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# From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce

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# From The Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce

Kristina M. Reed\*

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## I. INTRODUCTION

The invention of the printing press in 1440 enabled the widespread distribution of information.<sup>1</sup> During this period, dissemination of printed information was the fastest way for a single message to reach a multitude of people spanning thousands of miles. However, the printed message still had to combat the differences between

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This Comment is dedicated to the memory of my grandmother, Jewell W. Reed, whose loving support and encouragement gave me inspiration and hope. She taught me that perseverance, integrity, and dedication are necessary elements for success.

1. See PAUL JACOBSEN, NET LAW: HOW LAWYERS USE THE INTERNET 223 (1997) (expounding on the history of information technology).

language, culture, and national borders. The inception of the Internet made the transcendence of speech across these old boundaries possible. Contemporary thinkers label the Internet as the most significant informational breakthrough in history.<sup>2</sup> The expectation that the Internet would "expand the freedom of speech worldwide"<sup>3</sup> is based on the Internet's transformational power to break down cultural, language, national, and philosophical barriers.<sup>4</sup> This borderless medium encourages world integration of economics<sup>5</sup> and the promotion of cultural diversity.

The power of the Internet is largely due to its sheer size. The Internet contains "millions of messages, millions of Web sites,<sup>6</sup> and thousands of newsgroups" connected over a seemingly endless number of paths.<sup>7</sup> In theory, any person with access to the Internet can be their own editor by choosing which sites to visit, disseminating information by creating a web page, and sharing their theories and opinions on a global scale by participating in chat rooms or posting messages in newsgroups. However, in reality, the transformational power of the Internet is blocked. Every person's right to speak and share information and ideas freely on the Internet is limited by the proliferation of governmental regulation.

Individual nations are developing national responses to the perceived effects of the Internet<sup>8</sup> on the nation-state and their social values.<sup>9</sup> Countries are concerned

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2. See *id.* (discussing the problems with printed information and the benefits of the Internet).

3. Caroline Uyttendaele & Joseph Dumortier, *Free Speech on the Information Superhighway: European Perspectives*, 16 J. MARSHALL J. COMPUTER & INFO. L. 905, 905 (1998).

4. See *Control@china.com? Show the Net's Potential for Breaking Authoritarian Barriers*, THE FRESNO BEE, Jan. 7, 1998, at B6 (proclaiming that modern technology has played a major role in fomenting revolutions that have disrupted established order in Germany and China). See generally Janet Caldwell, *Surfing Through a Portal*, GOV'T TECH.: E COM., Aug. 1999, at 12 (explaining that the Internet changes the composition of communities by grouping people according to interests regardless of geographic boundaries). But see Patricia B. Nisperos, *Gartner Analyst Sees the Internet as the Business Medium of the Future*, BUS. WORLD (MANILA), Oct. 22, 1998, available in 1998 WL 21789474 (asserting that the cultural, language and policy barriers, as well as national firewalls, will separate nations on the Internet).

5. See Nisperos, *supra* note 4, at 2 (postulating that the Internet will be the predominant medium for conducting business by the year 2003).

6. See JACOBSEN, *supra* note 1, at 233 (defining websites as "a set of web pages for a person or organization"). A web page is a file accessible by a web browser, such as Netscape or Internet Explorer, that contains text, sounds, pictures, movies, and hypertext links to other web pages. *Id.*

7. See James Martin, *It's good, bad and ugly . . . and unbeatable*, COMPUTER WKLY., July 23, 1998, at 20 (hypothesizing that because of the Internet's size and decentralized network, censorship measures will fail).

8. See Jonathan Green-Armytage, *Governments Tighten the Net*, COMPUTER WKLY., Feb. 8, 1996, at 16 (listing the controls applied to the Internet by countries such as Germany, China, and France); see also Wayne Arnold, *Hong Kong Won't Regulate Cyberspace*, ASIAN WALL ST. J., Jan. 23, 1997, at 1 (claiming that Internet regulation is harmful to the Internet's usefulness).

9. See generally Simon Davies, *Make It Safe, But Keep It Free; Once the Filtering Infrastructure is in Place the Era of Mass Censorship Will Have Begun*, THE INDEP. (LONDON), Sept. 4, 1998, at 5 (explaining that countries around the globe, from the major European States to ASEAN nations, are policing the Internet to ensure that sites containing detrimental information are blocked).

about harmful or objectionable content,<sup>10</sup> such as obscenity<sup>11</sup> and pornography,<sup>12</sup> that threatens national security, upsets cultural stability,<sup>13</sup> or consists of racially or ethnically sensitive materials.<sup>14</sup> Individual countries are assuming the role of "cyberpolice" by requiring Internet Service Providers (ISPs)<sup>15</sup> to unilaterally censor undesirable information<sup>16</sup> or by using government censorship to block content that is received or transmitted within the country.<sup>17</sup> Laws providing for criminal and civil liability are being passed for failure to censor information.<sup>18</sup>

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10. See Jose I. Rojas, *Liability of ISPs, Content Providers and End-Users on the Internet*, 507 PLI/PAT 1009, 1011 (1998) (defining "content" as: text, such as e-mail messages, chat messages and other HTML text; graphics, including pictures and video; voice and sound recordings, such as music recordings and voice telephony; multimedia presentations that use video, sound and graphics; and software, utilities, and regular commercial products).

11. See *Bonn Approves Internet Law Barring Pornography, Neo-Nazis*, DEUTSCHE PRESSE-AGENTUR, Dec. 11, 1996, available in WESTLAW, Allnewsplus Database; see also Randall Mikkelsen, *Governments Wary of Internet Content*, DES MOINES REG., Feb. 20, 1996, at 6 (explaining that proponents of Internet regulation believe that regulation is necessary to protect children from obscenity). Further, many governments are seeking ways to limit sex on the Internet. The United States has banned the use of the Internet for distribution of indecent or obscene material to minors. *Id.*

12. See Isabelle Parenthoen, *Internet Grapples with Laws from Pornography to Property Rights*, AGENCE FRANCE-PRESSE, Dec. 16, 1996, available at 1996 WL 12200600 (expounding that countries such as the U.S., Singapore, China, and Germany are enacting laws that ban indecent material on the Internet); see also Mikkelsen, *supra* note 11, at 6 (discussing that both Germany and China have banned the dissemination of pornography over the Internet).

13. See, e.g., *Internet Presents Cultural Obstacles to Chinese Users*, ASIA PULSE, Apr. 17, 1998, Nationwide Financial News, at 1 (recognizing that the Internet is difficult to use and expensive to access for the average Chinese citizen because most systems do not recognize traditional Chinese characters); Michael Laris, *Internet Police on the Prowl in China; Free Flow of Ideas Worries Leaders*, WASH. POST, Oct. 24, 1998, at A12 (stating that no one is allowed to release harmful information attacking China's territorial integrity, the socialist system, or China's independence on the Internet); Amy Harmon, *Why the French Hate the Internet: They Are Wary of Being Wired Because of Fears of Cultural Pollution, A Strong Tradition of Centralization and Loyalty to an Earlier System Called Minitel*, L.A. TIMES, Jan. 27, 1997, at A1 (criticizing the Internet as a medium that will destroy the French language and culture because the content on the Internet is in English while only two percent is in French).

14. See *German Law Attacks Smut on Internet*, ST. LOUIS POST-DIS., July 5, 1997, at 21 (mentioning that Germany is concerned with keeping Nazi propaganda off the Internet).

15. See JACOBSEN, *supra* note 1, at 218 (defining an ISP as "[a]n organization that supplies users with access to the Internet").

16. See Information and Communications Act, art. 1, § 5 (Aug. 1, 1997) 37 I.L.M. 564, 565 (1998) (translated by the Ministry of Education, Science, Research and Technology) (providing that the industry will self-regulate in accordance with European Commission Directive 90/387/EEC of June 28, 1998); see also Kimberley Strassel, *Watch Group in U.K. Hails Internet Self-Regulation*, WALL ST. J. EUR., Jan. 9, 1997, at 4.

17. See *China Network Regulations Issued*, CHINA DAILY, Mar. 9, 1998, News, at 1 (declaring that China has enacted laws for the security, protection and management of all computer networks in the People's Republic of China); see generally Mo Zhang, *China Issues New Rules Strengthening Regulatory Structure Over Internet: Emphasis on Public Security and State Interest*, 19 NO. 11 E. ASIAN EXEC. REP. 9 (Nov. 15, 1997).

18. See *Draft German Law May Set Net Precedents*, S. CHINA MORNING POST, May 13, 1997, at 12 (discussing Germany's multi-media law and the criminal charges brought against the head of CompuServe Germany for pornographic material and Nazi propaganda disseminated through the CompuServe network); see also *China—Cyberspace Crimes on the Rise*, CHINA DAILY, Oct. 20, 1998, News, at 2 (describing computer crimes and efforts to combat Internet-aided crimes).

"The reach of the Internet multiplies both the number of laws and the number of jurisdictions applicable to speech transmitted on-line."<sup>19</sup> ISPs face liability in some countries,<sup>20</sup> but not in others, for content placed on the Internet.<sup>21</sup> "Because content posted on the Internet is instantaneously transmitted worldwide, Internet users and providers almost automatically face potential liability in any country to which the Internet is connected—not just the nation where the speech was created or where the author lives."<sup>22</sup> In addition, companies placing advertisements on the Internet<sup>23</sup> face potential world wide liabilities.<sup>24</sup> China and Germany, the leaders of e-commerce<sup>25</sup> in their regions, are not only restricting speech for the world. The two countries are also dictating the speech norms for the international community and

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19. Samuel Fifer & Michael Sachs, *The Price of International Free Speech: Nations Deal With Defamation on the Internet*, 8 DEPAUL-LCA J. ART & ENT. L. 1, 2 (1997) (postulating that because content on the Internet is transmitted worldwide, users and providers face potential liability in any country that is connected to the Internet).

20. See generally Davies, *supra* note 9, at 5 (detailing how the U.K. supported the creation of the Internet Watch Foundation to investigate and notify ISP's of obscene or inciteful sites and militate for their removal from the Internet). Last year, the Internet Watch Foundation assisted in the removal of 2,000 pornographic sites from the Internet and several resulting prosecutions. ISP's proclaim that they should be immune from liability, but they must conform as a condition of their license. *Id.*

21. See Fifer & Sachs, *supra* note 19, at 2. (stating that Internet laws vary in each country); see also Net Pact Slowed by Porn and Security, THE SCOTSMAN, Sept. 23, 1998, at 2 (noting that most countries do not hold ISPs liable for content located beyond their control on computers in other countries).

22. Fifer & Sachs, *supra* note 19, at 2 (hypothesizing that users and providers can be held liable not only in the country where the content was created, but in every country that receives the message).

23. See Terry Fletcher, Comment, *Engineering Economy Study: Advertising on the World Wide Web* (visited Nov. 1999) <<http://www.kern.com/~daemonic/econ/econstdy.html>> (prognosticating that virtually every company will eventually be on the web and that the majority of households worldwide will be able to access their sites).

24. Charles R. Topping, *The Surf Is Up, But Who Owns The Beach?—Who Should Regulate Commerce On the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 179, 188 and nn.27–28 (1999) (explaining that corporations transacting business on the Internet can be entangled with laws and courts in a remote state).

25. See *The Impact of the Development of Electronic Commerce on the Employment Situation in European Commerce*, HELLENIC ELECTRONIC TRADING RES. UNIT, June 1998, at ¶ 1.1 [hereinafter *Electronic Commerce*] (defining electronic commerce as "transactions involving the exchange of goods or services between two or more parties using electronic means"); see also Reuters, *E-Commerce Develops Beyond U.S.*, reprinted in CNET NEWS.COM (visited Aug. 27, 1999) <<http://www.news.com/News/0-1007-200-346481.html>> (emphasizing that Western Europe and Asian-Pacific regions are the hotbeds of e-commerce activity). E-commerce spending in Western Europe and Asia is expected to reach U.S.\$430 and U.S.\$72 billion respectively in 2003; David E. Kalish, *Global Companies Form Group to Curb Governmental Regulation of Internet*, NAPLES DAILY NEWS, Jan. 16, 1999 (visited Aug. 27, 1999) <<http://www.naplesnews.com/today/business/d297418a.htm>> (stating that major companies, such as IBM, German publisher Bertelsmann, Mitsubishi, France's Telecom, Finland's Nokia and other media technology companies, have formed the Global Business Dialogue on E-Commerce Group to discourage governments from passing laws that could hinder business over the Internet); Martin Jetter, *Electronic Commerce Update: Germany*, NAT'L TRADE DATA BANK, MARKET REP., Sept. 1, 1997 (explaining that since German companies are acutely aware that the Internet is the business medium of the future, they are developing and expanding their on-line capabilities); see generally Stephen Anderson, *Electronic Commerce Update: China*, NAT'L TRADE DATA BANK, MARKET REP., June 18, 1999 (describing how the Internet is affecting the commercial markets in China).

are blocking the potential money making opportunities in e-commerce<sup>26</sup> by stringently regulating Internet content.

In 1997, Chinese officials unleashed sweeping Internet controls designed to "safeguard national security and social stability."<sup>27</sup> While Chinese leaders realize the importance of the Internet in its country's growth,<sup>28</sup> the Internet's free floating exchange of ideas<sup>29</sup> is at odds with the philosophy of the Communist Party.<sup>30</sup> As a result, this legislation restricted content that could endanger national security, divulge state secrets, damage the national, social and collective interest, or infringe on other individual rights.<sup>31</sup>

Similarly, Germany enacted legislation tightening control over speech and the modes of communication entering the country.<sup>32</sup> On July 4, 1997, Germany's upper house of Parliament passed the Information and Communications Services Act (ICSA) requiring the censorship of pornography, violence, and Neo-Nazi propaganda on the Internet.<sup>33</sup> Moreover, current legislation in Germany seems to be at odds with the European view of freedom of speech: "to protect the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source."<sup>34</sup>

Although China and Germany have different political systems and social values, they are both using police power and restrictions on speech to achieve their

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26. See Paul Bambury, *A Taxonomy of Internet Commerce*, 3 FIRST MONDAY 10, ¶ 1 (visited Nov. 10, 1999) <[http://www.firstmonday.dk/issues/issue3\\_10/index.html](http://www.firstmonday.dk/issues/issue3_10/index.html)> (stating that "e-commerce" is used interchangeably with the "Information Economy," "The Online Economy," and "Internet Commerce"). Electronic Commerce is not limited to business conducted via the Internet, but includes business conducted with the assistance of telecommunications and information technology. *Id.* Commerce on the Internet falls into two broad categories: Transplanted Real-World Business Models, which are business models that occur naturally in the real world and have been adopted for use on the Internet, and Native Internet Business Models, business activities that evolved on the Internet. *Id.*; see also Sanu K. Thomas, *The Protection and Promotion of E-Commerce: Should There Be A Global Regulatory Scheme for Digital Signatures?*, 22 FORDHAM INT'L L. J. 1002, 1021 (postulating that e-commerce is changing the global economy by opening up new business opportunities and increasing international trade).

27. *Control@china.com?*, *supra* note 4.

28. See John Borland, *China Pushes Net Access, Restricts Content*, CMP TECHWEB, June 26, 1998, available at 1998 WL 9296767 (quoting Xing Fan, a research fellow with the Center for Strategic and International Studies, as saying that "[o]fficially the [Chinese] government is trying hard to recruit as many users as possible. It makes good economic sense. It's directly beneficial to the telecommunications regime, and to the big ISPs, which are all state owned").

29. See *id.*

30. See Craig S. Smith, *China to Build National Network Tied to Internet*, ASIAN WALL ST. J., Jan. 27, 1995, at 1 (discussing the use of computers by academicians and dissidents in China).

31. See Charles D. Paglee, *Chinalaw Web—Computer Information Network and Internet Security, Protection and Management Regulations* (last modified Apr. 7, 1998) <<http://www.qis.net/chinalaw/prclaw54.htm>>.

32. See generally Bonn Approves Internet Law Barring Pornography, Neo-Nazis, *supra* note 11.

33. See *German Law Attacks Smut on the Internet*, *supra* note 14, at 21 (stating that the ICSA gained approval only six months after its proposal in the Bundersrat, the Upper House of Parliament).

34. Uytendaele & Dumortier, *supra* note 3, at 912.

goals of limiting harmful content on the Internet.<sup>35</sup> Civil and criminal liabilities are imposed on ISPs, companies competing in the world of e-commerce and individuals participating in Internet activities for violations of government Internet regulations. This comment will explain the historical development of the right to freedom of speech in China and Germany, explore this right as applied to the Internet, and analyze the impact of legislation on commercial speech and business, in particular e-commerce in the two countries. Part II will discuss the creation of the Internet and the incorporation of the Internet into the business world. Part III will examine the history of free speech in China and Germany and the relevance of this history as applied to Internet content. Part IV will discuss the relevance of the Internet and its content in the business world and the impact of government regulation on e-commerce. Part V will conclude that government regulation is stifling e-commerce and that governments should abandon strict content controls.

## II. THE INTERNET

The challenges facing countries trying to control Internet content can be better understood by analyzing the basic nature of the Internet. The Internet is an ever-increasing number of computer networks that communicate using TCP/IP protocol<sup>36</sup> and which share information through interlinked high-speed telephone lines.<sup>37</sup>

The Internet was created by the United States Department of Defense<sup>38</sup> and launched to the public in the form of the Advanced Research Projects Agency Network (ARPANET) in 1969.<sup>39</sup> The main goal was to create a computer system that allowed for a free exchange of ideas and scientific findings and also could

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35. See also Germany, 'World Champion' at Spying On Its Own Citizens, to Monitor Internet Usage, GERMAN ALERT, (visited Apr. 21, 1999) <<http://www.magnet.ch/serendipity/more/german01.html>> (stating that Germany's Multimedia Law is a "massive invasion" into the private lives of German citizens). The Multimedia Law requires ISPs to provide the police with information on every customer, such as a name and address, which services the user utilizes, and in which newsgroups the user participates. *Id.* Additionally, it is against the law in Germany to encrypt e-mail messages. *Id.* See generally John T. Delacourt, *Recent Development: The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207 (1997) (exploring the impact of regulations in the U.S., China and Germany on the Internet).

36. See JACOBSEN, *supra* note 1, 220 (1997) (explaining that a protocol is how computers talk to one another). Protocols are how information, such as an e-mail, is joined together and sent to another computer. TCP/IP protocol is the standard protocol used by computers connected to the Internet. This protocol allows information to be shared by computers from different manufacturers and to travel through various networks to reach its destination. *Id.* at 218, 222.

37. Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL'Y J. 361, 362-63 (1997).

38. See Robert H. Zakon, *Hobbes' Internet Timeline v5.0* (last modified Aug. 15, 1999) <<http://info.isoc.org/guest/zakon/Internet/History/HIT.html>> (noting that the U.S. Department of Defense started the Advanced Research Projects Agency (ARPA) in 1957).

39. See Bruce Sterling, *Short History of the Internet* (visited Sept. 1, 1999) <<http://www.w3.aces.uiuc.edu/AIM/scale/nethistory.html>> (outlining that in the fall of 1969, the Defense Department launched four public computers that could transfer data at high speed and could be programmed remotely from other computers).

withstand a nuclear holocaust.<sup>40</sup> To achieve this goal, the system was designed to reroute any messages around a sector that became inoperable.<sup>41</sup>

The rapid growth of the Internet was staggering. In 1973, England and Norway joined the U.S. network as the first international gateways.<sup>42</sup> In the next decade, a new computer joined the network every twenty-three days.<sup>43</sup> Advancement of network capability brought about a new protocol in 1983. Networks using the new protocol became known as the "Internet."<sup>44</sup> This advancement resulted in computers now being able to send data to the intended recipients by the quickest route, bypassing any inoperable sections.<sup>45</sup> Improvements in technology over the years have led to faster and newer systems coming on-line.<sup>46</sup> Currently, approximately 150 countries and sixty million people are connected to the Internet.<sup>47</sup>

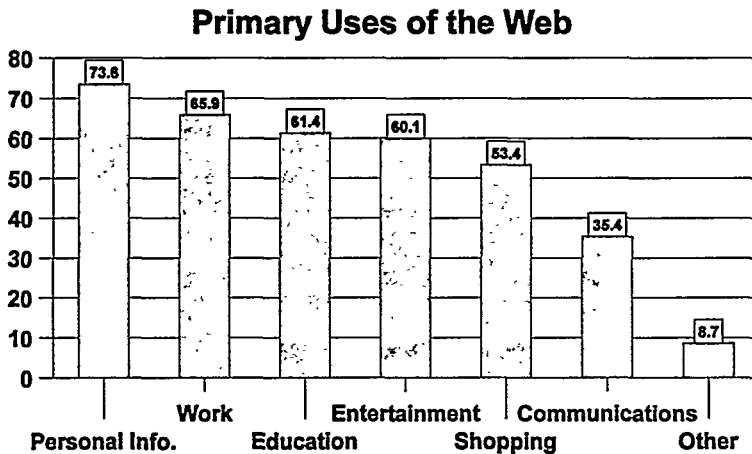


Figure 1

As noted by one commentator, "[t]he utility of the Internet is exemplified by the timely availability of political correspondence and news from distant and

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40. See GWYNETH TSENG ET AL., THE LIBRARY AND INFORMATION PROFESSIONAL'S GUIDE TO THE INTERNET 6, 9 (1996).

41. See generally Zakon, *supra* note 38.

42. See Feir, *supra* note 37, at 362-63 (citing that computers with Internet capabilities were installed at the University of California Los Angeles, Stanford Research Institute, University of California Santa Barbara, and University of Utah in September of 1969); see also JACOBSEN, *supra* note 1, at 216 (clarifying that a gateway is a computer system that transfers data between two or more networks).

43. See Daniel P. Dern, THE INTERNET GUIDE FOR NEW USERS 9 (1994); see also Feir, *supra* note 37, at 362-63.

44. See Dern, *supra* note 43, at 9; see also TRACY LAQUEY & JEANNE C. RYER, THE INTERNET COMPANION: A BEGINNER'S GUIDE TO THE INTERNET 6, 22 (1996).

45. See Feir, *supra* note 37, at 363-64.

46. See *id.* at 364; see also fig. 1, available at <<http://www.nua.ie>>.

47. See China's Own "Internet" to Start Operation at Year End, XINHUA NEWS AGENCY, Oct. 29, 1996, available in NEXIS, Asia & Pacific Rim Library, Xinhua File [hereinafter Xinhua].



generally isolated countries.”<sup>48</sup> For example, Tiananmen Square, the Yugoslavian civil war, the Los Angeles riots, and the fall of communism in the former Soviet Union were all described over the Internet by people who witnessed the events.<sup>49</sup> Additionally, the Internet is incorporated into almost every sector of life, such as education and work. Most importantly, companies use the Internet as a business tool—factoring the utility of the Internet in corporate strategy.<sup>50</sup> Companies can now compete globally by having instant access to international markets.

### III. FREEDOM OF SPEECH AND THE INTERNET

#### A. China

##### 1. Historical Background of the Right to Free Speech in China

China's governments have traditionally utilized censorship. “Spanning from 213 B.C. to the literary inquisition during the reign of the Manchu Emperor Chi'en Lung in the eighteenth century, China persecuted scholars who asserted their freedom of expression,” while still encouraging intellectual pursuits.<sup>51</sup> The early 1900s saw the rise of many revolutionary free thinkers.<sup>52</sup> For example, Zou Rong spoke out against the current government by printing and distributing a pamphlet calling for revolution.<sup>53</sup> Rong was tried and sentenced to prison where he died in 1905.<sup>54</sup> This revolution kindled the growth of the literary culture in China,<sup>55</sup> and resulted in the increased publication of books, magazines, and pamphlets.

Unfortunately, Chinese authors still had to answer to the existing government for their thoughts. In 1919 Chen Duxiu was tried for crimes against the government for creating and publishing *New Youth*—a magazine that assaulted the existing government.<sup>56</sup> Tighter government controls that undermined civil liberties were

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48. Patrick G. Crago, Note, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 467, 476 (1997).

49. See *id.*

50. See John H. Taylor, III, *The Internet In China: Embarking on the "Information Superhighway" With One Hand on the Wheel and the Other Hand on the Plug*, 15 DICK. J. INT'L L. 621, 624 (discussing the role of the Internet in the global marketplace).

51. See Feir, *supra* note 37, at 377; see also J.A.G. ROBERTS, *MODERN CHINA: AN ILLUSTRATED HISTORY* 16 (1998) (relating that the Manchu Empire encouraged scholarship and the compilation of literary works; any works found to be offensive to the Manchus were destroyed).

52. See generally ROBERTS, *supra* note 51, at 128–29 (detailing the lives and persecutions of several revolutionary thinkers in the early 1900s).

53. PATRICIA BUCKLEY EBREY, *CAMBRIDGE ILLUSTRATED HISTORY: CHINA* 264 (1996).

54. See ROBERTS, *supra* note 51, at 129. In the early 1900s China's top General, Yuan Shikai, tried to consolidate his power by executing members of parliament and shutting down newspapers. *Id.* at 139; see also EBREY, *supra* note 53, at 265.

55. See ROBERTS, *supra* note 51, at 150–53 (describing the emergence of the new literary world in China and the government's response to new and independent thought).

56. See *id.* at 152.

developed in the 1940s,<sup>57</sup> while censorship and arrest continued to bridle critics of the government.<sup>58</sup>

The rise of the Chinese Communist Party (CCP) brought about another revolution.<sup>59</sup> However, the clamp on independent thought and ideas remained tight. In the 1960's, top journalists of national and local newspapers and networks were replaced with those sympathetic to the government.<sup>60</sup> Currently, China is censoring books and other publications that threaten the status quo or criticize China's attitude towards human rights.<sup>61</sup>

The Constitution for the People's Republic of China (PRC) recognized Four Great Democracies: "(1) to speak out fully, (2) air views freely, (3) hold great debates, and (4) write big character posters."<sup>62</sup> This provision was repealed in 1980.<sup>63</sup> Nevertheless, the PRC Constitution still provides for "freedom of speech."<sup>64</sup>

However, the concept of freedom of expression is typically viewed differently in China than in most Western democracies. The PRC believes that rights are only instruments for realizing state objectives,<sup>65</sup> and are merely residual freedoms found within the confines of the law.<sup>66</sup> All rights must be sacrificed, if necessary, for the good of the common collective.<sup>67</sup> As a result, China has traditionally kept the dissemination of information and freedom of expression to a minimum.<sup>68</sup> The CCP controls all facets of government including the freedom of expression granted in the Constitution.<sup>69</sup> The CCP has historically utilized the "official" press as a propaganda tool to disseminate the Party's goals and values.<sup>70</sup> Moreover, since the

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57. See *id.* at 213 (explaining that during the 1940s, China was in a civil war). The Guomindang and the Chinese Communist Party were fighting for control. Each party was restricting any literature or speeches against their interests. *Id.*

58. *Id.*

59. See generally EBREY, *supra* note 53, at 262-336 (illustrating the rise of the Communist Party and the establishment of communism in China).

60. See Feir, *supra* note 37, at 377.

61. See Fons Tuinstra, *Chinese Imports of Foreign Books Expected to Rise, Despite Censorship*, DEUTSCHE PRESSE-AGENTUR, Oct. 24, 1996, available in LEXIS, News Library, DPA File.

62. XIANFA art. 13 (1975).

63. *Id.*

64. *Id.* art 35 (1982) (stating that "citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration"); see also SUZANNE OGDEN, CHINA'S UNRESOLVED ISSUES, 151-52 (3d ed. 1995).

65. See generally Peter Lin, Note, *Between Theory and Practice: The Possibility of a Right to Free Speech In The People's Republic of China*, 4 J. CHINESE L. 257, 261 (1990).

66. See *id.*; see also XIANFA, *supra* note 62, art. 53 ("Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property and observe labor discipline and public order, and respect social ethics.").

67. See Lin, *supra* note 65, at 262.

68. See generally OGDEN, *supra* note 64, at 150; *Censorship, Chinese Style*, THE INDIANAPOLIS STAR, Dec. 9, 1996, at A18.

69. See ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 47 (1995).

70. See EBREY, *supra* note 53, at 301 (explaining that the CCP created propaganda departments which controlled the publishing industry, to disseminate the party ideals); see generally Taylor, *supra* note 50, at 630.

educated members of Chinese society are employees of the state, they are neither allowed to express views divergent from the CCP nor have a distinct cultural life.<sup>71</sup>

However, China's desire to compete in the world market has induced the CCP to integrate into the international community.<sup>72</sup> In 1977, the CCP committed itself to transforming China into a modern state by the year 2000.<sup>73</sup> This need has led the CCP to allow the availability of Internet access, even though the CCP has not given up control over the dissemination of ideas and the modes of communication.<sup>74</sup>

The CCP has recently passed several laws to regulate Internet access. Ultimately, any mode or manner of speech and its content must receive authorization from the CCP.<sup>75</sup> These laws raise serious questions regarding the right to free speech in China.

## 2. The Internet and the Freedom of Speech in China

Internet use in China is on the rise. In 1995, there were 20,000 users on-line and<sup>76</sup> 2.1 million by 1998.<sup>77</sup> The China Internet Network Center predicts that the number of users will rise to 6.7 million in 1999.<sup>78</sup> The number of users is expected to exponentially increase to 16 million by 2005.<sup>79</sup>

With the rise of Internet users in China, the Chinese government has faced significant difficulties in trying to control access to, and content on, the Internet. For example, the Chinese government witnessed the political power of the Internet in 1989 when the Tiananmen democracy movement used the Internet through local university connections in an effort to promote their political messages.<sup>80</sup>

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71. See EBREY, *supra* note 53, at 307 (discussing the role of intellectuals in the CCP).

72. See Yan Ma, *Internet: The Global Access of Information*, 12 MICROCOMPUTERS FOR INFO. MGMT. 189, (1995); see also Kathy Chen, *China and Vietnam Resist A Common Foe: Internet*, ASIAN WALL ST. J., Sept. 5, 1996, at 1.

73. See ROBERTS, *supra* note 51, at 264 (explaining that the CCP recognized the Four Modernizations—modernization of agriculture, industry, science and technology, and national defense—as being the gateway to success).

74. See Marcus W. Brauchli, *China to Tighten Access to International Internet*, ASIAN WALL ST. J., Feb. 5, 1996, at 6; see also Simon Fluendy, *Pandora's Box: Asian Regimes Struggle to Keep a Lid on the Net*, FAR E. ECON. REV., Sept. 26, 1996, at 71; Arnold, *supra* note 8, at 1.

75. See generally Human Rights Watch, *Silencing the Net: The Threats to Freedom of Expression On-line*, (visited July 22, 1999) <[http://www.epic.org/free\\_speech/intl/hrw\\_report\\_5\\_96.html](http://www.epic.org/free_speech/intl/hrw_report_5_96.html)> (stating that Xinhua News Agency, China's state run news agency, screens all information generated outside of China before it is released to the limited number of newsgroup subscribers).

76. See *China: A Shift in Focus With a Little Restructuring*, ASIA-PAC. TELECOMM., Oct. 1, 1998.

77. See Anderson, *supra* note 25.

78. *Id.*; see also fig. 2, available at <<http://www.nua.ie>>.

79. See generally *China: A Shift in Focus With a Little Restructuring*, *supra* note 76.

80. See Feir, *supra* note 37, at 367 (emphasizing the difficulties the Chinese government faces in trying to control Internet access and content).

### Number of Internet Users in China

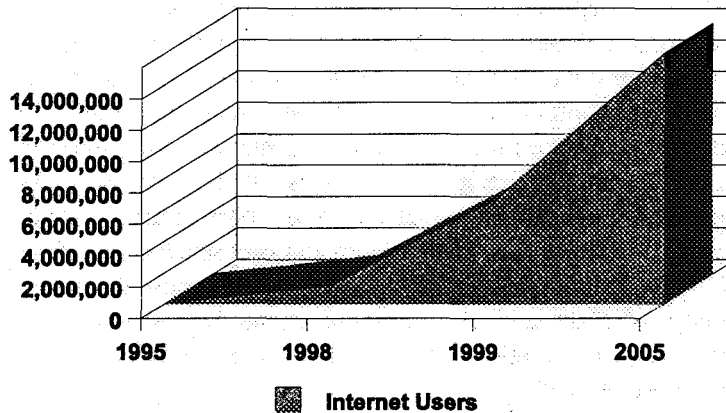


Figure 2

In response to the rapidly expanding and unrestrained use of the Internet, the CCP has issued regulations in an effort to maintain tight control of the exchange of information and ideas on the Internet.<sup>81</sup> The CCP is concerned with the potential harm posed by unfettered access to sites that contain harmful information, such as “politically, ideologically, socially, or morally sensitive information” and illegal or criminal activity on the Internet.<sup>82</sup> According to the CCP, these restrictive Internet regulations were enacted to “promote Internet applications in China in a sturdier, more orderly way.”<sup>83</sup> To achieve its goals, the CCP requires individuals to obtain licenses for Internet access. ISPs can gain access only through gateways controlled by the Ministry of Posts and Telecommunications.<sup>84</sup> Moreover, Internet users are required to register with the local police and provide their name, the name of the service provider, their e-mail address; and any newsgroups in which the individuals participate.<sup>85</sup> These Internet regulations were approved and signed into law in 1996,

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81. See Zhang, *supra* note 17, at 9 (describing the new Internet regulations passed by the Chinese Ministry of Public Security); see also Michael Aldrich, *An Overview of Electronic Commerce Issues in the People's Republic of China*, 15 No. 9 COMP. LAW. 17, 21 (1998) (explaining the emergence of the PRC's Internet laws and how e-commerce will be effected).

82. See Zhang, *supra* note 17, at 9; see also *China—Cyberspace Crimes On The Rise*, *supra* note 18.

83. *China Network Regulations Issued*, *supra* note 17, at 1.

84. REV. PROVISIONAL REG. GOVERNING THE MGMT. OF CHINESE COMPUTER INFO. NETWORKS CONNECTED TO INT'L NETWORKS, art. 6 (1997); see Smith, *supra* note 30, at 1.

85. See Uli Schmetzer, *China's Internet Users Must File with Police*, NEW ORLEANS TIMES-PICAYUNE, Feb. 16, 1996, at A14; *China Logs on to the Internet*, ECONOMIST, Jan. 7, 1995, at 27.

revised in 1997, and incorporated twenty-five more stipulations in 1998.<sup>86</sup> China now has the most regulated Internet environment in the world.<sup>87</sup>

The new Internet regulations are divided into five Chapters. Each Chapter outlines either rights, obligations, or punishments for both ISPs and individuals. Chapter One addresses the oversight and the application of the regulations and the types of activities and content that is illegal. "The Ministry of Public Security is responsible for the security, protection and management of computer information networks and the Internet."<sup>88</sup> Prohibitions consist of the "transmission of state secrets, politically subversive material, and pornographic and violent communications."<sup>89</sup> Additionally, unregistered and unrestricted use of the Internet is prohibited.<sup>90</sup> For example, all Internet and network users must gain prior approval from the Ministry of Posts and Telecommunications before using the Internet, adding information to or deleting information from the Internet or Intranet, or changing network functions.<sup>91</sup>

Chapters Two and Three of the new regulations outline the responsibilities of ISPs and the Ministry of Public Security for administering networks and protecting the public.<sup>92</sup> Internet Service Providers are under the control and supervision of the Ministry of Public Security. ISPs must: (1) assist the Ministry of Public Security in discovering individual users who violate the law,<sup>93</sup> (2) ensure that all networks are safe and secure, and (3) that no users violate the law.<sup>94</sup> For example, ISPs must register all Internet users and provide the Ministry of Public Security with the user's identifying information.<sup>95</sup> The ISPs must supervise what information is being transmitted through their gateways.<sup>96</sup> Further, ISPs must remove access to all sites that are in violation of Chinese law.<sup>97</sup> However, Beijing Internet Service Providers,

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86. *New PRC Internet Regulation*, U.S. EMBASSY BEIJING, Jan. 1998, (visited Nov. 4, 1999) <<http://www.usembassy-china.org.cn/english/sandt/netreg.html>> (maintaining that the regulations cover the management of the security of networks, outlines the duties and responsibilities of Internet Service Providers, and the punishments for outlawed Internet use). The Embassy found that the twenty-five new provisions added in 1998 contained no new regulations. *Id.* They only provided more detail and outlined specific procedures for Internet use. *Id.*; see also Zhang, *supra* note 17; Feir, *supra* note 37, at 367. See, e.g., *China Network Regulations Issued*, *supra* note 17, at 1.

87. See Peng Hwa Ang, *Internet Development in Asia* (visited Nov. 14, 1999) <[http://jargo.itim.mi.cnr.it/inet96/h1/h1\\_1.htm](http://jargo.itim.mi.cnr.it/inet96/h1/h1_1.htm)> (explaining the factors behind the growth of the Internet in Asia and finding that China is maintaining the tightest control over Internet access in Asia).

88. COMPUTER INFO. NETWORK AND INTERNET SEC., PROTECTION AND MGMT REG., ch. 1, § 3 (1997) [hereinafter INTERNET LAWS].

89. *Sweeping New Controls For Surfing the Net in China*, THE CANBERRA TIMES, Jan. 1, 1998, at 5; see also INTERNET LAWS, *supra* note 88, ch. 1, § 4-5.

90. See Feir, *supra* note 37, at 367-69.

91. INTERNET LAWS, *supra* note 88, ch. 1, § 6.

92. See *id.* ch. 2, § 8.

93. See *id.* ch. 3, § 15-17.

94. See INTERNET LAWS, *supra* note 88, ch. 2, § 10.

95. See *id.* ch. 2, § 10-11.

96. See *id.*

97. See *id.* ch. 2, § 10.

in speech, writing, and picture,” and to obtain information from generally accessible sources without interference.<sup>106</sup> The freedom of the press and the freedom to report information through broadcast and film are guaranteed.<sup>107</sup> However, Article 5 also limits these freedoms of personal expression by provisions in the general law, statutes that protect the youth, and an individual’s right to protect his or her personal honor.<sup>108</sup> Government action under Article 5 is limited by Article 1(3). It provides that the “basic rights [shall bind the] legislature, [the] executive, and [the] judiciary as directly enforceable law.”<sup>109</sup> The most unique aspect of Article 5 is that it applies to both private actors and government action.<sup>110</sup>

The German Constitution is hierarchically organized with all Articles connected with and dependant upon each other.<sup>111</sup> The German Federal Constitutional Court (the FCC) applies a balancing test for proposed restrictions in order to analyze each statute to determine if it infringes on other constitutional rights. The aim of the FCC is to protect personal development from government and private intrusion. Because “[s]peech is valued according to its utility in promoting” personal development,<sup>112</sup> the FCC balances the interest of free speech with civility norms under an objective ordering of values. Based on the hierarchical system, if the FCC determines that the community value needing protection is more important than the individual right, the law is deemed constitutional.<sup>113</sup> For example, the FCC has held that pieces of art are constitutionally guaranteed freedom of expression. However, some art, like pornography, has to yield to human dignity concerns.<sup>114</sup> In light of the hierarchical or step ladder approach employed by the FCC, any constitutionally guaranteed right may be balanced away as having infringed on a higher hierarchical right.<sup>115</sup>

Freedom of expression restrictions exist not only in the construction of the German Constitution but also in the attitude of the government and ultimately in the formation of German laws.<sup>116</sup> For example, the German Penal Code restricts anyone from disseminating, producing, or importing Internet content that can be used to

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106. *Id.* art. 5.

107. *Id.* (“There shall be no censorship.”).

108. *See id.* art 5, pt. 2. *See generally* Eberle, *supra* note 102, at 800–07 (presenting German law and its guarantee to freedom of expression).

109. GG, *supra* note 105, art. 1, § 3.

110. *See* Eberle, *supra* note 102, at n.18 (explaining that the holding in the *Luth* case applies the Basic Law to private actions. The Court held that the Basic Law applies indirectly to private causes of action. *Id.* Civil law courts must apply a balancing test between the express general law and Basic Law when deciding a case).

111. *See* Uli Widmaier, *German Broadcast Regulation: A Model For A New First Amendment?*, 21 B.C. INT’L & COMP. L. REV. 75, 84 (1998).

112. Eberle, *supra* note 102, at 800.

113. *See id.* at 800–07.

114. *See* Widmaier, *supra* note 111, at 85–86; *see also* 30 Bundesverfassungsgericht 173 (1971) [hereinafter BverfGE].

115. *See* Widmaier, *supra* note 111, at 87.

116. *See* Eberle, *supra* note 102, at 800–07 (presenting German law and its guarantee to freedom of expression); GG, *supra* note 105, art. 131 (F.R.G.).

an organization of independently owned ISPs, state that holding service providers responsible for what sites their customers visit on-line is an unrealistic expectation.<sup>98</sup> One Beijing Internet Service Provider commented that “[t]here is no practical way to monitor the on-line activity of China’s hundreds of thousands of Internet users.”<sup>99</sup> If so, the efficacy of this requirement may be questionable.

Chapters Four and Five establish penalties for violating the Regulations. For example, any income derived from illegal use of the Internet will be confiscated by the Ministry of Public Security.<sup>100</sup> Additionally, users, ISPs, and ISP officials face punishment in the form of fines, assignment to work projects, jail terms, the loss of their business license, or the closing of their network for up to six months.<sup>101</sup>

These regulations will have a profound impact on the Chinese people as well as on individuals and companies doing business in China. This impact is discussed in Part IV.B. China is not the only nation whose stringent regulations are impacting business on the Internet. Germany has also taken a heavy hand to regulate Internet content.

## *B. Germany*

### *1. Historical Background of the Right to Free Speech in Germany*

After World War II, Germany adopted a new Constitution in 1949.<sup>102</sup> This new constitution was intended to be the embodiment of the best of German thought and experience by incorporating the social, liberal, and democratic principles embodied in the 1849 Frankfort Constitution and the 1918 Constitution of the Weimar Republic and by adding a comprehensive system of judicial review.<sup>103</sup> Germany focuses on the development of the individual by granting the “right to speak, think, and inform oneself [and be] free from official and, notably, private intrusion.”<sup>104</sup> To achieve this end, Germany’s Constitution encourages the development of the human personality by guaranteeing the right to freedom of expression.<sup>105</sup>

These rights are embodied within Article 5 of the German Constitution, which states that “[each person] has the right to freely express and disseminate his opinion

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98. See New PRC Internet Regulation, *supra* note 86.

99. *Id.*

100. INTERNET LAWS, *supra* note 88, ch. 4, § 20.

101. *Id.* chs. 4–5.

102. See Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 800–07 (1997).

103. See *id.* at 797 (explaining that the German Constitution is a national response to the Nazi totalitarian regime by combining the nation’s three major legal traditions: classical liberalism, democratic socialism, and Christian natural legal thought, outlining an ordered set of values and setting forth rights and freedoms).

104. *Id.*

105. GRUNDGESETZ [Constitution] art. 5, pt. 1 (F.R.G.) [hereinafter GG] (“Everyone [shall have] the right to freely express and disseminate his opinion by speech, writing and pictures and to freely inform himself from generally accessible sources . . . . There [shall] be no censorship.”).

promote Nazi propaganda.<sup>117</sup> Additionally, a jail term is imposed on those individuals who use denigrating speech regarding race, ethnicity, gender, or physical appearance.<sup>118</sup> Government restrictions are also supported by the attitudes and beliefs of German citizens.<sup>119</sup> One poll found that fifty-eight percent of Germans want to avoid radical political messages on the Internet. Sixty-one percent of Germans believe that messages depicting violence should also be blocked from the Internet.<sup>120</sup> However, only thirteen percent of Germans want nudity blocked on the Internet.<sup>121</sup>

Germany's attitude about freedom of expression and modern communication mediums is incorporated in the German Constitution. Germany has recognized that speech takes many forms by providing for the freedom of broadcast and freedom of expression in film.<sup>122</sup> However, in recent years, Germany has further restricted its citizens' right to freedom of expression by limiting their ability to communicate and disseminate ideas using modern communication mediums.<sup>123</sup> For example, in 1994, the German Parliament passed legislation permitting government eavesdropping on telephone calls.<sup>124</sup> Additionally, Germany does not recognize pure commercial speech as a protected form of speech unless it conveys an opinion and it does not exude undue influence over the public.<sup>125</sup>

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117. See Eric Stein, *History Against Free Speech: The New German Law Against The 'Auschwitz'—And Other—'Lies'*, 85 MICH. L. REV. 277, 279 (1986) (analyzing the German Penal Code's function in preventing unwanted public discourse).

118. See STRAFGESETZBUCH [German Penal Code] § 86(I)(4) [StGB]; see also Stein, *supra* note 117, at 286–322.

119. Bertelsmann Foundation Publishes Results of a Survey Conducted in Germany, The United States and Australia, PR NEWswire, July 29, 1999, available in LEXIS, Fin. News Library.

120. *Id.*

121. *Id.*

122. See GG, *supra* note 105, art. 5, § 1.

123. See Germany, 'World Champion' at Spying on its Own Citizens, to Monitor Internet Usage, *supra* note 35 (arguing that Germany's Multimedia Law is a "massive invasion" into the private lives of German citizens. The Law requires ISPs to provide the police with information on every customer, such as name, address, which services the user uses and in which newsgroups the user participates. Additionally, it is against the law to encrypt e-mail messages); see also German Law Attacks Smut on the Internet, *supra* note 14, at 21 (stating that the ICOSA gained approval only six months after its proposal in the Bundersrat, the Upper House of Parliament).

124. See Germany, 'World Champion' at Spying On Its Own Citizens, to Monitor Internet Usage, *supra* note 35.

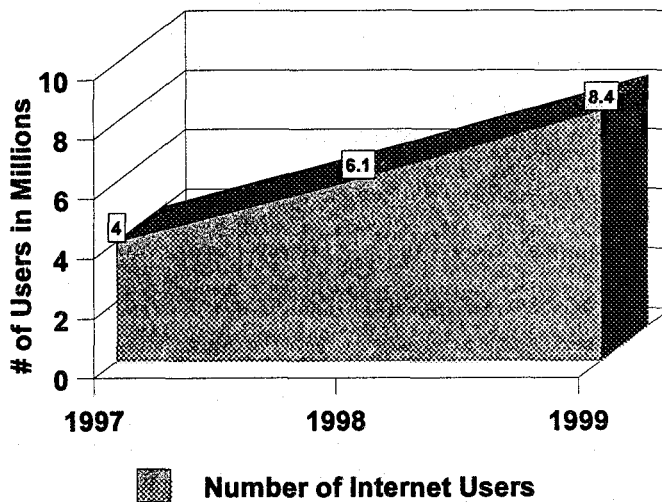
125. See Eberle, *supra* note 102, at 797 n.32 (citing several German cases that hold that commercial speech that purposes a commercial transaction is not protected by the Constitution). However, some advertisements may be protected under freedom of the press and an individual's right to inform oneself. *Id.* These rights will be balanced by the government's responsibility to protect the public from undue influence. *Id.*



## 2. The Internet and the Freedom of Speech in Germany

The number of Internet users in Germany has increased by about two million users a year since 1997.<sup>126</sup> The growing number of Internet users has increased the demand for Internet services. Until recently, liability for ISPs under German Law was ambiguous and unclear.<sup>127</sup> In an effort to establish legal certainties for publishing or making inaccessible illegal content on the Internet, the German Legislature responded with new legislation. In 1997, Germany passed the Information and Communications Services Act (ICSA).<sup>128</sup> The ICSA was the first attempt by any country to appoint ISPs to act as cyber police.<sup>129</sup> The ICSA enables

**Number of Internet Users in Germany**



**Figure 3**

126. NUA Surveys, October 7, 1999, (visited Nov. 30, 1999) available at <[http://www.nua.ie/surveys/how\\_many\\_online/europe.html](http://www.nua.ie/surveys/how_many_online/europe.html)> (see fig. 3).

127. See, e.g., John F. McGuire, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 770-72 (1999) (demonstrating the uncertainty that existed in German law prior to the enactment of the ICSA). In 1995, CompuServe Germany blocked access to 200 sites that violated German obscenity laws. *Id.* Because CompuServe did not have the technology to block those sites in Germany only, the sites were blocked to all CompuServe users worldwide. *Id.* However, despite the fact that CompuServe tried to adhere to German law, CompuServe's General Manager was charged with dissemination of pornography and extremist propaganda. *Id.*

128. Heiner Bunting, *The New German Multimedia Law—A Model for the United States?*, COMP., Sept. 1997, at 17 (stating that Germany is the first jurisdiction to address Internet regulation).

129. See Kim Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 794 (1998) (noting that Germany is the first country to require screening of Internet content by Internet Service Providers).

Germany to restrain self expression by prohibiting certain communications on the Internet. It requires ISPs to provide the police, German intelligence agencies, and administrative agencies with the name and address of all Internet users and the services and newsgroups to which the users subscribe.<sup>130</sup> Further, ISPs are required to appoint a youth protection officer or self-control committee to ensure that content unsuitable for youth is limited to adults.<sup>131</sup>

The ICSA is divided into eleven articles. However, only Articles One and Six affect content regulation. Article One applies to all electronic and communication services<sup>132</sup> and providers of electronic information.<sup>133</sup> A provider is a natural or legal person who provides access to the use of teleservices.<sup>134</sup> All providers are held responsible under the criminal and civil laws for content created by the provider. If the providers are aware that third parties have posted information contrary to German law, those providers must use all reasonable means to block access to the illegal information.<sup>135</sup> However, unlike China,<sup>136</sup> Germany does not subject teleservice providers to licensing or registration.<sup>137</sup>

"Article Six brings service providers within the Law on Protection of Minors [which] requires the use of a complicated rating system to determine what material constitutes a threat to youth."<sup>138</sup> Under the Law on Protection of Minors, providers are prohibited from disseminating or providing users access to any material that is rated as harmful to children.<sup>139</sup> Further, providers are required to appoint youth protection officers to ensure objectionable content is not disseminated to children.<sup>140</sup>

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*See, e.g.,* Human Rights Watch, *supra* note 75 (stating that several Germany ISPs were acting as cyber police before the enactment of the ISCA). *Id.* In 1996, DT, a German telephone company, blocked users to its T-Online network from sites that posted anti-semitic propaganda. *Id.*

130. *See Germany, 'World Champion' at Spying On Its Own Citizens, to Monitor Internet Usage, supra* note 35. The Law requires ISPs to provide the police with information on every customer, such as name, address, which services the user uses and in which newsgroups the user participates. Additionally, it is against the law to encrypt e-mail messages. *Id.*; *see also* Entwurf eines Gesetz zur Regelung der Rahmenbedingungen für Informations und Kommunikationsdienste [Federal Act Establishing the General Conditions for Information and Communication Services] (1996) [hereinafter *IuKDG*], available at <<http://www.iid.de/rahmen/iukdge.html>>; Information and Communications Act (F.R.G.) (1997) translated in 37 *I.L.M.* 564 (1998) [hereinafter *ICSA*].

131. *See ICSA, supra* note 130, art. 6, § 78a.

132. *See id.* art. 1, § 2.

133. *See id.*

134. *See id.* art. 1, § 3. "Teleservices" includes Internet access, telebanking, data exchange, telegames, goods, and services for sale on any communications network that has the ability of direct order and data services. *See id.* art. 1, § 2.

135. *See id.* art. 1, § 5.

136. *See discussion supra* text in Part III.A.2.

137. *See ICSA, supra* note 130, art. 1, § 4; *see also* INTERNET LAWS, *supra* note 88, ch. 1.

138. *ICSA, supra* note 130, art. 6; *see also* Rappaport, *supra* note 129, at 794 (analyzing the scope of ISCA Article Six).

139. *See Rappaport, supra* note 129, at 794.

140. *See ICSA, supra* note 130, art. 6.

Once illegal content is found, ISPs must erect a firewall, or a series of blocks and filters to block access to those sites.<sup>141</sup>

Like China, Germany's content regulations are seriously impacting the growth of business on the Internet. These impacts are discussed in Part IV.

#### IV. BUSINESS AND THE INTERNET

##### A. *Commerce on the Internet in China and Germany*

The ever growing advances in technology provide companies with new means and methods to conduct business.<sup>142</sup> The arrival of the World Wide Web user friendly browsers,<sup>143</sup> and the launch of Internet e-commerce is dramatically reshaping the marketplace.<sup>144</sup> For example, in 1998, consumers spent eight billion dollars on products purchased over the Internet.<sup>145</sup> With the advancements in technology and the growth of the Internet, e-commerce "is expected to exceed one trillion by 2003."<sup>146</sup>

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141. See discussion *infra* text Part IV.B.

142. See generally The Organization for Economic Co-operation and Development (OECD), *The Economic and Social Impact of Electronic Commerce*, (visited Sept. 24, 1999) <<http://www.oecd.org/subject/e-commerce/summary.htm>>.

143. See *id.* at 10.

144. See Thomas, *supra* note 26, at 1022-23 (expounding on the impact the Internet has on business development); see also Ciaran Ryan, *The Land of the (Nearly) Free*, GOV'T. TECH.: E-COMMERCE, Aug. 1999, at 16 (explaining that the playing field for commerce is changing). Companies will offer free net access and free computers to users willing to be overrun by advertisements. *Id.* Computer companies offer free products with the belief that the difference in profit will be realized by consumer spending on the Internet. *Id.*

145. See BLOOMBERG NEWS, *Media, Tech Execs Form E-commerce Group*, available at <<http://www.news.cnet.com/news/o-1007-200-337397.html>> (estimating the growth potential of commerce on the Internet).

146. *Visa Survey Forecasts Substantial Growth of Commercial Electronic Commerce*, COMLINE PACIFIC RESEARCH CONSULTING, Mar. 12, 1999, available in 1999 WL 10556239 (finding that the annual growth of Internet business is 66%); see also fig. 4, available at <<http://www.nua.ie>>.

### Estimated Revenue From E-Commerce

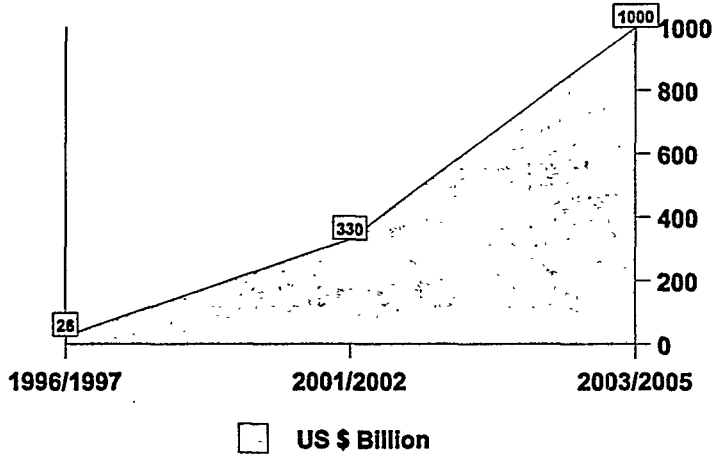


Figure 4

The emergence of e-commerce provides new market openings<sup>147</sup> that will “increase[] competition, improve[] telecommunications infrastructures, [provide] more customer choice, lower prices and increase[] and improve[] services.”<sup>148</sup>

E-commerce will affect every industry sector around the globe such as services, manufacturing, governments, educational institutions, technology, financial services, and retail.<sup>149</sup> The largest sector of e-commerce is located in the United States. However, electronic commerce in Europe will be focused in Germany<sup>150</sup> with Asia struggling to tap into the e-commerce market.<sup>151</sup> Because the growth of the Internet is imperative to the development of e-commerce, any restrictive Internet regulations will impede the growth of this market.

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147. See *The Economic and Social Impact of Electronic Commerce*, *supra* note 142, at 10.

148. G. Doukidis et al., *The Impact of the Development of Electronic Commerce on the Employment Situation in European Commerce*, Sept. 30, 1998, (visited Nov. 30, 1999) <<http://www.fiet.ch>> (explaining that the benefits of e-commerce to businesses and the consumer will transform merchant services such as marketing and customer service).

149. See *Media, Tech Execs Form E-commerce Group*, *supra* note 145 (stating that a wide range of companies are actively trying to stimulate Internet commerce and encourage web users to purchase goods and services on-line).

150. See *Internet in Europe Surging, Over Half are Consumers*, COMPUTERGRAM INT'L, available at 1998 WL 18863937 (estimating that Germany will be a major player in the European Internet market because Germany holds the largest number of Internet seats in Europe).

151. See Martyn Williams, *China Electronics Giant to Launch Internet Shopping Mall*, NEWSBYTES, Mar. 25, 1999, available at 1999 WL 5120711 (maintaining that the opening of the new on-line shopping mall is an effort by the government to help launch e-commerce in China); see also *China: A Shift in Focus with a Little Restructuring*, *supra* note 76 (emphasizing that the economic turmoil in Asia has not undermined China's efforts in developing e-commerce).

E-Commerce is broken down into two parts: business-to-business and business-to-consumer. Business-to-business e-commerce refers to transactions that occur between two or more corporations through the use of electronic means.<sup>152</sup> Business-to-business e-commerce accounts for about eighty percent of all of e-commerce activity.<sup>153</sup> Not surprisingly, companies supplying the infrastructure for the Internet are among the largest business-to-business players in the e-commerce market.<sup>154</sup>

Despite the large revenues generated by the business-to-business segments, the most public attention is on the business-to-consumer segment.<sup>155</sup> The business-to-consumer segment is comprised of several real-world business models such as: (1) the mail order model, an Internet site that sells tangible goods for purchase and shipment to the buyer's address, (2) the advertising based model, a site that offers free services such as e-mail or web search capabilities that will incorporate advertisements, such as banners or other icons, for a fee, (3) the subscription model, a digital database, such as a library, music sites or newspapers, that can be accessed for a fee, (4) the free trial model, sites that allow users to download a software package that will work for a limited time, (5) the direct marketing model, the use of e-mail for direct marketing, better known as "spam," (6) the real estate model, the sale of web space, and (7) the incentive scheme model, the use of contests or free goods or services to gain information on a user.<sup>156</sup> Many companies use a combination of these models to increase profits.

The Internet provides a level playing field for competing companies by presenting them with the same consumer base and marketing options.<sup>157</sup> A company can streamline<sup>158</sup> its purchasing processes and buy materials and services at lower costs.<sup>159</sup> For instance, customer service consists of more than ten percent of operating costs for major companies.<sup>160</sup> Because interactive web sites allow the customer to receive immediate results, companies can cut costs and improve the quality of customer service by moving services on-line.<sup>161</sup> Not only does the

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152. See G. Doukidis et al., *supra* note 148.

153. See *The Economic and Social Impact of Electronic Commerce*, *supra* note 142, at 36.

154. See *id.* (explaining that the growth of the Internet and business intranets are pushing companies that supply Internet infrastructure to the top of the revenue charts). Some supply companies, such as Cisco, are generating over two billion dollars per day. *Id.*

155. See generally G. Doukidis et al., *supra* note 148.

156. See generally Bambury, *supra* note 26.

157. See Angela Soane, *Europe Set to Head Online Push E-Commerce UK, Germany and France Predicted to Make Up 80 Percent of all Internet Transactions by 2003*, PC DEALER, Mar. 17, 1999, at 10 (predicting that small businesses will grow at the fastest pace and volume levels at large and medium size companies will increase).

158. See generally Ryan, *supra* note 144, at 17-19 (postulating that companies can realize massive benefits from the use of e-commerce such as lower distribution costs, smaller staff, and give better customer services). However, survival for smaller companies may require the formation of alliances and networks. This could result in monopolies in several industry sectors. *Id.*

159. See Soane, *supra* note 157, at 10 (explaining how the Internet can help companies maximize profits).

160. See *The Economic and Social Impact of Electronic Commerce*, *supra* note 142, at 10.

161. See *id.*; see also Fletcher, *supra* note 23 (setting forth the unique characteristics of Internet advertising).

Internet offer low cost advertising with a potentially worldwide reach,<sup>162</sup> but Internet advertisements are also accessible twenty-four hours per day, 365 days per year.<sup>163</sup> Additionally, the Internet gives companies direct access to systems with electronic mail, payment, and credit verification.<sup>164</sup>

China's current top force sees technology as the route to economic development<sup>165</sup> by helping China stay competitive on the global market.<sup>166</sup> Many business owners are using the Internet to locate the most promising markets and to develop business contacts outside of China. In 1997, China's industrial sector engaged in US\$15 billion of foreign trade and development through the use of the Internet.<sup>167</sup> Additionally, China is using e-commerce to boost the confidence of the Chinese people in technology and Internet shopping.<sup>168</sup> However, Chinese law has limited foreign investment in China's new technology sector. For example, ISPs in China are prohibited from accepting foreign investors.<sup>169</sup> China's Information Industry Minister, Wu Jichuan, contends that China still needs to strengthen its control over the Internet business before allowing foreign investments.<sup>170</sup>

Despite the leaps and bounds of progress by the CCP in venturing into the Internet age, e-commerce in China still has many limitations.<sup>171</sup> For instance,

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162. See Mark Sableman, *Business Liabilities on the Internet*, 16 COMM. LAW 3, 3 (1998) (discussing how the Internet has become a popular business medium); see also Fletcher, *supra* note 23 (explaining that web pages are accessed according to the interests of the user. Additionally, there are no printing or distribution fees when advertising on the Internet. The cost is the same to reach millions of users as it is to reach just one. Further, there is no increased cost to reach a consumer on the other side of the world).

163. See Fletcher, *supra* note 23 (describing the effect of Internet advertising on business growth and explaining the initial cost to advertise on the Internet).

164. See Mark Sableman, *Business on the Internet, Part II: Liability Issues*, 53 J. MO. B. 223, 223 (describing the economic benefits of Internet usage).

165. See Susan V. Lawrence, *China: Surf's Up*, FARE. ECON. REV., Mar. 4, 1999, at 10 (stating that China's top leaders, President Jiang Zemin and Premier Zhu Rongji, are trained engineers who understand the importance of technology. Chen Bangzhu, Vice Minister of the State Economic and Trade Commission, said that "The practice of e-commerce is sure to bring new opportunities and vitality to domestic industry"); see also Feir, *supra* note 37, at 365 (commenting that Chinese government is taking large steps toward establishing a strong Internet base in China and promoting the use of the Internet by Chinese businesses).

166. See Lawrence, *supra* note 165, at 10 (explaining that the Chinese government recognizes that competing on cost in low-end manufacturing will not propel China into the main growth industries).

167. See *Using Information Technology for Foreign Trade in China*, XINHUA NEWS AGENCY, June 29, 1998 (describing the increase in profits seen by China's industrial province due to the use of information technology).

168. See Williams, *supra* note 151 (proclaiming that China's new on-line shopping mall will boost the confidence of the Chinese populace in e-commerce).

169. See *China Warns Off Foreign Investment*, INSIDE CHINA TODAY, Sept. 14, 1999 (visited Sept. 15, 1999) <<http://www.invest.insidechina.com/business.php3?id=92265.html>> (stating that China's ISPs are value added services and that service area is not open to foreign investors).

170. *Internet Firms Spooked By Minister's Remark*, INSIDE CHINA TODAY, Sept. 15, 1999 (visited Sept. 15, 1999) <<http://www.invest.insidechina.com/features.php3?id=92579.html>>.

171. See Gabriella Faerber, *China.com Faces Dot.competition*, WORLDLYINVESTOR.COM, Aug. 25, 1999 (visited Sept. 15, 1999) <[http://www.worldlyinvestor.com/article/article.jhtml?article\\_id=3573.html](http://www.worldlyinvestor.com/article/article.jhtml?article_id=3573.html)> (quoting Matei Mihalca, Head of Internet Research with Merrill Lynch Asia Pacific, as saying that cultural differences, legal obstacles, and low credit-card penetration are obstacles to E-Commerce in China). See generally Aldrich, *supra* note 81, at 21 (explaining that China is still in the early stages of Internet business development). The PRC

Chinese banks have not yet authorized the use of debit or credit cards on the Internet.<sup>172</sup> Small-business owners in China are faced with the new challenge of international delivery.<sup>173</sup> Most importantly, China still has not authorized its citizens to have full access to the Internet,<sup>174</sup> thus limiting the beneficial impact of using the Internet to promote business.

In Europe, Germany is a major leader in e-commerce. In large part, this is because Germany has the world's most technologically advanced telecommunications systems and the world's third largest economy.<sup>175</sup> The German government encourages the use of Internet technology in their booming economy.<sup>176</sup> German corporations own the majority of corporate Internet sites, comprising twenty-seven percent of all Internet commerce sites.<sup>177</sup> In 1998, more than fifty percent of Germany's top 500 corporations used the Internet for advertising.<sup>178</sup> Because of the growth of the Internet and Germany's progressive attitude towards e-commerce, "[t]he customer potential for Germany is forecasted to be around fifteen million people by the year 2000."<sup>179</sup> However, unlike China, some commentators state that Internet regulation in Germany will boost e-commerce.<sup>180</sup>

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is still formulating and shaping its Internet commerce laws. There are no regulations dealing with Internet contracts. *Id.* See also Feir, *supra* note 37, at 367 (noting the PRC's desire to maintain tight control over the exchange of information on the Internet).

172. See Lawrence, *supra* note 165, at 10 (explaining that Chinese on-line consumers still have to drop a check in the mail or fax credit card information when ordering on-line). However, the Bank of China is now allowing its debit card holders to pay Internet connection fees on-line. *Id.*

173. See *id.* (noting that Chinese businesses mostly rely on their national post office for delivery of products).

174. See discussion *supra* text Part III.A.2.

175. See CIA, THE WORLD FACTBOOK 1999: GERMANY (visited Sept. 29, 1999) <<http://www.odci.gov/cia/publications/factbook/gm.html>>; see also fig. 5, available at <<http://www.nua.ie>>.

176. See Jetter, *supra* note 25 (expounding on the technological advances in Germany and the interaction of the German government).

177. See Visa Survey Forecasts Substantial Growth of Commercial Electronic Commerce, *supra* note 146 (finding that e-commerce will be focused in five countries including the following: France, Germany, Japan, U.K. and the United States. This will comprise 94% of the total Internet sales); see also Internet in Europe Surging, Over Half are Consumers, COMPUTERGRAM INT'L, available in 1998 WL 18863937 (stating that Germany held the most Internet sites in Europe in 1997 with 4.7 million sites).

178. See Alexander Ehrlich, Germany 1998: Was the Breakthrough Year for On-line Advertising, MARKET INSIGHT, Jan. 12, 1999, available at <<http://www.ch7europe.com/archive/market/1999/199901/19990112.htm>> (finding that German companies are using the Internet for more efficient advertising). Banner advertising is expected to increase exponentially. Currently, German companies have bought out all available space and banner locations for the foreseeable future. *Id.*

179. See Jetter, *supra* note 25.

180. *Id.*

### Consumer Spending at German Sites

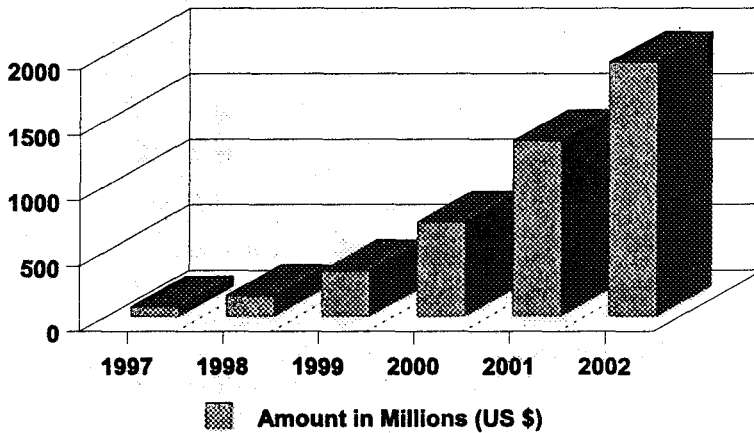


Figure 5

#### B. The Effect of Free Speech Restrictions on E-Business

Governmental regulation of the Internet not only affects the right of free self-expression, but has a direct impact on the business-to-consumer commercial speech.<sup>181</sup> Commercial speech consists of advertising and promotions including contests, lotteries, games of chance, and other similar activities.<sup>182</sup> Commercial speech appears in many different Internet formats such as corporate home pages, banner advertising on unrelated web pages, general product or service information, and unwanted e-mail solicitations.<sup>183</sup> The use of commercial speech on the Internet is an avenue for companies to increase their profit margins. However, the ease, convenience, and cost of Internet access as well as the access to commercial sites has a large impact on the growth potential of these markets and the business-to-consumer e-commerce segment.

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181. See Sableman, *supra* note 162, at 3 (defining commercial speech as speech that proposes a commercial transaction).

182. See *id.* (listing the types of commercial speech utilized on the Internet).

183. See *id.* (describing the various ways that commercial speech appears on the Internet); see also Joshua A. Marcus, *Commercial Speech On The Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 247 and n.14 (1998) (explaining that spam advertisements or advertisements posted in multiple newsgroups or mailing lists and bulk e-mail solicitations are frequently used by businesses).



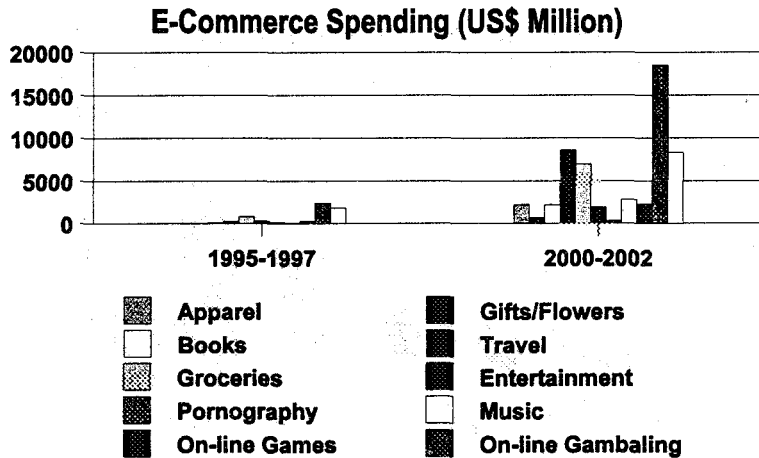


Figure 6

The creation of a national firewall or a system of Internet blocks and filters stop users from accessing all sites that contain any information a country deems undesirable or illegal.<sup>184</sup> Blocking software involves searching for key words or phrases that are deemed unacceptable or illegal.<sup>185</sup> By using broad language to block sites, many commercial sites will never be viewed by potential customers, thus limiting the profitability of these sites.<sup>186</sup> For instance, a book seller listing titles or book descriptions that contain any of the undesirable words will be blocked.<sup>187</sup> Additionally, newspapers, research firm services, travel sites, and apparel sites, to name a few, will also be blocked if any of the undesirable words appear on their sites. Both China and Germany have erected firewalls in their Internet networks.

China created the "Great Chinese Firewall," a series of blocks and filters to stop Chinese Internet users from accessing undesirable and illegal sites.<sup>188</sup> Chai Ling, CEO of Jenzabar.com, remarked that "[t]he Internet is a new and powerful means of communication that if stifled not only hurts free speech, but China's ability to

184. See discussion *supra* text Part III.A.2, Part III.B.2, and Part IV.A.

185. See generally Kelly M. Doherty, *www.obsenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 294-99 (1999) (describing various the filtering software available).

186. See Davies, *supra* note 9, at 5 (explaining that filtering devices exclude the undesirable content, but also exclude up to 90% of "decent" material on the Internet); see also fig. 6, available at <<http://www.nua.ie>>.

187. See Doherty, *supra* note 185.

188. See Maggie Farley, *Dissidents Hack Holes in China's New Wall*, L.A. TIMES, Jan. 4, 1999, at A1 (describing China's firewall and the firewall's vulnerability to hackers).

do business in the new Internet economy.”<sup>189</sup> To date, the Chinese government has not heeded such advice.

Germany has also erected a firewall to keep out illegal and potentially “harmful” material.<sup>190</sup> In April 1997, *Radikal* magazine and several pornographic sites were blocked in Germany.<sup>191</sup> Additionally, Deutsche Telekom, Germany’s telephone company, stopped phone line access to a California-based web server in an effort to block access to one neo-nazi web site.<sup>192</sup> The effect of these blocks and access termination is stagnation of e-commerce. Any business site that is located on a blocked server is blocked by this instant barrier to the German marketplace.

Government content regulation is inhibiting businesses from participating globally. Because laws change, from one country to another, businesses must cater to each individual nation when posting websites or developing Internet advertising. For example, when companies create advertisements, they must hire local agencies to adapt their advertisements to conform with the legal structure of that country.<sup>193</sup> The necessity of adapting an advertisement for each country adds to the company’s costs, thus limiting the usefulness of e-commerce.

Another commercial use of Internet information is the buying and selling of lists or compilations of e-mail addresses for direct advertising. These lists are used to send out advertisements to a large group of customers. Lin Hai, a Chinese businessman, sold a list of e-mail addresses for commercial purposes to VIP Reference.<sup>194</sup> VIP Reference, a Chinese dissident publication, used the e-mail addresses to send their on-line magazine to mainland China.<sup>195</sup> Hai was charged

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189. See *Tiananmen Square Democracy Movement Leader Chai Ling Available to Comment on Chinese Premier Zhu’s MIT Speech*, BUS. WIRE, Apr. 13, 1999 (explaining the difficulties facing foreign companies such as limited access due to firewalls when doing business in China).

190. See discussion *supra* text, Part III.B.2.

191. Interview with Ingo Ruhmann, member of the Board of Directors for Computer Professionals for Peace and Social Responsibility, *Telepolis*, Aug. 17, 1997, (visited Oct. 8, 1998) <<http://www.ix.de/tp/english/inhalt/te/1260/1.html>>.

192. See Martin, *supra* note 7, at 20 (stating that Internet laws are not stopped by national boundaries because they pertain to a borderless medium).

193. See David Reed, *Web of Intrigue: EU Laws Complicate Online Cross-Border Marketing*, DIRECT, Nov. 1997 (describing the difficulties in placing advertisements on the Web). The Marketing Director of Europe Yahoo explained that each advertisement must be altered to conform to the laws of each country. *Id.* Yahoo hires local agencies to adapt the advertisement before it is posted in that country. *Id.* For example, an advertisement in France must be in French only and advertisements in Germany must be free from any other links or information about pornography. *Id.*

194. See *Jailed Chinese Cyber-Dissident Receives US Web Award*, AGENCIE FRANCE-PRESSE, Feb. 13, 1999, available in 1999 WL 2545837 (reporting that Lin Hai, a Chinese businessman jailed for political subversion, was awarded the Freedom of Cyberspace Award).

195. See Farley, *supra* note 188 at A1 (explaining that VIP Reference’s on-line magazine contains content, such as articles and essays about democratic and economic revolution in China, that China’s filters were intended to block from the China Intranet). VIP Reference buys commercial and uses public lists of e-mail addresses in China. *Id.* They send their pro-democracy magazine to about 250,000 addresses in China. *Id.*

with subversion of the political system through the Internet.<sup>196</sup> Hai is currently serving a two year jail term for selling<sup>197</sup> what other countries view as a commodity.

## V. CONCLUSION

China and Germany, two very different governments, have unilaterally imposed national speech restraints on an international medium. In an effort to achieve their ends, both countries have erected national firewalls that employ the use of filtering systems to block illegal and unwanted content. However, it is difficult to isolate the individual sites that contain the illegal content from sites containing otherwise legal content. In the end, both illegal and legal sites are effectively blocked from access. Consequently, these two countries have effectively regulated content access for the global community. Moreover, China and Germany have not only dictated the free speech rights for the international community, they have also limited the profit-making ability of the new e-commerce market. Since it is simply impossible to limit illegal content without blocking access to legal sites, many legal commercial sites will be blocked. Additionally, companies and company officials participating in the e-commerce market face both criminal and civil liabilities in various countries if their company's site contains illegal information or links to illegal information. The result of blocking content access and imposing criminal and civil penalties on companies and their officials is a reduction of commerce in the fastest growing market today. If governments want to reap the economic benefits of e-commerce and the Internet, legislation must focus on economic issues.

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196. See *Jailed Chinese Cyber-Dissident Receives US Web Award*, *supra* note 194 (stating that Hai is the first Chinese person to be tried for political use of the Internet).

197. *Id.*