



Global Policy Disorder:

Governing illegal and harmful content on the Internet with special reference to hate speech without restricting Freedom of the Media

Dr. Yaman Akdeniz

**Lecturer in CyberLaw, University of Leeds;
Director, Cyber-Rights & Cyber-Liberties (UK)**

<<http://www.cyber-rights.org>>

BETTER CALL TECH SERVICES. I
STUMBLED ONTO A HATE SITE!



Topher Terry THE HUMANIST
www.humanist.com



Issues

- Different approaches to “hate speech” in Europe: Illegal, harmful, offensive speech?
- **Harm Criterion is different within different European states**
- ECHR article 10, and margin of appreciation
- Problems of harmonisation and concerns for freedom of expression
- Different approaches to “hate speech” between Europe and North America
- First Amendment, US Constitution
- Within the Council of Europe, only France, Germany, Belgium, Switzerland, and Austria have laws criminalising the denial of crimes against humanity, and in the case of Germany, Belgium, and Austria this is only limited to the denial of genocide committed by the Nazis.
- Effectiveness of international initiatives such as the CoE Additional Protocol to the CyberCrime Convention 2001 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems
- Internet Service Providers Liability

Comparisons with “child pornography”

Child Pornography

- Society sees it as a problem.
- Child pornography is not a new problem.
- Digital child pornography is not a new problem - can be traced back to mid 1980s.
- Clear cut example of “illegal “content”
- Criminalised by the CoE CyberCrime Convention, the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and the EU Council Framework Decision on combating the sexual exploitation of children and child pornography (not adopted yet)
- UN Optional Protocol: **108 Signatories, 71 Parties as of February 2004.**

Hate Speech

- Society sees it as a problem
- Racism and xenophobia is not a new problem.
- Digital hate is not a new problem - can be traced back to mid 1980s.
- Difficult to categorise: Depending upon its nature and the laws of a specific state it could be considered illegal or harmful/offensive (BUT legal)
- Harm criterion is different within different European states.
- CoE Additional Protocol to the CyberCrime Convention on the criminalisation of acts of a racist and xenophobic nature committed through computer systems: 23 signatories so far but no ratifications.



Internet Governance





Harmonisation and Concerns for Freedom of Expression

- Differing views of the limits to freedom of expression have produced different legal responses to racist and xenophobic discourse in North America (especially the United States) and in Europe.
- The recent prosecution of Yahoo in France (Tribunal de Grande Instance de Paris) and the subsequent court case in San Jose (United States District Court for the Northern District of California) is a good example of the differences in legal approaches and protection provided to expression.

Yahoo Case

“This case is *not* about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.”

“What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation.”

YAHOO!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme, Case Number C-00-21275 JF [Docket No. 17], United States District Court for the Northern District of California, SAN JOSE DIVISION, 169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378, November 7, 2001, Decided.



Harmonisation and Concerns for Freedom of Expression

- While such differences are legitimate and acceptable, enforcement of such local and national standards to a person or ISP or company based in another jurisdiction remains problematic but at the same time “states within Western Europe should especially avoid pandering to the lowest common denominator where the least tolerant [such as France and Germany] can set the pace.”
- The Internet is not a lawless place but if the international norms are developed by adhering to the rules and laws of the lowest common denominator, then such actions (including cases like Yahoo) will have a chilling effect on cyber-speech.



CoE Additional Protocol

- Provisions involving the criminalisation of acts of a racist and xenophobic nature committed through computer systems were left out of the Cyber-Crime Convention 2001 as there was no consensus on the inclusion of such provisions.
- The additional protocol was opened for signature in Strasbourg, on 28 January 2003. It aims to harmonise substantive criminal law in the fight against racism and xenophobia on the Internet.
- It also aims to improve international co-operation in this field. The Council of Europe believes that a harmonised approach in domestic laws may prevent misuse of computer systems for a racist purpose.
- 23 member states have signed the additional protocol since it was opened to signature in January 2003 but no ratifications have taken place as of June 2004.
- The Protocol will enter into force following the ratification of the Protocol by five member states of the Council of Europe.



The Parliamentary Assembly considered racism not as an opinion but as a crime in its Recommendation 1543 (2001) on Racism and xenophobia in cyberspace. The Parliamentary Assembly also noted that the protocol will “have no effect unless every state hosting racist sites or messages is a party to it.”

Effectiveness of the Additional Protocol

- The Additional Protocol carries political significance but will the additional protocol have an impact upon reducing the problem of racism and xenophobia on the Internet?
- The steps taken by Belgium, France, Germany, and Switzerland at the national level have shown their limitations, and an Additional Protocol aimed at punishing racism on the Internet will have no effect unless every state hosting racist sites or messages is a party to it.
- The alignment of national criminal laws in relation to content (speech) regulation generally seems not to be a feasible option due to the moral, cultural, economic, and political differences between the member states. The different approaches to freedom of expression should also not be forgotten.
- Even if all member states of the CoE sign and ratify the additional protocol, the problem may not disappear. This also reflects the true nature of the Internet which includes risks.
- The “one for all” rules advocated by the CoE remains problematic and countries with strong constitutional protection for freedom of expression such as the USA will not be queuing to sign and ratify the additional protocol. In other words there will always be safe havens to host and carry content deemed to be illegal by the Additional Protocol.
- Although state legislation is still a strong option and maybe preferred in most instances, problems associated with the Internet may require the careful consideration of alternatives to state regulation. Due to the global and decentralised nature of the Internet, government regulation may not be the best alternative to tackle global problems, and jurisdictional issues should be taken into account while policies are developed at the state level.



Margin of Appreciation

- Article 10 of the ECHR recognises the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas. “Article 10 of the ECHR is applicable **not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.**”
- However, the European Court of Human Rights held that the State’s actions to restrict the right to freedom of expression are properly justified under the restrictions of paragraph 2 of Article 10 of the ECHR, in particular when such ideas or expressions violated the rights of others.
- The Explanatory Report of the Additional Protocol states that “this Protocol, on the basis of national and international instruments, establishes the extent to which the dissemination of racist and xenophobic expressions and ideas violates the rights of others.” But it should also be noted that the European Court of Human Rights has consistently held that:
- “the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case.”
Autronic AG judgment of 22 May 1990, Series A No. 178, § 61.



Margin of Appreciation

- Where there has been an interference with the exercise of the rights and freedoms guaranteed in Article 10(1), the supervision must be strict, because of the importance of the rights in question. Therefore, **the necessity for restricting them must be convincingly established**. *Autronic AG* judgment of 22 May 1990, Series A No. 178, § 61.
- At the same time **there is little scope for restrictions under Article 10(2) on political speech or on debate of matters of public interest**. *Erdogdu and Ince v. Turkey*, 8 July 1999, App. Nos. 25067/94 and 25068/94
- But **criminalisation of speech which incite violence against an individual** or a public official or a sector of the population **is deemed to be compatible with article 10**. *Sener v. Turkey*, 18 July 2000, Application No. 26680/95
- In such cases the State authorities **enjoy a wider margin of appreciation** when examining the need for an interference with freedom of expression, and it does remain open for competent state authorities to adopt measures, even of a criminal law nature, intended to react appropriately to such remarks.

Alternatives to International Regulation

- Regulation is often designed to reduce risk but alternative methods can be less costly, more flexible and more effective than prescriptive government legislation. These include the option “to do nothing”, self-regulation, co-regulation, and information and education campaigns.
- Within the context of racism and xenophobia on the Internet, “to do nothing” does not seem to be an appropriate option as the problem does not seem to disappear. In fact the growing concerns for the availability of such content over the Internet triggered the Council of Europe to develop the Additional Protocol.
- On the other hand, the Declaration on Freedom of communication on the Internet adopted by the Committee of Ministers of the Council of Europe on 28 May 2003 encouraged self-regulation and co-regulatory initiatives regarding Internet content.
- Similar recommendations were also made in a CoE Recommendation (2001) 8 on self-regulation concerning cyber-content.
- The no rush to legislation approach adopted by the European Commission with its Action Plan on promoting safer use of the Internet should be applauded which is now extended to cover EU candidate countries. The Action Plan includes research into technical means to tackle both illegal and harmful content, and information and education campaigns.
- So there is more to be done to tackle the problem of racism and xenophobia on the Internet.



Better Policy Making?

