

FAST FACTS:

- The questions of whose laws apply to Internet activities and the appropriate forum for adjudication are complex.
- A case between Yahoo! Inc. and two French anti-Semitism groups over free speech, about which the laws of the two countries conflict, illustrates the problematic issue.
- Although international Internet jurisdiction is an evolving issue, time-tested principles set forth in the Restatement of Foreign Relations Law of the United States offer guidance.



WHO'S IN CHARGE?

The Web may be world-wide, but lawmaking bodies are not. Two experts take a look at the evolving field of international jurisdiction over the Internet.

By Margaret Khayat Bratt and Norbert F. Kugele

Worldwide access to and use of the Internet has grown at an extraordinary pace in recent years. In 1992, approximately 1.3 million computers were connected to the Internet. By 2000, there were almost 260 million worldwide Internet users. Projections indicate that there will be over 765 million Internet users by 2005. While Internet use has been most widespread in the U.S., where there were approximately 110 million Internet users by the end of 1999, it is proliferating quickly in other countries. It is believed that in 2000, there were almost 99 million Internet users in Europe, 72 million in the Asia-Pacific region, and 19.6 million in South and Central America.¹

The Internet offers unprecedented opportunities for international communication and commerce. At the same time, the Internet presents unique jurisdictional challenges, and uncertainty regarding who has jurisdiction over Internet activities threatens to hinder the development of e-commerce. In 1998, the American Bar Association empanelled a group

to examine and make recommendations regarding the knotty question of Internet jurisdiction. The group's report, published in August, 2000, recognizes that "a critical element of the predictability necessary for electronic commerce to evolve profitably and efficiently is businesses' and consumers' knowledge of what regulatory regimes will apply to the businesses in which they engage and with which they interact."²

Businesses and consumers need to know whose law governs their online activities so they can comply with the applicable law. Should a legal dispute arise, the parties also confront the question of the appropriate forum for adjudication. Determining the appropriate forum and choice of law is particularly problematic with regard to online activities, however, because the Internet is available around the globe. Whose regulatory regime applies to material posted on the World Wide Web and accessible from any country? It would be unreasonable to expect a business to comply with "the consumer protection, securities, criminal,



intellectual property, sales, and other substantive laws of every state, country or confederation of countries every time that it offers a service or product on the Internet."³ Some law must apply, but whose law will govern international Internet contacts remains uncertain.

An important case in the unsettled area of international jurisdiction over the Internet has been unfolding in France and California. In April, 2000, two organizations devoted to combating anti-Semitism sued Yahoo! Inc. and its French subsidiary, Yahoo! France, in the Superior Court of Paris. Yahoo! Inc. is a U.S. company, a Delaware corporation with its principal place of business in California. The plaintiff organizations are *La Ligue Contre Le Racisme et L'Antisemitisme* (the International League Against Racism and Anti-Semitism, or LICRA) and *L'Union des Etudiants Juifs de France* (the Union of French Jewish Students, or UEJF). LICRA and UEJF brought suit primarily to force Yahoo! Inc. to ban from its auction site, "Yahoo! Auctions," any objects associated with Nazism, such as coins, medals, and other memorabilia. They also demanded that Yahoo! Inc. eliminate access through its site to any materials condoning Nazism or contesting Nazi crimes. French law prohibits the exhibition or sale of objects inciting racial hatred.⁴ While Yahoo! France did not provide links directly to the Yahoo! Auctions site, French Internet users could link from Yahoo! France to the main Yahoo! site and then access the auction site from there. Yahoo! France is now required to post a notice warning French users that they may violate French law if they access sites relating to Nazi objects or condoning Nazism.

On May 22, 2000, the French court found in favor of LICRA and UEJF. Judge Gomez, who presided in the case, ordered Yahoo! Inc. to take all measures necessary to make it impossible to access auction services offering Nazi memorabilia as well as any other site or service offering an apology for Nazism or questioning whether Nazi crimes occurred. In August, 2000, Judge Gomez granted a two-month reprieve, during which three court-appointed experts examined the technical feasibility of eliminating access from France to certain websites originating in the United States. The experts concluded that it would be possible to block the access to the sites in

question for many, but not all, Internet users in France. On November 20, 2000, the court issued a final order, reiterating that Yahoo! Inc. must deny access from France to sites involving Nazi objects, apologies, or questions about whether Nazi crimes occurred. The court granted Yahoo! Inc. three months to comply or begin paying a penalty of 100,000 francs or about U.S. \$13,000 per day commencing once the three months passed.

Yahoo! Inc. had argued that the Paris court lacked jurisdiction over Yahoo! Inc. in the matter. Yahoo! Inc. maintained that its services were aimed principally toward U.S. users, its servers were located in the U.S., and that any measure restricting speech available through yahoo.com would impermissibly violate the First Amendment of the U.S. Constitution. However, Judge Gomez rejected the argument and asserted French jurisdiction.

Judge Gomez did acknowledge that the Yahoo! Auctions site targets U.S. citizens, and he noted specifically that the nature of most of the objects on the site, the methods of payment provided, the terms of delivery, and the language and currency used all supported the argument that the site is aimed at U.S. citizens. Judge Gomez nonetheless concluded that the connections between Yahoo! Inc.'s role in the dispute and France justified the Paris court's exercise of jurisdiction for the following reasons:

- Sites auctioning objects relating to Nazi ideology might interest French Internet users, and a French Internet user who wanted to visit such a site could obtain access through yahoo.com.
- Merely displaying or making visible a symbol of Nazi ideology is illegal in France. Such a display therefore disrupts the public order in France.
- The sight of the Nazi symbols caused pain to the plaintiff French organizations.

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- When a computer located in France connects to "Yahoo! Auctions," Yahoo! responds by dispatching advertising banners in French. That the auction site transmits advertisements in French suggests that the site is targeting the French users.⁵

To carry out the judgment of the French court against Yahoo! Inc., the French plaintiffs must sue for enforcement in the U.S., not France. Yahoo! Inc. does not have assets in France. Yahoo! France is a legally separate entity that obeys French law, and the French court has held that Yahoo! France is not subject to a monetary fine in this case.⁶ Yahoo! Inc. has already responded to the French decision by filing suit in U.S. District Court for the Northern District of California, San Jose Division, seeking a declaratory judgment that the Paris court's orders of May 22 and November 20, as well as any comparable orders against Yahoo! Inc. thereafter, are not recognizable or enforceable. Yahoo! Inc.'s complaint emphasizes arguments that the Paris court lacked jurisdiction over it and that the Paris court's decision is unenforceable in the U.S. because it radically contravenes the First Amendment:



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“The Orders exercise an unreasonable, extraterritorial jurisdiction over the operations and content of a U.S.-based webservice belonging to a U.S. citizen. The Paris court has extraterritorially imposed... the drastic remedy of a prior restraint and penalties that are impermissible under U.S. law, instead of simply enforcing the French Penal Code against French citizens who break French law by accessing information hosted outside their country that the French Penal Code deems illegal.”

The complaint notes first that the services of Yahoo! Inc. are aimed at United States Internet users: “All Yahoo! services that end in the ‘.com’ suffix, without an associated country code as a prefix or extension, are operated in the English language, targeted to a U.S. audience, hosted on U.S. servers, and operate under U.S. laws.” In contrast, the complaint elaborates, there exist specific, clearly distinguishable, regional Yahoo! sites, including Yahoo! France. The suffix or prefix of the Internet address (also known as the Uniform Resource Locator, or URL) of each regional site contains a two-letter code corresponding to the country, for example, <http://www.yahoo.fr>.

The regional Yahoo! sites are aimed toward the citizens of a specific country. “All regional Yahoo! sites, including Yahoo! France, are operated in that local region’s primary language, targeted to the local citizenry, and operated under local laws.” Yahoo! France already removes from its own auction site, <http://fr.auctions.yahoo.com>, any user-posted items violating French law, including Nazi symbols.

Yahoo! Inc.’s claim for relief states that complying with the Paris court’s order to block access to certain sites is not technically possible. Even if it were feasible, it would “require Yahoo! to collaborate in an unconstitutional prior restraint on freedom of expression ordered by a French court acting extraterritorially and without jurisdiction.” The Paris court’s orders “violate U.S. and California public policy of protecting free speech.” Yahoo! Inc.’s complaint also points out that U.S. law already “immunizes Internet Service Providers such as Yahoo! from responsibility and liability for the content of postings by third parties.” Thus, the French judgment would grant to foreign nationals a cause of action unavailable to U.S. citizens.

Yahoo! Inc.’s arguments that it lacked sufficient contacts with France for the Paris court to exercise jurisdiction, and Judge Gomez’s emphasis upon the contacts between Yahoo! Inc. and France, point to a crucial, familiar factor used to determine who may exercise jurisdiction: the extent of the contacts between the parties and the state. Just as minimum contacts and reasonable expectations factor prominently in domestic disputes regarding jurisdiction, international jurisdiction also weighs these elements. Although international jurisdiction over Internet activities is an evolving area, time-tested principles regarding international jurisdiction over other activities offer some guidance.

The Restatement (Third) of Foreign Relations Law of the United States sets forth jurisdictional principles that may be useful in developing policy regarding international jurisdiction over Internet activities. The restatement posits limits on a state’s jurisdiction to prescribe, to “make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by leg-

islation, by executive act or order, by administrative rule or regulation, or by determination of a court.” A state has jurisdiction to prescribe law with respect to, among other things, conduct that wholly or substantially takes place within its territory, the status of persons and interests in things present within its territory, and conduct intended to have a substantial effect within its territory. However, a requirement of reasonableness circumscribes a state’s prescriptive jurisdiction: “Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”⁷

The restatement recommends evaluating all relevant factors to determine whether the exercise of jurisdiction over a person or activity is unreasonable, including, where appropriate:

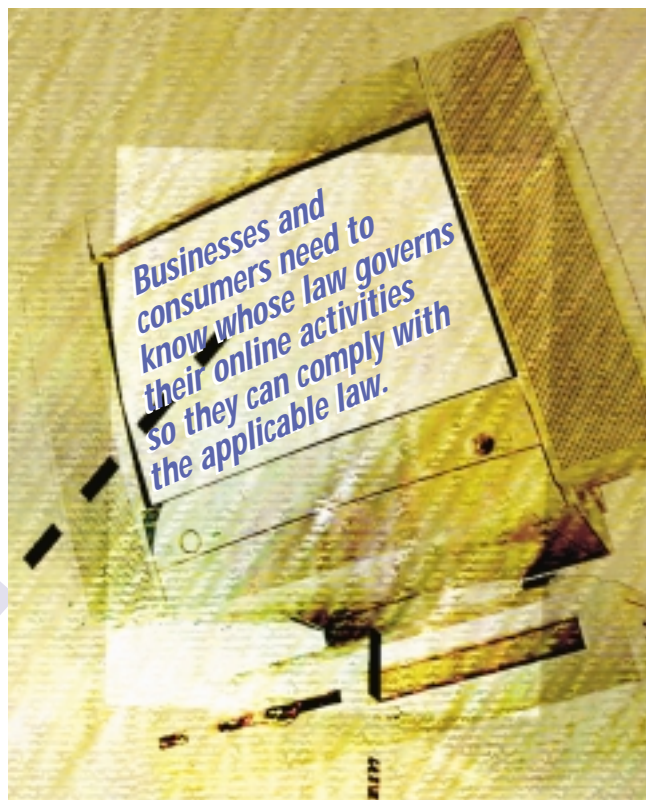
- the extent to which the activity takes place within the regulating state or has substantial, direct, and foreseeable effects upon or in the state
- the connections between the regulating state and the person principally responsible for the activity being regulated, or between the regulating state and those the regulation seeks to protect
- the nature of the activity being regulated, importance of the regulation to the state imposing the regulation, extent to which other states regulate similar activities, and degree to which the desirability of such regulation is generally accepted
- the existence of justified expectations that the regulation might hurt or protect
- the extent to which another state may have an interest in regulating the activity
- the likelihood of conflict with regulation by another state

Situations may arise in which it would be reasonable for more than one state to exercise prescriptive jurisdiction and the laws of the multiple states conflict. For example, even if both the U.S. and France could reasonably assert prescriptive jurisdiction over Yahoo! Inc.’s online activities insofar as they impact French citizens, the substantive laws of the U.S. and France clash in this matter. The U.S. affords great protection to pure political speech, including speech many find offensive, while

France does not permit certain political speech. The restatement concludes that "in a situation where it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate both its own and the other state's interest in exercising jurisdiction, in light of all the relevant factors." Further, "a state should defer to the other state if that state's interest is clearly greater." Under such an analysis, the French court probably should have deferred to the particularly strong U.S. public policy claim.

A real problem in using a minimum contacts analysis to determine whether a state has jurisdiction over particular Internet activity arises in that webpages may be accessed from virtually anywhere. Businesses may have contact with citizens in states all over the world simply by maintaining a website. It does not seem reasonable for every state to be able to assert jurisdiction over the interactions between any citizen who merely visits a website and the person or business maintaining the website. Indeed, as the ABA report points out, "mere maintenance of a website cannot subject a defendant to global jurisdiction if new technology is to be capable of meaningful use."⁸ Yet Judge Gomez relied primarily on the fact that French citizens could access Yahoo! Auctions and sites condoning Nazism to conclude that the Paris court could assert jurisdiction over Yahoo! Inc. Only the fact that Yahoo! Auctions deployed advertising banners in French to French users of the auction site suggests that Yahoo! Inc. deliberately targeted French citizens. Otherwise, Judge Gomez focused on the mere ability to access a website through yahoo.com in asserting jurisdiction.

Citing *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp 1119 (WD Pa 1997), the ABA panel proposes using a sliding scale focusing on the degree to which an alien purposely invokes the benefits and protections of the forum to determine when jurisdiction may properly be asserted over Internet activities:⁹ "At one end of the spectrum are situations where a defen-



dant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions." In the middle area, such as interactive websites involving the exchange of information between the user and host computer, proper jurisdiction would be determined "by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website."

The Yahoo! cases unfolding in France and California are especially significant in that very little precedent exists regarding how courts throughout the world will treat jurisdiction over the Internet. Since the Internet may be accessed from any location in the world, any country could at least attempt to assert jurisdiction over Internet material with which its citizens interact. Individual governments have incentives to regulate cyberspace ranging from financial gain, for example through taxes, to enforcing moral codes of conduct, for example by prohibiting access to pornography.

Decisions in one country regulating a portion of cyberspace may now impact Internet users throughout the world. For example, as Yahoo! Inc. explained in its complaint, the Paris court's orders, if enforced, would have dramatic implications in the United States. Enforcement of the Paris court's orders could "significantly chill freedom of expression for users of Yahoo! and other U.S.-based ISPs (Internet Service Providers) because such companies may choose to remove constitutionally-protected speech in order to avoid protracted court battles or legal liability." The developments in the Yahoo! cases in California and France will have important implications for both political speech and commercial activity over the Internet, as well as for public policy toward inter-

national jurisdiction over the Internet. ♦

Margaret Khayat Bratt is an associate with the firm of Warner Norcross & Judd LLP. She received a BA, magna cum laude, as well as an MA and M Phil., from Yale University, and a JD from Vanderbilt Law School.

Norbert F. Kugele is a partner with the firm of Warner Norcross & Judd LLP. He holds BAs in Economics and Management from the University of Oregon, and a JD, magna cum laude, from the University of Illinois. His practice areas include e-commerce and commercial litigation.

Footnotes

1. *Achieving Legal and Business Order in Cyberspace: a Report on Global Jurisdiction Issues Created by the Internet*, 55 Bus. Law. 1801, 1808 (August 2000) [hereinafter, "ABA Panel Report"].
2. Id. at 1809.
3. Id. at 1813.
4. *Union of French Jewish Students and League Against Racism and Anti-Semitism v Yahoo! Inc. and Yahoo! France*, Unofficial English Translation (visited Mar. 17, 2001), www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html.
5. Id.
6. *Yahoo! Inc v La Ligue Contre le Racisme et L'Antisemitisme*, et al., No. C00-21275, complaint filed (ND Cal, Dec 21, 2000).
7. Restatement (Third) of the Foreign Relations Law of the U.S. §§ 401, 402, 403 (1987).
8. ABA Panel Report at 1850.
9. Id. at 1851.