

## Seminar Guaranteeing Media freedom on the Internet

### Presentation by Morris Lipson, Article 19

#### I. BASIC LAWS – VARIATIONS

##### A. International Covenant for Civil and Political Rights

- 1. Article 20.2

Prohibit any incitement to violence based on racial hatred.

- 2. Article 5

Convention doesn't entitle anyone (e.g. using freedom of expression) to destroy any rights recognized under ICCPR.

- 3. Human Rights Committee

Restrictions on freedom of expression and hate as defined. OK if narrow/necessary.

- 4. It's up to States to draft legislation falling under these broad terms.

##### B. Convention for the Eradication of Racial Discrimination (Article 4)

- 1. States must ban dissemination of racist speech, as well as incitement.
- 2. But do so with due regard for all UD human rights, including freedom of expression.
- 3. Various States (Australia, US, UK) have entered reservations saying they'll interpret Art 4 so as not to conflict with their national freedom of expression balance of speech and hate speech.

##### C. Protocol to Council of Europe Cyber-crime Convention

- 1. Signatories (as of July 1<sup>st</sup> 2004)

To CC (entry into force on July 1<sup>st</sup> 2004)

Total number of signatures not followed by ratifications:	32
Total number of ratifications/accessions:	6

To Protocol

Total number of signatures not followed by ratifications:	23
---	----

□ 2. Substance

(a). "Racist material" equals "material which advocates, promotes or incites racial hatred.

(b). States to establish criminal offences for following intentional acts:

- distributing or making available to the public racist materials (via computer)
- threatening based on race
- publicly insulting based on race
- distributing / making available materials minimising / approving genocide / crimes against humanity

(c). For some, Protocol says State may reserve right not to apply where conflict with national freedom of expression.

(d). Some may be applied in whole or in part.

(e). Specifically provides that "public" includes chat rooms, newsgroups, discussion fora.

(f). States may prosecute/hold liable for any contravening act that occurs in its territory.

**D. Resulting picture**

□ 1. Lots of leeway for different anti-racism legislative schemes.

□ 2. And in fact, there is very substantial variation between countries.

(a). Germany and France have holocaust denial laws. US, for example, doesn't.

(b). US requires incitement plus high probability of violence. In other countries incitement is enough.

(c). Some countries impose liability on ISPs for hosting racist content.

Others: only if they know and have failed to take reasonable steps.

Others: even more protection for ISPs.

□ 3. Major consequences

(a). What is legal - hate speech - in country X may be illegal in country Y.

(b) Lots of variety.

(c). Impossible for ordinary people to know about these laws in all these countries.

(d). Not just US vs. others; lots of variation in CoE countries and OSCE countries.

Insert: Download or Upload?

1. When there is racist content on the Internet, the question one should wonder is “where does the offending event occur?”.
2. Recall: Protocol says countries are to prosecute racist content when the incitement / promotion / insult “occurs in the country”.
3. Choice:
  - Upload jurisdiction, or
  - Download jurisdiction?
4. Analogy to newspaper publisher: if you ship paper to jurisdiction X, you’re responsible to comply with X’s laws.
5. Various tendencies in this direction  
More below but:
  - (a). Australia defamation case.
  - (b). Rome II: new proposed rule in EU would make, e.g., the defamation law of the country where the defamation occurs as the applicable law + relevant EU law says defamation occurs upon download.

## II. DILEMMA

1. X lives in country A; uses an ISP there, uploads materials there.
  - (a). Can be hate speech that doesn’t incite but may promote
  - (b). Probably legal in US, India, Israel
2. Typically, X has no control over who accesses his material.
  - (a). Some may just read it.
  - (b). Others may download the stuff.
3. But clearly, it’s available everywhere.
4. E.g. Protocol to Cybercrime Convention says: “will apply where the event happens in the country”.
5. As we will see, other courts have also said the crime occurs upon download.
6. Under download rule, X is criminally liable in any country where his material is downloaded and where it’s illegal hate speech.

## III. COMPARE TO NEWSPAPER PUBLISHER

1. Publisher has control over where newspapers are distributed.

2. Has an "official formal network of sellers".
3. Has reasonable expectation of which jurisdictions his materials will land in.
4. Could not complain if he's brought to court in any of those places for illegal content.
5. Compare: if newspaper is taken without his approval to another jurisdiction where material is illegal, he's clearly not liable.

#### **IV. BACK TO INTERNET PUBLISHER, AT LEAST SMALL PUBLISHERS**

1. Generally, they have no control.
2. Yet, if it's held that the material is published where it's downloaded, he is potentially liable everywhere.
3. Particularly onerous where there are very different criminal regimes, as there are with hate speech.

#### **V. CASES**

##### 1. German Federal Court of Justice, 2000

- Australian national uploads pro-Nazi stuff in Australia
- Stuff downloaded in Germany
- Legal in Australia, illegal in Germany
- Court ruled that the publisher was liable to criminal prosecution in Germany

##### 2. Yahoo & France

- Yahoo in US ran an auction site in which Nazi memorabilia was for sale
- French residents could access the site and buy materials
- Auction legal in US, illegal in France
- French court orders Yahoo to block access to all persons using computers in France
- Various technical disputes; final order is that Yahoo in US is liable for fines if it doesn't effectively block

##### 3. Yahoo in US

- Court held that it would not enforce any fines imposed by the French court
- Because that would be to penalise Yahoo for activities it's entitled to perform in the US

##### 4. Consider the implications regarding jurisdictions with very broad anti-racism provisions

###### (a). Turkey

- Basic provision prohibiting face-based incitement

- Convicted for: distributing leaflets objecting to restrictions on street vendors which they said were an attempt to marginalise Kurds.
- ECHR said it was a violation of Article 10.

(b). Uzbekistan

- Newspaper shut down for commenting on need for minority-language textbooks

## **VI. CONCLUSIONS REGARDING INDIVIDUALS**

1. The rule that the action occurs where downloading occurs treats all Internet publishers like commercial print publishers.
2. Broad definitions of “public”, and other broad definitions in mass media laws, reach all kinds of small Internet communicators:
  - Chat room + discussion participants
  - Small newsletters
  - In extreme cases, emailers.
3. The picture that emerges: virtually any “right wing” message posted on the Internet – and many innocent messages too – may subject the authors to criminal liability, totally inappropriately.
4. This shows: the print media model which is being imported to Internet hate speech regulation is inappropriate.

## **VII. CONCLUSION REGARDING INTERNET REGULATION**

1. What about the idea of a “uniform” Internet rule against hate speech?
2. Current instruments – CERD, Cyber Protocol – show this is unworkable.
3. The most we can expect, by way of uniformity, is what we’ve got.
4. But as we’ve seen, with download rule, this doesn’t work.
5. Scrap download rule.
6. And think about regulation of Internet content again.