
Europe Attempts to Criminalize Unpopular Speech on the Internet

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In a recent move by the Council of Europe, an organization of 43 European nations focused primarily on human rights, that has implications for free speech and e-commerce, several European nations have proposed the criminalization of speech on the Internet that they deem offensive—including speech from the United States. These proposals have been made despite a recent U.S. federal court decision holding that European nations have no authority to regulate Internet speech that originates in the United States. Internet service providers ("ISPs") and online service providers ("OSPs"), as well as individual speakers, could be liable for speech that violates the terms of the proposed European speech protocol.

On November 23, 2001, the Council of Europe adopted the [Convention on Cybercrime](#), which among other things facilitates international cooperation in the prosecution of Internet crimes such as child pornography and the denial of service attacks that plagued a number of prominent e-commerce web sites in the past. In connection with the adoption of that Convention, a number of European member states, including the United Kingdom, Russia, France, Germany, Italy and Sweden, have proposed an "additional protocol" that would criminalize speech that European member states deem "racist or xenophobic." The actual draft of the European speech protocol is scheduled for release by May 2002.

The United States is a signatory to and supporter of the Convention on Cybercrime. The United States, however, has resisted supporting the proposed European speech protocol, arguing that it would be inconsistent with the First Amendment to the U.S. Constitution. Despite the resistance of the United States, the European member states say they [seek the United States' cooperation](#) to prevent dissemination, via servers located in the U.S., of hate messages. The Council of Europe calls this concept "unlawful hosting". Under at least one proposal, ISPs and OSPs who engage in "unlawful hosting" — even those located within the United States — could be held liable under European law. The European speech protocol has obvious First Amendment implications. Although the Council of Europe says it recognizes the First Amendment and seeks only "cooperation" from the United States, under one proposal

the United States could be asked to "order the host operator to do away with unlawfully hosted content."

Further, the First Amendment issues appear even greater in light of a recent U.S. federal court decision involving Yahoo! and its freedom to permit the posting of unpopular speech on its Internet sites. In *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, the United States District Court for the Northern District of California granted summary judgment for Yahoo! and declared that a French court and certain French human rights groups could not force Yahoo! to take down speech deemed illegal under French law. Specifically, the court held that Yahoo! could continue to offer for sale on its auction site Nazi-related items and documents.

Months earlier, a French court found Yahoo! guilty of violating France's speech laws by permitting Yahoo!'s users to post pro-Nazi propaganda and offer Nazi-era items for sale on Yahoo!'s online auction site. The French court ordered Yahoo! either to block the ability of French citizens to access the offensive material or face a fine of \$13,000 per day. Yahoo! stated that it was technologically impossible to single-out French citizens for blocking and that, therefore, the only way Yahoo! could comply with the French court's order would be to take down all offensive material, thereby violating Yahoo!'s rights of free speech under the United States Constitution. Yahoo! sued in federal court in California for a declaration that France had no right to dictate what speech Yahoo! could permit on its web sites.

The U.S. federal court agreed with Yahoo! and explicitly recognized that the case presented "novel and important issues arising from the global reach of the Internet." Although quick to emphasize that it was not criticizing France's decision to outlaw racist speech that would otherwise be permissible in the United States, the court ruled that the First Amendment does not allow a foreign 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.

Members of the Council of Europe contend that their proposed speech protocol would be enforceable by a United States court because, unlike the *Yahoo!* case, the proposed protocol would be directed at European citizens (not United States citizens) who set up web sites through U.S. ISPs or OSPs for the specific purpose of skirting European speech laws. It is unclear whether a U.S. court would accept the Council of Europe's interpretation of the First Amendment's lack of protection under those circumstances or the Council of Europe's attempt to distinguish the *Yahoo!* case. In addition, as discussed in our [April 28, 2000](#) and [December 5, 2000](#) Internet Alerts, ISPs and OSPs enjoy broad immunity from liability under the U.S. Communications Decency Act in addition to the protection of the First Amendment.

This does not mean, however, that American ISPs and OSPs do not face risk of liability. In apparent recognition that the United States Government is unlikely to "cooperate" with the

proposed European speech protocol, one member of the Council of Europe suggests it would be better to persuade ISPs and OSPs directly to "cooperate." For American ISPs or OSPs with any presence, license or property in Europe, this "persuasion" could take the form of fines, levies, attachments or regulatory action against such property if a European tribunal finds the American ISP or OSP violated the speech protocol. American ISPs and OSPs should, therefore, carefully monitor the development of Europe's new speech protocol, which poses at least the risk of future liability.

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