NEW YORK LAW SCHOOL

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 49
Issue 1 *State of Play*

Article 15

January 2004

Sound and Fury Signifying Nothing?: Jurgen Büssow's Battle Against Hate-Speech on the Internet

Eric T. Eberwine
New York Law School

SOUND AND FURY SIGNIFYING NOTHING?: JÜRGEN BÜSSOW'S BATTLE AGAINST HATE-SPEECH ON THE INTERNET

ERIC T. EBERWINE*

Propaganda has only one object . . . to conquer the masses. Every means that furthers this aim is good; every means that hinders it is bad.[1]

The combination of hatred and technology is the greatest danger threatening mankind.[2]

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.[3]

I. INTRODUCTION

Derek Black is a thirteen-year-old webmaster. He is responsible for designing his own web page, replete with eye-catching animated graphics, articles about Martin Luther King, Jr., and a collection of optical illusions. Perhaps these are not unusual features for a teenager's web site. However, Derek's page takes on a darker meaning because it is the "Kid's Page" featured on Stormfront.org, ("Stormfront") a site run by his father, Don Black, promoting "White Pride World Wide." Don Black, who succeeded David Duke as the leader of the Ku Klux Klan in 1980, founded Stormfront on January 11, 1995.[4] Since then, Stormfront has grown to become one of the Internet's most popular right-extremist web sites, boasting a traffic

* J.D., New York Law School (2003).

1. JOESEPH GOEBBELS, THE GOEBBELS DIARIES: 1942-1943 13 (Louis P. Lochner ed. & trans., 1948).

2. SIMON WIESENTHAL, JUSTICE, NOT VENGEANCE 358 (Ewald Osers trans., Grove Weidenfeld 1989).

3. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, JJ., concurring).

4. *See* http://www.stormfront.org (last visited Sept. 15, 2004).

rank of 4,222 with 1,405 other linking sites.[5] By way of comparison, the Anti-Defamation League's web page, has a traffic rank of 22,109.[6]

Gary "Gerhard" Lauck publishes Nazi newspapers in twelve languages and offers a free download of Adolf Hitler's *Mein Kampf* on his web site Nazi-Lauck-nsdapao.com ("Lauck" or "Nazi-Lauck").[7] Lauck provides a wide selection of Nazi propaganda materials and also sells Nazi memorabilia. Although Lauck's site does not enjoy the popularity of Stormfront, Gary Lauck does have the distinction of having been imprisoned for four years in Germany for inciting racial hatred and disseminating illegal propaganda.[8]

Savvy right-extremists have adapted to advances in information technology. Specifically, they have utilized the Internet to proselytize their hatred. Stormfront's astonishing popularity is an example of this phenomenon. Many of these web sites are located within the United States, where the courts have emphatically provided the highest level of protection to controversial Internet sites under the First Amendment.[9]

The Internet is a truly global medium that is "ambient - nowhere in particular and everywhere at once."[10] Web sites such as Stormfront, based in Palm Beach, Florida, and Nazi-Lauck, based in Lincoln, Nebraska are simultaneously available around the world.

---

5. *See* http://www.alexa.com (last visited Sept. 14, 2003). Alexa.com provides free traffic rankings and data for Internet sites. *See also* Tara McKelvey, *Father and Son Team on Hate Site*, *at* http://www.usatoday.com/life/2001-07-16-kid-hate-sites.htm (last visited July 16, 2001).

6. *See* Anti-Defamation League *at* http://www.adl.org (last visited Sept. 15, 2004); *see also* http://www.alexa.com (last visited Mar. 25, 2003). Other Alexa.com traffic rankings for comparison: ACLU.org 15,047; Wiesenthal.com 30,326; Tolerance.org 56,417.

7. *See* http://www.nazi-lauck-nsdapao.com (last visited Sept. 15, 2004).

8. Nancy Finkin, *Nebraska's Nazi, at* http://www.net.unl.edu/~swi/pers/nazi.html (Mar. 24, 1995). Gary Lauck was convicted in Hamburg, Germany on August 22, 1996. Lauck was arrested in Denmark and was extradited to Germany (Mar. 24, 1995). *See also* http://www.alexa.com (last visited Sept. 14, 2003). The traffic rank on the Nazi-Lauck site on October 27, 2003 was 338,868. *Id.*

9. *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Reno v. ACLU, 521 U.S. 844 (1997); Cyberspace Communications, Inc. v. Engler, 238 F.3d 420 (6th Cir. 2000); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000) ("*Reno II*"), *cert. granted*, 532 U.S. 1037 (2001); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

10. *Reno II*, 217 F.3d at 169 (quoting Doe v. Roe, 955 P.2d 951, 956 (Ariz. 1998)).

Not all countries, however, afford the same constitutional protection for hate-speech as the United States Supreme Court.[11] This raises the following questions: Should web sites based in the United States and protected under the First Amendment be subject to regulation in foreign countries? Or should countries with stricter speech regimes be able to block web site content or even force the content to be taken down and removed from servers in other countries? In other words, should the First Amendment be the default standard for free speech on the Internet? Further, should the Internet be thought of as an "American environment"?[12]

Germany's response to these questions appears to be an emphatic *Nein!* Düsseldorf District Government President Jürgen Büssow has ordered all Internet Service Providers ("ISPs") in the German State of Nordrhein-Westfalen (North Rhine-Westphalia) to block user access[13] to the U.S.-based Stormfront and Nazi-Lauck sites. Büssow's *Sperrungsverfügung*[14] (hereinafter "Blocking-Order") has taken a highly controversial, and hotly debated stance on the

11. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that the First Amendment does not permit the government to impose special prohibitions on speakers who express views on disfavored subjects. The petitioner was charged with a violation of the St. Paul Bias Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), for allegedly burning a cross in the yard of an African-American family).

12. For example, one may argue that the interest is an "American Environment" due to the concentration of power in the Internet Corporation for Assigned Names and Numbers ("ICANN"), incorporated and located in the United States. *See generally* John Perry Barlow, *The Accra Manifesto* (Mar. 12, 2002), *available at* http://www.eon.law.harvard.edu/ghana2002/icann.html (discussing the significant concentration of power in ICANN). ICANN is responsible for IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions). *Id. See also* John Perry Barlow, *A Declaration of the Independence of Cyberspace* (February 8, 1996), *available at* http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration ("Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter. There is no matter here.").

13. The term "user access" refers to Internet users in the general public. Büssow's *Sperrungsverfügung* does not apply when the prohibited sites are accessed for science, research, or educational purposes. *See* Sperrungsverfügung, v. 06.02.2002.

14. The *Sperrungsverfügung* is an Administrative Order issued by the Düsseldorf District Government. The *Sperrungsverfügung* is currently in force for all of North Rhine-Westphalia pending further judicial review.

question of racist and xenophobic content on the Internet.[15] To date, Büssow's Blocking-Order has found near unanimous support in German courts.

Jürgen Büssow's Blocking-Order is consistent with United Nations and European Union attitudes towards regulating racist and xenophobic speech. The Blocking-Order in many ways is a local reaction to the First Amendment protections afforded hate-speech in the United States, as well as a reflection of unique social and moral values forged in Europe following World War II. The fundamental split in attitude towards hate-speech between the U.S., U.N., and E.U. forms a contextual backdrop for the more focused legal debate developing in Germany.

In Germany, the debate turns on just how the Internet, or more precisely Internet access, should be legally defined and there-

15. *See* Arved Greiner, *Sperrungsverfügungen als Mittel der Gefahrenabwehr im Internet*, 8 COMPUTER UND RECHT [CR] 620 (2002); Bernd Holznagel and Stephanie Kussel, *Möglichkeiten und Risiken bei der Bekämpfung rechtsradikaler Inhalte im Internet*, 6 MULTIMEDIA UND RECHT [MMR] 347 (2001); Bernd Holznagel, *Meinungsfreiheit oder Free Speech im Internet*, 2 ZEITSCHRIFT FÜR MEDIEN- UND KOMMUNIKATIONSRECHT 93 (2002); Michael Hornig, *Möglichkeiten des Ordnungsrechts bei der Bekämpfung rechtsextremistischer Inhalte im Internet- Zur Internet-Aufsicht auf der grundlage des § 18 Mediendienste-Staatsvertrags*, 11 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 846 (2001); Christian Koenig and Sascha Loetz, *Sperrungsanordnungen gegenüber Network- und Access-Providern*, 7 CR 438 (1999); Kristian Köhntopp and Marit Köhntopp, *Sperrungen im Internet*, 1 KOMMUNIKATION UND RECHT [K&R] 25 (1998); Peter Mankowski, *Die Düsseldorfer Sperrungsverfügung- alles andere als rheinischer Karneval*, 5 MMR Editorial (2002); Andreus Neumann, *Ordnungsrechtliche Sperrungsverfuugungen und die Informationsfreiheit nach Art. 5 Abs. 1 S. 1 2. Alt. GG*, (2002), *available at* http://www.artikel5.de/artikel/sperrunginffreiheit.html (last visited Oct. 24, 2002)*;* Gerhard Schneider, *Die Wirksamkeit der Sperrung von Internet-Zugriffen*, 10 MMR 571 (1999); Jürgen Schütte, *Sperrung von Internet-Seiten mit verbotenem Inhalt- Und es geht doch* 23 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] (2002); Gerald Spindler and Christian Volkmann, *Die öffentlich-rechtliche Störerhaftung der Access-Provider*, 8 K&R 398 (2002); Thomas Stadler, *Sperrungsverfügung gegen Access-Provider*, 6 MMR 343 (2002); Thomas Stadler, *Verantwortlichkeit für Hyperlinks nach der Neufassung des TDG*, INTERNET-ZEITSCHRIFT FÜR RECHTSINFORMATIK, JurPC Web-Dok. 2/2003 (Jan. 13, 2003), *at* http://www.jurpc.de/aufsatz/20030002.htm.; Andreus Zimmermann, *Polizeiliche Gefahrenabwehr und das Internet*, 43 NJW 3145 (1999). *See also Materialien zu: Internet-Sperrungsverfügungen,* Deutsche Arbeitsgemeinschaft zur Verteidigung der Informationsfreiheit in Datennetzen [DAVID], *at* http://www.david-gegen-goliath.org (last visited April 20, 2003); *Internationaler Kongress "Hass und Gewalt im Internet,"* Bezirksregierung Düsseldorf, Landesanstalt für Medien Nordrhein-Westfalen (Sept. 17, 2002), *at* http://www.brd.nrw.de/BezRegDdorf/hierarchie/themen/Sicherheit_und_Ordnung/Medienmissbrauch/Internationaler_Kongress__Hass_und_Gewalt_im_Internet_.php (last visited April 20, 2003).

fore regulated. The Federal Communications Commission and courts in the United States have recently struggled with this question as well.[16] Is Internet access a telecommunications service, a broadcast service, or something else entirely? In Germany, the debate is fueled by a separation of regulatory competence between the *Bund* (federal government) and the *Länder* (German states).[17] The *Bund* is responsible for regulating the means by which electronic media is distributed, including telecommunications. The *Länder* regulate content, including broadcasting, via a series of inter-state treaties.

This Note examines the conflict between the German *Bund* and the *Länder* concerning regulation of Internet service and, more specifically, Internet content. The development of German media law supports the conclusion that State law — not federal law — will control the issue of content regulation on the Internet. Büssow's Blocking-Order is premised on State law, and to date, the administrative courts in Nordrhein-Westfalen have agreed that State law is the proper foundation. While ISPs in Nordrhein-Westfalen will undoubtedly appeal the administrative court decisions, finding that Internet content may be subject to federal regulation would ultimately require the German courts to reevaluate constitutional court precedent and the German Constitution itself.

To that end, Part II of this Note explores the historical roles of the *Bund* and *Länder* in regulating media through German constitutional law and relevant case law. Next, Part III demonstrates that there is a fundamental conflict in legally defining Internet service

16. *See, e.g.,* Recording Indus. Ass'n of Am. v. Verizon, 240 F. Supp. 2d 24, 27 (D.D.C. 2003) (discussing that an ISP falls within one of four categories based on how content has interacted with the service provider's system or network); MediaOne v. County of Henrico, 97 F. Supp. 2d 712 (E.D. Va. 2000) ("MediaOne's Road Runner service contains news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access, and therefore it falls under the statutory definition of 'cable service.'"); AT&T v. Portland, 216 F.3d 871 (9th Cir. 2000) (ISP provides both an information and telecommunication service); *FCC Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 00-355 (rel. Sept. 28, 2000); In Re Fed.-State Joint Bd. On Universal Serv., 13 FCC Rcd. 11501 (1998) ("Internet service providers themselves provide information services . . . .").

17. Timo Rosenkranz, *Sperrungsanordnungen gegen Access-Provider*, JurPC Web-Dok. 16/2003, (Feb. 3, 2003) ¶4 INTERNET-ZEITSCHRIFT FÜR RECHTSINFORMATIK, *at* http://www.jurpc.de/aufsatz/20030016.htm.

and Internet content under existing German law, namely the *Länder's Staatsvertrag über Mediendienste* (*Mediendienste-Staatsvertag*)[18] ("State Treaty on Media Services" or "MDStV"), and the *Bund's Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste* (*Informations- und Kommunikationsdienste-Gesetz*)[19] ("IuKDG"). The conflict in legislative competence between the *Bund* and *Länder* is discussed within the greater context of conflict in regulatory attitudes with the United States. Part IV analyzes the legality and applicability of either *Bund* or *Länder* statutory law to Büssow's Blocking-Order through a statutory comparison, legal criticism of the Blocking-Order, and ultimately recent German court decisions interpreting Büssow's Blocking-Order. Finally, Part V argues that Jürgen Büssow's Blocking-Order is likely to survive subsequent judicial scrutiny in Germany, with the result that German ISPs in Nordrhein-Westfalen will be forced to block user access to racist and xenophobic web sites originating in the United States. This conclusion is supported by the unique development of German media law, constitutional law, and the criminal code, as well as U.N. and E.U. law.

II. The Development of German Media Law

Legislation often reflects the state of media technology at the time it was drafted, and therefore often fails to anticipate new technological developments.[20] It is no surprise that there are unique challenges in regulating the Internet, which at times incorporates or closely mimics older forms of media, such as broadcasting or telecommunications, but is simultaneously a completely new form of mass media. It is therefore important to recognize the unique German approach to regulating traditional media, not only in terms of legislative competence, but also with regard to how the

18. Staatsvertrag über Mediendienste [State Treaty on Media Services] [MDStV], v. 20.01.1997 (BerlGVB1. S. 360), *amended by* v. 12.12.2001 (BerlGVB1 S. 162).

19. Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste (Informations- und Kommunikationsdienste- Gesetz) [Statute on the General Conditions of Information and Communication Services] [IuKDG], v. 13.06.1997 (BGB1. I S. 1870-1879).

20. Katja Stamm, *Das Bundesverfassungsgericht und die Meinungsfreiheit*, [The Constitutional Court and the Freedom of Opinion], Politik und Zeitgeschichte, B37-38/2001 at 24 (2001).

German Constitution has been applied to mass media. The following discussion will highlight the most important legal developments in German media law, and will provide a framework for analyzing the legality and potential success of Jürgen Büssow's Blocking-Order.

A. The Basic Law and Basic Rights

After World War II, the process of democratization began in Germany. In September 1948, members of the German parliamentary council began to draft a new constitution, and on May 23, 1949 Germany's *Grundgesetz*, or Basic Law, went into effect.[21] Not surprisingly, the new Basic Law included strong reactions against Nazi ideology, including strong affirmations of equality, personal honor, and freedom of expression.[22]

The *Grundrechte*, or Basic Rights, form the cornerstone of the Basic Law. The central purpose of the Basic Rights section is to protect the individual's "sphere of freedom" from encroachment by the state.[23] The Basic Rights create an objective system of values focused on the freedom of a human being to develop in society, and these rights "apply as a constitutional axiom throughout the whole legal system: must direct and inform legislation, administration, and judicial decision."[24] Further, private law may not conflict with the Basic Rights, and judges must consider the "radiant effect" of the Basic Rights on private law and implement the values inherent in constitutional law.[25]

Article 5 of the Basic Law addresses freedom of expression and freedom of the press.[26] With Nazi control as a backdrop, it became clear that broadcasting freedom demanded freedom from centralized state control.[27] In particular, the principle of broadcasting freedom was deemed to be incompatible with pre-publication cen-

21. Grundgesetz [GG] [Constitution] v. 23.5.1949 (BGB1. I, 2470 (F.R.G.).

22. Grundgesetz [GG] arts. 1-5 (F.R.G).

23. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 7, 198 (1958) (F.R.G.) [hereinafter *Lüth*].

24. *Id.*

25. *Id. See* Stamm, *supra* note 20; *see also* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 90, 241-55 (1994) (F.R.G.) [hereinafter *Auschwitzlüge*], *infra*, note 81.

26. Grundgesetz [GG] [Constitution] art. 5.

27. ERIC BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY 34 (1993).

sorship by government.[28] Indeed, Article 5 of the Basic Law specifically proscribes censorship[29] as well as attempts to restrict access to information.[30]

The German Constitutional Court (*Bundesverfassungsgericht*) held that broadcasting freedom (*Rundfunkfreiheit*) is an instrumental freedom (*dienende Freiheit*) serving the more fundamental freedom of speech.[31] Broadcasting freedom should be protected as long as it promotes the goals of free speech, namely an informed democracy and the discussion of a wide variety of views.[32] Broadcasting freedom, therefore, is not an unlimited freedom, but instead is balanced against a social conception of free speech in society.[33] Thus, it is permissible to restrict broadcasting freedom in order to protect the greater goal of a free democratic society.

B. Separation of Power: Foundations in Broadcasting Law

Freedom from state control and censorship is a prominent feature in the structure of German broadcasting. In *First Television*[34] the German Constitutional Court underscored the importance of freedom from state control when it held that the federal government's foundation of *Deutschland-Fernsehen GmbH* ran afoul of the Basic Law's distribution of powers between the federal and state

28. *Id.*

29. Grundgesetz [GG] art. 5(1) ("Eine Zensur findet nicht statt") [There shall be no censorship].

30. *Id.* ("und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten") [and to inform himself without hindrance from generally accessible sources].

31. *See* BARENDT, *supra* note 27, at 34. *See also* Grundgesetz [GG] art. 5(1) ("Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed."). *See also* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 57, 295 (320) (1981) (F.R.G.) [hereinafter *Third Broadcasting*]; Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 73, 118 (152) (1986) (F.R.G.) [hereinafter *Fourth Broadcasting*].

32. *See* BARENDT, *supra* note 27, at 34; *See also* Grundgesetz [GG] art. 5(1).

33. Grundgesetz [GG] [Constitution] art. 5(2) ("These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.").

34. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 12, 205 (1961) (F.R.G.) [hereinafter *First Television*].

government and the fundamental principle of broadcasting freedom guaranteed under Article 5.[35]

First Television emphasized the separate roles of the federal and state governments in broadcasting. The Constitutional Court determined that under Article 73(7) of the Basic Law, the federal government has the authority to regulate the establishment and operation of broadcasting transmission facilities.[36] The Court found that broadcasting transmitters are part of the telecommunications system within the meaning of Article 73(7), but that the telecommunications system only comprises the technical steps in the transmission of broadcasting presentations.[37] Within the meaning of Article 73(7), the telecommunications system comprises the technical requirements whose regulation is necessary for the efficient operation of broadcasters and the reception of their programs.[38] Specifically, the federal government is granted authority under Article 73(7) to assign frequencies and regulate other technical aspects of transmission technology.[39]

Because the federal government's authority to regulate broadcasting is limited to technical aspects of transmission under the definition of telecommunications in Article 73, it follows that the same distinction in federal regulatory authority must apply to other Articles within the Basic Law. Article 5 of the Basic Law uses the term "Broadcasting," which according to the Constitutional Court, means broadcasting as an institution.[40] Article 5 does not permit the assumption that the term "telecommunications system" covers broadcasting as a whole, but may only apply to those areas that serve the conveyance of presentations, assignment of licenses and frequencies or transmission technology.[41]

35. *See* BARENDT, *supra* note 27, at 35. *Deutschland-Fernsehen GmbH* was to be a national television station owned by the Federal government.

36. *First Television*, BVerfGE 12, 205. *See* Grundgesetz [GG] art. 73 (Gegenstände der ausschließlichen Gesetzgebung) [Subjects of exclusive legislative power] ("Der Bund hat die ausschließliche Gesetzgebung über . . . das Postwesen und Telekommunikation") ["The Federation shall have exclusive power to legislate with respect to . . . postal and telecommunication services"].

37. *First Television*, BVerfGE 12, 205.

38. *Id.*

39. *Id.*

40. *Id. See also* Grundgesetz [GG] art. 5(1).

41. *First Television*, BVerfGE 12, 205 at D(II).

Further, the court found that as a medium of mass communication, broadcasting belongs "in the neighborhood of press and film."[42] Indeed, Article 5 refers to press, film, and broadcasting in the same sentence.[43] While Article 75(2) expressly provides for the federal government's legislative competence in the general legal affairs of press and film, broadcasting is not mentioned.[44] As such, the federal government may enact framework provisions dealing with the general legal affairs of the press and film, but it is not entitled to exclusive legislative competence for broadcasting as a whole.[45]

Regarding the general structure of legislative competence of the federal and state governments, the Basic Law operates under the principal that the states have primary competence.[46] The federal government only has legislative competence to the extent that the Basic Law endows it.[47] In cases of doubt regarding the jurisdiction of the federal government, there is no assumption under the Basic Law that argues in favor of federal competence.[48] The general principal "*Bundesrecht bricht Landesrecht*" or "Federal Law breaks State Law" in Article 31 of the Basic Law is applicable only if the federal government has specific legislative competence over the states.[49] Relevant here, the federal government has no constitutional competence to regulate mass-communications, and as such federal law may not pre-empt state law governing mass-communica-

42. *Id.*

43. Grundgesetz [GG] art.5(1) ("Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet.)" [Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed.]).

44. *First Television*, BVerfGE 12, 205. *See* Grundgesetz [GG] art. 75 (Rahmenvorschriften) [Areas of federal framework legislation].

45. *First Television*, BVerfGE 12, 205 at D(II). *See* Grundgesetz [GG] art. 75 (Rahmenvorschriften) [Areas of federal framework legislation].

46. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 10, 89 (101) (1959) (F.R.G.).

47. Grundgesetz [GG] art. 70(1).

48. *First Television*, BVerfGE 12, 205 ("[T]he Basic Law calls for a strict interpretation of arts. 73ff. Basic Law").

49. Cornelius von Heyl, *Jugendschutz im Internet- Mit Software gegen harte Sachen-Fachtagung des Ministeriums für Kultur, Jugend, Familie und Frauen Rheinland-Pfalz, at* http://www.jugendschutz.net/Schaubilder_29-05-982.htm. (May 29, 1998).

tions.[50] This distinction will weigh heavily in analyzing the applicability of state law in regulating Internet content.

The Constitutional Court found that broadcasting is also a cultural phenomenon.[51] To the extent that cultural matters can be administered and regulated by the state,[52] they nevertheless fall, in accordance with the Basic Law's fundamental decision,[53] in the area of the states[54] when special provisions of the Basic Law do not provide restrictions or exceptions in favor of the federal government. This fundamental decision by the Basic Law, which is in effect a decision in favor of a federalist structure promoting separation of powers within the State, forbids, especially in the area of cultural matters, the assumption that the federal government has jurisdiction without a sufficiently clear, contrary rule of exception.[55]

The Constitutional Court determined that broadcasting is a "public function" and not a function of the centralized federal government in accordance with the development of German law.[56] In founding Deutschland-Fernsehen GmbH, the federal government violated Article 30 in conjunction with Article 83 of the Basic Law.[57] The Court stated that broadcasting in Germany is a public service under public responsibility.[58] The broadcasting of programs as a function of public administration is covered by the delineation of competencies between the federal government and the states.[59] As a form of public service, the states, a more local form of government, have exclusive jurisdiction over broadcasting content.

In subsequent cases, the Constitutional Court emphasized that freedom from state control requires the legislature to frame some

50. *Id. See also* Rosenkranz, *supra* note 17, at 4.

51. *See* von Heyl, *supra* note 49.

52. Entscheidungen des Bundesverfassungsgerichts BVerfGE 10, 20 (36f).

53. Grundgesetz [GG] arts. 30, 70, 83.

54. Entscheidungen des Bundesverfassungsgerichts BVerfGE 6, 309 (354).

55. *First Television*, BVerfGE 12, 205 at D(II).

56. *Id.*

57. *Id.* Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder. *See* Grundgesetz [GG] art. 30; *see also* Grundgesetz [GG] art. 83 (noting that the Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit).

58. *See* Grundgesetz [GG] arts. 30, 83.

59. *Id.*

basic rules ensuring that the state government is unable to exercise any influence over the selection, content, or scheduling of programs.[60] The *Fourth*[61] and *Sixth Television*[62] cases struck down state law provisions which allowed the state government or licensing authority unlimited discretion in allocating permits and frequencies,[63] thereby acknowledging the danger that the executive could choose between applicants on the basis of their programming.[64]

C. Pluralism

In addition to the restriction of state influence, the German Constitutional Court took measures to ensure pluralism in broadcasting. The *Third Television* case re-emphasized that freedom of broadcasting "is a freedom *serving* the freedom of formation of opinion in the latter's subjective and objective legal elements: Under the conditions of modern mass communication, it forms a necessary addition and reinforcement of this freedom; it serves the mandate of ensuring free, comprehensive formation of opinion by way of broadcasting."[65] It is the responsibility of the legislature to ensure that a positive regulatory order exists to ensure that public opinion is expressed in broadcasting as widely and completely as possible.[66] To achieve this goal, substantive, organizational, and procedural rules are necessary to give effect to the guarantee of broadcasting freedom mandated by Article 5(1) of the Basic Law.[67]

However, the mandate flowing from Article 5 of the Basic Law that freedom of broadcasting be given a legal structure does not give any authority to restrict that basic right.[68] The rights guaranteed in the first paragraph of Article 5 are only limited by Article 5(2), which provides that broadcasting freedom may be limited in accordance with provisions of general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal

60. *See* BARENDT, *supra* note 27, at 35.
61. *Fourth Broadcasting*, BVerfGE 73, 118 (1986).
62. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 83, 238 (1991) (F.R.G.) [hereinafter *Sixth Broadcasting*].
63. *See* BARENDT, *supra* note 27, at 35.
64. *Sixth Television*, BVerfGE 83, 118 (1991).
65. *Third Television*, BVerfGE 57, 295 (1981).
66. *Id.*
67. *Id.*
68. *Id.*

honor.[69] This provision is the basis for all speech restrictions in Germany.

The court continued, stating that the Basic Law did not contemplate a particular form of organization of broadcasting.[70] The sole issue should be that free, comprehensive, and truthful formation of opinion is guaranteed, and that the legislature provide safeguards to ensure that broadcasting is not left to the mercy of one or several societal groups, that all relevant societal forces have their say, and that the freedom of reporting remains unimpaired.[71]

To further ensure that the pluralistic values of public broadcasting are protected, controlling broadcasting authorities are charged with determining balanced programming schedules.[72] The broadcasting authorities, or *Rundfunkräte*, are composed of members representing a wide variety of interest groups in order to prevent the domination of the media by a particular political party or commercial interest.[73] *First Television* emphasized the need for adequate rules to ensure that all significant social forces can exercise influence on the administration of public broadcasting authorities.[74] While the court did not exclude some state representation on the broadcasting authorities, Article 5 of the Basic Law did preclude state control, whether direct or indirect.[75] Indeed, *Länder* statutes governing the composition of broadcasting authorities have generally provided for balanced representation of all significant political, cultural, and industrial groups to ensure a broad range of impartial programs.[76]

It is clear that the principal developments in German broadcasting law will be broadly applied to Internet regulation. Whether

69. *Id*. *See generally* Grundgesetz [GG] Part I, (Die Grundrechte) [Basic Rights]; *see also* Stamm, *supra* note 20, at 20.

70. *See* Stamm, *supra* note 20, at 20.

71. *Id*.

72. *See* BARENDT, *supra* note 27, at 60.

73. *Id*.

74. *First Television*, BVerfGE 12, 205, 261-62.

75. *See* BARENDT, *supra* note 27, at 60.

76. *Id*. The Rundfunkrat must be composed of 42 members, of which 17 members must be from such social groups and institutions as the Evangelical Church in Nordrhein-Westfalen, the Catholic Church, the State Association of the Jewish Religious Community, and the German Trade Union of Nordrhein-Westfalen. *See, e.g.,* Gesetz über den "Westdeutschen Rundfunk Köln" (WDRG) ["Code on the German Broadcasting Co., Cologne"], v. 25.04.1998 (GV NW S. 265/SGV NW 2251), art. II, § 15.

the federal government will continue to be limited to regulation of the physical means of transmission while the *Länder* are permitted to make decisions regarding Internet content is a primary issue addressed in this article. Traditionally, German media law manifests a strong desire to protect pluralism and prevent the domination of the media by any one political or commercial interest. At the same time, broadcasting is free of censorship, but subject to limitation by other general laws, including constitutional protections laid down in the Basic Law, provisions in the Criminal Code, and youth protection laws. Some of the tensions between state and federal regulatory authority, the reach of the freedom of speech, and youth protection issues are discussed in the following cases.

D. Recent Cases on the Road to Büssow's Blocking-Order

Article 1 of Germany's Basic Law proclaims: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[77] Article 2 of the Basic Law covers personal freedoms, stating that "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."[78] Article 3 covers equality before the law, declaring that "[n]o person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability."[79]

Notwithstanding some apparently conflicting constitutional protections, Germany has taken a strong stance against racism and xenophobia, as reflected in the Basic Law and the German Criminal Code. For example, certain political parties, such as the Nazi party (NSDAP), are illegal in Germany, as is the display of Nazi paraphernalia and propaganda.[80] As the following case illustrates, Basic Rights under the Basic Law are not always absolute.

77. Grundgesetz [GG] art. 1(1).

78. *Id.* art. 2(1).

79. *Id.* art. 3(3).

80. *See* Grundgesetz [GG] art. 21(2) ("Parties that . . . seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."). The political party *Sozialistische Reichspartei* upheld the *Führerprinzip*, an anti-democratic organizational structure, and the party's close relationship to the former NSDAP disregarded fundamental human rights, espe-

Auschwitzlüge ("Auschwitz Lie") held that a statement denying the Holocaust was not protected speech under Article 5 of the Basic Law.[81] According to the Constitutional Court, the fundamental right protected under Article 5 of the Basic Law is freedom of opinion.[82] However, freedom of opinion is not unconditionally guaranteed. General laws may restrict the right to freedom as well as other Basic Rights, such as personal honor.[83] In interpreting a statute limiting the freedom of opinion, the court must balance the value of freedom of opinion along with the legal interest which the statute restricting the basic right serves.[84]

Assertions of fact are, strictly speaking, not statements of opinion.[85] The protection of assertions of fact ends at the point where they cease to contribute anything to the formation of opinion that is presupposed under constitutional law.[86] Incorrect information is not an interest worthy of protection under Article 5.[87] An assertion of fact known or proved to be untrue is not covered by the protection of freedom of opinion.[88] The court concluded that a statement asserting there was no persecution of the Jewish persons in the Third Reich is an assertion of fact, which has been proven untrue by countless eyewitness reports, documents, criminal trial verdicts, and the findings of history.[89] Accordingly, assertion of such

---

cially the dignity of man, the right to the free development of personality, and the principle of equality before the law. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 2, 1 (1952) (F.R.G.); Strafgesetzbuch [StGB] [Criminal Code] v. 15.05.1871 (RGB1. S. 127), *amended by* v. 22.08.2002 (BGB1. 1, 3390) §§ 86, 86(a) (making illegal the dissemination of propaganda and use of symbols of unconstitutional organizations).

81. *Auschwitzlüge*, BVerfGE 90, 241-55 (1994).

82. *Id.* at B(II)(1).

83. *Id.* at B(II)(1)(c).

84. *Id. See also Lüth*, BVerfGE 7, 198, 208 (1958) (F.R.G.).

85. *See Lüth*, BVerfGE 7, 198, 208.

86. *Id.*

87. *Id.*

88. *Id.*

89. Grundgesetz [GG] art. II(2)(b); *compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (observing that some classes of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."); *but see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (White, J., concurring) ("[B]y characterizing fighting words as a form of 'debate', the majority legitimates hate speech as a form of public discussion.").

content does not enjoy the protection of freedom of opinion.[90] Although the *Auschwitz Lie* case does not specifically address Internet content, it is useful to illustrate the German attitude towards right-extremist ideology and propaganda.

The introduction of the Internet in Germany resulted in several judicial attempts to control illegal Internet content. In *CompuServe*, the local court in Munich (*Amtsgericht München*) held that the managing director of CompuServe Germany, Felix Somm, was personally liable under criminal law[91] for child pornography located on a news server of CompuServe USA and accessible in Germany.[92] The Local Court based its decision on the grounds that CompuServe Germany was granting access to child pornography via its parent affiliate in the U.S. when CompuServe USA had failed to block access to the child pornography despite having knowledge of the content and the technological means to block access to it.[93] Felix Somm was sentenced to two years probation for the dissemination of pornography.[94] The Munich Court of Appeals (*Landgericht München*) reversed the decision in 1999.[95] Some of the reasons given for the reversal include the fact that CompuServe Germany was completely subordinate to CompuServe USA and therefore had no control over the web site, and that the mere knowledge of the existence of the web site was not sufficient to constitute willful conduct. In addition, CompuServe Germany could not be considered a "guarantor" of the unlawful content merely by granting access to such content.[96]

90. *City of St. Paul*, 505 U.S. 377 (concluding, after employing a balancing test, that if statements of opinion containing assertions of fact are proved to be untrue, then the freedom of opinion takes second place to the protection of personality); *but see* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] BVerfGE 90, 1 1994) (F.R.G.) (holding that statements about guilt and responsibility for historical events pose a question of complex judgments which can not be reduced to an assertion of facts, while the denial of the event itself will generally have the character of an assertion of facts).

91. §§ 184 Nr.3 StGB, § 14Nr. 1 StGB, § 25 Nr.2 StGB.

92. Entscheidungen des Amtsgericht München in Strafsachen [Munich Local Court] Az. 8340 Ds 465 Js 173158/95 (1995) [hereinafter *CompuServe I*].

93. *Id.*

94. *Id.*

95. Entscheidungen des Landgericht München I in Strafsachen [Munich State Court I], 20 Ns 465 Js 173158/95 (1999) [hereinafter *CompuServe II*].

96. *Id.*

The *CompuServe* Court never approached the issue of legislative competence between the *Bund* and *Länder*; it simply qualified CompuServe Germany as an ISP under section 3(1) of the Federal Tele-Services Law, or *Teledienstegesetz* (TDG).[97] The Court could have arguably applied the State Treaty on Media Services because Internet newsgroups qualify as Media Services, not Tele-Services.[98] The CompuServe court never discussed the applicability of the MDStV, a question which would become a centerpiece of the dispute over Büssow's Blocking-Order.

In December 2000, the German Federal High Court (Bundesgerichtshof)[99] upheld the conviction[100] of an Australian citizen, Dr. Fredrick Toben, for denial of the Holocaust, a criminal offense under German law,[101] even though the incriminating documents were located and disseminated from an Internet server located in Australia.[102] Toben, a director and founder of the Adelaide Institute, published a series of circulars and articles on the Institute's web site promoting revisionist theories of the Holocaust, including a claim that "the original count of 4 million dead from Auschwitz . . . can be lowered to 800,000 at the highest. This alone is already good news, because it means that approximately 3.2 million people did not die in Auschwitz — a reason to celebrate."[103] In an open letter sent to a judge and the Berlin newspaper *Sleipnir*,[104] Toben proclaimed: "I visited Auschwitz in 1997, and I have come to the conclusion based on my own investigation that

97. *Id.*

98. Lothar Determann, *The New German Internet Law*, 22 HASTINGS INT'L & COMP. LAW REV. 113 (1998).

99. [BGHSt] [Supreme Court], 1 StR 184/00 (2000).

100. Entscheidungen des Landgericht Mannheim, 5 Große Strafkammer [Mannheim State Court, 5 Chamber] 5 KLs 503 Js 9551/99 (1999).

101. § 130 Nr. 3 StGB (containing the "Auschwitzlüge" provision which makes it a crime for anyone to publicly, or in a collection, condone, lie about, or play down past deeds of the Nazis in a way that will disturb the public peace by promoting hatred against a particular part of the population or damaging the human dignity). *See also Auschwitzlüge*, BVerfGE 90, 241-55 (1994).

102. BGHSt 1, 184; *see also* Jones v. Toben [2002] FCA 1150 (Federal Court of Australia, New South Wales District Registry).

103. BGHSt 1, 184 at Internet Example II.1. The article was posted between April 1997 and March 1999. *But see Toben*, [2002] FCA 1150 at 18, 19 (indicating article was posted in March 1996 and crediting Jean Claude Pressac with the statistics).

104. *Sleipnir*, *Journal of History*, *Culture*, *Politics* is considered a right-extremist newspaper and is currently being prosecuted in Germany. *Sleipnir* can be accessed at http:/

during the war years the camp never had gas chambers in operation."[105] Finally, Toben posted a paper claiming that "looking back on five years of work, we can firmly conclude: the Germans have never exterminated European Jews in lethal gas chambers in KL Auschwitz or other locations. Therefore, all Germans and people with German heritage can live without a guilt complex being forced upon them — a way of thinking that has maliciously enslaved them for a half century."[106]

The court's ruling was based on the grounds that the relevant text could be read and further disseminated in Germany and was thus capable of disturbing public order.[107] The Federal High Court expressly pointed out that the ruling was limited to the criminal liability of the author himself and should not be applied to ISPs.[108]

Both *CompuServe* and *Toben* demonstrate the willingness of German courts to apply German law to illegal content on Internet servers located outside German borders but accessible within Germany. While the *CompuServe I* decision was eventually reversed,[109] and the *Toben* case ruling was limited to the criminal liability of the author,[110] there have been no German cases to date successfully holding ISPs liable for the dissemination of unlawful hate-speech.

However, in neighboring France, an attempt was made to hold the U.S.-based Yahoo!, Inc. ("Yahoo!") liable for allowing access to Nazi and extremist propaganda and paraphernalia via its auction site based in the United States. The French case against Yahoo!, as detailed in the following paragraphs, has been cited by the Düssel-

/www.sleipnir.netfirms.com (last visited Sept. 15, 2004). Netfirms, which hosts *Sleipnir*, is located in Toronto, Canada.

105. BGHSt 1,184 (Internet Example II.2, article posted in August 1998).

106. *Id.* (Internet Example II.3 Posted December 1999-January 2000).

107. *Id. Compare Toben*, [2002] FCA 1150 at 18 (concluding that "the act of placing text and graphics on a web site which is not password protected is an act of publication, or perhaps more accurately an act which causes repeated publications . . . ."); *see also* Court of Cassation, Section V: Penal, Judgment No. 47141 (2000) (Italy) (holding there are no national boundaries for libel on the Internet).

108. *Id. See also* "Verbreitung der Auschwitzlüge im Internet" [Spreading the Auschwitz Lie in the Internet], *at* http://www.eee.medien-recht.com/luege.html (last visited Sept. 9, 2002); "BGH: Volksverhetzung im Internet strafbar" [BGH: Incitement of the People in the Internet punishable], *at* http://www.publex.de/cgi-bin/recht.cgi/Aktuell/news00121200.html (last visited Sept. 9, 2002).

109. *CompuServe II*, 20 Ns 465 Js 173158/95.

110. *Id.*

dorf District Government as a reason for forcing ISPs in Germany to block access to web sites featuring prohibited content. The *Yahoo*! case demonstrated, in the eyes of the district government, that enforcement of a German court decision against an American ISP would ultimately prove futile.

La Ligue Contre Le Racisme Et l'Antisemitism ("LICRA") and *L'Union Des Etudiants Juifs De France* ("UESF") filed a civil complaint against Yahoo! in the *Tribunal de grande Instance de Paris* for violation of Section R645-1 of the French Criminal Code which prohibits the exhibition of Nazi propaganda and artifacts for sale.[111] The complaint stemmed from Yahoo!'s auction site which allows anyone in the world to post an item for sale and solicit bids from any Internet user around the world.[112] Yahoo!, however, does not actively regulate the content of each posting; therefore, some individuals have posted highly offensive material on the auction site. Yahoo! is incorporated in the state of Delaware, and operates regional web sites, including Yahoo! France.[113]

The French court found that a large number of Nazi and Third Reich related objects were being offered for sale on the Yahoo! auction site.[114] Because any French citizen was able to access those materials on Yahoo.com directly or via a link on Yahoo.fr, the

111. Yahoo!, Inc. v. LICRA, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) [hereinafter *LICRA I*] *rev'd* 379 F.3d 1120 (9th Cir. 2004) [hereinafter *LICRA II*]. *LICRA II* reversed the district court's decision due to a lack of *in personam* jurisdiction over LICRA and UEJF. The court of appeals held "[j]urisdiction may be obtained, and the First Amendment claim heard, once LICRA and UEJF ask a U.S. district court to enforce the French judgment." While this decision raises a host of interesting issues of personal jurisdiction, it does not substantively alter the district court's analysis of Yahoo!'s First Amendment claim relevant to this article. *See* Sakura Mizuno, *When Free Speech and the Internet Collide: Yahoo!-Nazi-Paraphernalia Case*, 10 CURRENTS: INT'L TRADE L.J. 56 (2001); *see also* Benoît Frydman and Isabelle Rorive, *Fighting Nazi and Anti-semitic Material on the Internet: The Yahoo! Case and its Global Implications*, Keynote Address at the Cardozo School of Law during the Conference: "Hate and Terrorist Speech on the Internet: The Global Implications of the Yahoo! Ruling in France" (Feb. 11, 2002), *at* http://www.pcmlp.socleg.ox.ac.uk/YahooConference (last visited Sept. 17, 2002). *But see* "French Court Rules in Favor of Yahoo in Internet Free Speech Case," Center for Democracy & Technology, *at* http://www.cdt.org/jurisdiction (Feb. 11, 2003) (holding that Yahoo! never tried to "justify war crimes [or] crimes against humanity." Please note that the Paris court dismissed criminal charges against Yahoo! and former CEO Tim Koogle).

112. *LICRA I*, 169 F. Supp. 2d 1181.

113. *Id. See* http://www.yahoo.fr (last visited Sept. 15, 2004).

114. *LICRA I*, 169 F. Supp. 2d 1181.

French Court concluded that Yahoo was in violation of Section R645-1 of the French Criminal Code.[115] The French Court ordered Yahoo! to:

> (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove all browser directories accessible in the French Republic index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust."[116]

The order also subjected Yahoo! to a fine of 100,000 Euros for each day it failed to comply with the order.[117]

Yahoo! appealed to the French court to reconsider the terms of the order, claiming that it could comply with the warning requirement on Yahoo.fr, but that the requirements regarding Yahoo.com were technologically impossible.[118] The French court solicited an expert opinion and subsequently reaffirmed its order.[119] Yahoo! complied with the warning and changed its auction guidelines, but as of October 24, 2001, Nazi memorabilia could still be found for sale on the Yahoo! auction site.[120]

Yahoo! predictably appealed the French decision in the United States, claiming that it lacked the technology to block French citizens from accessing the Yahoo! auction site or from accessing other Nazi-based content of web sites on Yahoo.com[121] Yahoo! claimed that such a ban on content would "infringe impermissibly upon its

115. *Id.* at 1184.
116. *Id.* at 1184-85.
117. *Id.* 1185.
118. *Id.*
119. *Id.*
120. *LICRA I*, 169 F. Supp. 2d at 1185 n.3-4.
121. *Id.* at 1185-86.

rights under the First Amendment to the United States Constitution."[122] As a result, Yahoo! filed a complaint seeking a declaratory judgment that the French court's orders are neither cognizable nor enforceable under U.S. law.[123]

The issue considered by the U.S. court was whether it was "consistent with the Constitution and laws of the United States for another nation to regulate speech by a U.S. resident within the United States on the basis that such speech can be accessed by Internet users in that nation."[124] The court stated that it "must and will" decide the case in accordance with the U.S. Constitution and laws, and recognized that in so doing it "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 offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech."[125] The court further noted that both "the government and people of France have made a different judgment based on their own experience" and that the court did not intend to disrespect French judgment or experience.[126]

The U.S. court concluded the French order violated the First Amendment. "The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of web pages based on the author's viewpoint regarding the Holocaust and anti-Semitism."[127] "A United States court could constitutionally not make such an order."[128] "The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence."[129] In addition, the French order was "far too general and imprecise to survive the strict scrutiny required by the First Amendment."[130] Phrases such as "all necessary measures" and

122. *Id.* at 1186.
123. *Id.*
124. *Id.*
125. *Id.* at 1187.
126. *LICRA I*, 169 F. Supp. 2d at 1186.
127. *Id.* at 1189 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).
128. *Id.* at 1189.
129. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
130. *LICRA I*, 169 F. Supp. 2d at 1189.

"render impossible" instructed Yahoo! to undertake efforts that would impermissibly "chill" or "censor protected speech."[131]

The court then considered whether it could enforce the French order without violating the First Amendment.[132] No legal judgment has any effect, of its own force, beyond the limits of sovereignty from which its authority is derived.[133] The extent to which the United States or any state honors the judicial decrees of a foreign state is a matter of choice governed by the "comity of nations."[134] Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will on the other."[135] U.S. courts will generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to U.S. interests.[136] "The Court noted that the Internet allows one to speak in more than one place at the same time." France has the sovereign right to regulate permissible speech within France, but a French order that violates the protections of the First Amendment by "chilling" protected speech that simultaneously occurs within U.S. borders may not be enforced by a U.S. court.[137] The Court concluded:

> Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.[138]

As the aforementioned case demonstrates, federal court precedent has now been established that would, in effect, allow a U.S. based ISP or content provider to escape the enforcement of an or-

131. *Id.*

132. *Id.* at 1190.

133. 28 U.S.C.A. § 1738 (2004).

134. Hilton v. Guyot, 159 U.S. 113 (1895); *see also* Wilson v. Marchington, 127 F.3d 805, 807-08 (9th Cir. 1997) (discussing how judgments of foreign courts are not automatically entitled to recognition or enforcement in American courts); Ackerman v. Levine, 788 F.2d 830 (2d Cir. 1986); Laker Airways Ltd v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

135. *Guyot*, 159 U.S. at 164.

136. Sompertex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971); *see also Guyot*, 159 U.S. at 164, 193; *Ackerman*, 788 F.2d at 841.

137. *LICRA I*, 169 F. Supp. 2d at 1192.

138. *Id.* at 1193.

der given by a foreign court so long as the content at issue is protected under the First Amendment. The message of the case, *Yahoo! Inc. v. LICRA* was not lost on Jürgen Büssow.

III. The First Amendment and Jürgen Büssow's Crusade Against American Extremists

It is often the case that what is illegal offline is also illegal online. This is particularly true regarding child pornography in the U.S. and in Europe. Europe and the United States, however, diverge sharply on the question of whether racist and xenophobic speech should be legal to publish or distribute via the Internet. There is a fundamental and inescapable difference between the legal treatment afforded racist and xenophobic speech under the American First Amendment and U.N., E.U., and German law.

Racist and xenophobic content online fall within the sphere of Internet content regulation in Europe.[139] One of the principal challenges facing Internet content regulation is the "fundamental clash" between the United States and Europe.[140] The First Amendment of the American Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[141] The U.S. Supreme Court has consistently held that racist and xenophobic propaganda are protected under the First Amendment as constitutionally protected forms of controversial political speech.[142] Generally speaking, governmental authorities are prohibited from imposing liability on ISPs for racist and xenophobic content, either on the Internet or via traditional media.[143]

139. Isabelle Rorive, *Strategies to Tackle Racism and Xenophobia on the Internet- Where are We in Europe?*, 7 Int'l J. Comm. L. & Pol'y 8 (2002); *see also* Gianluca Esposito, *Racist and Xenophobic Content on the Internet- Problems and Solutions*, 7 Int'l J. Comm. L. & Pol'y 9 (2002).

140. *Id.*

141. U.S. Const, amend. I.

142. *See, e.g.,* Whitney v. California, 274 U.S. 357 (1927); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000) ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.").

143. 47 U.S.C.A. § 230(c) (2004) ("No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider."); Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting that Congress created "a federal immunity to any cause of action that would make service providers liable for information originating with a third-

Attitudes towards racist and xenophobic speech outside the United States are far less tolerant. On a supra-national level, the United Nation's *International Covenant on Civil and Political Rights* states "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[144] The U.N. *International Convention on the Elimination of all Forms of Racial Discrimination* ("ICERD") provides that signatory states "shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, [and] incitement to racial discrimination . . . ."[145] In addition, the 2001 U.N. Conference against racism in Durban, South Africa made clear that Internet content should not be excluded from regulation.[146] The United States, however, is not bound to follow the U.N. provisions.[147]

Consistent with U.N. legislation, Europe has also enacted law proscribing racist and xenophobic speech. According to Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*[148] and the case law of the European Court of Human Rights, the right to free speech does not extend to speech that

party user of the service"). *See also,* Alexander v. United States, 509 U.S. 544 (1993); Wilson v. Superior Court, 532 P.2d 116 (1975).

144. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 20-22

145. International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195, Jan. 4, 1969 art. 4(a). Germany signed the ICERD in 1969).

146. Rorive, *supra* note 139, at 5.

147. When the United States signed ICERD on September 28, 1966, it noted that "nothing in the Convention shall be deemed to require or to authorize legislation or other action" by the U.S. that is "incompatible" with the U.S. Constitution. When the United States ratified ICERD on October 21, 1994, the Senate states: "The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States." United Nations Treaty Collection, Declarations and Reservations, United States of America declaration (Feb. 5, 2002) *available at* http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

148. United Nations Treaty Collection, Declarations and Reservations, United States of America Declaration (Feb. 5, 2002), *available at* http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm. The freedom of expression guaranteed under Article 10 "carries with it duties and responsibilities, [which] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime, for protection of health or morals, for the protection of the reputation or rights of others . . . ." art. 10(2).

threatens, denies or leads to the destruction of human dignity and human integrity.[149] Further, Article 17 of the Convention states that none of its provisions grant the right to engage in any activity that aims at destroying rights and freedoms of others.[150]

Germany also has strong national laws that vigorously protect fundamental human rights and dignity, and proscribe actions and information advocating forms of racism and xenophobia.[151] *CompuServe* and *Toben* demonstrate the willingness of German courts to protect German citizens from illegal Internet content.[152] However, in both instances, the ISP itself, the conduit through which the prohibited content was accessed, was specifically held not liable.[153] Given that many, if not most authors of illegal web content are unidentifiable or unreachable, there has been increasing pressure to either enlist the voluntary support of ISPs in restricting access to illegal web sites, or force the ISPs to filter and block access to illegal content.[154] As the Council of Europe considers a proposal outlawing the publishing of hate-speech on the Internet,[155] Düsseldorf

149. Rorive, *supra* note 139, at 2.

150. United Nations Treaty Collection, Declarations and Reservations, United States of America Declaration (Feb. 5, 2002) *at* http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm. *See also*, Rorive, *supra* note 139, at 2.

151. *See* Grundgesetz [GG] art. 1(1) § 130, *available at* http://www.dejure.org/gesetze/StGB/130.html (translated through http://www.google.com) (last visited Nov. 3, 2003).

152. *See CompuServe I*, Az. 8340 Ds 465 Js 173158/95.

153. *See CompuServe II*, 20 Ns 465 Js 173158/95.

154. *See* Benoît Frydman and Isabelle Rorive, Racism, *Xenophobia and Incitement Online: European Law and Policy, Programme in Comparative Media Law and Policy*, Oxford University-Wolfson College, *at* http://www.selfregulation.info/iapcoda/rxio-background-02093.htm (last visited Nov. 3, 2003).

155. Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, Strasbourg, Jan. 28, 2003, Europ. T.S. No. 189, *at* http://www.conventions.coe.int/Treaty/en/Treaties/Html/189.htm (last visited Nov. 3, 2003). Article 3 of the Additional Protocol would require each Party to "adopt such legislative or other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system." Paragraph 23 of the Explanatory Report attached to the Additional Proposal says, "'Distribution' refers to the active dissemination of racist and xenophobic material . . . to others, while 'making available' refers to the *placing on line of racist and xenophobic material for the use of others.* This term also intends to cover the creation or compilation of hyperlinks in order to facilitate access to such material." *Id. at* Explanatory Report, Nov. 7, 2002, ¶28, *at* http://www.conventions.coe.int/Treaty/en/Trea-

District Government President Jürgen Büssow has taken aggressive steps to force ISPs operating in Nordrhein-Westfalen to block access to U.S.-based racist web sites.[156] Büssow's *Sperrungsverfügung*, or "Blocking-Order," of February 8, 2002, specifically ordered ISPs based in Nordrhein-Westfalen to immediately block all access to the right-extremist Stormfront and Nazi-Lauck web sites[157] The Blocking-Order finds legal footing in the Mediendienste-Staatsvertag (State Treaty on Media Services), a body of German state law that was drafted, in part, as a reaction to the *CompuServe* cases and a recognition of the need for laws applicable to new media.[158]

Should the First Amendment be the default standard for legally protected speech on the Internet? Jürgen Büssow has answered that question with his Blocking-Order. Will other German *Länder* follow his lead? Will other E.U. Members? First, the legality of the Blocking-Order must be analyzed under existing German statutory and case law within the broader context of German media law precedent. If Büssow's Blocking-Order survives judicial scrutiny, it is important to consider the impact it will have on ISPs worldwide, and perhaps more importantly, whether the United States can afford to remain an island of protection for racists and xenophobes.

---

ties/Html/189.htm (last visited Nov. 3, 2003) (emphasis added). It should also be noted that under Paragraph 45 of the Explanatory Report, which comments on Article 7 of the proposal (Aiding and abetting), an ISP "that does not have criminal intent cannot incur liability under this section." Further, Article 7 imposes no duty on an ISP to actively monitor content in order to avoid criminal liability. *See also* Proposal for a Council Framework Decision on Combating Racism and Xenophobia, Commission of the European Communities, 2001/0270(CNS), *at* http://www.europa.eu.int/eurlex/en/com/pdf/2001/com2001_0664en01.pdf (Nov. 11, 2001).

156. Sperrungsverfügung [Blocking-Order], Bezirksregierung Düsseldorf [District Government Düsseldorf], AZ 21.50.30 [hereinafter Sperrungsverfügung], *available at* http://www.nps-brd.nrw.de/BezRegDdorf/hierarchie/aufgaben/Abteilung_2/Dezernat_21/Medienmissbrauch/Rechtsextremismus_im_Internet_Die_Sperr7072.php (Feb. 6, 2002). *See also* Press Release, Bezirksregierung Düsseldorf erlässt Blocking-Orderen wegen rechtsextremischer Angebot im Internet, Pressemitteilung *available at* http://www.brd.nrw.de/BezRegDdorf/hierarchie/index.php (Feb. 8, 2002).

157. Sperrungsverfügung, *supra* note 156, at 1.

158. Andreus Neumann, Das neue Multimediarecht- Einleitung zu IuKDG und MDStV, Oct. 31, 2002, *available at* http://www.mathematik.uni-marburg.de/~cyberlaw/texte/multimediarecht.html (translated through http://www.google.com) (last visited Nov. 3, 2003).

IV. Analysis of Büssow's Blocking-Order: Sound and Fury Signifying Nothing?

A. *Regulatory Competence of the Bund and Länder: German Statutory Law Applicable to the Internet*

Germany is wrestling with the difficult problem of how to regulate the Internet. Currently, there are twenty statutory codes governing online services in Germany.[159] Fortunately, nearly the same rules apply throughout Germany because the individual *Länder* codes resemble federal law.[160] As the *Television* and *Broadcasting* cases illustrate, content regulation in mass media has been subject to a fundamental separation of power between the sixteen German *Länder* and the Federal *Bund*.[161]

The split in regulatory competence between the *Länder* and the *Bund* manifested itself in 1996 as the *Länder* began an initiative to draft a "State Treaty on Media Services" and the *Bund* drafted a proposal for the "Information and Communications Services Law" (IuKDG).[162] Almost immediately, the *Bund* and *Länder* began to argue about the limits of their respective legislative authority.[163] A series of controversial discussions between the *Bund* and *Länder* occurred concerning the limits of state and federal authority to regulate online services.[164] On the basis of a *Compromise-paper* passed in June, 1996, the *Länder* claimed for themselves the regulatory authority for Media Services.[165] The *Bund*, on the other hand, would regulate online services that supplemented or replaced existing telecommunications services, known collectively as Tele-Services.[166] The final versions of the MDStV[167] and the IuKDG came into force

159. *See* Determann, *supra* note 98, at 129.

160. *Id.*

161. *See First Television*, BVerfGE 12, 205 at D(II).

162. Neumann, *supra* note 158, at 1.

163. *Id.* at 2. *See also* George M. Bröhl, *Rechtliche Rahmenbedingungen für neue Informations- und Kommunikationsdienste*, CR, 73-74 (1997).

164. Thomas Hoeren, Grundzüge des Internetrechts 95 (Verlag C.H. Beck, 2001).

165. *Id.*

166. Determann, *supra* note 98, at 137.

167. Staatsvertrag über Mediendienste [State Treaty on Media Services] [MDStV], v. 20.05.1997 (NWGVB1 S. 134, BerlGVB1. 1997) *amended by* v. 20.12.2001 (GVB1. Berlin 2002, S. 162), *available at* http://www.mdstv.de (translated through http://www.google.com) (last visited Nov. 3, 2002). All sixteen Bundesländer signed the MDStV between January 20 and February 12, 1997. It should be noted here that a revised

between January and June 1997.[168] An analysis of Büssow's Blocking-Order must begin with a comparative examination of the relevant statutory provisions of the MDStV and the IuKDG.

The federal IuKDG incorporates two new statutes specifically dealing with Tele-Services.[169] First, there is a specific code on Tele-Services, the *Teledienstegesetz* (TDG), and a code applying to data protection in connection with Tele-Services, the *Teledienstedatenschutzgesetz* (TDDSG). The TDG is the IuKDG code most relevant to an analysis of the Blocking-Order. The IuKDG also amends some existing federal statutes, including the German penal code (StGB),[170] the Youth Protection Media Law (GjS),[171] and the intellectual property code (UrhG).[172] The StGB and UrhG are currently applicable to all online services, including those defined as either Tele-Services or Media Services.[173] However, most provisions in the GjS apply only to Tele-Services.[174]

The MDStV was uniformly enacted by all sixteen German *Länder* as state code governing Media Services. The MDStV contains provisions on the same topics covered under federal law, in-

version of the MDStV went into effect on July 1, 2002. Differences in the section numbers between MDStV 1997 and MDStV 2002 will be noted parenthetically when relevant.

168. Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste (Informations- und Kommunikationsdienste-Gesetz) [Statute on the General Conditions of Information and Communications Services] [IuKDG] v. 22.07.1997 (BT-Drs. 13/7934), *available at* http://www.netlaw.de/gesetze.iukdg.htm (translated through http://www.google.com) (last visited Nov. 3, 2002) (passed by the German Bundestag on June 13, 1997).

169. *See* IuKDG, 22.07.1997.

170. Strafgesetzbuch [StGB] v. 15.5.1871 (RGB1. S. 127*), amended by* v. 22.08.2002 (BGB1. I, 3390).

171. Gesetz über die Verbreitung jugendgefährdender Schriften und Medien [Law Against the Distribution of Materials Endangering Minors] [GjS], v. 29.04.1961, (amended 22.07.1997).

172. Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtgesetz) [Intellectual Property Code] [UrhG], v. 09.09.1965 (BGB1. I S, 1273), *amended by* v. 01.09.2000 (BGB1. I S. 1374).

173. Determann, *supra* note 98, at 129.

174. *Id.* The GjS content-based speech restrictions have only been extended to Tele-Services. GjS § 7(a) requires a Youth Protection Officer to be appointed for all ISPs, including providers of Media Services. This extension was criticized by the Bundesrat. *See* Bundestagsdrucksache [Federal Parliament Document] [BT-Drs], 13/7285, 52; *see also* BT-Drs 13/7385, 70.

cluding ISP liability, data protection, and protection against violent and pornographic content.[175]

Both the IuKDG and the MDStV apply simultaneously in each of the sixteen *Länder*.[176] The applicability of the IuKDG or the MDStV to a particular online service depends on whether the service is qualified as a "Tele-Service"[177] or as a "Media Service."[178] The distinction between the definitions of Tele-Services and Media Services is difficult because the technology covered by the IuKDG and the MDStV is already similar.[179] The spectre of technological convergence adds to the difficulty in distinguishing new media technology from the more traditional forms of media.[180]

In addition to problems arising from technological similarities, the legal definitions of Tele-Services and Media Services are extremely vague.[181] To further complicate matters, the examples outlined by the legislatures in the TDG and MDStV fail to clarify these definitions and actually overlap.[182]

Tele-Services are defined as "all electronic information and communication services which are designed for the individual use of combinable data such as characters, images or sounds and are based on transmission by means of telecommunication (Tele-Services)."[183] The legislative history of the TDG suggests that it was

175. Determann, *supra* note 98, at 131.

176. *Id.* at 137. *See also* Grundgesetz [GG] art. 74 I(11) (assigning the legislative power to regulate commerce to the federal Bund without limitation to interstate or foreign commerce).

177. *See* Gesetz über die Nutzung von Telediensten (Teledienstegesetz) [Act on the Utilization of Tele-Services] [TDG], v. 22.07.1997 (BGB1. I S. 1870), *amended by* v. 27.06.2000 (BGB1. I S. 897), § 2. (The Tele-Services Act was enacted as Art. 1 of the Information and Communication Services Act [IuKDG], v. 22.07.1997 (BT-Drs. 13/7934).

178. *See* § 2 MDStV (1997, 2002).

179. Determann, *supra* note 98, at 137.

180. *See generally* Rundfunkstaatsvertrag [Interstate Broadcasting Agreement] [RStV] v. 31.08.1991 (Berl1. 1991 S. 309), *amended by* v. 6. July/7. Aug. 2000 (BerlGVB1. 2000 S. 447), § 2(1).

181. Determann, *supra* note 98, at 138. Definitions are found in sections 2 of the IuKDG and MDStV, respectively.

182. *Id.* at 138-39. The definitions are contained in § 2(1) TDG and § 2(1) MDStV (1997, 2002). The examples can be found in § 2(2) TDG and § 2(2) MDStV (1997, 2002). *See also* von Heyl, *supra* note 49, at 1; Rosenkranz, *supra* note 17, at 3.

183. § 2(1) TDG ("Die nachfolgenden Vorschriften gelten für alle elektronischen Informations- und Kommunikationsdienste, die für eine individuelle Nutzung von

intended to cover primarily commercial services offering individual communications and services based on individual requests, rather than services disseminated to the public like broadcasting or cable television.[184]

However, non-commercial services can also qualify as Tele-Services.[185] Under § 2(2) TDG, examples of Tele Services include in particular: (1) services offered in the field of individual communication (e.g., tele-banking, data exchange); (2) services offered for information or communication unless the emphasis is on editorial arrangement to form public opinion (data services providing e.g. traffic, weather, environmental and stock exchange data, the dissemination of information on goods and services); (3) *services providing access to the Internet or other networks*; (4) services offering access to telegames; and (5) goods and services offered and listed in electronically accessible data bases with interactive access and the possibility for direct order.[186] Notes accompanying the government draft of TDG § 2 provide additional examples of Tele-Services, including: discussion forums, tele-commuting, tele-medicine, tele-learning, home pages, search engines, mail-order businesses, broker services, and consulting services.[187]

Media Services are defined as the offering and use of information and communications services by the public, in text, sound or image, transmitted via electromagnetic waves.[188] The phrase "transmitted via electromagnetic waves" immediately suggests traditional broadcasting technology inconsistent with the digital world of the Internet. Indeed, the State Broadcasting Treaty (RStV) defines broadcasting as the provision and transmission for the general public of presentations of all kinds of speech, sound and picture, using

kombinierbaren Daten wie Zeichen, Bilder oder Töne bestimmt sind und denen eine Übermittlung mittels Telekommunikation zugrunde liegt (Teledienste).").

184. Determann, *supra* note 98, at 139; *compare* § 2(2)(4) MDStV (1997, 2002) ("On-demand Services").

185. § 2(3) TDG.

186. § 2(2) TDG (emphasis added).

187. Determann, *supra* note 98, at 139. *See also* BT-Drs 13/7385, 18-19.

188. § 2(1) MDStV (1997, 2002) ("Dieser Staatsvertrag gilt für das Angebot und die Nutzung von an die Allgemeinheit gerichteten Informations- und Kommunikationsdiensten (Mediendienste) in Text, Ton oder Bild, die unter Benutzung elektromagnetischeer Schwingungen ohne Verbindungsleitung oder längs oder mitttels eines Leiters verbreitet werden.").

electromagnetic waves without junction lines or by means of a conductor.[189] However, this apparent conflict is undone in the exclusion provisions of both the MDStV and the RStV. The MDStV specifically provides that the regulations of the RStV remain unaffected.[190] The RStV also provides that it does not apply to Media Services as defined in § 2 of the MDStV.[191]

Having somewhat awkwardly extricated itself from the world of traditional broadcasting, the MDStV proceeds to provide examples of Media Services. In particular, the MDStV applies to the following: (1) distribution services in the form of direct offers to the public for the sale of goods or furnishing of services, including real property, rights and duties, for consideration (Tele-shopping); (2) distribution services, to which results of data inquiry are distributed in text or image with or without a carrier tone; (3) distribution services in the form of television text, radio text and similar text services; and (4) on demand services, where performance is conveyed for use on request from electronic storage in text, sound or image, with the exception of such services where individual performance or the pure conveyance of data is predominant, except telegames.[192]

The baseline provisions of the TDG and MDStV make clear that similar technology is contemplated in both codes. The question, for the purposes of this article, is which code applies to ISPs. Section 2(2)(3)TDG specifically says that the Tele- Services are "services providing access to the Internet or other networks." It sounds very much like the TDG should prevail. However, the devil is often in the exceptions to the rule. Section 2(4)(3) TDG specifically excludes "content provided by distribution and on-demand services if the emphasis is an editorial arrangement to form public opinion pursuant to § 2 of the Interstate Agreement on Media Services (Media Services Treaty) . . . ." Further, the TDG also excludes telecom-

189. § 2(1) RStV ("Rundfunk is für die Allgemeinheit bestimmte Veranstaltung und Verbreitung von Darbietungen aller Art in Wort, in Ton und in Bild unter Benutzung elektromagnetischer Schwingungen ohne Verbindungsleitung oder längs oder mittels eines Leiters.").

190. § 2(1) MDStV (1997, 2002).

191. § 2(1) RStV.

192. § 2(2) MDStV (1997, 2002). Please note that "individual performance" is the author's translation, and can be understood as the one-on-one exchange of goods and payments.

munications services and the commercial provision of telecommunications services, as well as traditional broadcasting.[193] Therefore, if ISPs provide either distribution services or on-demand services, they fall under the regulatory umbrella of the MDStV, and thus are subject to regulation through Jürgen Büssow's Blocking-Order.

Recalling the distinction in German media law between the authority of the *Bund* to regulate means (e.g., frequency allocation) and the authority of the *Länder* to regulate content, it is not surprising there is a similar tension concerning Internet regulation. Prior German case law indicates longstanding support for this separation of power, and to allow Internet content regulation to fall under the purview of a federal statute would clearly be contradictory to traditional legal thinking. The debate surrounding the applicability of the IuKDG or the MDStV has been hotly contested in Germany.

B. An Overview of Büssow's Blocking-Order

The storm clouds began to gather in Nordrhein-Westfalen months before the Düsseldorf District Government issued its initial order to ISPs to block extremist web pages.[194] Jürgen Büssow indicated early on that he believed the district government could regulate the access to extremist web sites under the MDStV.[195] In October 2001, Büssow invited local ISPs via a written invitation to a hearing where the legal basis for blocking extremist web sites under the MDStV would be clarified.[196]

193. § 2(4)(1)-(2) TDG. The TDG excludes "Telecommunications" as defined under § 3 of the Telekommunikationsgesetz (TKG) and broadcasting under §2 of the Rundfunkstaatsvertrag (RStV).

194. *See* Strafen für Provider für rechtsextreme Internetseiten, 26.08.2000, *at* http://www.heise.de/newsticker/data/jk-26.08.00-005/ (last visited Nov. 3, 2003); Online-Anbieter sollen Nazi-Sites sperren, 28.05.2001, *at* http://www.heise.de/newsticker/data/em-28.05.01-000/ (last visited Nov. 3 2003).

195. *Id.* Büssow indicates that should ISPs continue to offer extremist web sites, they could face fines up to 500,000 DM under the MDStV.

196. *See* Anhörung- Aufsicht nach dem Mediendienste-Staatsvertrag (MDStV), AZ 21.50.20, Bezirksregierung Düsseldorf, 04.10.2001. The *Anhörung* issued by the District Government Düsseldorf can be understood as a draft proposal for the later Blocking-Order. The provisions are largely identical, with the notable exception that http://www.rotten.com was not listed as one of the prohibited web sites in the Blocking-Order. Another site originally listed in the Anhörung was http://www.front14.org, which was defunct by the time the Blocking-Order was issued). *See also* Nordrhein-westfälische

Büssow released the Blocking-Order in February 2002.[197] The Blocking-Order begins with a recital of legal authority granted under the MDStV giving the district government oversight of ISPs and Internet content. The Blocking-Order states that ISPs fall within the definition of "Provider" under § 3(1) MDStV.[198]

As such, the district government has the authority under the MDStV to regulate ISPs and the content accessible via their networks.[199] In particular, § 18(1) MDStV grants the district government the power of oversight for youth protection purposes pursuant to § 8 MDStV.[200]

Under MDStV § 18, the Blocking-Order ordered ISPs to block access to Stormfront and Nazi-Lauck.[201] Stormfront is an American service provider which exclusively hosts right-extremist Internet sites, for the most part in English. Stormfront offers several services for a fee, such as server space, data transfer and email addresses with individual domain names.[202] Stormfront clearly expresses its right-extremist point of view, declaring "White Pride World Wide," and offers a German language section featuring an article advocating censorship-free "Free Zones."[203] The Stormfront homepage provides access to various services, links, a "Kids Page," and a "Women's Page," all of which promote racist ideology.[204] The

Provider sollen Nazi-Web sites ausfiltern, 08.10.2001 http://www.heise.de/newsticker/data/hod-08.10.01-001 (last visited Nov. 3, 2003).

197. Press Release, Bezirksregierung Düsseldorf erlässt Sperrungsverfügungen wegen rechtsextremischer Angebote im Internet, 42/2002 (Feb. 8, 2002), *at* http://www.brd.nrw.de/BezRegDdorf/hierarchie/index.php.

198. Sperrungsverfügung, AZ 21.50.30, 06.02.2002, at 1. "'Provider' means natural or legal persons or associations of persons who make available either their own or third-party media services or who provide access to the use of media services." MDStV § 3(1) (1997). Please note that the definition of "provider" in § 3(1) TDG is identical to MDStV except that the word "Tele-Services" is substituted for "Media Services."

199. Sperrungsverfügung, *supra* note 156, at 1.

200. *Id. See* § 7 MDStV (1997) (Content, Duty of care to a child, Opinion Poll); *see also* § 8 MDStV (1997) (Prohibited Media Services, Youth Protection); *see also* §9 MDStV (1997) (Advertising, Sponsoring); *see also* §§ 11, 12, 13, 22(1) MDStV (2002).

201. § 22 MDStV (2002).

202. *See* White Nationalist Community, *at* http://www.stormfront.org (last visited Sept. 15, 2004).

203. *Id. See also* Sperrungsverfügung, *supra* note 156, at 1. Please note that a "Free Zones" article found on the Stormfront site features the phrase "wir bestrafen Abweichler und Feinde" ["we punish deviants and enemies"]. The same phrase was selected to appear in the Blocking-Order.

204. http://www.stormfront.org (last visited Sept. 15, 2004).

Blocking-Order concludes that the site, on the whole, is aimed at building and influencing public opinion.[205] The determination that a site contains editorial content intended to influence public opinion has a direct bearing on whether the site can be regulated under the MDStV or under the TDG. Further, the many available links constitute the informational equivalent of a "Lazy Susan" for the German right-extremist scene.[206]

According to the Blocking-Order, Stormfront is prohibited under § 8(1) MDStV, because it violates the regulations in the German penal code.[207] The elements of *Volksverhetzung*, or Incitement of the People, are fulfilled by promoting hatred against Jews and foreigners.[208] Stormfront also violates the penal code for using and distributing symbols and propaganda material for unconstitutional organizations, namely Nazi swastikas and symbols.[209] Stormfront also violates § 8(1)(2) by glorifying war, and § 8(1)(3)MDStV by endangering children.[210]

The Blocking-Order concludes that Stormfront promotes national socialist ideology with the goal of establishing national socialist rule. National socialist ideology stands in conflict with the moral ideals of German social and legal order, and therefore is considered a great moral danger to children and youth.[211]

For similar reasons, the Lauck site is also prohibited under the MDStV and the penal code. The Lauck site features national socialist propaganda material, including a free download of Hitler's *Mein Kampf*, as well as national socialist songs, symbols, mobile phone ring tones, articles, flyers for download and printing, and replicas of Zyklon B gas canisters featuring the "KZ Auschwitz" logo.[212]

The Lauck site violates the penal code for incitement of the people through the open approval of the annihilation of the Jews

205. *Id.*

206. *Id.* (the word used in the Blocking-Order is "Verteilerdrehscheibe").

207. § 12 (1) MDStV (2002).

208. *See* Sperrungsverfügung, *supra* note 156, at 2. *See also* § 130 StGB, *supra* note 101.

209. *See* § 86 StGB (use of symbols of unconstitutional organizations).

210. *See* http://www.stormfront.org. (last visited Sept. 15, 2004); *see also* §§ 12(1)-(3) MDStV (2002).

211. Sperrungsverfügung, *supra* note 156, at 1.

212. *See* http://www.nazi-lauck-nsdapao.com. (last visited Sept. 15, 2004).

under the Third Reich.[213] The use of Nazi symbols and distribution of propaganda materials violates § 86 StGB. The Lauck site glorifies war via the free distribution of *Mein Kampf*, certain music files, and Music-CDs.[214] As with Stormfront, the Lauck site is deemed to promote national socialist ideology with the goal of establishing national socialist rule. Because national socialist ideology promoting the "Führer Principle" (*Führerprinzip)* conflicts with the moral ideals of German social and legal order, it is deemed to be a great moral danger to children and youth.[215]

According to § 5 of the MDStV, ISPs are answerable under law for their own content (Content-Provider), and for foreign content (Service Provider), only when the ISP has knowledge of the content and it is possible to prevent access to the foreign content.[216] If an ISP acts merely as an Access Provider, providing Internet service without knowledge of content, it is not responsible for foreign content.[217]

It would seem that if an ISP is merely providing access to foreign content, it can escape legal liability.[218] According to the interpretation under § 18(3) MDStV, this is not so.[219] If it is proven that content cannot be blocked under § 18 as a Content Provider or as a Service Provider, a mere Access Provider can still be held accountable for blocking content and treated as a Service Provider if it attains knowledge of content consistent with the Telecommunications Secrecy provision of the Telekommunikationsgesetz (TKG).[220] Thus, if a mere Access Provider gains knowledge

213. *See* http://www.nazi-lauck-nsdapao.com. Please note that the mere approval of Nazi atrocities against the Jews is a *prima facia* violation of § 130 StGB.

214. *Id. See* § 8 MDStV (1997) (MP3 music files for download include the *Horst Wessel Lied*). *See* § 12 MDStV (2002).

215. http://www.nazi-lauck-nsdapao.com; *see* § 6, § 23 BVerfGE (1952).

216. *See* §§ 6, 9 MDStV (2002).

217. http://www.nazi-lauck-nsdapao.com (last visited Sept. 15, 2004); *see* § 5 MDStV (1997) (providing definitions of Content, Service, and Access Provider); *see* § 7 MDStV (2002).

218. *See CompuServe I*, Az. 8340 Ds 465 Js 173158/95; s*ee also CompuServe II,* 20 Ns 465 Js 173158/95.

219. § 22(3) MDStV (2002).

220. *See Id.*; *see also* Telekommunikationsgesetz [Telecommunications Law] [TKG] 25.07.1996 (BGB1. I S. 1120), *amended by* v. 31.01.2001 (BGB1. I S. 170), § 85 (Telecommunications Secrecy); *see also* Press Release, Bezirksregierung Düsseldorf nicht "die Wacht am Rhein" im Internet- Düsseldorfer Regierungspräsident weist taz-Bericht

of illegal content through any means, even knowledge attained through the operation of the network, it can be forced to block access to the illegal content under the MDStV.[221]

The Blocking-Order asserts that a direct request for assistance from the American Service Providers would not be feasible.[222] *Yahoo! v. LICRA* indicates that European laws and judicial decisions may not be upheld in the United States.[223] As a result, German ISPs cannot shift blame to the American content and service providers in an attempt to avoid liability under German law.

The MDStV makes clear that ISPs are only responsible for blocking prohibited content if it is technologically possible and reasonable to do so.[224] According to the Blocking-Order, it is both technically possible and reasonable to block access to the prohibited web sites. For § 5 of the MDStV to apply, there must be reasonable technological means available to block access to the prohibited content.[225] Perhaps drawing from the conclusions of the French court in *Yahoo! v. LICRA*,[226] the district government lists a number of technological means that may be employed to effectively block access to Stormfront and the Lauck site.[227] The ISPs may exclude the domain from the Domain-Server (DNS), use Proxy-Servers, or exclude the prohibited site through a router.[228] ISPs are also re-

zurück, 70/2002 (Feb. 26, 2001), *at* http://www.brd.nrw.de/BezRegDdorf/hierarchie/index.php. The duty of Access Providers to block prohibited content under § 18(3) MDStV (§ 22(3) MDStV 2002) is not unclear or uncharted legal territory. *See also* § 22 MDStV (2002). *Compare* TDG § 5(4), *infra* note 242, 255.

221. *See* Sperrungsverfügung, *supra* note 156, at 6. The District Government Düsseldorf points out that the ISPs were notified of the illegal sites in the Anhörungsschreiben in October 2001. This would presumably make it difficult, if not impossible, for the targeted ISPs to claim lack of knowledge of the prohibited sites.

222. *Id.* In fact, the District Government Düsseldorf did request that Stormfront and Lauck block access to the prohibited content. Not surprisingly, there was no reaction from either site.

223. *See LICRA I*, 169 F. Supp. 2d 1181.

224. *See* § 5 MDStV (1997); *see also* § 7 MDStV (2002).

225. *See* Sperrungsverfügung, *supra* note 156, at 6. *See also* § 5(1)(2) MDStV (1997). The standard is whether it is "technologically possible and reasonable" to block access or use of the prohibited content. *See* §§ 6,9 MDStV (2002).

226. *See LICRA I*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

227. *See* Sperrungsverfügung, *supra* note 156, at 6.

228. *Id.* at 6, 7. The Sperrungsverfügung does not detail the technical aspects of blocking access to the web sites. For the purposes of this article, it is sufficient to recognize that the filtering occurs after the user sends the request for the web page and

quired to block access to the sites via "mirror sites" and search engines.[229] Not surprisingly, and perhaps with good reason, ISPs in Nordrhein-Westfalen have hotly disputed the technological effectiveness of the proposed methods.[230]

According to the Blocking-Order, it is quite reasonable for ISPs to implement the necessary filtering technology because, in a balancing test between the burden to ISPs and the potential danger to society, the concerns of society and the protection of legally protected rights of persons are paramount.[231] The Blocking-Order lists in detail right-extremist related crime statistics to highlight the current and future danger posed by right-extremist propaganda and organizations.[232] Therefore, the concrete danger to society posed by right-extremists outweighs any burden imposed on the ISPs to filter the prohibited sites.

The Blocking-Order acknowledges that the technical measures employed by ISPs will largely affect the average Internet user, and only a technologically savvy minority will be able to circumvent the blockade.[233] According to the Blocking-Order, it is not necessary

---

either prevents the request from reaching the desired server or prevents the content from being transmitted to the user.

229. *Id.* at 10. *See also* Jonathan Zittrain and Benjamin Edelman, Localized Google Search Result Exclusions, Berkman Center for Internet & Society, *at* http://www.cyber.law.harvard.edu/filtering/google (last visited April 3, 2003). French and German Google search engines appear to filter search results for sites with content that may be sensitive or illegal.

230. *See* Stefan Krempl, Netsperre für Fritschen Doof, 22.11.2001, *at* http://www.heise.de/tp/deutsch/inhalt/te/11175/1.html (last visited Oct 24, 2002); Provider halten Sperrung von Websites für unwirksam und unzumutbar, 13.11.2001, *at* http://www.heise.de/newsticker/meldung/22653 (last visited Oct. 24, 2004).

231. *See* Sperrungsverfügung, *supra* note 156, at 8 ("Da insofern der Rechtsextremismus auch eine konkretisierte Gefährdung für die o.g. Rechtsgüter aber auch für Leben und Gesundheit vieler Einzelner darstellt, wirkt die Belastung der Anbieter durch eine Sperrung nicht so schwer, wie der Schutz der bedrohten Rechtsgüter"). *See also*, Stamm, *supra* note 20, at 25. The freedom of speech per Article 5 is subject to the Doppelbegründung doctrine, which calls for a balancing of the right to opinion against other basic rights, such as the right to personality. *See also Lüth*, BVerfGE 7, 198-230 (1958).

232. *See* Sperrungsverfügung, *supra* note 156, at 7, 8. In 2000, 15,951 criminal acts were committed which had proven or suspected right-extremist origins, while in 1999, 10,037 criminal acts were committed. Most of the cases (6,823) were propaganda offenses. Further statistics include: 579 violent offenses, 508 attacks against persons, 385 people injured by right-extremists, and seven attempted murders.

233. *Id.* at 9.

that access to the sites be completely blocked in order to justify the implementation and execution of the law, only that progress is made toward the ultimate goal of blocking illegal content.[234] Therefore, it is enough that the average user will be prevented from accessing the illegal content.

The Blocking-Order finally concludes that the freedom of access to information under Article 5(2) of the Basic Law is not violated.[235] Internet users have no constitutional claim to access prohibited information, because the information itself is already illegal under the German penal code.[236] However, in order to comply with Article 5(3) of the Basic Law, the Blocking-Order exempts schools and universities from the order, so long as the sites are accessed for art and scholarship, research or educational purposes.[237]

C. Objections and Answers: Büssow holds his ground

1. Applicability of the MDStV

One of the first objections to Büssow's Blocking-Order concerned the applicability of the MDStV to all ISPs.[238] To qualify as a Provider under § 3(1) of the MDStV, the web sites must necessarily qualify as Media Services.[239] However, it is not clear that access to all web sites can qualify as a Media Service, because not all sites necessarily contain edited content.[240] According to Jugendschutz.net, a youth protection watch-dog organization, some youth protection organizations founded in other *Länder* have qualified home pages as "Individual communications," whereby they qualify

234. *Id.* at 8-9. *See generally* HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (5th ed., 2000).

235. *See* Sperrungsverfügung, *supra* note 156, at 10. *See* Grundgesetz [GG] art. 5(2) ("These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor." The criminal code falls within "provisions of general laws.").

236. *See* Sperrungsverfügung, *supra* note 156, at 10. *See, e.g.,* §§ 84, 85, 86, 130, 185, 189 StGB; *see generally* GjS.

237. Grundgesetz [GG] art. 5(3) ("Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.").

238. Thomas Hoeren, *Stellungnahme zur geplanten Sperrungsverfügung der Bezirksregierung Düsseldorf* (Hearing Nov. 13, 2001).

239. § 3(1) MDStV (1997, 2002), *supra* note 198.

240. Hoeren, *supra* note 238, at 2 (comparing web sites that have edited content and sites which merely present a series of photos).

as Tele-Services.[241] If web sites qualify as Tele-Services, not Media Services, the Blocking-Order cannot find a legal basis in the MDStV. Instead, it may be possible to regulate ISPs as providers of Tele-Services under § 5(4) of the TDG, which provides similar provisions as MDStV § 18(3) used in the Blocking-Order.[242]

The district government maintains that it can regulate all ISPs under the MDStV.[243] According to the district government's *Widerspruchsbescheid*,[244] a "reply to the appeal" of the ISPs, the ISPs do not fall under the jurisdiction of the TDG or TKG[245] as either Tele-Service Providers or Network Providers. Access Providers provide protocol functions such as IP-Addresses, Name-Service, and Routing, and cannot be considered to be Network Providers who do not provide these additional protocols for users.[246] Further, Tele-Service Providers offer services limited to the field of individual communications, whereas Access Providers offer services which can be accessed by multiple users simultaneously.[247] Finally, both the TDG and TKG contain provisions that seemingly exclude Access Providers.[248]

241. *Id. See* § 2(2)(1) TDG; *see also* http://www.jugendschutz.net/teledienst.net (last visited Sept. 15, 2004).

242. § 5(4) TDG ("The obligations in accordance with general laws to block the use of illegal content shall remain unaffected if the provider obtains knowledge of such content while complying with telecommunications secrecy under § 85 of the Telecommunications Act (Telekommunikationsgesetz) and if blocking is technically feasible and can reasonably be expected."). *See* § 22(3) MDStv 2002; s*ee also* Hoeren, *supra* note 238, at 4.

243. Widerspruchsbescheid zur Sperrverfügung, Bezirksregierung Düsseldorf, (Sept. 23, 2002), *available at* http://www.nps-brd.nrw.de/BezRegDdorf/hierarchie/aufgaben/Abteilung_2/Dezernat_21/Medienmissbrauch/Widerspruchsbescheid_zur_Sperrverfuegun8229.php (last visited April 14, 2003).

244. *See* MATTHEW BENDER & CO., INC., BUSINESS TRANSACTIONS IN GERMANY, § 7.05 (2002). The ISPs initiated a protest procedure against the district government's Blocking-Order by filing a complaint, or *Widerspruch*. The *Widerspruchsbescheid* is the district government's reply to the ISPs appeal. The *Widerspruchsbescheid* is the final administrative procedure before resorting to the courts.

245. Telekommunikationsgesetz [Telecommunications Law] [TKG] v. 25.07.1996 (BGB1. I S. 1120), *amended by* v. 31.01.2001 (BGB1. I S. 170).

246. *Id.* at 1.

247. *Id. See* § 2(1) TDG ("Teleservices within the meaning of § 2 (1) shall include in particular . . . services offered in the field of individual communication.").

248. § 2(4)(1) TDG ("This Act shall not apply to . . . telecommunications services and the commercial provision of telecommunications services under § 3 TKG"). *See* § 3(18) TKG ("'telecommunications services' [shall mean] the profit-oriented offer of

In addition, the *Widerspruchsbescheid* points out that web sites are not Individual Communications, because unlike letters or telephone conversations, they are accessible to everyone.[249] In this sense, Access Providers do not violate Telecommunications Secrecy if they block access to illegal web sites.[250]

Instead, web sites, according to Büssow, in particular Stormfront and Lauck, are Media Services in that they are organized and contain editorial content similar to a magazine.[251] When combined with right-extremist symbols and images, it becomes clear that the sites intend to influence public opinion and are therefore mass communications, not individual communications.[252]

Further, the regulation of Access Providers is consistent with the intent and purpose of the MDStV. Because it is not possible to regulate content originating outside Germany, the MDStV contemplates the authority to require German ISPs to block foreign content that is illegal according to German law.[253]

2. Available Technology and Reasonableness?

German ISPs seized immediately upon the technological burdens associated with blocking access to the Stormfront and Lauck sites. In particular, ISPs claimed that any measures taken would be largely ineffective due to ever-changing IP-addresses, proxy servers and mirror sites.[254] Further, a 2000 decision by the Munich Regional Appellate Court (OLG München) declared that it is not necessary for an ISP to consider every potential access alternative when

telecommunications, including transmission line offers to third parties); § 3(5) TKG ("'commercial provision of telecommunications services' [shall mean] telecommunications offered on a sustained basis, including transmission line offers to third parties, with or without the intention to realise profits").

249. *See* Grundgesetz [GG] art. 10 (1) ("The privacy of correspondence, posts and telecommunications shall be inviolable."); § 85 TKG, *supra*, note 220.

250. § 85 TKG, *supra* note 220.

251. *Id.*

252. *Id.*

253. Widerspruchsbescheid, *supra* note 243, at 3 (justifying the applicability of § 18(3) MDStV (1997) currently § 22(3) MDStV (2002)). *Id.* at 4-5 (documenting unsuccessful attempts to require the U.S. Providers and the F.C.C. to block the illegal content. Also a repetition of the unwillingness of the U.S. to enforce the French judgment in *LICRA I*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)).

254. Hoeren, *supra* note 238, at 3.

blocking illegal content.[255] The *Widerspruchsbescheid* reiterated that the technological means to block access to the site exist and are reasonable to apply.[256]

3. Constitutionality

The *Widerspruchsbescheid* answers a number of constitutional objections raised by ISPs. Access Providers claimed they were being treated differently than Network Providers, and therefore the Blocking-Order violated Article 3(1) of the Basic Law.[257] The MDStV contemplates three levels of responsibility for Content, Service, and Access Providers, respectively. Access Providers are not singled out for sole responsibility under the MDStV and are thus not the subject of unfair discrimination.

ISPs may not rely on the Article 5 exception for art and scholarship, research, and teaching. This exception does not apply to private entities that are not solely concerned with education or research.[258]

The constitutional right to occupational freedom is also not violated by the Blocking-Order. Article 12 of the Basic Law is subject to the limitations of other laws, such as the MDStV.[259] Because the limitations imposed by the Blocking-Order are relatively unburdensome compared to the rights of youth protection, human dignity, and public security, there is no constitutional claim under Article 12.[260]

4. European Law

The Blocking-Order comports with European legal and political principles.[261] The E-Commerce Directive allows member states to enact measures to combat hatred based on race, gender, relig-

255. Entscheidungen des Oberlandesgericht München [OLG München], Multimedia und Recht [MMR], 10 (2000), 617 (*CD-Bench* case). The decision was based on TDG § 5(4) and is of questionable applicability).

256. Widerspruchsbescheid, *supra* note 243, at 5-7. The same reasons given in the Blocking-Order are repeated almost verbatim.

257. *Id.* at 7. *See* Grundgesetz [GG] art. 3(1) [All persons shall be equal before the law].

258. Widerspruchbescheid, *supra* note 243, at 5-7. *See* Grundgesetz [GG] art 5(3).

259. *Id.* at 8. *See* Grundgesetz [GG] art. 12, 12(1).

260. Grundgesetz [GG] art. 12, 12(1).

261. *Id.*

ion, or nationality.[262] Article 12 of the Directive contemplates legal action against Access Providers.[263]

D. The Administrative Courts: First Round Decisions

After exhausting all available administrative procedures with the district government[264] the ISPs filed suit in six administrative courts (*Verwaltungsgerichte)* in Nordrhein-Westfalen. Administrative courts are courts of general jurisdiction and typically entertain disputes between private parties and administrative agencies.[265] Administrative courts may decide constitutional questions so long as both parties are not constitutional organs, such as the federal and *Länder* governments.[266] The primary focus of the administrative court is to address whether a specific administrative agency decision is "well-founded and supported by the applicable statute, regulation and general principal of public law."[267]

Many of the following cases make broad statements concerning the legality of the Blocking-Order. The standard of review applied to administrative decisions is whether the agency has exceeded the statutory limits of its discretion, or if the agency has abused its power in contradiction to statutory intent.[268] An ill-advised exercise

262. The Electronic Commerce Directive (E-Commerce Directive), 2000/31/EC, art. 3(4)a)(i) (Original Journal L 178 9 2000) ("Member States may take measures to derogate from paragraph 2 in respect of a given information society service if . . . necessary for one of the following reasons: public policy, in particular the prevention, investigation, detection and prosecution of criminal offenses, including the protection of minors and the fight against incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons.").

263. *Id.* art. 12(3) Directive 2000/31/EC at (l 178) 9 ("This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or to prevent an infringement.").

264. MATTHEW BENDER & CO., INC., BUSINESS TRANSACTIONS IN GERMANY, § 7.05 (2002). Before a claim may be made in an Administrative Court, the plaintiff must exhaust all administrative procedures. This was accomplished when the ISPs issued an appeal (*Widerspruch*) to the district government, and the district government in turn delivered its "reply to the appeal" (*Widerspruchbescheid)* refusing to amend the Blocking-Order.

265. *Id.* at 2. *See generally* VwGO, v. 21,01.1960 (BGB1 I S. 17), *amended by* VwGO v. 13.06.1980 (BSB1 I S. 677).

266. *Id.*

267. *Id.* at 5.

268. *Id.* at 4.

of discretion is not necessarily illegal, and courts may not review the expediency of discretionary administrative decisions.[269] If the administrative decision is within the legal scope of discretion and is based on proper consideration of fact and law, the court may not "second guess" the agency.[270] The net effect is that administrative courts review administrative decisions with great deference.

To date, thirty-six out of seventy-six Access Providers in Nordrhein-Westfalen have opposed the Blocking-Order, and ten lawsuits have been filed.[271] Since October 2002, there have been seven court decisions regarding the Blocking-Order. All but one, Minden, have supported Jürgen Büssow's Blocking-Order.

1. VG Minden

The 11th Chamber of the Minden Administrative Court (Verwaltungsgericht (VG) Minden) handed down the first decision regarding the Blocking-Order on October 31, 2002.[272] However, the Minden court did not do much more than recognize that legal issues exist. The court did not make a decision as to the legality of the Blocking-Order, saying that the order was "neither blatantly legal [n]or blatantly illegal," and did not approach the issue of whether the MDStV or IuKDG was the correct statutory basis for the Blocking-Order.[273] Instead the court decided in favor of the ISPs, stating that the interests of the ISPs outweighed public interests.[274] The ISPs were not required to block the web sites pending further judicial review. The District Government of Düsseldorf immediately appealed the decision to the High Administrative Court in Münster.[275]

269. *Id.* at 5.

270. MATTHEW BENDER & CO., INC., BUSINESS TRANSACTIONS IN GERMANY § 7.05 (2002) at 1.

271. Sperrung der Internet-Angebote http://www.stormfront.org und www.nazilauck-nsdapao.com, AZ 21.50.30-22/01 (Sept. 6, 2002). The Sperrung ordered that all internet providers in Nordrhein-Westfalen comply immediately with the Blocking-Order of February 6, 2002, and the Widerspruchsbescheid of July 29, 2002.

272. Verwaltungsgericht Minden [Administrative Court Minden] [VG Minden], 11 L 1110/02 (October 31, 2002), *available at* http://www.artikel5.de/entscheidungen/vg-minden_20021031.html (last visited Jan. 30 2003).

273. *Id.* at 2.

274. *Id.*

275. *Id.*

2. VG Arnsberg

On December 6, 2002, the Administrative Court in Arnsberg released the first decision in favor of the Blocking-Order.[276] The Arnsberg court held that the District Government had the proper authority and interest sufficient to support issuing the Blocking-Order.[277] Further, the Arnsberg court found the interests of the ISPs inferior to the public interest behind the immediate order to block the extremist web sites.[278] The court found that it was in the public interest to be spared from *Volksverhetzung* (Incitement of the People) on the Internet, and that this interest could be served by blocking access to the extremist web sites.[279]

In response to the claim that the Blocking-Order imposed too great a burden on the ISPs, the Arnsberg court forcefully responded, "Our legal system . . . does not protect business interests, even those indirectly affected, if they contravene the free democratic constitutional order by promoting — regardless of the origin — Incitement of the People. Such Interests are never worthy of protection."[280]

3. VG Gelsenkirchen

Twelve days later, the ISPs received another blow from the Administrative Court in Gelsenkirchen.[281] Consistent with Minden and Arnsberg, the Gelsenkirchen court found that the Blocking-Order was not blatantly illegal. More importantly, the court found that offering access to the web sites named in the Blocking-Order constituted a Media Service within the meaning of the MDStV

276. Verwaltungsgericht Arnsberg [Administrative Court Arnsberg] [VG Arnsberg], 13 L 1848/02 (Dec. 6, 2002), *available at* http://www.jurpc.de/rechtspr/20030010.htm (last visited Jan. 30, 2003).

277. *Id.* at ¶7. *See also* § 80 VwGO.

278. *Id.* at ¶10.

279. *Id.* at ¶11.

280. *Id.* at ¶13 ("Unsere Rechtsordnung schütz indessen keine wirtschaftlichen Interessen, die mittlebar betroffen sind, wenn durch Volksverhetzung gegen die freiheitliche demokratische Grundordnung- durch wen und von welchem Ort aus auch immer verstoßen wird. Solche Interessem sind nicht schützenswert.").

281. Verwaltungsgericht Gelsenkirchen [Administrative Court Gelsenkirchen] [VG Gelsenkirchen] 1 L 2528/02 (Dec. 18, 2002), *available at* http://www.artikel5.de/entscheidungen/vg-gelsenkirchen_20021218.html (last visited Jan. 30, 2003).

§ 2(2).[282] The Gelsenkirchen court concluded that offering access to the banned Internet sites constituted a Distribution Service or an On-Demand Service, and could thus be distinguished from Tele-Services governed under the TDG.[283] The MDStV concerns itself with information and communications services offered to the general public, while the TDG contemplates information and communications services limited to individual use.[284] The crucial distinction in the mind of the court was that the content found on the Stormfront and Lauck sites was clearly directed towards and accessible by the general public in contrast to a small user group or individuals.

The Gelsenkirchen court held that both the Stormfront and Lauck sites contained content prohibited under § 12 MDStV. As a result, the Blocking-Order is supported under § 22 MDStV 2000.[285] After examining the web sites, the court found numerous examples of content which clearly violated the penal code and could endanger children.[286] The court found that all of the prohibited content was intended to influence public opinion and therefore fell within the purview of the MDStV.

Finally, the Gelsenkirchen court held that public interest in preventing *Volksverhetzung* outweighs any interests of the ISPs.[287] The court emphasized the importance of § 130 StGB's prohibition of *Volksverhetzung*, noting that in light of Germany's history, there is special responsibility to protect the German population from direct attacks on human dignity.[288] The court acknowledged the danger of "poisoning the political climate if national-socialist violence and tyranny were found to be harmless."[289]

282. *Id.* at 3. *See* § 2(2) MDStV (1997, 2002), *supra* note 186.

283. VG Gelsenkirchen, *supra* note 281, at 3.

284. *Id.*

285. *Id.* at 4. *See* § 12 MDStv (1997, 2002); *see also* § 8, 18 MDStV (1997).

286. VG Gelsenkirchen, *supra* note 281, at 4 (discussing examples including: the use of swastikas, downloadable propaganda materials, a downloadable copy of *Mein Kampf*, downloadable propaganda films such as *The Wandering Jew*. The court made a detailed reference to Gary Lauck's photo, which shows him wearing a Hitler-like haircut and mustache, and clothed in a khaki uniform shirt with a swastika armband).

287. VG Gelsenkirchen, *supra* note 281, at 6.

288. *Id. See also* BGH 1 StR 184/00 (Dec. 12, 2000).

289. VG Gelsenkirchen, *supra* note 281, at 6.

4. VG Düsseldorf

On December 19, 2002 the Administrative Court in Düsseldorf handed down a detailed decision regarding the legality of the Blocking-Order.[290] Although the effect of the decision is substantially the same as that of Arnsberg and Gelsenkirchen, the Düsseldorf court explored in greater detail the relationship between the MDStV and the IuKDG, as well as some constitutional issues not discussed in previous decisions. First, the Düsseldorf court took up the issue of whether access to the prohibited web sites falls within the scope of the MDStV or one of two federal statutory provisions, namely the Telecommunications Law (TKG) and the IuKDG's Tele-Services Law (TDG).

The court determined that Access-Providers could either be Media Services Providers under § 3(1) MDStV or Tele-Services Providers under § 3(1) TDG, but could not be Telecommunications Service Providers under § 4 TKG.[291] The court distinguished Telecommunications Service as having a "technical-side," such as pure data transport, as opposed to "content offers," either on an individual or mass-communications basis.[292] Because Internet Access-Providers are more concerned with offering content, the TKG can not be applied to Internet access service.[293]

The court acknowledged that the challenged Blocking-Order could find a legal basis in either the MDStV or in the TDG in combination with general legal rules.[294] The court went on to note that even if the ISPs were found to offer Tele-Services rather than Media Services, the outcome would be substantially the same: The ISPs could be forced to block access to the prohibited sites.[295]

The Düsseldorf court examined the applicable provisions of the MDStV and concluded that there is a clear legal basis for supporting the Blocking-Order. The court concluded that "The Media Services Treaty 2002 — and not the TDG 2001 — is applicable to

290. Verwaltungsgericht Düsseldorf [Administrative Court Düsseldorf] [VG Düsseldorf], 15 L 4148/02 (2002).

291. *Id.* at 13. *See* § 3(1) MDStV (1997, 2002).

292. VG Düsseldorf, 15 L 4148/02, 13.

293. *Id.* at 14.

294. *Id.*

295. *Id. See* Hoeren, *supra* note 238.

the appellant [ISPs]."[296] The Düsseldorf court found that Media Services include, in particular, on-demand services, and distinguished Tele-Services as applicable to individual communications or pure data transfer.[297] As such, Media Services apply primarily to services for the general public, while services which are primarily for individual communication fall within the scope of the TDG.[298] The court gave examples of communications services which have a more concrete individual nature, such as telebanking, or the exchange of X-ray pictures and medical data between a hospital and family doctor.[299]

However, when the services in question have the primary purpose of providing access to sites that influence public opinion, then the Media Services Treaty applies.[300] Both the Stormfront and the Lauck sites contain editorial content in combination with links to additional sources and provide offers to purchase goods, and as such, these sites cannot be considered to offer the "pure information" contemplated by services covered under the TDG.[301]

The Düsseldorf court entertained the appellants claim that they should be considered providers of Tele-Services under the TDG. The court concluded that even if this were the case, the district government would still have the duty and authority to order the ISPs to block the sites in question.[302] On the basis of the jurisdiction granted under Article III of the State Treaty amending the Broadcasting State Treaty of December 12, 2000,[303] the state legislature intended to give local authorities, such as the Düsseldorf District Government, the authority to regulate both Media Services and Tele-Services.[304] The Düsseldorf District Government is charged with the general duty to protect the public, and given the illegality and public danger posed by both the Stormfront and Lauck sites, the district government would be obliged to order the

296. VG Düsseldorf, 15 L 4148/02, 15.
297. *Id.*
298. *Id.*
299. *Id.* at 16.
300. *Id.*
301. *Id.*
302. VG Düsseldorf, 15 L 4148/02, 24.
303. Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge, v. 12.12.2000 (GV NRW S. 706).
304. VG Düsseldorf, 15 L 4148/02, 24.

sites blocked under the authority of § 8(2) TDG in conjunction with §§ 86, 130 StGB.[305] The court noted that even if ISPs were relieved of responsibility for the web site content under the TDG, they would still be responsible to block access to the content under the general laws, in particular the penal code.[306] Thus, according to the court, any exception for content liability under the TDG would not, in the end, relieve the ISPs from liability under any other statute prohibiting the web site content. As such, the ISPs still have a duty to block access to the Stormfront and Lauck sites.

The Düsseldorf court concluded that the content of Stormfront and the Lauck site clearly violated § 12 MDStV and provisions of the penal code.[307] The district government had the authority to order ISPs to block access to the sites under § 22 MDStV. Both sites violated §§ 86, 130 StGB by glorifying the murder of Jews under the Nazis, and by using prohibited symbols of National Socialism, such as the swastika.[308] Therefore, there was ample justification to order access to the web sites blocked under the MDStV.

The Düsseldorf court also found that it was technically possible for the ISPs to block access to the prohibited web sites.[309] While the court noted that the available filtering technology would not be completely effective, it was "a step in the right direction" and sufficient to frustrate the average Internet user's attempts to access the prohibited sites.[310] For this reason, the available technology is sufficient to satisfy the requirements of § 22 MDStV.

The Düsseldorf court addressed several constitutional defenses raised by the ISPs. First, the Nordrhein-Westfalen ISPs claimed they were not being treated equally under Article 3 of the Basic Law because ISPs in the other *Länder* were not subjected to the Blocking-Order. The court held that Article 3 only applies to the actions of a public authority within its jurisdiction.[311] The fact that all ISPs

305. *Id.* at 25.

306. *Id. See* §§ 9-11 TDG (exceptions for ISP content liability).

307. VG Düsseldorf, 15 L 4148/02, 17. *See* § 12 MDStV (1997, 2002).

308. VG Düsseldorf, 15 L 4148/02, 17. *See* § 18 MDStV (1997).

309. VG Düsseldorf, 15 L 4148/02, 20.

310. *Id.*

311. *Id.* at 21. *See* Entscheidungen des Bundesverfassungsgerichts [BverfG] Az. 2 BvR 1619, 1628, 1683 (2002); Entscheidungen des Bundesverfassungsgerichts, BVerfGE 79, 127, 168 (1988).

in Nordrhein-Westfalen were being treated equally is not disputed. Therefore, an objection under Article 3 must fail.

The ISPs also raised defenses under Article 5 of the Basic Law, including freedom of opinion, freedom of broadcasting, and the prohibition against censorship.[312] The Düsseldorf court held that the provisions of Article 5 are subject to "general laws," including those for the protection of youth and those incorporated within 22 MDStV.[313] The general laws provision is not intended to prohibit opinions, but is instead intended to protect the continued existence of the state and its constitution against attacks, independent of the concrete intent or effect of a statement of opinion.[314] This is particularly true when the opinions in question have been deemed punishable under criminal law for endangering state and constitutional principles protecting democracy.[315]

The court described the censorship provision in Article 5 as a "Limitation-limit," and not an original basic right.[316] While the censorship provision is clearly designed to prevent so-called preventative-censorship, it does not preclude a public authority from prohibiting a broadcast, or in this instance a Media or Tele-Service from providing access to material deemed criminally injurious to the principles of a free democratic constitutional order.[317]

The ISPs also raised objections under Articles 12 and 14 of the Basic Law. Article 12, Occupational Freedom, guarantees the right to freely choose an occupation or profession.[318] The court found that the Blocking-Order did not prohibit a choice of profession, but rather regulated the practice of the ISPs' occupation. There was no violation of Article 12 because all ISPs in Nordrhein-Westfalen are

312. VG Düsseldorf, 15 L 4148/02, 21. *See* Grundgesetz [GG] art. 5. *See* § 18 MDStV (1997).

313. Grundgesetz [GG] art. 5.

314. VG Düsseldorf, 15 L 4148/02, 21; *see* Entscheidungen des Bundesverfassungsgerichts, BVerfGE 47, 198 (232) (1978).

315. VG Düsseldorf, 15 L 4148/02, 21.

316. *Id.* at 22.

317. *Id.*

318. Grundgesetz [GG] art. 12 (stating that all Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law).

equally regulated and because there is no prohibition against the choice of profession.

The ISPs raised a similar objection under Article 14, which guarantees property and the right of inheritance.[319] The court found that Article 14, much as Article 12, allows the content and limits of property to be defined by other laws, and concluded that such a defining law was § 22 MDStV.[320]

The Düsseldorf court's decision supported the legality of the Blocking-Order and answered a number of legal and constitutional questions not addressed by previous decisions. However, even though the Düsseldorf court clearly thought the ISPs were providing Media Services, by considering the possibility that the TDG could potentially be applicable, it left the door open for future courts to reconsider whether ISPs can, or should, be regulated under the Tele-Services law.

5. VG Aachen

In the first decision of 2003, the Administrative Court in Aachen dealt ISPs another blow in favor of Büssow's Blocking-Order.[321] The Aachen court found that the Blocking-Order was neither obviously illegal nor obviously legal.[322] In congruence with prior decisions, the Aachen court recognized that some legal issues beyond the scope of the district government's authority to issue the Blocking-Order might be appealed to a higher court for final disposition.

The Aachen court found that the MDStV, not the TDG, was the correct legal foundation for the Blocking-Order.[323] The Aachen court focused, as did prior courts, on the difference between offering information in editorial form for the purpose of influencing public opinion and contrasted it with offering

319. Grundgesetz [GG] art. 14 (stating that property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws).

320. VG Düsseldorf, *supra* note 290, at 23. *See* § 18 MDStV (1997).

321. Verwaltungsgericht Aachen [Administrative Court Aachen] [VG Aachen], 8 L 1284/02 (Feb. 5, 2003), *available at* http://www.jurpc.de/rechtspr/20030075.htm (last visited Feb. 25, 2003)

322. *Id.* at ¶4.

323. *Id.* at ¶7.

information for individual use.[324] When information is offered, either as a distribution or on-demand service, in a way that could influence general public opinion, the MDStV must apply. It is only when the information is offered for individual use that the TDG may apply.

The Aachen court found that the web sites targeted by the Blocking-Order were intended, via their presentation and form, to influence general public opinion and not for individual use.[325] The court supported its finding by citing examples from the Lauck site, such as a subtitle for an alleged interview with Osama bin Laden, "Die for Israel? No, thanks!"[326] The court further noted that the sites contained links to purchase related material which strengthened the conclusion that the purpose of the sites is to influence public opinion.[327]

The Aachen court further found, without much difficulty, that the content of both sites violated § 12 MDStV via violations of the penal code.[328] The sites were found to have violated § 130 StGB, Incitement of the People, by offering videos such as *The Wandering Jew* and texts such as *Mein Kampf.*[329] The court also found that the use of National Socialist symbols, such as swastikas and SS-runes, violated § 86 StGB.[330] The Aachen court further noted that even discounting the aforementioned criminal violations, the sites would still be prohibited under § 12 MDStV due to the danger posed to children and youth, as well as injury caused to human dignity.[331] Although the ISPs claimed that because the content originated outside Germany it could not be held accountable under the penal code, the court found that in the instant case, the prohibited con-

324. *Id.*

325. *Id.* at ¶8.

326. *Id.*

327. VG Aachen, *supra* note 321, at ¶8.

328. *Id.* at ¶9. *See* § 12 MDStV (1997,2002).

329. VG Aachen, *supra* note 321, at ¶9. The court singled out a tag-line from *The Wandering Jew*: "Animal lovers all over the world sharply protest the comparison of (four-legged) rats with their infinitely worse two-legged species."

330. *Id.* (noting in particular the collection of National Socialist graphic available on Stormfront).

331. *Id. See* § 12 MDStV (1997, 2002).

tent has made a successful entry into Germany, and could be subjected to the provisions of the penal code.[332]

The Aachen court also rejected the ISPs claim that they could not be held accountable for content originating in the U.S. because they are mere Access Providers, and not Content or Service Providers under § 6 MDStV.[333] The court concluded that Access Providers could still be regulated under § 7 MDStV because they transmitted foreign content over a communications net, in this instance by providing access to the use of foreign information.[334]

The Aachen court concluded that an order to block access to the Stormfront and Lauck sites was justifiable, even if the available technology would only be effective against the average Internet user. The district government has a duty to protect against general threats and even against what may be perceived as a latent threat to society.[335] Therefore, it is sufficient to frustrate the average user's access, and it is not necessary to contemplate all possible ways the prohibited sites might be accessed.[336]

Finally, the Aachen court forcefully addressed the ISPs' complaints that immediate compliance with the Blocking-Order would damage their business interests. The ISPs argued that, while the matter was still being disputed in the courts, compliance with the Blocking-Order be suspended because customers might switch to other ISPs and because of the expenses related to blocking the prohibited sites.[337] The court responded, saying that the interests of the ISPs were subordinate to the interests of society.[338] The primary objective of § 130 StGB is to protect the public peace, and from a historical and contemporary perspective, there is an overriding goal to promote harmony between different groups of people living in Germany.[339] As such, this supports blocking Internet sites which glorify right-extremist ideology — not only the ideology on National Socialism — which primitively propagates a hatred of the

332. VG Aachen, *supra* note 321, at ¶8. *See* BGH, 1 StR 184/00 (Dec. 12, 2000); *see also* § 9(1) StGB.

333. VG Aachen, *supra* note 321, at ¶10. *See* § 5 MDStV (1997).

334. VG Aachen, *supra* note 321, at ¶10. *See* § 5 MDStV (1997).

335. VG Aachen, *supra* note 321, at ¶15.

336. *Id.*

337. *Id.* at ¶16.

338. *Id.*

339. *Id.*

Jews and also attacks the dignity of other societal groups living in Germany.[340] The distribution of materials such as the song "*The Zillertaler Türkenjäger*" and stickers featuring swastikas and the phrase "Foreigners Get Out" poison the social climate, in light of this danger, the interests of the ISPs are clearly subordinate.[341]

6. VG Köln

On February 7, 2003, the Administrative Court in Köln released its decision regarding the Blocking-Order and sided again with the district government.[342] The Köln court held that the Blocking-Order was not obviously illegal, and that it was more likely a legal application of the MDStV.[343] The Köln court followed the analysis of the Düsseldorf court, and determined that an Access-Provider can be regulated under either the MDStV or the TDG, but not the TKG.[344] The Köln court distinguished the technical aspect of a Telecommunications-Provider under the TKG from the more content-oriented services provided by a Media Services or Tele-Services Provider. The court found that the form of the content on the web page was germane to determining whether the Access Provider was providing a Media Service under the MDStV or a Tele-Service under the TDG.[345] The court's review of both prohibited web sites revealed that "without a doubt, the editorial form [of the sites] was primarily intended to influence public opinion."[346] As such, the MDStV, which applies to mass-communications, not the individual communications contemplated under the TDG, provides a sound basis for the Blocking-Order. Like the Düsseldorf court, the Köln court also noted that even if the TDG were applicable, the Blocking-Order would still be supported.[347]

340. *Id.*

341. VG Aachen, *supra* note 321, at ¶16. (examples given by the court appear on the Lauck site).

342. Verwaltungsgericht Köln [VG Köln] [Administrative Court Köln] 6 L 2495/02, *available at* http://www.artikel5.de/entscheidungen/vg-koeln_20030207.html (Feb. 7, 2003).

343. *Id.* at II(2)(a).

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

The Köln court also found that it was technologically possible and reasonable to block access to the prohibited sites.[348] The court noted that the district government had requested voluntary compliance without success. In addition, the court specifically mentioned that the two largest ISPs in Germany, AOL and T-Online, had voluntarily blocked access to the sites despite being outside the jurisdiction of the Blocking-Order.[349]

The Köln court also found that the interests of the ISPs did not outweigh public interest in blocking access to the sites.[350] The goals of public peace, youth protection, and the protection of individual rights such as human dignity, especially when viewed in light of Germany's history, took precedence over any interests the ISPs may have.[351]

The Köln decision completed the first round of Administrative Court decisions on the enforceability of Büssow's Blocking-Order. Only the Administrative Court in Minden offered any tentative support for the ISPs; the other courts, Arnsberg, Gelsenkirchen, Düsseldorf, Aachen, and Köln, albeit with some reservations, clearly favored Büssow's order. The ISPs filed appeals to the High Administrative Court in Münster, which handed down its first decision on March 19, 2003.[352]

7. OVG Münster

The Münster court affirmed the decision of the Arnsberg court in favor of the Düsseldorf District Government and ordered that access to the prohibited web sites be immediately blocked.[353] The Münster court repeated that public interests outweigh any interests of the ISPs and affirmed the legality of the Blocking-Order under the MDStV.[354] The court affirmed that the content of both web sites violate the provisions of the MDStV and the StGB, citing exam-

348. VG Köln, *supra* note 342, at II(2)(a).

349. *Id.*

350. *Id.* at II(2)(b).

351. *Id.*

352. Oberverwaltungsgericht Münster [High Administrative Court Münster] [OVG Münster], 8 B 2567/02 (Mar. 19, 2003), *available at* http://www.artikel5.de/entscheidungen/ovg-muenster_20030319.html (Mar. 19, 2003).

353. *Id. See* VG Arnsberg, 13 L 1948/02.

354. OVG Münster, *supra* note 352.

ples that satisfied the requirements for incitement of the people, unconstitutional organizations, the glorification of war, and the endangerment of children and youth.[355] The court further affirmed that it was technologically possible and reasonable for the ISPs to block access to the prohibited sites; it quoted the Arnsberg court finding that even if not all users could be prevented from accessing the sites, it was a "step in the right direction."[356] However, as a small consolation to the ISPs, the Münster court left open for appeal the question of whether a mere Access Provider could be held accountable for content originating outside Germany.[357]

For the time being, virtually all access to Stormfront and Nazi-Lauck is blocked in Nordrhein-Westfalen. Jürgen Büssow's Blocking-Order has survived the initial scrutiny of the Administrative Courts and the High Administrative Court in Münster. However, it must be remembered that these initial court decisions did nothing more than decide that it was permissible to block access to the sites under the MDStV.

Following the OVG Münster decision, the case will return to the Administrative Court in Arnsberg to consider principle legal issues of the ISPs' appeal to the Blocking-Order. The Arnsberg court will examine the Blocking-Order in greater detail and consider the applicability of the MDStV, the TDG, and constitutional objections under Article 5 of the Basic Law.

Following a second decision from the Arnsberg court, the ISPs may again appeal to the High Administrative Court in Münster. From there, if the decision is again unfavorable, the ISPs may appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig. Only after a decision by the Federal Administrative Court may the ISPs appeal to the Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe.

The administrative court decisions to date have done little more than affirm the authority of Jürgen Büssow and the Düsseldorf District Government to regulate ISPs under the State Treaty on Media Services. However, this is not an insignificant finding, as the courts have maintained continuity with the historical develop-

355. *Id.*

356. *Id. See* VG Arnsberg, 13 L 1948/02.

357. OVG Münster, *supra* note 352.

ment of German media law which allocates the authority to regulate media content with the State rather than the federal government. It is likely that the Nordrhein-Westfalen ISPs will continue to appeal the decisions of the administrative courts with the hope that subsequent proceedings will focus more heavily on the constitutional issues of free speech and freedom of the press. However, as outlined in Part II of this article, the German courts have not been receptive to including racist or extremist speech within the sphere of speech protected under Article 5 of the Basic Law. Further, it would be difficult to show that Stormfront and Nazi-Lauck do not violate any provisions of the German penal code. In these respects, the Nordrhein-Westfalen ISPs face an uphill battle.

There are at least two arguments that favor the ISPs. First, the ISPs may have a valid argument that the technological means required to block access to the web sites will either be ineffective or will become so burdensome that few ISPs will be able to survive financially. The Internet is a quicksilver environment where technology becomes obsolete in stunningly short periods of time. It is a strong possibility that by the time the court proceedings are concluded, the filtering technology proposed in the Blocking-Order will be obsolete. Should the ISPs be forced to continually develop new filtering technology to keep pace with those who are determined to circumvent such technologies?

Second, the Blocking-Order only requires that access to two web sites be blocked. The Stormfront and the Lauck sites are certainly powerful examples of hate-speech on the Internet, but they are only representative of thousands of such web sites. An important question for the courts to address is how to differentiate between Stormfront, which is in clear violation of German law, and those web sites which contain similar content in an entirely different context, such as sites containing historical documents or accounts of Nazi atrocities. While Büssow's Blocking-Order may appear sound in theory, the practical application of such an order could yield over-broad results significantly reducing the positive social and/or democratic effects of the Internet.

It is also important to consider the effects of the Blocking-Order within Germany and on the world stage. If the Blocking-Order

were ultimately upheld in the courts, it could conceivably be implemented in the other German States. The MDStV is a treaty between the States, but the extent to which the other German states would implement a MDStV-based Blocking-Order is unclear. One possible scenario is that the various German states enact Blocking-Orders of varying degrees or against different web sites. Some may not issue a Blocking-Order at all. This possibility could create a confusing regulatory regime within Germany and cause significant difficulties for ISPs operating in several States.

Finally, from a global perspective, Büssow's Blocking-Order appears to fit nicely with U.N. and E.U. law prohibiting racist and xenophobic speech. If successful, Büssow's Blocking-Order may be copied in other countries in Europe and around the world. This would result in a "Balkanization" of the Internet — different regulatory regimes would apply to different geographical parts of the globe. The problem is, the Internet does not respect geographical boundaries and does not exist in any one place. If such a splintered regulatory system were to develop, ISPs could face multiple content filtering requirements and varying levels of liability, both civil and criminal, worldwide. Compliance with multiple regulatory regimes would be a financial and technological nightmare for any ISP seeking to do business internationally.

V. CONCLUSION

Will the Internet remain a realm free from governmental interference? Will the Internet be "Balkanized" into national spheres of influence where content is regulated according to national social, moral, and legal standards? Will Germany, and potentially the European Union, take a stand against the First Amendment protection granted to hate-speech? These are some of the larger questions that may be answered in Germany's higher courts.

The separation of legislative competence between the *Bund* and *Länder*, as formalized in the early broadcasting cases, will likely be applied to Internet regulation. Legislative competence over media content will remain in the hands of the *Länder*, and Internet content will be subject to regulation under the MDStV rather than any federal law. To do otherwise would require a reinterpretation of the Basic Law and overturning what has been a stable, successful

model of media regulatory structure. Further, Germany would have to reconsider its penal code and its attitudes towards National Socialism and hate-speech. In light of the *Auschwitz Lie* case, and German history, it is not likely that German courts will allow sites like Stormfront or Nazi-Lauck any protection under Article 5. Further, European Union Directives lend support to Germany's hard line stance against hate-speech. Jürgen Büssow's *Sperrungsverfügung* will, more likely than not, survive judicial scrutiny.[358]

358. In Nordrhein-Westfalen, Don Black's and Gerhard Lauck's First Amendment privileges have been revoked.