

THE WAR ON

SPEECH

Can Europe and the United States Find Middle Ground?

By Kimberly A. Paulson

More than two centuries ago, the Revolutionary War ended. The United States of America declared its independence from Europe and codified its newly found freedoms so that no one, Europeans or others, could take them away again. Although most Americans do not realize it, there is now a new war waging between the United States and Europe. It is a legal war, one being fought in courtrooms and legislatures, not battlefields. It is a war based on conflicting values and fueled by the proliferation of the Internet. It is a war over one of America's most coveted freedoms—the freedom of speech—and it is unlikely that the combatants will find middle ground.

Hate on the Web

The Internet is home to the weird, the obscene, and, sometimes, the hateful. Websites promoting hate have become a mainstay of cyberspace. While most U.S. citizens presumably find such sites, and the views they express, abhorrent, we accept them as part of the mix of information protected by the First Amendment to the United States Constitution. However, the proliferation of these sites, especially neo-Nazi sites, have caused great concern in European nations, which tend to have a heightened sensitivity to the tragedies of the World War II era. In fact, many European nations have in place laws prohibiting the display, possession, or sale of neo-Nazi memorabilia as well as the espousing of neo-Nazi views and ideologies. In addition, questioning facts surrounding the Holocaust is often prohibited.

For example, recently the publisher of *Quid*, a popular French reference manual, which publishes both on and off-line, was ordered by a French court to remove a revisionist historical theory of the Holocaust, which claimed that the number of Jews put to death during the Holocaust was greatly exaggerated. The judge ordered that this theory be removed from *Quids* 2004 edition as well as from its Internet site, that correction notices be sent to all bookstores where *Quid* is sold, and that the publisher insert a correction in copies still being published. The court also ordered the publisher to publish corrections in five newspapers. Such court-mandated censorship is not uncommon in Europe, but it is unthinkable in the U.S.

Because of these strict laws throughout Europe, the United States has become the safe harbor of hate group websites, with numerous groups hosting their controversial websites from within the U.S. to take advantage of America's broader protections. However, although a website is hosted in the U.S., it is still generally accessible anywhere in the world, even in places where its subject matter may be prohibited by law. Based on the language of the laws of many European countries, the source of the offending material is irrelevant, as long as it is made available to citizens of the respective European country. This, of course, means that European courts can attempt to impose their much more restrictive content-based laws on U.S. websites, that are acting within their rights under the laws of the United States. Understandably, this leads to complicated and controversial disputes.

For instance, in 2001, newspapers reported that the German Interior Minister was contemplating perpetrating "denial of service" attacks to disable neo-Nazi websites. Reportedly, the German government believed such attacks would be legal, even if directed at sites hosted in other countries, because it represents "the defense of [the German] system of laws." If the German government were to target sites based in the U.S., how far could the First Amendment reach? As of now this is a theoretical question, because it appears that the German government has not yet exercised this purported right against a U.S.-based website. However, the mere thought that foreign governments might be able to shut down U.S. websites undeterred based solely on their content is, to say the least, troubling.

French Law v. American Law

Beyond the legality of "self-help" tactics, the question also arises as to whether a European nation can impose legal penalties against a U.S. citizen for on-line activity that is perfectly legal in the U.S. This question is no longer simply theoretical.

In 2000, French non-profit organizations committed to fighting anti-Semitism filed a suit in French court against Yahoo! based on its auction sites' display of more than 1,000 items related to Nazism and the Third Reich that were for sale. The organization claimed that such postings violated French law, which prohibits exhibition of Nazi propaganda and artifacts for sale. Items posted for sale on the Yahoo! auction site included Adolf Hitler's *Mein Kampf*, *The Protocol of the Elders of Zion* (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900s), and purported "evidence" that the gas chambers of the Holocaust did not

exist. The court ordered Yahoo! to block the offering from being viewed by French citizens, with a monetary fine for each day past the court-imposed deadline that the offensive items were still accessible. Although Yahoo! made many concessions, it contended that it was technologically unable to perform the extent of blocking that the French ordered. The court disagreed, and reaffirmed its order.

Like the white-hatted cowboy of Old West lore, a federal court in California came to the rescue. After it became clear that the French court was not about to alter its decision, Yahoo! filed a complaint in the U.S. District Court for the Northern District of California, seeking a declaratory judgment that the French court's orders were not enforceable under the laws of the United States. In a carefully crafted opinion, the U.S. District Court showed great deference to France and the legitimacy of French laws, but still upheld the primacy of the First Amendment.¹

The court noted that "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." The court also stated "[n]or is this case about the right of France or any other nation to determine its own law and social policies . . . France clearly has the right to enact and enforce laws such as those relied upon by the French court here." Instead, the court explained, "[w]hat 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."

The court concluded that it must decide the case "in accordance with the Constitution and laws of the United States." It acknowledged that in so doing,

it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of

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offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

Despite its deference, the U.S. District Court granted Yahoo! the requested relief, holding that “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.” The court’s opinion confirmed that European laws regulating the content of speech cannot be reconciled with the United States’s constitutionally guaranteed freedom of speech.

Unfortunately, this case is little more than a small battle in an ongoing war. The values underlying the respective laws are inherently different. The laws simply cannot be applied consistently with one another.

European Convention on Cybercrime

Recently, this issue has again reared its ugly head. The Council of Europe has added provisions to its European Convention on Cybercrime that criminalize certain Internet content. While many commentators refer to the provisions as banning “hate speech,” the restrictions, in fact, go much further than that. The amendment prohibits distributing or otherwise making available to the public through a computer system “any written material, any image or any other representation of ideas or theories, which advocates, promotes, or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent, or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”

Using cyberspace to make threats to commit a serious criminal offense against a person or group of persons based on their “race, colour, descent, or national or ethnic origin, as well as religion” is also outlawed. Even simply “insulting publicly” a person or group of persons on the same basis is criminalized. Finally, the amendment also outlaws distributing or otherwise making available to the public through a computer system “material which denies, grossly minimizes, approves, or justifies acts constituting genocide or crimes against humanity.”

This amendment would make all signatories to the convention, including those outside of Europe, equally subject to these restrictions. ISP’s and web-hosting companies in signatory countries would be required to respond to and comply with legal process from other signatory countries with respect to these hate speech provisions, regardless of the laws of the country in which they reside.

The representatives serving on the European Council must still decide whether to adopt or reject the measure during the next Parliamentary Assembly session in January 2003, but have reportedly indicated their intention to adopt it.² Even if the measure is adopted, though, the respective law-making bodies of European countries will still need to ratify it.

The United States is a non-European signatory to the Convention on Cybercrime in its current form, as are Canada, Japan, and South Africa. This new “hate speech” amendment was left out of the original convention due largely to opposition by the U.S. and other delegates who were concerned about its significant restrictions on freedom of speech. President Bush has already indicated that the U.S. will not sign on to the amendment because its provisions are contrary to the First Amendment. If this amendment is adopted and eventually ratified by European countries, it will strengthen the position of the European countries in its war on speech and pose an even greater threat to America’s beloved freedom of speech. Even without the U.S.’s signature, the amended convention would also pose more dangers to U.S. citizens in cyberspace.

Revolutionary War Revisited

Many Americans forget that the Internet freedoms to which we have become accustomed in the U.S. are privileges bestowed upon us by virtue of the First Amendment to the U.S. Constitution. Such privileges do not accompany us into foreign cyberspace territories. We leave our First Amendment at the U.S. border. Perhaps the U.S. courts will continue to rescue U.S. citizens who find themselves mired in European legal quicksand, but there is uncertainty as to the results of future legal proceedings. Moreover, even if a U.S. court finds a foreign judgment unenforceable in the U.S., the foreign court can still enforce it against a person or assets located in Europe.

The question of which country’s laws apply to an Internet transaction is not novel. In every area of the law, the Internet presents a challenge. This dispute is notable, though, because of the fundamental freedom at issue. If Internet users have to conform their speech to the laws of all countries where the speech might be accessible, then speech in cyberspace will be reduced to the lowest common denominator and U.S. citizens’ free speech rights will be all but obliterated with respect to the Internet. Ironically, more than 200 years after the Revolutionary War, Americans again find themselves fighting against European nations to protect a fundamental freedom. Given the strength of the convictions behind the competing values, and the inherent power of the Internet, this international war on speech is unlikely to be resolved soon. ◆



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Footnotes

1. See *Yahoo!, Inc v La Ligue Contre Le Racisme Et L’antisemitisme*, 169 F Supp 2d 1181 (ND Cal 2001).
2. This article was submitted for publication prior to the January Parliamentary Assembly session.