

**Volume VIII - Article 2**

**A Tangled Web We Weave:  
Enforcing International Speech Restrictions in an Online World**

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*The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments. . . . The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.*

— Judge Jeremy Fogel, *Yahoo!, Inc. v.*

*LICRA*<sup>1</sup>

## **I. Introduction**

It is no secret that the Internet has transformed the way we communicate with each other in the modern world. No longer “a unique and wholly new medium of worldwide human communication,”<sup>2</sup> the Internet has seen a dramatic increase in the number of users across the globe, from about 40 million at the time of trial in *Reno v. ACLU*,<sup>3</sup> to more than 1.1 billion today.<sup>4</sup> As is becoming ever more clear as the technology continues to develop, in merely a decade, this “explosion” of the Internet has led to a host of legal complications, challenging some of our most fundamental legal assumptions and doctrines. Basic notions of jurisdiction and enforcement are turned on their head, as “content on the Internet does not exist in one particular place; rather, it exists in several places at once.”<sup>5</sup> But these complications are not just a matter for scholars, lawyers, and judges. Underlying this legal chaos is a cultural battleground, as different nations find themselves confronted with the question of how to preserve national values in the face of a medium that is quite adept at transcending territorial borders.

The area of domestic speech regulations illustrates this clash with stark clarity. When speech is permitted in Country A but prohibited in Country B, which law should apply to speech

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<sup>1</sup> *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1187 (N.D. Cal. 2001), *rev’d*, 379 F.3d 1120 (9th Cir. 2004).

<sup>2</sup> *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (quoting the district court’s finding of fact in *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

<sup>3</sup> *Reno*, 521 U.S. at 850.

<sup>4</sup> Internet World Stats: Usage and Population Statistics, World Internet Usage Statistics News and Population Stats, <http://www.internetworldstats.com/stats.htm> (last visited March 21, 2007). These statistics were current as of March 10, 2007.

<sup>5</sup> Julie L. Henn, Note, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT’L L.J. 157, 158 (2003).

that originates in the former but is accessed by citizens in the latter? For example, Germany criminalizes certain racial and religious insults, as well as the denial of the Holocaust,<sup>6</sup> France bars the public display of Nazi-related materials,<sup>7</sup> and Saudi Arabia has barred access to sites that the government considers “morally offensive to the Saudi culture.”<sup>8</sup> But when we are talking about the Internet, “[t]o paraphrase Gertrude Stein . . . not only is there perhaps ‘no there there,’ the ‘there’ is *everywhere* where there is Internet access.”<sup>9</sup> Thus, what can countries do about offensive speech that only occurs domestically in the sense that domestic Internet users can call up this “speech” on their computer screens? And to what extent are countries like the United States, with near-absolute free-speech protections, obligated to recognize and enforce foreign speech-restrictive judgments?

The French case of *UEJF et LICRA v. Yahoo! Inc. et Yahoo France*<sup>10</sup> and its progeny (including two U.S. District Court judgments and one Court of Appeals judgment, as recent as January 2006) illustrate that the answers to these questions are hardly straightforward. Despite the fact that Yahoo! is a United States corporation with servers located in California, the French Tribunal de Grande Instance de Paris asserted jurisdiction over Yahoo! based on a “domestic effects” doctrine. Under that doctrine, jurisdiction was exercised pursuant to a complaint that French users could access auction sites offering for sale Nazi memorabilia, in violation of French law. The Tribunal eventually ordered Yahoo! to take measures to block Internet access to offending materials from within France (or face stiff monetary penalties). Because any enforcement of the judgment against Yahoo!’s assets would require action in the United States

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<sup>6</sup> See Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBI.I], 945, 3322, § 130, *translation available at* <http://www.iuscomp.org/gla/statutes/StGB.htm> (last visited on March 21, 2007).

<sup>7</sup> *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1227 (9th Cir. 2006) (citing N.C. PEN. ART. R. 645-2).

<sup>8</sup> Henn, *supra* note 5, at 171.

<sup>9</sup> *Digital Equip. Corp. v. Altavista Tech.*, 960 F. Supp. 456, 462 (D. Mass. 1996).

<sup>10</sup> Tribunal de grande instance [T.G.I.] [Superior Court of Paris] Paris, May 22, 2000, obs. J. Gomez (Fr.), *translation available at* <http://www.lapres.net/yahen.html> (last accessed on March 21, 2007).

(due to the location of those assets), Yahoo! then brought a declaratory judgment action in federal court in California, seeking a declaration that the French judgment was unenforceable in the United States. Although the court did not deny the validity of the French court’s jurisdiction or decision, it granted Yahoo!’s motion for summary judgment, finding that enforcement of the judgment would violate the First Amendment.<sup>11</sup> While the Ninth Circuit reversed on other grounds,<sup>12</sup> this practice of reviewing a foreign judicial act using U.S. constitutional standards is nothing new in the realm of foreign judgment recognition. With U.S. courts poised to extend American free speech protections to expression occurring outside the country, what does this leave for domestic speech regulation based on local community standards, at least when it comes to the Internet?

This paper will explore this question, suggesting the need for a coherent set of principles of jurisdiction and enforcement that recognize the rights of states to set standards for speech within those states.<sup>13</sup> As the development of geo-location technology has made it more feasible to confine Internet regulation to a particular location, the factors cited by the French court to justify jurisdiction — the effect of Internet speech in a particular country, and whether an Internet provider targeted users within the country — make both theoretical and practical sense. Such an approach requires sufficient ties to the state where the offense is realized, and also puts Internet Service Providers (ISPs) on notice regarding potential liability. Once such jurisdiction has been properly exercised, foreign courts facing enforcement actions must resist the temptation to impose their own domestic legal (constitutional or otherwise) standards on the foreign

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<sup>11</sup> *Yahoo!, Inc.*, 169 F. Supp. 2d 1181 (order granting motion for summary judgment); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (order denying motion to dismiss).

<sup>12</sup> *Yahoo!, Inc.* t this paper, I will use the word “state” to refer to a state in the geopolitical sense. When I specifically mean states of the United States, I will make that clear in context.

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judgment, as the District Court did in *Yahoo!*. While courts in the United States and elsewhere should not be cornered into enforcing judgments repugnant to fundamental notions of justice, they must also not impose their cultural values upon other sovereign states. As Internet borders become increasingly possible, the law should adjust to permit greater regulation of Internet activity affecting a particular state's polity. Rhetoric about the "global" nature of the Internet should not be permitted to trump the realities of state sovereignty.

## **II. Jurisdiction & Free Expression**

As Judge Fogel noted in *Yahoo!*, "[w]hat makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time."<sup>14</sup> Along with this challenge is the problem that the source of the speech can literally be anywhere in the world. If such Internet speech should contravene the laws of the speaker's jurisdiction, the receiver's jurisdiction, or any other jurisdiction along the digital pathway of communication, how might a national court justify exercising its jurisdiction over such a case? Although a survey of the different approaches to this jurisdictional question reveals anything but a model of clarity, there emerges a useful set of categories to help frame the discussion: territorial claims, personality and nationality claims, and protective (and other stylized) claims.<sup>15</sup>

With respect to cases involving issues of speech and expression, territorial approaches seem to be the most prevalent. They also provide the most coherent and predictable scheme of jurisdiction, as I will discuss below. However, nationality-based jurisdiction is a regular practice in many states, being asserted over citizens who commit acts abroad that are criminal at home, as well as over citizens who commit acts abroad that are criminal abroad, though not necessarily at home. It is no small matter that the Convention on Cybercrime subscribes to the latter notion,

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<sup>14</sup> *Yahoo!, Inc.* 169 F. Supp. 2d at 1192.

<sup>15</sup> See Susan W. Brenner & Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, 4 J. HIGH TECH. L. 1, 5 (2004).

requiring states, *inter alia*, to claim jurisdiction over their nationals who commit acts that are criminal where committed — even if those acts are not punishable under their own laws.<sup>16</sup> Several other countries, such as Germany, The Netherlands, and Belgium, have similar clauses for various categories of crimes.<sup>17</sup> These countries and others also have provisions for jurisdiction based on the victim’s identity, and indeed, certain sections of 18 U.S.C. § 1030 are based on the extent to which conduct affects the federal government as a “victim.”<sup>18</sup> In other areas of the law, several states base jurisdiction on a “protective principle” which “allows a state to exercise extraterritorial prescriptive jurisdiction when the conduct in question is ‘directed against crucial state interests, especially state security.’”<sup>19</sup> Parts of § 1030 embody this principle as well.<sup>20</sup>

Despite the usefulness of nationality and protective approaches in some contexts, when it comes to Internet expression, the law needs some other solution to the “Yahoo! Problem” — that is, how to assert jurisdiction over a United States company that (passively) allows foreign users access to materials prohibited in their respective countries. In enacting speech restrictions, governments are specifically trying to prohibit the negative effects of that speech within the country. The fact that the harm is specific to the locality helps to explain why we must turn to territorial principles — the most common factor found in jurisdiction provisions<sup>21</sup> — to enforce Internet speech restrictions. In this vein, the most prevalent provisions are jurisdictional grants based on the location of the acts in question. In the United States, for example, various state

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<sup>16</sup> Convention on Cybercrime, *opened for signature* Nov. 23, 2001, Europ. T.S. No. 185, available at <http://www.conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (last accessed on March 21, 2007).

<sup>17</sup> Brenner, *supra* note 15, at 23.

<sup>18</sup> *Id.* at 24-25; *see also* 18 U.S.C. §§ 1030(a)(3) and 1030(a)(6)(B) (2002).

<sup>19</sup> Henn, *supra* note 5, at 162-63 (citing MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 322 (3d ed. 1999)).

<sup>20</sup> Brenner, *supra* note 15, at 26-28.

<sup>21</sup> *Id.* at 10.

statutes allow for jurisdiction when a transmission is received in or sent from a particular state,<sup>22</sup> when a computer is accessed within a particular state,<sup>23</sup> and when other hooks of varying breadth are triggered. Other statutes look less to the location of the act and more to the location of a computer, the location of the offending data,<sup>24</sup> or the location (or even potential location) of nearly anything remotely connected to the crime.<sup>25</sup>

But while these solutions offer the virtue of “neatness,” they leave substantial problems unsolved. The nature of Internet communication results in many computer crimes, particularly speech-based offenses, lying outside the reach of such territorial hooks. As such, “contemporary practice on both sides of the Atlantic seems to have converged more or less from a ‘place-of-conduct’ rule to an ‘effects’ test . . . [with] ‘substantial effects’ within the regulating state as justifying prescriptive jurisdiction.”<sup>26</sup> In terms of personal jurisdiction, the well-established “minimum contacts” test used in the United States<sup>27</sup> and elsewhere provides a convenient starting point for developing a coherent set of jurisdictional principles to extend to the Internet.

But “effects” and “contacts” alone cannot be the answer, as this would require the naïve assumption that the rules of the physical world are perfectly suited for the cyber world. The global character of communications and transmissions on the Internet belies the fact that these principles would be a real stopgap. Without further limitation, such an approach could result in unpredictable and arguably universal jurisdiction. Indeed, nearly half a century ago, long before the modern Internet was even a blip on the radar screen, the Supreme Court recognized that “as technological progress has increased the flow of commerce between States, the need for

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<sup>22</sup> See, e.g., ARK. CODE ANN. § 5-27-606 (2003).

<sup>23</sup> See, e.g., CONN. GEN. STAT. ANN. § 53a-261 (2004).

<sup>24</sup> See, e.g., Computer Misuse Act, art. 11(3), 1993 (Singapore).

<sup>25</sup> See, e.g., Computer Crimes Act, art. 9(2), 1997 (Malaysia): “if the offence in question, the computer, program, or data was in Malaysia or capable of being connected to or sent to or used by or with a computer in Malaysia at the material time.”

<sup>26</sup> Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT’L L. 673, 685 (2003).

<sup>27</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

jurisdiction over nonresidents has undergone a similar increase.”<sup>28</sup> And from new modes of transportation to new modes of communication, the doctrine of jurisdiction has proven considerably adaptable.

With respect to jurisdiction via the Internet, one of the first cases to recognize the compelling need for the doctrine to evolve was *Zippo Manufacturing Co. v. Zippo Dot Com*,<sup>29</sup> which developed a sliding scale test for jurisdiction resulting from online activities. Under *Zippo*, a state’s power to assert jurisdiction is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>30</sup> Judge McLaughlin’s opinion in *Zippo* distinguished between “active” and “passive” Web sites, and recognized the degree of interactivity as a criterion for jurisdiction. This case set the stage for what has emerged as the most workable articulation to date of a coherent jurisdictional doctrine — the Ninth Circuit’s “targeting” approach in *Cybersell, Inc. v. Cybersell, Inc.*<sup>31</sup> Working from the traditional hook of “purposeful availment,”<sup>32</sup> the Ninth Circuit looked at whether a company had targeted Internet users in a particular state, specifically encouraging those users to access the company’s site. This approach (which has its roots in non-Internet personal-jurisdiction cases<sup>33</sup>) has since been followed by several U.S. courts,<sup>34</sup> and has been lauded for its effective balancing of domestic enforcement interests with the foreseeability that is at the crux of personal jurisdiction doctrine. To assist courts in assessing whether a company’s Web site has targeted consumers in a particular state or country, Professor Michael Geist has suggested a three-part test: (1) whether

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<sup>28</sup> *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958).

<sup>29</sup> *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>30</sup> *Id.* at 1124.

<sup>31</sup> *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

<sup>32</sup> *E.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Hanson v. Denckla*, 357 U.S. 235 (1958).

<sup>33</sup> *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 789 (1984) (noting that a libel defendant’s “intentional, and allegedly tortious, actions were expressly aimed at” the jurisdiction in question).

<sup>34</sup> *Henn*, *supra* note 5, at 164; *see also* *Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696 (D. Md. 2001); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537 (E.D. Pa. 1999).

the parties have contractually specified which law should govern,<sup>35</sup> (2) whether the company has used technology to target specific jurisdictions,<sup>36</sup> and (3) whether the parties “had or ought to have had [knowledge] about the geographic location of the online activity.”<sup>37</sup>

Courts outside the United States have followed this effects-plus-targeting approach as well, employing criteria that some argue are more broadly applicable than Geist’s three-pronged test.<sup>38</sup> For example, in its discussion of the technological feasibility of geographic filtering, the French court in *Yahoo!* pointed out that Yahoo!’s practice of using targeted advertising based on the location of the user revealed a clear knowledge about those users’ locations.<sup>39</sup> Conversely, a German court opted not to prosecute the German subsidiary of Yahoo!, which had a copy of Adolph Hitler’s *Mein Kampf* available for sale on its auction site (in violation of German law).<sup>40</sup> The court said that Yahoo! should not be liable for the content of user forums,<sup>41</sup> implying that despite the clear effects within Germany, there must be something more than the mere availability of illegal material to impose liability. In addition to taking into account targeted advertising, other factors courts could take into account might include the extent to which a site uses a foreign language, which has proven to be a key factor with respect to neo-Nazi Web sites based in the United States but written in German.<sup>42</sup> Also, the extent to which a site directs viewers to local information can weigh in favor of asserting jurisdiction in that locality.<sup>43</sup>

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<sup>35</sup> Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1386 (2001).

<sup>36</sup> *Id.* at 1393.

<sup>37</sup> *Id.* at 1402.

<sup>38</sup> Henn, *supra* note 5, at 174-75.

<sup>39</sup> Tribunal de grande instance [T.G.I.] [Superior Court of Paris] Paris, Nov. 20, 2000, obs. J. Gomez (Fr.), translation available at <http://www.lapres.net/yahen11.html> (last visited Mar. 21, 2007).

<sup>40</sup> Henn, *supra* note 5, at 171.

<sup>41</sup> Jay Lyman, *German Court Rules Yahoo Not Liable for Nazi Items*, Mar. 28, 2001, <http://www.newsfactor.com/perl/story/8500.htm> (last visited Nov. 28, 2007).

<sup>42</sup> See Patrick Bartlett, BBC News, *Germany struggles with neo-Nazi websites*, Dec. 22, 2000, <http://news.bbc.co.uk/2/hi/europe/1083049.stm> (last visited Mar. 21, 2007).

<sup>43</sup> Henn, *supra* note 5, at 175.

Subscriptions may be another factor, as illustrated in *Dow Jones & Co. v. Gutnick*,<sup>44</sup> where the High Court of Australia held Dow Jones subject to suit in Australia for material that appeared in an online article hosted on a server in New Jersey. The High Court’s decision noted that the material was available to subscribers in Australia who paid using Australian credit cards, and thus Dow Jones had accepted the risk of suit in Australia.<sup>45</sup>

All of those criteria posited above, and others, have their virtues as factors in an inevitably complex jurisdictional analysis. Whatever the specific criteria used, coherent rules for extra-territorial jurisdiction over organizations that utilize the Internet are particularly necessary in the speech/expression context. Without the ability to hold Internet providers and other organizations operating abroad accountable, there would be a “perverse race to the bottom generated by First Amendment liberalism” as organizations seeking to avoid speech-restrictive laws could simply relocate to the United States<sup>46</sup> (or some other permissive jurisdiction<sup>47</sup>). That said, one must not ignore the corresponding danger of chilling speech overall by subjecting companies to the mandates of the most restrictive jurisdictions.<sup>48</sup> Also, there is the danger that countries that are particularly amenable to certain speech-related lawsuits might become excessively used as forums for such actions. For example, the British House of Lords has been quite hospitable to libel suits based on relatively tenuous domestic connections.<sup>49</sup> “London

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<sup>44</sup> *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575 (Austl.).

<sup>45</sup> Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 205-06 (2006).

<sup>46</sup> Watt, *supra* note 26, at 677.

<sup>47</sup> See, e.g., Frank B. Arenas, *Cyberspace Jurisdiction and the Implications of Sealand*, 88 IOWA L. REV. 1165 (2003).

<sup>48</sup> See Amy Oberdorfer Nyberg, Note, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, 92 GEO. L.J. 663, 687 (2004).

<sup>49</sup> See, e.g., *Berezovsky v. Michaels*, (2000) E.M.L.R. 643 (H.L.). Although not an Internet case, the House of Lords permitted a Russian to sue *Forbes* (an American publication) in England, despite the fact that less than one percent of the magazine’s copies were distributed in the country.

accordingly has become a world capitol of ‘libel tourism.’”<sup>50</sup> In Zimbabwe, an American journalist writing for a London newspaper was prosecuted under a Zimbabwean privacy law, on the sole basis that the article could be accessed by a prosecutor actively searching the Internet.<sup>51</sup> “These cases demonstrate the ability of a country with lower standards for free expression to thwart the efforts of other countries with differing legal constructs.”<sup>52</sup> Indeed, the *UEJF et LICRA v. Yahoo! Inc. et Yahoo France* case itself is an example of at least the potential for such a result, as the ruling creates opportunities for litigants to use France as a forum to prosecute expression that may be protected elsewhere.<sup>53</sup>

This variety of values, cultures, and legal systems does not mean we should strive for a universal speech standard, a topic to which I will return below. However, leaving countries free to enact their own speech restrictions and other laws affecting Internet *content* does not necessarily mean a litigation free-for-all, with company executives globetrotting through courtrooms whenever a foreign prosecutor or litigant stumbles across something offensive. With countries free to regulate within their borders, however, there is a compelling need for a coherent international jurisdictional standard so that content providers are on notice of how they may be subject to suit in foreign jurisdictions.<sup>54</sup> As Geist argues, “[t]he move toward using contract and technology to erect virtual borders may not answer the question of whether there is a there there, but at least it will go a long way in determining where the there might be.”<sup>55</sup>

As technology develops and the jurisdictional conflicts continue to grow, a new dimension in the jurisdiction debate may emerge from the chaos. For the time being, however,

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<sup>50</sup> Wimmer, *supra* note 45, at 209.

<sup>51</sup> *Id.* at 209-10.

<sup>52</sup> *Id.* at 210.

<sup>53</sup> Daniel Arthur Lapres, *Of Yahoos and Dilemmas*, 3 CHI. J. INT’L L. 409, 425-26 (2002).

<sup>54</sup> See Henn, *supra* note 5, at 177.

<sup>55</sup> Geist, *supra* note 35, at 1407.

the cases and research strongly support an effects-based approach, limited by a targeting criterion. In addition to its practical benefits, such an approach avoids calling for a “revolution” in the law of Internet jurisdiction and control by recognizing “that the Internet brings with it evolutionary, rather than revolutionary shifts in the law.”<sup>56</sup> But debate as we will about the final solution, a solution is, indeed, necessary. If we expect the Internet to continue to evolve profitably and efficiently, the rules need to be predictable. “It is safe to assume that users would be willing to comply with the law – if only they knew what the law was.”<sup>57</sup>

### III. Zoning & Domestic Enforcement

As the *Yahoo!* litigation illustrates, beyond the threshold jurisdictional issue lies the problem of enforcement at the domestic level. Whatever the theoretical appeal of a regulatory model that preserves domestic sovereignty without chilling Internet speech, can such a model effectively be implemented? While the Internet may once have been borderless, technological developments have “brought geography to the Internet as a widespread commercial and political reality.”<sup>58</sup> Indeed, when the French court ordered Yahoo! to take measures to “render impossible” French users’ access to offending material, that order came only after a panel of experts concluded that geo-location technology existed, and that it was already being utilized in the marketplace.<sup>59</sup> Thus, the *Yahoo!* court did not act until it was clear that the geo-location technology would allow it to order compliance with French laws without chilling speech outside its borders. And geo-location technology has only improved in the nearly seven years since the court conducted its study, further undermining claims that it is impossible to regulate Internet

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<sup>56</sup> Asaad Siddiqi, *Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction over Internet Activities – Including a Critique of Suggested Approaches*, 14 N.Y. INT’L L. REV. 43, 104 (2001).

<sup>57</sup> *Id.* at 94.

<sup>58</sup> Matthew Fagin, Comment, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 412 (2003).

<sup>59</sup> Tribunal de grande instance [T.G.I.] [Superior Court of Paris] Paris, Nov. 20, 2000, obs. J. Gomez (Fr.), translation available at <http://www.lapres.net/yahen11.html> (last visited Mar. 21, 2007).

speech domestically without affecting speech abroad.

Although these geo-location technologies operate on various levels, the basic mechanism is straightforward. When a Web site receives a request from an Internet user to access a particular page, the server operating that site forwards the requesting user's Internet Protocol (IP) address to its geo-location service provider, which has a working database of the physical locations of many IP addresses currently in use. Based on the information in this database, the geo-location service sends back to the Web site server "an educated guess" of the user's location. The Web site can use this information to provide targeted advertising and other links, render pages in a particular language, or otherwise provide (or deny) access to particular content.<sup>60</sup>

The development of this technology has led to new ways to regulate the Internet. For example, China has made rather successfully isolated its users from certain foreign sources of information, countries like Singapore and Saudi Arabia have taken steps to filter specific content, South Korea has banned access to gambling sites, and Iran has made efforts to keep children from using the Internet.<sup>61</sup> As countries continue to look toward the local effects of Internet speech when implementing their laws, "there is a huge incentive for Web site operators to know the location of those who access their content."<sup>62</sup> With many already using geo-location technologies in other contexts, the potential for the regulatory use of such services is there.

The practical availability of regulation for geo-location technologies, however, is hardly by itself a good justification for such regulation, and proposals to "zone" the Internet using geo-location services definitely have their critics. Objections to regulation through such "zoning" on the Internet are both philosophical and pragmatic. For many, the architecture and purpose of the

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<sup>60</sup> Dan Jerker B. Svantesson, *Geo-location Technologies and Other Means of Placing Borders On the 'Borderless' Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101, 102 (2004).

<sup>61</sup> *The Internet's New Borders*, ECONOMIST, Aug. 11, 2001.

<sup>62</sup> Svantesson, *supra* note 60, at 137.

World Wide Web embody values underlying the First Amendment, “making the very idea that the free movement of data might encounter the regulatory claims of other States seem an anathema to the Web’s ideological foundations.”<sup>63</sup> One reporter characterized the reaction to the Australian decision in *Dow Jones*<sup>64</sup> as follows: “cyberspace shuddered. It was the first time in internet history that a nation’s top court . . . had claimed sovereignty over the stateless wastes of cyberspace . . . . The demise of the internet was widely predicted.”<sup>65</sup> Other critics of Internet zoning have termed filtering and blocking techniques as a form of “Internet death penalty,” subjecting innocent Internet speakers to tactics typically used to prevent denial-of-service attacks or large-scale spam.<sup>66</sup> Still other critics predicted that e-commerce would soon grind to a halt due to the inherent complications from the sanctioning of Internet zoning.<sup>67</sup> Of course, one man’s “demise” is another’s salvation, and many realized that the sky was not falling, inviting this early attempt to regulate content on the Internet as “a welcome harbinger of things to come.”<sup>68</sup>

Nightmare scenarios aside, as Internet use continues to grow and as material that strikes at the heart of domestic values continues to find its way into homes across the globe, countries

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<sup>63</sup> Watt, *supra* note 26, at 681.

<sup>64</sup> See *supra* note 44 and accompanying text.

<sup>65</sup> Patti Waldmeir, Comment & Analysis, *Material Published on the Internet and Thus Accessible Anywhere in the World is Increasingly Being Challenged Under the Laws of Individual Nation States*, FINANCIAL TIMES (London), Dec. 16, 2002, at 19.

<sup>66</sup> Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 679 (2003).

<sup>67</sup> See Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market*, 18 BERKELEY TECH. L.J. 1191, 1219 (2003) (“The next thing you know a court in the Middle East will order another U.S. Internet company to block Middle Eastern consumers from seeing soft-core pornography . . . . You can pick your country and pick your problem. Will every Internet company in the future have to put on 42 geographical filters to make everybody happy? Or 420 filters? . . . Does an Internet company have an affirmative duty to figure out the laws of every nation in the world and put on the appropriate geographical filters, or do they just have to put on filters following a court order? And as the technology gets better, does a company have a duty to slap on the newest filtering gizmo?”) (quoting Carl S. Kaplan, *Ruling on Nazi Memorabilia Sparks Legal Debate*, N.Y. TIMES, Nov. 24, 2000, available at <http://www.nytimes.com/2000/11/24/technology/24CYBERLAW.html?ex=1195880400&en=9c36998e3fef729b&ei=5070> (internal citations omitted)).

<sup>68</sup> *Id.*

are hardly going to sit by and watch the erosion of those cultural values — nor should they be expected to. Just because the Internet was once lawless does not mean it must remain so. As technology changes what we are able to do on the Internet, it is only reasonable that the law should adapt. If the Internet “is not naturally borderless, then real-world yardsticks for the exercise of prescriptive jurisdiction retain their legitimacy.”<sup>69</sup> An international agreement on the contours of appropriate speech regulation seems to be a virtual impossibility, and so the enforcement of local rules is necessary if we wish to avoid an outcome where the Internet becomes a safe haven where domestic criminals can escape punishment for actions they could not get away with in the non-digital world. As *The Economist* rather cleverly (and accurately) put it, “[t]hough it is inspiring to think of the Internet as a placeless datasphere, the Internet is part of the real world. Like all frontiers, it was wild for a while, but policemen always show up eventually.”<sup>70</sup>

The more pragmatic objections to Internet zoning focus on the fact that geo-location and related technologies are not 100 percent effective,<sup>71</sup> and that their implementation is cost-prohibitive for many smaller companies and organizations. While it is true that these technologies would not currently achieve the ideal of perfect enforcement, skeptics’ criticisms based on technical accuracy ignore the fact that to have the desired regulatory impact, all that is necessary is that such tools be reasonably effective.<sup>72</sup> A regulation “need not raise the cost of the prohibited activity to infinity in order to reduce the level of that activity quite substantially. If regulation increases the cost of access to this kind of information, it will reduce access to this

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<sup>69</sup> Watt, *supra* note 26, at 683-84.

<sup>70</sup> *The Internet’s New Borders*, *supra* note 61.

<sup>71</sup> See Tribunal de grande instance [T.G.I.] [Superior Court of Paris] Paris, Nov. 20, 2000, obs. J. Gomez (Fr.), translation available at <http://www.lapres.net/yahen11.html> (last visited Mar. 21, 2007).; see also Svantesson, *supra* note 60, at 111-13 (various measures of accuracy).

<sup>72</sup> Fagin, *supra* note 58, at 414.

information, even if it doesn't reduce it to zero.”<sup>73</sup> Indeed, if a government entity had to show that its regulations were perfect in order to justify their implementation, few regulatory schemes — virtual or otherwise — would make the grade.<sup>74</sup>

Comparing the *Yahoo!* case to prior litigation involving Internet speech helps to illustrate the sharp contrast between the “then and now” of geo-location technology, as well as the benefits these services can now offer as regulatory tools. Five years before the original French judgment in *Yahoo!* (which came in 2000), CompuServe was faced with quite a dilemma when it found itself indicted in Germany for violation of Germany's obscenity laws. Without effective technology to filter access based on geographic location, CompuServe blocked access worldwide to the offensive material in an attempt to avoid prosecution.<sup>75</sup> However, modern technology allows courts to fashion a remedy aimed at the users within its jurisdiction, while avoiding the risk of over-regulation.<sup>76</sup> And unlike “real world” regulations, this technology allows for the rules governing online content to be embedded in the software itself, which can effectively “cause illegality to become a technical impossibility.”<sup>77</sup> Thus, while reasonable minds may disagree with the substance of a regulation, there does not seem to be anything inherently flawed about the idea itself to justify the “pariah” status some critics have given to Internet zoning schemes.

The question of who is to bear the cost of these regulations, however, seems much more fertile ground for zoning critics. The French court in the *Yahoo!* case did not hesitate to impose the burden on Yahoo! itself. And as Watt points out, it is not uncommon for companies who

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<sup>73</sup> Lawrence Lessig, *Surveying Law and Borders: The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1405 (1996).

<sup>74</sup> *Id.*

<sup>75</sup> Siddiqi, *supra* note 56, at 89-90.

<sup>76</sup> Watt, *supra* note 26, at 688.

<sup>77</sup> *Id.* at 689-90; *see also* Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999). Of course, this idea of a technical impossibility seems a bit naïve, given the adeptness sophisticated users have shown in circumventing technological barriers in other contexts.

market a product or service in the non-digital world to have to comply with local regulations; the “polluter pays” principle is quite often invoked in other regulatory contexts.<sup>78</sup> Watt suggests, however, that these traditional approaches to regulation ignore the complexity of the Internet context, where states have a greater incentive to ensure adequate enforcement and are also in a better position to craft regulatory schemes suited to their specific legal requirements.<sup>79</sup> Left to their own devices and faced with a host of conflicting national laws, ISPs and other providers of online content would likely resort to the least-common-denominator approach, being “forced to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards.”<sup>80</sup>

In some cases, even a single regulatory scheme may prove too difficult for service providers to enforce effectively, resulting in inconsistent regulation if ISPs are to be relied upon for enforcement. Under a 2002 Pennsylvania law directing ISPs to block access to sites containing child pornography (upon notice by the Attorney General), the result was significant over-blocking,<sup>81</sup> which led to invalidation under the First Amendment.<sup>82</sup> But while his opinion focused on the free-speech violation, Judge Dubois also noted that the patchwork means of enforcement — notification to individual ISPs following specific complaints and identifications of offending sites — resulted in sites being banned for some users (customers of a particular ISP) but not others.<sup>83</sup> In addition, the costs and difficulties of different mechanisms of filtering also led to inconsistent approaches across ISPs, leaving great holes in the regulatory scheme depending on which ISP residents used, as well as the sophistication of the user.<sup>84</sup> This absence

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<sup>78</sup> *Id.* at 693.

<sup>79</sup> *Id.* at 694.

<sup>80</sup> *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996).

<sup>81</sup> Zittrain, *supra* note 66, at 674-75.

<sup>82</sup> *See generally* *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

<sup>83</sup> *Id.* at 628.

<sup>84</sup> *Id.* at 631-33.

of uniform implementation portended additional costs for ISPs, including the threat of lost customers due to competitive differences in filtering and the effects on customers' online access.<sup>85</sup> Even though most ISPs had substantial filtering capabilities for use in combating denial-of-service attacks and the like, the infrastructure of each was quite different and the costs necessary to implement the law varied significantly across companies.<sup>86</sup> The over-blocking that resulted from these patchwork efforts to comply with the Pennsylvania law in some sense legitimated the fears of Internet-regulation critics. That said, Judge Dubois specifically noted that the court was "not prepared to rule that [U.S.] states can never regulate the Internet."<sup>87</sup>

Whatever the resolution in particular jurisdictions, Pennsylvania's first attempt at geographic filtering illustrates the importance of the debate over cost. Ignoring the First Amendment problems that would still arise regardless of who bore the cost of implementation, a state-funded scheme would reduce the incentive for ISPs to undercut their competitors and would remove the regulatory "preference" for large ISPs with greater resources. While it is true that this preference exists in the physical world, the ease of cross-border Internet communications and the global nature of the Internet suggest that "analogies with the real world should not be pushed too far."<sup>88</sup> That said, one cannot ignore the fact that many states with more restrictive regimes (*vis-à-vis* speech) may lack the resources to finance such regulations, resulting in the theoretically preferable approach becoming a practical impossibility in many places. Of course, a convincing response to such criticism might simply be that prohibitive costs may not be such a bad thing after all. Making the receiving State responsible for ensuring compliance "could be an efficient means of counteracting the inevitable temptation to

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<sup>85</sup> *Id.* at 628-29.

<sup>86</sup> *Id.* at 629-30.

<sup>87</sup> *Id.* at 663.

<sup>88</sup> Watt, *supra* note 26, at 694.

overregulate,” and may help to prevent States that feel threatened by the availability and dissemination of information on the Internet from being overly aggressive in their efforts to control access to that information.<sup>89</sup>

However these dimensions of the zoning debate are eventually resolved, the explosion in Internet use against the backdrop of a collage of speech-restrictive laws speaks to the inevitability of the regulation of cyberspace.<sup>90</sup> Whatever service providers may argue, and whatever may once have been the case, the fact is that reliable geo-location technologies are not only available but are actively in use by Web sites, both for profit (advertising) and otherwise (language compatibility, etc.). With such tools now being a realistic means for regulation, Justice O’Connor’s analogy in *Reno v. ACLU* to zoning laws<sup>91</sup> seems prescient, rather than hypothetical. Real-world, territorially restricted solutions do exist, having now evolved and adapted from models based in non-Internet law. In the words of Judge Easterbrook, whatever might have been the case in the past, the law of regulating cyberspace is no longer “The Law of the Horse.”<sup>92</sup>

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<sup>89</sup> *Id.* at 694-95.

<sup>90</sup> See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 889 (1996) (“Zoning is coming to cyberspace, with an efficiency unmatched in real space.”).

<sup>91</sup> 521 U.S. 844, 887 (1997) (O’Connor, J., dissenting) (“The creation of ‘adult zones’ is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults.”)

<sup>92</sup> See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207-08 (1996) (“When he was dean of this law school, Gerhard Casper was proud that the University of Chicago did not offer a course in ‘The Law of the Horse.’ He did not mean by this that Illinois specializes in grain rather than livestock. His point, rather, was that ‘Law and . . .’ courses should be limited to subjects that could illuminate the entire law . . . Dean Casper’s remark had a second meaning — that the best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on ‘The Law of the Horse’ is doomed to be shallow and to miss unifying principles. Teaching 100 percent of the cases on people kicked by horses will not convey the law of torts very well. Far better for most students — better, even, for those who plan to go into the horse trade — to take courses in property, torts, commercial transactions, and the like, adding to the diet of horse cases a smattering of transactions in cucumbers, cats, coal, and cribs. Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses.”).

#### IV. Constitutional Hurdles & International Enforcement

Thus, we arrive at the endgame of the *Yahoo!* litigation: when courts are faced with the question of whether to enforce a foreign judgment based on the foreign country's speech restrictions, what role is there for the law and values of the enforcing state? Specifically, given the enormous presence on the Internet of companies based in the United States, and given that the First Amendment is among the most speech-permissive regimes in the world, what is the responsibility of U.S. courts in enforcing decrees like that of the French court in *Yahoo!*? As a general rule, courts in the United States are quite deferential to foreign judgments, even when the substantive outcome is different from the outcome that would have been reached had the suit been commenced in the United States. More than a century ago, the Supreme Court explained this deference in a case that is still followed today:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a *competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record,* the judgment . . . should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.<sup>93</sup>

But despite the fact that all of the positive criteria of this rule (italicized above) — and none of the negative conditions — seem to have been met by the French judgment, the District Court in *Yahoo!* decided otherwise.<sup>94</sup> In declining to enforce the French court's order in the United States, Judge Fogel reasoned that the interests of international comity did not extend to a

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<sup>93</sup> *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895) (emphasis added).

<sup>94</sup> It is worth noting, of course, that the *Yahoo!* case as styled before the District Court was not yet a suit to enforce a money judgment — the general factors cited by the Court in *Hilton*, however, can be extended to a broader comity analysis.

“foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.”<sup>95</sup>

The court’s holding in this regard is nothing new, particularly in the First Amendment context. A decade before the *Yahoo!* decision, a state trial court in New York declined to recognize a defamation judgment from the British High Court of Justice, arguing that because of significant differences in American and British defamation law, enforcement would have a chilling effect on free speech in the United States.<sup>96</sup> Gregory Wrenn, a Deputy General Counsel for Yahoo!, argues that such a strong view of First Amendment protections is inherent in the nature of our constitutional law. Wrenn, in fact, goes so far as to claim that all those who keep their assets in the United States “should be effectively judgment-proof with respect to foreign judgments that attempt to hold them accountable for . . . Internet-based communication services if those judgments are incompatible with the First Amendment.”<sup>97</sup> On one level, such an approach has consistency on its side — the same “borders” that zone the Internet for regulatory purposes could be seen to create analogous zones of constitutional law, with the enforcing country free to apply its own constitutional limitations within its borders. But while this consistency may be attractive, such calls to apply the First Amendment in this context fail to recognize that in the *Yahoo!* litigation, France was only seeking to enforce restrictions against speech *in France* — the order did not target any speech within the United States.

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<sup>95</sup> *Yahoo!, Inc.*, 169 F. Supp. 2d at 1192.

<sup>96</sup> *Bachchan v. India Abroad Pubs., Inc.*, 154 Misc. 2d. 228, 234 (N.Y. Sup. Ct. 1992) (The suit here was the result of a story written by a London author for an Indian news service, about an Indian citizen. Two Indian newspapers in the United Kingdom carried the story, leading Bachchan to sue in England (no doubt due to England’s rather plaintiff-friendly defamation laws). The court’s refusal to enforce the British judgment in *Bachchan* is, perhaps, even more distressing than in *Yahoo!*. At least in *Yahoo!*, the offending speech originated from servers in the United States, whereas in *Bachchan*, the speech — from origination to effect — was wholly outside the United States.).

<sup>97</sup> Gregory J. Wrenn, *Cyberspace is Real, National Borders are Fiction: The Protection of Expressive Rights Online Through Recognition of National Borders in Cyberspace*, 38 STAN. J. INT’L L. 97, 106 (2002).

If we accept that effective tools for geographic filtering exist (which the U.S. court was seemingly willing to do<sup>98</sup>), then it is difficult to see how enforcement of the French judgment would chill any more speech in the United States than would be chilled if, for example, Yahoo! had significant assets in France, thus obviating the need for U.S. enforcement. Like in *Bachchan* and another well-known libel-enforcement case, *Telnikoff v. Matusevich*,<sup>99</sup> the U.S. court in *Yahoo!* conflated the very separate issues of speech directed within the country, and speech originating in the country but directed abroad. None of these opinions sheds any light on the courts' conclusions that "limiting speech directed abroad is an effect that comes within the ambit of the First Amendment."<sup>100</sup> Of course, the Internet makes it nearly impossible to classify any speech as completely extraterritorial. But the point is not that the speech itself is limited to any particular jurisdiction. It is that with the ability to geographically restrict who can access Internet speech, there exists the corresponding ability to limit significantly any spillover effects, thus avoiding the chilling of domestically protected speech. While it is comforting to know that U.S. courts are concerned with the speech-restrictive effects of their judgments, it remains unclear what protected speech will be chilled by enforcement of a foreign judgment, based on foreign law, affecting a foreign citizenry.

The decision of the District Court in *Yahoo!* assumes, incorrectly, "that mere enforcement of a foreign speech-restrictive judgment has the same First Amendment (and, thus, public policy) implications as imposition of a speech-restrictive rule by a state actor in the first instance."<sup>101</sup> Indeed, nearly 40 years ago, Professors von Mehren and Trautman set out a list of relevant

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<sup>98</sup> See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1188 (N.D. Cal. 2001).

<sup>99</sup> 702 A.2d 230 (Md. 1997).

<sup>100</sup> Molly S. Van Houweling, *Enforcement of Foreign Judgments, The First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT'L L. 697, 704 (2003).

<sup>101</sup> *Id.* at 701.

policies to consider when assessing foreign judgments, several of which are relevant to the Internet expression context:

[A] desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated; a related concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent; . . . an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction; and, in certain classes of cases, a belief that the rendering jurisdiction is a more appropriate forum than the recognizing jurisdiction, either because the former was more convenient or because as the predominantly concerned jurisdiction or for some other reason its views as to the merits should prevail.<sup>102</sup>

All of these policies, though not specifically enshrined anywhere in the law, favor enforcement of the French court's judgment in *Yahoo!*, as well as in other cases involving speech-restrictive laws and enforcement of territorially constrained foreign court orders. That is, while the principles governing the recognition of foreign judgments, including the Uniform Foreign Money-Judgments Recognition Act, allow for the refusal to enforce a judgment that is "repugnant to the public policy" of the enforcing state,<sup>103</sup> it is not enough that the judgment differs from what the enforcing state would have done in the first instance. Rather, it "must be so wrong, such a violation of justice, that it works an injustice wherever it may be given effect."<sup>104</sup>

Outside the First Amendment context, courts have proven quite unwilling to extend this public policy exception beyond relatively confined circumstances. Although it was hardly a case of constitutional proportions, the Fifth Circuit recently suggested that the public policy exception

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<sup>102</sup> Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04 (1968).

<sup>103</sup> Unif. Foreign Money-Judgments Recognition Act § 4(b)(3), 13 U.L.A. 59 (Part II, 2002). It should be noted that some claims do not fall under the aegis of the Act, such as tax judgments and criminal fines/penalties. *Id.* § 1(2).

<sup>104</sup> Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1028 (1994).

only applied to situations where the cause of action itself was repugnant to public policy.<sup>105</sup>

While it would depend on the level of abstraction at which one defined Internet-speech-restriction causes of action, prosecutions based on speech regulations are not *per se* against U.S. public policy. Indeed, our own First Amendment jurisprudence recognizes many categories of speech that are unprotected, and which could subject a speaker to both criminal and civil suit.<sup>106</sup>

The Restatement (Third) of Foreign Relations Law recognizes the limited scope of the exception:

the fact that a particular cause of action does not exist or has been abolished in the state where recognition or enforcement is sought . . . does not necessarily make enforcement of a judgment based on such an action contrary to the public policy of the recognizing State or of the United States.<sup>107</sup>

However strongly we might feel about First Amendment protections in this country, unless it is truly our intent to export U.S. constitutional protections abroad, there is no reason why our interest in protecting free speech at home should trump the interests of other countries in applying their own laws.<sup>108</sup>

In addition to either misunderstanding or ignoring the real distinctions here between enforcement and prosecution in the first instance, the District Court's First Amendment analysis in *Yahoo!* smacks of an effort to globalize U.S. constitutional values, as well as an attempt to hold on to the time when these values dominated the Internet. As one writer said with respect to the *Yahoo!* decision,

The French democracy has chosen rules for free expression in its criminal code that are consistent with international human rights but that do not mirror U.S. constitutional protections. . . . The Internet gives neither policy a greater claim to legitimacy than the other. Yet, *Yahoo* reflects a shifting economic and political

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<sup>105</sup> *Southwest Livestock and Trucking Co., Inc. v. Ramon*, 169 F.3d 317, 321 (5th Cir. 1999). The public policy exception involved was enshrined in the Texas Recognition Act, which is substantially the same as the Uniform Foreign Money-Judgments Recognition Act, which was in turn designed to codify common-law norms.

<sup>106</sup> See generally 16A AM. JUR. 2D *Constitutional Law* §§ 498, 502-07.

<sup>107</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. f. (1987).

<sup>108</sup> See Stern, *supra* note 104, at 1031-34.

power struggle on the Internet that suggests that the American position is becoming a minority view.<sup>109</sup>

While attempts to measure and quantify regional Internet use are hardly scientific, it seems quite clear that a majority of Internet traffic now originates outside the country.<sup>110</sup> According to one measurement, North America is now only home to just over one-fifth (approximately 21 percent) of worldwide Internet usage.<sup>111</sup>

This shift away from an American-centered Internet toward an infrastructure that is truly international in scope raises new concerns about pluralistic democracy and the preservation of state sovereignty in cyberspace. Despite the fact that “the U.S. cultural value of the free flow of information is embedded in the technical rules of data transmission over the Internet,” other democracies give decidedly more weight to other human rights and interests, including the interests of racial, ethnic, and religious groups in remaining free from harassment — even when those interests conflict with free speech.<sup>112</sup> The fact that the major international human rights instruments limit free speech when it comes to the advocacy of ethnic, racial, religious, or other hatred<sup>113</sup> indicates that it is really the United States which is the outlier.

Regardless of where majority opinion lies in terms of substance, those who argue for an untrammelled cyberspace ignore that such an approach, while “liberal” in the sense of non-restrictive, undermines basic liberal democratic principles.<sup>114</sup> Professor Netanel’s analysis of a hypothetical Web site that is based in Texas, accessed in Germany, and is violative of German

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<sup>109</sup> Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 263 (2002).

<sup>110</sup> *Id.*; see also Dick Kelsey, *Study — 55% of World’s Web Traffic Non-U.S.*, NEWSBYTES, Jan. 23, 2001.

<sup>111</sup> Internet World Stats: Usage and Population Statistics, World Internet Usage Statistics News and Population Stats, <http://www.internetworldstats.com/stats.htm> (last visited March 21, 2007). These statistics were current as of March 10, 2007.

<sup>112</sup> Reidenberg, *supra* note 109, at 273.

<sup>113</sup> See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>114</sup> See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000).

law illustrates the problem:

[T]o deny Germans the possibility of applying their law to the web site operators would frustrate their fundamental expression of democratic self-rule. . . . [I]n our increasingly interconnected world (offline as well as online), many local ordinances have spillover effects in other countries. To focus only on whether foreign residents have consented to those effects is to ignore the legislating country side of the liberal democracy equation. When . . . foreign resident conduct has substantial effect within the legislating country and runs strongly against that country's fundamental public policy, the prescriptive outcome of the legislating country's democratic process should prevail.<sup>115</sup>

Those who decry domestic speech restrictions and the zoning of cyberspace as the “Internet death penalty” imply that such restrictions are evidence of a democratic failure of sorts. But while we have reason to be concerned about, for example, absolute bans on children using the Internet in countries with oppressive, non-democratic regimes, the argument that the well-developed democracies of Europe deserve such a paternalistic approach is far weaker.<sup>116</sup>

There is also much to the argument that the democratic process itself serves as a real check on overly oppressive regulation. “To the extent that societies engage in extensive censorship, they will be marginalized on the Internet. The potential risk of doing business in oppressive societies will serve to discourage companies from supporting those repressive regimes through commercial activities.”<sup>117</sup> In the face of such consequences on local commerce, the voters (to the extent that they have a say) would then have to reassess the degree to which they value the speech restrictions. The outcome may be the status quo, but assuming this status quo comes about through the democratic process, there seems to be little in the way of a normative argument justifying the imposition of a global set of Internet values. It is no small fact

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<sup>115</sup> *Id.* at 492-93.

<sup>116</sup> See also Reidenberg, *supra* note 109, at 278 (“The empowerment of democratic states through the principles of geographic determinacy and local accountability brings a concomitant concern that non-democratic states will also be able to enforce repressive legal rules. While this concern clearly merits reflection, controlling the behavior of non-democratic regimes is more broadly a question of international law than of this particular technical choice allowing local accountability.”)

<sup>117</sup> Reidenberg, *supra* note 109, at 277.

that the United States itself subscribes to this notion of local communities having some control over the standards for expression within those communities.<sup>118</sup> And while the Internet no doubt complicates the idea of what is meant by a “local community,” surely it must at least encompass a national citizenry.

All of this raises a more practical question: given the international character of most Internet-related litigation, to what extent should courts, when addressing these cases in the first instance, consider the law of the enforcing jurisdiction? With the exception of its jurisdictional analysis, the French court in *Yahoo!* did not pay much heed to U.S. substantive law and as a result, issued a judgment that proved unenforceable. Of course, there is something to the arguments of those who cite the overriding importance of domestic constitutional values.<sup>119</sup> Enforcement of foreign judgments does require some sort of judicial state action, and thus a court faced with a foreign order is still subject to institutional and constitutional constraints that may be unrelated to the substantive law that is being applied.<sup>120</sup> The problem with this argument and with its proponents’ analogy to *Shelley v. Kraemer*,<sup>121</sup> is that in cases like *Yahoo!*, the original actor — here, a state actor itself — is not acting contrary to its own laws. Unlike the *Shelley* context of a court being asked to enforce an action by an actor who himself was operating in the shadow of the U.S. Constitution, in the *Yahoo!* case, France was clearly not subject to these restrictions. To expect France to allow foreign constitutional interests to trump its own laws is an affront to its sovereignty, particularly when one considers the centrality of hate

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<sup>118</sup> See, e.g., *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (“[O]bscenity is determined by the standards of the community where the trial takes place.”); see also *Miller v. California*, 413 U.S. 15, 30-33 (1973).

<sup>119</sup> See Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2112 (2004) (“Even when choice of law analysis dictates the applicability of the law of the forum, the normative superiority of the constitutional law of the performance country must be reckoned with.”).

<sup>120</sup> *Id.* at 2132-33.

<sup>121</sup> 334 U.S. 1 (1948).

speech restrictions to much of international law, culture, and society.<sup>122</sup> Indeed, such matters demand care and precision, not, as one writer has put it, “an over-generous enthusiasm.”<sup>123</sup>

## V. Conclusion

It is unsurprising that some of the harshest criticism of U.S. “over-involvement” in efforts to regulate the Internet stems from the United States’ permissive attitude toward all forms of speech.<sup>124</sup> In a 1998 report on regulating the Internet, the French Council of State illustrated with some clarity the tension caused by disparate approaches to speech regulation, as well as by America’s continued role as a safe-haven for hate speech on the Internet:

The point is to prove, once again, the ability of our Old World to imagine tomorrow’s world, given our continent’s cultural diversity and attachment to the defense of human rights. The general philosophy behind this report might be summed up by the objective whereby digital networks become a space for “world civility.” . . . From the European perspective, while the balkanization of the Internet might not be desirable, the American privileging of the market has had a detrimental impact on cultural integrity.<sup>125</sup>

The struggle between nations over cultural differences is an old and particularly futile one. Rather than attempt to impose our values on other nations with markedly different histories, cultural values, and legal norms, our interests would be better served by seeking out ways to preserve these differences while accounting for the globalization of commerce and communication.<sup>126</sup> The challenge lies in trying to figure out where to strike the balance between the freedom of speech that is the hallmark of Internet communication, and preservation of local cultural values — not in devising ways to undermine these local values by effectively

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<sup>122</sup> See, e.g., *Faurisson v. France*, Human Rights Comm., UN Doc. A/52/40 (1997) (upholding the conviction of a former professor under a French act that made it a criminal offense to deny the Holocaust, on the grounds that the right of the Jewish community to live free from fear of an atmosphere of anti-Semitism trumped the defendant’s right to free speech under the ICCPR).

<sup>123</sup> Stern, *supra* note 104, at 1036.

<sup>124</sup> See Fagin, *supra* note 58, at 440.

<sup>125</sup> Quoted in *id.* at 442-43. I could not locate the original text of this report. The author’s citation links to an invalid Web site, and the only report I was able to locate was in French, with no English translation readily available.

<sup>126</sup> Greenberg, *supra* note 67, at 1197.

standardizing speech norms.<sup>127</sup>

One author's analogy of the Internet to a "global network of big and small spiders and their respective webs linked together in networks,"<sup>128</sup> while perhaps now bordering on the cliché, is quite apt when considering the Web's place within a broader cultural framework:

As each spider regulates the infrastructure and content of its section of the web within the framework of its political, social, cultural and economic values, the Internet, like all communication media before it, is becoming what technology, economics, politics and culture make of it. The result is that Internet regulation has begun to reflect the political and cultural complexities of the world.<sup>129</sup>

This typology is nothing new. While the Internet may be unique in how quickly it grew to the point of worldwide usage (largely in the absence of a legal framework to govern it), it is not, nor should it be, any more immune from legal rules than any other new technologies. Users have enjoyed more than a decade of the law's playing "catch-up," as it will continue to do for some time. But critics of the principles underlying the French court's decision in *Yahoo!*, while championing themselves as protectors of the freedom of the Internet, are actually taking a rather myopic view of this medium, with U.S. values as their blinders.

Indeed, "the initial wave of cases seeking to deny jurisdiction, choice of law, and enforcement to states where users and victims are located constitutes a type of 'denial-of-service' attack against the legal system. . . . [T]he attackers seek to disable states from protecting their citizens online."<sup>130</sup> It is hardly speculation to suggest that endless litigation under the legal system *du jour* will continue to lead only to legal stalemates and unenforceable judgments.<sup>131</sup>

While the approach taken by the French court in *Yahoo!* may be flawed, it is at least a valiant

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<sup>127</sup> See *id.* at 1198-1199.

<sup>128</sup> Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 445, 482 (2001).

<sup>129</sup> *Id.*

<sup>130</sup> Joel R. Reidenberg, *Choice of Law and Jurisdiction on the Internet: Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1953 (2005).

<sup>131</sup> Greenberg, *supra* note 67, at 1198.

attempt by a state to split the Internet baby, as it were. As the technology of the Internet continues to change, the debate over the best way for states to enforce laws protecting domestic cultural values can evolve alongside it. But the answer must not be that of the “Internet separatists.” Regulating the Internet is possible, and grows more possible by the day. Thus, the constitutional capital provided to U.S. judges by the First Amendment’s mandate to avoid speech-chilling within the country is slowly vanishing.

In the absence of international agreements on the matter, this leaves us only with comity, which “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”<sup>132</sup> But however we characterize it, the *Yahoo!* case demonstrates that the conflicting values even among the most liberal of the world’s democracies will continue to challenge courts whose tendency is to export the First Amendment to the far corners of the globe. In his opinion granting summary judgment to Yahoo!, Judge Fogel promised us that despite the proper assertion of jurisdiction and application of French law by the French court, the District Court in effectively rendering the French judgment unenforceable “intend[ed] no disrespect for that judgment or for the experience that has informed it.”<sup>133</sup> Perhaps not. But I would imagine that the citizens of France, along with those throughout Europe who support their countries’ speech restrictions, feel otherwise.

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<sup>132</sup> *Hilton*, 159 U.S. at 163-64 (1895).

<sup>133</sup> *Yahoo!, Inc.*, 169 F. Supp. 2d at 1187.