

Racism versus Freedom of Expression: Current and future approaches to the regulation of Internet hate speech.*

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Abstract

The regulation of Internet hate speech is one of the most controversial topics concerning the new worldwide medium. As this work will demonstrate, the importance of consensus in this area cannot be overstated. The Internet offers many unique opportunities for promoting hate propaganda and hate activists have readily utilized these opportunities. Despite this, members of the world community have adopted diametrically opposed positions towards the regulation of hate speech and these differences extend to Internet hate speech.

Two main positions are examined - the United States and Germany. Within an analysis of the latter and in recognition of their increasingly important regulatory role, the initiatives of the Council of Europe and the European Union's are explored. Attention is also given to the regulatory efforts of private companies and the extent that states are willing to delegate control to their hands.

The main focus of this work is a legal analysis of the regulation of hate speech on the Internet. In addition it considers relevant historical circumstances and the technological aspects of the functioning of Internet, without which any discussion of the topic would be incomplete.

INTRODUCTION

Debate on the conflict of hate speech and the free speech is no recent invention, yet in recent years, the attention it has received has increased considerably. Within Europe, on one hand, there is growing hostility to foreigners and new-comers, the results of elections in Austria and to lesser degree in France are a vivid example. On the other hand there is a strong concern for the basic human right of free expression, something which is particularly important for the new democracies of Central and Eastern Europe, including former Soviet Republics. The development of the new technology such as the Internet has introduced new concerns, yet the main arguments of the debate have not changed much. It is probably true that the more technology changes the more free speech issues remain the same.¹

The conception of the Internet as a regulation-free medium is very appealing to some.² 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-many; it provides globalism, anonymity and speed for any on-line activity; it does not have such inherent restrictions as scarcity of resources or limited accessibility.³ Nevertheless, the reality is that the Internet is being regulated, regulated to the extent that each nation considers

* This article is based on factual and legal material as of August 2002.

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

² McGuire, John F. (1999) 'When Speech Is Heard around the World: Internet Content Regulations in the United States and Germany'. 74 *N.Y.U. L. Rev.* 750 at p.773.

³ Branscomb, A.W. (1995) 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces' 104 *Yale L.J.* 1639 at p.1669 and Schmölzer, Gabriele. (1997) *Strafrechtliche Aspekte zum Thema Rassismus, Neonazismus und Rechtsextremismus im Internet*. IN: *Das Netz des Hasses: rassistische, rechtsextreme und neonazistische Propaganda im Internet*. Redaktion und Lektorat, Brigitte Bailer-Galanda et al., Wien: Stiftung Dokumentationsarchiv des österreichischen Widerstandes. pp.246-272 at p.272.

possible and appropriate. Many states have their own strategies for fighting racism, there are some international instruments as well. In case of the Internet regulation it is almost impossible for one country to achieve valid results on its own, that is why international aspects are of exceptional significance.

It is widely recognized that hate propaganda harms society as a whole and many countries outlaw hate speech in their criminal codes (Germany, Canada, France, Netherlands, Austria, and Italy, to name a few).⁴ There is also another approach: the United States, for example, is traditionally more liberal to hate speech than many European countries. The US position is strongly influenced by the First Amendment of the Federal Constitution and hate speech, being considered close to political speech most of the time, falls under its protection. 165 nations of the world 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.⁵ The difference of approaches becomes particularly disturbing in the age of the Internet as regulatory efforts of one country may be nullified by lack of similar regulations in another country.

This work examines the essence of the controversy between restricting hate speech on the Internet and the interests of freedom of expression. It describes two distinct legal approaches to its regulation: the anti-hate approach and pro-speech approach. It analyzes the existing alternatives for acceptable state policy in regulating racist speech and investigates their advantages and shortcomings. Based on this the work offers guidance on possible solutions to the conflict of hate speech and freedom of expression. The aim is that certain policy choices towards regulating hate speech can be evaluated, taking into consideration the implications for freedom of expression and the technological ramifications of policy changes.

I. WHY HATE SPEECH ON THE INTERNET IS SPECIAL

Obviously, Internet hate speech has its roots in social biases and prejudices 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. It has began as a US military program ARPANET in the 60s and outgrew into civilian network that enables millions of people to communicate to one another and to access vast amounts of information from around the world.⁶ The Internet offers a wide variety of communication and information retrieval methods. The most popular include electronic mail, automatic list services, newsgroups, chat rooms and the World Wide Web. 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 Internet.⁷ Any person or organization with a computer connected to the Internet can “publish” information. No single organization controls membership of the Web, nor there is any single centralized point from which individual Web sites or services can be blocked from the Web.⁸

⁴ Delgado, Richard. (1997) *Must we defend Nazis?: hate speech, pornography, and the new first amendment*. New York: New York University Press at p.58)

⁵ 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 Kubler, Friedrich. (1998) ‘How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights’. 27 *Hofstra L. Rev.* 335 at p.357. Fogo-Schensul, Credence. (1997) ‘More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms’. 33 *Gonz. L. Rev.* 241 at p.247

⁶ *Reno v. American Civil Liberties Union* (1997) p.850

⁷ *Ibid* p.851

⁸ *Ibid* p.853

Hate activists were fast to recognize the opportunities offered by the new medium. Among the first there were US neo-nazis who began to use the Internet for their propaganda in the beginning of 80s. They prepared guides on how to seek and contact potential members, how to attract those just curious, how to increase their influence by means of the Internet.⁹ Soon American activists were followed by German adherents and others - often from outside of their home-countries as in some of them racist activities were criminalized.

B. New Opportunities

The Internet provides unique resources for expanding hate propaganda. Its influence went beyond text and word that were available before on leaflets and brochures.¹⁰ It appeared 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. The Internet gave an opportunity to establish groups and discussion forums, offered easy means of communication, made it possible to accumulate data and reach large number of people, both potential followers and victims. It also supplied additional methods to attract children and youth, such as making available hate-music to listen and hate-games to download.¹¹ Besides, it offered the convenience of “mirror sites” so that even with imposed regulations, enjoined web sites may appear again on another server.¹²

The opportunities of the Internet have been assessed differently around the world. For example, the United States Supreme Court has traditionally treated different types of media differently for purposes of First Amendment analysis.¹³ The Supreme Court recognized that the Internet has neither the history of extensive government regulation, nor the scarcity of available frequencies at its interception, nor the “invasive nature” of broadcasting, and thus “is entitled to the highest protection from governmental intrusion.”¹⁴ In Germany, on the contrary, the unique nature of the Internet does not play any major role. Nazi propaganda is illegal in Germany, consequently there is no imposition of any new censorship but rather enforcement of existing policies on the Internet.¹⁵

C. Hate Speech on the Internet

The term “hate speech” is most often used as meaning racist and xenophobic speech but is also applied in respect to other distinct groups and minorities. Black’s Law Dictionary (1999) 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.”¹⁶ Other sources characterize hate speech as, for example, “a form of expression offensive to women, ethnic and religious groups, and other discrete minorities.”¹⁷ In many circumstances hate speech communicates the message that

⁹ Dietzsch, Martin & Maegerle, Anton. (1997) Rechtsextreme deutsche Homepages. IN: *Das Netz des Hasses: rassistische, rechtsextreme und neonazistische Propaganda im Internet*. Redaktion und Lektorat, Brigitte Bailer-Galanda et al., Wien: Stiftung Dokumentationsarchiv des österreichischen Widerstandes. pp.47-77 at 47

¹⁰ Wetzel, Juliane. (1997) Antisemitismus im Internet. IN: *Das Netz des Hasses: rassistische, rechtsextreme und neonazistische Propaganda im Internet*. Redaktion und Lektorat, Brigitte Bailer-Galanda et al., Wien: Stiftung Dokumentationsarchiv des österreichischen Widerstandes. pp.78-105 at 78.

¹¹ For example “Ethnic Cleansing” and “Shoot the Blacks” Anti-Defamation League. (accessed Aug. 2002a) *ADL Report: Growing Proliferation of Racist Video Games Target Youth on The Internet*. <http://www.adl.org/presrele/extremism_72/4042_72.asp>

¹² Marsh, Elizabeth Phillips. (2000) ‘Purveyors of Hate on the Internet: Are We Ready for Hate Spam?’ 17 *Ga. St. U.L. Rev.* 379

¹³ Ibid p.386

¹⁴ *Reno v. American Civil Liberties Union* (1997) pp. 845, 863)

¹⁵ Op cit McGuire, (1999) p.788

¹⁶ Black, Henry Campbell. (1999) Black’s law dictionary. St. Paul, MN: West Pub. Co.

¹⁷ Weintraub-Reiter, Rachel. (1998) ‘Hate Speech over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?’ 8 *B.U. Pub. Int. L.J.* 145 at p.149

distinctions of race or origin are ones of merit, dignity, status and personlihood; it injures the career prospects, social mobility, may even cause mental illness and psychosomatic disease.¹⁸ These definitions, developed by the US authors, have their focus on victim's sufferings and reaction and are not quite suitable for the Internet speech because of its particular nature: first, communications over the Internet do not appear on computer screens without the user taking a series of affirmative steps and in most cases it is possible to avoid undesirable messages; second, as a rule neither the speaker, nor the addressee is accessible but in many cases is anonymous or unknown.¹⁹

Another approach to defining hate speech comes from the Council of Europe. According to the draft of the First Additional Protocol to the Convention on Cybercrime (2002) "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 based on race, color, descent or national or ethnic origin. Obviously, the focus here is not on a particular victim but on the dissemination of racist attitudes in the society. It seems that this kind of definition better reflects the essence of the problem of Internet hate speech. While in the United States the focus is mainly on the impact of hate speech on its victims, some European authors fear, not without a reason, that from ideologically eccentric neo-nazi network can actually appear a powerful political movement.²⁰

The most popular hate subjects the Internet (at least among those that attract attention nowadays) encompass white superiority, intimidation of people of color and Jews, neo-nazism and Holocaust denial. One of the most controversial topics is Holocaust denial, or revisionism. With its recent history, it is particularly disturbing in Germany however, it is not regarded as the same serious issue in other countries. One problem is that the hate message is not so obvious. For the most part modern revisionists do not deny that atrocities were committed against Jews during World War II, however, they contend that there was no Nazi plan to exterminate European Jewry, the "Final Solution" being no more than their expulsion from Europe; that the Nazis did have a system of concentration camps, but there were no gas chambers for mass murder in them; and finally, that the claim of six million murdered Jews is a big exaggeration, as the number killed was far less.²¹ Some deniers claim that their goal is contrary to the intentions of anti-Semites (to intimidate Jews) but to uncover the truth.²² Numerous Internet sites invite free discussion for the sake of the "historical accuracy". In Germany, nevertheless, this kind of discussion is criminalized, perfectly in accordance with its constitutional values.²³

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, hate speech on the Internet falls into the least dangerous category of verbal activity (although with possible serious consequences in the long run, of course).²⁴ On the other hand, the idea that messages can be a "killing force" is sometimes taken quite literally nowadays.²⁵ For example, the US Supreme Court denied writ

¹⁸ Op cit Delgado, (1997) pp.4-6

¹⁹ Wolfson, Nicholas. (1997) *Hate speech, sex speech, free speech*. Westport, Conn.: Praeger at p.165.

²⁰ Tsesis (2001) *Hate in Cyberspace: Regulating Hate Speech on the Internet*. 38 San Diego L. Rev. 817 Seils, Christoph. (2001) Das Netz der Nazis. *Die Woche*. August 17

²¹ Grubach, Paul. (accessed Aug. 2002) *The Political Implications of Holocaust Revisionism*. <<http://www.duke.org/library/race/revisionism1.shtml>>.

²² Lasek, Wilhelm. (1997) "Revisionistische" Gruppen und Personen im Internet. IN: *Das Netz des Hasses: rassistische, rechtsextreme und neonazistische Propaganda im Internet*. Redaktion und Lektorat, Brigitte Bailer-Galanda et al., Wien: Stiftung Dokumentationsarchiv des österreichischen Widerstandes. pp.123-161 at p.134

²³ *Holocaust Denial Case* (1994)

²⁴ Taguieff, Pierre-André. (2001) *The force of prejudice: on racism and its doubles*. Hassan Melehy ed., trans. Minneapolis: University of Minnesota Press at p.50

²⁵ Op cit Calvert & Richards, (1999) p.980

of certiorari to an appeal from the decision of the lower court in *Paladin Enterprises, Inc. v. Rice* (1998),²⁶ thus refusing to extend the First Amendment protection for a book “Hit Man. A Technical Manual for Independent Contractors” which instructions had allegedly been relied on in a triple-murder-for-hire crime. It may be mentioned, however, that the book may be easily found on the Internet.

II. RESTRICTION OF HATE SPEECH ON THE INTERNET

Many countries adopt restrictive approaches to regulating Internet hate speech. In democratic societies any restriction on speech must conform to recognized standards on the limits of freedom of expression. The Western European states are a good example of how a restrictive state policy functions in an atmosphere of proclaimed respect for fundamental human rights. Among this group, Germany will be the subject of further analysis. This country has perhaps the strictest attitude to any kind of racist activities and at the same time Germany has consistently expressed its commitment to the ideals of free democratic society.

A. At 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 the World War II included numerous measures specifically intended to eradicate the ideology of Nazism and the racial prejudice underlying the Holocaust.²⁷ At the end of 60s, however, attempts of revisionism began, first in the way of reburdening the responsibility of war.²⁸ These circumstances have led to the prohibition of certain forms of political speech that will not be tolerated in any medium, including the Internet.²⁹

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 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”.

The article expressly imposes limitations on free expression in §2. 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), Article 18 (forfeiture of basic rights when abusing them), Article 21 §2 (prohibition of political parties seeking to impair the free democratic order) and some other implicit provision, all of them establishing basis for the functioning of the German militant democracy and allowing German legislators to successfully restrain racist (hate) activities in almost any form.

Several provisions of the German Penal Code (*Strafgesetzbuch - StGB*) specifically target hate speech: §130 criminalizes incitement to hatred or violence against parts of the

²⁶ The District Court held that the book merely advocated rather than encouraged murder (*Paladin Enterprises, Inc. v. Rice* (1996), however, the Court of Appeals reversed (*Paladin Enterprises, Inc. v. Rice* (1997)).

²⁷ Minsker, Natasha L. (1998) “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 J.* 113 at p.137

²⁸ Bailer-Galanda, Brigitte. (1997) “Revisionismus” als zentrales Element der internationalen Vernetzung des Rechtsextremismus. IN: *Das Netz des Hasses: rassistische, rechtsextreme und neonazistische Propaganda im Internet*. Redaktion und Lektorat, Brigitte Bailer-Galanda et al., Wien: Stiftung Dokumentationsarchiv des österreichischen Widerstandes. pp.106-122 at p.109)

²⁹ Op cit McGuire, (1999) p.773)

population and attacks on the human dignity; prohibits distribution and publication of hate messages, including by means of broadcast; it also specifically penalizes Holocaust denial, i.e. approval, denial and minimization of the acts of Nazis committed during the Second World War. Other relevant provisions address depiction of violence in a glorifying or degrading manner (§ 131), insult to personal honor (§ 185), defaming the memory of dead (§ 189). Remarkably, in spite of the rule that insulting statements are actionable on the petition of the injured person, § 194 provides for public prosecution in case of distribution of insulting or defamatory statements by broadcast (which includes the Internet) in respect of victims (or members of the group) prosecuted by the Nazis or other totalitarian regime.

In 1997 Germany passed the Multimedia Law (*Mediendienstestaatsvertrag* - *MDStV*) which was meant to keep illegal material out of the cyberspace. *Inter alia*, the law prohibits incitement to hatred and degrading depiction in accordance with § 130 and § 131 of the Penal Code by means of the Internet (*MDStV* § 8 abs.1). The law also establishes criteria for the liability of Internet service providers (ISPs): German Internet service providers are not responsible for illegal content put on the Net by third parties unless they are aware of such content and it is technically possible and reasonable to block it (*MDStV* § 5, § 18 abs.3). Almost identical provisions are contained in the Teleservice Law (*Teledienstegesetz* - *TDG*). Many German providers and users have greeted the law with a sigh of relief (Langer, 1997), as the issue of ISPs' liability has been a tense one. However, critics said that the law still left open to what extent online services were responsible for content they did not control and indeed, this issue produced much controversy in the Felix Somm case.³⁰

Felix Somm, the former manager of German CompuServe, was prosecuted by Bavarian authorities for distributing online pornography.³¹ As CompuServe manager, he provided access to the Internet and, according to the indictment, he should have filtered out criminal contents originating in the USA and reaching German Internet users. In 1999 the case was reversed on appeal proceedings on the grounds that there was no liability for the third-party content and Felix Somm could not technically filter the Internet, especially being in charge of a subsidiary company owned by an American CompuServe.³² As one of his lawyers commented, "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."³³

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. 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. In this decision the Federal Court effectively set the precedent that all material published on the Web is subject to German

³⁰ Germany Passes Internet Law Limiting Content Cyberspace: Online ban on porn and other controversial material draws skepticism over enforcement and liability. (1997) *L.A. Times*. July 5.

³¹ Langer, Michael. (posted Aug. 17, 1997) *Germany's New Multimedia Law and the Possible Consequences*. <<http://www.heise.de/tp/english/inhalt/te/1260/1.html>>

³² Besides technological impossibility, the court also considered Somm's lack of authority to employ filtering. See Felix Somm, Compuserve Urteil des LG München vom 17. November 1999.

³³ Sieber, Ulrich. (accessed Aug. 2002) *Commentary on the Conclusion of Proceedings in the "CompuServe Case" (Acquittal of Felix Somm)*. <http://www.digital-law.net/somm/commentary.html>

legislation. Laws prohibiting racial hatred clearly apply to Internet material which is created outside of Germany but which is accessible to German Internet users.³⁴

Thus, Germany upholds criminal responsibility for those who put racist material on the Internet without regard for their location and thereby releases ISP executives from responsibility. However, there remains another problem: even released from criminal responsibility, German ISPs are still under an obligation to block Internet material that is illegal by German standards.

Although this legal obligation concerns only material of which Internet service providers 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 and the Internet is considered to be an influential tool.³⁵ German providers complain, "If we block certain sites then we support censorship; if we don't then we support right-radicalists" (Internet ohne Zensur, 2001a). Since the choice is usually in favor of self-censorship, some critics have even called Germany "one of the most Internet-averse nations."³⁶

However, Germany's approach has proven influential. After the country's largest Internet service provider cut off Germans' access to the more than 1,500 Web sites operated by the American provider which housed Zündel's site (Holocaust revisionist's site), the European Union's Consultative Commission on Racism and Xenophobia urged all other member states to follow this example.³⁷

B. At the European level

Cooperation within Europe is particularly important for European countries combating hate speech on the Internet. There are numerous concerns in this area, for example, when German authorities required German ISPs to block certain web sites on a server of the Netherlands magazine that allegedly promoted terrorist violence, the Dutch host service provider argued that such requirements interfere with the free movement of services within the EU.³⁸ Being a member of the European Union or of the Council of Europe, the state has to comply with the legal obligations emanating from both these bodies. In general, however, the EU's and CoE's approach reflects almost identically the position of Germany as described above.

1. The Council of Europe

The Council's of Europe position in respect of hate speech is strict. It has announced that it considers racism not an opinion but a crime and intends to fight it. This position is general for any hate speech, not only racist remarks, and the Council emphasized that "not only racism, but also the dissemination of hate speech against certain nationalities, religions and social groups must be opposed."³⁹

Putting words into action, the Council of Europe has 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. It was opened for signature in November 2001 and 26 states signed the treaty on the first day.⁴⁰ The final text of the

³⁴ Center for Democracy and Technology. (2001) *CDT Policy Post*, Volume 7, Number 6, July 11

³⁵ Human Rights Watch. (posted 1995) *Germany for Germans. Xenophobia and Racist Violence in Germany*. <<http://www.hrw.org/reports/1995/Germany.htm>>

³⁶ Op cit McGuire, (1999) p.795

³⁷ Op cit Fogo-Schensul, (1997) p.269

³⁸ *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* COM(2001) 690, final [The European Union].

³⁹ (Recommendation, 2001)

⁴⁰ Press Release of the Council of Europe. (accessed Nov. 2001) *30 states sign the Convention on Cybercrime at the opening ceremony*. <[http://press.coe.int/cp/2001/875a\(2001\).htm](http://press.coe.int/cp/2001/875a(2001).htm)>

Convention does not deal with the problem of hate speech, although this possibility has been discussed. Instead, the Committee of Experts on the criminalization of racist or xenophobic acts using computer networks has been instructed to prepare a draft of the First Additional Protocol to the Convention on Cybercrime that would address the issue.⁴¹ The problem is that the Additional Protocol may not have the approval of all major actors. The United States is usually very strict over copyright infringements or sexually explicit materials but usually more liberal over racist speech.⁴² The Council of Europe itself recognized that the First Additional Protocol to 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. As a temporarily solution the Council's starting-point is to initiate a dialogue with all Internet service providers to convince them of the need to take steps themselves to combat the existence of racist sites.⁴³ This strategy may be successful but there are some implications about private censorship that will be discussed in Chapter IV.

In the meantime, the final draft of the First Additional Protocol has been made public. The Additional Protocol will impose obligations on state parties to criminalize the following acts of racist and xenophobic nature committed through computer systems: dissemination of racist and xenophobic material; racist and xenophobic motivated threat; racist and xenophobic motivated insult; revisionism; aiding and abetting in the above activities. The draft of the Additional Protocol also confirms the important principle that Internet service providers cannot be held criminally liable as they do not have any criminal intent which is one of the central elements of crime. Moreover, ISPs are not required to actively monitor content to avoid criminal liability (*Draft*, 2002 abs.25, 45).

One more required element for the offenses described by the Protocol is that racist/xenophobic material has to be made available to public (except for racist/xenophobic motivated threat) (*Draft*, 2002 abs.29, 35). One-to-one communications are not covered, however offensive they may be. 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 by far a straightforward task. The provisions of the Protocol are supposed to be mandatory and yet to make them acceptable for the various legal cultures several options have to be made available. The signatory may choose not to criminalize dissemination of material that promotes discrimination (there is no such option for incitement to hatred or violence) (*Draft*, 2002 a.3 ss.2, 3); 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 (*Draft*, 2002 a.5 s.2, a.6 s.2). With so many options it is somewhat questionable whether the Additional Protocol is able to achieve its main purpose to harmonize criminal law in the sphere. It is even more questionable whether the Protocol will have any meaningful impact on fighting racist speech on the international level. Its provisions run contrary to US standards in many respects leaving serious doubts on the potential for the First Additional Protocol to become an international treaty signed by all major states.

2. The European Union

⁴¹ *Recommendation 1543 (2001) Racism and xenophobia in cyberspace* [The Council of Europe]

⁴² Lipschultz, Jeremy Harris. (2000) *Free expression in the age of the Internet: social and legal boundaries*. Boulder, Colo. Westview Press, at p.56

⁴³ *Ibid Recommendation*, 2001

The European Union expressed its approval and support of the Council's of Europe Convention on Cybercrime and of its initiative on the Additional Protocol.⁴⁴ It also developed its own strategies on fighting hate speech in cyberspace. The European Union's intervention in this area is carried out within two areas of the EU's competence: the free movement of services (first pillar) and civil liberties and justice (third pillar) (*Resolution* (1996) § 18).

The importance of the Internet is greatly appreciated by the EU. It recognized that Internet services with their possibilities for interactive communication can benefit large sections of the population and noted that in several authoritarian and repressive states the Internet, 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 (*id.* § 5). The European Union declared its commitment to freedom of expression and affirmed that the free movement of information on the Internet is a fundamental manifestation of it (*id.* § 6).

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 EU Commissioner for Justice and Home Affairs, at the conference "The Internet and the changing face of hate". He emphasized the necessity of unified international efforts, "Because 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 levels of international cooperation."⁴⁵

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 (Community Research and Development Information Society, 2000). 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 (*Proposal*, 1998).

Later initiatives of the EU addressed the creation of a legal framework for combating hate speech. In line with the draft of the First Additional Protocol to the Convention on Cybercrime, the EU wants to ensure that racist and xenophobic content on the Internet is criminalized in all Member States. The basic idea would be contained in the principle, "what is illegal off-line is illegal on-line" (*Proposal*, 2001).

As to the ISPs' liability, according to Article 12 of the Directive on Electronic Commerce, Internet service providers should not be held liable for the information transmitted, on condition that the provider neither initiates the transmission, nor selects the receiver of the transmission, nor selects or modifies the information contained in the transmission. 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 (*Directive 2000/31/EC*). This raises additional issues of self-censorship that will be addressed later.

In respect to personal liability for racist and xenophobic content the European Union, like Germany, follows a broad approach and proposes that states' jurisdiction extends 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 (*Proposal*, 2001).

⁴⁴ Vitorino, Antonio. (2000) *Speech: The Internet and the changing face of hate*.
<http://europa.eu.int/ISPO/docs/services/docs/2000/June/speech_00_239_en.pdf>.

⁴⁵ *Ibid*

III. 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 Internet-related services, the significance of its position is hard to overestimate. First, the Internet began and was developed in the United States and, until now, the US maintains a leading position in the number of Internet users and services. Second, the US position is deeply rooted in the moral and legal traditions of American society with its priority for freedom of expression. Third, it is unwise to disregard the position of the US as a powerful and independent nation in the modern world. A relevant example is the recent Yahoo! controversy when a US District court refused to enforce the order of a French court which required Yahoo!, a California Internet company, to bar access to French citizens to Nazi memorabilia auctions available on the Internet. At the same time, US courts were successful in enforcing their decisions against foreign Internet services that provided Internet material which was illegal in the USA but perfectly legal in their own countries.

A. The development of legal doctrine

The legal doctrines regulating freedom of expression in the United States emerged from the interpretation of the First Amendment of the Constitution. This provides simply that Congress shall make no law abridging the freedom of speech. This strong statement, however, is seldom taken literally.⁴⁶ The Supreme Court as the foremost interpreter of the Constitution has created different categories of speech, allowing them greater or lesser degree of First Amendment protection, or denying it.

The debate in the US occurs only within a category of speech which is "protected" by the First Amendment.⁴⁷ The attitude to hate speech is controversial. Many recognize the harm of hate speech and want to treat hate speech in the same way as pornography, denying for it constitutional protection.⁴⁸ The Supreme Court usually places hate speech in the protected category, regardless of the effect it has on the listener and society.⁴⁹ Obviously, the same rule applies to the Internet hate speech as well. Internet hate speech that is merely critical, annoying, offensive, or demeaning enjoys constitutional protection.⁵⁰

There are many reasons to limit hate speech, including on the Internet yet the US 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."⁵¹ Once in *Beauharnais v. Illinois* (1952), the Supreme Court upheld the statute prohibiting racist speech directed at a class of citizens for the benefit of "free, ordered life on a metropolitan, polyglot community."⁵² Yet the validity of *Beauharnais* has been seriously questioned. It has never been overruled, and the Supreme Court still mentions it in its decisions.⁵³ However, many courts have expressly

⁴⁶ Reed, O. Lee. (2000) '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

⁴⁷ Gosnell, Chris. (1998) 'Hate Speech on the Internet: A Question of Context', 23 *Queen's L.J.* 369 at p.412

⁴⁸ Op cit Tesis, (2001)

⁴⁹ Op cit Weintraub-Reiter, (1998) p.161

⁵⁰ *Statement of the Anti-Defamation League on "Hate" on the Internet before the Senate Committee on the Judiciary* (Sep. 14, 1999). <<http://www.jeffsarchive.com/ADL/ADL>

⁵¹ (*Street v. New York* (1969) p.592, *Bachellar v. Maryland* (1970))

⁵² *Beauharnais v. Illinois* (1952) at p.259

⁵³ See op cit Delgado, (1997) at p.63. For case examples, see *New York v. Ferber* (1982) and *R.A.V. v. St. Paul* (1992) where it was mentioned and distinguished but not overruled.

refuse to recognize its authority and it has been considerably weakened by subsequent cases.⁵⁴ Most commentators agree that defamation of a group is probably no longer a valid cause of action.⁵⁵ Moreover, racist remarks are different from libel in many cases as they may be true and not necessarily defamatory (*id.* p.64). The relevant issue in the latter case is a civil action for racially insulting language, which is possible within a tort of intentional infliction of emotional distress.⁵⁶ There have been a number of lawsuits where courts have awarded damages for racial insult (*Wiggs v. Courshon* (1973); *Alcorn v. Anbro Engineering, Inc.* (1970); *Agarwal v. Johnson* (1979)). However, in more recent decisions the Supreme Court was less willing to recognize this tort. "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 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."⁵⁷

One of the leading precedents for racist speech regulation is *R.A.V. v. St. Paul* (1992). Here, the Supreme Court created the standard that content-based regulations of hate speech are not permissible. It refused to impose special prohibitions on speakers who express their views on disfavored subjects (such as race, color, religion, etc.) however odious those views may be. Only general rather than content-based prohibition of insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace is permitted.⁵⁸ Clearly, this standard runs absolutely contrary to the European initiative and raises serious doubts on the possibility of successful regulation of Internet hate speech worldwide.

The rule in *R.A.V.* does not mean that hate speech is totally uncontrolled. The usual exception from the protected category is that the speech presents a "clear and present danger" and thereby may be outlawed.⁵⁹ More specifically, *Brandenburg* requires that such speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁶⁰ Some authors consider that this traditional clear and present danger test is difficult to apply in cyberspace.⁶¹ Indeed, it does not seem highly probable that impersonal, or even personal messages on a 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" of lawless actions, including advocacy of racism, and the Europeans expressly prohibit it.

A perhaps more applicable rule for Internet speech is comes from the case of *Watts v. US* (1969) where "true threats" were held not to be protected under the First Amendment.⁶² This category has already been tested for the Internet speech in several cases. In *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (1999) for example, abortion providers brought a suit against anti-abortion activist organizations, following the public disclosure of their names, photos, home addresses and other personal information on an Internet site. In three instances, after a doctor listed on the site was murdered, a line was drawn through his name. A US District Court entered judgment on the basis of a jury verdict awarding \$107 million in damages and granted permanent injunction.

⁵⁴ *Dworkin v. Hustler Magazine Inc.* (1989) p.1200; in respect of group libel claim it has been weakened by *New York Times Co. v. Sullivan* (1964).

⁵⁵ *Op cit* Wolfson, (1997) p.65

⁵⁶ Restatement (Second) of Tort defines this tort in the following way: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" (*id.* p.54).

⁵⁷ *Hustler Magazine v. Falwell* (1988) p.55.

⁵⁸ *Chaplinsky v. State of New Hampshire* (1942) p.752

⁵⁹ *Schenck v. U.S* (1919); *Brandenburg v. Ohio* (1969).

⁶⁰ *Ibid* p.447).

⁶¹ *Op cit* Lipschultz at p.11.

⁶² And also proscribed in 18 U.S.C.A. §875 (c).

The Court of Appeals, however, held that the actions of organizations could not be construed as direct threats that organizations or their agents would physically harm abortion providers, and thus were protected speech under First Amendment. It remains to be seen what will be the final solution in this case.⁶³

In *U.S. v. Alkhabaz* (1997) the court had to decide on criminal liability for electronic communications allegedly containing threats to kidnap or injure another person. Alkhabas (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. The particularity of the case was that the messages describing sexual violence against a girl bearing the name of Alkhabas' classmate were not sent to a victim but posted on an electronic bulletin board and sent to a pen pal by e-mail. The court concluded that "to constitute a threat, 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", which was not found here.⁶⁴ When applied to anonymous or obscure or non-specific hate messages on the Internet, this standard makes the successful prosecution for Internet threats very unlikely.

It appears that the judgments of the US courts leave Internet hate speech ample pathways to become an acceptable discourse in the US.⁶⁵ In most cases hate speech transmitted over the Internet will remain constitutionally protected speech, but it also may become a hate crime if it threatens a specific person.⁶⁶ 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 state hate crimes law.⁶⁷ Currently 40 states and the District of Columbia have such laws in place, yet certainly these laws do not apply to conduct or speech which is protected by the First Amendment.⁶⁸

B. Liability and jurisdictional issues

In addition to the question to what extent hate messages fall outside of the protection of the First Amendment, there is the issue of liability for unprotected messages. Initially by the courts, and then subsequently under legislation, Internet service providers were declared as not the same as a publisher or speaker of information provided by another information content provider. In other words, they could face civil liability for content they do not actually produce.⁶⁹ At the same time, ISPs are encouraged to exercise self-censorship. The same legislation provides that no 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, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.⁷⁰

The controversy of *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme* (2001) is a remarkable illustration of the conflict between European and US approaches and their consequences for racist speech on the Internet. The case originated in France when a French court found that Yahoo!, a California corporation, through its auction services had violated the provision of the French Criminal Code prohibiting exhibition of Nazi propaganda and artifacts for sale. 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

⁶³ The case was ordered for rehearing in *Planned Parenthood* 268 F.3d. 908 (2001).

⁶⁴ *Alkhabaz* (1997) p.1495.

⁶⁵ *Op cit* Tsesis (2001) at p.853

⁶⁶ *Op cit* Weintraub-Reiter, Rachel. (1998) at p.148

⁶⁷ *Wisconsin v. Mitchell* (1993).

⁶⁸ *Ibid* *Statement of the Anti-Defamation League*

⁶⁹ *Cubby, Inc. v. CompuServe Inc.* (S.D.N.Y.1991); *Zeran v. America Online, Inc.* (1997)), and 47 U.S.C.A. § 230

⁷⁰ 47 U.S.C.A. § 230

each day for non-compliance with the order. Yahoo! amended its auction policy, making it more restrictive in respect of hateful material, however, it opposed the French decision in the US court on the basis that it violated the First Amendment to the US Constitution.

The US District Court considering the global nature of the Internet remarking 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.”⁷¹ 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. Having expressed respect to the decision of the French court, the US 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.”⁷² Ironically, it largely depends on the US whether such international standards will be established.

Although the decision of the district court is currently on appeal and cannot be regarded as the highest constitutional adjudication, it is a vivid illustration of how other US courts are likely to treat such controversies. So far the First Amendment of the US Constitution protects the vast majority of extremist Web sites that disseminate racist or anti-Semitic propaganda, as well as individual statements expressing hatred of an ethnic, racial, or religious nature.⁷³

One of the biggest problems in regulating Internet speech is the question of jurisdiction. The *Yahoo!* case provides an example of how this problem is addressed when the speech in question is protected by the US First Amendment. However, US courts do not feel particularly reluctant from exercising jurisdiction over foreign companies. Thus, in the *iCraveTV* case, an US judge issued an injunction against a Canadian company ordering them not to place television broadcasts on its web page if viewers in the US could access them.⁷⁴ Since *iCraveTV* could not possibly provide its service for Canadians only, it had to shut down its web site although it was in compliance with Canadian laws.⁷⁵ A similar case involved an Italian Internet site “Playmen” that was charged with trademark infringement by the US court and was ordered not to provide access to the site to American customers.⁷⁶ Noteworthy, in *Yahoo!* the US court did not examine the technical possibility of Yahoo! to block access to certain sites just to French citizens. On the contrary, it announced that the factual question of whether Yahoo! possesses the technology to comply with the order was immaterial.⁷⁷ It seems that the US will continue to use its position of a powerful nation for one-sided application of the law and will not extend the *Yahoo!* approach to foreign entities engaged in Internet speech that is illegal in the US.⁷⁸

Even if the US decides to set up an example for other nations by freeing foreign providers from liability for certain Internet content, as some authors recommend, it is not

⁷¹ *Yahoo!* (2001) p.1187

⁷² *Ibid* p.1193

⁷³ *Ibid Statement*

⁷⁴ Crane, William. (2001) ‘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.* 267 at p.288

⁷⁵ The decision was taken by the Canadian company in an out of court settlement after the court’s preliminary injunction *Pietrucha, Bill.* (accessed Aug. 2002) *iCraveTV Shuts Down Internet site.* <http://dc.internet.com/news/article/0,,2101_312481,00.html>.

⁷⁶ *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.* (1996)

⁷⁷ *Yahoo!* 2001 p.1194

⁷⁸ *H.Res. 12* (2001)

likely that other nations will accept similar approach.⁷⁹ With the development of new technology, the “possibility and reasonableness” of blocking Internet hate speech may be decided differently than in the Felix Somm case. US providers may face more suits like *Yahoo!* in countries where hate speech is outlawed. This issue was recently addressed by Dreier’s legislation in the US Congress.⁸⁰ The bill 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 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.⁸¹

As for US users, some of them already face criminal prosecution in Germany, since they are liable for the content they put on the Internet regardless of their physical location. This perspective has been criticized from the point of view of participants. The near-impossibility of controlling the flow of information on the Internet with certainty 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.⁸² However, this argument extends to the US regulations as well. The US has subjected users from different jurisdictions to criminal liability in such areas as copyright infringement and obscenity.

IV. FILTERING AND SELF-CENSORSHIP

Self-regulation is an additionally important form of regulating hate speech on the Internet. Sometimes ISPs voluntarily agree to prohibit users from sending or receiving racist and hateful messages over their services. If such self-regulation is undertaken by many of the major ISPs it may have a significant effect. This kind of ISP activity does not raise any legal controversies. It is encouraged in European countries, and it does not implicate First Amendment rights in the United States because it does not involve government action.⁸³ As Prodigy, an Internet computer service, has replied in response to criticism of its policy to review and edit any material submitted for display, “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.”⁸⁴

Once an ISP promulgates such regulations, it monitors 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.⁸⁵ Some ISPs do not undertake contractual obligations but declare “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.⁸⁶ 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.⁸⁷

⁷⁹ *ibid* Crane 2001 at p.307

⁸⁰ *H.Res. 12* (2001).

⁸¹ *Summary of House Resolution 12, as of 1/3/2001* < <http://thomas.loc.gov/cgi-bin/bdquerytr/z?d107:HE00012:@@@L&summ2=m&>>

⁸² Johnson, D.R. and Post, D. (1996) ‘Law and Borders-The Rise of Law in Cyberspace’. 48 *Stanford L.Rev.* 1367 at p.1374)

⁸³ *Ibid Statement.*

⁸⁴ *Op cit.* Weintraub-Reiter, 1998 at p.168

⁸⁵ *Ibid Statement*

⁸⁶ Yahoo (accessed Feb. 2002) *Yahoo GeoCities Terms of Service.*

<<http://docs.yahoo.com/info/terms/geoterms.html>>

⁸⁷ *Ibid Statement*

In addition to ISPs self-censorship, users may independently ensure hate-free cyberspace for themselves by installing filtering software on their computers. Many web sites release free hate-filtering software; for example, 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 characteristics.⁸⁸ There are also some commercially marketed filters that contain many categories of objectionable material, including “intolerance” and “racism or ethnic impropriety.”⁸⁹

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 pornographic, violent, and hateful or other problematic material. There is no problem with parental control over children’s access to the Internet: parents may control how they want.⁹⁰ As to restricting adults’ access, this 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 choose to do so. Thus, when governments or ISPs exercise censorship, it mostly targets those who are really interested in learning about unpopular views, be that from curiosity or looking for allies. At least in respect of hate speech, this would be a result that was particularly incompatible with the United States’ First Amendment yet desirable in Germany.

The issue of filters and private blocking inspires much criticism. First, there is a problem of imperfect technology. Many filters are based on word recognition and in this way they screen out educational or other harmless materials on objectionable topics. The notorious example is of America Online screening out material with the word “breast”, thereby denying access to information and discussion groups about breast cancer.⁹¹ Such filters are also unreliable in case of hate speech since they ban speech on the basis of words that may be present in anti-hate propaganda as well.

Second, in case of filters based on various rating systems by independent bodies there remains a 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.”⁹² Even suggestions of computer warnings and blocking statements appearing before display of objectionable material are met with suspicion by “cyberlibertarians”, as they serve “to make judgments for the majority of the public that is unwilling to exercise independent thought.”⁹³

For those who struggle for a cyberspace free of government-imposed censorship there is one more point of criticism. As Floyd Abrams, a First Amendment scholar, asserted, “the only problem with private filters is to make sure they don’t become public filters.”⁹⁴ Even the PISC (Platform for Internet Content Selection) technology that allows multiple independent rating systems to be standardized and read by different screening software packages in accordance with personal preferences does not fully get away 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.⁹⁵ Barry Steinhardt, the Associate Director of

⁸⁸ Anti-Defamation League. (accessed Aug. 2002b) *ADL Releases Free Filtering Software Designed to "Keep Hate Out Of Homes"*. <http://www.adl.org/presrele/Internet_75/4054_75.asp>

⁸⁹ Op cit Lipschultz, 2000 at p.100; Cyber Patrol. (accessed Aug. 2002) *CyberNot for download*. <<http://www.cyberpatrol.com/trial/home.htm>>

⁹⁰ Op cit Lipschultz, 2000 at p.30

⁹¹ Op cit McGuire (1999) at p.783

⁹² Op cit Lipschultz, 2000 at p.65

⁹³ Ibid

⁹⁴ Op cit Weintraub-Reiter, 1998 p.169

⁹⁵ Op cit McGuire 1999 pp.783-788.

the ACLU echoed these concerns, “the Internet has changed the nature of the issue . . . in order to preserve free speech values, you have to concern yourselves with the actions of the dominant private companies that will structure this medium.”⁹⁶

Proponents of anti-hate speech measures are against private censorship as well but for a different reason. They argue that ISPs' filtering actions do not release the government from its responsibility to provide for rights of citizens for hate-free cyberspace and control should not be placed to private establishments but to democratic institutions.⁹⁷

V. PUBLIC DEBATE AND PUBLIC REACTION

Obviously, the regulation of Internet speech would be most successful if there was international cooperation between all major states. Nevertheless, even countries with similar democratic values differ on the content they wish to control on the Internet, indicating the wide disparity of policy choices that an international Internet regulatory structure must accommodate.⁹⁸ In Internet-restrictive and Internet-liberal societies there are eager advocates of both approaches.

The US supporters of free speech approach often rely on Justice Holmes' marketplace of ideas theory and self-government argument of Meiklejohn.⁹⁹ Their opponents reply that society derives no benefit from deliberately falsified scientific data, fabricated fallacies about intellectual and economic attributes of people and concocted stereotypes.¹⁰⁰ For 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”¹⁰¹ 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.¹⁰² 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? Besides, it is pointed out that pre-Hitler Germany had anti-hate speech laws and there is some indication that Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency.¹⁰³

There are numerous arguments on both sides, however, they do not always have much prospect to change the legal framework in any given nation. The main constitutional values vary from country to country, freedom of speech in the US, for example, human dignity in Germany. These values taken together with historical and traditional requirements are usually determinative for legislature and courts.

The conflict between different approaches creates controversy not only at the normative but also at the practical level. In 1996 at the request of the German government, the German ISP Deutsche Telekom began denying its customers access to Zundelsite, the page of Ernst Zündel, a renowned Holocaust denier and anti-Semite living in Canada. Users from the US began creating mirror sites with an exact copy of materials from Zündel's web-pages, making them available on pages of other providers that the German government could not control. The individuals who created these sites were not Nazi sympathizers, they were just free speech advocates and at present Zündel's writings are more accessible than ever.¹⁰⁴

⁹⁶ Harmon, Amy. (1997) The Self-Appointed Cops of the Information Age. *N.Y. Times*. Dec. 7.

⁹⁷ Terhoerst, Wolfgang. (1999) Selbstregulierung, Filtersysteme, Meinungsfreiheit und der Staat; Internet Content Summit: Zensur im Internet. *Computerwoche*, September 17. and op cit Tthesis, 2001 p.867

⁹⁸ Op cit McGuire 1999 p.791

⁹⁹ Op cit Weintraub-Reiter, 1998 p.177 and op cit Reed, (2000) at p.183

¹⁰⁰ Op cit Tthesis, 2001 p.849

¹⁰¹ Op cit Wolfson (1997) at p.30

¹⁰² Op cit Tthesis, 2001 pp. 844-849

¹⁰³ Strossen, Nadine. (2001) ‘Incitement to Hatred: Should There Be a Limit?’ 25 *S. Ill. U. L.J.* 243 at p.260

¹⁰⁴ Op cit Greenberg, 1997 p.693

Anti-hate movements do have an impact as well. In the past years the US mass media and anti-hate organizations have been persistently pressuring ISPs to block access to Internet sites that promote hate and racism.¹⁰⁵ Many Internet service providers are influenced by public opinion, 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;¹⁰⁶ GeoCities removed some KKK sites;¹⁰⁷ Yahoo! also announced its decision to take steps to remove hateful materials from its Internet auctions even though it proceeded to fight penalties and legal obligations imposed by the French court.¹⁰⁸

One further point deserves attention. Whether filtering and blocking measures are employed by ISPs or by governments they are likely to fail unless there is international conformity in regulating hate speech on the Internet. So far, several examples have been offered to illustrate how users may overcome separate censoring efforts. Most anti-censorship methods were developed by western liberalists to overcome local Internet restrictions for citizens in totalitarian societies.¹⁰⁹ However that same technology may clearly be used by users in democratic countries who want access to restricted web sites.

There are web-based anti-censorship proxy servers (ACP servers) that work by creating an alternate namespace for the entire Internet. It makes possible for every site on the entire Internet to appear as if it is a page on such server, and as such the site is not detected as objectionable by ISP filters. Brian Ristuccia, who set up such ACP server, contended that the ACP server is a very effective Internet censorship repair tool because it takes only one unblocked site to unblock the entire Internet.¹¹⁰ Alternatively, there is a method developed on the base of Peer-to-Peer technology. After installation of specific software on the user's computer it requires no central server for the exchange of information, thus avoiding much of control and liability for any content.¹¹¹ There is also a very simple method that requires no fancy technology (though it may be more expensive), whereby users dial into another country on their modems and bypass local service provider restrictions.¹¹²

It has been argued that with development of technology and filtering devices it may be possible to adequately control hateful content, including within the borders of one country.¹¹³ However, there is no doubt that new anti-censorship technologies will be developed as well. Unless legal responsibility for posting, transmitting, distributing hateful material on the Internet is universally recognized, the success of separate blocking measures is highly questionable. Even if it is unrealistic to expect cooperation from every country in the world, only the unified efforts of several major states (certainly, including the US) may be expected to produce sufficient results.

CONCLUSION

¹⁰⁵ Op cit Siegel, 1999 p.382

¹⁰⁶ Anti-Defamation League. (accessed Aug. 2002c) *ADL Applauds eBay for Expanding Guidelines to Prohibit the Sale of Items that Glorify Hate*. <http://www.adl.org/presrele/internet_75/3820_75.asp>.

¹⁰⁷ Op cit Siegel, 1999 p.382

¹⁰⁸ Anti-Defamation League. (posted Jan. 03, 2001) *ADL Commends Yahoo for Action Banning Nazi Memorabilia and Other Hateful Items on its Auction Site*. <http://www.adl.org/presrele/internet_75/3735_75.asp>

¹⁰⁹ Internet ohne Zensur. (posted Aug. 11, 2001b) *Tool ermöglicht Zugriff auf verbotene Websites: FreeBird umgeht Zensursysteme mit Peer-to-Peer-Netzwerk*. <<http://www.ioz.ch/news/010811.htm>>.

¹¹⁰ Human Rights Watch. (accessed Nov. 2001a) *Legal Standards Pertaining to Online Freedom of Expression*. <<http://www.hrw.org/advocacy/Internet/mena/legal.htm>>.

¹¹¹ Internet ohne Zensur. (posted May 10, 2001c) *Browser für unzensurierbare Informationen. Hacker wollen Software im Juli vorstellen*. <<http://www.ioz.ch/news/010510.htm>>.

¹¹² (Human Rights Watch. (accessed Nov. 2001b) *How Users can Protect their Right to Privacy and Anonymity*. <<http://www.hrw.org/advocacy/Internet/mena/privacy-rights.htm>>.

¹¹³ Op cit Tesis, 2001 p.836

Hate and harassment existed long before the establishment of the Internet and would continue even if the Net was heavily censored.¹¹⁴ Various states choose to fight hate speech using different means, from the free and open encounter of ideas to suppressing such speech. Indeed, there may be no single balance that would work for all cultures.¹¹⁵ The Internet has introduced new challenges for the regulation of hate speech that go beyond the borders of one country.

Obviously, an international solution would be the most effective way to deal with the problem. Yet this seems highly improbable due to the different views on the nature of free speech and freedom from censorship. The choice of a particular state policy in regulating hate speech depends on many factors, such as a nation's history, its traditional and constitutional values. Both pro-speech approach and anti-hate approach may be justified in terms of appropriateness in a respective society. No single nation can claim the absolute rightness of its position for all others.

As a result, hate speech on the Internet is and will continue to be controlled to different degrees by national authorities. In the settings of the Internet there are inevitable side effects of separate regulatory measures for all participants. Within the anti-hate state policy the state secures direct control over the material originating and put on servers within its borders. As to foreign objectionable content, its availability to the users may be limited by blocking measures but it will not be blocked out completely due to imperfect filtering technology and various technical opportunities of the Internet.

Within the pro-speech state policy there are also side effects to be considered. Although the state itself does not take any action in respect of hate speech, its ISPs and users that engage in this kind of speech may face civil and criminal liability once they happen to get into another more restrictive country.

The encouraging fact is that despite drastically different regulatory approaches, hate speech remains unwelcome in many parts of the world. Public pressure becomes a meaningful factor in fighting hate speech. Its success in persuading some large American companies to adopt anti-hate policy shows an alternative way to deal with the problem. It may not be as powerful as a government regulation but it does have an impact on the overall situation. Moreover, it does not infringe on the right to free expression in any way.

Without worldwide conformity in the regulation of hate speech with the US First Amendment as a cornerstone, hate speech will remain available on the Internet despite the regulatory efforts of other countries. It does not mean, however, that the regulatory efforts are meaningless. Various blocking and filtering measures mandated by government can help to prevent the spread of racist attitudes, for example, to the extent that they preclude Internet surfers from accidental access to racist sites. Those who are really interested will presumably find the way to get around the blocking.

Today, the regulation of Internet hate speech has reached a kind of equilibrium. Two main distinct approaches are established and adopted without entirely being able to fulfill their purpose. It is most likely that in the future each nation will pursue one of these two routes, at the same time trying to eliminate spillover effects. In the attempt at independent regulation, which has a limited prospect of success, it is necessary to remember that the best results would be achieved by unified international efforts. If not tomorrow, the day after tomorrow may offer new perspectives, new opportunities to reconsider old views and to have more recognition, tolerance and acceptance of others' values.

¹¹⁴ Greenberg, Sally. (1997) 'Threats, Harassment, and Hate On-Line: Recent Developments', 6 *B.U. Pub. Int. L.J.* 673 at p.695

¹¹⁵ *Op cit* Delgado (1997)

Appendix

A. List of Treaties, Legislative Materials and Proposed Legislation

International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification on 21 December 1965, entry into force 4 January 1969.

Recommendation 1543 (2001) Racism and xenophobia in cyberspace [The Council of Europe].

Draft of the First Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems and its Explanatory Report PC-RX (2002) 15 [The Council of Europe].

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') [The European Union].

Resolution on the Commission communication on illegal and harmful content on the Internet COM(96) 0487 - C4-0592/96 [The European Union].

Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(2001) 690, final [The European Union].

Proposal for a Council Framework Decision on combating racism and xenophobia 2001/0270 (CNS) COM(2001) 664, final [The European Union].

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 COM(98) 784 [The European Union].

German Basic Law (Grundgesetz).

Strafgesetzbuch (StGB) vom 15. Mai 1871 (RGBl. S. 127) in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I, 3322), zuletzt geändert durch das Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz - ProstG) vom 20.12.2001 (BGBl. I, 3983) [German Penal Code].

Staatsvertrag über Mediendienste (Mediendienstestaatsvertrag - MDStV) vom 1. August 1997 [German Multimedia Law].

Gesetz über die Nutzung von Telediensten (Teledienstegesetz - TDG) vom 22. Juli 1997 [German Teleservice Law].

U. S. Constitution

18 U.S.C. §875 (c) [The United States].

47 U.S.C.A. § 230 [Protection for private blocking and screening of offensive material] [The United States].

H.Res. 12, 107th Cong. (2001) [The United States].

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Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725 (1952)
Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969)
Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942)
Cubby, Inc. v. CompuServe Inc., 776 F.Supp. 135 (S.D.N.Y.1991)
Dworkin v. Hustler Magazine Inc., 867 F.2d 1188 (1989)
Holocaust Denial Case 90 BverGE 241 (1994)
Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876 (1988)
New York v. Ferber, 102 S.Ct. 3348 (1982)
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964)
Paladin Enterprises, Inc. v. Rice, 940 F.Supp. 836(1996); 128 F.3d 233 (1997); 118 S.Ct. 1515 (1998)
Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F.Supp.2d 1130 (1999); 244 F.3d 1007 (2001); 268 F.3d 908 (2001)
Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 939 F.Supp. 1032 (1996)
R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992)
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Wiggs v. Courshon, 485 F.2d 1281, 17 Fed.R.Serv.2d 1451 (1973)
Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194 (1993)
Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F.Supp.2d 1181 (2001)
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