the property of the NBA.”⁴⁴⁶

The Second Circuit noted that the NBA had failed to show any competitive effect stemming from the defendant’s product. The Court reached this conclusion by distinguishing between the products being offered by the parties. The NBA’s product, the Court explained, consisted of organizing basketball games and obtaining revenue from the sale of access to these games, either as live entertainment or through broadcast media, including full-descriptions of the games broadcast as live transmissions.⁴⁴⁷ It was a collateral and separable consequence of the NBA’s activities, the Court reasoned, that its product—the organization

⁴⁴⁰ *Id.* at 845.

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 852.

⁴⁴³ *Id.* at 853.

⁴⁴⁴ Shyamkrishna Balganesh, *The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 140 (2012).

⁴⁴⁵ *NBA*, 105 F.3d at 843.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

of basketball games—generated information about its games. The Court concluded that the defendant’s efforts to “[collect] and [retransmit] strictly factual information about the games” represented a completely distinct market activity.⁴⁴⁸ The Court was convinced that no one would confuse the two products—the games, on one hand, and information about the games, on the other hand. From this, the Court held that the defendant was not in competition with the plaintiff.⁴⁴⁹

The Second Circuit’s assessment of the question of direct competition in the *NBA Case* seems particularly relevant to the dynamic that exists between publishers and ad-blocking services. The two operate in separate and distinct segments of the market and are not in competition with one another: publishers seek to monetize the presentation of information and content on websites; ad-blocking firms seek to monetize individual users’ interest in determining for themselves the nature of their use and experience of the Internet. There are echoes of the German courts’ reasoning in this assessment of the misappropriation claims. On several occasions, the German courts found that ad-blocking firms were not in a competitive relationship with media firms because they were offering distinct products to different end-users.⁴⁵⁰ In light of the *NBA Case* it seems likely that U.S. courts assessing a misappropriation claim would reach a similar conclusion and find that ad-blocking services are completely distinct when compared to the services offered by publishers, as ad-blocking does not involve copying and repackaging publishers’ valuable efforts.

The Second Circuit also found that the lack of competition between two products precludes the possibility of free-riding.⁴⁵¹ To confirm this, in the *NBA Case*, the Court considered the respective costs of presenting the parties’ products.⁴⁵² The Court ultimately determined that the NBA failed to show damage to its product resulting from the defendant’s activities.⁴⁵³

Publishers hoping to succeed with a misappropriation claim against ad-blocking firms would confront a similar problem. While publishers’ loss of advertising revenue might be attributable to some ad-blocking services, there are a number of reasons to believe that this dynamic falls short of the “existential” fifth element of the misappropriation test. First, most online advertising works on the basis of payments-for-clicks. But it seems unlikely that users who turned to ad-blocking services were the source of an existential number of advertising clicks to begin with. After all, their disdain for online advertising motivated their resort to ad-blocking services. And, even if revenue losses might be attributable to ad-

⁴⁴⁸ *Id.* at 853-54.

⁴⁴⁹ *Id.*

⁴⁵⁰ *See, e.g.*, LG Mar. 22, 2016, 33 O 5017/15, at 36; LG Dec. 10, 2015, 11 O 238/15.

⁴⁵¹ *Id.* at 854 (“An indispensable element of an *INS* ‘hot news’ claim is free riding by a defendant on a plaintiff’s product, enabling the defendant to produce a directly competitive product for less money because it has lower [production] costs.”).

⁴⁵² *Id.*

⁴⁵³ *Id.*

blocking services, the publishers could characterize this as an existential threat only if their efforts at self-help failed to remedy the situation. As several of the German courts concluded, in the first instance publishers might consider entering into a whitelisting agreement with a prominent ad-blocking firm.⁴⁵⁴ This poses an opportunity to restore (perhaps even increase) a significant portion of advertising revenue. The German courts identified a number of other responsive measures publishers might take to adapt to ad-blocking services and minimize or mitigate the loss of revenue. These remedial measures include new advertising schemes, pay-walls, or restricted access.⁴⁵⁵ If the media firms challenging ad-blocking services really are doomed to extinction (as would have to be the case were they to succeed with a misappropriation claim), it seems that in the first instance their fate will be a result of their failure to adapt to new market conditions and expectations, including users' increasing hostility to a tradition of obtrusive advertising.

b) Misappropriation and Free-Riding

Still, the more fundamental reason for skepticism toward the applicability of the misappropriation doctrine in challenges to ad-blocking services lies in the absence of a free-riding problem. The preceding cases focus almost exclusively on free-riding conduct that involved the defendant copying and then passing off the plaintiff's efforts as its own. The actionable conduct is best understood as a kind of theft and pawning-off: "the unauthorized taking of the results of another's efforts . . . and using them to provide a competitive product or service in such a way as to obtain an unfair cost saving in the relevant market."⁴⁵⁶ Ad-blocking firms are not in the business of pawning-off the media firms' property. Unlike the *NBA Case*, and the misappropriation cases that generally involve profiteering from the efforts of others,⁴⁵⁷ ad-blocking firms do not take publishers' content and offer that content as their own for commercial value. In fact, ad-blocking services do not offer any substantive content. In the case of Ad-Block Plus, Eyeo offers open source software that aims to enable individual users to choose what content they receive through the Internet. This is far from the delivery of content for value, let alone the delivery of another's content for value. To the degree that "hot news" misappropriation is narrowly defined, it simply does not apply to ad-blocking services.

⁴⁵⁴ See, e.g., LG Mar. 22, 2016, 33 O 5017/15, at 37.

⁴⁵⁵ See, e.g., LG, Apr. 21, 2015, 416 HKO 159/14, at 10-12.

⁴⁵⁶ Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 513.

⁴⁵⁷ See *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 794 (N.Y. Sup. Ct. 1950).

Further support for this argument is seen in *Barclays Capital, Inc. v. Theflyonthewall.com*.⁴⁵⁸ The judgement is significant for several reasons. First, although the Court conceded the viability *vel non* of a “hot news” misappropriation tort, the Court dismissed *NBA*’s five elements of misappropriation as being non-binding dictum.⁴⁵⁹ This signaled the Court’s general pessimism towards the doctrine of misappropriation and emphasized the court’s view that misappropriation survived federal preemption only as a very narrow exception.⁴⁶⁰ This view is explained by the suggestion that federal copyright may be better suited for providing legal uniformity and the recognition that the misappropriation doctrine applied in the *INS Case* arose out of very particular facts relating to news gathering.⁴⁶¹ In any case, the *Barclays* judgement again emphasized that misappropriation must involve a free-riding problem that sees the diversion of profits away from a plaintiff in a way that benefits a defendant that has not earned it.⁴⁶²

3. Copyright Infringement

Publishers might also consider challenging ad-blocking services on the basis of federal statutory copyright protection. The foundation of the claim would be “that the [ad-blocking service] in question infringes publishers’ copyrights by impermissibly changing the publishers’ pages.”⁴⁶³ More precisely, because they empower individual users to decide what website content they want to download to their computers, ad-blocking firms would have to be found vicariously liable for the individual users’ infringement of the publishers’ copyright interests.⁴⁶⁴ In other words, ad-blocking firms that promote or induce the infringing acts of others may be liable if they also have “the right and ability to supervise the infringing activity and . . . direct financial interest in such activities.”⁴⁶⁵ Framing the claim in terms of vicarious liability may be more advantageous to publishers

⁴⁵⁸ 650 F.3d 876-77 (2d Cir. 2011). The circumstances of the case are as follows. Financial firms engaged in extensive securities research to create recommendations that would be distributed to clients and prospective clients each morning before the stock market opened. The defendant was a news aggregator that electronically distributed this time sensitive information, for a price, to its own subscribers. This information would reach the defendant’s subscribers before the financial firms could reach their own clients, thereby severely harming the business models of the financial firms and reducing their incentive to create the recommendations in the first place. The Court ruled for the defendant, stating that “a Firm’s ability to make news—by issuing a Recommendation that is likely to affect the market price of a security—does not give rise to a right for it to control who breaks the news and how.”

⁴⁵⁹ *Id.* at 890, 896–97, 900–01.

⁴⁶⁰ *Id.* at 890, 897–98, 905; *See also* BALGANESH, *supra* note 444, at 136.

⁴⁶¹ 650 F.3d at 896–97, 905.

⁴⁶² *Id.* at 904.

⁴⁶³ *See* Eisert & Savage, *supra* note 429.

⁴⁶⁴ *See* Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1161–62 (2d Cir. 1971); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) [hereinafter *Betamax*].

⁴⁶⁵ *Gershwin*, 443 F.2d at 1162.

because it would be difficult to prove that the ad-blocking firms' actions directly infringed a copyright holder's exclusive interests in preparing derivative works.⁴⁶⁶

a) Elements of Copyright Infringement

The natural starting point is to determine what constitutes copyrightable material. The two essential elements of copyrightable material are originality and fixity in a tangible form.⁴⁶⁷ Copyright protection is extended only to those "original works of authorship" that are independently created by the author and possess at least some minimal degree of creativity.⁴⁶⁸ While digital advertisements themselves may meet these requirements, the question is whether the entire webpage (of which the planned advertisements would be a part) is protected under copyright. Importantly, the minimal creativity requirement allows for unique selections and arrangements of elements to warrant copyright protection.⁴⁶⁹ This flexibility favors the publishers. But, while the creative arrangements of a webpage (including planned advertisements) may be protected, the underlying content may not be.⁴⁷⁰ Copyrightable material (in these cases, the website) often contains elements within it (in these cases, the advertisements) that copyright does not protect.⁴⁷¹

b) Copyright Jurisprudence

There are several cases which suggest that blocking advertisements does not infringe upon copyright protections.

The *Betamax* case, for example, dealt with the advent of the eponymous recording technology that "enable[ed] a viewer to omit a commercial advertisement from the recording [of a television broadcast], provided . . . that the viewer [was] present when the program [was] recorded."⁴⁷² The *Betamax* recorder also allowed the viewer to fast forward through the portions of the recording that he or she did not wish to see.⁴⁷³ As part of their allegations the plaintiffs claimed

⁴⁶⁶ *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir. 2014) ("[O]perating a system used to make copies at the user's command does not mean that the system operator, rather than the user, caused the copies to be made.").

⁴⁶⁷ *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 356 (1991).

⁴⁶⁸ *Id.* at 345.

⁴⁶⁹ *Id.* at 348.

⁴⁷⁰ *Id.*

⁴⁷¹ *NBA*, 105 F.3d at 849.

⁴⁷² *Betamax*, 464 U.S. at 423. See Julia Qui, *Is Ad-Blocking the New Frontier for Copyright Law?*, COLUM. SCI. & TECH. L. REV. (Dec. 6, 2012) ("Universal Studios challenged the legality of home video recorders because they allowed viewers to skip the advertisements that were normally part of television broadcasts by fast-forwarding through them.").

⁴⁷³ *Betamax*, 464 U.S. at 423.

that the Betamax system hurt their business because it amounted to another business profiting from their work.⁴⁷⁴ In analyzing the facts of the case the Supreme Court emphasized that technological changes that render the literal terms of the Copyright Act ambiguous should be met with the knowledge that the ultimate purpose of the Act is to “stimulate artistic creativity for the general public good.”⁴⁷⁵ Thus, the Court insisted that any decision regarding Betamax’s alleged copyright infringement would have to account for the general benefits the public would derive from the Betamax system.⁴⁷⁶

The Court’s analysis in *Betamax* is a useful analogy for the application of a contributory copyright infringement claim to ad-blocking services.⁴⁷⁷ The Court noted that it would be unprecedented in copyright law to “deprive the public of the very tool or article of commerce capable of some non-infringing use.”⁴⁷⁸ This underscores the priority the Court gives to public interest factors. Similarly, the Court recognized that some unauthorized uses of a copyright do not amount to an infringement.⁴⁷⁹ This portion of the Court’s analysis refers to the fair-use doctrine, which permits copyrighted works to be used for “socially laudable purposes” that strike a balance between reducing an author’s incentive to create and reducing the general creative benefits for society.⁴⁸⁰ The Court engaged with two other factors as part of its fair-use doctrine analysis: the commercial character of the challenged activity; and the effect of the challenged use upon the potential value of the work.⁴⁸¹ Addressing the first of these fair-use factors the Court concluded that it would be presumptively dubious if the Betamax system were used to generate a profit or if it impaired the copyright holder’s ability to obtain the rewards of having a copyright.⁴⁸² With respect to the second fair-use factor, however, the Court concluded that the potential harm to the copyright holders might be negligible because “the viewer still had to receive and record the commercials as part of the transition, and that fast-forwarding is a process that would be too tedious for most viewers.”⁴⁸³

⁴⁷⁴ *Id.* at 486.

⁴⁷⁵ *Id.* at 432.

⁴⁷⁶ *Id.*

⁴⁷⁷ *See id.* at 446 (“[I]n an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome [of the case].”).

⁴⁷⁸ *Id.* at 443.

⁴⁷⁹ *Id.* at 447.

⁴⁸⁰ *Id.* at 478–79. *See also* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005) (“[Sony] struck a balance between the interests of protection and innovation by holding that the products capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.”).

⁴⁸¹ *Betamax*, 464 U.S. at 448–50.

⁴⁸² *Id.* at 449–50.

⁴⁸³ *Qui, supra* note 472.

Fox Broadcasting Company, Inc. v. Dish Network also involved a copyright challenge to a commercial-skipping service.⁴⁸⁴ At the heart of the case was the Dish Network's "AutoHop" program, "a feature that lets consumers skip commercials in . . . recordings. The feature appear[ed] to rely on markings in the recordings indicating when commercials begin and end . . ."⁴⁸⁵ To insure the accuracy of the markings, Dish copied the programming onto its own computers.⁴⁸⁶ Ultimately, the Ninth Circuit dismissed both the direct and contributory copyright infringement claims.⁴⁸⁷ Regarding the direct claim, the Court found that, where the operating system was under the command of the individual user, the commercial-skipping service did not cause the infringement.⁴⁸⁸ The Court reasoned that the "user, not Dish, must take the initial step of enabling" the program to record the show in ad-free mode.⁴⁸⁹

With regard to the contributory infringement claim, the Court made several observations relevant to the fair-use doctrine. First, the Court concluded that commercial-skipping did not implicate Fox's copyright interests "because Fox owns the copyrights to the television programs, not to the ads aired in the commercial break."⁴⁹⁰ Second, this connected to what the Court identified as the most important element of fair-use: "the effect of the use upon the potential market for or value of the copyrighted work."⁴⁹¹ The non-commercial purpose of a consumer's use of the "AutoHop," the Court explained, required that the plaintiff demonstrate the likelihood of harm to the potential market of the copyrighted work.⁴⁹² The Court concluded that, by itself, the "AutoHop" feature did not infringe Fox's copyright interests.⁴⁹³

Nevertheless, publishers might rely on *In re Aimster Copyright Litigation* to allege that ad-blocking services lead to a copyright infringement.⁴⁹⁴ In *Aimster Copyright Litigation* the Seventh Circuit found that commercial-skipping services were the equivalent of creating an unauthorized copy that reduces the copyright's owner's income from the original.⁴⁹⁵ But the facts of the *Aimster Copyright Litigation* case are radically different from the circumstances involved in

⁴⁸⁴ *Fox*, 747 F.3d. at 1063-64.

⁴⁸⁵ Mitchell Zimmerman, *5 Issues in Fox Broadcasting v. Dish Network*, LAW360, (Jan. 9, 2013), <http://www.law360.com/articles/405510/5-issues-in-fox-broadcasting-v-dish-network>.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Fox*, 747 F.3d at 1066-73.

⁴⁸⁸ *Id.* at 1067.

⁴⁸⁹ *Id.* (citations omitted).

⁴⁹⁰ *Id.* at 1068.

⁴⁹¹ *Id.* at 1069.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 1070.

⁴⁹⁴ 334 F.3d 643 (7th Cir. 2003).

⁴⁹⁵ *Id.* at 647.

the case of ad-blocking services. The court, for example, found a copyright violation precisely because the file sharing service at issue in the *Aimster Copyright Litigation* case was used exclusively to create and distribute unauthorized copies of music files.⁴⁹⁶ Ad-blocking services, however, do not enable a user to create copies of a website's content for distribution. Similarly, although *Beta-max* and *Fox Broadcasting* involved skipping advertising in recordings of television broadcasts, the reasoning of those cases fits neatly with ad-blocking services. As with the AutoHop program, it is the individual Internet user who chooses to install and operate the ad-blocking software. Services such as Eyeo's AdBlock Plus have no functionality without the individual user telling the browser extension what content to block.⁴⁹⁷ Moreover, ad-blocking services generate a number of significant public benefits.⁴⁹⁸ Ad-blocking services such as Eyeo's AdBlock Plus do not, by themselves, generate revenue. They have commercial character only when combined with whitelisting services. But this combination does not necessarily erode the value of the publisher's copyright interests. It is worth reiterating that the whitelisting service does not generate revenue for Eyeo unless it has the effect of increasing the value of advertising to the publisher.⁴⁹⁹ For this reason ad-blocking services would likely survive the second fair-use factor because they actually have the potential to enhance the value of the copyright holder's interests.

Furthermore, manipulating the elements displayed on a webpage may not amount to the creation of a copy distinct from the original. In *Wells Fargo & Co. v. WhenU.Com*,⁵⁰⁰ for example, users installed defendant's free software that used pop-ups that appeared on top of the plaintiff's website. These pop-ups included advertising.⁵⁰¹ The Court rejected plaintiff's copyright claim, concluding that "[e]ven if the presence of an overlapping window could be said to change the appearance of the underlying window on a computer screen, the mere alteration of the manner in which an individual consumer's computer displays the content sent by plaintiffs' websites does not create a 'derivative work.'"⁵⁰² The Court reached this conclusion after noting the impermanency of the changes to the user's experience of the webpage and the transitory nature of the medium generally. The Court observed that the pixels on a computer screen are updated every 1/70th of a second and that the defendant's conduct "only temporarily changes the way the sites are viewed by consumers . . ."⁵⁰³ In any case, the

⁴⁹⁶ *Id.* at 653.

⁴⁹⁷ *About AdBlock Plus*, *supra* note 68.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ 293 F. Supp. 2d 734 (E.D. Mich. 2003)

⁵⁰¹ *Id.* at 736–745.

⁵⁰² *Id.* at 769 (citing *Lewis Galoob Toys v. Nintendo of Am.*, 780 F. Supp. 1283, 1291 (N.D. Cal. 1991) (indicating that "the consumer may experiment with the product and create new variations of play, for personal enjoyment, without creating a derivative work")).

⁵⁰³ *Id.* at 770–71.

Court was impressed by the fact that the plaintiff's website reverts to its original form when the software is closed or minimized.⁵⁰⁴ Moreover, the Court specifically regarded as irrelevant those cases in which copyrighted material was not just altered, but also publicly retransmitted in the altered form.⁵⁰⁵

Based on the courts' reasoning in these cases, it seems unlikely that a copyright claim against ad-blocking firms would be successful. There does not seem to be any substantial difference between overlay and ad-blocking services that empower an individual user to prevent some content from displaying. If the mere cosmetic alteration of how the consumer perceives the website does not infringe copyrights, then ad-blocking firms also would survive a copyright violation claim.

CONCLUSION

When the American ad-blocking cases come, they are bound to be met with the fate they suffered in Germany, where ad-blocking has triumphed in a number of cases litigated in the last several years. The prediction that ad-blocking also will be sustained in the United States is supported by my survey of the doctrine of several plausible U.S. private law causes of action.

No less important, however, is the finding that the relevant German and American legal frameworks seem to be reinforcing a similar set of values. First, the law in both systems gives significance to the fact that ad-blocking firms are not directly responsible for blocking Internet advertising. Instead, ad-blocking services are just a tool deployed by individuals seeking to reclaim their independence in the Internet's technologically complex and cacophonous ecosystem. The law is inclined to credit this feature of ad-blocking as a profound strengthening of human autonomy. Second, it seems to be relevant that this expression of individual autonomy happens to be leveled against what most consider to be increasingly irredeemable Internet advertising schemes. In a consideration of the totality of circumstances, whether to determine "propriety" as part of the German unfair competition regime or as part of the application of an American tortious interference claim, the law is inclined to give significant weight to the broad social benefits ad-blocking generates. These benefits include the eponymous escape from disruptive advertising. But they also include enhanced privacy and improvements to the technical performance of Internet users' computers.

Finally, the law is capable of understanding that the commercial facets of ad-blocking (especially when combined with whitelisting services) do not represent a kind of extortion or misappropriation of publishers' economic interests. Ad-blocking is correctly seen as a wholly separate commercial service that is not in competition with publishers' activities. Rather than harming publishers' commercial interests, some versions of the constellation of ad-blocking and whitelisting may actually strengthen publishers' position. This can be accomplished

⁵⁰⁴ *Id.* at 770.

⁵⁰⁵ *Id.*

by ensuring that the “acceptable” advertisements that are ultimately published are likely to be well-received. The law’s embrace of the economic nuances of ad-blocking represent a general commitment to the free market in which publishers are be expected to respond to an evolving commercial landscape through innovation that makes their products more competitive.

Ad-blocking services represent a disruptive new force in the tumultuous world of Internet publishing. But the law—in America no less than in Germany—understands that ad-blocking is a form of liberation, not extortion.