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## Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany

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## Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany

### Cover Page Footnote

LL.M., Central European University; Ph.D. candidate at Max-Weber-Kolleg, Germany. This article is an updated and adapted version of the author's Masters thesis submitted in the Comparative Constitutional Law program at Central European University, written under the supervision of Dr. Andras Sajo.

# HATE SPEECH ONLINE: RESTRICTED OR PROTECTED? COMPARISON OF REGULATIONS IN THE UNITED STATES AND GERMANY

YULIA A. TIMOFEEVA\*

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## I. INTRODUCTION

Debate on the limits of free expression is not an invention of recent years. Development of new technology, such as the Internet, has introduced some new concerns, yet the main arguments in the debate have not changed much. It is probably true that “the more technology changes, the more free speech issues remain the same.”<sup>1</sup>

“[C]onception of the Internet as a regulation-free medium . . . [is very] appealing in principle.”<sup>2</sup> The Internet retains a number of unique characteristics: “[it] offers a [whole] range of communicative options: person-to-person, some-to-some, one-to-many, or many-to-

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1. Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don't*, 79 B.U. L. REV. 959, 960 (1999).

2. John F. McGuire, Note, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 773 (1999).

many;<sup>3</sup> it provides “globalism, anonymity and speed for any on-line activity;<sup>4</sup> and it does not have such inherent restrictions as scarcity of resources or limited accessibility. However, the reality is that the Internet is being regulated to the extent that each nation considers possible and appropriate.

In spite of many new communicative and technical options of the Internet, both the United States and Germany attempt to fit this new media into their old free speech standards. Approaches by both countries to the regulation of Internet speech reflect their usual preferences in the application of free expression doctrines. Although “both nations—built on tenets of traditional liberalism with its focus on the individual—face the legacy of massive atrocities stemming from racial prejudice: Slavery and the Holocaust,<sup>5</sup> Germany is traditionally less tolerant of hate speech as compared to standards in the United States.<sup>6</sup> This attitude is demonstrated with respect to Internet speech as well.

It is widely recognized that hate propaganda harms society as a whole, and many countries outlaw hate speech in their criminal codes (such as Germany, Canada, France, the Netherlands, Austria, and Italy).<sup>7</sup> The United States’ approach is strongly influenced by the First Amendment of the federal Constitution, and hate speech, being considered close to political speech, falls under its protection most of the time.<sup>8</sup> One hundred sixty-five nations, including Germany, have ratified the Convention on the Elimination of All Forms of Racial Discrimination that calls “on states to ban racist activities outright. The United States has not.”<sup>9</sup> The difference in

3. Chris Gosnell, *Hate Speech on the Internet: A Question of Context*, 23 *QUEEN’S L.J.* 369, 376 (1998).

4. Gabriele Schmölder, *Strafrechtliche Aspekte zum Thema Rassismus, Neonazismus und Rechtsextremismus im Internet [Criminal Aspects for the Topic of Racism, Neo-Nazism and Right-Wing Extremism on the Internet]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEOFAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 246, 272 (Brigitte Bailer-Galanda et al. eds., 1997).

5. Natasha L. Minsker, “*I Have a Dream—Never Forget*”: *When Rhetoric Becomes Law, a Comparison of the Jurisprudence of Race in Germany and the United States*, 14 *HARV. BLACKLETTER L.J.* 113, 113 (1998).

6. Wolfgang Terhoerst, *Selbstregulierung, Internet Content Summit: Zensur im Internet*, *COMPUTERWOCHE*, No. 37, Sept. 17, 1999, available at <http://www.computerwoche.de>.

7. See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 58 (1997).

8. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (protecting cross burning as political speech).

9. Credence Fogo-Schensul, Comment, *More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 *GONZ. L. REV.* 241, 247 (1997). Actually, the United States has ratified the treaty but with a number of reservations, including one for protection of the right of free speech. See Office of the United Nations Commissioner for Human Rights, *Status of Ratification of the Principal International Human*

approaches becomes particularly disturbing in the age of the Internet, as regulatory efforts of one country may be nullified by a lack of similar regulations in another country.

This article examines the controversy between the restrictions of hate speech on the Internet and the interests of freedom of expression. It describes two distinct legal approaches to Internet hate speech regulation: the pro-speech approach of the United States and the anti-hate approach of Germany, including the regulatory framework of European bodies of which Germany is a part. This article compares conceptual arguments on both sides, investigates practical advantages and shortcomings of national solutions, analyzes the necessity for international cooperation, and attempts to evaluate the probability of success of international initiatives. This article also attempts to predict the future of hate speech on the Internet, taking into consideration the implications that freedom of expression and the technological phenomenon of the Internet will inevitably produce.

## II. WHY HATE SPEECH ON THE INTERNET IS SPECIAL

Obviously, hate speech on the Internet has its roots in the biases and prejudices of society that existed long before the appearance of the Internet. The Internet, however, added some new aspects.

### A. *Historical and Technological Overview*

"The Internet is an international . . . [framework] of interconnected computers."<sup>10</sup> It began as a military program, ARPANET, in the sixties, and it has grown into a civilian network that enables ten million people to communicate with one another and access vast amounts of information from around the world.<sup>11</sup> The Internet offers a wide variety of communication and information retrieval methods.<sup>12</sup> The most popular include electronic mail, automatic list services, newsgroups, chat rooms and the World Wide Web.<sup>13</sup> "Taken together, these tools constitute a unique medium [known as "cyberspace"] located in no particular geographical location but available to anyone . . . with access to the

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*Rights Treaties as of Dec. 9, 2002*, at 9, at <http://193.194.138.190/pdf/report.pdf> (last visited Feb. 21, 2003). See also Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 357 (1998) (describing additional international treaties which show consensus towards protecting speech as a fundamental human right).

10. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

11. *Id.* at 850.

12. *Id.* at 851.

13. *Id.*

Internet.”<sup>14</sup> “Any person or organization with a computer connected to the Internet can ‘publish’ information. . . . ‘No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.’”<sup>15</sup>

Hate activists were fast to recognize the opportunities offered by this new medium. Among the first were American neo-nazis who began to use the Internet for their propaganda in the beginning of the 1980s. They prepared guides on how to seek and contact potential members, how to attract those who were just curious, and how to increase their influence by means of the Internet.<sup>16</sup> Soon American activists were followed by German adherents, often from outside of Germany, because in Germany most racist activities were criminalized.

### B. New Opportunities

The Internet has provided unique resources for expanding hate propaganda. Its influence goes beyond text and word that were available before leaflets and brochures.<sup>17</sup> It appears to be “a relatively cheap and highly effective tool for racist individuals or groups to spread hateful ideas to an audience of thousands, if not millions.”<sup>18</sup> The Internet offers an opportunity to establish groups and discussion forums, easy means of communication, and makes it possible to accumulate data and reach large numbers of people, both potential followers and victims. It also supplies additional methods of attracting children and youth, such as making available hate-music and hate-games to download (for example, “Ethnic Cleansing” and “Shoot the Blacks”).<sup>19</sup> The Internet also offers the convenience

14. *Id.* at 853 (citing *Reno v. ACLU*, 929 F. Supp 824, 838 (E.D. Pa. 1996)).

15. *Id.*

16. Martin Dietzsch & Anton Maegerle, *Rechtsextreme deutsche Homepages [Right-Wing German Homepages]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 47, 47 (Brigitte Bailer-Galanda et al. eds., 1997).

17. Juliane Wetzel, *Antisemitismus im Internet [Anti-Semitism on the Internet]*, in *DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET]* 78, 78 (Brigitte Bailer-Galanda et al. eds., 1997).

18. Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, EUR. PARL. DOC. (COM 664 final) 9 (2001) [hereinafter Proposal], available at [http://europa.eu.int/comm/employment\\_social/news/2002/feb/proposal\\_jai\\_664\\_en.pdf](http://europa.eu.int/comm/employment_social/news/2002/feb/proposal_jai_664_en.pdf) (last visited Feb. 21, 2003).

19. Anti-Defamation League, Press Release, *ADL Report: Growing Proliferation of Racist Video Games Target Youth on The Internet* (February 19, 2002), at [http://www.adl.org/presrele/extremism\\_72/4042\\_72.asp](http://www.adl.org/presrele/extremism_72/4042_72.asp) (last visited Feb. 21, 2003).

of "mirror sites" whereby, even with imposed regulations, enjoined Web sites may appear again on another server.<sup>20</sup>

The new opportunities of the Internet have been assessed differently in the United States and Germany. Traditionally, "[t]he United States Supreme Court has treated different types of media differently for purposes of First Amendment analysis."<sup>21</sup> In respect to the Internet, the Supreme Court recognized that the Internet has neither the history of extensive government regulation, nor the scarcity of available frequencies at its inception, nor the "invasive nature" of broadcasting, and thus "is entitled to 'the highest protection from governmental intrusion.'"<sup>22</sup> In Germany, however, the unique nature of the Internet does not play a big role. "Nazi propaganda is illegal . . . in Germany;"<sup>23</sup> consequently, there is no imposition of "new censorship, but rather enforce[ment of] existing policies on the Internet."<sup>24</sup>

### C. Hate Speech on the Internet

The term "hate speech" is most often used to refer to racist and xenophobic speech, but it also applied in respect to other distinct groups and minorities. Black's Law Dictionary defines hate speech as "speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances where the communication is likely to provoke violence."<sup>25</sup> Other sources characterize hate speech as "a form of expression offensive to women, ethnic and religious groups, and other discrete minorities."<sup>26</sup> In many circumstances, hate speech communicates the message "that distinctions of race [or origin] are ones of merit, dignity, status, and personhood."<sup>27</sup> It also injures career prospects, social mobility, and may even cause mental illness and psychosomatic disease.<sup>28</sup> These definitions and descriptions, developed by United States authors, have their focus on victims' sufferings and reactions and are only partly applicable to Internet

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20. Elizabeth Phillips Marsh, *Purveyors of Hate on the Internet: Are We Ready for Hate Spam?*, 17 GA. ST. U. L. REV. 379, 389 (2000).

21. *Id.* at 386.

22. *Reno*, 521 U.S. at 863 (citing *Reno v. ACLU*, 929 F.Supp. at 877).

23. McGuire, *supra* note 2, at 788.

24. *Id.*

25. BLACK'S LAW DICTIONARY 1407-08 (7th ed. 1999).

26. Rachel Weintraub-Reiter, Note, *Hate Speech over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 149 (1998) (citing SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (1994)). This definition comes from the Human Rights Watch, a non-profit advocacy organization dedicated to protecting human rights around the world.

27. DELGADO & STEFANCIC, *supra* note 7, at 4.

28. *See id.* at 6.

speech. First, "communications over the Internet do not appear on computer screens without the user taking a series of affirmative steps,"<sup>29</sup> and in most cases, it is possible to avoid undesirable messages; second, as a rule, neither the speaker nor the addressee is accessible for violence, and in many cases is anonymous or unknown.

Another approach to the definition of hate speech, fully reflective of Germany's attitude, was undertaken by the Council of Europe. According to the Additional Protocol to the Convention on Cybercrime, "racist and xenophobic material' means any representation of thought or theories, which advocates, promotes or incites hatred, discrimination or violence against any individual or group of individuals based on race, color, descent or national or ethnic origin."<sup>30</sup> Obviously, the focus of this definition is not on a particular victim but on the dissemination of racist attitudes in the society. This approach is closer to Germany's concerns regarding the regulation of Internet hate speech. Many German authors fear, not without a reason, that a powerful political movement can actually appear from an ideologically eccentric neo-nazi network.<sup>31</sup>

The most popular hate motives on the Internet (at least among those that attract attention in the United States and Germany) include themes of white superiority, intimidation of people of color and Jews, neo-nazism, and Holocaust denial. Among different topics of hate speech on the Internet, the most controversial topic belongs to Holocaust denial, or revisionism. It is a particularly disturbing topic in Germany due to its recent history; however, it is not regarded as the same serious issue in the United States. One of the problems arises from the fact that the hate message is not so obvious. For the most part, modern:

revisionists do not deny that atrocities were committed against Jews during WWII. However, they contend that there was no Nazi plan to exterminate European Jewry, the 'Final Solution' ...

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29. Weintraub-Reiter, *supra* note 26, at 165.

30. Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist or Xenophobic Nature Committed Through Computer Systems, *opened for signature* Jan. 28, 2003, Europ. T.S. No. 189 [hereinafter Protocol], *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 21, 2003). *See also Explanatory Report of the Comm. of Ministers [of the Additional Protocol to the Convention on Cybercrime]*, 111th Sess., (adopted on Nov. 7, 2002) [hereinafter *Explanatory Report*], *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 21, 2003).

31. Christoph Seils, *Das Netz der Nazis [The Net of Nazis]*, DIE WOCHE (Germany), Aug. 17, 2001, at 1.



being no more no less their expulsion from Europe[; that t]he Nazis did have a system of concentration camps, but there were no gas chambers for mass murder in them[; a]nd finally, the claim of six million murdered Jews is an exaggeration, as the number killed was far less.<sup>32</sup>

Some Holocaust deniers claim that their goal is not the same as the intentions of anti-Semites, their goal is not to intimidate Jews, but to uncover the truth.<sup>33</sup> Numerous Internet sites invite free discussion for the sake of "historical accuracy."<sup>34</sup> In Germany, nevertheless, this kind of discussion is criminalized, which is perfectly in accordance with its constitutional values.<sup>35</sup>

From another perspective, hate speech on the Internet is special because it usually does not imply any physical harm and is unlikely to cause immediate violence. It is pure speech, and among degrees of racial discrimination, such as verbal rejection, avoidance, discrimination, physical attack and extermination,<sup>36</sup> hate speech on the Internet falls into the least dangerous category of verbal activity. On the other hand, "[t]he idea that messages can be a 'killing force' is sometimes taken quite literally nowadays."<sup>37</sup> For example, the United States Supreme Court denied writ of certiorari to an appeal from the decision of the lower court in *Paladin Enterprises, Inc. v. Rice*,<sup>38</sup> thus refusing to extend the First Amendment protection for a book, *Hit Man On-Line: A Technical Manual for Independent Contractors*, which instructions had allegedly been relied on in a triple murder-for-hire crime.<sup>39</sup> It may

32. See, e.g., Paul Grubach, *The Political Implications of Holocaust Revisionism*, David Duke Online, at <http://www.duke.org/library/race/revisionism1.shtml> (last visited Feb 21, 2003).

33. Wilhelm Lasek, "Revisionistische" Gruppen und Personen im Internet ["Revisionist" Groups and Persons on the Internet], in DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEONAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET] 123, 134 (Brigitte Bailer-Galanda et al. eds., 1997).

34. See, e.g., The Institute of Historical Review, Website, at <http://www.ihr.org/> (last visited Feb. 21, 2003).

35. See, e.g., Holocaust Denial Case, BverfGE 90, 241 (1994) [German Federal Constitutional Court].

36. See, e.g., PIERRE-ANDRÉ TAGUIEFF, THE FORCE OF PREJUDICE: ON RACISM AND ITS DOUBLES 50-51 (Hassan Melehy ed. & trans., 2001).

37. Calvert & Richards, *supra* note 1, at 980 (describing numerous popular culture media "messages" which were accused of inciting crimes).

38. *Rice v. Paladin Enters., Inc.*, 940 F.Supp. 836 (D. Md. 1996), *rev'd*, 128 F.3d.233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

39. The district court held that the book merely advocated, rather than encouraged, murder. See *Rice*, 940 F.Supp. at 836. However, the Court of Appeals reversed and held that the book was not entitled to protection under the First Amendment as abstract advocacy. *Rice*

be mentioned, however, that the book may be easily found on the Internet.<sup>40</sup>

### III. RESTRICTION OF HATE SPEECH ON THE INTERNET

The restrictive approach to regulation of speech on the Internet is chosen by many countries. In democratic societies, any restriction on speech must be in conformity with recognized standards on the limits of freedom of expression. The functioning of a restrictive state policy in an atmosphere of proclaimed respect to fundamental human rights is well demonstrated by the example of Western European states. The German example is particularly interesting because Germany perhaps has the strictest attitude towards any kind of racist activities, and at the same time, it has consistently expressed its commitment to the ideals of a free democratic society.

#### A. *On The National Level*

Germany's legal approach to regulation of hate speech on the Internet has to be considered in light of the nation's history. "The legal reconstruction of Germany following [World War II] included numerous measures specifically intended to eradicate the ideology of Nazism and the racial prejudice underlying the Holocaust."<sup>41</sup> At the end of the 1960s, however, attempts at revisionism began, first by shifting the responsibility for the war.<sup>42</sup> These circumstances have led "to the prohibition of certain forms of political speech that will not be tolerated in any medium, including the Internet."<sup>43</sup>

The basis for the free expression doctrine in Germany is provided by Article 5 of the German Basic Law:

- (1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom

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v. *Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997).

40. See, e.g., REX FERAL, HIT MAN ON-LINE. A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (1983), available at <http://www.die.net/prose/hitman/> (last visited Feb. 21, 2003).

41. Minsker, *supra* note 5, at 137.

42. Brigitte Bailer-Galanda, "Revisionismus" als zentrales Element der internationalen Vernetzung des Rechtsextremismus ["Revisionism" as a Central Element of the International Network of Right-Wing Extremism], in DAS NETZ DES HASSES: RASSISTISCHE, RECHTSEXTREME UND NEO-NAZISTISCHE PROPAGANDA IM INTERNET [THE NET OF HATE: RACIST, RIGHT-WING AND NEO-NAZI PROPAGANDA ON THE INTERNET] 106, 109 (Brigitte Bailer-Galanda et al. eds., 1997).

43. McGuire, *supra* note 2, at 773.

of reporting by means of broadcasts and films are guaranteed. There will be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.

(3) Art and science, research and teaching are free. The freedom of teaching does not release from allegiance to the constitution.<sup>44</sup>

The article expressly imposes limitations on free expression in section 2.<sup>45</sup> Besides these limitations, the Basic Law contains other provisions that may serve to restrict freedom of speech: article 1, declaring human dignity as an utmost value;<sup>46</sup> article 18, forfeiture of basic rights when abusing them;<sup>47</sup> article 21, section 2, prohibition of political parties seeking to impair the free democratic order;<sup>48</sup> and some other, implicit, provisions, all of which establish the basis for the functioning of the German militant democracy and allow German legislators to successfully restrain racist (hate) activities in almost any form.<sup>49</sup>

Several provisions of the German Penal Code specifically target hate speech.<sup>50</sup> For example, section 130 criminalizes incitement to hatred or violence against parts of the population and attacks on the human dignity and also prohibits distribution and publication of hate messages, including through broadcast. Section 130 also specifically penalizes Holocaust denial, *i.e.*, the approval, denial and minimization of the acts of Nazis committed during World War II.<sup>51</sup> Other relevant provisions address depictions of violence in a glorifying or degrading manner,<sup>52</sup> insults to personal honor,<sup>53</sup> and defaming the memory of the dead.<sup>54</sup> Remarkably, in spite of the rule that insulting statements are actionable on the petition of the injured person, section 194 provides for public prosecution in the

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44. Art. 5, GUNDESETZ [German Constitution], *translated in* CONSTITUTIONS OF THE WORLD 106 (Albert P. Blaustein & Gisbert H. Flants eds., 1994) [hereinafter GG].

45. *Id.* § 2.

46. *Id.* art. 1.

47. *Id.* art. 18.

48. *Id.* art. 21, § 2.

49. *See generally* GG, *supra* note 44.

50. *See* STRAFGESETZBUCH [Penal Code] [hereinafter StGB].

51. § 130 StGB.

52. § 131 StGB.

53. § 185 StGB.

54. § 189 StGB.

case of distribution of insulting or defamatory statements by broadcast (which might include the Internet) in respect of victims, or members of groups prosecuted by the Nazis or other totalitarian regimes.<sup>55</sup>

In 1997, Germany passed the Multimedia Law which is meant to keep illegal material out of cyberspace.<sup>56</sup> *Inter alia*, the law prohibits content criminalized by the Penal Code,<sup>57</sup> no doubt having hate speech in mind in the first place.<sup>58</sup> The law also establishes criteria for the liability of an Internet service provider (“ISP”). Generally, ISPs are not liable for transmission or short storage of a third-party’s illegal content unless they initiate, select, or modify the information.<sup>59</sup> In cases of longer storage of information (hosting), ISPs are not liable if they do not have actual knowledge of illegal information, and upon obtaining such knowledge, act expeditiously to remove or to disable access to such information.<sup>60</sup> Almost identical provisions are contained in the Teleservice Law.<sup>61</sup> “Many German providers and users have greeted [the law] with a sigh of relief,”<sup>62</sup> as the issue of ISPs’ liability has been a tense one. However, critics say that the law still left open the “extent [to which] online services are responsible for content they do not control,”<sup>63</sup> and indeed, this issue produced much controversy in the *Felix Somm* case.

Felix Somm, the former manager of the German subsidiary of CompuServe, was prosecuted by Bavarian authorities for “distributing online pornography (as CI\$ [CompuServe] manager, he provides access to the Internet).”<sup>64</sup> “[A]ccording to the indictment, [he] should have filtered out criminal contents originating in the United States and reaching German Internet users.”<sup>65</sup> In 1999, the case was reversed on appeal on the grounds

55. § 194 StGB.

56. MEDIENDIENSTESSTAATSVERTRAG [Media Law] [hereinafter MDSStV].

57. § 12 abs.1 MDStV.

58. Originally the law expressly prohibited incitement to hatred and degrading depictions, in accordance with §§ 130 & 131 of the Penal Code. See § 8 abs. 1 MDStV (as adopted in 1997).

59. § 7 abs. 1 MDStV; § 8 MDStV.

60. § 9 MDStV.

61. § 9-§ 11 TELEDIENSTEGESETZ [Teleservice Law] [hereinafter TDG].

62. Michael Langer, *Germany’s New Multimedia Law and the Possible Consequences*, TELEPOLIS: MAGAZIN DER NETZKULTUR (Aug. 17, 1997), at <http://www.heise.de/tp/english/inhalt/te/1260/1.html> (last visited Feb. 21, 2003).

63. *Germany Passes Internet Law Limiting Content Cyberspace: Online ban on porn and other controversial material draws skepticism over enforcement and liability*, L.A. TIMES, July 5, 1997, at D1.

64. Langer, *supra* note 62.

65. Ulrich Sieber, *Commentary on the Conclusion of Proceedings in the “CompuServe Case” [Acquittal of Felix Somm]*, DIGITAL LAW NET, at <http://www.digital-law.net/somm/commentary.html> (last visited Feb. 21 2003).

that there was no liability for the third-party content, and that Felix Somm could not technically filter the Internet, especially since he was only a manager of a subsidiary company owned by the American company CompuServe.<sup>66</sup> As one of his lawyers commented, “the acquittal of Felix Somm . . . [goes] beyond the individual aspect of rehabilitation of the accused—furthermore shows clearly the failure of national solutions intended to protect the German part of the Internet with a virtual wall against harmful contents from abroad.”<sup>67</sup>

Another important issue was raised in 1999 by the case of “Frederick Toben, an Australian-based Holocaust revisionist who denied that millions of Jews died during World War II.”<sup>68</sup> Toben, an Australian citizen born in Germany:

was found guilty . . . of promoting his opinions on Holocaust denial through printed leaflets and Web pages. Sentenced to 10 months in prison [by a German court], Toben appealed, arguing that since his Internet material was ‘printed’ outside of Germany, it was not subject to German legislation. The German Federal Court of Justice [disagreed and] ruled that the country’s legislation banning communications glorifying the Nazis and denying the Holocaust applies to all aspects of the Internet, no matter what their country of origin, or how the information is presented.<sup>69</sup>

In this decision, the Federal Court “effectively set the precedent that all material published on the Web is subject to German legislation . . . [and] laws prohibiting racial hatred clearly apply to Internet material created outside of Germany . . . but . . . accessible to German Internet users.”<sup>70</sup>

Thus, Germany upholds criminal responsibility for those who put racist material on the Internet with no regard to their location

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66. Besides technological impossibility, the court also considered Somm’s lack of authority to employ filtering. See Felix Somm, *Compuserve Urteil des LG München vom* [The Judgment of München Land Court in Case of Felix Somm] (Nov. 17, 1999), at <http://www.publex.de/cgi-bin/prt.cgi/Rechtsquellen/Urteile/Cybercrime/1999crim01.html> (last visited Feb. 21, 2003). The possibility of blocking illegal content was one of prerequisites for liability at time of Somm’s prosecution. See § 5 abs. 3 TDG (as adopted in 1997).

67. Sieber, *supra* note 65.

68. Center for Democracy and Technology, *Exercise of Jurisdiction by Foreign Courts Seen in Other Cases*, CDT Policy Post 7.06(3) (July 11, 2001) available at <http://www.cdt.org/publications/pposts2001.shtml> (last visited Feb. 21, 2003).

69. *Id.*

70. *Id.*

and releases from responsibility ISP executives. However, there remains another problem: even released from criminal responsibility, German ISPs are still under obligation to block Internet material that is illegal by German standards.<sup>71</sup> Although this legal obligation concerns only material of which ISPs are aware, it has resulted in extensive self-censorship by German ISPs. "The German government has reported a phenomenal increase in right-wing and xenophobic violence in the last decade,"<sup>72</sup> and the Internet is considered to be an influential tool. German providers complain that if they block certain sites then they support censorship, and if they don't then they support right-radicalists.<sup>73</sup> Since the choice is usually in favor of self-censorship, some critics have even called Germany "one of the most Internet-averse nations."<sup>74</sup> However:

Germany's approach has proven influential. After the country's largest [ISP] cut off Germans' access to the more than 1,500 Web sites operated by the American provider which houses Zündel's site [a Holocaust revisionist's site], the European Union's Consultative Commission on Racism and Xenophobia urged all other member states to follow the example of Germany.<sup>75</sup>

### B. On The European Level

Cooperation within Europe is particularly important for Germany in combating hate speech on the Internet. There are numerous concerns in this area. One example is when German authorities required German ISPs to block "a magazine published on a Web site in the Netherlands which allegedly promoted terrorist violence . . . [t]he Dutch host service provider . . . complained that the action of the German authorities constitutes an interference with the free movement of services within the E.U."<sup>76</sup> Furthermore,

71. See § 6 abs. 2 MDStV; § 8 abs. 2 TDG.

72. Maryellen Fullerton, *Germany for Germans: Xenophobia and Racist Violence in Germany*, HUMAN RIGHTS WATCH, (April 1995), available at <http://www.hrw.org/reports/1995/Germany.htm> (last visited Feb. 21, 2003).

73. Internet ohne Zensur [Internet Without Censorship], *Der deutsche Provider ISIS sperrt US-Seiten ISIS: "Die Provider sind immer die Dummen," [The German Provider ISIS Blocks US-Sites ISIS: "The Providers are Always the Blockheads"]*, (posted Nov. 23, 2001), at <http://www.ioz.ch/news/011123.htm> (last visited Feb. 21, 2003).

74. McGuire, *supra* note 2, at 768.

75. Fogo-Schensul, *supra* note 9, at 269.

76. European Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Illegal and Harmful*

as a member of the European Union and the Council of Europe, Germany is forced to comply with the legal obligations that it undertook by participating in these bodies. In fact, this is not a big effort for Germany, as the approach of these bodies is almost identically reflected in Germany's own attitude.

### 1. *The Council of Europe*

The Council of Europe's position in respect to hate speech is strict. It has announced that it "considers racism not as an opinion but as a crime"<sup>77</sup> and that it intends to fight it. This position is generalized to apply to any hate speech, not only racist remarks, and the Council emphasized that "[n]ot only racism, but also the dissemination of hate speech against certain nationalities, religions and social groups must be opposed."<sup>78</sup>

Having previously put words into action, the Council of Europe had prepared "the first ever international treaty on criminal offences committed against or with the help of computer networks such as the Internet"—The Convention on Cybercrime.<sup>79</sup> It was opened for signature in November 2001, in Budapest, and 26 States signed the treaty on the first day, including Germany and the United States, who took part in the drafting.<sup>80</sup> The final text of the Convention does not deal with the problem of hate speech, although this possibility has been discussed.<sup>81</sup> Instead, the Committee of Experts on the Criminalization of Racist or Xenophobic Acts Using Computer Networks was instructed to prepare a draft of the First Additional Protocol to the Convention on Cybercrime that would address the issue.<sup>82</sup> The main problem is that this First Additional Protocol may not have the approval of all major actors. The United States may be very strict when it comes to copyright infringements or sexually explicit materials, however it is usually more liberal when it comes to racist speech (with other forms of speech).<sup>83</sup> The Council of Europe itself recognized that the Additional Protocol to

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*content on the Internet, available at <http://europa.eu.int/ISPO/legal/en/internet/communic.html> (last visited Feb. 21, 2003).*

77. Racism and Xenophobia in Cyberspace, EUR. PARL. DOC. (REC 1543) (2001), at ¶ 1 [hereinafter Recommendation], available at <http://assembly.coe.int/Documents/AdoptedText/TA01/EREC1543.htm> (last visited Feb. 21, 2003).

78. *Id.* ¶ 5.

79. Press release, Council of Europe, *30 States Sign the Convention on Cybercrime at the Opening Ceremony* (November 23, 2001), available at [http://press.coe.int/cp/2001/875a\(2001\).htm](http://press.coe.int/cp/2001/875a(2001).htm) (last visited Feb. 21, 2003).

80. *Id.*

81. *Id.*

82. Protocol, *supra* note 30. See also Recommendation, *supra* note 77.

83. JEREMY HARRIS LIPSCHULTZ, *FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES* 56 (2000).

the Convention on Cybercrime, aimed at punishing racism on the Internet, will have no effect unless every state hosting racist sites or messages is a party to it.<sup>84</sup> As a temporary solution, the Council's starting-point is to initiate a dialogue with all service providers to convince them of the need to take steps to combat the existence of racist sites.<sup>85</sup> This strategy may be successful, but there are some implications about private censorship which will be discussed in Section V.

Meanwhile, the Council of Europe's Committee of Ministers adopted the Additional Protocol to the Convention on Cybercrime and decided to open it for signature by the states at the next Parliamentary Assembly.<sup>86</sup> The Additional Protocol will impose obligations on state parties to criminalize the following acts of racist and xenophobic nature committed through computer systems: the dissemination of racist and xenophobic material; racist and xenophobic motivated threats; racist and xenophobic motivated insults; revisionism; and aiding and abetting in the above activities.<sup>87</sup> The draft of the Additional Protocol also confirms an important principle: it essentially releases ISPs from criminal liability, as they do not normally have the criminal intent which is one of the elements of crime.<sup>88</sup> Moreover, ISPs are not required to "actively monitor content to avoid criminal liability."<sup>89</sup>

One more required element for the offenses described by the Protocol is that racist/xenophobic material be made available to the public, except for a racist/xenophobic motivated threat.<sup>90</sup> One-to-one communications are not covered, however offensive they may be.<sup>91</sup> This is another detail that demonstrates that the main purpose of this initiative is to protect society in general and not an individual addressee of racist/xenophobic messages.

The drafting of the First Additional Protocol was not an easy task. The provisions of the Protocol are supposed to be mandatory for the participants, and to make them acceptable for various legal cultures many options have to be available. The signatory may choose not to criminalize dissemination of materials that promote

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84. Recommendation, *supra* note 77, at ¶ 1.

85. *Id.* at ¶ 6.

86. Press Release, Council of Europe, *The Council of Europe Fights Against Racism and Xenophobia on the Internet* (November 7, 2002), available at [http://www.coe.int/T/E/Communication\\_and\\_Research/Press/Theme\\_Files/Cybercrime/e\\_CP554.asp](http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Cybercrime/e_CP554.asp) (last visited Feb. 21, 2003).

87. Protocol, *supra* note 30, arts. 3-7.

88. *Explanatory Report*, *supra* note 30, ¶¶ 25, 45.

89. *Id.* ¶ 45.

90. *Id.* ¶¶ 29, 35.

91. *Id.* ¶ 30.



discrimination (there is no such option for incitement to hatred or violence);<sup>92</sup> the requirements on criminalization of racial insult and denial, gross minimization, approval or justification of genocide and crimes against humanity (revisionism) are optional, in whole or in part, as well.<sup>93</sup> With so many options, it is somewhat questionable whether the Additional Protocol is able to achieve its main purpose, which is to harmonize criminal law in the sphere. It is even more questionable whether the Protocol will have a meaningful impact on fighting racist speech at the international level. Its provisions run contrary to United States' standards in many respects and bring about serious doubts on the perspective of the First Additional Protocol to become an international treaty signed by all major states.<sup>94</sup>

## 2. *The European Union*

The European Union expressed its approval and support of the Council of Europe's Convention on Cybercrime and of its initiative on the Additional Protocol.<sup>95</sup> It also developed its own strategies in fighting hate speech in cyberspace. European Union intervention in this area is carried out within two areas of the European Union's competence: "the free movement of services (first pillar) and civil liberties and justice (third pillar)."<sup>96</sup>

The importance of the Internet is greatly appreciated by the European Union.<sup>97</sup> It recognizes that:

Internet services with their possibilities for interactive communication . . . can benefit large sections of the population . . . and notes that in several authoritarian and repressive states the Internet services, because of the possibility of anonymity, interactivity and speed, has played an important role in communication between persecuted persons and other victims and the rest of the world.<sup>98</sup>

92. Protocol, *supra* note 30, art. 3, §§ 2, 3.

93. *Id.* art. 5, § 2; art. 6, § 2.

94. *See id.* § 4.

95. Antonio Vitorino, Speech delivered in Berlin, *The Internet and the Changing Face of Hate* (June 26, 2000) (transcript available at [http://europa.eu.int/ISPO/docs/services/docs/2000/June/speech\\_00\\_239\\_en.pdf](http://europa.eu.int/ISPO/docs/services/docs/2000/June/speech_00_239_en.pdf) (last visited Feb. 21, 2003)).

96. Committee on Civil Liberties and Internal Affairs, Report on the Commission on the Communication on Illegal and Harmful Content on the Internet, EUR. PARL. DOC. COM(96)0487-C4-0592/96, § 18 [hereinafter Report].

97. *Id.* § 5.

98. *Id.*

The European Union declared its adherence to freedom of expression and affirmed that “the free movement of information on the Internet is a fundamental manifestation” of it.<sup>99</sup>

At the same time, not every kind of expression is welcome on the Internet, and the European Union took a position very similar to the German approach. “The fight against racism and xenophobia—these profound forms of rejecting diversity—is a major concern of the international community and a challenge for our society,” said Antonio Vitorino, the European Union’s Commissioner for Justice and Home Affairs, at a conference entitled *The Internet and the Changing Face of Hate*.<sup>100</sup> He emphasized the necessity of unified international efforts, “[b]ecause of the nature of the Internet, there are serious limits to what any country can achieve on its own.... The Internet is an international phenomenon in every sense of the word and any effective response will hinge on high levels of international co-operation.”<sup>101</sup>

“In 1999, the European Council and Parliament adopted an Action Plan for safer use of the Internet by combating illegal or harmful content on global networks.”<sup>102</sup> It mainly consists of four measures which directly involve European Internet companies: the creation of a European network of hotlines, the development of a rating system for Internet content, the encouragement of consumer awareness, and the institution of consumer support.<sup>103</sup>

Later initiatives of the European Union addressed the creation of a legal framework for combating hate speech. In line with the Additional Protocol to the Convention on Cybercrime, the European Union wants “to ensure that racist and xenophobic content on the Internet is criminalised in all Member States. The basic idea would be contained in the principle that ‘what is illegal off-line is illegal on-line.’”<sup>104</sup>

As to the ISPs’ liability, according to Article 12 of the Directive on Electronic Commerce, ISPs should not be held “liable for the

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99. *Id.* § 6.

100. Vitorino, *supra* note 95, at 2.

101. *Id.*

102. Community Research and Development Information Society, *Cooperation needed to combat Internet racism*, Doc. 15102 (June 30, 2000), at <http://www.cordis.lu/en/home.html> (on file with Journal of Transnational Law & Policy).

103. Proposal for a European Parliament and Council Decision Adopting a Multiannual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks Document, EUR. PARL. DOC. (COM 0784) (1998), available at <http://europa.eu.int/ISPO/iap/proposal/en.html> (last visited Feb. 21, 2003).

104. Proposal for a Council Framework Decision on combating racism and xenophobia, EUR. PARL. DOC. (COM 644 final) 6 (2001) [hereinafter Proposal], available at [http://europa.eu.int/comm/employment\\_social/news/2002/feb/proposal\\_jai\\_664\\_en.pdf](http://europa.eu.int/comm/employment_social/news/2002/feb/proposal_jai_664_en.pdf) (last visited Feb. 21, 2003).

information transmitted, on the condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.”<sup>105</sup> At the same time, the Directive permits a court or administrative authority of a Member State to require “the service provider to terminate or prevent an infringement.”<sup>106</sup> This raises many issues that will be addressed later in this article.

In respect to personal liability for racist and xenophobic content, the European Union, like Germany, follows a broad approach and proposes that states’ jurisdiction should extend to all cases where the offence is committed through an information system, and:

(a) the offender commits the offence when physically present in its territory, whether or not the offence involves racist material hosted on an information system in its territory; (b) the offence involves racist material hosted on an information system in its territory, whether or not the offender commits the offence when physically present in its territory.<sup>107</sup>

#### IV. HATE SPEECH ON THE INTERNET AS PROTECTED SPEECH

Hate speech is perceived as undesirable in almost any society. However, even being unwelcome, it may be protected for the sake of the fundamental human right to freedom of expression. The major country that follows this approach is the United States of America. Although it is not the only country that hosts the Internet-related services, the significance of its position for the regulation of Internet speech worldwide is hard to overestimate for several reasons. First, there is the fact that the Internet began and developed in the United States and until now, the United States has kept the leading position in the number of the Internet users and services.<sup>108</sup> Second, the United States’ position is deeply rooted in the moral and legal traditions of the American society with its priority on freedom of

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105. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), art. 12, § 4, 2000 O.J. (L 178), available at <http://europa.eu.int> (last visited Feb. 21, 2003).

106. *Id.*

107. Proposal, *supra* note 104, art.12.

108. See Leonard R. Sussman, *The Internet in Flux: Press Freedom Survey 2001*, FREEDOM HOUSE, 41, available at <http://www.freedomhouse.org/pfs2001/pfs2001.pdf> (last visited Feb. 21, 2003).

expression. Third, it is unwise to disregard the position of the United States as a powerful and independent nation in the modern world. A relevant example is the recent Yahoo! controversy.<sup>109</sup> The United States District Court refused to enforce an order of the French court which sought to require Yahoo!, a California Internet company, to bar the access of French citizens to Nazi memorabilia auctions available on the Internet.<sup>110</sup> At the same time, United States courts were successful in enforcing their decisions against foreign Internet services that provided Internet material which is illegal in the United States of America, but perfectly legal in their own countries.<sup>111</sup>

### A. Development of Legal Doctrine

Legal doctrine for regulating freedom of expression in the United States emerged from the interpretation of the First Amendment of the United States Constitution.<sup>112</sup> The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>113</sup> This strong statement, however, is seldom taken literally.<sup>114</sup> The United States Supreme Court created different categories of speech, allowing some a greater or lesser degree of First Amendment protection, or denying it.<sup>115</sup>

The "debate in the United States occurs only within a category of speech 'protected' by the First Amendment."<sup>116</sup> The attitude towards hate speech is controversial. Many recognize the harm of hate speech and want to treat it in the same way as pornography, denying it constitutional protection.<sup>117</sup> The United States Supreme Court usually places hate speech into a protected category, "regardless of the effect it has on the listener and society."<sup>118</sup> Obviously, the same rule applies to Internet hate speech as well. "Internet [hate] speech that is merely critical, annoying, offensive, or demeaning enjoys constitutional protection."<sup>119</sup>

109. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme*, 169 F.Supp 2d. 1181 (N.D. Cal. 2001).

110. *Id.*

111. More detailed analysis of this point is provided later in the section.

112. See, e.g., Omer Lee Reed, *The State is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech That Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177 (2000).

113. U.S. CONST. amend. I. See also, Reed, *supra* note 112, at 183.

114. Reed, *supra* note 112, at 183.

115. *Id.* at 185-88.

116. Gosnell, *supra* note 3, at 412.

117. See, e.g., DELGADO & STEFANCIC, *supra* note 7, at 7.

118. See, e.g., Weintraub-Reiter, *supra* note 26, at 161 (citing DAVIDS.HOFFMAN, HIGH-TECH HATE: EXTREMIST USE OF THE INTERNET 9 (1997)).

119. *Statement of the Anti-Defamation League on Hate on the Internet before the Senate*

There are many reasons to limit hate speech, including on the Internet, but the United States Supreme Court found reasons not to do so. It has been firmly established by Supreme Court precedents that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”<sup>120</sup> In *Beauharnais v. Illinois*, the Supreme Court upheld a statute prohibiting racist speech directed at a class of citizens for the benefit of “free, ordered life in a metropolitan, polyglot community.”<sup>121</sup> The validity of *Beauharnais* is seriously questioned at present. On one hand, it has never been overruled,<sup>122</sup> and the Supreme Court still mentions it in its decisions,<sup>123</sup> however, on the other hand, many courts expressly refuse to recognize its authority as it has been considerably weakened by subsequent cases.<sup>124</sup> It seems that most authors agree that “defamation of a group is probably not a valid cause of action anymore.”<sup>125</sup> Moreover, racist remarks may be different from libel in many cases as the remarks may be true and not necessarily defamatory.<sup>126</sup> The relevant issue in *Beauharnais* is whether a civil action for racially insulting language is possible within the tort of intentional infliction of emotional distress. The Restatement (Second) of Torts defines this tort as being committed by “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”<sup>127</sup> There have been a number of lawsuits where courts have awarded damages for racial insult.<sup>128</sup> However, in more recent decisions the Supreme Court has been less willing to recognize this tort. In *Hustler Magazine v. Falwell* the Court made clear that:

outrageousness in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the

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*Committee on the Judiciary*, FDCHPOL. TRANSCRIPTS, Sept. 14, 1999 [hereinafter *Statement*], available at 1999 WL 27594383.

120. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (citing *Street v. New York*, 394 U.S. 576, 592 (1969)).

121. 343 U.S. 250, 259 (1952).

122. DELGADO & STEFANCIC, *supra* note 7, at 63.

123. See, e.g., *New York v. Ferber*, 458 U.S. 747, 763 (1982); *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (mentioned and distinguished but not overruled).

124. See, e.g., *Dworkin v. Hustler Magazine*, 867 F.2d 1188, 1200 (9th Cir. 1989); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (weakening group libel claim).

125. See, e.g., NICHOLAS WOLFSON, *HATE SPEECH, SEX SPEECH, FREE SPEECH* 65 (1997).

126. *Id.* at 64.

127. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

128. See, e.g., *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Alcorn v. Anbro Eng'g*, 2 Cal. 3d 493 (Cal. 1970); *Agarwal v. Johnson*, 25 Cal. 3d 932 (Cal. 1979).

basis of the jurors' tastes or views. . . . An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.<sup>129</sup>

One of the leading precedents for racist speech regulation is *R.A.V. v. St. Paul*.<sup>130</sup> The Supreme Court created the standard that content-based regulations of hate speech are not permissible and disallowed the imposition of special prohibitions on speakers who express their views on disfavored subjects, such as race, color, or religion, however odious those views may be.<sup>131</sup> Only general non-content based prohibitions on "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"<sup>132</sup>—are permitted. This standard runs contrary to the European initiative and raises serious doubts about the possibility of successful regulation of Internet hate speech worldwide.

The *R.A.V.* rule does not mean that hate speech is totally uncontrolled. There is an exception from the protected category where speech may be outlawed when that speech presents a "clear and present danger."<sup>133</sup> More specifically, the *Brandenburg* rule requires that such speech must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>134</sup> Some authors consider that this traditional clear and present danger test is "difficult to apply in cyberspace."<sup>135</sup> Indeed, it does not seem highly probable that impersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder. Again, this is a major difference from the European approach, as *Brandenburg* expressly allows "mere advocacy"<sup>136</sup> of lawless actions, including advocacy of racism, whereas the Europeans expressly prohibit it.<sup>137</sup>

Perhaps more applicable to Internet speech is the rule from *Watts* that "true threats" are not protected under the First

129. 485 U.S. 46, 55 (1988).

130. 505 U.S. 377 (1992).

131. *Id.* at 391.

132. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

133. *See Schenck v. United States*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

134. *Brandenburg*, 395 U.S. at 447.

135. LIPSCHULTZ, *supra* note 83, at 11.

136. *Brandenburg*, 395 U.S. at 449.

137. *See, e.g., Protocol, supra* note 30, arts. 2, 3.

Amendment.<sup>138</sup> This category has already been tested for Internet speech in several cases. In *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists*, abortion providers brought a suit against anti-abortion activist organizations, based on public disclosure of their names, photos, home addresses and other personal information on the Coalition's Internet web site.<sup>139</sup> "In three instances, after a particular doctor listed on the site was murdered, a line was drawn through his name."<sup>140</sup> The United States District Court for the District of Oregon entered judgment on a jury verdict awarding the abortion providers monetary damages and also granted a permanent injunction.<sup>141</sup> The Ninth Circuit Court of Appeals confirmed that computer threats are not protected by the First Amendment but the propriety of the punitive damages award has yet to be evaluated.<sup>142</sup> It remains to be seen what will be the final resolution of this case.

In *United States v. Alkhabaz*, the Sixth Circuit court had to decide on criminal liability for electronic communications allegedly containing threats to kidnap or injure another person.<sup>143</sup> Alkhabaz, a university student also known as Baker, "exchanged e-mail messages over the Internet, the content of which expressed a sexual interest in violence against women."<sup>144</sup> The unique aspect of the case was that the messages describing sexual violence against a girl, bearing the name of Alkhabaz's classmate, were not sent to the victim, but posted on an electronic bulletin board and sent to a pen pal by e-mail.<sup>145</sup> The court concluded that:

to constitute 'a communication containing a threat' ... a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm . . . and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation<sup>146</sup>

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138. *Watts v. United States*, 394 U.S. 705, 708 (1969). True threats are also proscribed in 18 U.S.C. §875(c) (2003).

139. 41 F. Supp 2d. 1130 (D. Or. 1999), *rev'd*, 290 F.3d 1058 (9th Cir. 2002).

140. *Statement, supra* note 119. See also *Planned Parenthood*, 41 F. Supp 2d. at 1131-55.

141. *Planned Parenthood*, 41 F. Supp 2d. at 1131-55.

142. 290 F.3d 1058, 1086 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3292 (U.S. Oct. 8, 2002) (No. 02-563).

143. 104 F.3d 1492 (6th Cir. 1997).

144. *Id.* at 1493.

145. *Id.*

146. *Id.* at 1495.

which was not found here. This standard, when applied to anonymous, obscure, or non-specific hate messages on the Internet, makes successful prosecution for Internet threats very unlikely.

It appears that the "Supreme Court precedents leave Internet hate speech ample pathways to become acceptable discourse in the United States."<sup>147</sup> In most cases, "hate speech transmitted over the Internet . . . [will] remain constitutionally protected speech," but it may also become a hate crime if it threatens a specific person.<sup>148</sup>

If a bigot's use of the Internet rises to the level of criminal conduct, it may subject the perpetrator to an enhanced sentence under a state's hate crimes law. Currently, 40 states and the District of Columbia have such laws in place. . . . However, these laws do not apply to conduct or speech protected by the First Amendment.<sup>149</sup>

### *B. Liability and Jurisdictional Issues*

Besides the issue as to what extent hate messages may fall outside of the protection of the First Amendment, there is an issue of liability for unprotected messages. First by courts,<sup>150</sup> later by legislation,<sup>151</sup> ISPs were declared not to be treated as the publisher or speaker of any information provided by another information content provider, that is, they were released from civil liability for any content they do not actually produce. At the same time, ISPs are encouraged to exercise self-censorship, as the same legislation provides that:

[n]o provider of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>152</sup>

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147. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 853 (2001).

148. Weintraub-Reiter, *supra* note 26, at 148.

149. *Statement*, *supra* note 119.

150. *See, e.g.*, *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Zeran v. America Online*, 129 F.3d. 327 (4th Cir. 1997).

151. 47 U.S.C. § 230 (2002) (providing protection for private blocking and screening of offensive material).

152. 47 U.S.C. § 230(c)(2) (2002).



The controversy of *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme* is a remarkable example of the conflict between European and United States standards and of the implications it raises for racist speech on the Internet.<sup>153</sup> The case originated in France when a French court found that Yahoo!, a California corporation, through its auction services, violated the provision of the "French Criminal Code which prohibits exhibition of Nazi propaganda and artifacts for sale."<sup>154</sup> Yahoo! was ordered to "eliminate French citizens' access to . . . [Nazi-related] material on the Yahoo.com auction site" and was subjected "to a penalty of 100,000 Euros for each day that it fails to comply with the order."<sup>155</sup> Yahoo! amended its auction policy, making it more restrictive towards hateful material, however, it opposed the French decision in the United States courts on the basis that it violated the First Amendment to the United States Constitution.<sup>156</sup>

The United States District Court reflected on the global nature of the Internet and noticed that "there is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press."<sup>157</sup> The court emphasized the First Amendment principle "that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech."<sup>158</sup> Having expressed respect for the decision of the French court, the court nevertheless announced that "absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."<sup>159</sup>

Although the decision of the district court is currently on appeal and cannot be regarded as the highest constitutional standard, it is a vivid illustration of how other United States courts are likely to treat such controversies. The First Amendment of the United States Constitution protects the vast majority of extremist Web sites that disseminate racist or anti-Semitic propaganda, as well as

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153. See 169 F. Supp 2d. 1181 (N.D. Cal. 2001).

154. *Id.* at 1184.

155. *Id.* at 1185.

156. *Id.* at 1185-86.

157. *Id.* at 1186-87.

158. *Id.* at 1187.

159. *Id.* at 1193.

individual statements expressing hatred of an ethnic, racial, or religious nature.<sup>160</sup> This approach has been extensively criticized, both by anti-hate activists in the United States and in Europe. Some authors have opined that “the U.S. (sic) Supreme Court’s short-sightedness is, therefore, causing waves around the world.”<sup>161</sup> After the *Yahoo!* decision the debate on how to successfully regulate (or not to regulate) hate speech on the international level may become more vigorous than ever.

Jurisdictional issues raise the biggest problem in regulating Internet speech. The case of *Yahoo!* provides an example of how the problem is addressed when the speech in question is protected by the United States’ First Amendment.<sup>162</sup> However, the United States courts do not feel particularly constrained in exercising jurisdiction over foreign companies. For example, in *iCraveTV*,<sup>163</sup> “an American judge issued an injunction against iCraveTV, a Toronto-based Internet company”<sup>164</sup> ordering it “not to place . . . television broadcasts on its web page if viewers in the United States could access them.”<sup>165</sup> Since “*iCraveTV* could not possibly provide its service solely for Canadians . . . [it had to] shut down its web site”<sup>166</sup> although it was in compliance with Canadian laws.<sup>167</sup> A similar case involved an Italian Internet site, “Playmen,” that was charged with trademark infringement in a United States court and was ordered not to provide access to the site to American customers.<sup>168</sup> It is noteworthy that in *Yahoo!*, the United States court did not examine the technical possibility of requiring Yahoo! to block access to certain sites just to French citizens.<sup>169</sup> On the contrary, it announced that “the factual question of whether Yahoo! possessed the technology to comply with the order is immaterial.”<sup>170</sup> Remarkably, it seems that the United States will continue to use its position as a powerful nation for one-sided application of the law

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160. *Statement, supra* note 119.

161. *Tsesis, supra* note 147, at 859.

162. *See Yahoo!*, 169 F. Supp 2d. at 1181.

163. *Twentieth Century-Fox Film Corp. v. iCraveTV*, 2000 U.S. Dist Lexis 11670 (W.D. Pa. 2000).

164. William Crane, Legislative Update, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix it*, 11 DEPAUL-LCA J. ART & ENT. L. AND POL’Y 267, 287 (2001).

165. *Id.* at 288.

166. *Id.*

167. The decision was taken by the Canadian company in an out of court settlement after the court’s preliminary injunction. *See, e.g.*, Bill Pietrucha, *iCraveTV Shuts Down Internet site*, INTERNETNEWS.COM (Feb. 29, 2000), at [http://dc.internet.com/news/article/0,,2101\\_312481,00.html](http://dc.internet.com/news/article/0,,2101_312481,00.html) (last visited Feb. 21, 2003).

168. *Playboy Enterprises v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

169. *Yahoo!*, 169 F.Supp.2d at 1194.

170. *Id.*

and will not extend the *Yahoo!* approach to foreign entities engaged in Internet speech which is illegal in the United States.<sup>171</sup>

Even if the United States decides to set an example for other nations by freeing foreign providers from liability for certain Internet content, as some authors recommend,<sup>172</sup> it is not likely that Germany will accept a similar approach, and American providers may face more suits like *Yahoo!* in Germany. This issue was recently addressed by Congressman Dreier in the United States Congress.<sup>173</sup> He introduced a bill that:

opposes efforts by foreign governments to hold ISPs based in the United States criminally liable under foreign laws for content that is protected by the First Amendment; [and objects to] the expansion of liability for Internet service providers under international treaties . . . which might expose ISPs based in the United States to criminal liability for third-party content.<sup>174</sup>

As for American users, some of them already face criminal prosecution in Germany, since they are liable in Germany for the content they put on the Internet regardless of their physical location. This perspective has been criticized on the ground that “[f]rom the point of view of participants, the near-impossibility of controlling with certainty the flow of information on the Internet would give them no notice of the legal regime to which they might be subjected, a fundamental principle of legal fairness and the rule of law.”<sup>175</sup> However, this argument extends to the United States regulations as well, as the United States has also subjected users from different jurisdictions to criminal liability in the areas of copyright infringement and obscenity.<sup>176</sup>

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171. See, e.g., H.R. Res. 12, 107th Cong. (2001), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=f:hr12ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:hr12ih.txt.pdf) (last visited Feb. 21, 2003).

172. See, e.g., Crane, *supra* note 164, at 307.

173. H.R. Res. 12, *supra* note 171.

174. *Summary of House Resolution 12*, Thomas: Legislative Information on the Internet (as of Jan. 3, 2001), available at <http://thomas.loc.gov/> (last visited Feb. 21, 2003).

175. Gosnell, *supra* note 3, at 415.

176. See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp 2d. 1111 (N.D. Cal 2002) (prosecution by the United States of a Russian programmer); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (prosecution by the state of Tennessee of a California user).

## V. FILTERING AND SELF-CENSORSHIP

Self-regulation is another important aspect of the regulation of hate speech on the Internet. Sometimes ISPs voluntarily agree to prohibit users from sending or receiving racist and hateful messages over their services.<sup>177</sup> Such prohibitions are encouraged in Germany and do not raise any legal problems in the United States: as they do not implicate First Amendment rights because they do not involve government action.<sup>178</sup> In response to criticism of its policy to review and edit any material submitted for display, Prodigy, an Internet computer service, has replied that “the First Amendment protects private publishers . . . [and] bestows no rights on readers to have their views published in someone else’s private medium. What the Constitution does give readers is the right to become publishers themselves.”<sup>179</sup>

“Once an ISP promulgates such regulations, it must monitor the use of its service to ensure that the regulations are followed. If a violation does occur, the ISP should, as a contractual matter, take action to prevent it from happening again.”<sup>180</sup> Some ISPs do not undertake contractual obligations but declare a “hate-free policy” and reserve the right to modify or terminate their services at any time if the service is used for posting or transmitting objectionable material.<sup>181</sup> “The effectiveness of this remedy is limited, however. Any subscriber to an ISP who loses his or her account for violating that ISP’s regulations may resume propagating hate by subsequently signing up with any of the dozens of more permissive ISPs in the marketplace.”<sup>182</sup>

In addition to self-censorship by ISPs, users may independently ensure hate-free cyberspace for themselves by installing filtering software on their computers.<sup>183</sup> Many Web sites release free hate-filtering software. For example, the Anti-Defamation League offers *HateFilter* “that blocks access to sites that advocate hatred, bigotry, or violence towards Jews or other groups on the basis of their religion, race, ethnicity, sexual orientation, or other immutable

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177. See, e.g., Weintraub-Reiter, *supra* note 26, at 168.

178. *Statement, supra* note 119.

179. Weintraub-Reiter, *supra* note 26, at 168 (quoting Lynn Sharp Paine, *Prodigy Services Company*, HARV. BUS. SCHOOL CASE, at 6A (1993)).

180. *Statement, supra* note 119.

181. See, e.g., Yahoo, *Yahoo GeoCities Terms of Service*, at <http://docs.yahoo.com/info/terms/geoterms.html> (last visited Feb. 21, 2003).

182. *Statement, supra* note 119.

183. Anti-Defamation League, *ADL Releases Free Filtering Software Designed to “Keep Hate Out Of Homes”* (March 21, 2002), at [http://www.adl.org/presrele/Internet\\_75/4054\\_75.asp](http://www.adl.org/presrele/Internet_75/4054_75.asp) (last visited Feb. 21, 2003). A free copy of the software is located at the Anti-Defamation League’s website, at <http://www.asl.org>, to download the free software.

characteristics. There are also some commercially marketed filters that<sup>184</sup> contain many categories for objectionable material, such as “intolerance” or “racism or ethnic impropriety.”<sup>185</sup>

It is necessary to mention that such individual filtering software is mostly recommended for parents who want “to prevent . . . [their children] from viewing sites that contain pornography[, violent, and hateful] or other problematic material.”<sup>186</sup> There is no problem with parental control over children’s access to the Internet; parents may control what they want.<sup>187</sup> The restriction of adults’ access is a completely different issue. Generally, the Internet is not regarded as an intrusive medium and most adults can avoid hateful messages on the Internet if they chose to do so. Thus, when governments or ISPs exercise censorship it mostly targets those who are really interested in learning about unpopular views, be it from curiosity or when looking for allies. The result is particularly incompatible with the United States’ First Amendment but is desirable in Germany (at least in respect to racism).

The issue of filters and private blocking has inspired much criticism. First, there is the problem of imperfect technology. Because many filters are based on word recognition they screen out educational or other harmless materials on objectionable topics. The most notorious example is when “America Online screened out material with the word ‘breast,’ thereby denying access to information and discussion groups about breast cancer.”<sup>188</sup> Such filters are also unreliable in cases of hate speech since they ban speech on the basis of words that may be present in anti-hate propaganda as well.<sup>189</sup>

Second, in the case of filters based on various rating systems by independent bodies, there remains the question of arbitrary human evaluation. Some authors fiercely oppose them. It is “a blow to free expression on the Internet because it removes judgment from the hands of audience members. They become, instead, atomized members of a mass society to be programmed at, measured, and sold consumer goods.”<sup>190</sup> Even suggestions of “computer warnings and blocking statements”<sup>191</sup> appearing before a display of objectionable material are met with suspicion by “cyberliberitarians,” because

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184. *Statement, supra* note 119.

185. *See, e.g.,* LIPSCHULTZ, *supra* note 83, at 100. *See also* Cyber Patrol, *CyberNot for download*, at <http://www.cyberpatrol.com/trial/home.htm> (last visited Feb. 21, 2003).

186. *Statement, supra* note 119.

187. *See, e.g., id.* at 30.

188. McGuire, *supra* note 2, at 782.

189. *Die These: Internet; Neonazi*, DIE WOCHE (Germany), August 18, 2000, at 4.

190. LIPSCHULTZ, *supra* note 83, at 65.

191. *Id.*

they serve "to make judgments for the majority of the public that is unwilling to exercise independent thought."<sup>192</sup>

Third, "Floyd Abrams, a First Amendment scholar, asserted, that the only problem with private filters is to make sure they don't become public filters."<sup>193</sup> Even the Platform for Internet Content Selection, (PICS), technology, which "allows multiple independent rating systems to be standardized and read by different screening software packages" in accordance with personal preferences,<sup>194</sup> does not provide release from this concern. Some authors "see PICS as a vehicle through which governments can control the Internet rather than as private preemption of legislative censorship."<sup>195</sup> Barry Steinhardt, the Associate Director of the American Civil Liberties Union ("ACLU") echoed these concerns when he "noted that '[t]he Internet has changed the nature of the issue . . . [i]n order to preserve free speech values, you have to concern yourselves with the actions of the dominant private companies that will structure this medium."<sup>196</sup>

Proponents of anti-hate speech measures are also against private censorship, but for a different reason. They argue that filtering actions from ISPs do not release the government from its responsibility to provide for rights of the citizen for hate-free cyberspace<sup>197</sup> and controls should not be placed on private establishments but on democratic institutions.<sup>198</sup>

## VI. PUBLIC DEBATE AND PUBLIC REACTION

Obviously, regulation of Internet speech would be most successful in a case of international cooperation by all major states. "The United States and Germany, countries with similar . . . [democratic values], differ on what content they wish to control on the Internet, indicating the wide disparity of policy choices that an international Internet regulatory structure must accommodate."<sup>199</sup> Among the public, both in Germany and in the United States, there are eager proponents of both approaches.

The United States supporters of a free speech approach often rely on Holmes' marketplace of ideas theory<sup>200</sup> and the self-

192. *Id.*

193. Weintraub-Reiter, *supra* note 26, at 169.

194. McGuire, *supra* note 2, at 783.

195. *Id.* at 787-88.

196. Weintraub-Reiter, *supra* note 26, at 170 (quoting Amy Harmon, *The Self-Appointed Cops of the Information Age*, N.Y. TIMES, Dec. 7, 1997, sec. 4, at 1, 6).

197. See, e.g., Terhoerst, *supra* note 6.

198. Tsesis, *supra* note 147, at 867.

199. McGuire, *supra* note 2, at 791.

200. Weintraub-Reiter, *supra* note 26, at 147.

government argument of Meiklejohn.<sup>201</sup> Their opponents reply that "society derives no benefit from deliberately falsified scientific data, fabricated fallacies about the intellectual and economic attributes of people, and concocted stereotypes."<sup>202</sup> In response to the argument that "because we cannot be certain as to what opinions help or harm democracy, we should not censor that which we consider offensive to the democratic ideal,"<sup>203</sup> there is a counter-argument that "hate speech does not further the interests of democracy because it advocates that certain social elements should be denied fundamental rights."<sup>204</sup> Supporters of free speech give many examples: Should we ban Roman Catholic preaching because it advocates that homosexuality is loathsome and sinful? Should we ban Huckleberry Finn because it disparages blacks?<sup>205</sup> They also point out that pre-Hitler Germany had anti-hate speech laws and "there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency."<sup>206</sup> Their opponents are not convinced.<sup>207</sup>

There are numerous arguments on both sides, however, arguments do not have much chance to change the legal framework of both nations. The main constitutional values, freedom of speech in the United States and human dignity in Germany, taken together with historical imperatives are determinative for the legislature and courts.

The conflict between different approaches has caused controversies not only on the normative level but also as a practical response. For example, in 1996, "at the request of the German government . . . [the German ISP] Deutsche Telekom began denying its customers access to Zündelsite, a web page by Ernst Zündel, a renown holocaust denier and anti-Semite living in Canada."<sup>208</sup> Users from the United States "began creating 'mirror sites' [with] . . . an exact copy of material on Zündel's Web page . . . mak[ing] it available . . . [through alternate] access providers that the German

201. Reed, *supra* note 112, at 183; Weintraub-Reiter, *supra* note 26, at 147.

202. Tthesis, *supra* note 147, at 849.

203. WOLFSON, *supra* note 125, at 30.

204. Tthesis, *supra* note 147, at 847.

205. See, e.g., WOLFSON, *supra* note 125, at 53.

206. Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?* 25 S. ILL. U. L.J. 243, 260 (2001) (quoting R. v. Keegstra, [1990] 3 S.C.R. 697(Can.)).

207. For more arguments, see William G. Ortner, Note, *Jews, African-Americans, and the Crown Heights Riots: Applying Mastuda's Proposal to Restrict Racist Speech*, 73 B.U. L. REV. 897 (1993); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Kübler, *supra* note 9, at 335.

208. Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 693 (1997).

government could not control.”<sup>209</sup> “The individuals who created these sites were not Nazi sympathizers; [t]hey were [just] free speech advocates.”<sup>210</sup> Zündel’s “writings are now more accessible than ever.”<sup>211</sup>

The critics have said:

While it is clear that the United States will not change its domestic regime, the trans-national nature of the Net requires that it make some concession to the rule of international law. The United States is out of step; it should attempt to contain the bile that spews from the servers in its physical jurisdiction—this burden should not fall upon the rest of the international community.<sup>212</sup>

Yet, so far the United States government has emphasized that it “supports the broadest possible free flow of information across international borders.”<sup>213</sup>

Anti-hate movements have an impact as well. In the past years, United States mass media and anti-hate organizations have been persistently pressuring ISPs to block access to Internet sites that promote hate and racism.<sup>214</sup> Many ISPs were not influenced by public opinion, but some were. For instance, the Internet auctioneer eBay expanded “its listing policy to prohibit the sale of Nazi memorabilia and other items that glorify hatred, violence or racial intolerance or promote hate groups.”<sup>215</sup> GeoCities removed some KKK sites.<sup>216</sup> Yahoo! also announced “its decision to take steps to remove hateful materials from its Internet auctions”<sup>217</sup> even though it proceeded to fight penalties and legal obligations imposed by the French court.

Whether filtering and blocking measures are employed by ISPs or by governments, they are likely to fail unless there is

209. *Id.*

210. *Id.* at 694.

211. *Id.*

212. Fogo-Schensul, *supra* note 9, at 276.

213. McGuire, *supra* note 2, at 790.

214. Michael L. Siegel, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 382 (1999).

215. Press Release, Anti-Defamation League, *ADL Applauds eBay for Expanding Guidelines to Prohibit the Sale of Items that Glorify Hate* (May 4, 2001), at [http://www.adl.org/presrele/internet\\_75/3820\\_75.asp](http://www.adl.org/presrele/internet_75/3820_75.asp) (last visited Feb. 21, 2003).

216. Siegel, *supra* note 214, at 382.

217. Press Release, Anti-Defamation League, *ADL Commends Yahoo for Action Banning Nazi Memorabilia and Other Hateful Items on its Auction Site* (Jan. 3, 2001), at [www.adl.org/presrele/internet\\_75/3735\\_75.asp](http://www.adl.org/presrele/internet_75/3735_75.asp) (last visited Feb. 21, 2003).



international conformity in legal regulation of online hate. There are several examples which illustrate how separate censoring efforts may be overcome by users. Most of the anti-censorship methods were developed by western liberalists to overcome local Internet restrictions of citizens by totalitarian governments.<sup>218</sup> Obviously, the same technology may be employed by users in democratic countries who want to access restricted Web sites.

There are Web-based anti-censorship proxy ("ACP") servers that work "by creating an alternate namespace for the entire Internet."<sup>219</sup> This makes it possible for "every site on the entire Internet . . . to appear as if it is a page on . . . [such a] server," and as such, the site is not detected as objectionable by ISP filters.<sup>220</sup> Brian Ristuccia, who set up such an ACP server, contended that "[t]he ACP server is a very effective Internet censorship repair tool because it takes only one unblocked site to unblock the entire Internet."<sup>221</sup>

There is also a method developed on the basis of Peer-to-Peer technology.<sup>222</sup> After installation of specific software on the user's computer, it requires no central server for the exchange of information, thus avoiding much control and liability for any content.<sup>223</sup> Another is a very simple method that requires no fancy technology (though it may be more expensive), where users can dial into another country on their modems and bypass local service provider restrictions.<sup>224</sup>

Some are of the opinion that with the development of technology and filtering devices it may be possible to adequately control hateful content, including that within the borders of one country.<sup>225</sup> However, there is no doubt that new anti-censorship technologies will be developed as well. Unless legal responsibility for posting, transmitting, and distributing hateful material on the Internet is

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218. See, e.g., Internet ohne Zensur, *Tool ermöglicht Zugriff auf verbotene Websites: FreeBird umgeht Zensursysteme mit Peer-to-Peer-Netzwerk* [Tool makes access possible to forbidden Websites: FreeBird deals censorship systems with Peer to Peer network] (Aug. 11, 2001), at <http://www.ioz.ch/news/010811.htm> (last visited Feb. 21, 2003).

219. Human Rights Watch, *The Internet in the Mideast and North Africa: Free Expression and Censorship, Cybercensorship: Its Various Forms* (June 1999), at <http://www.hrw.org/advocacy/internet/mena/censorship.htm> (last visited Feb. 21, 2003).

220. *Id.*

221. *Id.*

222. Internet ohne Zensur, *Browser für unzensurable Informationen. Hacker wollen Software im Juli vorstellen, [Internet without Censorship, Browser for Uncensorable Information. Hackers want to introduce the Software in July]* (May 10, 2001), at <http://www.ioz.ch/news/010510.htm> (last visited Feb. 21, 2003).

223. *Id.*

224. Human Rights Watch, *The Internet in the Mideast and North Africa: Free Expression and Censorship How Users can Protect their Right to Privacy and Anonymity* (June 1999), at <http://www.hrw.org/advocacy/internet/mena/privacy-rights.htm> (last visited Feb. 21, 2003).

225. Tsesis, *supra* note 147, at 836.

universally recognized, success of private blocking measures is highly questionable.

## VII. CONCLUSION

Hate speech on the Internet is and will be controlled to different degrees by different national authorities. However, the probability of success of national regulations is limited and the result of any regulatory efforts is inevitably influenced by the position of other participants.

Several common principles of liability for unprotected messages are already recognized by many countries, including the United States and Germany. Thus, it is not a viable practice to hold ISPs liable for transmitting a third-party's Internet content unless the ISP itself initiates the transmission. This is a fair principle from ISPs' point of view; however, it deprives the state of legal mechanisms to regulate the availability of harmful material to the users. Perhaps as compensation for that, another principle has been developed: states can expose anyone that they can exert jurisdiction over to liability, disregarding the fact that the material in question was physically put on the Internet in a territory where it may be perfectly legal, or was put on a server located in such territory.

There is less agreement, however, as to questions about the content of the hateful material. Absent worldwide conformity with the United States' First Amendment as a cornerstone, hate speech will remain available on the Internet despite regulatory efforts of other countries, and its regulation will have implications for the actors on both sides. By the choice of anti-hate state policy, the availability of objectionable content to the users may be limited within a given country, but it will not be blocked out completely due to imperfect filtering technology and numerous technical opportunities of the Internet. By the choice of pro-speech state policy, there is a danger that national ISPs and users may face civil and criminal liability once they happen to get into another more restrictive country.

"Hate and harassment existed long before the establishment of the Internet and would continue even if the Net was heavily censored."<sup>226</sup> The United States and Germany chose to fight hate speech with different means—the United States through the free and open exchange of ideas, and Germany through suppressing such speech. Indeed, "[t]here may be no single balance that would work for all cultures."<sup>227</sup> At present, the international solution, though

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226. Greenberg, *supra* note 208, at 695.

227. DELGADO & STEFANCIC, *supra* note 7, at 130.

much desirable, is highly improbable “due to differing views on the nature of free speech and freedom from censorship.”<sup>228</sup> The option left to every country is to educate the public, to teach tolerance to and acceptance of diverse values. After all, “[r]acist speech is a mere symptom of racism.”<sup>229</sup>

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228. Siegel, *supra* note 214, at 396.

229. Ortner, *supra* note 207, at 918.

