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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 span thousands of miles to reach a multitude of

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\* J.D., University of the Pacific, McGeorge School of Law, conferred May, 2000; B.A., Political Science/International Relations, Christopher Newport University, 1995. I would like to thank my parents, Rodney and Susan, for their endless love, support, and encouragement and my brother, Jeffrey, for teaching me the patience necessary to complete my Comment.

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).

people. However, the printed message still combated language, cultural, and national borders. The inception of the Internet made the transcendence of speech across these old boundaries possible. Contemporary thinkers label the Internet the most significant information 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 language, cultural, national, and philosophical barriers.<sup>4</sup> Due to the lack of barriers, this medium makes world integration of economics<sup>5</sup> and the promotion of cultural diversity possible.

The power of the Internet is largely due to its 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. Internet users choose which sites to visit, disseminate information by creating web pages, and share 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 social values.<sup>9</sup> Some countries view the Internet

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

3. Caroline Uytendaele & 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*, FRESNO BEE, Jan. 7, 1998, at B6 [hereinafter *Control@china.com*] (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).

as a prolific source of harmful or objectionable content,<sup>10</sup> such as obscenity,<sup>11</sup> pornography,<sup>12</sup> and hate speech.<sup>13</sup> Other countries view the Internet as a medium monster that threatens national security and upsets cultural stability.<sup>14</sup> Countries fear that what is perceived as harmful content on the Internet will corrupt society. In response, individual countries are assuming the role of "cyberpolice." Laws providing for criminal and civil liability are being passed for failure to censor information.<sup>15</sup> Some countries require Internet Service Providers (ISPs)<sup>16</sup> to unilaterally censor undesirable information.<sup>17</sup> Other countries use government censorship to block content that is received or transmitted within each country.<sup>18</sup>

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10. See Jose I. Rojas, *Liability of ISPs, Content Providers and End-Users on the Internet*, 507 PLUPAT 1009, 1011 (1998) (defining "content" as follows: 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 [hereinafter *Bonn Approves Internet Law*]; 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 sexual material on the Internet. See *id.* The United States banned the use of the Internet for distribution of indecent or obscene material to minors. See *id.*

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

13. 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).

14. 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); see also Michael Laris, *Internet Police on the Prowl in China; Free Flow of Ideas Worries Leaders*, WASH. POST, Oct. 24, 1998, at A12 (stating that the release of harmful information attacking China's territorial integrity, the socialist system, or China's independence on the Internet is not allowed); see also 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 majority of content on the Internet is in English, while only two percent is in French).

15. 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, at 2 (describing computer crimes and efforts to combat Internet-aided crimes).

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

17. See Information and Communications Act, art. 1, § 5 (Aug. 1, 1997), translated in 37 I.L.M. 564, 565 (1998) (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.

18. 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 within the country); see generally Mo Zhang, *China Issues New Rules Strengthening Regulatory Structure Over Internet: Emphasis on*

"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> Even companies placing advertisements on the Internet<sup>23</sup> face potential worldwide liability.<sup>24</sup> Two of the leading e-commerce<sup>25</sup> nations are restricting speech for the world.<sup>26</sup> China's and Germany's regulations and stringent controls are dictating the speech norms for the international

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*Public Security and State Interest*, 19 No. 11 E. ASIAN EXEC. REP. 9 (Nov. 15, 1997).

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 ISPs of obscene or inciteful sites and militate for their removal from the Internet). Last year, the Internet Watch Foundation assisted in the removal of two thousand pornographic sites from the Internet and several resulting prosecutions. ISPs proclaim that they should be immune from liability. See *id.* However, they must conform to government regulation as a condition of their license. See *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. See 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 & 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 (defining electronic commerce as "transactions involving the exchange of goods or services between two or more parties using electronic means"); see also 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"). E-commerce is not limited to business conducted via the Internet, but includes business conducted with the assistance of telecommunications and information technology. See *id.* E-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. See *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).

26. See *E-Commerce Develops Beyond U.S.* (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. See *id.*; see also 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).

community. These stringent regulations also interfere with the international community's potential money-making opportunities in e-commerce.<sup>27</sup>

In 1997, Chinese officials unleashed sweeping Internet controls designed to "safeguard national security and social stability."<sup>28</sup> While Chinese leaders realize the importance of the Internet in their country's growth,<sup>29</sup> the Internet's free floating exchange of ideas<sup>30</sup> is at odds with the philosophy of the Communist Party.<sup>31</sup> As a result, China's legislation restricts content that could endanger national security, divulge state secrets, damage the national, social and collective interest, or infringe on other individual rights.<sup>32</sup>

Similarly, Germany enacted legislation tightening control over speech and the modes of communication entering the country.<sup>33</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>34</sup> Interestingly, 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>35</sup>

Although China and Germany have different political systems and social values, they are both using police power and government regulation of speech to achieve their goals of limiting perceived harmful content on the Internet.<sup>36</sup> Both countries

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27. See 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).

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

29. 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 ("Officially 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." *Id.*)).

30. See *id.*

31. 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).

32. 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/prclaw 54.htm>>.

33. See generally *Bonn Approves Internet Law*, *supra* note 11.

34. See *German Law Attacks Smut on the Internet*, *supra* note 13, at 21 (stating that the ICSA gained approval only six months after its proposal in the Bundersrat, the Upper House of Parliament).

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

36. See 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>> [hereinafter *Germany, 'World Champion'*] (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 the following information on every customer: name, address, which services the user utilizes, and in which newsgroups the user participates. See *id.* Additionally, it is against the law in Germany to encrypt e-mail messages. See *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 Internet regulations in the United States, China, and Germany).

impose civil and criminal liabilities for violations of government Internet regulations. These regulations affect ISPs, companies competing in the world of e-commerce, and individuals participating in Internet activities.

This Comment explains the historical development of the right to freedom of speech in China and Germany, explores this right as applied to the Internet, and analyzes the impact of legislation on commercial speech, business, and, in particular, e-commerce. China's and Germany's stringent regulations are strong examples of the regulations impacting the new economy. Part II discusses the creation of the Internet and the incorporation of the Internet into the business world. Part III examines the history of free speech in China and Germany, and the relevance of this history as applied to Internet content. Part IV discusses the relevance of the Internet and its content in the business world and the impact of government regulation on e-commerce. Part V concludes that government regulation is stifling e-commerce and that governments should abandon stringent content controls.

## II. THE INTERNET

The challenges facing countries trying to control Internet content is 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 protocols<sup>37</sup> and share information through interlinked high-speed telephone lines.<sup>38</sup>

The U.S. Department of Defense created the Internet,<sup>39</sup> and in 1969, launched the new medium to the public in the form of the Advanced Research Projects Agency Network (ARPANET).<sup>40</sup> The design of ARPANET allowed a free exchange of ideas and scientific findings, and could withstand a nuclear holocaust.<sup>41</sup> The system re-routes messages around any sector that becomes inoperable.<sup>42</sup>

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37. See JACOBSEN, *supra* note 1, at 220 (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. See *id.* at 218. TCP/IP protocol is the standard protocol used by computers connected to the Internet. See *id.* at 222. This protocol allows information to be shared by computers from different manufacturers and to travel through various networks to reach its destination. See *id.*

38. See 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).

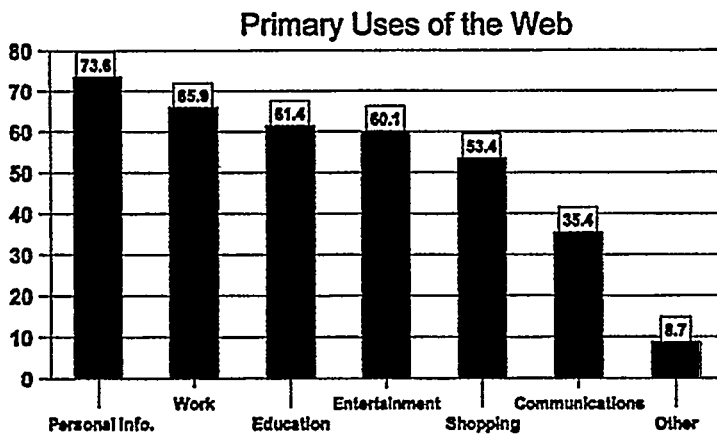
39. See Robert H. Zakon, *Hobbes' Internet Timeline v5.0* (last modified Aug. 15, 1999) <<http://info.isoc.org/guest/zakon/Internet/History/HIT.html>> (noting that the U.S. Department of Defense started the Advanced Research Projects Agency (ARPA) in 1957).

40. 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).

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

42. See generally Zakon, *supra* note 39.

The rapid growth of the Internet was staggering. In 1973, England and Norway joined the U.S. network as the first international gateways.<sup>43</sup> In the next decade, a new computer joined the network every twenty-three days.<sup>44</sup> Developments in network capabilities brought about a new protocol in 1983. Networks using the new protocol became known as the "Internet."<sup>45</sup> Improvements in technology over the years led to faster and newer systems coming on-line.<sup>46</sup> These advancements realized the main goal of ARPANET. Computers now send data to the intended recipient by the quickest route, bypassing any inoperable sections.<sup>47</sup> Currently, approximately 150 countries and 60 million people are connected to the Internet.<sup>48</sup>



**Figure 1**

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43. See Feir, *supra* note 38, at 362–63 (citing that computers with Internet capabilities were installed at the University of California Los Angeles, the Stanford Research Institute, the University of California Santa Barbara, and the 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).

44. See DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 9 (1994); see also Feir, *supra* note 38, at 362–63.

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

46. See Feir, *supra* note 38, at 364; see also fig. 1, available at <<http://www.nua.ie>>.

47. See Feir, *supra* note 38, at 363–64.

48. 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.



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 generally isolated countries."<sup>49</sup> For example, witnesses to the massacre at Tiananmen Square, the Yugoslavian civil war, the Los Angeles riots, and the fall of Communism in the former Soviet Union, all described the events over the Internet.<sup>50</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 into corporate strategy.<sup>51</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 traditionally utilized censorship as a means for control. However, every government in China encouraged the intellectual growth of its nationals. History frames this dichotomy of control and intellectual development. "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>52</sup> The early 1900s saw the rise of many revolutionary free thinkers.<sup>53</sup> For example, Zou Rong spoke out against the current government by printing and distributing a pamphlet calling for revolution.<sup>54</sup> Rong was tried and sentenced to prison, where he died in 1905.<sup>55</sup> The 1900s revolution kindled the growth of the literary culture in China,<sup>56</sup> and resulted in the increased publication of books, magazines, and pamphlets.

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49. 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).

50. See *id.*

51. See John H. Taylor, III, *The Internet In China: Embarking on the "Information Data Superhighway" With One Hand on the Wheel and the Other Hand on the Plug*, 15 DICK. J. INT'L L. 621, 624 (1997) (discussing the role of the Internet in the global marketplace).

52. See Feir, *supra* note 38, 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, but destroyed any works found to be offensive).

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

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

55. See ROBERTS, *supra* note 52, 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. See *id.* at 139; see also EBREY, *supra* note 54, at 265.

56. See ROBERTS, *supra* note 52, at 150–53 (describing the emergence of the new literary world in China and the government's response to new and independent thought).

Unfortunately, Chinese authors still answered to the existing government for freely expressing 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>57</sup> The 1940s witnessed the development of tighter government controls that undermined civil liberties.<sup>58</sup> Censorship and arrest continued to bridle critics of the government.<sup>59</sup>

The rise of the Chinese Communist Party (CCP) brought about another revolution.<sup>60</sup> However, the clamp on independent thought and ideas remained tight. In the 1960s, government sympathizers supplanted the top journalists of national and local newspapers and networks.<sup>61</sup> China currently censors books and other publications that threaten the status quo or criticize China's attitude towards human rights.<sup>62</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>63</sup> However, the provision was repealed in 1980.<sup>64</sup> Nevertheless, the PRC's Constitution still provides for "freedom of speech."<sup>65</sup>

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>66</sup> Individual rights are merely residual freedoms found within the confines of the law.<sup>67</sup> If necessary, all rights must be sacrificed for the good of the common collective.<sup>68</sup> As a result, China traditionally keeps the dissemination of information and freedom of expression to a minimum.<sup>69</sup>

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57. *See id.* at 152.

58. *See id.* at 213 (explaining that a civil war was fought in China during the 1940s). In the 1940s, the Guomindang and the Chinese Communist Party battled for control of the government. *See id.* Each party restricted any literature or speeches that conflicted with their interests. *See id.*

59. *See id.*

60. *See generally* EBREY, *supra* note 54, at 262-336 (illustrating the rise of the CCP, marking the establishment of communism in China).

61. *See* Feir, *supra* note 38, at 377.

62. *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.

63. XIANFA art. 13 (1975).

64. *See id.*

65. XIANFA 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).

66. *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).

67. *See id.*; *see also* XIANFA art. 53 (1982) ("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.").

68. *See* Lin, *supra* note 66, at 262.

69. *See* OGDEN, *supra* note 65, at 150; *see also* *Censorship, Chinese Style*, THE INDIANAPOLIS STAR, Dec. 9, 1996, at A18.

The CCP controls all facets of government, including the freedom of expression granted in the Constitution.<sup>70</sup> The CCP historically utilizes the “official” press as a propaganda tool for disseminating its goals and values.<sup>71</sup> Moreover, since the educated members of Chinese society are employees of the state, they are not allowed to express views divergent from the views of the CCP nor have a distinct cultural life.<sup>72</sup>

However, China’s desire to compete in the world market forced the CCP to integrate into the international community.<sup>73</sup> In 1977, the CCP committed itself to transforming China into a modern state by the year 2000.<sup>74</sup> This goal led the CCP to allow Internet access, but the CCP did not give up control over the dissemination of ideas and the modes of communication.<sup>75</sup>

The CCP recently passed several laws to regulate Internet access. Ultimately, any mode or manner of speech and its content must receive authorization from the CCP before release on the Internet.<sup>76</sup> These types of 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, twenty thousand users were on-line.<sup>77</sup> The number of users rose to 2.1 million by 1998.<sup>78</sup> The China Internet Network Center predicted the number of users would rise to 6.7 million in 1999.<sup>79</sup> The number of users is expected to exponentially increase to 16 million by 2005.<sup>80</sup>

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

71. See EBREY, *supra* note 54, at 301 (explaining that the CCP created propaganda departments to disseminate CCP ideals). The propaganda departments control the publishing industry in China. See *id.* See generally Taylor, *supra* note 51, at 630.

72. See EBREY, *supra* note 54, at 307 (discussing the role of intellectuals in the CCP).

73. 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.

74. See ROBERTS, *supra* note 52, at 264 (explaining that the CCP recognized the Four Modernizations—modernization of agriculture, of industry, of science and technology, and of national defense—as being the gateway to success).

75. 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*, *FARECON. REV.*, Sept. 26, 1996, at 71; see also Arnold, *supra* note 8, at 1.

76. 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, a state-run news agency, screens all information generated outside of China before it is released to a limited number of newsgroup subscribers).

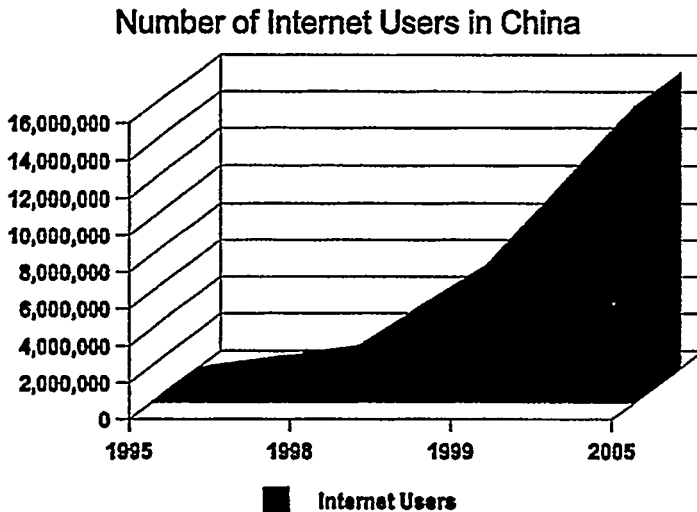
77. See *China: A Shift in Focus With a Little Restructuring*, *ASIA-PAC. TELECOMM.*, Oct. 1, 1998 [hereinafter *China: A Shift in Focus*].

78. See Anderson, *supra* note 26.

79. See *id.*; see also fig. 2, available at <<http://www.nua.ie>>.

80. See generally *China: A Shift in Focus*, *supra* note 77.

With the significant rise of Internet users in China, the Chinese government faces the difficulty of trying to control access to and content on the Internet. For example, in 1989 the Chinese government witnessed the political power of the Internet. The Tiananmen democracy movement used local university connections to gain access to the Internet to promote its political message.<sup>81</sup>



**Figure 2**

In response to the rapidly expanding and unrestrained use of the Internet, the CCP issued regulations in an effort to maintain tight control over the exchange of information and ideas on the Internet.<sup>82</sup> The CCP is concerned about the potential harm posed by unfettered access to sites that contain political, ideological, social, or moral content the CCP perceives as harmful. In addition, illegal and criminal activity on the Internet is on the rise in China.<sup>83</sup> According to the CCP, it enacted these restrictive Internet regulations to “promote Internet applications in China in a sturdier, more orderly way.”<sup>84</sup> To achieve its goals, the CCP requires individuals

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81. See Feir, *supra* note 38, at 367 (emphasizing the difficulties the Chinese government faces in trying to control Internet access and content).

82. See Zhang, *supra* note 18, 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*, No. 9 15 COMP. LAW. 17, 21 (1998) (explaining the emergence of the PRC's Internet laws and how e-commerce will be affected).

83. See Zhang, *supra* note 18, at 9; see also *China—Cyberspace Crimes On The Rise*, *supra* note 15, at 2.

84. *China Network Regulations Issued*, *supra* note 18, at 1.

to obtain licenses for Internet access. ISPs can gain access to China's Internet subscribers only through gateways controlled by the Ministry of Posts and Telecommunications.<sup>85</sup> Moreover, Internet users are required to register with the local police and provide their names, the names of their service provider, their e-mail addresses, and list any newsgroups in which they participate.<sup>86</sup> These Internet regulations were approved and signed into law in 1996, revised in 1997, and joined by twenty-five more stipulations in 1998.<sup>87</sup> China is now the most regulated Internet environment in the world.<sup>88</sup>

The new Internet regulations are divided into five chapters. Each chapter outlines either rights, obligations, or punishments for both ISPs and individual Internet users. Chapter 1 addresses the oversight and the application of the regulations. "The Ministry of Public Security is responsible for the security, protection and management of computer information networks and the Internet."<sup>89</sup> Chapter 1 also enumerates what types of activities and content are deemed illegal. Prohibitions include the "transmission of state secrets, politically subversive material, and pornographic and violent communications."<sup>90</sup> Additionally, unregistered and unrestricted use of the Internet is prohibited.<sup>91</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 changing network functions.<sup>92</sup>

Chapters 2 and 3 of the new regulations outline the responsibilities of ISPs and the Ministry of Public Security for administering networks and protecting the public.<sup>93</sup> ISPs are under the control and supervision of the Ministry of Public Security. ISPs' responsibilities include the following: (1) assisting the Ministry of

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85. See REV. PROVISIONAL REG. GOVERNING THE MGMT. OF CHINESE COMPUTER INFO. NETWORKS CONNECTED TO INT'L NETWORKS, art. 6 (1997); see also Smith, *supra* note 31, at 1.

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

87. See *New PRC Internet Regulation*, U.S. EMBASSY BEIJING, Jan. 1998, (visited Nov. 4, 1999) <<http://www.usembassy-china.org.cn/english/sand/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. See *id.* They only provided more detail and outlined specific procedures for Internet use. See *id.*; see also Zhang, *supra* note 18; see also Feir, *supra* note 38, at 367; see, e.g., *China Network Regulations Issued*, *supra* note 18, at 1.

88. See Peng Hwa Ang, *Internet Development in Asia* (visited Nov. 14, 1999) <[http://jargo.itim.mil.cnr.it/inet96/h1/h1\\_1.htm](http://jargo.itim.mil.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).

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

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

91. See Feir, *supra* note 38, at 367-69.

92. See INTERNET LAWS, *supra* note 89, ch. 1, § 6.

93. See *id.* ch. 2, § 8.

Public Security in discovering individual users who violate the law,<sup>94</sup> (2) ensuring that all networks are safe and secure, and (3) preventing users from violating the law.<sup>95</sup> ISPs must register all Internet users by providing the Ministry of Public Security with a user's identifying information.<sup>96</sup> The ISPs must supervise the information transmitted through their gateways.<sup>97</sup> Further, ISPs must restrict access to all sites that are in violation of Chinese law.<sup>98</sup> However, Beijing Internet Service Providers, an organization of independently owned ISPs, states that holding ISPs responsible for what sites their customers visit on-line is an unrealistic expectation.<sup>99</sup> One member of the Beijing Internet Service Providers commented that "[t]here is no practical way to monitor the on-line activity of China's hundreds of thousands of Internet users."<sup>100</sup> If this statement is true, the efficacy of this requirement may be questionable.

Chapters 4 and 5 establish penalties for violating the regulations. For example, any income derived from illegal use of the Internet is confiscated by the Ministry of Public Security.<sup>101</sup> Additionally, users, ISPs, and ISP officials face punishment in the form of fines, assignment to work projects, jail terms, the loss of business licenses, or the network closures for up to six months.<sup>102</sup>

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

## *B. Germany*

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

In 1949, after World War II, Germany adopted a new Constitution.<sup>103</sup> By implementing this new Constitution, Germany intended to incorporate the best of German thought and experience, first by integrating the social, liberal, and democratic principles embodied in the 1849 Frankfort Constitution and the 1918 Constitution of the Weimar Republic, and then by adding a comprehensive system

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94. *See id.* ch. 3, §§ 15-17.

95. *See id.* ch. 2, § 10.

96. *See id.* ch. 2, §§ 10-11.

97. *See id.*

98. *See id.* ch. 2, § 10.

99. *See New PRC Internet Regulation, supra* note 87.

100. *Id.*

101. *See INTERNET LAWS, supra* note 89, ch. 4, § 20.

102. *See id.* chs. 4-5

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

of judicial review.<sup>104</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>105</sup> To achieve this end, Germany's Constitution encourages the development of the human personality by guaranteeing the right to freedom of expression.<sup>106</sup>

This right is embodied within Article 5 of the German Constitution, which states that "[each person] has the right to freely express and disseminate his opinion in speech, writing, and picture," and to obtain information from generally accessible sources without interference.<sup>107</sup> The freedom of the press and the freedom to report information through broadcast and film are also guaranteed.<sup>108</sup> However, Article 5 also limits the freedom of personal expression by provisions in the general law, statutes that protect the youth, and statutes that guarantee an individual's right to protect his or her personal honor.<sup>109</sup> Government action under Article 5 is limited by Article 1(3). Article 1(3) provides that the "basic rights [shall bind the] legislature, [the] executive, and [the] judiciary as directly enforceable law."<sup>110</sup> The most unique aspect of Article 5 is that it applies to both private actors and government action.<sup>111</sup>

The German Constitution is hierarchically organized with all Articles connected with and dependant upon one another.<sup>112</sup> The German Federal Constitutional Court (FCC) applies a balancing test for proposed restrictions in order to determine if the statute 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>113</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

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104. *See id.* at 797 (explaining that the German Constitution is a national response to the Nazi totalitarian regime). The German Constitution combines the nation's three major legal traditions—classical liberalism, democratic socialism, and Christian natural legal thought. *See id.* It outlines an ordered set of values, and sets forth rights and freedoms. *See id.*

105. *Id.*

106. GRUNDGESETZ [GG] art. 5, pt. 1 (F.R.G.) ("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.").

107. *Id.*

108. *See id.* ("There shall be no censorship.").

109. *See id.* art. 5, pt. 2. *See generally* Eberle, *supra* note 103, at 800–07 (presenting German law and its guarantee of freedom of expression).

110. GG art. 1, § 3.

111. *See* Eberle, *supra* note 103, at n.18 (explaining that the holding in the *Luth* case applies the Basic Law to private actions). The *Luth* Court held that the Basic Law applies indirectly to private causes of action. *See id.* Civil law courts must apply a balancing test between the express general law and Basic Law when deciding a case. *See id.*

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

113. Eberle, *supra* note 103, at 800.

law is deemed constitutional.<sup>114</sup> For example, the FCC held that art is a constitutionally guaranteed freedom of expression. However, some art, like pornography, must yield to human dignity concerns.<sup>115</sup> In light of the hierarchical or step ladder approach employed by the FCC, any constitutionally guaranteed right may be balanced away if found to infringe on a higher hierarchical right.<sup>116</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>117</sup> For example, the German Penal Code restricts anyone from disseminating, producing, or importing Internet content that can be used to promote Nazi propaganda.<sup>118</sup> Additionally, a jail term is imposed on individuals who use denigrating speech regarding race, ethnicity, gender, or physical appearance.<sup>119</sup> Government restrictions are supported by the attitudes and beliefs of German citizens.<sup>120</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>121</sup> However, only thirteen percent of Germans want nudity blocked on the Internet.<sup>122</sup>

Germany's attitude about freedom of expression and modern communication mediums is incorporated in the German Constitution. Germany recognized that speech takes many forms and provided for the freedom of broadcast and freedom of expression in film.<sup>123</sup> However, in recent years, Germany restricted its citizens' right to freedom of expression by limiting their ability to communicate and disseminate ideas using modern communication media.<sup>124</sup> In 1994, the German Parliament passed legislation permitting government eavesdropping on telephone calls.<sup>125</sup> Additionally, Germany does not recognize pure commercial speech as a

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114. See *id.* at 800-07.

115. See Widmaier, *supra* note 112, at 85-86; see also 30 Bundesverfassungsgericht [BverfGE] 173 (1971).

116. See Widmaier, *supra* note 112, at 87.

117. See Eberle, *supra* note 103, at 800-07 (presenting German law and its guarantee of freedom of expression); GG art. 131.

118. 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).

119. See § 86(1)(4) STRAFGESETZBUCH [StGB]; see also Stein, *supra* note 118, at 286-322.

120. See 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.

121. See *id.*

122. See *id.*

123. See GG art. 5, § 1.

124. See Germany, 'World Champion', *supra* note 36 (arguing that Germany's Multimedia Law is a "massive invasion" into the private lives of German citizens); see also *supra* notes 33, 35 and accompanying text. The Multimedia Law requires ISPs to provide the police with information on every customer, such as the name, the address, the services the user uses, and the newsgroups in which the user participates. See *id.* Additionally, it is against the law to encrypt e-mail messages. See *id.*; see also *German Law Attacks Smut on the Internet*, *supra* note 13, at 21 (stating that the ICSA gained approval only six months after its proposal in the Bundersrat, the Upper House of Parliament).

125. See Germany, 'World Champion', *supra* note 36.



protected form of speech unless it conveys an opinion and it does not exude undue influence over the public.<sup>126</sup>

## 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>127</sup> The growing number of Internet users increased the demand for Internet services. Until recently, liability for ISPs under German law was ambiguous and unclear.<sup>128</sup> In an effort to establish legal certainties for publishing and make inaccessible illegal content on the Internet, the German Legislature responded with new legislation. In 1997, Germany passed the ICSA.<sup>129</sup> The ICSA attempted, for the first time, to appoint ISPs to act as cyber police.<sup>130</sup> The ICSA enables Germany to restrict self-expression by prohibiting certain communications on the Internet. It also requires ISPs to provide the police, German intelligence agencies, and administrative agencies with the names and addresses of all Internet users and the services and newsgroups to which the users subscribe.<sup>131</sup> Further, ISPs are required to appoint a youth protection officer or self-control committee to ensure that content deemed unsuitable for the youth is limited to adults.<sup>132</sup>

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126. See Eberle, *supra* note 103, at 797 n.32 (citing several German cases that hold that commercial speech that proposes 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. See *id.* These rights will be balanced by the government's responsibility to protect the public from undue influence. See *id.*

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

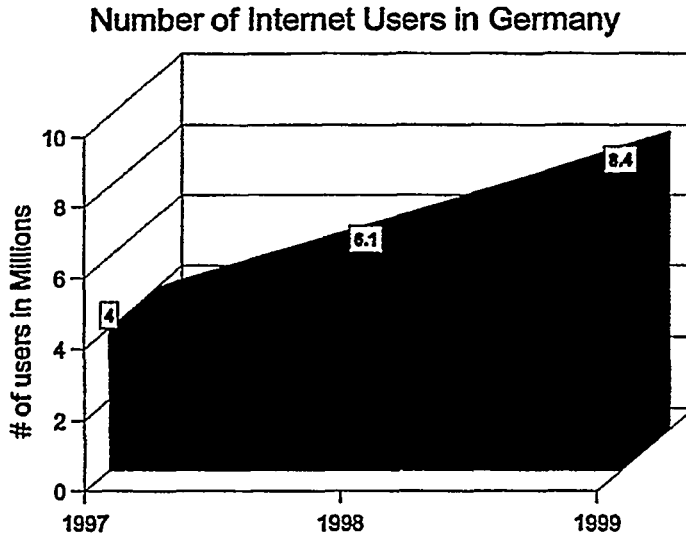
128. See, e.g., John F. McGuire, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 770-72 (1999) (demonstrating the uncertainty that existed in German law prior to the enactment of the ICSA). In 1995, CompuServe Germany blocked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

129. See Heiner Buenting, *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); see also *supra* note 33 and accompanying text.

130. 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 ISPs). See, e.g., Human Rights Watch, *supra* note 76 (stating that several Germany ISPs were acting as cyber police before the enactment of the ICSA). In 1996, DT, a German telephone company, blocked users to its T-Online network from sites that posted anti-semitic propaganda. See *id.*

131. See Germany, 'World Champion', *supra* note 36; 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), available at <<http://www.iid.de/rahmen/iukdgc.html>> [hereinafter IuKD G]; Information and Communications Act (F.R.G.) (1997), translated in 37 I.L.M. 564 (1998).

132. See ICSA art. 6, § 78a.



**Figure 3**

The ICSA is divided into eleven articles. However, only Articles 1 and 6 affect content regulation. Article 1 applies to all electronic and communication services,<sup>133</sup> and providers of electronic information.<sup>134</sup> A provider is a natural or legal person that provides access to the use of teleservices.<sup>135</sup> A provider is held responsible under criminal and civil laws for content created by the provider. If the provider is aware that a third party posted information contrary to German law, the provider must use all reasonable means to block access to the illegal information.<sup>136</sup> However, unlike China,<sup>137</sup> Germany does not subject teleservice providers to licensing or registration requirements.<sup>138</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>139</sup> Under the Law on Protection of Minors, ISPs are prohibited from disseminating or providing young users access to any material that is rated as harmful to children.<sup>140</sup> As previously noted, ISPs appoint youth protection

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133. *See id.* art. 1, § 2.

134. *See id.*

135. *See id.* art. 1, § 3. “Teleservices” include 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.

136. *See id.* art. 1, § 5.

137. *See supra* notes 77-102 and accompanying text.

138. *See* ICSA art. 1, § 4; *see also* INTERNET LAWS, *supra* note 89, ch. 1.

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

140. *See* Rappaport, *supra* note 130, at 794.

officers to ensure objectionable content is not disseminated to children.<sup>141</sup> Once illegal content is found, ISPs must erect a firewall, a series of blocks and filters, to prevent access to those sites.<sup>142</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>143</sup> The arrival of the World Wide Web user-friendly browsers<sup>144</sup> and the launch of Internet e-commerce are dramatically reshaping the marketplace.<sup>145</sup> In 1998, consumers spent eight billion U.S. dollars on products purchased over the Internet.<sup>146</sup> With the advancements in technology and the growth of the Internet, e-commerce spending "is expected to exceed one trillion by 2003."<sup>147</sup>

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141. See ICSA art. 6.

142. See *infra* notes 182-98 and accompanying text.

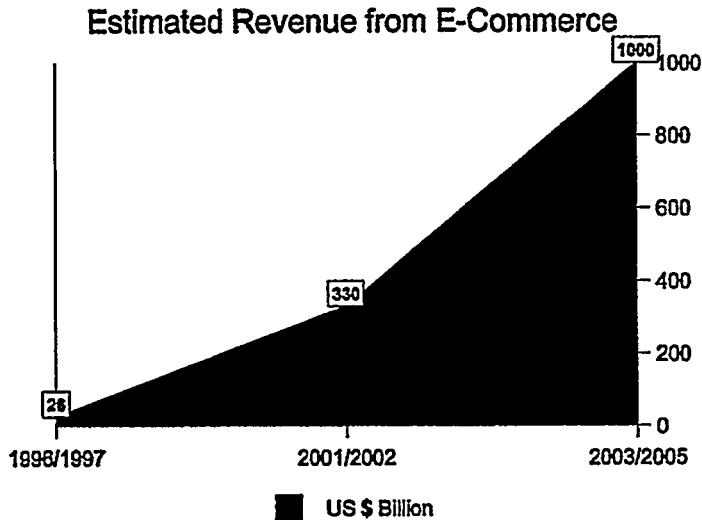
143. See generally The Organization for Economic Co-operation and Development (OECD), *The Economic and Social Impact of Electronic Commerce* (visited Sept. 24, 1999) <[http://www.oecd.org/subject/e\\_commerce/summary.htm](http://www.oecd.org/subject/e_commerce/summary.htm)> [hereinafter OECD].

144. See *id.* at 10.

145. See Thomas, *supra* note 25, 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 offer free net access and free computers to users willing to be overrun by advertisements. See *id.* Computer companies offer free products hoping to profit from consumer spending on the Internet. See *id.*

146. See Media, Tech Execs Form E-commerce Group, BLOOMBERG NEWS (visited Sept. 24, 1999) <<http://www.news.cnet.com/news/0-1007-200-337397.html>> (estimating the growth potential of commerce on the Internet).

147. Visa Survey Forecasts Substantial Growth of Commercial Electronic Commerce, COMLINE 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>> [hereinafter Visa Survey].



**Figure 4**

The emergence of e-commerce provides new market openings<sup>148</sup> that will “increase[] competition, improve[] telecommunications infrastructures, [provide] more customer choice, lower prices and increase[] and improve[] services.”<sup>149</sup>

E-commerce affects every industry sector around the globe, including services, manufacturing, government, education, financial services, and retail.<sup>150</sup> The largest e-commerce sector worldwide is located in the United States. However, e-commerce in Europe is focused in Germany<sup>151</sup> with Asia struggling to tap into the market.<sup>152</sup> Because the growth of the Internet is imperative to the development of e-commerce, restrictive Internet regulation impede the growth of the market.

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148. See OECD, *supra* note 143, at 10.

149. 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 transforms merchant services such as marketing and customer service).

150. See Media, Tech Execs Form E-commerce Group, *supra* note 146 (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).

151. See Internet in Europe Surging, Over Half are Consumers, COMPUTERGRAM INT’L, available in 1998 WL 18863937 [hereinafter *Internet in Europe Surging*] (concluding that Germany is a major player in the European Internet market because Germany holds the largest number of Internet seats in Europe).

152. See Martyn Williams, *China Electronics Giant to Launch Internet Shopping Mall*, NEWSBYTES, Mar. 25, 1999, available in 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*, *supra* note 77 (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>153</sup> Business-to-business e-commerce accounts for about eighty percent of all e-commerce activity.<sup>154</sup> Not surprisingly, companies supplying the infrastructure for the Internet are among the largest business-to-business players in the e-commerce market.<sup>155</sup>

Despite the large revenues generated by the business-to-business segments, most of the public attention is on the business-to-consumer segment.<sup>156</sup> The business-to-consumer segment is comprised of several real-world business models, including the following: (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, and incorporate advertisements, such as banners or other icons, for a fee; (3) the subscription model, a digital database, such as libraries, music sites or newspapers, that can be accessed for a fee; (4) the free trial model, a site that allows users to download a software package that works 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>157</sup> Many companies use a combination of these models to increase profits.

The Internet provides a level playing field for competing companies by presenting companies with the same consumer base and marketing options.<sup>158</sup> A company can streamline<sup>159</sup> its purchasing processes and buy materials and services at lower costs.<sup>160</sup> For instance, customer service consists of more than ten percent of operating costs for major companies.<sup>161</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>162</sup> Not only does the Internet

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153. See Doukidis et al., *supra* note 149.

154. See OECD, *supra* note 143, at 36.

155. 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 US\$2 billion dollars per day. See *id.*

156. See generally Doukidis et al., *supra* note 149.

157. See generally Bambury, *supra* note 25.

158. 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*, PCDEALER, 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).

159. See generally Ryan, *supra* note 145, 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. See *id.* This could result in monopolies in several industry sectors. See *id.*

160. See Soane, *supra* note 158, at 10 (explaining how the Internet can help companies maximize profits).

161. See OECD, *supra* note 143, at 10.

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

offer low cost advertising with a potentially worldwide reach,<sup>163</sup> but Internet advertisements are also accessible 24 hours per day, 365 days per year.<sup>164</sup> Additionally, the Internet gives companies direct access to systems with electronic mail, payment, and credit verification.<sup>165</sup>

China's current government views technology as the route to economic development<sup>166</sup> by helping China stay competitive in a global market.<sup>167</sup> Many Chinese business owners use 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>168</sup> Additionally, China uses e-commerce to boost the confidence of the Chinese people in technology and to increase Internet shopping.<sup>169</sup> However, Chinese law limits foreign investment in China's new technology sector. For example, ISPs in China are prohibited from accepting foreign investors.<sup>170</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>171</sup>

Despite the leaps and bounds made by the CCP in venturing into the Internet age, e-commerce in China still faces many limitations.<sup>172</sup> For instance, the use of

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163. See Mark Sableman, *Business Liabilities on the Internet*, 16 COMM. LAW 3, 3 (1998) [hereinafter Sableman, *Business Liabilities*] (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. See *id.* The cost to reach millions of users is the same as the cost to reach just one. See *id.* Further, there is no increased cost to reach a consumer on the other side of the world. See *id.*

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

165. See Mark Sableman, *Business on the Internet, Part II: Liability Issues*, 53 J. MO. B. 223, 223 (1997) (describing the economic benefits of Internet usage).

166. 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 that understand the importance of technology). Chen Bangzhu, Vice Minister of the State Economic and Trade Commission, said that "[t]he practice of e-commerce is sure to bring new opportunities and vitality to domestic industry." *Id.*; see also Feir, *supra* note 38, at 365 (commenting that the Chinese government is taking large steps toward establishing a strong Internet base in China and promoting the use of the Internet by Chinese businesses).

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

168. 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).

169. See Williams, *supra* note 152 (proclaiming that China's new on-line shopping mall will boost the confidence of the Chinese populace in e-commerce).

170. 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 the service area is not open to foreign investors).

171. See *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>>.

172. 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

debit or credit cards on the Internet is not yet authorized by Chinese banks.<sup>173</sup> Small-business owners in China are also faced with the new challenge of international delivery.<sup>174</sup> Most importantly, Chinese citizens still do not have full access to the Internet,<sup>175</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>176</sup> The German government encourages the use of Internet technology in its booming economy.<sup>177</sup> German corporations own the majority of the corporate Internet sites, which comprise twenty-seven percent of all Internet commerce sites.<sup>178</sup> In 1998, more than fifty percent of Germany's top five hundred corporations used the Internet for advertising.<sup>179</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>180</sup> However, some commentators state that, unlike China, Internet regulation in Germany will boost e-commerce.<sup>181</sup>

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obstacles, and low credit-card penetration are obstacles to e-commerce in China). *See generally* Aldrich, *supra* note 82, at 21 (explaining that China is still in the early stages of Internet business development). The PRC is still formulating and shaping its Internet commerce laws. *See id.* For example, there are no regulations dealing with Internet contracts. *See id.*; *see also* Feir, *supra* note 38, at 367 (noting the PRC's desire to maintain tight control over the exchange of information on the Internet).

173. *See* Lawrence, *supra* note 166, at 10 (explaining that Chinese on-line consumers must still mail a check or fax credit card information to businesses when ordering on-line). However, the Bank of China is now allowing its debit card holders to pay Internet connection fees on-line. *See id.*

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

175. *See supra* notes 77-102 and accompanying text.

176. *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>>.

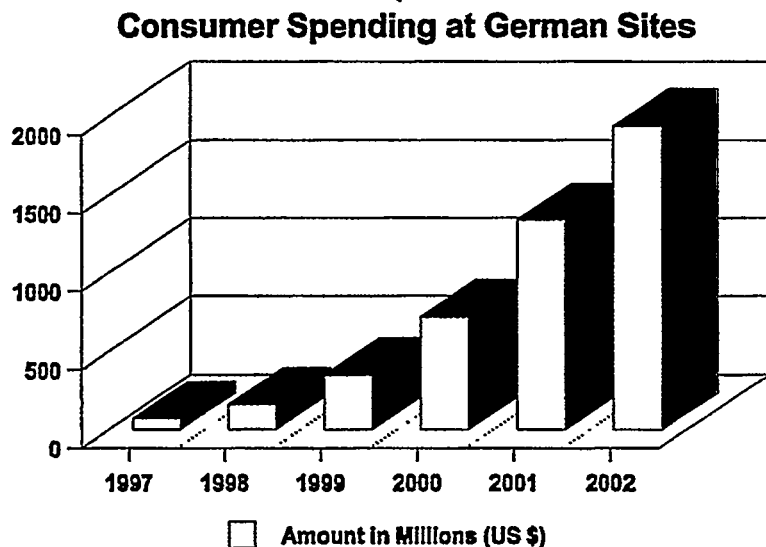
177. *See* Jetter, *supra* note 26 (expounding on the technological advances in Germany and the interaction of the German government).

178. *See* Visa Survey, *supra* note 147 (finding that e-commerce will be focused in five countries including the following: France, Germany, Japan, the U.K. and the United States). This will comprise 94% of the total Internet sales. *See id.*; *see also* Internet in Europe Surging, *supra* note 151 (stating that Germany held the most Internet sites in Europe in 1997 with 4.7 million sites).

179. *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. *See id.* Currently, Germans own all available space and banner locations for the foreseeable future. *See id.*

180. Jetter, *supra* note 26.

181. *See id.*



**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>182</sup> Commercial speech consists of advertising and promotions, including contests, lotteries, games of chance, and other similar activities.<sup>183</sup> It appears in many different Internet formats, such as corporate home pages, banner advertising on unrelated web pages, general product or service information, and unrequested e-mail solicitations.<sup>184</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, largely impacts the growth potential of the business-to-consumer e-commerce segment.

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182. See Sableman, *Business Liabilities*, *supra* note 163, at 3 (defining commercial speech as speech that proposes a commercial transaction).

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

184. 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 & 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).



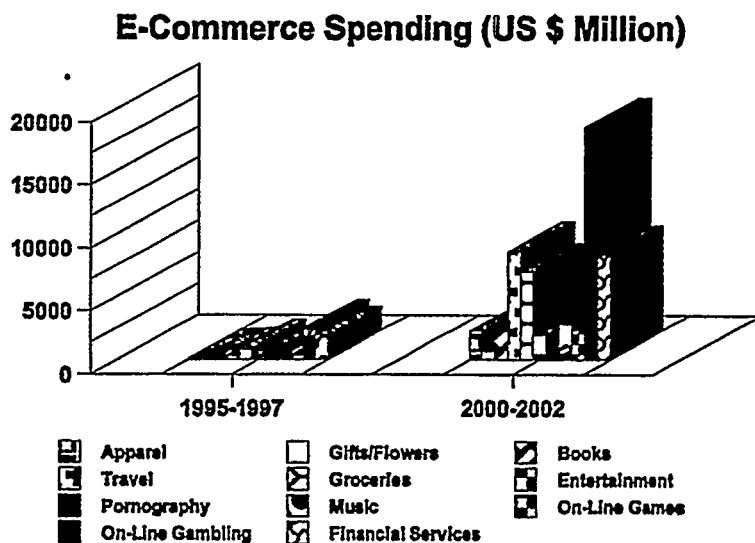


Figure 6

The creation of a national firewall or a system of Internet blocks and filters stops users from accessing sites that contain any information a country deems undesirable or illegal.<sup>185</sup> Blocking software involves searching for key words or phrases that are deemed unacceptable or illegal.<sup>186</sup> The use of broad language to block sites prevents many commercial sites from being viewed by potential customers, thus limiting the profitability of these sites.<sup>187</sup> For instance, a book seller listing titles or book descriptions that contain any of the undesirable or illegal words are blocked.<sup>188</sup> In addition, newspapers, research firms, travel sites, and apparel sites, to name a few, are also blocked if any of the undesirable or illegal words appear on their sites. Both China and Germany 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>189</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 do

185. See *supra* notes 77-102, 127-42, and 143-81 and accompanying text.

186. 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 filtering software that is available).

187. 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>>.

188. See Doherty, *supra* note 186.

189. 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).

business in the new Internet economy."<sup>190</sup> To date, the Chinese government has not heeded such advice.

Germany also erected a firewall to keep out illegal and potentially "harmful" material.<sup>191</sup> In April 1997, Germany blocked *Radikal* magazine and several pornographic sites.<sup>192</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>193</sup> The effect of these blocks and access terminations is the stagnation of e-commerce. Any business site that is located on a blocked server is barred entry into 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 advertisements. Companies must hire local agencies to adapt their advertisements to conform with the particular legal structure of each country.<sup>194</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 the Internet is the buying and selling of lists or compilations of e-mail addresses for direct advertising. Companies use these lists of Internet users to send out advertisements to a large group of customers. Lin Hai, a Chinese businessman, sold a list of Chinese citizens' e-mail addresses for commercial purposes to VIP Reference.<sup>195</sup> VIP Reference, a Chinese dissident publication, sent its on-line magazine to the addresses on Lin Hai's list.<sup>196</sup> Hai was charged with subversion of the political system through the Internet.<sup>197</sup> As a result,

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190. *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 when such firewalls limit access to business in China).

191. See *supra* notes 127-42 and accompanying text.

192. See 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>>.

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

194. 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. See *id.* Yahoo hires local agencies to adapt the advertisement before it is posted in that country. See *id.* For example, an advertisement in France must be in French only and advertisements in Germany must be free of any links or information about pornography. See *id.*

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

196. See Farley, *supra* note 189, 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 intended to block from the China Intranet). VIP Reference buys public lists of e-mail addresses for commercial use. See *id.* They send their pro-democracy magazine to about 250,000 addresses in mainland China. See *id.*

197. See *Jailed Chinese*, *supra* note 195 (stating that Hai is the first Chinese person to be tried and convicted for political use of the Internet).

Hai is currently serving a two year jail term for selling what other countries view as a commodity.<sup>198</sup>

## V. CONCLUSION

China and Germany, two very different governments, have both unilaterally imposed national speech restraints on an international medium. In an effort to achieve their individual aims, both countries erected national firewalls that employ the use of filtering systems to block illegal and unwanted content. Unfortunately, it is difficult to isolate sites that contain illegal content from sites that contain otherwise legal content. In the end, both illegal and legal sites are effectively blocked from access by Internet users. Consequently, these two countries are effectively regulating content access for the global community. Moreover, China and Germany are not only dictating the free speech rights to the international community, they also limiting the profit-making ability of the new e-commerce market. Since it is impossible to limit illegal content without blocking access to legal sites, many legal commercial sites are being blocked. Additionally, companies and company officials participating in the e-commerce market face both criminal and civil liabilities if their company sites contain information or links to illegal information. Blocking content, stopping Internet access, and imposing criminal and civil penalties on companies and their officials results in 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 and not dictate independent thought.

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198. *See id.*