



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 13, 2001

The Chairman of the PC-RX Committee
c/o Mr. Manuel LEZERTUA & Mr. Peter CSONKA
Directorate General of Legal Affairs
Department of Crime Problems
Council of Europe
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FRANCE

Dear Chairman:

As the first meeting of the PC-RX draws near, the United States would like to take this opportunity to respond to certain assertions regarding United States law that were submitted to the Council in the October 12, 2001 Report, Document 9263, entitled "Racism and xenophobia in cyberspace," and its accompanying explanatory memorandum.

The United States deplores racism and xenophobia, and the violence and other harmful conduct that racist and xenophobic groups often seek to foster. The United States also supports dialogue among Internet users, providers, and others regarding racist and xenophobic content. However, as the Report suggests, there are a number of factors – legal, as well as political, ethical, and technological – that would impose significant constraints on the implementation of any provision restricting racist and xenophobic content on the Internet. Foremost among these factors for the United States is our Constitution's protection of freedom of speech and expression.

In concluding that an "unlawful hosting" provision would be permissible under the United States Constitution, the Report makes a number of assertions with respect to United States law with which we respectfully disagree, and which we would like to clarify so that other PC-RX participants will not begin the Committee's task with any misapprehension of United States law in this area.

The United States does not have criminal laws criminalizing or prohibiting racist speech *per se*. The First Amendment to the United States Constitution imposes severe constraints on state action that restrains or punishes speech based on its content. Nor are the restrictions of the First Amendment necessarily limited to materials originating in the United States or to publications with a purely American audience. Under U.S. law, the First Amendment affords protection (to varying degrees) to the interests of both "speakers" and "listeners," and these protections may under certain circumstances apply to speech that originates outside the United States and to speech that originates in the United States but that has a primarily foreign audience.

The Report appears to assume that certain Web sites contain messages "aimed exclusively at an audience in a . . . state [outside the originating nation]." It is not at all certain that the First Amendment would be inapplicable to such a site located within the United States. In any event, it would be difficult, in a country as diverse as the United States, to identify United-States-based web sites that are "aimed exclusively at an audience" abroad.

As the Report indicates, there are additional technical, ethical, and political obstacles to implementation of an "unlawful hosting" offense as described in the Report. There may be additional legal concerns as well. Some of the technical and legal issues faced were illustrated by recent court proceedings involving Yahoo! in both the United States and France, in which the courts reached differing conclusions both as to whether and to what degree Yahoo! may be required to shield residents of France from interaction with certain material deemed to be racist or xenophobic, and also as to the technical feasibility of doing so.

The United States remains committed to fighting racism and xenophobia. We look forward to a productive exchange of views on the issue of racist and xenophobic content on the Internet.



Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

Sincerely,



for John C. Keeney
Acting Assistant Attorney General
Criminal Division