

2007

A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content

Paul Przybylski

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [First Amendment Commons](#), [International Trade Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Paul Przybylski, A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content, 9 *Vanderbilt Journal of Entertainment and Technology Law* 927 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol9/iss3/11>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Entertainment & Technology Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Thu Nov 16 09:58:26 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Paul Przybylski, A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content, 9 VAND. J. ENT. & TECH. L. 927 (2007).

ALWD 7th ed.

Paul Przybylski, A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content, 9 Vand. J. Ent. & Tech. L. 927 (2007).

APA 7th ed.

Przybylski, P. (2007). common tool for individual solutions: why countries should establish an international organization to regulate internet content. Vanderbilt Journal of Entertainment and Technology Law , 9(3), 927-956.

Chicago 17th ed.

Paul Przybylski, "A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content," Vanderbilt Journal of Entertainment and Technology Law 9, no. 3 (Spring 2007): 927-956

McGill Guide 9th ed.

Paul Przybylski, "A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content" (2007) 9:3 Vand J Ent & Tech L 927.

AGLC 4th ed.

Paul Przybylski, 'A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content' (2007) 9(3) Vanderbilt Journal of Entertainment and Technology Law 927

MLA 9th ed.

Przybylski, Paul. "A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content." Vanderbilt Journal of Entertainment and Technology Law , vol. 9, no. 3, Spring 2007, pp. 927-956. HeinOnline.

OSCOLA 4th ed.

Paul Przybylski, 'A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content' (2007) 9 Vand J Ent & Tech L 927

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content

I.	BACKGROUND.....	932
	A. <i>A Brief Description of How the Internet Works</i>	932
	B. <i>The Internet Preferences of Different Countries</i>	934
	1. Europe.....	934
	2. United States.....	936
	3. China.....	938
	C. <i>Practical and Theoretical Steps Towards International Internet Regulation</i>	940
	1. Practical Steps.....	940
	2. Theoretical Approaches.....	941
II.	WHY AN INTERNATIONAL ORGANIZATION COULD REGULATE THE INTERNET MORE EFFECTIVELY.....	942
	A. <i>The Basic Idea</i>	942
	B. <i>The Benefits of International Organizations</i>	944
	1. Providing a Forum for Negotiations.....	944
	2. Offering a Central Administrative Apparatus	945
	3. Operating as an Independent Third Party	945
	4. Reconstructing Identities and Interests	946
	C. <i>An International Organization to Regulate the Internet Would Capture These Benefits</i>	947
	1. Why the Theoretical Model for International Organizations Fits the Internet Context	947
	2. Benefits by Serving as a Forum for Negotiations.....	948
	3. Benefits from Providing an Organizational Apparatus	949
	4. An International Organization as a Neutral Third Party and Potential Creator of Shared Norms	951
III.	POTENTIAL CRITICISMS OF CREATING AN INTERNATIONAL ORGANIZATION TO REGULATE THE INTERNET.....	952
IV.	CONCLUSION.....	955

Imagine you want to learn more about a recently-passed law. In doing so, you attempt to access the U.S. Justice Department's website. But instead of "www.usdoj.gov," you accidentally type "www.usdoj.com" into your web browser. As a result, you do not access the Justice Department's website, but instead another website displaying content that is deeply offensive to you—for example, a terrorist website spreading anti-U.S. propaganda. Something similar happened to German Internet users in 2001. When they tried to access the German Ministry of the Interior's website, they accidentally ended the Ministry's web address by typing ".com" instead of the correct ".de," and as a result were taken to a Neo-Nazi website containing Nazi symbols and hate speech, both of which are illegal under German law.¹ The website was run by U.S.-based Neo-Nazi Gerhard Lauck, who had placed it on a server stationed in the United States and thus outside of the jurisdiction of German laws. Only after Germany filed a lengthy trademark infringement complaint before the World Intellectual Property Organization (WIPO) was the website eventually taken down.²

The case illustrates a widespread problem of the Internet age. No other technology has ever allowed people to disseminate their views to a global audience as rapidly as the Internet. In the most common scenario, a person gains access to the Internet through an Internet Service Provider (ISP) and expresses his views on a website that is stored on a server, accessible to Internet users all over the world.³ Because the Internet crosses national borders so easily, countries struggle to regulate it through national legislation.⁴ Countries can regulate Internet content published by ISPs stationed within their borders because national law applies to these providers.⁵

1. See, e.g., Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law* (Part I), 4 GERMAN L.J. 1, 2, 16 (2003), available at http://www.germanlawjournal.com/pdf/Vol04No01/PDF_Vol_04_No_01_01-44_Public_Brugger.pdf.

2. See THE STEPHEN ROTH INSTITUTE, ANTI-SEMITISM AND RACISM: UNITED STATES OF AMERICA (2001-2002), <http://www.tau.ac.il/Anti-Semitism/asw2001-2/usa.htm>; see also Bundesrepublik Deutschland (Republic of Germany) v. RJG Eng'g Inc./Gerhard Lauck, No. D2002-0110 (WIPO Admin. Panel Decision 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0110.html>.

3. See generally Jeff Tyson, How Internet Infrastructure Works, <http://computer.howstuffworks.com/internet-infrastructure.htm/printable> (last visited Feb. 17, 2007). This process is described in detail *infra* in Part I.A

4. See Keith Perine, *The Trouble with Regulating Hatred Online*, CNN.COM, July 25, 2000, <http://archives.cnn.com/2000/TECH/computing/07/25/regulating.hatred.idg>.

5. See *id.*

However, if an ISP is stationed abroad, a country's national laws cannot regulate what the ISP publishes.⁶ Yet due to the global nature of the Internet, users within a country can view the content published by foreign ISPs, thus circumventing national legislation.⁷

Because national legislation cannot reach Internet content published abroad, this note proposes that countries should establish an international organization for the regulation of Internet content. Such an organization could serve as a forum in which countries could collaborate with ISPs and private Internet businesses, such as Amazon and eBay, to agree on what Internet content should be accessible in each country. Rather than a uniform international regulatory scheme, such a solution would attempt to respect each country's specific preferences regarding Internet regulation. Reaching out to ISPs and private Internet businesses located abroad, each country could more effectively regulate which Internet content would be accessible within its national borders.

Because of the global nature of the Internet, an international solution is arguably the only viable method for effectively regulating Internet content. A country cannot solve its problems by banning offensive content from servers stationed within its borders when its citizens can still access websites from servers stationed abroad. Additionally, different countries have different preferences as to what Internet content they want to ban. Germany and several European countries want to ban certain forms of hate speech, in particular Neo-Nazi ideology that is often spread by servers stationed in the United States.⁸ The United States has generally allowed the expression of Neo-Nazi ideology and similar hate speech with reference to the First Amendment's broad protection of speech.⁹ However, the United States has attempted to ban certain pornographic material and has recently banned Internet gambling.¹⁰ China has banned politically

6. *See id.*

7. *See id.*

8. KidShield, International Internet Politics: Borderless Technology, http://www.kidshield.com/politics/politics_international.htm (last visited Feb. 17, 2007).

9. *See, e.g.*, ANTI-DEFAMATION LEAGUE, COMBATING EXTREMISM IN CYBERSPACE: THE LEGAL ISSUES AFFECTING INTERNET HATE SPEECH 3 (2000), http://www.adl.org/Civil_Rights/newcyber.pdf; *see also infra* Part II.B.2.

10. Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1003-04 (1998); U.S. Ban Sparks Web Gaming Crisis, <http://www.poe-news.com/stories.php?poeurlid=64750> (last visited Feb. 17, 2007).

objectionable material,¹¹ and Muslim countries may be interested in banning content such as caricatures of Mohammed, which are considered sacrilegious under Islam.¹²

Because countries have diverging preferences as to what content they want to ban, as well as to what content they do *not* want to ban, it is difficult for them to agree on one regulatory solution that would be applied to all countries. This problem became clear during the latest effort for an international regulation of the Internet: the Cybercrime Treaty. The United States signed the main part of the treaty, which deals with measures to prevent general Internet crimes such as Internet fraud, but refused to sign an addendum to the treaty that would ban Neo-Nazi websites and other sites spreading hate speech.¹³ According to the United States, the addendum violates the First Amendment's right to free speech, and the United States cannot sign a convention that abridges a constitutional protection.¹⁴ However, because many servers, and especially those that spread hate speech content, are stationed within the United States,¹⁵ any solution without U.S. participation severely limits the effectiveness of any international regulation.

Because of such problems, any international Internet regulation must allow for country-specific solutions. An international organization is the best vehicle for achieving this goal. Such an organization could provide a forum for regular meetings and agreements between countries and ISPs as well as private Internet business. ISPs could regulate what content would be available in a specific country, while businesses like Amazon and eBay could regulate what products they sell to customers abroad. Thus, governments and business could work out country-specific solutions. For governments, this is desirable because it would more effectively

11. See Hanley, *supra* note 10, at 1005-06; see also JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 87-90 (2006).

12. See Mohammad Kamran, *SC Seeks Legal Avenues to Ban Blasphemous Cartoons Worldwide*, DAILY TIMES, Mar. 14, 2006, http://www.dailytimes.com.pk/default.asp?page=2006\03\14\story_14-3-2006_pg1_7.

13. See Declan McCullagh & Anne Broache, *Senate Ratifies Controversial Cybercrime Treaty*, CNET NEWS.COM, Aug. 4, 2006, http://news.com.com/2100-7348_3-6102354.html.

14. Declan McCullagh, *U.S. Won't Support Net "Hate Speech" Ban*, CNET NEWS.COM, Nov. 15, 2002, <http://news.com.com/2100-1023-965983.html>.

15. Isabelle Rorive, *Freedom of Speech v. Hate Speech in the Council of Europe*, Presentation at the Center for Media & Communication Studies Conference: Hate Speech from the Street to Cyber-Space (Mar. 31, 2006), available at http://www.cmcs.ceu.hu:8080/cmcs/HS_Rorive.doc.

regulate what content can be accessed in their countries. For ISPs and other Internet-based companies, this would also be acceptable because it would enable them to do business in countries without encountering legal challenges, fines and other pressure to change their policies.

This note advances the case for an international organization to control Internet content. Part I describes the current state of affairs with respect to Internet regulation. First, this part describes briefly how the Internet works, to the extent that such a description is necessary to advance the argument presented in this note. Second, concentrating on Europe, the United States, and China, Part I describes the diverging preferences of countries regarding Internet regulation, the approaches they have taken, and the problems they have encountered due to the international nature of the Internet. Third, this part addresses the major attempt at international Internet regulation to date, the Cybercrime Treaty of 2001¹⁶ and its 2003 Hate Speech Addendum.¹⁷ As mentioned, the United States has refused to sign the addendum and is unlikely to change its position in the future, which severely undermines any uniform international regulation.¹⁸ Finally, as a result of these problems, several solutions have been advanced in favor of a more flexible international regulation of the Internet.¹⁹ Expanding on these solutions, Part II explains why an international organization would be a more effective tool for international Internet regulation. Finally, Part III addresses possible criticisms of the approach advanced in this note. Despite certain limitations, this note concludes that an international organization would be a useful step towards an effective international regulation of Internet content.

16. Council of Europe, Convention on Cybercrime, Nov. 23, 2001, Europ. T.S. No. 185, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>.

17. Council of Europe, Additional Protocol to the Convention on Cybercrime, Jan. 28, 2003, Europ. T.S. No. 189, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> [hereinafter Additional Protocol].

18. See McCullagh, *supra* note 14.

19. See, e.g., Hanley, *supra* note 10, at 1012; Rorive, *supra* note 15.

I. BACKGROUND

A. A Brief Description of How the Internet Works

To understand to what extent governments can react to Internet content that they find objectionable, as well as to what extent they *cannot* respond to such content, it is necessary to first obtain a basic understanding of how the Internet works. The Internet is a vast network that consists of numerous smaller networks located all over the globe.²⁰ From a personal computer, an Internet user connects via a modem or a similar device to an Internet Service Provider (ISP). An ISP “is a business or organization that provides to consumers access to the Internet and related services.”²¹ There are large national ISPs, such as America Online (AOL), as well as small regional and local ISPs.²² Individual networks connect to each other through Network Access Points (NAPs).²³ Two ISPs that run smaller networks agree to specific NAPs, “and traffic between the two [ISPs] flows between the networks at the NAPs.”²⁴ The Internet is a collection of ISP networks “that agree to all intercommunicate with each other at the NAPs” in this way.²⁵

Every computer connected to the Internet has a unique identification number, its Internet Protocol (IP) address.²⁶ Likewise, websites have IP addresses that are linked to their text name, or “domain name.”²⁷ A website can be identified either by its IP address or its domain name.²⁸ Some computers are “servers.” A server is a computer that stores information and provides services for other computers, or “clients.”²⁹ If an Internet user creates a website, the site is stored on a server and can be accessed from there. ISPs

20. Tyson, *supra* note 3.

21. Wikipedia.org, Internet Service Provider, http://en.wikipedia.org/wiki/Internet_service_provider (last visited Feb. 17, 2007).

22. RAIDStorage.uk.com, Technical Glossary, <http://www.raidstorage.uk.com/glossary.html> (last visited Feb. 28, 2007).

23. Tyson, *supra* note 3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.* (explaining that, for example, “howstuffworks.com” is the domain name of the site Howstuffworks).

28. *Id.*

29. Microsoft, Microsoft Windows Small Business Server 2003 Resource Kit: What is a Server?, <http://www.microsoft.com/smallbusiness/products/server/resource-kit/server.htm> (last visited Feb. 17, 2007).

manage servers by providing space on which servers can publish information that is then passed on to the client computers.

This structure explains the main way in which a country can react to an objectionable website located abroad. For example, a European government may object to a website stationed in the United States that publishes content whose display is illegal in Europe but legal in the United States. Because the Internet is simply an interconnection of networks, the European government can request one of its national ISPs to block the connection to the American ISP that displays the website. The European ISP can identify the objectionable website by its domain name or its IP address and block access to the site at the government's request.

However, there are two problems with this approach. First, blocking the connection to an ISP blocks all websites running via this ISP, not merely the objectionable website.³⁰ As a result, many websites that do not contain any objectionable content will be blocked.³¹ Second, even if the European ISP blocks the site by cutting off the connection to the American ISP, the operators of the website can simply re-register the same site through a different ISP.³² The cycle then repeats itself. Clearly, targeting an objectionable website located abroad by making a national ISP block that website is not the optimal solution.³³

30. KidShield, *supra* note 8.

31. *Id.*

32. *See id.*

33. A second, though lesser-known way of accessing a website displaying objectionable content stationed abroad, is via a proxy server. For example, let us assume that a German ISP has blocked a questionable website in the U.S. A German user cannot access this site. However, the user can access a proxy computer. A proxy is simply another intermediate computer that could be stationed in the U.S. or another country outside Germany. *See generally* Wikipedia.org, Proxy Server, http://en.wikipedia.org/wiki/Proxy_server (last visited March 18, 2007). The user tells the proxy the objectionable website he wants to access, and the proxy connects to the website and sends its data to the user. *See id.* The German ISP does not oppose this process as long as the proxy is not blocked as well. *See id.* The user acquires the data of the website from the proxy's data storage system and not from the website itself. *See id.* As a result, the German ISP cannot detect the sending of the website data from the proxy to the user. Because this method is technically quite sophisticated, it is not widely known.

B. The Internet Preferences of Different Countries

1. Europe

European countries have probably felt the need for the international regulation of Internet content most strongly. Several European countries have laws restricting free speech, particularly with regard to any denial that the holocaust occurred and the display and spread of Nazi ideology.³⁴ Denying the Holocaust is a punishable offense in Israel and eleven European countries.³⁵ Germany in particular has very strict laws banning the Nazi party and any glorification of it, including the denial of the Holocaust.³⁶ In Germany, it is illegal to display or reproduce symbols used by the Nazis, as is printing or distributing Neo-Nazi material.³⁷ Germany has repeatedly enforced these laws in the Internet context. The case of Germany's complaint against US-based Neo-Nazi Gerhard Lauck has already been mentioned.³⁸ In addition, in 1996, Germany forced its largest ISP, T-Online, to block access to a website displaying Neo-Nazi material located in California.³⁹ This move came at a cost, since T-Online had to block access not only to the particular website but to its whole server, thus blocking nearly 1500 other websites.⁴⁰ Under German threat of potential action against the company, however, T-Online complied with the order.⁴¹

Like Germany, France prohibits the expression of pro-Nazi and anti-Semitic views.⁴² In 2000, a French judge ordered California-

34. Abraham Cooper & Harold Brackman, *Punishing Religious Defamation and Holocaust Denial: Is There a Double Standard?*, EQUAL VOICES, July 2006, http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&contentid=44bb8bd0bd09f&catid=4498115372af1&lang=EN (last visited Oct. 22, 2006).

35. *Id.*

36. Steve Kettmann, *German Hate Law: No Denying It*, WIRED.COM, Dec. 15, 2000, <http://www.wired.com/news/politics/0,1283,40669,00.html>.

37. *Germany Said May Modify Nazi Symbols Law*, ASSOC. PRESS, Oct. 2, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/10/02/international/i135042D92.DTL>; see also KidShield, *supra* note 8.

38. THE STEPHEN ROTH INSTITUTE, *supra* note 2.

39. Tony Taylor, *The Internet: The New Free Speech Battleground*, <http://www.cosc.georgetown.edu/~denning/cosc450/papers/taylor.html> (last visited Feb. 17, 2007).

40. KidShield, *supra* note 8; see also Taylor, *supra* note 39.

41. KidShield, *supra* note 8.

42. Stephen Lawson, *Judge Dismisses French Case Against Yahoo!*, CNN.COM, Nov. 12, 2001, <http://archives.cnn.com/2001/TECH/industry/11/12/french.yahoo.case.idg/index.html>.

based ISP Yahoo! to block French citizens from accessing auction listings and web pages on its site containing Neo-Nazi and anti-Semitic content, threatening to fine Yahoo! about \$13,600 a day if it did not comply.⁴³ At Yahoo!'s request, U.S. District Court Judge Fogel declared the French judgment unenforceable in the United States because it violated the First Amendment.⁴⁴ According to Fogel, "[a]lthough France has the sovereign right to regulate what speech is permissible in France, this court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders."⁴⁵

After the San Francisco Court of Appeals reversed the decision, the Ninth Circuit agreed to rehear the decision en banc.⁴⁶ The court decided against Yahoo!, holding that the case was not ripe for adjudication.⁴⁷ However, the proceedings on appeal were more complicated than this final judgment would suggest. The plaintiffs in the original suit, members of a French anti-racist group, raised two issues on appeal.⁴⁸ First, they argued that the U.S. District Court "lacked personal jurisdiction over them"; second, that the lawsuit was not ripe because it had been filed before Yahoo! "faced any realistic prospect of harm."⁴⁹ On both of these issues, a majority of judges actually decided in Yahoo!'s favor.⁵⁰

Yahoo! lost because the three 9th Circuit judges who dissented from the en banc court's personal jurisdiction holding combined with the three other judges, who thought personal jurisdiction existed but that Yahoo!'s lawsuit was unripe, to produce a 6–5 majority in favor of overturning the declaratory judgment in Yahoo's favor. Thus, although Yahoo! seemingly won on both issues raised on appeal, it nevertheless lost the appeal.⁵¹

Even though Yahoo! lost, because both of the factual issues on appeal were decided against the French plaintiff, it seems doubtful that the Yahoo! case will have strong precedential value for future

43. Troy Wolverton, *Court Shields Yahoo from French Law*, CNET NEWS.COM, Nov. 8, 2001, <http://news.com.com/2100-1017-275564.html>.

44. Rorive, *supra* note 15.

45. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (internal quotation marks omitted); Wolverton, *supra* note 43.

46. Rorive, *supra* note 15.

47. *Id.*

48. Howard J. Bashman, *In Nazi Memorabilia Fight, Yahoo Can't Win for Losing*, LAW.COM, Jan. 23, 2006, <http://www.law.com/jsp/article.jsp?id=1137665111229>.

49. *Id.*

50. *Id.*

51. *Id.*

foreign plaintiffs suing American companies for violations of their national laws.

The German and French cases show that European countries have struggled to enforce their national legal standards in the Internet context. Even though Germany successfully forced one of its ISPs to block access to a U.S. server displaying objectionable content, it could only do so at the cost of simultaneously blocking a broad range of non-objectionable websites.⁵² Moreover, while Germany might be able to prevent access to some U.S.-based servers by regulating its large national ISPs such as T-Online, there are many small ISPs stationed in the United States that Germany simply cannot reach. All that is needed is a right-wing ideologist setting up a small, local server in the United States that cannot be reached by one of the large national ISPs in Europe. As a result, "German xenophobes . . . [could] easily have their Web sites hosted from the States, which in turn [could] be accessed from anyplace."⁵³ There are many servers run by small local ISPs who disseminate hate speech in this way. "In 2002, the Council of Europe recorded 4,000 xenophobic websites around the world, compared to 160 in 1995. Over half of these were hosted in the United States, where xenophobic speech is protected under the Constitution, in the name of freedom of expression."⁵⁴

2. United States

In general, the United States has been much more reluctant than Europe to regulate the Internet. The main reason is the First Amendment's protection of free speech, which includes most kinds of offensive or hate speech. Recent developments, however, such as the signing of the Cybercrime Treaty, the passing of legislation against Internet gambling, and the use of the Internet by terrorists, suggest that the United States is nevertheless amenable to international Internet regulation, albeit in a limited capacity.

The First Amendment to the U.S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."⁵⁵ The Supreme Court has traditionally interpreted this provision rather strictly, allowing federal and local government to

52. KidShield, *supra* note 8.

53. Perine, *supra* note 4.

54. Rorive, *supra* note 15 (citing EUR. PARL. ASS. DEB. 4th Sess. 9538 (Sept. 5, 2002), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/EDOC9538.htm>).

55. U.S. CONST. amend. I.

restrict free speech only in limited circumstances.⁵⁶ According to the Court, good and bad ideas should compete in the “marketplace of ideas,” with the bad ideas being tested and rejected over time.⁵⁷ This logic also applies to ideas represented through hate speech: by comparing those ideas with better alternatives, people will generally reject hate speech so that formally banning it is not necessary.⁵⁸ Following this doctrine, the Court has allowed a ban of hate speech only in very limited situations, such as when such speech constitutes a direct threat against an identifiable individual, fulfills the legal test for harassment, or incites immediately lawless action.⁵⁹

This reluctance to restrict free speech is also apparent in the Court’s approach to Internet regulation. In 1997, the Supreme Court deemed unconstitutional the Communications Decency Act (CDA), the main attempt towards Internet regulation in the United States to date.⁶⁰ Passed in 1996, the CDA sought “to protect children from indecent and patently offensive material on the Internet.”⁶¹ According to the Court, the CDA was too broad because it “effectively suppress[e] a large amount of speech that adults have a constitutional right to receive and to address to one another.”⁶² The Court suggested that it would apply a similarly rigid approach to the regulation of free speech on the Internet. Subsequently, the Child Online Protection Act (COPA) of 1998 was challenged immediately after it was signed into law and has been declared unconstitutional twice by appellate courts. In addition, the Supreme Court has upheld an injunction barring prosecutors from filing criminal cases under COPA.⁶³ While COPA’s successor, the Children’s Internet Protection Act (CIPA), was upheld as constitutional in 2003, it faced similar legal challenges.⁶⁴

A number of recent developments suggest that the United States is nevertheless interested in at least some form of international Internet regulation. First, in the summer of 2006, the Senate ratified

56. See, e.g., ANTI-DEFAMATION LEAGUE, *supra* note 9, at 3.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

61. Stephen T. Maher, Government Regulation of Internet Content (Mar. 1997), <http://www.usual.com/article4.htm>.

62. *Reno*, 521 U.S. at 874.

63. Declan McCullagh, *Supreme Court Keeps Net Porn Law on Ice*, CNET NEWS.COM, June 29, 2004, http://news.com.com/2100-1028_3-5251475.html.

64. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 202-03 (2003).

the Cybercrime Treaty,⁶⁵ a convention signed by thirty-eight European nations as well as Canada, Japan and South Africa, to harmonize computer crime laws.⁶⁶ While the United States has not signed an addendum to the treaty dealing specifically with hate speech on the Internet, the United States is at least demonstrably willing to participate in discussions about international Internet regulation.⁶⁷

Second, in October 2006, the United States passed legislation outlawing Internet gambling.⁶⁸ Because online gambling is legal in other countries, and the United States cannot effectively ban Internet content that is published abroad, it is likely that the new law against Internet gambling could renew U.S. interest in some form of international regulation. The arrest of the CEO of a British online gambling company during a business trip in the United States in July 2006 foreshadowed some of the problems that the United States might soon encounter in attempting to enforce the new law.⁶⁹

Third, the use of the Internet by terrorists has sparked a renewed interest in Internet regulation. After September 11, 2001, The Federal Bureau of Investigation shut down several websites created by Azzam Publications, named after Sheikh Azzam, Osama Bin Laden's mentor.⁷⁰ Since terrorist activity on the Internet continues to be a debated issue, similar action might be expected in the future.

3. China

China has already set up its own Internet regulation system in order to regulate dissident speech and maintain political control over the population.⁷¹ The Chinese government uses a firewall system to

65. McCullagh & Broache, *supra* note 13.

66. Council of Europe, Convention on Cybercrime: Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=18/06/04&CL=ENG> (listing the ratification date for each Member State of the Council of Europe) (last visited Feb. 28, 2007).

67. McCullagh, *supra* note 14. For a detailed discussion of the treaty addendum, see *infra* Part I.C.1.

68. Frank Ahrens, *New Law Cripples Internet Gambling*, WASH. POST, Oct. 14, 2006, at A01.

69. Michael McCarthy, *U.S. Cracking Down on Offshore Betting Industry*, USA TODAY, July. 18, 2006, http://www.usatoday.com/sports/2006-07-18-online-gaming_x.htm.

70. Edgar Burch, Comment, *Censoring Hate Speech In Cyberspace: A New Debate in a New America*, 3 N.C. J.L. & TECH. 175, 180 (2001).

71. See GOLDSMITH & WU, *supra* note 11, at 92-97; Hanley, *supra* note 10, at 1005-06.

control which websites its citizens can access.⁷² A firewall is a program that filters information before it reaches a personal computer or network.⁷³ If incoming information is “flagged by the filters, it is not allowed through.”⁷⁴ Special “Internet Police” can identify objectionable websites and subsequently ban them through firewall software.⁷⁵

This system has generally been quite efficient and subtle in allowing the Chinese government to regulate Internet content.⁷⁶ However, this approach also has certain disadvantages. First, it is costly and labor-intensive—many government agencies are involved in monitoring and keeping up the government’s control of the Internet.⁷⁷ Moreover, “because of the government’s extraordinary system of monitoring and filtering, the Chinese Internet is becoming less and less like its Western counterparts.”⁷⁸ Due to the international nature of the Internet, as well as the fact that many of its innovations occur in the United States, China risks losing pace with global technical developments. Finally, censorship is generally problematic because it stifles innovative ideas, and because it is ultimately ineffective in withholding information from the population.⁷⁹ In any case, given its own attempts, China arguably should be interested in an international regulation of Internet content.

72. GOLDSMITH & WU, *supra* note 11, at 92.

73. Jeff Tyson, How Firewalls Work, <http://www.howstuffworks.com/firewall.html/printable> (last visited Feb. 17, 2007).

74. *Id.*

75. GOLDSMITH & WU, *supra* note 11, at 93-94.

76. *Id.* at 94.

77. *See id.* at 93.

78. *Id.* at 89.

79. Even members of the Chinese Communist party are apparently aware of the latter problem. Thus, a group of former senior Communist Party officials recently criticized the Chinese system of Internet censorship by stating, “History demonstrates that only a totalitarian system needs news censorship, out of the delusion that it can keep the public locked in ignorance.” *Party Elders Attack China Censors*, BBC NEWS, Feb. 14, 2006, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4712134.stm>.

C. Practical and Theoretical Steps Towards International Internet Regulation

1. Practical Steps

Several countries have already taken concrete steps towards instituting international regulation of the Internet. For instance, the Cybercrime Convention of 2001 and the Additional Protocol to the Convention of 2002 seek to harmonize computer crime laws on issues such as unauthorized intrusion into networks, child pornography, and copyright infringement.⁸⁰ The Cybercrime Convention has been signed by thirty-eight countries, including most European countries, Japan, and the United States.⁸¹ The U.S. Senate ratified it in August 2006.⁸²

The Additional Protocol to the Convention has proven to be controversial. Specifically addressing the issue of hate speech, the Protocol seeks to “establish as criminal offenses under domestic law . . . distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.”⁸³ Since many European countries already have laws that criminalize hate speech, they have signed the Protocol without reservation.⁸⁴ In addition, Canada, which has some of the most comprehensive laws against hate crimes in the world, recently signed the Protocol.⁸⁵ However, the United States has refused to sign. As a spokesperson for the U.S. Justice Department stated, “[t]he important thing to realize is that the U.S. can’t be a party to any convention that abridges a constitutional protection.”⁸⁶ Because a large number of Internet servers, particularly those that host hate speech websites, are located

80. McCullagh & Broache, *supra* note 13.

81. Council of Europe, Convention on Cybercrime: Chart of Signatures and Ratifications, *supra* note 66.

82. McCullagh & Broache, *supra* note 13.

83. Additional Protocol, *supra* note 17.

84. As of February, 2007, twenty-nine European countries have signed the Additional Protocol. Council of Europe, Additional Protocol to the Convention on Cybercrime: Chart of Signatures and Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=3/2/2007&CL=ENG> (last visited Feb. 28, 2007).

85. *Canada Signs Protocol to Fight Online Hate*, OUT-LAW.COM, July 12, 2005, <http://www.out-law.com/page-5901> [hereinafter *Canada Signs*].

86. McCullagh, *supra* note 14.

in the United States, any international agreement without U.S. participation will be of little significance.⁸⁷

2. Theoretical Approaches

The United States' refusal to sign the Additional Protocol demonstrates that any "one-size-fits-all" approach to international Internet regulation is unlikely to work. Different countries have different preferences with respect to Internet content they want banned, as well as to which content they refuse to ban. Scholars have adopted two main approaches to the problem.

First, Steven Hanley has suggested a flexible multinational solution for Internet regulation.⁸⁸ According to Hanley, because countries have diverging preferences and levels of tolerance regarding Internet content, "[o]ne rigid unitary solution to international Internet regulation is impossible."⁸⁹ Consequently, Hanley suggests a model in which each country agrees with its main national ISPs as to what content is accessible to citizens.⁹⁰ Government agencies, located at the national level, would work in concert with ISPs to identify objectionable websites.⁹¹ Under the threat of liability, ISPs would then block such websites at the government's request.⁹² In this way, each country is able to exercise its own level of regulation.⁹³ Finally, by comparing individual approaches and considering useful portions of each approach, countries could gradually implement a multinational framework.⁹⁴

Second, Isabelle Rorive has advocated a regulatory model that focuses on the problems European countries face in trying to reach American ISPs.⁹⁵ Based on the 2001 European Directive on E-commerce, Rorive suggests "a *notice and take down* procedure that could help reach American hosting providers with business interest in

87. Rorive, *supra* note 15.

88. Hanley, *supra* note 10, at 999.

89. *Id.* at 1016.

90. *Id.*

91. *Id.* at 1018.

92. *Id.*

93. *Id.* at 1016.

94. *Id.* at 1017. Hanley is a bit vague on how the individual approaches of countries would be incorporated into a multinational framework. Apparently he imagines a "lowest common denominator" solution, which would essentially consist of each country's individual regulatory system supplemented by an international agreement consisting of those measures that all or many countries could accept.

95. Rorive, *supra* note 15.

Europe, despite the First Amendment shield.”⁹⁶ The basic idea is that European governments would notify American ISPs of objectionable websites, and the ISPs would take down the website under the threat of having their European assets frozen.⁹⁷ The ISPs are immune from legal action as long as they comply with the warning that they are hosting content that is illegal in Europe.⁹⁸

While Hanley’s and Rorive’s approaches are useful starting points, they do not provide complete solutions for an international Internet regulation. The main problem with Hanley’s approach is that it fails to explain how countries could reach ISPs located abroad. Even if countries can control their national ISPs, this may be ineffective in regulating content that is accessible in a country if such content originates abroad. Unless a government can also directly come to an agreement with *foreign* ISPs, any regulation of national access to the Internet will remain incomplete. Rorive’s model does provide for a method of reaching foreign ISPs. However, it only does so with respect to ISPs with assets or business interests in Europe. Because her method ultimately relies on the threat of reaching such assets, it is not effective for those American ISPs that display objectionable content but do not have any business interests in Europe. In addition, because Rorive’s model focuses heavily on Europe and the United States, it may not be as applicable to a global solution. In sum, an improved model for an international regulation of Internet content is needed.

II. WHY AN INTERNATIONAL ORGANIZATION COULD REGULATE THE INTERNET MORE EFFECTIVELY

A. *The Basic Idea*

Instead of regulating the Internet on a nationwide basis, countries should form an international organization to regulate Internet content. Such an organization should not attempt to create a uniform regulatory scheme for all countries. Rather, it would function as a forum in which countries could meet in regular, pre-determined intervals with ISPs and large, internationally-operating Internet businesses such as Amazon.com and eBay. In this forum, countries

96. *Id.*

97. *Id.*

98. *Id.*

could continue to work out individual solutions with their national ISPs. In addition, countries would have the opportunity to engage foreign ISPs that publish Internet content from abroad. Countries would be interested in such dialogue because it would give them an opportunity to regulate Internet content that originates from beyond their borders. Likewise, ISPs would have an incentive to engage in negotiations with foreign countries because many of these ISPs operate, or will often be potentially interested in operating, on a global scale.⁹⁹ Yahoo!, for example, should have an incentive to talk to the French government regarding its preferences for Internet regulation because it can anticipate that France may fine its subsidiary, Yahoo! France, for Yahoo!'s violations of French law by publishing content that is illegal in France. While countries cannot punish foreign ISPs as easily as they can fine their national ISPs,¹⁰⁰ foreign ISPs should still have an incentive to consider another country's preferences as long as these ISPs have any ties to the country or are potentially interested in establishing such ties. In a global economy, an ISP should be worried about the threat of having its foreign subsidiaries or branches fined, or of being prohibited from carrying out business in a potentially lucrative market. In short, both countries and internationally operating Internet businesses have an incentive to find consensual solutions for each country's preferred mode of Internet regulation. An international organization to regulate Internet content would provide an ideal forum to find such solutions.

In addition to serving as a forum, an international organization could provide centralized monitoring of Internet activity, pool expertise, and address technical changes quickly and effectively. Pooling expertise and being able to address technical developments quickly are especially relevant to a technology as fast-paced and changing as the Internet. Through these functions, an international organization could help countries implement and enforce their preferred modes of Internet regulation.

Finally, an international organization could harmonize the approaches of different actors towards Internet regulation in the long

99. Clearly, globalization continues to induce especially larger ISPs to expand their services and operations globally. See, e.g., Press Release, AOL Canada, America Online and Bertelsmann Launch AOL in Australia (Oct. 7, 1998), http://canada.aol.com/press/press_10_07_98.adp; Press Release, Yahoo! Inc., Yahoo! Mail to Kick-Off Emerging International Market Expansion with Russian Language Version (Mar. 23, 2004), <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=131468>.

100. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001); see also *Perine*, *supra* note 4.

run. According to a number of scholars, membership in international organizations has the potential to not only change the behavior of actors, but may even transform their identities and interests.¹⁰¹ As a result, an international organization could generate a more uniform approach towards Internet regulation.

B. The Benefits of International Organizations

International relations scholars have long pointed out the benefits of international organizations.

1. Providing a Forum for Negotiations

First, international organizations provide a forum that facilitates negotiation and reduces transaction costs, which in the context of interstate cooperation means the costs of making and enforcing agreements.¹⁰² Even though states may be aware that they could benefit from cooperating on a specific issue, they may refrain from doing so due to uncertainty over whether other states will later comply with the agreement.¹⁰³ If one state complies with an agreement, but a second state does not, cooperation could render the first state worse off in relative terms. Therefore, states “naturally respond to uncertainty by being less willing to enter into agreements.”¹⁰⁴

However, “international institutions can reduce this uncertainty by promoting negotiations in which transparency is encouraged; by dealing with a series of issues over many years and under similar rules, thus encouraging honesty in order to preserve future reputation; and by systematically monitoring the compliance of governments with their commitments.”¹⁰⁵ If states deal with an issue over many years through repeated rounds of negotiations, a state will

101. See, e.g., Alexander Wendt, *Anarchy is What States Make of it: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 418 (1992).

102. See Robert O. Keohane, *International Institutions: Can Interdependence Work?*, 110 FOREIGN POL'Y 82, 86 (1998). In general, the theories regarding international organizations presented in this section refer to interactions among states. However, as will be argued later, they could also apply to interactions between states and ISPs or other Internet businesses. See *infra* Part II.C.1. Moreover, on some level, the disagreements regarding Internet regulation are in fact disagreements among states: those states have different attitudes regarding Internet regulation, and their laws reflect those attitudes and shape the environment in which ISPs and other Internet businesses operate.

103. Keohane, *supra* note 102, at 86.

104. *Id.*

105. *Id.*

have little incentive to cheat in one round, because it can reasonably expect the cheated state to reciprocate in the next round. International organizations offer both a setting for different rounds of negotiation and an institutional apparatus that can monitor whether states comply with agreements.

2. Offering a Central Administrative Apparatus

Second, international organizations “allow for the centralization of collective activities through a concrete and stable organizational structure and a supportive administrative apparatus.”¹⁰⁶ A central administrative apparatus has several advantages:

[International organization] personnel coordinate and structure agendas, provide background research, and promote successful negotiations. They keep track of agreements on particular issues, trade-offs, and areas of disagreement, periodically producing texts that consolidate the current state of play. They also transmit private offers or assurances, improving the flow of information.¹⁰⁷

In particular, international organizations are able to produce a common body of data that provides an important factual background for decisions.¹⁰⁸ As such, they constitute a source of pooled expertise.¹⁰⁹

3. Operating as an Independent Third Party

Third, international organizations can promote agreements by operating as an independent, neutral third-party actor.¹¹⁰ The existence of an independent third party is particularly helpful when negotiations are deadlocked.¹¹¹ In such a situation, an independent third party may be able to provide an unbiased and therefore more legitimate opinion. An example of an international organization performing such a function is the WTO Dispute Settlement Mechanism which provides impartial judgment for states deadlocked

106. Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. CONFLICT RESOL.* 3, 4 (1998).

107. *Id.* at 12.

108. *See id.* at 13.

109. *Id.*

110. *Id.* at 16.

111. *See id.* at 17.

in trade disputes.¹¹² Today, states are increasingly making use of such settlement mechanisms.¹¹³

4. Reconstructing Identities and Interests

Finally, some scholars claim that cooperation can reconstruct the identities and long-term interests of states.¹¹⁴ The theory is that rational actors enter into agreements for the self-interested reason of exploiting the benefits of cooperation, but in the long-term may develop a collective identity based on shared norms.¹¹⁵ A frequently-cited example of this process is the European Union: states presumably initially entered into the EU merely to benefit from cooperation, but today often tend to display what scholars have described as a common European identity.¹¹⁶ The development of a shared identity through an international organization may open new possibilities for cooperation on specific issues.

In sum, international relations scholars have pointed out that international organizations offer many potential benefits. To realize these benefits, it is not surprising that even powerful states such as the United States have increasingly relied on international institutions to set rules and standards to govern specific activities.¹¹⁷

112. See, e.g., John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, 2000 BROOKINGS TRADE F. 179, 180-89 (describing the development of the WTO Dispute Settlement Mechanism as a more legalistic, quasi-binding mechanism building on its less formal predecessor under GATT); James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 137 (2000) (describing the increased delegation of trade disputes to impartial third party adjudication).

113. See Jackson, *supra* note 112, at 188-89; Smith, *supra* note 112, at 137.

114. See, e.g., Wendt, *supra* note 101, at 417.

115. See *id.*

116. *Id.*

117. See Keohane, *supra* note 102, at 84.

*C. An International Organization to Regulate the Internet Would
Capture These Benefits*

1. Why the Theoretical Model for International Organizations Fits the
Internet Context

An international organization to regulate Internet content would capture the benefits of international organizations. Before describing these benefits, however, it is necessary to explain why the model outlined in the previous section applies to the Internet regulation context. Scholars describing the benefits of international organizations envision interactions among states.¹¹⁸ By contrast, in the Internet context, negotiations within the setting of an international organization would primarily occur between states interested in some form of regulation and private firms, such as ISPs and other large Internet businesses. Nevertheless, the situation is comparable. In classic international relations theory, states are considered rational, utility maximizing actors.¹¹⁹ The same is true for Internet businesses, which, as private firms, are interested in maximizing profits above all. Therefore, to the extent that both are interested in maximizing utility, the situation between states and transnational Internet businesses is comparable to the interaction among states.¹²⁰

Moreover, both states and Internet businesses stand to gain from cooperation. To effectively realize their preferred modes of regulation, states need to involve foreign ISPs because those ISPs can undermine national laws by publishing objectionable Internet content from abroad.¹²¹ This should even be true for powerful states such as the United States: according to international relations theorists, even powerful states use international organizations to set rules and standards in specific areas.¹²² Without such participation, powerful states may lose out on the potential benefits of international

118. JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 15, 17 (2001); JOHN G. RUGGIE, *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* 9 (1998).

119. RUGGIE, *supra* note 118, at 9.

120. There are other differences between states and private businesses. However, for the purpose of this note, utility maximization—which applies to both states and private firms—is the most important factor.

121. See *supra* Parts I.A and I.C.2.

122. Keohane, *supra* note 102, at 86.

institutions and risk isolating themselves. Therefore, even the United States, which has traditionally been skeptical of regulating speech, should be interested in finding some form of international agreement on Internet regulation.¹²³

2. Benefits by Serving as a Forum for Negotiations

The first way in which an international organization would be beneficial in the Internet context is by providing a forum for negotiations between states and Internet businesses. Such a forum would allow states to enforce their respective regulatory model against their national ISPs. On a basic level, this would essentially reflect the current state of Internet regulation: countries control the Internet to the extent they can make national ISPs comply with national legislation. For example, “[t]oday, German, French, and British laws require local ISPs to screen out illegal content once they are notified of its existence.”¹²⁴

However, an international organization as a forum would additionally allow states to negotiate directly with foreign ISPs and to encourage them to implement voluntary forms of regulation for content they consider offensive. While a state cannot *force* a foreign ISP to comply with its laws because foreign ISPs are not stationed within the state’s jurisdiction, many experts on Internet regulation tout voluntary self-control as the best approach to encourage ISPs to restrict offensive content. According to Rabbi Abraham Cooper, one of the major activists in favor of restricting hate speech on the Internet:

[W]e have to turn to ISPs and firms to encourage them to set standards on their own, to become good “online citizens” . . . [F]or example, by encouraging them to adopt respective passages as part of their user conditions. In this way, it would be possible to eliminate racist and anti-Semitic web pages from the Internet.¹²⁵

Several Internet businesses have already proven receptive to voluntary self-regulation: “[f]ree Web-based page-hosting services such as GeoCities, Tripod and XOOM.com refuse to host hate sites.”¹²⁶ Likewise, services such as Angelfire and AOL have removed hateful pages from their servers.¹²⁷ Some Internet businesses have even

123. See *supra* Part I.B.2.

124. GOLDSMITH & WU, *supra* note 11, at 73.

125. Simone Rafael, Mut Gegen Rechte Gewalt [Stand up to Right Wing Violence], Interview with Rabbi Abraham Cooper (July 23, 2004), <http://www.mut-gegen-rechte-gewalt.de/artikel.php?id=5&kat=39&artikelid=1144> (trans. by author).

126. ANTI-DEFAMATION LEAGUE, *supra* note 9, at 11.

127. *Id.* at 11-12.

removed objectionable content with explicit reference to the sensitivities of foreign countries. Internet auction house eBay, for example, banned the sale of Nazi memorabilia in 2001, stating:

As the eBay community expands around the globe, we are encountering different laws and different points of view as to what constitutes illegal, offensive or inappropriate items. . . . Given our expansion, as well as feedback we've received from our users, we reviewed our policy and concluded that these changes [banning Nazi memorabilia] are appropriate.¹²⁸

These examples show that Internet businesses have proven to be receptive both to calls for self-regulation and to the proclivities of foreign countries and underscore the fact that ISPs have an incentive to honor such requests as a result of having business relations, or potential business interests, in countries requesting regulation.

By serving as a forum for negotiation, an international organization would allow cross-border negotiations regarding such measures. By providing a direct and institutionalized dialogue between states and Internet businesses, such an organization would recognize the reality that “[o]nly greater international cooperation can help eradicate the scourge of racist and hate-related material made increasingly accessible over the Internet.”¹²⁹ In addition, an international organization functioning as a forum would reduce transaction costs by bringing all interested parties together in one setting at one specified time and by allowing parties to exchange experiences, compare solutions, and create synergies by coordinating similar approaches.

3. Benefits from Providing an Organizational Apparatus

A second way in which an international organization could be beneficial is by providing an organizational apparatus. “Most international organizations include a “secretariat or similar administrative apparatus.”¹³⁰ Such an apparatus could employ experts, collect data, and follow new technical developments.¹³¹ In this way, it could provide a sound factual basis for negotiations between states and private businesses. In particular, an organizational apparatus could fulfill a function that many experts

128. Beth Cox & Thor Olavsrud, *eBay Bans Nazi, Hate Group Memorabilia*, INTERNETNEWS.COM, May 3, 2001, http://www.internetnews.com/ec-news/article.php/4_758221.

129. *Canada Signs*, *supra* note 85 (quoting Hon. Irwin Cotler, Justice Minister of Canada).

130. Abbott & Snidal, *supra* note 106, at 11.

131. *See id.* at 11-12.

have identified as crucial to regulating hate speech on the Internet: monitoring.¹³² As Rabbi Abraham Cooper explains: “because hate sites constantly reappear under new addresses, we need intensive monitoring of the Internet with respect to racism and anti-Semitism—something that is still not done systematically.”¹³³

At the moment, non-governmental institutions, such as the International Network Against Cyberhate (INACH) or the Association of Internet Hotlines (INHOPE), largely monitor the Internet.¹³⁴ These institutions keep track of hate speech on the Internet, thus allowing a better understanding and analysis of such activity.¹³⁵ Additionally, they help to enforce national laws against hate speech.¹³⁶ INACH, for example, is a network of worldwide institutions that allows Internet users to report websites that contain hate speech.¹³⁷ INACH then hands on the information to those institutions that may be able to take action against the website.¹³⁸ For example, assume that a Dutch Internet user reports a website containing hate speech whose display is illegal under Dutch law.¹³⁹ The website is published in the United States and therefore not within Dutch jurisdiction. In such a situation, INACH can do two things: first, it can report the website to its partner organization in the United States, which may be able to exert pressure; second, it can notify Dutch authorities.¹⁴⁰ These authorities may not be able to take action against the creator of the website, or the ISP that publishes the site, because both are based in the United States. However, they can attempt to identify persons associated with the website located in the Netherlands, such as the Dutch webmaster who manages the Holland forum of the website.¹⁴¹ Because such persons may be criminally liable in the Netherlands, this may well be a method to counteract the reach of the website. While there are currently many private organizations such as INACH, “a better monitoring of Internet hate speech, ideally carried out by a

132. Rafael, *supra* note 125.

133. *Id.* (trans. by author).

134. See Simone Rafael, Mut Gegen Rechte Gewalt, Hetze im Internet: Was Kann Gesetzgebung Leisten? [Stand up to Right Wing Violence, Internet Hate Speech: What Can the Legislature Do?] (July 8, 2004), <http://www.mut-gegen-rechte-gewalt.de/artikel.php?id=39&kat=39&artikelid=1123>.

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

centralized institution, would be desirable in order to allow for concrete responses.”¹⁴²

An international organization would be an ideal vehicle to provide for such centralized monitoring. In fact, such an organization could provide monitoring in a twofold sense. First, it could monitor hateful activity on the Internet similar to institutions such as INACH. Moreover, if an international organization were to perform the monitoring, such an organization could pool resources, achieve economies of scale, and thereby provide for greater efficiency. Second, an international organization could monitor whether states and ISPs comply with agreements.¹⁴³ Hence, by pooling expertise, providing technical assistance, and carrying out centralized monitoring, an organizational apparatus could facilitate an international regulation of Internet content.¹⁴⁴

4. An International Organization as a Neutral Third Party and Potential Creator of Shared Norms

An international organization could function as a neutral third party in negotiations between states and ISPs. States have given international organizations the ability to perform this function in other important areas. The WTO's Dispute Settlement Mechanism, for example, regulates trade disputes despite the existence of national trade laws.¹⁴⁵ Why should states not endow an international organization to regulate Internet content with a similar function? In the Yahoo! case, an American judge refused to uphold a French ruling.¹⁴⁶ The case illustrates that due to the transnational nature of the Internet, disputes involving Internet regulation can quickly cause jurisdictional problems. Therefore, providing an international organization with an arbitration function might be a useful measure in the Internet context.

Finally, over the long-term, an international organization might be able to produce shared norms that could lead to greater harmonization of approaches towards Internet regulation. As developments such as the Cybercrime Convention show, producing

142. *Id.* (trans. by author).

143. This is the more traditional type of monitoring of international organizations that scholars envision. *See, e.g.,* Abbott & Snidal, *supra* note 106, at 14-15.

144. *See id.*

145. *See* Jackson, *supra* note 112, at 185-89.

146. *See supra* text accompanying notes 43-51.

international agreements in the Internet context is not impossible.¹⁴⁷ Likewise, while countries have different preferences and modes of regulation, many countries seem to agree that counteracting Internet hate speech is generally desirable.¹⁴⁸ In 2004, even the United States “proposed a 10-point action plan to the Organization for Security and Cooperation in Europe (OSCE) for addressing the profusion of racist, xenophobic and anti-Semitic propaganda on the Internet.”¹⁴⁹ Despite adhering to a policy of broadly protecting free speech, “[t]he plan urges OSCE states to prosecute criminal threats of violence on the Internet and to collect and publish data on hate crimes, while nongovernmental organizations (NGOs) are urged to increase their monitoring of the Internet. . . .”¹⁵⁰ These developments suggest that a development of shared norms in the Internet context might be possible. In line with the predictions of some scholars, an international organization could help develop such norms.¹⁵¹

III. POTENTIAL CRITICISMS OF CREATING AN INTERNATIONAL ORGANIZATION TO REGULATE THE INTERNET

While creating an international organization to regulate Internet content would provide many benefits, the approach admittedly has its limitations. First, it could be argued that an international organization would be ineffective because it is unlikely to include many of those ISPs that actually produce hate speech.¹⁵² Even if an international organization could provide a forum in which states and large, internationally-operating ISPs could meet, such a forum is unlikely to include smaller ISPs that spread hate speech. Much Internet hate speech is actually published by smaller servers who often exist specifically for the purpose of producing such content. An example is Stormfront, a U.S.-based ISP run by a former Ku Klux Klan leader that hosts dozens of sites that espouse hatred of blacks,

147. See, e.g., McCullagh & Broache, *supra* note 13.

148. The Additional Protocol, which has been signed not only by European countries but also by countries such as Canada and Japan, confirms this point. See *Canada Signs*, *supra* note 85. In addition, while the United States has a different *official* position on hate speech, as described above, there have been voluntary restrictions of Internet hate speech in the United States. See *supra* Part II.C.2.

149. United States Mission to the European Union, *U.S. Presents 10-Point Action Plan Against Internet Hate Crimes*, June 17, 2004, <http://useu.usmission.gov/Article.asp?ID=3E4AF8F8-837E-47BA-B5D6-9CC4C8CC8914>.

150. *Id.*

151. See, e.g., Wendt, *supra* note 101, at 417.

152. See Perine, *supra* note 4.

homosexuals, and Jews.¹⁵³ Hate sites such as Stormfront are unlikely to participate in any type of international solution to restrict hate speech. As a result, "even if ISPs such as Yahoo and EarthLink completely purge xenophobic content, Stormfront is always waiting in the wings."¹⁵⁴

However, a forum for agreements between states and large, internationally-operating ISPs would still be a helpful step in the right direction. "Governments can achieve a large degree of control by focusing on the most important ISPs that service the vast majority of Internet users."¹⁵⁵ In addition, the centralized monitoring that an international organization could provide would help to specifically observe and thereby to some degree control the activities of ISPs such as Stormfront. Thus, while an international organization may not be a perfect measure, it would still do much to contain Internet hate.

Second, it could be argued that an approach that is essentially based on voluntary self-control by ISPs is toothless. As described in the previous section, an international organization would to a large extent be based on states and ISPs agreeing on voluntary restrictions of objectionable Internet content.¹⁵⁶ Why, it could be asked, would private businesses accept the costs of voluntary restrictions? However, as mentioned above, as long as an ISP has any assets or potential business interests in a country, the threat of states reaching those assets, or of restricting market access, is a real one. Moreover, litigation such as the suit against Yahoo! France is costly for a company, and being publicly associated with supporting hate speech surely has no positive effect on a company's image. An ex-ante agreement between an ISP and a state could avoid such costs, thus providing for greater reliability in planning. The examples of ISPs that have already agreed to voluntary self-restrictions confirm the feasibility of such an approach.¹⁵⁷

Third, countries have experimented with methods for regulating Internet content that do not require forming agreements with ISPs. As described above, China has installed a comprehensive firewall system,¹⁵⁸ and European countries have also considered

153. *Id.*

154. *Id.*

155. GOLDSMITH & WU, *supra* note 11, at 73.

156. See Rafael, *supra* note 125; *supra* Part II.C.2.

157. See ANTI-DEFAMATION LEAGUE, *supra* note 9, at 11; see also *supra* text accompanying notes 126-127.

158. See GOLDSMITH & WU, *supra* note 11, at 92-95.

installing filtering systems.¹⁵⁹ Why not use such methods rather than forming an international organization? As China's experience shows, a national filtering system is very costly¹⁶⁰ and labor-intensive.¹⁶¹ While an international organization serving as a forum would produce initial setup costs, it would not require countries to maintain an expensive filtering system. As a result, attempting to find agreements with ISPs may well be cheaper over the long-term than running a comprehensive filtering system.¹⁶² In addition, a national filtering system risks isolating a country with respect to technological progress,¹⁶³ while reaching agreements through an international organization does not pose such a danger and may in the long-run even produce greater harmonization of national approaches.¹⁶⁴

Finally, critics reject voluntary self-restriction as nothing more than censorship. According to this line of argument, voluntary restrictions equal classical censorship in that both methods suppress people from expressing unfavorable opinions.¹⁶⁵ "History has learned [sic] us that societies which embrace 'censorship' are ultimately doomed to self extinction."¹⁶⁶ Rather than censorship—voluntary or not—people should be allowed to express ideas because the "marketplace of ideas" will in the long-term ensure that good ideas triumph over bad ones.¹⁶⁷ This logic also applies to hate speech on the Internet. According to Kenneth McVay, the spokesperson for Nizkor, an anti-Nazi online project which strongly supports free speech, "[he] can cite examples where Web sites have been forced to remove

159. Hanley, *supra* note 10, at 1014-15 (describing how Europe has considered filtering software).

160. See GOLDSMITH & WU, *supra* note 11, at 100.

161. *Id.* at 93.

162. Where needed, countries could still complement their approach by using filtering software, but in general, finding agreements with ISPs would seem to be less costly than a comprehensive, China-style filtering system. See, e.g., *id.* at 92-95.

163. See *id.* at 101-02 (noting how the Chinese system bears the risk of isolating the country with regard to Internet innovations).

164. See Wendt, *supra* note 101, at 417 (suggesting that international organizations may in the long-term reconstruct the identities of actors and thereby lead to greater harmonization of interests).

165. See, e.g., K.K. Brattman, Managing Editor, Holocaust Remembrance Network, Refuting Rabbi Abraham Cooper and His Drive in Censoring the Internet (Aug. 12, 2005), http://isurvived.org/Rabbi_Cooper-refutal.html.

166. *Id.*

167. See ANTI-DEFAMATION LEAGUE, *supra* note 9, at 3.

outright lies, through the simple vehicle of exposing those lies permanently, and doing so in a highly visible public forum.”¹⁶⁸

Against these arguments, advocates of voluntary self-restriction argue that the Internet does not fit the classic marketplace-of-ideas model.¹⁶⁹ According to this view, hate sites “provide no reasonable mechanism for discussion or debate. There is no opportunity to combat bad speech with more speech, and ensure that people who see the former also have the opportunity to see the latter.”¹⁷⁰ Considering the fact that different countries have different preferences regarding Internet regulation, this debate misses the point. In many countries, displaying certain content is simply illegal, and the international nature of the Internet undermines the enforcement of these laws. Against this background, an international organization arguably provides a useful method to allow different countries to implement their preferred modes of regulation. The solution advocated in this note tackles this reality, rather than taking sides in the debate on free speech.

IV. CONCLUSION

The attempt to apply national laws in the Internet context presents a problem of international scope. Because the Internet transcends national borders, no country can regulate it through national legislation only. While national legislation allows a country to control Internet content that originates within its borders, if an ISP is located abroad, a country’s national laws cannot regulate what the ISP publishes. Yet because of the global nature of the Internet, users within a country can view the content published by foreign ISPs, thus bypassing national legislation.

An international organization to regulate Internet content presents a powerful tool to deal with this problem. Such an organization could serve as a forum for negotiations between countries and foreign ISPs as well as internationally-operating Internet businesses. Through such negotiations, countries could attempt to encourage foreign ISPs to implement voluntary forms of regulation that would respect a country’s national laws. Moreover, an international organization would provide the benefit of an

168. Barry D. Bowen, *The Net and Extremists: Where Does the Responsibility Fall?*, SUNWORLD, Nov. 1996, <http://sunsite.uakom.sk/sunworldonline/swol-11-1996/swol-11-extremists.html>.

169. *See id.*

170. *Id.*

organizational apparatus that could employ experts and follow new technical developments. Finally, an international organization could act as a neutral third party in transnational disputes between countries and ISPs, eventually producing shared norms and a more uniform approach to Internet regulation in the long run.

Because an international organization is unlikely to include those ISPs that specifically aim to spread hate speech and other objectionable content, it is not a perfect solution. However, by including large, internationally-operating Internet businesses, an international organization could contribute significantly towards allowing countries to implement their national preferences regarding Internet regulation. As a result, the Internet would not only be a global medium that offers tremendous opportunities, but also one that respects diverging national legislation to a greater extent.

*Paul Przybylski**

* I would like to thank Philipp Sturm for his helpful comments and explanations of how the Internet works, and Jordana Cornish and Courtney Glaser for editing several drafts of this note.