

Censoring Cyberspace: A Free Speech Analysis of the Problems, Controversies, and
Possible Solutions Posed by International Internet Regulation

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I. Introduction

The World Wide Web has long been heralded as the great equalizer of information. Indeed, this incredible medium has revolutionized the way the world communicates, and has allowed information to become more available and accessible than ever before in human history. However, the availability of so much information to so many people has created a controversy as to what exactly should be allowed on the Internet. Independent countries around the world have taken very different approaches to this controversy in the number and severity of Internet regulations they have imposed. To a great extent, each country's level of tolerance for certain Internet content directly corresponds with its commitment to protecting the freedom of speech. Thus, in countries like the United States, where freedom of speech is highly valued, very little content is expressly prohibited. By comparison, countries like China, which have a long history of censorship, are very active in the area of Internet regulation, and prohibit a great deal of content.

The global nature of the Internet has caused this controversy to rise beyond national borders and into the international arena. In recent years, several countries have attempted to assert criminal and civil liability over citizens and entities of other countries for posting certain content on the Internet. Such behavior raises serious concerns for the international community. In response, some scholars have proposed the adoption of an international agreement regulating internet content and usage. Some have even gone so far as to lay out the specifics of what such an agreement would entail. Others, however, criticize the feasibility of reaching and implementing such an agreement.

This paper will examine the issues raised by both national and international Internet regulation from a free speech perspective. Part II will discuss the efforts that have been taken by various individual countries in regulating Internet access and content. The section will present examples of some of the most and least restrictive national approaches to regulation, as well as regulatory schemes that fall somewhere in the middle. Part III will examine recent controversies that have arisen in the international arena, as several countries have attempted to hold foreign citizens liable for Internet-related offenses. The jurisdictional issues raised by this type of state action are so incredibly complex that they could themselves be the subject of an entirely separate paper, but for purposes of this paper will be touched upon only briefly. Instead, this section will focus on the free speech implications of these controversies. Part IV will discuss some of the various solutions that have been proposed to resolve these international conflicts, including suggestions for an international agreement on Internet regulation. This section will also present the criticisms that have been expressed in opposition to an international agreement. Finally, Part V will conclude that an international agreement, while perhaps a good idea in theory, is ultimately an unrealistic objective, given the vast range of perspectives, across the international spectrum, on exactly what content should be protected and what should be prohibited. This section will conclude that a cooperative effort, on the state-to-state level, is a more practical solution to this issue.

II. National Approaches to Internet Regulation

Efforts by individual countries to regulate Internet content have proven to be as diverse as the countries themselves. While some countries prohibit a great deal of information¹, other prohibit very little.² In addition to content regulation, some countries have adopted technical measures to prevent access to certain types of information.³ This section will explore the regulatory schemes of several specific countries. In an effort to demonstrate the diversity in these regulations, the section will proceed from the least to the most restrictive Internet regulations.⁴

A. The United States

The United States' long history of protecting the freedom of speech stems from its early indoctrination of that right in the nation's Constitution.⁵ However, the protections of the First Amendment are not absolute, and certain types of speech are not protected.⁶ In 1997, the United States Supreme Court issued its first major decision concerning a

¹ China has perhaps the most restrictive regulatory scheme in the world. See Trina K. Kissel, *License to Blog: Internet Regulation in the People's Republic of China*, 17 *Ind. Int'l & Comp. L. Rev.* 229 (2007).

² The United States prohibits very little content. See Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 *Am. U. Int'l L. Rev.* 765 (1998).

³ See Christopher Stevenson, *Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World*, 30 *B.C. Int'l & Comp. L. Rev.* 531 (Spring, 2007).

⁴ The ordering of the countries on the "restrictiveness spectrum" is a highly subjective analysis conducted entirely at the author's discretion. Factors considered in the ordering process include 1) the country's history of Internet regulation, from its earliest attempts at regulation through the present day; 2) the number of regulations currently in place; 3) the breadth of the regulations 4) the amount of content prohibited by the regulations; 5) the use of "technical" censoring devices such as filtering systems; and 6) the breadth of content censored by technical devices.

⁵ U.S. Const. amend I.

⁶ *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

federal Internet regulatory statute.⁷ That statute was the Communications Decency Act of 1996 (CDA), and the provision in question made it illegal to transmit “obscene or indecent messages” to anyone under eighteen years of age.⁸ The Court struck down this provision of the statute on First Amendment grounds, holding that “the Internet should receive the highest level of First Amendment protection.”⁹

The United States Congress responded to the *Reno* decision with the passage of the Child Online Protection Act (COPA), a key provision of which required that “operators of commercial websites restrict access by children to material which the average person applying contemporary community standards would find is designed to pander to the minor’s prurient interest.”¹⁰ Unlike the CDA, this provision survived review by the Supreme Court because it only applied to sexually-based content available to minors.¹¹ The Court noted, however, that a filtering system would be preferable to regulating the content by statute, as filters would “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”¹² Aside from longstanding statutes prohibiting the use and distribution of child pornography, this provision of COPA is essentially the only federal legislation in the United States to explicitly prohibit Internet content.¹³

⁷ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁸ *Id.* at 859.

⁹ *Id.* at 870.

¹⁰ 47 U.S.C. § 609 (2000).

¹¹ *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

¹² *Id.* at 667. For a complete discussion of filtering as an alternative to statutory regulation see Aaron D. White, *Crossing the Electronic Border: Free Speech Protection for the International Internet*, 58 DePaul L. Rev. 491 (Winter, 2009).

¹³ Rappaport, *supra* note 2 at 774.

B. India

The Freedom of Speech is also guaranteed by the Indian Constitution, although it expressly qualifies this right by a “reasonable state restriction in the interest of decency and morality.”¹⁴ In attempting to define the concepts of decency and morality, the Supreme Court of India, much like that of the United States, has struggled to reach a consensus on the issue of obscenity.¹⁵ It would appear, however, that the Indian Court has taken a substantially more restrictive approach to this issue than has the United States Court, having gone so far as to uphold a criminal conviction for possessing a copy of D.H. Lawrence’s *Lady Chatterley’s Lover*.¹⁶

Prior to 1998, Internet service in India was provided by the state-owned Videsh Sanchar Nigam Limited.¹⁷ However, the government’s interest in maintaining its monopoly on Internet service was primarily based on financial rather than censorship motives, and the only websites being blocked during this time period were those of competing Internet Service Providers.¹⁸ As private companies began to develop a foothold in the Indian market, these blockages subsided.¹⁹ However, the government still controlled the gateways through which all Indian Internet Service Providers were required to operate.²⁰ For the most part, the Indian government has allowed these providers to operate without interference, only twice in the past decade imposing a

¹⁴ India Const. art XIX, cl. 2.

¹⁵ See Farzad Damania, *The Internet: Equalizer of Freedom of Speech? A Discussion on Freedom of Speech on the Internet in the United States and India*, 12 Ind. Int’l & Comp. L. Rev. 243 (2002).

¹⁶ *Ranjit v. State of Maharashtra*, 1965 A.I.R. (S.C.) 881.

¹⁷ Damania, *supra* note 15 at 258.

¹⁸ *Id.*

¹⁹ *Id.* at 259.

²⁰ *Id.* at 260

government-ordered blockage of certain websites.²¹ Both blockages, however, were short lived, and all blocked sites were accessible within a week of their original blockage.²²

While the Internet may not enjoy the same Constitutional protections in India as it does in the United States, the practical differences in the content available to citizens of the two countries appear to be minimal. The primary dilemma in India at the present time tends to be more of an accessibility issue than restrictions on the type of content that can be accessed.²³ According to one commentator, “In India, the degree of freedom enjoyed on the internet has far exceeded any similar freedom enjoyed with conventional media. The internet provides access to all who wish to use the medium, and has created a relative parity among all users.”²⁴ Thus, in India, freedom of speech on the internet is a close second to that enjoyed in the United State.

C. Germany

Like that of the United States, the German Constitution protects the right to freedom of speech.²⁵ However, the German Constitutional provision is qualified by allowing the government to limit an individual’s right if it conflicts with other people’s rights, public order, or criminal laws.²⁶ Germany’s domestic laws have explicitly banned obscenity, child pornography, racial hatred, and Neo-Nazi propaganda.²⁷

²¹ *Id.*

²² *Id.*

²³ *Id.* at 263.

²⁴ *Id.* at 264.

²⁵ Grundgesetz [Constitution] art. 5, pt. 1.

²⁶ *Id.*

²⁷ Rappaport, *supra* note 2 at 786.

Since the late 1990's, Germany has frequently been criticized for its regulation and censorship of Internet content.²⁸ Various government investigations conducted in search of pornography, Neo-Nazi materials, and other content have forced German Internet Service Providers to shut down websites and block access to many web-based forums and newsgroups.²⁹ While some of these websites were ultimately discovered to contain prohibited materials, many others were not, leading to criticisms that the German government had conducted an “electronic book burning.”³⁰ Other examples of Internet censorship in Germany include the government-forced shut down of Radikal – a website advocating the overthrow of the German government through terrorism – and the criminal prosecution of an Internet Service Provider for failure to prevent the dissemination of illegal materials in its online service, the first such prosecution by any Western democracy.³¹

The Information and Communication Services Act is Germany's most comprehensive national Internet regulatory act.³² This legislation, adopted in 1997, relieves Internet Service Providers from liability for content posted on their servers by third parties, but also makes them liable for content of which they have knowledge and a reasonable technical ability to prevent.³³ Other key components of the Act include the creation of the world's first “cyber sheriffs”³⁴ and the implementation of a rating system used to determine whether Internet content constitutes a “threat to youth.”³⁵

²⁸ *Id.* at 789.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 790-91.

³² *See* ICOSA art. I.

³³ ICOSA art. I, § 5.

³⁴ ICOSA art. 6, § 7(a).

³⁵ ICOSA art 6.

D. Australia

Although Australia does not explicitly prohibit as many different types of content as many other countries, it garners a higher “restrictiveness” classification due to its long history of using complicated filtering systems to restrict its citizens’ access to certain types of information.³⁶ Regulation of Internet content in Australia is governed by the Australian Broadcasting Authority.³⁷ Specific types of content prohibited by the Authority include child pornography, materials related to terrorism, and materials related to euthanasia.³⁸

The Broadcasting Services Amendment Act of 1999 is Australia’s primary source of domestic Internet regulation.³⁹ The Act gives the Australian Broadcasting Authority regulatory authority over Internet content, and the power to investigate complaints about online materials.⁴⁰ Pursuant to the Act, the Authority has established a ratings system, by which questionable content is designated as R, X, or RC.⁴¹ R-rated materials hosted by Australian servers are considered illegal, as are X and RC-rated materials hosted anywhere in the world.⁴² When the Authority discovers illegal material hosted on Australian servers, it can issue a “take-down order,” requiring the Internet Service Provider to remove the prohibited content.⁴³ When the Authority finds illegal content

³⁶ Carolyn Pennfold, *Nazis, Porn, and Politics: Asserting Control Over Internet Content*, 6 J. Int’l L. & Tech. 2 (July 2, 2001), available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/penfold

³⁷ Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. Int’l LJ. 57 (Spring, 2003).

³⁸ Jennifer L. Prinz, *The Phenomenon of Cybersuicide: An Examination of Australia’s Solution, the Criminal Code Amendment (Suicide Related Material Offenses) Act 2005 and the Difficulty of International Implementation*: 18 Ind. Int’l & Comp. L. Rev. 477 (2008).

³⁹ Pennfold, *supra* note 25 at 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

hosted on servers outside of Australia, the site is added to a list of banned sites and added to the country's highly advanced filtering software, which all Internet Service Providers are required to provide to their customers.⁴⁴ While the use of this filtering software is not yet mandatory for all Australian households, the Australian Labor Party has recently committed to implementing such a requirement.⁴⁵

E. China

If the Internet, in a worldwide sense, is the "Great Equalizer" of information, the Internet in China is perhaps best described as the "Great Firewall."⁴⁶ China's efforts to regulate Internet access and content are numerous and far-reaching. Chinese regulatory endeavors include statutes that impose criminal and civil liability on Internet Service Providers, Internet Content Providers, and Internet users who attempt to post or access prohibited materials; highly advanced filtering systems that prevent access to forbidden content; and obstructions that make it difficult for many citizens to access the Internet at all.⁴⁷ In addition, the Chinese Communist Party has found ways to use the Internet to its advantage, as a means to convey the Party's position on controversial issues and, generally, to spread propaganda.⁴⁸

Censorship in China is by no means a new phenomenon. For decades, the Chinese government has controlled the national media, and has looked with extreme disfavor on any criticisms of the government or its policies.⁴⁹ A detailed listing of all forms of prohibited content would be a lengthy endeavor. The primary distinction

⁴⁴ *Id.*

⁴⁵ Electronic Frontiers Australia, *Labor's Mandatory ISP Internet Blocking Plan*, 1, March 4, 2008, available at <http://www.efa.org.au/censorship/mandatory-isp-blocking/>.

⁴⁶ Kissel, *supra* note 1 at 229.

⁴⁷ *Id.* at 233.

⁴⁸ *Id.*

⁴⁹ Stevenson, *supra* note 3 at 540.

between content prohibited in China and that prohibited in the aforementioned countries is this: while some countries prohibit controversial materials affecting the public health, welfare, and morals, in China there *is* no controversy (at least publicly) about what should be prohibited precisely because China also prohibits most forms of political speech. This prohibition, aside from any means used to achieve it, is the essential reason that China stands alone as the most restrictive country with respect to Internet Regulation.

Since 1998, the Chinese government has adopted five major regulatory acts governing private use of the Internet, the most recent of which were the Registration Administration Measures for Internet Services and the Administration of News Regulations, both adopted in 2005.⁵⁰ These increasingly restrictive regulations have increased the number of classifications of illegal materials from five, to nine, and most recently, to 11 broad classifications.⁵¹ These classifications are so broad they can encompass almost any type of content. One classification, for example, prohibits content that would “jeopardize the security of the nation, divulge state secrets, subvert the national regime, or jeopardize the integrity of the nation’s unity.”⁵² Additionally, by making Internet Service Providers, Internet Content Providers, and individual Internet users criminally and civilly liable for illegal Internet content, the Chinese government “ensures that content on the Internet is not double – but triple – checked: at the gateway, at the network responsible for delivering the content, and at the receiver itself.”⁵³ The

⁵⁰ Kissel, *supra* note 1 at 238-39.

⁵¹ *Id.*

⁵² Provisions on the Administration of Internet News Information Services, art. 19 (promulgated by State Council Information Office & Ministry of Information Industry, Sept. 25, 2005), translated in Congressional-Executive Commission on China, Provisions on the Administration of Internet News Information Services, <http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=24396> (last visited November 21, 2009).

⁵³ Kissel, *supra* note 1 at 237.

possible punishments for violations of these content regulations include fines, imprisonment, and, where state secrets are involved, even death.⁵⁴ By arresting, convicting, and imprisoning several prominent individuals for their roles in posting illegal content, the Chinese government has created a widespread fear among the Chinese people, resulting in well-functioning system of self-censorship.⁵⁵

China also uses an advanced system of technological controls to limit individuals' access to Internet content:

The [Chinese Communist Party] has created the most extensive, technologically sophisticated, and broad-reaching system of Internet filtering in the world. It is difficult to determine exactly how the Party controls the Internet because it changes dynamically over time. Filtering primarily occurs at the "backbone level" of China's network through the construction of a nationwide firewall. In addition, ISPs, Chinese search engines, and blog-hosting services, among others, also filter content. When content is filtered, users sometimes view a "block page," which is a webpage with text identifying that the content may not be accessed. Filtering is often less obvious, however, appearing to be network errors, redirections, or lengthy timeouts rather than deliberate blocking.⁵⁶

The actual content which is restricted through this filtering system varies on a day-to-day basis. Often, it used to block access to foreign media sources.⁵⁷ The websites of international news organizations such as Amnesty International, Time, and the BBC are routinely blocked.⁵⁸ The technology is also commonly used to selectively censor the results of searches on popular search engines such as Google and Yahoo!.⁵⁹

⁵⁴ Kristen Farrell, *The Big Mamas are Watching: China's Censorship of the Internet and the Strain on Freedom of Expression*, 15 Mich. St. J. Int'l L. 577 (2007).

⁵⁵ *Id.* at 585.

⁵⁶ Kissel, *supra* note 1 at 246 (internal citations omitted).

⁵⁷ *Id.* at 247.

⁵⁸ *Id.*

⁵⁹ *Id.* at 248.

III. International Conflicts: The Yahoo! Case Study

The extreme diversity in national approaches to internet regulation has inevitably lead to several international conflicts, as countries with more restrictive regulatory schemes have attempted to assert jurisdiction over citizens and entities from less restrictive countries. While there are numerous examples of these conflicts, one case in particular, *Yahoo!, Inc. v. La Ligue Contre Racisme et L'Antsemitisme*, has generated more controversy than any other.⁶⁰ This section will set forth the background to this controversy, and then examine the decisions of both the French and United States courts, including commentary about the merits of each decision.

A. Background

In 2000, Yahoo!, Inc. was a large Internet Service Provider incorporated under the laws of Delaware, and based primarily out of Santa Clara, California.⁶¹ In addition to its United States-based website, us.yahoo.com, it also operated approximately twenty regional subsidiaries, which operated under the languages and laws of the countries in which they could be accessed.⁶² Among the many services offered by Yahoo! was an online auction site, where users all around the world could buy and sell various types of merchandise.⁶³ The site's user agreement prohibited users from selling products to other users in countries where such transactions would be illegal.⁶⁴

⁶⁰ 169 F Supp 2d 1180

⁶¹ *Id.*

⁶² *Id.* at 1183

⁶³ See Elissa A. Okoniewski, *Yahoo, Inc. v. LICRA: The Frnch Challenge to Free Expression on the Internet*, 18 Am. U. Int'l L. Rev. 295 (2002).

⁶⁴ *Id.* at 312-13.

The controversy which eventually gave rise to litigation began when French users started purchasing Nazi and Third Reich memorabilia from United States-based sellers.⁶⁵ Although such memorabilia was prohibited on Yahoo!'s French subsidiary, yahoo.fr.com, the company had no restrictions in place to keep French users from accessing the United States-based site, where the materials in question could be freely bought and sold.⁶⁶ On February 19, 2000, the Union of Jewish Students in France and the International League Against Racism and Anti-Semitism called for a boycott on Yahoo!⁶⁷ Three months later, on May 15, 2000, the two organizations filed suit in France's Tribunal de Grande Instance, requesting that Yahoo! shut down access to the offensive materials.⁶⁸ The organizations also asked that a fine of \$91,000 per day be imposed if the site was not shut down.⁶⁹

Attorneys for Yahoo! argued that the materials in question were permissible in the United States, and were made available for sale only on the United States-based website.⁷⁰ They contended that the company could not be responsible for ensuring that it was in constant compliance with the laws of every country in the world.⁷¹ The French prosecutor, however, contended that "directly or indirectly, the company was exercising an activity on [French] soil and should comply with the law."⁷²

⁶⁵ *Id.*

⁶⁶ Caitlin T. Murphy, *International Law and the Internet: An Ill-Suited Match*, 25 *Hastings Int'l & Comp. L. Rev.* 405 (Summer, 2002).

⁶⁷ *Id.* at 406.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 407

⁷¹ *Id.*

⁷² *Id.*

B. French Court Decision

The French tribunal found Yahoo! to be in violation of R. 645-1 of the French Criminal Code, which outlaws the “sale, exchange or display of Nazi-related materials or Third Reich memorabilia.”⁷³ It then ordered Yahoo! to take the following actions:

- (1) eliminate French citizens' access to any Nazi objects, relics, insignia, emblems, and flags on the Yahoo.com auction site;
- (2) eliminate French citizens' access to web pages on Yahoo.com that display text, extracts, or quotations from *Mein Kampf*, Hitler's autobiography, or Protocol of the Elders of Zion, a collection of writings about the secret police of Czarist Russia;
- (3) post a warning on Yahoo! France stating that searches on Yahoo.com could lead to sites containing material prohibited by R. 645-1 of the French Criminal Code, and that viewing of such material could result in legal action against the Internet user; and
- (4) remove from browser directories accessible in the French Republic index headings entitled “negationists” and from all hypertext links the term “negationists” under the heading “Holocaust.”⁷⁴

In response to the decision, Yahoo! asked the French court to reconsider its order, claiming that compliance with the order would be technologically impossible.⁷⁵ The Court then set about gathering numerous expert opinions about the feasibility of implementing its order.⁷⁶ When the study was complete, the Court reaffirmed its order and gave Yahoo! three months to comply, after which a fine of 100,000 francs per day would be enforced for noncompliance.⁷⁷ Reluctantly, Yahoo posted the warning, prohibited the sale of items that violated the French code, and amended its auction policy to prevent the future sale of such items.⁷⁸

⁷³ Okoniewski, *supra* note 63 at 314.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 315.

⁷⁷ *Id.*

⁷⁸ Murphy, *supra* note 66 at 407.

C. United States District Court Decision

After the French court reaffirmed its order, Yahoo! filed a complaint in the U.S. District Court for the Northern District of California, seeking a declaratory judgment that the French decision was unenforceable under United States law.⁷⁹ Yahoo! argued that it could not comply with the order without completely banning Nazi-related materials from its site, a requirement which would violate its First Amendment rights.⁸⁰ Applying, U.S. Constitutional law, the District Court found that the First Amendment would prohibit any U.S. court from issuing an order like that handed down by the French tribunal.⁸¹ The French court's order, it said, could not survive strict scrutiny.⁸² The Court further noted that the order required Yahoo! to take actions that would impermissibly chill or censor protected speech.⁸³

The Court was careful to point out that full faith and credit is normally given to the courts of sister states.⁸⁴ However, such deference is a matter of comity between nations, and foreign judgments will not be enforced when they “violate the fundamental interests or public policy of the United States.”⁸⁵ The Court reasoned that limited comity in the area of free speech was appropriate, because the protections of the First Amendment would be destroyed if other countries were allowed to enter judgments

⁷⁹ *Yahoo!, Inc.*, 169. Supp. 2d at 1185.

⁸⁰ *Id.* at 1186.

⁸¹ *Id.* at 1189.

⁸² *Id.*

⁸³ *Id.* at 1191.

⁸⁴ *Id.* at 1192.

⁸⁵ *Id.*

against United States citizens based solely on the laws of their respective nations.⁸⁶ The Curt ultimately granted Yahoo!’s request for declaratory judgment.⁸⁷

D. Fallout from the Yahoo! Case

As might have been expected, the French tribunal’s assertion of jurisdiction over a United States company, and U.S. District Court’s subsequent invalidation of the French court’s order generated a great deal of controversy within the international community.⁸⁸ The vast majority of the criticisms were directed toward the decision of the French court.⁸⁹ Among other things, the French tribunal was criticized for disrespecting national sovereignty, trampling on the free speech rights of French citizens, violating the International Covenant on Civil and Political Rights and the European Convention on Human Rights, and setting a poor precedent for the rest of the international community.⁹⁰

Perhaps the most controversial aspect of the French judge’s decision was his statement that, by taking the Nazi paraphernalia off its website, Yahoo! would “satisfy an ethical and moral requirement shared by all democratic societies.”⁹¹ This statement would seem to ignore the fact that the United States has a long history of free speech protection, including protections for hate speech. It has been argued that this lack of recognition of the United States’ position demonstrates a “high level of disregard for the rights of other nations to have different views, a right which flows from their sovereign

⁸⁶ *Id.*

⁸⁷ *Id.* at 1193.

⁸⁸ Julian Mailland, *Freedom of Speech, the Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. Int’l L. & Pol. 1179 (Summer, 2001); Daniel Arthur Laprés, *Of Yahoos and Dilemmas*, 3 Chi. J. Int’l L. 409 (Fall, 2002); Pamela G. Smith, *Free Speech on the World Wide Web: A Comparison Between French and United States Policy with a Focus on UJEF v. Yahoo!, Inc.*, 21 Penn. St. Int’l L. Rev. 319 (Winter, 2003); Okoniewski, *supra* note 63 at 322; Murphy, *supra* note 66 at 416.

⁸⁹ Mailland, *supra* note 88 at 1212.

⁹⁰ *Id.* at 1213.

⁹¹ *Yahoo!, Inc.* 169 F. Supp. 2d 1178.

characters”⁹² The decision creates the impression that French domestic law is in some way superior to the laws of other nations, and attempts to “coerce” citizens of other nations into complying with French laws.⁹³ This type of coercion is a violation of many longstanding principles of international law, including basic principles of equality and sovereignty.⁹⁴

The French court’s decision has also been criticized as a major step backward in the area of free speech protection, both for French citizens and for Internet users around the world.⁹⁵ Because France has very restrictive prohibitions on many different types of speech, many different websites from all over the world could potentially contain content that is prohibited in France.⁹⁶ Based on the French court’s decision, the Content Provider for each one of those websites could potentially be subject to jurisdiction in French courts.⁹⁷ Fear of such liability could have a “chilling effect” on Internet users all over the world, causing them to refrain from posting material that is illegal under French law, but legal under the laws of the users’ own countries.⁹⁸

It has also been argued that the French decision sets a dangerous precedent in international law.⁹⁹ According to one professor, “With regard to the internet, decisions rendered by tribunals of dominant countries such as France and the United States sometimes become very important. Because of the planetary character of the Network,

⁹² Mailland, *supra* note 88 at 1213.

⁹³ *Id.*

⁹⁴ See U.N. Charter art. I: “[T]he Organization is based on the principle of the sovereign equality of all its Members.”

⁹⁵ Mailland, *supra* note 88 at 1213.

⁹⁶ *Id.* at 1214.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1215.

solutions applied in one instance can be considered relevant in other countries.”¹⁰⁰ If other countries were to follow the French approach, the consequences would be devastating. It is very easy to conceive of hypothetical situations in which France would suffer the backlash of its own decision.¹⁰¹ China, for example, could choose to sue the French Republic for posting the Declaration on the Rights of Man to its official website.¹⁰² French fashion designers who post pictures of new and trendy miniskirt designs on their websites could be prosecuted in Iran for violating the Iranian conception of women in society.¹⁰³ The possibilities are endless. Ultimately, the only content which could safely be viewed or posted on the Internet would be that which is legal in every country of the world, leading to a “lowest common denominator” approach to Internet regulation.¹⁰⁴

IV. Proposals and Criticisms of International Regulations

Due in large part to the fallout from the *Yahoo!* case, a movement has begun in the international community to reform Internet regulation through an international agreement. However, even among those who support such an agreement, there is little consensus as to what it should contain, how it should be implemented, and how it should be enforced. The difficulty in reaching a consensus lends support to the criticisms of those who oppose an international agreement. They argue, among other things, that it would be impossible for the international community to reach such an agreement, and even if an agreement were reached, it would be technologically impossible to enforce.

¹⁰⁰ Interview by Lionel Thoumyre with Pierre Trudel, Professor, University of Montreal (Jan.-Mar. 2001), available at <http://www.juriscom.net/en/uni/doc/yahoo/trudel.htm>.

¹⁰¹ See Mailland, *supra* note 88 at 1216.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

This section will detail the various suggestions made by those who support an international agreement, and then provide commentary from those who criticize an international regulatory solution.

A. Proposals for International Regulation

One method of regulation that has been proposed is a Global Free Speech Act, modeled after the Berne Convention.¹⁰⁵ Such an Act would apply minimum standards of free speech protection to the Internet through an international agreement.¹⁰⁶ Several standards have been proposed, through which such an agreement could be implemented.¹⁰⁷

One suggestion is to use the European Union's approach under the E-Commerce Directive.¹⁰⁸ The directive provides that companies are subjected only to the jurisdiction and the law of the Member State in which they are established.¹⁰⁹ Applying this standard to free speech, citizens of individual nations would only be liable to their home country for content they post on the Internet. According to proponents, "[T]his approach would provide simplicity and predictability because [citizens] would know the extent of their legal liability and with which domestic laws they would need to comply."¹¹⁰

¹⁰⁵ Viktor Mayer-Schonberger and Teree E. Foster, *A Regulatory Web: Free Speech and the Global Information/Infrastructure*, 3 Mich. Telecomm. & Tech. L. Rev. 45 (1996-1997); White, *supra* note 12 at 520. The Berne Convention, established in 1866, was the first international convention on copyright law. The primary principle which the authors draw from the Berne Convention is the concept that authors are only entitled to as much copyright protection in a given country as a citizen of that country would enjoy. Thus, an American author could only expect to receive as much copyright protection in Germany as any German citizen would ordinarily enjoy, and vice versa.

¹⁰⁶ White, *supra* note 12 at 520.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Mayer-Schonberger, *supra* note 105 at 49.

¹¹⁰ White, *supra* note 12 at 521.

Another suggested approach to the Global Free Speech Act is to adopt the language used by the United States House of Representatives in the Global Online Freedom Act.¹¹¹ While this approach, if adopted, would seem to fulfill the free speech guarantees of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, it would provide no greater method for enforcement than those two international instruments currently have in place – which is to say, virtually nothing.¹¹² One possible solution to this concern would be that all signatories to the Global Free Speech Act agree to adopt national legislation prohibiting businesses from cooperating with countries that restrict Internet speech, thereby isolating the most restrictive countries.¹¹³

A final method of implementing the Global Free Speech Act would be to use the international legal custom of *jus cogens*. One conception of how this approach would work is described as follows:

[A] method should be devised for defining certain categories of speech that will be subject to regulation, while at the same time staunchly protecting all speech not within these categories. Essentially, regulatory lines should be drawn circumspectly, so that only speech that is encompassed within certain specified and narrow confines can be regulated on the basis of its content. All speech outside these narrow boundaries should be assiduously sheltered from content-based regulation.¹¹⁴

¹¹¹ Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. § 101(1). The Act would require all countries to “promote the ability of all [people] to access and contribute information, ideas, and knowledge via the Internet and to advance the right to receive and impart information and ideas through any media . . . regardless of frontiers.”

¹¹² See Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.

¹¹³ White, *supra* note 12 at 525.

¹¹⁴ Mayer-Schonberger, *supra* note 105 at 57.

According to supporters, a system using *jus cogens* would provide international protection for the vast majority of Internet content.¹¹⁵

Instead of a binding international agreement regulating Internet content, some scholars have proposed that an international governing body be created to promulgate rules and Internet regulations.¹¹⁶ This body would have the ultimate authority to determine exactly what type of content is permissible on the Internet and what should be prohibited.¹¹⁷ Unfortunately, the specifics of how such a governing body would operate have never been fully established. Nor has there been any effort made to explain how this approach avoids any of the problems inherent in creating binding international agreements.

Other scholars have advocated for the creation of an international court to handle Internet issues.¹¹⁸ Such a court would be in a much better position than any domestic court to address the many complicated jurisdiction issues raised in cases such as *Yahoo!*.¹¹⁹ Additionally, advocates suggest this type of court would be particularly useful with respect to criminal issues, or cybercrimes.¹²⁰ It would create a neutral forum for trying these types of criminal cases, and would allow for the free flow of evidence and information between countries.¹²¹

¹¹⁵ *Id.*

¹¹⁶ Michael H. Spencer, *Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty*, 3 Va. J. L. & Tech 1 (Spring, 1998).

¹¹⁷ *Id.* at 34.

¹¹⁸ Okoniewski, *supra* note 63 at 337 (also noting the limitations and potential problems with the creation of such a court).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

B. Criticisms of International Regulation

While the international regulatory schemes described above do have their share of supporters, the vast majority of scholars tend to believe that these types of regulations are not workable in practice.¹²² Some of the many criticisms that have been made in opposition to an international agreement include “scope issues, cultural differences, varying standards of computer technology, difficulty in reaching a consensus, and difficulty with enforcement.”¹²³

The criticism that arises most frequently with regard to this issue is the infeasibility of reaching an international consensus on exactly which content such should be prohibited and which should be permitted on the Internet.¹²⁴ As the study of various national approaches to Internet regulation¹²⁵ indicates, countries around the world vary greatly in the type and amount of Internet content they prohibit. These are not minor legal differences that vary slightly from one jurisdiction to the next and can be easily overcome through reason and civil discourse; they are major doctrinal differences that represent millennia of culture and values. In the United States, for example, the First Amendment has become such a treasured freedom, it is difficult to believe that nation would ever agree to prohibitions on any new types of content. It is equally difficult to foresee any Western European nations, having suffered through the atrocities of the Holocaust, altering their positions on hate speech. This is to say nothing of the more restrictive countries in Asia and the Middle East. Indeed, it seems highly unlikely that

¹²² Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 Cornell Int'l L.J. 435 (2000); Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Controversies: A Comparative Analysis*, 20 Conn. J. Int'l L. 199 (Summer, 2005); Murphy, *supra* note 66; Mailland, *supra* note 88 at 1218.

¹²³ Timofeeva, *supra* not 122 at 425.

¹²⁴ See Shipchandler, *supra* note 122 at 453.

¹²⁵ *Infra*, Section II.

these drastically different perspectives could be forged into a cohesive international agreement on internet regulation.

An international governing body does not seem to adequately solve this problem either. The body would still be comprised of representatives from individual countries, who would ultimately have to come to some sort of agreement about what type of content could be regulated. Even if the body did manage to reach a consensus, its rules would be meaningless if the individual nations were so upset by them that they refused to implement them. The same logic holds true for an international tribunal. Its decisions would be meaningless if it did not have the respect of the international community, which would likely be the case in the absence of a consensus on what exactly should be prohibited.

Another frequent criticism of international approaches to Internet regulation is the technological difficulty in implementing and enforcing these agreements. One problem, for example, is that any international agreement would likely be dependent on the ability to identify individual Internet users based on their nationality.¹²⁶ Many Internet users can be identified based on their Internet Protocol address, which is provided for them by their Internet Service Provider.¹²⁷ Assuming the Internet Service Provider is based in the same country as the Internet user, the nationality of the user can usually be identified by the Internet Protocol address.¹²⁸ However, many Internet users rely on Internet Service Providers from other countries, making it nearly impossible to determine their national origin. For example, America Online provides Internet access to millions of people all

¹²⁶ Shipchandler, *supra* note 122 at 455.

¹²⁷ *Id.*

¹²⁸ *Id.* at 456.

around the world.¹²⁹ However, because all of America Online's servers are located in Virginia, any person using that company as an Internet Service Provider would also appear to be located in Virginia based on their Internet Protocol address.¹³⁰ Thus, it quickly becomes very difficult to determine the nationality of a large percentage of Internet users. This is just one of the many technological problems with an international regulatory agreement.¹³¹

V. Conclusion

The Internet is undoubtedly one of humankind's greatest creations. The incredible wealth of knowledge it provides is constantly advancing society into the future. Unfortunately, access to this information is not enjoyed equally around the globe. Many countries continue to be highly active in regulating Internet content and usage, preventing their citizens from reaping the full benefit of this powerful communications medium. But no matter how restrictive this form of censorship may be, the authority to decide what Internet content is permissible must ultimately be left to the individual countries. An international agreement on permissible Internet content is simply not going to happen. The differences in opinion between countries are far too great for this idealistic solution to ever become a reality. Furthermore, states must, as a matter of respect for national sovereignty, refrain from asserting jurisdiction over entities or individuals from other states who post Internet material that is prohibited by that state, even when the content is viewed by citizens of the state in which it is prohibited. The *Yahoo!* case illustrates why it is vital for states to exercise restraint in this regard. As

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See Id.* Shipchandler ultimately concludes that neither national nor international regulatory solutions are workable in practice, and suggests that non-regulation is the best approach to Internet-related issues.

worldwide Internet usage continues to grow at an exponential rate, these controversies are almost certain to increase in number and magnitude. It is essential for states to recognize one another's sovereignty in order to prevent these controversies from transforming into a major international conflict.