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Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union

By Patrick G. Crago*

I. Introduction

The European Union (EU)¹ and the Internet² share similar goals: to transcend traditional political, geographical, and cultural barriers in order to promote greater regional and transnational cooperation.³

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1. The European Union (EU) is the current name given to an evolving political and economic institutional framework for uniting European countries organized under the European Coal & Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC) (the name of the EEC was changed by Article G of the Treaty On European Union to the European Community (EC)). See Josephine Shaw, European Community Law 4-5 (1993); European Commission, Chronology of the Union (visited Nov. 3, 1996) <http://europa.eu.int/en/euhist/euchron.html>. The EU is currently composed of Belgium, France, Germany, Italy, Luxembourg, the Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, and Sweden. European Commission, EU In Brief (visited Nov. 3, 1996) <http://www.eurunion.org/profile/members.htm>. See discussion infra Part II for a history of the European Union. In order to avoid confusion, references to the EU will represent a reference to all the Communities and their unified institutions. The EU is not a legal personality, so where possible, references to the EU in this Note that would require a legal personality should be understood to be references to the European Community. Finally, for the purposes of this Note, references to EC Treaty will represent a reference to the Treaties of Rome and the Single European Act, as amended by the TEU.

2. The Internet is popularly referred to in the United States as the “Information Superhighway” and in Europe as the “Infobahn.” See discussion infra Part III for an examination and explanation of the Internet.

3. Knit Your Own Superhighway, Economist, Oct. 16, 1993, at 101 (explaining President of the European Commission Jacques Delors' hopes that European countries could be bound by networks to bring “Europeans closer together and make[ ] them richer.”) Id.; Green Paper: European Update: Telecommunications, § I.1 (last update Oct. 1995), available in WESTLAW, Eurupdate Database. A Green Paper is a report produced by the European Commission for public discussion and debate. After analyzing a specific problem and offering a solution, the Commission then distributes the report to EU Member States and relevant organizations to foster a dialogue on the subject. The Member States
With this dual onslaught of technology and regional integration efforts, these goals appear to be transforming themselves into realities.\textsuperscript{4} However, what should be a time for celebration, with 1997 signifying the fifty-first anniversary of the computer information age\textsuperscript{5} and the fifth year of the signing of the Treaty on European Union (TEU),\textsuperscript{6} has instead witnessed the growth of a divisive conflict, as governments around the world debate the degree to which they will regulate the delivery of services and content on the Internet.\textsuperscript{7} Although the Internet, as a medium of communication, should be helping the EU integrate and promote its economic power and cultural diversity, it has instead generated fragmented, individualized efforts from many of the EU Member States ("Member States"), as each Member State struggles to develop a coherent national response to the effect of the Internet on national laws and social values, such as: obscenity;\textsuperscript{8} pornography;\textsuperscript{9} politically sensitive material;\textsuperscript{10} material with national security implications;\textsuperscript{11} racially/culturally sensitive material;\textsuperscript{12} technological standards for the delivery of Internet access and related services;\textsuperscript{13} and the future individuality of the Member State (culturally and
politically) as the “onrush of globalisation calls into question the future of the nation state as a meaningful political . . . unit.”

As an organization, the EU is uniquely poised, with the political and legal competencies granted to it under the EC Treaty, to provide a cohesive framework to guide its Member States through an Internet standards harmonization process. In developing a cohesive baseline from which to regulate the delivery of Internet related services among the Member States, the EU can ensure that the social and cultural identity of its Member States are protected.

The explosive growth of the Internet is rapidly creating the need for unified political and legal responses to sustain the availability of Internet services. Without a guiding unified legal mechanism or political imperative for a harmonized effort, nations have reacted unilaterally to this phenomenon in order to protect their interests. Many countries are struggling to balance their tripartite interests in maintaining their cultural identity; ensuring that the regulations do not discriminate; and minimizing the loss of their national culture through the use of the Internet.

The stakes are clear. If, in the new media [referring to the Internet], our language, our programs, our creations are not strongly present, the young generation of our country will be economically and culturally marginalized.

Id. (emphasis added); Strains on the Global Village, supra note 4, at 21.

15. The number of hosts connected to the Internet has nearly tripled in the period from January 1995 to July 1996, from 4,853,000 to 12,851,000. Network Wizards, Host Count History (visited Nov. 3, 1996) <http://www.nw.com/zone/host-count-history>. From August 1981 to July 1991, the number of hosts on the Internet grew from 213 to 535,000. Id. While the percentage rate of growth during the 1980's was, on average, greater than in the early 1990's, it is the increasing availability of access to the Internet that has many nations concerned. A "host" is a domain name with a corresponding address. Network Wizards, Domain Survey Definitions (visited Nov. 3, 1996) <http://www.nw.com/zone/WWW/defs.html> [hereinafter Network Wizards, Domain Survey Definitions]. Any computer system connected to the Internet whether full time, part time, direct, or dialup would be a host. Id. See discussion infra Part III.A.

16. See Singapore Curbs Internet Freedom, New Media Age, July 6, 1995, at 2, available in LEXIS, News Library, Mags File; Green-Armytage, supra note 7, at 16; Mikkelsen, supra note 5, at 6; Bonn Approves Internet Law, supra note 8; French Court to Test Limits of Cyberspace, supra note 12, at 6.

17. Luciana Castellina, Chair of the European Parliament's Culture Committee, stated "what is at stake is the survival of the cultural identity of Europe." Strains on the Global Village, supra note 4, at 21. Even where a government attempts to completely ban a particular type of service, it will not necessarily follow that the national culture or the quality of
not hinder the competitiveness of national information industries;\textsuperscript{18} and upholding public morals through legislation.\textsuperscript{19} To balance these three competing interests, nations have responded by promoting private Internet Service Providers (ISPs) to unilaterally censor the information available from their portion of the network;\textsuperscript{20} passing laws or threatening lawsuits to censor the information received by or originating in the regulating nation;\textsuperscript{21} or using a combination of government and private censorship over what can be transmitted or received within a nation.\textsuperscript{22}

As the preceding indicates, Member States have been responding in a reactionary and fractional manner.\textsuperscript{23} The increasing fractionalization of an EU-wide legal standard addressing Internet related services, as Member States proceed with their individual regulations, runs counter to the basic purposes of the Internet and the EU. Instead of allowing this type of Member State response to continue, the European Union should take the lead, through legislative and/or judicial measures, to rule on the propriety of Member State regulation of the

\textsuperscript{18} Green Paper, \textit{supra} note 3, § 1.1 "Advanced telecommunications are thus recognized as an essential basis for the development of knowledge and information based industries and societies." \textit{Id.}

\textsuperscript{19} \textit{See generally Strains on the Global Village, supra} note 4, at 21; Mikkelsen, \textit{supra} note 5, at 6; \textit{Bonn Approves Internet Law, supra} note 8; \textit{French Court to Test Limits of Laws in Cyberspace, supra} note 12, at 6.


\textsuperscript{21} \textit{Strains on the Global Village, supra} note 4, at 21; Mikkelsen, \textit{supra} note 5, at 6; \textit{Bonn Approves Internet Law, supra} note 8; \textit{French Court to Test Limits of Laws in Cyberspace, supra} note 12, at 6; \textit{EU Probes BT, supra} note 13.

\textsuperscript{22} James Pressley & Martin du Bois, \textit{EU Commission May Let Cable Firms Run Telecoms, WALL ST. J. EUR.}, Oct. 10, 1995, at 4 (discussing how service providers on the French Minitel system have agreed to exert some degree of censorship over the content of their transmissions); \textit{French Court to Test Limits of Law in Cyberspace, supra} note 12, at 6; \textit{EU Probes BT, supra} note 13; Strassel, \textit{supra} note 20; European Commission, \textit{supra} note 20.

delivery of Internet related services. The EU should further consider the extent to which it should, consistent with the EC Treaty, allow Member State regulation of the Internet and ISPs. The EU has the legal mechanisms in place to promulgate a unified legal and political solution to this crisis. This effort could serve as an international model for the development of regional Community standards for regulating the delivery of Internet related services.

Consistent with the philosophies of the Internet and regional organizations like the EU, this Note proposes that supranational solutions are the most appropriate responses to the problems surrounding regulation of the Internet. Looking to the EU and its institutions as a model, this Note will first explore the ease and immediacy with which Member States are taking jurisdiction over Internet related claims, focusing on the jurisdictional principles of customary public international law and European Community law ("EC law"). The Note will explore the implication of these jurisdictional issues, focusing on the fractionalization of legal and business standards that have occurred, and will continue to occur, when each Member State rules on its individual ability to regulate the delivery of Internet related services and the potential for the attachment of liability. The Note will then concentrate on how the EU can, under principles of Community law, provide a cohesive framework within which to generate Community-wide standards for Internet related claims. It will then briefly contrast the proposed Community solution with those employed by other nations. Finally, it will explore how a Community solution based in large portion on a set of fundamental rights with respect to the delivery of Internet related services promulgated at the Community level which can serve as a model for other countries and regional economic integration organizations.

II. The European Union

A. Overview

The EU is an evolving political and economic transnational organization of European countries.24 The process and nomenclature began in 1951 with the Treaty of Paris establishing the European Coal and Steel Community (ECSC), comprised of France, Germany, Italy, and the BENELUX (Belgium, the Netherlands, Luxembourg) coun-

tries. In 1957 the Treaties of Rome established the European Atomic Energy Community (Euratom) and the European Economic Community (EEC), both signified deeper integration among Member States. The Single European Act (SEA) went into effect in 1987, further tightening the scope and pace of the integration efforts as, among other things, it introduced majority voting for all areas directly related to the Single Market. Finally, in 1992, the TEU, also known as the Maastricht Treaty, amended the Treaties of Rome and the SEA to integrate the existing Communities more tightly together under the common framework of the EU. By 1996, the number of Member States had increased to fifteen.

B. Institutions and Procedures

The EU's legislative branch is comprised of the European Commission ("Commission"), the European Council of Ministers ("Council"), and the European Parliament ("Parliament"). The Commission proposes Community policy and legislation to be reviewed and approved by the Council and, in some cases, by Parliament. The Commission is responsible for policing Member State compliance with all EC law.

The EU has four main legislative tools to establish Community law: a Directive; a Regulation; a Decision; and Recommendations and Opinions. A Regulation is generally applicable and has direct effect in all Member States. A Directive is binding in the result to be achieved, but it allows each Member State to choose the method by which the result is nationally realized. A Decision is binding upon

25. Id. at 1.
26. Id.
30. Id. arts. 155-63.
31. Id. arts. 145-54. The Council of Ministers should not be confused with the European Council. The responsibilities of the European Council include setting priorities for the EU that provide the impetus for political developments and establishment of guidelines for institutions such as required by the Economic and Monetary Union. TEU art. D.
32. EC Treaty art. 155; see generally id. arts. 189b, 189c.
33. Id. art. 192.
34. Id. art. 189.
35. Id.
36. Id.
any Member States, individuals, and/or undertakings it addresses. The Council is the body primarily responsible for enacting binding legislation throughout the EU, setting political objectives, and resolving Member State differences. Depending upon the nature of the legislation, the Council may have to obtain the consent of the Parliament.

The Parliament has three fundamental powers: the power to legislate, the power of the purse, and a limited power to investigate and issue a report on executive decisions. The TEU reestablishes that the legislative role of the Parliament is four-fold, depending upon the nature of the legislation being reviewed. First, in circumstances such as agricultural price reviews, under the Consultation Procedure, Parliament must be consulted and must issue an opinion before the Council can adopt a legislative proposal from the European Commission. Second, Parliament may utilize the Cooperation Procedure. Under this procedure, Parliament has two opportunities to amend and comment on legislative proposals issued by the Commission, but the Council has the power to overrule the amendment. The Council is then obliged to seek conciliation with Parliament. Third, under the Co-Decision procedure provided for in Article 189b, Parliament shares decision-making power with the Council equally through a Conciliation Committee composed equally of members of the Parliament and the Council. This procedural power is limited to issues involving the free movement of services, goods, and people, the establishment of an internal market, environmental issues, and consumer protection legislation. This power means that Parliament can veto a legislative proposal adopted by the Council if members feel that the

37. Id.
38. Id.
39. Id. arts. 145-54.
40. See id. arts. 189b, 189c.
42. EC Treaty art. 138c.
43. Id. arts. 189-92.
44. Powers and Responsibilities, supra note 41.
45. EC Treaty art. 189c.
46. Id.
47. Powers and Responsibilities, supra note 41.
48. Id.
49. Id.
Council has not taken Parliament’s opinion into account or no decision can be reached. Finally, the Assent Procedure provides that Parliament’s approval is required for all new members, international agreements, or associations with third parties.

Although all Member State courts are responsible for apply EC law, the European Court of Justice (ECJ) is responsible for interpreting EC law and is the final arbiter of all disputes concerning the interpretation of Community treaties. In fact, the ECJ alone can decide on the validity of Community law. Under Article 177 of the EC Treaty, the ECJ has the power to deliver preliminary rulings concerning the interpretation of Community treaties even where the question is raised before the courts of a Member State.

**III. The Internet Defined**

**A. Network of Networks**

The Internet is a global amalgamation of computer networks connected by a common communications protocol, Transmission Control Protocol/Internet Protocol (TCP/IP). The Internet originated in 1969 as a project sponsored by the U.S. Department of Defense called ARPANET. ARPANET was designed to connect Department of Defense computers with other communication systems across a na-

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50. Id.
51. Id.
53. EC TREATY arts. 164-88.
54. Article 177 of the EC TREATY states in relevant part:
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty . . . Where such a question is raised before any court or tribunal of a member State, that court or tribunal may . . . request the Court of Justice to give a ruling thereon.
Id. art. 177. As there appears to be a judicial remedy under national law in most countries, the final paragraph of Article 177, requiring a mandatory appeal to the ECJ, would most likely not apply.
56. Id. See also Information Sciences Institute, Internet Protocol (visited Nov. 3, 1996) <http://www.internic.net/rfc/rfc791.txt>. All the different networks are able to communicate with each other employing TCP/IP as a standard suite of network communication and addressing protocols, although many of the networks may employ other communications protocols as well. J. Postel, Internet Control Message Protocol (visited Nov. 3, 1996) <http://www.internic.net/rfc/rfc777.txt>; J. Postel, Internet Protocol (visited Nov. 3, 1996) <http://www.internic.net/rfc/rfc791.txt>.
tional network, such as radio and satellite, to ensure the continual availability of information, and more specifically, that the military and government retained their ability to communicate in the event of a national catastrophe, such as a nuclear war. Once the technology proved successful, more and more networks were connected to the expanding ARPANET. Universities, the National Science Foundation, and other research centers around the world wanted to share resources and also benefit from the opportunity to communicate with their international peers. This pattern of expansion, whereby individual national networks connect themselves to a national “backbone” network to access and expand the Internet, describes the manner of growth for the Internet.

Because new networks are connected daily, Internet usage statistics are imprecise; however in 1996 it was estimated that approximately thirteen million host computer systems extending to more than a hundred countries comprised the Internet. Between 1993 and 1995, Europe alone averaged a 74.6% annual growth rate, with over three million host computers systems currently connected to the Internet.

Business executives and governments recognize the imperative of timely information to maintain a competitive advantage. Moreover, information experts recognize that the information providing the largest edge is not generated internally, but comes from the “outside world.” The Internet offers this type of access to information, services, and individuals. In spite of a lingering concern about the security

58. Id. at 11.
59. Id.
60. Krol & Hoffman, supra note 55.
61. Id.
64. Network Wizards, Domain Survey Definitions, supra note 15.
65. Network Wizards, Host Distribution, supra note 63.
68. Green Paper, supra note 3, § 1.1.
69. CRONIN, supra note 67, at 13.
of the Internet\textsuperscript{70} and Internet commerce,\textsuperscript{71} the Internet has become the communications medium of choice.\textsuperscript{72}

\section*{B. Examples of Internet Political Utility}

The utility of the Internet is exemplified by the timely availability of political correspondence and news from distant and generally isolated nations. For example, during the attempted coup that ushered in the demise of the Soviet Union in August 1991, RELiable COMMunications (RELCOM), a small e-mail company with an Internet connection, was the only available conduit for information from within the former Soviet Union.\textsuperscript{73} Western media was cut off.\textsuperscript{74} The major Western news sources, such as the Associated Press (AP) and Cable News Network (CNN), used RELCOM as their primary source of information and also as a channel to disseminate outside information.\textsuperscript{75} In addition, Tiananmen Square, the Yugoslavian civil war, the fall of communism, and and the Los Angeles riots were all described by people who witnessed these events and transmitted timely reports across the Internet.\textsuperscript{76} More recently, the Tupac Amaru Revolutionary Movement (the Marxist guerrillas in Peru who stormed the Japanese embassy there and took hostages) had supporters posting updates, communiqués from inside the embassy, and photographs on the Internet.\textsuperscript{77}

\section*{C. Trans-European Network}

As a transnational telecommunication segment on the Internet, the pan-European telecommunications technical "infrastructure" outlined in the TEU\textsuperscript{78} is still in its nascency when compared to the infor-

\begin{thebibliography}{9}
\bibitem{72} See Mikkelsen, \textit{supra} note 5, at 6.
\bibitem{73} TRACY LAQUY, with JEANNE C. RYER, \textit{THE INTERNET COMPANION: A BEGINNER'S GUIDE TO GLOBAL NETWORKING} 4 (1993) (citation omitted).
\bibitem{74} \textit{Id.} at 4-6.
\bibitem{75} \textit{Id.}
\bibitem{76} \textit{Id.} at 6.
\bibitem{78} EC TREATY arts. 129b, 129c, 129d. Articles 129b and 129c do not provide a legal basis by which the EU may regulate the delivery of Internet related services as they are more concerned with governing the Community contributions to a trans-European network that is technical inter-operable. \textit{Id.} at 129b(1), (2); 129c(1). \textit{See also} Green Paper, \textit{supra} note 3, §§ 1.1, 1.3.3, 4.2.2.4, 4.2.2.5.
\end{thebibliography}
The capacity and capabilities of the most advanced Member State networks still lag significantly behind the United States. Additionally, even among Member States, there are huge disparities in regional access to telecommunications technology and services. Although Member States must overcome significant hurdles to harmonize their telecommunications infrastructures, such as developing "broadband" (high capacity) networks, this type of development would greatly benefit from a single European Community standard addressing how the delivery of information and services over the Internet will be regulated.

What the European networks lack in current technology and capabilities may be offset by an enthusiasm to harness the commercial potential of the Internet. Experts estimate that European on-line services will grow by three billion dollars in the next five years.

Much like the harmonization of protocols governing the networks weaving Member State economies together, the EU requires the harmonization of legal and business standards for Internet commerce and other related services. In short, without a definitive set of Community standards governing the delivery of Internet related services, the development of a trans-European network and the concomitant service industries will be retarded by the fractured law governing the delivery of Internet related services already developing in Member States.

One need only look to the benefits and reasons surrounding

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79. Knit Your Own Superhighway, supra note 3, at 102; see also Jack Powers, What's the World Coming To?, LAN MAGAZINE, May 1993, at 38.
80. Powers, supra note 79, at 38.
81. Id. (discussing the proliferation of computers but distinct lack of network connection between regions); Knit Your Own Superhighway, supra note 3, at 102.
82. Knit Your Own Superhighway, supra note 3, at 102. The discussion of a unified methodology to achieve the technological harmonization required by future networks is beyond the scope of this Note, but see generally Green Paper, supra note 3.
84. Id.
85. Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee on the Regions on "Europe at the Forefront of the Global Information Society: Rolling Action Plan", COM(96)607 final (discussing the EU's recognition that to improve the business environment, the EU must promote "internal market principles (i.e., the free circulation of goods, the free provision of services ... in the information society context ... [To ensure that the necessary conditions are met for the introduction of electronic commerce ... is also a major priority.").
86. See generally Silvia Ascarelli, Two On-Line Services Firms Probed in Racial Hatred Case, Dow Jones News Service-Wall Street Journal Stories, Jan. 26, 1996, available in WESTLAW, EuroNews Database; Provider Blocks Neo-Nazi Tracts on Net; Cyberspace:
the harmonization of tariffs within the EU and to the GATT to realize an impetus for action and to avoid post hoc responses to regulate the delivery of Internet related services.

IV. Member State Jurisdictional Bases to Regulate the Delivery of Internet Related Services

Public international law generally recognizes three different categories of jurisdiction that form a nation's right to subject foreign activities to national laws: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. While the issues surrounding the jurisdiction to adjudicate or enforce Internet related claims are significant, the primary hurdle to overcome, and the focus of analysis in this section, is the jurisdiction to prescribe. If a Member State, under principles of public international law consistent with EC law, exercises jurisdiction to prescribe these Internet related claims, then a chilling effect on the delivery of Internet related services has been achieved. The mere specter of legal liability has already lead many

Critics Accuse Germany's Deutsche Telekom of Overreacting, L.A. Times, Jan. 27, 1996, at D2 [hereinafter Provider Blocks Neo-Nazi Tracts on Net] (discussing German responses to the regulation of the Internet); Bonn Approves Internet Law, supra note 8; French Court to Test Limits of Law in Cyberspace, supra note 12, at 6; EU Probes BT, supra note 13; Strassel, supra note 20, at 4.

87. Although there is no single source to provide the exact contours of International Law and its principles, the American Law Institute's efforts in the Restatement (Third) of Foreign Relations Law of the United States represents a thoughtful and thorough compilation of generally accepted and practiced customary public international law.

88. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401-04 [hereinafter RESTATEMENT]. The Restatement specifically provides that the jurisdiction to prescribe is defined as the ability to make national law "applicable to the activities, relations, or status of person, or the interests of person in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." Id. at § 401(a). A general survey of the application of these jurisdictional bases for Member States to regulate, wholesale, the delivery of Internet related services is beyond the scope of this Note.

89. Id. § 401(b). The Restatement states that the jurisdiction to adjudicate is the right of a nation "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings." Id.

90. Id. § 401(c). Jurisdiction to enforce is described by the Restatement as the right "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action." Id.

91. See AOL Added to German Probe of Racism on Internet; Computers: Company Says it May Face Charges There, Along with CompuServe, Another Firm. L.A. Times, Feb. 3, 1996, at D2 [hereinafter AOL Added to German Probe of Racism on Internet]; Provider Blocks Neo-Nazi Tracts on Net, supra note 86, at D2; Ascarelli, supra note 86.
multinational corporations to suspend their delivery of some Internet related services. The following section will focus on general public international law principles that would provide a Member State with a legitimate claim to prescribe jurisdiction over the delivery of Internet related services.

A. General Public Mandate to Regulate the Delivery of Services over the Internet

Although the current hysteria concerning pornography on the Internet (also known as “Cybersmut”) has been the impetus for many Member State actions, the technological implications of attempting to screen off certain portions of the Internet from national access mean that many other uncontroversial services will be blocked off as well. Although the current focus is on child pornography and neo-Nazi propaganda, there is a legitimate concern that one or more Member States may outlaw “indecent” material. Such a loose and undefined standard provides too much opportunity for the implementing Member State to apply its own particular values to generate a myriad of conflicting standards for regulating Internet content and services (similar to the standard the United States adopted in its recent Telecommunications Bill).  

92. See id.

93. See discussion infra Parts IV B & C for an exploration of the competency of Member States to exert jurisdiction over the movement of transnational services or goods under the EC Treaty.

94. See Kehoe, supra note 23, at 11; Cyberporn, FIN. TIMES, Jan. 9, 1996, at 15; Green-Armytage, supra note 7, at 16.

95. Provider Blocks Neo-Nazi Tracts on Net, supra note 79, at D2 (explaining the imperfection of blocking information on the Internet, whereby only specifically identified newsgroups and Internet sites may be blocked).

96. See Mikkelsen, supra note 5, at 6; Kehoe, supra note 23, at 11; Provider Blocks Neo-Nazi Tracts on Net, supra note 79, at D2.


There is also a legitimate concern that Member States may move to outlaw some forms of political speech.\textsuperscript{99} Member States have continued to act unilaterally with the sanction of a recently completed Green Paper, drafted by the Commission, discussing the regulation of Internet services as they impact minors and human dignity.\textsuperscript{100} The Green Paper provides, in part, that that Member States and private corporate actors are responsible for working together to regulate the content of services available over the Internet.\textsuperscript{101}

The ease and unpredictability with which a Member State may choose to exert jurisdiction over Internet related claims indicates not only possible conflicts of law among Member States but a quickly developing body of cases and unilateral Member State prerogatives that will define Internet regulation.\textsuperscript{102} This type of regulation may restrict EU citizens' rights to access information and receive Internet services from certain sites.

As discussed in Part III, the Internet is a vehicle to quickly deliver information to a worldwide audience.\textsuperscript{103} Whether political speech or commercial advertisements, Internet content is specifically designed to reach both a local and global audience.\textsuperscript{104} This means that a number of Member States, under accepted principles of public international law, may have proper jurisdiction to legislate, prescribe, and enforce their judgments at a national level.

\textbf{B. General Principles of Exerting International Jurisdiction}

The exact contours of who a Member State will attempt to exert jurisdiction over is uncertain at this time. The current trend appears to be to use national laws to either pursue the individual user who has acquired illegal material over the Internet\textsuperscript{105} or to pursue an action

\textsuperscript{99} See No Secrets on the Web, supra note 11, at 16A; see also Mikkelsen, supra note 5, at 6.
\textsuperscript{100} Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee on the Regions: Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, COM(96)483 final [hereinafter European Commission, Green Paper on the Protections of Minors and Human Dignity].
\textsuperscript{101} Id.
\textsuperscript{102} See discussion infra Parts IV B & C.
\textsuperscript{103} See discussion infra Part III.A.
\textsuperscript{104} Id.
against the private ISPs.\textsuperscript{106} It is as yet unclear whether Member State governments will successfully be able to prosecute actions against the persons providing the information or services over the Internet if they are not nationals.\textsuperscript{107} However, what is fairly clear is that the results of these actions will be to punish the individual citizen who acquired the illegal material\textsuperscript{108} and/or to censor access to the Internet services providing the illegal material.\textsuperscript{109}

In order to appreciate the numerous international principles of jurisdiction that may be employed to exert jurisdiction over Internet related claims, it will be useful at this time to briefly review four traditional bases of exerting personal jurisdiction. The assumption is that a Member State will be able to exert jurisdiction on the basis of at least one of the following principles.

1. \textit{Territorial Principle (Subjective Territoriality)}

The territorial principle of exerting jurisdiction reflects the most basic element of state sovereignty which grants the state the right to govern its population within its borders.\textsuperscript{110} Thus, when an act that is deemed illegal, as defined by the \textit{standards of a particular state}, occurs within the boundaries of that state, general international law considers the state right to determine the legality of an act to exert jurisdiction over the actor as a "general and almost universal rule."\textsuperscript{111} The territorial principle is therefore only concerned with two questions: whether the conduct occurred within the state borders and whether the state considers the conduct unlawful.\textsuperscript{112}

Applying this basis of exerting jurisdiction to Internet related claims arising within a Member State, it would appear to be the

\textsuperscript{106} See \textit{AOL Added to German Probe of Racism on Internet}, supra note 91, at D2; \textit{Provider Blocks Neo-Nazi Tracts on Net}, supra note 79, at D2.

\textsuperscript{107} No formal charges were filed against the multinational ISPs or against any non-nationals in Germany. See \textit{AOL Added to German Probe of Racism on Internet}, supra note 84, at D2; \textit{Provider Blocks Neo-Nazi Tracts on Net}, supra note 79, at D2.; Ascarelli, \textit{supra} note 86. Currently many technology companies in the United States are paying close attention to the litigation under way in France regarding French language content laws (the Toubon law) as applied to the delivery of Internet related services. \textit{French Court to Test Limits of Law in Cyberspace}, supra note 12; Swardson, supra note 14.

\textsuperscript{108} See Everett, \textit{supra} note 105.

\textsuperscript{109} See \textit{Provider Blocks Neo-Nazi Tracts on Net}, supra note 79, at D2 (no discussion of pursuing an action against the individuals in Germany accessing illegal information, only the Internet access providers).

\textsuperscript{110} \textit{MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW} 322 (2d ed. 1993).

\textsuperscript{111} American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). \textit{See also Restatement} § 402.

\textsuperscript{112} \textit{Restatement} § 402 (1987).
strongest basis for a Member State to exert jurisdiction over its own nationals or entities conducting business within its borders. A Member State has a strong argument to regulate both the ISPs, the authors of the content, and the consumers: end-users. Focusing on the content of the information, a Member State may deem certain subject-matter illegal and thus any "conduct that, wholly, or in substantial part, takes place within its [Member State] territory," can be properly regulated. Additionally, a Member State may, based on "the status of persons, or interests in things present within its territory," regulate the information accessible by individuals over the Internet.

2. **Nationality Principle**

The nationality theory of exerting jurisdiction holds that a state must have the right to exercise jurisdiction over persons or things possessing its nationality, wherever they may be. Thus, under this basis for jurisdiction, a state is not limited to exerting jurisdiction over parties located within its territory, such as local Internet service providers and consumers. A state may also extend the reach of its local standards internationally by subjecting its corporations and nationals located in other countries to its jurisdiction. This means that the individual user or a company headquartered in a Member State would have to comply with legal standards that may not be those of the state in which the individual resides or where business is conducted.

3. **Effects Principle (Objective Territoriality)**

A more controversial basis for exerting jurisdiction over a claim is the effects principle. Rooted in the territorial principle, the

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113. See generally AOL Added to German Probe of Racism on Internet, supra note 91, at D2.; Provider Blocks Neo-Nazi Tracts on Net, supra note 79, at D2.
114. RESTATEMENT § 402.
115. Id.
116. See Everett, supra note 105.
117. JANIS, supra note 110, at 324. See also BARTOLUS DE SAXOFERATO, BARTOLUS ON THE CONFLICT OF LAWS 51 (Joseph H. Beale trans., Oxford University Press, 1914); CODE CIVIL [C. civ.] art. 15 (Fr.) (which reads in relevant part that "Un Français pourra être traduit devant un tribunal de France, pour des obligations par lui contractées en pays étranger, même avec un étranger.").
118. Id.
119. The Georgia Tech Lorraine litigation currently underway in France may be the beginning of Member State standards reaching beyond the Member States. See French Court to Test Limits of Law in Cyberspace, supra note 12; Swardson, supra note 14.
premise is that when extraterritorial conduct has an effect within a state, then a state has jurisdiction over that conduct. It is thus the act itself, whether the locus of the act was territorial or extraterritorial, that is the jurisdictional basis. Often, the standard employed is that the conduct of the illegal act must be completed within the borders of a state. This provides a basis for a state to exercise jurisdiction over unlawful conduct originating outside its territory.

As a general principle, the European Court of Justice has held that to limit jurisdiction to the locus of the unlawful act would defeat the purpose and spirit of numerous Community and Member State laws. While controversial, this mitigated effects doctrine means that almost any state, and especially a Member State, may have a cognizable claim to jurisdiction over Internet related claims that are "implemented" in the EU. Taking into account the global nature of the Internet and the desire of service providers and authors to purposefully reach a global audience, it appears that where any Member State has promulgated or enacted particular standards for Internet services, the Member State may have a basis for exerting jurisdiction over not only territorial nationals, but international actors as well.

C. The Impact of Member States Exerting Jurisdiction to Censor Content on the Internet

As a result of the technology and structure of the Internet, the unilateral act of a single state, especially an EU Member State, can create reverberations that echo not only within the territory of the Member State, but around the globe. Individual states choosing to censor Internet content can unilaterally create a standard for "acceptable" subject matter that can become the de facto standard for numerous other states. The protocol used to allow all of the connected

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121. Id. See also JANIS, supra note 110, at 326.
122. JANIS, supra note 110, at 326. Compare the territorial principle where the focus is on the subject of the act or the actor which forms the basis of jurisdiction. Id.
123. Id. at 327.
124. Id.
126. Id.
129. JANIS, supra note 110, at 327. See generally RESTATEMENT § 402(c).
130. AOL Added to German Probe of Racism on Internet, supra note 91, at D2; Ascarelli, supra note 86; Provider Blocks Neo-Nazi Tracts on Net, supra note 86, at D2.
networks to communicate with each other, TCP/IP, makes it clear that only known Internet services may have their access blocked in a limited manner\(^\text{131}\) without causing unnecessary censorship of non-offending materials.\(^\text{132}\) Additionally, if the computer networks of a Member State are unable to provide access to certain portions of the Internet, then other states that rely on the retransmission of information from the blocking Member State will also be denied access to the offending Internet services.\(^\text{133}\) Thus, the standard promulgated by one Member State may create the de facto standard for the entire EU, until the Member State changes its policy or until the network traffic over that segment of the Internet is rerouted.\(^\text{134}\) This may not be possible in tightly integrated and shared network backbones such as that which exists within the EU.\(^\text{135}\)

I. Germany

Germany has been the most active Member State pursuing censorship of the Internet and its related services.\(^\text{136}\) As a preventative measure, T-Online, Germany's Deutsche Telekom Internet access service blocked access to 1500 sites on a segment of the Internet that contained some Neo-Nazi material.\(^\text{137}\) The author of the material was a Canadian citizen living in Toronto, while the ISP where the information was stored on is located in Santa Cruz, California.\(^\text{138}\) Relying on

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131. *AOL Added to German Probe of Racism on Internet*, supra note 91, at D2; *Ascarelli*, supra note 86; *Provider Blocks Neo-Nazi Tracts on Net*, supra note 86, at D2.

132. Louise Kehoe, *Battle to Block Porn on the Net - Louise Kehoe on Programs to Limit the Reception of Inappropriate Material*, FIN. TIMES, Jan. 22, 1996, at 11. The list of Internet sites offending one standard or another grows monthly. *Id.* This is causing the publishers of the software that controls access to Internet sites to constantly provide updates to their software. *Id.*

133. Programs such as Net-Nanny (published by a Canadian software company) are programmed with keyword searches that interrogate all incoming TCP/IP packets for the programmed words. *Id.* Unfortunately, this will only block the most egregious offenders and those who do not know enough to encode their messages. For a comprehensive analysis of software applications that can be used to block access to Internet sites, see European Commission, *Green Paper on the Protection of Minors and Human Dignity*, supra note 100, annex IV.

134. *Id.*

135. *Id.*

136. See generally *Provider Blocks Neo-Nazi Tracts on Net*, supra note 86, at D2; *AOL Added to German Probe of Racism on Internet*, supra note 91, at D2; *Mikkelsen*, supra note 5, at 6.

137. *AOL Added to German Probe of Racism on Internet*, supra note 91, at D2; *Ascarelli*, supra note 86; *Provider Blocks Neo-Nazi Tracts on Net*, supra note 86, at D2.

138. *Ascarelli*, supra note 86.
the effects principle of jurisdiction to justify its action, the Mannheim prosecutor's office stated that "because it's [the Neo-Nazi material] available over the Internet, it also can be called up in Germany... [t]hen the scene of the crime is all of Germany."

In late December 1995, Munich prosecutors declared two hundred sex-related Internet discussion forums as illegal under German law. United States based CompuServe Inc. responded by eliminating access to the groups for its 4 million members worldwide. America Online has followed suit raising the specter that perhaps other ISPs may, in the future, take similar measures. Because it is difficult to effectively screen out limited segments and services provided over the Internet, when a Member State attempts to regulate Internet services, services containing different subject matter may be collaterally censored.

Additionally, Germany is debating the types of liability that may attach to Internet or on-line services that provide access to pornography or neo-Nazi propaganda. Rita Suessmuth, President of the Bundestag, the lower house of the German Parliament, has publicly stated that "[f]reedom of expression reaches its limit when human dignity is violated and violence is promoted."

2. United Kingdom

The United Kingdom (UK) has also taken steps to regulate the Internet within its territory. The UK has adopted legislation to criminalize transmitting and receiving child pornography over the Internet. An inter-departmental working group on obscenity has recently been established to address problems of pornography on the Internet. Acknowledging a lack of expertise in dealing with "hi-tech cases," the United Kingdom is looking to the United States for guidance.

139. See discussion supra Part IV.B.3.
140. Ascarelli, supra note 86.
141. Provider Blocks Neo-Nazi Tracts on Net, supra note 86, at D2.
142. Id.
143. See AOL Added to German Probe of Racism on Internet, supra note 91, at D2.
144. Kehoe, supra note 124, at 11; European Commission, supra note 100, annex IV.
145. Mikkelsen, supra note 5, at 6.
146. Id.
148. Id.
149. Everett, supra note 105.
More recently, the government of the United Kingdom has promoted industry's self-regulation. Only a few months old, the Internet Watch Foundation is aimed at the discrete problem of child pornography. The success or failure of this type of effort remains to be seen.

D. Commission Ruling

The Commission recently responded to a written question from the Parliament regarding censorship of pornographic messages on the Internet. The Commission responded that in light of the impossibility of censoring Internet material originating outside of the Community without international agreements, it would leave the decisions of what constitutes public morals and their protection as the responsibility of the Member States.

The policy of allowing Member States to independently develop regulations to censor the Internet is a very counterproductive position for the EU to maintain for two reasons. First, as the Commission has recognized, the only way to offer true regulation of the services provided over the Internet is to enter into international agreements. However, the Community will find it difficult to negotiate an international agreement when there is no Community standard, but rather an amalgamation of standards provided by all the Member States.

Moreover, because of the technological repercussions that may limit access to other data and/or services, create higher costs to maintain networks that must censor information, and increase the number of different liabilities that an Internet service provider may encounter, it will be more difficult to foster the regional and transnational cooperation required for a successful trans-European network and the unfettered delivery of Internet related services within the internal market.

The Internet is changing the face and nature of mass communications. It is creating a new legal context that requires a redefinition of legal standards that will govern its use. Perhaps the best vehicles
for these redefinition are the new regional economic integration organizations (REICOs) that share similar qualities. In order to explore the legal machinations available to the EU to achieve this end, it will prove useful to provide a brief overview of the division of powers within the institutions of the EU.

V. The Harmonization of Laws Within the European Union

The delivery of Internet related services is a new form of commerce\(^\text{159}\) that, this Note argues, requires Community level action to provide a definitive and meaningful set of fundamental rights. This Note further posits, that in order to ensure satisfy the mandate of Article 7a, it will be necessary for the EU to employ a Regulation to harmonize the fundamental rights governing the regulation of the delivery of Internet related services.\(^\text{160}\)

In order to understand what this means and how this can be achieved within the EU, Part A will first discuss Community law supremacy over Member States, using Germany, France, and the United Kingdom as specific examples. Part B will explore whether Internet access falls within the competency of EC Treaty Articles 59 and 60 as a “transfrontier service provided for remuneration” and the competency of EU institutions to regulate.\(^\text{161}\) Part C will discuss what the obligations of Member States are under the EC Treaty, focusing in particular on what the harmonization of laws means and what law controls when there is a disparity among Member State laws. Part D will investigate the possibilities of promulgating regulations for the Internet through the ECJ. Finally, Part E will focus on the feasibility of Community legislative action.

A. Supremacy of Community Law over Member State Law

The EC Treaty does not contain an express supremacy clause rendering Community law superior to national law in the event of a conflict. Therefore, Member States had to take specific actions to provide

\(^{159}\) The uniquely global nature of the Internet combined with the interdependency of the national network segments required for its proper functioning are among the more compelling reasons to consider delivery of Internet related services a new form of commerce.

\(^{160}\) EC TREATY arts. 3(b), 7a. The term “four freedoms” describes EC Treaty Article Three’s protection of the free movement of goods, persons, services, and capital. EC TREATY art. 3(b). See George A. Bermann et al., Cases and Materials on European Community Law 428-29 (1993).

for Community law supremacy within their own legal framework.\textsuperscript{162} All the Member States amended their respective Constitutions, or in dualist countries passed enacting legislation, reflecting the supremacy of Community law.\textsuperscript{163} These measures reflected the assurances of Articles 3(b) and 7a of the EC Treaty (as provided for by the SEA) for an "internal market... without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."\textsuperscript{164} The internal market contemplated by the TEU included the elimination of all barriers to the free movement of goods, persons, services, and capital.\textsuperscript{165}

In France, Community provisions take precedent to any subsequent national legislation.\textsuperscript{166} In construing the role of Community law within the state, the French \textit{Conseil d'Etat} agreed with the ECJ in \textit{de Bretagne v. Le Campion}\textsuperscript{167} that Community law controlled over any national court interpretation.\textsuperscript{168} Furthermore, as part of the ratification process for the TEU, France amended its Constitution to reflect the power of the Community to make laws that bind France.\textsuperscript{169}

The German Basic Law\textsuperscript{170} has long recognized that public international law creates duties for its citizens.\textsuperscript{171} The power of these principles over the populace is not absolute because it is subject to review by national courts.\textsuperscript{172} Thus, although the Basic Law was amended in 1992 to include a specific transfer of additional powers to the EU,\textsuperscript{173}

\textsuperscript{162} Case 6/64, Flamino Costa v. ENEL, 1964 E.C.R. 585, 592-94.
\textsuperscript{163} See \textit{Constitution} arts. 54, 55 (France); \textit{Grundgesetz [Constitution]} [GG] arts. 23-25 (F.R.G.); \textit{Eur. Communities Act} of 1972 (ch. 68) (Eng).
\textsuperscript{164} EC Treaty arts. 3(b), 7a.
\textsuperscript{165} Completing the Internal Market: White Paper from the Commission to the European Council, COM (85)310 (classifying the barriers as physical (e.g. customs posts), technical (e.g. standards for health, safety, environmental, or consumer protection), and fiscal. See also Opinion on "Completing the Internal Market" - White Paper from the Commission to the European Council, 1985 O.J. (C 344) 16-20.
\textsuperscript{166} D. Curtin et al., \textit{Leading Cases on the Law of the European Communities} 303 (quoting Administration des Douanes v. Societe Cafes Jacques Vabre & J. Weigel et CIE Sari, Fr. Cour de Cassation (combined chambers) [1974] cass. ch. mix. 6, [1975] 2 C.M.L.R. 336, May 24, 1975 (holding that subsequent national customs law was invalid since it controverted Article 95 of the EC Treaty)).
\textsuperscript{169} \textit{Constitution} arts. 55, 88-84 (Fr.).
\textsuperscript{171} \textit{Grundgesetz [Constitution]} [GG] art. 25 (F.R.G.).
\textsuperscript{172} GG art. 25.
\textsuperscript{173} GG art. 23.
most EU activities with a direct effect in Germany can still be subject to review by national courts.\textsuperscript{174}

Under Article 23 of the Basic Law, the Constitutional Court of Germany retains the right to review Community Law and the actions of Community institutions to establish their constitutionality under German law.\textsuperscript{175} Thus, Community law, as well as ECJ decisions, control over German law to the extent that they comport with the theory of proportionality and guarantee "protection for fundamental rights essentially comparable to that provided for by [the] Basic Law."\textsuperscript{176} EU institutional actions that directly affect Germany will also be reviewed to ensure that they do not "treat or develop the Union Treaty [TEU] in a way that was not longer covered by the Treaty in the form that is the basis for the Act of Accession."\textsuperscript{177} The impact of these reservations is minimal however as the ECJ has adopted a large portion of the German general principles of law and fundamental rights.\textsuperscript{178}

The United Kingdom requires an Act of Parliament in order for a treaty to take effect.\textsuperscript{179} Although the issue of parliamentary sovereignty, whereby the British Parliament enjoys final authority to establish the legal norms effective in the United Kingdom\textsuperscript{180} remains, English courts have shown an extreme willingness to reconcile Community law with national law.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{174} Id. art. 23.
\item \textsuperscript{175} Id. art. 23.
\item \textsuperscript{176} Id. art. 23; Cases 2 BvR nos. 2134 & 2159/92, Manfred Brunner and Others vs. European Union Treaty, [1992] 1 C.M.L.R. 57, 89 (1992).
\item \textsuperscript{177} Brunner, supra note 176, at 89. For a thorough and thoughtful discussion of the evolution of the Supremacy Doctrine in Germany, see Currie, supra note 170, at 93-101.
\item \textsuperscript{178} See discussion infra V.A, C, & D.
\item \textsuperscript{180} Case C-213/89, Regina v. Secretary of State for Transport Ex Parte Factortame Ltd., (House of Lords, 1991), 1 All E.R. 70, 3 C.M.L.R. 375 (1990).
\item \textsuperscript{181} Macarthys Ltd. v. Smith, 3 All ER 325, 3 C.M.L.R. 44 (1979). The English court stated, "In construing our statute, we are entitled to look to the [EC] Treaty as an aid to its construction: but not only as an aid but an overriding force. If on close investigation it should appear that our legislation is deficient—or is inconsistent with Community law—by some oversight of our draftsmen—then it is our bounden duty to give priority to Community law. Such is the result of section 2(1) and (4) of the European Communities Act [of] 1972." Id. at 328-29 (emphasis added). See also Factortame Ltd., 1 All E.R. at 103 (quoting Lorde Bridge of Hardwich's opinion) "Under that Act [the European Communities Act of 1972] it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law." Id.
\end{itemize}
B. The Status of Internet Related Services Under the EC Treaty

In order to qualify as a "service" that gains the protection of the EC Treaty against restrictions, a service must satisfy two elements.\footnote{182} First it must meet the definition of "services" outlined in Article 60 by being a service "normally provided for remuneration."\footnote{183} Second, it must also be a transnational service that "pursues activities" in more than one Member State.\footnote{184} Although it may be conceptually difficult to ascertain the origin of many Internet related services, access to the Internet and all its related services is a booming global enterprise.\footnote{185} This would indicate that the Internet is a service that "pursues activities" in more than one Member State.\footnote{186} Therefore, Internet related services appear to easily qualify as services under the EC Treaty.

Article 66 of the EC Treaty contains public policy exceptions that refer back to and incorporate Articles 55 and 56.\footnote{187} Article 55 states that "[t]he provisions of this Chapter shall not apply, so far as any given member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."\footnote{188} This sovereign powers reservation is still subject to the second paragraph of Article 55, which grants the Council the broad power, through a qualified majority on a proposal from the Commission, to rule that "provisions of this Chapter (including this exception) shall not apply to certain activities."\footnote{189} Although the prescription of public morals may arguably appear to be an issue of sovereignty, perhaps the better argument for the Community as a whole is that the Community should define a Community baseline for public morals, below which the Member States may not regulate.

Given the uniquely global nature of the Internet, combined with the legal reality that since all citizens of Member States are also citizens of the EU\footnote{180} and have been given significant rights to vote in municipal elections and hold municipal offices in Member States not their own\footnote{181} it would seem that the "public", \textit{in this discrete instance}, should be defined by the Community public, not the Member State

\begin{itemize}
  \item \footnote{182} EC Treaty arts. 59-60.
  \item \footnote{183} Id. art. 60
  \item \footnote{184} Id.
  \item \footnote{185} See Salmon & Jones, supra note 83.
  \item \footnote{186} See discussion infra Part III.
  \item \footnote{187} EC Treaty art. 66
  \item \footnote{188} Id. art. 55.
  \item \footnote{189} Id.
  \item \footnote{180} Id. art. 8.
  \item \footnote{181} See discussion infra Part IV.B.
\end{itemize}
Otherwise, to allow a Member State to regulate what public morals are on the Internet would necessarily mean that Community standards are dictated by a single Member State more than any other, thus de facto creating a very undemocratic, and possibly illegal, process. But perhaps this dilemma itself, conflicting public morals/policy concerns creates the most compelling case for treating the delivery of Internet related services as a new form of services that requires harmonization.

Article 56, the public policy exception of the EC Treaty, has not been read as a broad exception although the language of the Article may indicate the contrary. "As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard." Similar to Article 55, Article 56 contains a Community institutional bypass procedure in the second paragraph. However, the same argument presented against Article 55 would appear to successfully address the exceptions conveyed in Article 56.

C. The Focus of Harmonization

As another fundamental field of Community action, the harmonization of Community laws across Member States paves the way for the "four freedoms" to overcome different Member State perceptions of "public order" defined in Article 36 by accelerating the establishment of an internal market through Community level legisla-

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192. Article 55 of the EC Treaty states in relevant part that "[t]he provisions of this chapter shall not apply, so far as any given member-State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority." EC Treaty art. 55. Article 56 of the EC Treaty adds the further exception that "[t]he provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation, or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." Id.


194. Article 56 of the EC Treaty states in relevant part that "the Council shall, acting in accordance with the procedure referred to in Article 189b, issue directives for the coordination of such provisions." EC Treaty art. 56(2).

195. Id. art. 56.


Although harmonization procedures are rooted in Community law, the practical effects of harmonization are that national provisions of the Member State that will continue to be respected after harmonization, not the supranational law, until the national legislation is amended by the Member State. This reflects the same principle guiding Community application of "general principles of law," namely that Member State recognition in the Community is critical even though the particulars of the "principles" may often be debated.

In the absence of the harmonization of national rules, "[i]t falls within the residual power of each Member State to regulate, restrict or even totally prohibit" certain activities in its territory. However, the Member State must still treat all services in that field identically, whatever their origin or nationality unless the EC Treaty provides for an express derogation. Therefore, such wide latitude in regulating the delivery of Internet related services should be of great concern to the EU with the current lack of harmonization.

Moreover, the EU should have little to fear in the near future, from Member States successfully taking a public morals exception under Article 56 of the EC Treaty. Although the language of Article 56 appears to grant Member States broad discretion to take exceptions or regulate based on public measures, the ECJ has indicated that "measures taken by virtue of that [Article 56] article must not be disproportionate to the intended effect." The ECJ has recognized that an exception to a fundamental principle of the EU, such as harmonization, requires a very narrow interpretation.

Thus far, the EU has provided only lackluster leadership in this area. The EU's attitude towards Internet regulation is exemplified in a recent response to a written question submitted by a member of the Parliament concerning the prevention of Internet content considered

199. Vignes, supra note 197, at 359.
200. Id. See discussion infra Part V.A regarding, among other things, the German reservation, through Article 23 of the Basic Law, to review even Regulations to ensure that they comport with certain principles.
202. Id. at 2134-35.
204. Id.
205. Id.
to be “in conflict with public morals.” As discussed above, it is within the prerogative and competency of the Member States to rule on issues concerning public morals. However, the ECI, consistent with Article 56(2) as ratified by all Member States under the TEU, provides the EU a mechanism to review the effects of Member State actions under the theory of proportionality. In order to avoid the additional conflict that may arise as a result of Member States filling the void where the EU has not regulated, the EU should simply provide a baseline: a unified set of fundamental rights governing the delivery of services over the Internet based in the competency granted the EU under Article 100a through Article 7a.

Otherwise, the lack of a harmonizing mandate from the EU provides the Member States with two bites at the Internet regulation apple: first, under the basic principle that a Member State has the de facto competency to regulate in the face of the lack of EU regulation, and second, the public morals exception under Article 56. This framework only invites a fragmented response by the Member States. On November 27, 1996 the Commission publishes a Communication titled “Europe at the Forefront of the Global Information Society: A Rolling Action Plan.” This Communication outlines the priorities and goals of the EU with regards to the delivery of Internet related and the information society in Europe. The Commission believes “[the] value added of Community level action... [as setting up] a common framework, to coordinate various activities, and to act as a catalyst.”

However, in light of the growing services and information available over the Internet, including offshore banking in the form of the European Union Bank, the need to decide on a supranational regulatory mechanism is imperative. This imperative will exist for the individual Internet consumer, so that, for example, they may know whether their deposits are covered by insurance. This imperative will also exist for Member States as they struggle to deal with all im-

206. Written Question, supra note 152, at 27.
208. Id. at 1-3.
209. Id. at 4.
211. Id.
portant tax issues, such as whether a Web site may be considered a permanent establishment and to how to tax software transactions over the Internet.\textsuperscript{212}

Article 7a of the EC Treaty states that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this treaty."\textsuperscript{213} Since Internet related services do indeed appear to satisfy the definition of services laid out in the EC Treaty,\textsuperscript{214} the Commission, or the Parliament indirectly, has a basis of action to propose Community control over the services. Such control should be exercised to facilitate business and consumer community looking standards on surety and safety over the Internet.

\textbf{D. European Court Of Justice}

Although Article 7a of the EC Treaty establishes the "four freedoms,"\textsuperscript{215} Article 59 provides the ECJ a basis to review Member State regulations regarding the delivery of Internet related services.\textsuperscript{216} Although Article 59 of the EC Treaty is quite clear in its goals to harmonize and integrate the services within the EU,\textsuperscript{217} it specifically states that "barriers to provide services within the Community shall be progressively abolished during the transitional period."\textsuperscript{218}

\textit{The freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all person or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of the Service is subject in the Member State of his establishment. In addition, such requirements must be objectively justified by the need to ensure that professional

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\textsuperscript{212} \textit{Financial Services, Internet, Among Top Foreign Issues, Treasury Official Says}, Int'l Bus. & Fin. Daily (BNA), Jan. 22, 1996, available in LEXIS, BNA library. U.S. Deputy International Tax Counsel Carol Doran Klein commented that the U.S. "cannot, and will not, tolerate continuation of treaties that no longer implement . . . important U.S. tax policy and whose continued existence creates a hole in the fabric of that policy." \textit{Id.} \\
\textsuperscript{213} \textit{EC TREATY} art. 7a. \\
\textsuperscript{214} \textit{Id.} art. 60. \\
\textsuperscript{215} \textit{Id.} art. 3. \\
\textsuperscript{216} \textit{Id.} art. 59. \\
\textsuperscript{217} \textit{Id.} \\
\textsuperscript{218} \textit{Id.}
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rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.219

As discussed infra, Member States clearly run the risk of impinging upon the free flow of Internet related services, by blocking out services to whole sections of the Internet. Therefore, it appears that if the Commission, under Article 169, or another Member State, under Article 170, an infraction procedure the ECJ would have to review and rule on the claims of the case.

Upon bringing the case before the ECJ, the Member State's censorship action would be reviewed under a general principle of law known as the theory of proportionality.220 "The 'European model' of protection of fundamental rights" rests on the existence of two distinct supranational legal orders,221 namely, the European Convention on Human Rights (ECHR) legal order and the Community legal order.222 The ECJ has recognized that the Treaties establishing the European Communities "perform the same function of a constitution in a composite legal order, which means that the institutions of this legal order, as well as its constituent entities see their political decision-making process constrained by the rules laid down in the Treaties."223


221. Koen Lenaerts, Fundamental Rights to be Included in a Community Catalogue, 16 EUR. L. REV. 367, 376-77 (1991). "The nucleus [of Community fundamental rights] is made up by the fundamental rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its (present and future) Protocols which are included as such into the Community constitution. The next circle consists of general principles of law whose respect the Court of Justice enforces at present on the basis of Article 164 EEC, referring to "the law" (apparently a kind of unwritten higher law) which is to be observed in the interpretation and application of the Treaty (that is the written constitution)." Id. at 376-77 (emphasis added). See generally Case 294/83, Parti écologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1339, 1365. ("It must first be emphasized in this regard that the [then] European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States, nor its institutions can avoid review of the question of whether measures adopted by them are in conformity with basic constitutional charter, the Treaty.").

222. Lenaerts, supra note 221, at 377.

223. Id.
Although only Article 215 suggests the application of general principles of law, the ECJ has "frequently applied general principles of law in other contexts also." These principles are applied in three different manners. First, they are employed to "interpret the Treaties and acts adopted by the institutions of the Communities to implement the Treaties," although they will not be applied when it is clear the drafters of the treaty intended to reject a principle or when there is a conflict between the Treaty and general principles of law.

Second, it is "used to fill gaps in the Treaties or in acts adopted by Community institutions." Finally, general principles of law provide a criterion for assessing the validity of acts adopted by Community institutions.

These general principles may be derived from those of the Member States, so although one may argue that whether an individual state passes on legislation or the ECJ does, there may be little difference because they may both apply the same doctrines of law. The ECJ will provide a single source of law and a legitimate expression of Community standards. Additionally, the ECJ has utilized general principles of law much more than any other international tribunal. The fact that a Member State is silent on a point does not prevent the ECJ from applying a principle which is clearly established by the laws of the other Member States.

Member States must thus comply not only with the provisions of Article 56, as far as service providers from other Member States are concerned, but their actions are also subject to the theory of proportionality. And although the principle of proportionality is arguably borrowed from the German legal principle of Verhältnismässigkeit, the ECJ has more and differing voices to reconcile a policy result than a single national court would face, thus it has had to develop and evolve tools necessary to deal with this issue.

224. EC TREATY art. 215, which in relevant part states that, "[i]n the case of non-contractual liability, the Community shall, in accordance with general principles common to the laws of the Member States . . ." (emphasis added).

225. Akehurst, supra note 220, at 29. See also EC TREATY art. 215.


227. Id. at 30 n.1.

228. Id. at 30.

229. Id.

230. Id. at 31.


Although the ECJ has held that "there is no such thing as a general principle of objective unfairness under Community law," it has recognized that:

[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objective of the Community.

The inquiry is whether the implementation of EU measures abridges any right of a fundamental nature. The test requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test puts the burden on the administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect, it is a more rigorous test than one based on reasonableness.

Applying this test to the action taken by the German government in regulating the Internet, it appears that the theory of proportionality has not been satisfied. The collateral impact on other services and the dangerous precedent set for other Member States indicates that the German response was not suitable, necessary or appropriate to curb the activities of international actors. Viable alternatives for the German government could have included simply prosecuting consumers of the illegal material or passing laws that govern the sale of Internet "browsers" which require the installation of site-blocking software.

The danger in relying upon the ECJ to create standards for regulating the Internet is that every successive court decision may slightly alter the prior principles in a manner contrary to the laws of all Member States. On the other hand, English Common Law and the case law of the French Conseil d'État have provided satisfactory judicial

236. Id.
237. The following cases have found Member State actions invalid because of the existence of less restrictive measures: Case 33/74, Van Binsbergen v. Bestuur van de Bedrijfvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299 (the administration of justice under Community law demands that the Member State employ the least restrictive measures available); see also Case 279/80, Criminal Proceedings Against Webb, 1981 E.C.R. 3305.
238. Akehurst, supra note 220, at 40.
legislation in their respective Member States. Moreover, since the ECJ is relying on general principles of law that “share the characteristic of being based-in their very essence, not necessarily in their precise contours-on the common legal traditions of the Member States,” then the ECJ is simply applying principles “which are or ought to be part of the laws of those member States.” However, since the ECJ would be in effect creating law, one could argue that the process is undemocratic, illegal, and unfair.

E. Legislative Powers of EU Institutions

Under the TEU and the EC Treaty, the legislative body of the Community may employ a number of separate Articles in order to adopt legislation regulating the Internet. For example, unlike the uncertainty of an ECJ promulgated solution to the regulation of Internet related services, a Directive, as permitted by EC Treaty Article 189 and initiated by the Commission, would create a concrete mandate from which to develop Community standards to regulate Internet related services. Attempting harmonization through anything less than a Directive would not achieve the application of uniform fundamental rights, nor will it provide a strong basis for ECJ reviews, but rather it would result in Member States being required to do no more than vaguely commit. This may cause more complications than those encountered without any Community action or from the Courts alone.

Articles 100 & 100a of the EC Treaty grant a broad power to the EU institutions to legislate harmonization, through Directives & Regulations under Article 100a, and through Directives alone, in Article 100. The requirements for action under Article 100, however, are

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239. *Id.*
240. Lenaerts, *supra* note 221, at 383.
242. *EC Treaty* art. 189. Article 189 defines the power of a directive as “binding, as to the result to be achieved, upon each member-State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” *Id.* This type of legislation would appear to provide the general latitude that Member States may feel they need in attempting to address their tripartite concerns, while providing the EU with a baseline below which a Member State may not appropriately regulate.
243. For an in depth review of EU harmonization, see generally Vignes, *supra* note 197.
244. Article 100 of the EC Treaty states that “[t]he Council shall... issue directives for the approximation of such laws, regulations, or administrative provisions of the member-States as directly affect the establishment or functioning of the common market.” *EC Treaty* art. 100. Article 100a, paragraph 1 adds that “[b]y way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply..."
very stringent. In addition to consulting the Economic and Social Committee and the Parliament, the Council’s vote must be unanimous before action can be taken. Article 100a, on the other hand, permits a qualified majority vote of the Council, and the approval of Parliament to adopt Directives and Regulations. Thus, its procedural obstacles are very light when compared to Article 100. Moreover, Article 100 is a general harmonization clause aimed at the “common market,” while Article 100a is a specific “derogation from Article 100” which is aimed at achieving the objectives of an internal market where the delivery of services can occur without internal barriers. Therefore, Article 100a, as lex specialis to Article 100, would supply the correct legal basis by which the EU can initiate a harmonization Directive with respect to the delivery of Internet related services.

Article 100a(4) of the EC Treaty provides an “opt-out” clause through the incorporation of Article 36, by which a Member State may go beyond the standards of a Directive and employ stronger national provisions even in the face of harmonization measures. This is a rarely used exception and even where employed, the Member State must justify why the more stringent standard is required. Additionally, the Commission will review the derogation to verify that it is not a means of arbitrary discrimination or a disguised restriction on trade between Member States, and that it comports with a theory of proportionality with respect to the rights the Member State wishes to protect.

for the achievements of the objectives set out in Article 7a: “[t]he Council shall . . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member States which have as their object the establishment and functioning of the internal market.” Id. art. 100a.

245. Id.

246. Id. (referring to the procedures set forth in Article 189b of the Treaty which allow for a qualified majority vote by the Council).

247. Id.

248. For an enlightening and thorough discussion of the substantive benefits of the development and use of Article 100a, see Langeheine, supra note 198, at 348-51.

249. Langeheine, supra note 198, at 351. This same argument can be applied to the inapplicability of Article 235 in evaluating the national derogations available under Article 100a(4). Id. at 351 n. 39.

250. EC TREATY arts. 36, 100(a)(4); Langeheine, supra note 198, at 353-55.


252. EC TREATY arts. 36, 100(a)(4); Langeheine, supra note 198, at 353-57.

253. EC TREATY art. 100(a)(4); Langeheine, supra note 198, at 357.
tection beyond the Community baseline would be effectively addressed, while simultaneously providing the business community with a fairly consistent set of standards from which to begin to operate.

VI. Comparison of Worldwide Responses

The current trend by governments worldwide is to respond with a heavy hand to material on the Internet that goes against "public morals." In the following brief survey of international responses, it quickly becomes apparent that the Community standards unilaterally proposed by regulating nations as the basis for the censorship are post hoc and very vague. The concern is that once one government takes measures to censor Internet related services, many other governments will follow their example.

Raising the specter of national security, the Xinhua News Agency, the official news agency of the People's Republic of China (PRC), prohibited the distribution of non-official news and data over the Internet. All foreign news services are required to register their information with Xinhua, who will then decide what information can be distributed and at what cost. Despite the significant demand for foreign news services approximately 1,000 clients across the PRC, Xinhua has stated that the "government will punish providers of economic information that's 'forbidden' or that 'slanders or jeopardizes the national interests of China.'" Very specious terms grant Xinhua a great deal of latitude in controlling the information approved for dissemination. Although there have been articles representing that these Internet rules can be regarded as a "Green Light" for Internet information service development, the fact remains that all users must register with the state and that violation of the dissemination of vague state secret laws is punishable by heavy fines and/or death. In fact, Vice Premier Zhu Rongji, a senior party leader has publicly

254. See discussion infra Part IV.A.
255. Mikkelsen, supra note 5, at 6.
257. Id.
258. Id. (emphasis added). Foreign news services have approximately 1,000 clients across the People's Republic of China. Id.
259. Jeffrey Parker, China's Internet Rules Seen as Green Light, Reuters World Service Feb. 19, 1996, available in LEXIS, Intlaw Library, Ecnews File; see also Ulrich Schmetzer, China Orders Internet Users to Register with the Police; Beijing Worried It is Losing Monopoly over Information, CHI. TRIB., Feb. 16, 1996, at 7.
stated that it is "[b]etter to kill 1000 in error than let even one slip through."\textsuperscript{261}

In a further attempt to control the flow of information beyond the business wires to what the individual user accesses. Beijing has place a moratorium on new Internet membership as it seeks a solution that would allow it to monitor all "links" made outside of China's "intranet."\textsuperscript{262}

The United States has adopted a similarly vague standard of indecency in the Telecommunications Bill of 1996.\textsuperscript{263} United States Senator Patrick Leahy said in introducing a bill to repeal the provisions: "The U.S. government is paving the way for censorship of Internet speech . . . What do we think the Iranian government will make illegal? What could Libya ban and criminalize?"\textsuperscript{264}

\textbf{VII. Conclusion}

"The problem is the Internet has no geographical boundaries, but laws do. As a result, government legislators tend to go after the takers rather than the pushers. There’ll be problems until we can commit to common laws worldwide."\textsuperscript{265} There is a hysteria sweeping across the world, creating a legal backlash of vague standards and non-proportional responses to the regulation of Internet related service delivery.

A new communications paradigm like the Internet requires new ways of defining standards to govern its use. Regional economic integration organizations, such as the EU, have redefined how the individual states of the world view themselves as part of a greater whole. These organizations are the mechanisms through which states should attempt to regulate the delivery of Internet related services.

In the European Union, there appears to be a substantial basis for judicial and legislative action by the Community. Although judicial action may appear to be more expedient, the specific regulations proposed and implemented will be difficult to predict. Alternatively, while Community legislative action may require more time and effort, it offers the certainty required to develop regulations that provide for a "Community" standard to govern Internet related services. In either

\textsuperscript{261} Parker, \textit{supra} note 259.
\textsuperscript{262} Joseph Kahn et al., \textit{Beijing Seeks to Build an Internet that Can be Censored}, Dow Jones News Service, Jan. 31, 1996, \textit{available in} WESTLAW, Euronews Database.
\textsuperscript{263} Mikkelsen, \textit{supra} note 5, at 6.
\textsuperscript{264} \textit{Id.}
\textsuperscript{265} Everetts, \textit{supra} note 105 (quoting Clive Gringras, a lawyer with Nabarro Nathanson).
case, resolution of this issue at the Community level will serve as a model for other regional economic integration organizations.

The EU's response has been lackluster. Its most recent publication regarding policy options and its conclusion regarding illegal and harmful content on the Internet encourages Member States to respond with self-regulation (both private and public efforts) and cooperation.266 The opportunity for Community level certainty, integration, and standards is quickly dissipating as each Member State plots its own course, with Germany and the United Kingdom already clearly preferring substantially different degrees of government regulation.

Once an ECJ decision is issued or a Directive is passed, the Community may take the further step of sponsoring and promoting an industry rating system, such as that launched by the Recreational Software Advisory Council on the Internet (RSACi).267 The RSACi system combines an objective rating system, based on information voluntarily provided by the proprietors of the services, with a blocking mechanism on browsers.268 Microsoft and SurfWatch, a leading provider of software that blocks access to undesirable World Wide Web sites, have both endorsed the RSACi system.269 The European Union should follow RSACi's example.

If we are able to view cyberspace as more than just digital impulses—in short, if we are able to view electronic space as a functional if not a physical equivalent of public spaces as we knew them before digital communication—we can apply an appropriately dynamic and creative approach to legal issues inherent in the regulation of the information superhighway.270

The EU, and other regional economic integration organizations, represent the "dynamic and creative" tool necessary to forge regulations on the delivery of Internet related services at the appropriate level. The EU can provide a baseline set of fundamental rights (both

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266. Illegal and Harmful Content, supra note 20, at 23-26.
268. Id.
269. SurfWatch Endorses RSACi Content Advisory System; Leading Provider of Internet Filtering Software Teams with RSAC and Microsoft to Strengthen Individual Choices over Access to Internet Content, Business Wire, Feb. 28, 1996, available in LEXIS, World Library, Allwld File.
270. Gordon, supra note 97, at 137.
social and economic) on the Internet which all Member States must protect. Otherwise, if a region as tightly integrated as the EU is unable to successfully promulgate a set of fundamental rights, what success can the Commission expect when it expresses its desire to forge a much farther reaching global agreement? It would appear that a model of success at a regional level would provide the international impetus required to generate a truly global agreement.