

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2001

# Yahoo and Democracy on the Internet

Joel R. Reidenberg

*Fordham University School of Law*, JREIDENBERG@law.fordham.edu

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Internet Law Commons](#)

---

### Recommended Citation

Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 *Jurimetrics* 261 (2001-2002)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/40](http://ir.lawnet.fordham.edu/faculty_scholarship/40)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# YAHOO AND DEMOCRACY ON THE INTERNET

Joel R. Reidenberg\*

**ABSTRACT:** This article examines the French court order requiring Yahoo to prevent French Internet users from accessing images of Nazi memorabilia available for auction on the company's American web site. The article uses the French case to challenge the popular belief that an entirely borderless Internet favors democratic values. The article starts from the premise that while the Internet enables actors to reach a geographically dispersed audience, the Internet should not change the accountability of those actors for their conduct within national borders. The article shows that Yahoo's extensive business in France justifies the application of France's democratically chosen law and argues that the decision has important normative implications for pluralistic democracy on the global network. Namely, the decision promotes technical changes in the Internet architecture that empower democratic states to be able to enforce their freely chosen public policies within their territories. At the same time, the infrastructure changes will not enhance the ability of non-democratic states to pursue repressive policies within their territories in violation of international law. The article shows the French decision as a maturing of the Internet regulatory framework and argues that the policy rules embedded in the technical infrastructure must recognize values adopted by different states and must not be dictated by technical elites.

**CITATION:** Joel R. Reidenberg, Yahoo and Democracy on the Internet, 42 *Jurimetrics J.* 261-280 (2002).

---

\*© 2002 Joel R. Reidenberg. Joel R. Reidenberg is Professor of Law, Fordham University School of Law. The author thanks Robert Gellman, Mark Lemley, Neil Netanel, Gideon Parchomovsky, Marc Rotenberg, and Dan Burk, as well as the participants at the University of Minnesota Faculty Works-in-Progress Colloquium and the Fordham Law School Faculty Colloquium for thoughtful comments on an earlier draft and discussions of a companion French article that appeared in *ÉDITIONS DU JURIS-CLASSEUR, COMMUNICATION, COMMERCE ÉLECTRONIQUE*, May 2001. He also thanks Yoram Elkaim for research assistance.

On November 20, 2000, the Tribunal de Grande Instance de Paris re-issued a preliminary injunction<sup>1</sup> ordering Yahoo, an American company, to take all possible measures to dissuade and prevent the access in France of web pages stored on Yahoo's US-based server that auction Nazi objects or that present any Nazi sympathy or Holocaust denial. Many commentators saw the November 20 order as a threat to freedom of expression on the Internet, a misguided attempt to impose national regulations on the Internet, or as an exercise in futility considering the global nature of the Internet.<sup>2</sup> Within weeks, Yahoo asked a United States federal district court to declare the French judgment unenforceable.<sup>3</sup> The sharp criticism of the French decision, however, is misplaced. The ruling will promote the respect of democratic values on the Internet and the respect of those values in the development of Internet technologies. For many, this assertion will be heresy. "Internet separatists" believe that the Net is a separate jurisdiction that transcends national borders and the control of nation-states.<sup>4</sup> They reject the complex relationship between the network and physical territory.<sup>5</sup> They favor allowing Internet actors to determine their own rules, and they reject the capability of democratic states to regulate behavior on the Internet. The Separatist philosophy derives largely from the American value placed on the unfettered flow of information, a value that is embedded in the present architecture of the Internet through the geographic indeterminacy of Internet transmissions.

The *Yahoo* decision, however, represents an affirmation of non-U.S. democratic values and comes at a critical developmental juncture for the Internet.

---

1. Tribunal de Grande Instance [T.G.I.] [trial court of original jurisdiction] Paris, Nov. 20, 2000, Ordonnance de Référé, UEJF, LICRA v. Yahoo!, Inc., available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm>. This decision confirmed the earlier ruling of May 22, 2000, ordering Yahoo to block access to the material deemed illegal to display in France under Article R. 645-1 of the Code pénal, the French criminal code. See T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>. An example of the auction page may be found at [http://www.legalis.net/jnet/illustration/yahoo\\_auctions.htm](http://www.legalis.net/jnet/illustration/yahoo_auctions.htm) (last visited May 1, 2002).

2. Various civil liberties groups including the Center for Democracy and Technology have criticized the French decision, as have French commentators. See, e.g., THE CENTER FOR DEMOCRACY AND TECHNOLOGY, *A Briefing on Public Policy Issues Affecting Civil Liberties Online*, C.D.T. POLICY POST NO. 6.20, Nov. 21, 2000, [http://www.cdt.org/publications/pp\\_6.20.shtml](http://www.cdt.org/publications/pp_6.20.shtml); Valérie Sedaillon, *Commentaire de L'Affaire Yahoo!*, CAHIERS LAMY DROIT DE L'INFORMATIQUE ET DES RÉSEAUX No. 130 (Nov. 2000), available at <http://www.juriscom.net/chr/2/fr20001024.htm>; Etienne Wary, *Yahoo! (Re)condamnée en Référé: À Problème Complexe Solution Boîteuse*, DROIT ET NOUVELLES TECHNOLOGIES: ACTUALITÉS, Nov. 22, 2000, at [http://www.droit-technologie.org/fr/1\\_2.asp?actv\\_id=359](http://www.droit-technologie.org/fr/1_2.asp?actv_id=359); Lucas Delattre, *Les États Mettent en Place Une Architecture Mondiale du Net*, LE MONDE, Feb. 11–12, 2001, at 2.

3. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

4. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

5. For a discussion of this complex relationship, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 65–87 (1999); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911 (1996).

The French democracy has chosen rules for free expression in its criminal code<sup>6</sup> that are consistent with international human rights but that do not mirror the U.S. constitutional protections found in the First Amendment. The Internet gives neither policy a greater claim to legitimacy than the other. Yet, *Yahoo* reflects a shifting economic and political power struggle on the Internet that suggests that the American position is becoming a minority view. Before 2000, the United States had an absolute majority "market share" of Internet content and use. During 2000, however, non-U.S. Internet use grew dramatically. At mid-year, only a slight majority of web use was in English.<sup>7</sup> By the end of 2000, 55% of web traffic originated outside the United States.<sup>8</sup> In France alone, by August 2001, the number of web users who were at least eleven years old and used the Internet several times a month rose to 14.3 million.<sup>9</sup>

The normative impact of *Yahoo* is that Internet actors will have to recognize varying public values across national borders. The decision begins to force the technical elites to respect democratically chosen values and the rule of law. The architecture that makes geographic filtering difficult is not immutable. Ironically, economic actors have been promoting technologies of localization and identification for commercial gain, such as intellectual property rights management and enforcement and the development of marketing profiles.<sup>10</sup> Even the Internet Society, one of the technical groups defining communications standards for the Internet, has been trying for several years to promote a new transmission protocol, IPv6, that would uniquely identify the location of every device connected to the Internet.<sup>11</sup> *Yahoo* can thus be seen as both an ordinary case that the French court judged according to basic jurisdictional principles that are also recognized in American law, and as an extraordinary case that creates a principle of international democracy and the respect of non-commercial values for the technological infrastructure of the Internet.

Part I of this Article will, thus, examine the decision as the routine enforcement of French law within French territory. Part II will then show how the French decision promotes democratization of the Internet.

---

6. See CODE PÉNAL [C. PEN.] art. R-645-2.

7. *Les Internautes: Les Langues Utilisées Sur le Net*, LE JOURNAL DU NET, at [http://www.journaldunet.com/cc/cc\\_inter\\_mde3.shtml](http://www.journaldunet.com/cc/cc_inter_mde3.shtml) (last visited Mar. 8, 2002).

8. StatMarket, *55 Percent of All Web Traffic Worldwide Comes from Outside of the United States* (Jan. 23, 2001), available at <http://www.statmarket.com/cgi-bin/sm.cgi?sm&eature&stat012301>.

9. Chiffres-Clés, *Internautes: Nombre D'internautes, France*, LE JOURNAL DU NET, Dec. 3, 2001, at [http://www.journaldunet.com/cc/01\\_internautes/inter\\_nbr\\_fr.shtml](http://www.journaldunet.com/cc/01_internautes/inter_nbr_fr.shtml) (last visited Mar. 8, 2002).

10. Bob Tedeschi, *E-Commerce*, N.Y. TIMES, Apr. 2, 2001, at C10 (discussing the business trend toward website user location identification).

11. Stephen E. Deering & Robert M. Hinden, *Internet Protocol, Version 6 (IPv6) Specification* (Dec. 1998), available at <http://www.ietf.org/rfc/rfc2460.txt?number=2460>.

## I. THE ENFORCEMENT OF FRENCH LAW WITHIN FRENCH TERRITORY

While the Internet enables actors to reach a geographically dispersed audience, the Internet does not change the accountability of those actors for their conduct within national borders. Similarly, the Internet does not vitiate the responsibility and the power of states to police activities within their territories. Aside from a few Internet separatists, no one could seriously challenge that France has jurisdiction to prescribe rules for activities within French territory. Yahoo, however, thought it was above the law in places where it did business on the Internet because it operated from U.S.-based servers. The co-founder of Yahoo, Jerry Yang, summed up the company's view during a press interview: "We are not going to change the content of our sites in the United States just because someone in France is asking us to."<sup>12</sup>

On the surface, the *Yahoo* case is a mundane exercise in the analysis of territorial sovereignty and personal jurisdiction. The American company sought to have a worldwide presence and maintained extensive contacts and business relationships in France. The web pages at issue, though based in the United States, were expressly designed to reach a global audience. In this context, one could hardly imagine a national court refusing to exercise personal jurisdiction and refusing to apply the local law against a company seeking to conduct business in its territory. The order for Yahoo to cease making Nazi material available in France was inevitable. Furthermore, France is not alone in taking this position. American courts have themselves exercised personal jurisdiction over foreign companies when those companies violated state rules from distant safe havens.<sup>13</sup>

### A. An Inevitable Result

As a sovereign democratic nation, France has outlawed the wearing or public display of any uniform, insignia, or emblem of any organization or person responsible for crimes against humanity.<sup>14</sup> The French Penal Code classifies this offense as a serious crime against the people, the state, and public safety. While this prohibition would not be legal in the United States under the U.S. Constitution, European democracies had ample justification following World War II to take a different view on the balance among human rights and the scope of the freedom of expression. Indeed, the French rule is more consistent with interna-

---

12. Janet Kornblum & Leslie Miller, *The News Behind the Net*, USA TODAY, June 19, 2000, available at <http://www.usatoday.com/life/cyber/tech/jk061900.htm>.

13. See *infra* notes 45–64 and accompanying text.

14. C. PÉN. art. R-645-1 ("Est puni . . . le fait, sauf pour les besoins d'un film, d'un spectacle ou d'une exposition comportant une évocation historique, de porter ou d'exhiber en public un uniforme, un insigne ou un emblème rappelant les uniformes, les insignes ou les emblèmes qui ont été portés ou exhibés soit par les membres d'une organisation déclarée criminelle en application de l'article 9 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945, soit par une personne reconnue coupable par une juridiction française ou internationale d'un ou plusieurs crimes contre l'humanité prévus par les articles 211-1 à 212-3 ou mentionnés par la loi n° 64-1326 du 26 décembre 1964.").

tional human rights norms than the U.S. doctrine. International human rights instruments and many national laws prohibit the advocacy of national, racial or religious hatred.<sup>15</sup>

Although Yahoo may choose to allow the sale of Nazi objects in the United States, France protects its citizens through an "effects" doctrine for territorial jurisdiction. French criminal law applies to any crime or felony committed outside French territory by a foreign person when the victim is a French national at the time of the infraction.<sup>16</sup> This doctrine is limited, however, by the restriction that French courts will only be competent to try cases when an infraction or any element of an infraction is committed on French territory.<sup>17</sup>

Yahoo's activities forced the French court to protect French sovereignty by prescribing rules of conduct within French territory. The company willingly promoted Nazi memorabilia with an active presence in France. Although Yahoo claimed that it "never . . . subscribed to the repugnant ideas of Nazism or neo-Nazism . . . or any form of revisionism,"<sup>18</sup> the facts suggest otherwise. The rules of the Yahoo auction service provided specifically that "[t]here are some things that you may not list or sell under any circumstances. These include . . . any item that is illegal to sell under any applicable law, statute, ordinance, or regulation[.]

---

15. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 489-96 (2000) (discussing a hypothetical ban by Germany of a neo-Nazi Texas web site); Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 803 (1996) (noting countries that outlaw hate speech).

16. C. PÉN. art. 113-7 ("La loi pénale française est applicable à tout crime, ainsi qu'à tout délit puni d'emprisonnement, commis par un Français ou par un étranger hors du territoire de la République lorsque la victime est de nationalité française au moment de l'infraction."); [THE FRENCH PENAL CODE OF 1994 AS AMENDED AS OF JANUARY 1, 1999 34 (Edward A. Tomlinson trans., Rothman Publ. 1999)] ("French criminal law is applicable to any felony, as well as to any misdemeanor punishable by imprisonment, committed by a French national or by a foreigner outside the territory of the Republic when the victim is of French nationality at the time of the offense.").

17. C. PÉN. art. 113-2 ("La loi pénale française est applicable aux infractions commises sur le territoire de la République. L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire."); [THE FRENCH PENAL CODE OF 1994 AS AMENDED AS OF JANUARY 1, 1999 33 (Edward A. Tomlinson trans., Rothman Publ. 1999)] ("French criminal law is applicable to offenses committed within the territory of the Republic. An offense is deemed committed within the territory of the Republic whenever one of its constituent elements has taken place within that territory.").

18. T.G.I. Paris, *Conclusions de la Défense*, Audience de Référé du 15 mai 2000, Partie 3.1 ("entend préciser qu'elle n'a jamais . . . souscrit aux idées ignobles que propagent le nazisme ou le néonazisme sous toutes leurs formes, ainsi qu'aux thèses des révisionnistes . . ."), available at <http://www.juriscom.net/txt/jurisfr/citi/tgiparis20000522-cc-def.pdf>.

... [I]ive animals[,] ... [and] [u]sed underwear.”<sup>19</sup> Yahoo’s “Terms of Service” stipulate that a user may not “transmit or otherwise make available any Content that is unlawful, ... hateful, or racially, ethnically or otherwise objectionable.”<sup>20</sup> Yahoo further requires that members not “intentionally or unintentionally violate any applicable ... international law.”<sup>21</sup> Nevertheless, Yahoo refused to remove its Nazi materials. Yahoo decided to allow the sale of Nazi memorabilia and affirmatively chose to ignore the various service rules regarding illegal sales and offensive content. Yahoo clearly found commercial benefit in promoting the traffic of Nazi memorabilia since the company had no difficulty banning the sale of pet hamsters and used underwear and was quite willing to suppress legal gambling advertisements when the National Football League complained and threatened to sever a business relationship with Yahoo.<sup>22</sup> Yahoo even had no compunction over the voluntary censorship of adult content and pornography.<sup>23</sup>

Yahoo argued that its actions were committed in the United States and therefore beyond French territorial jurisdiction.<sup>24</sup> Yahoo asserted that the physical situs of its servers in the United States rather than the transmission and display in France of Nazi material determined the “localization” of Yahoo’s activity. The Internet does not, however, displace the well-established principle in international law that allows states to exercise prescriptive jurisdiction for conduct having effects occurring within the national territory.<sup>25</sup> The intentional transmission by Yahoo of communications from servers in the United States to France brings the conduct within the prescriptive jurisdiction of France, and the French court noted that the “visualization” of Nazi objects in France was a violation of the French law;<sup>26</sup> the display on a computer screen takes place in France and satisfies the requirement of having an element of the infraction occur within France.

When Yahoo manifestly refused to comply with the original injunction of the French court,<sup>27</sup> the company expected the American First Amendment to apply to its global activities. Under U.S. law, there is no doubt that Yahoo had a legal right

---

19. See Yahoo! Auctions, at <http://auctions.yahoo.com/html/guidelines.html> (last visited Dec. 7, 2000). The Yahoo website has since changed and so have the guidelines. See Yahoo! Auctions, at <http://users.auctions.shopping.yahoo.com/html/guidelines.html> (last visited Mar. 7, 2002).

20. Yahoo! Terms of Service § 6(a), at <http://docs.yahoo.com/info/terms> (last visited Mar. 7, 2002).

21. *Id.* § 6(k).

22. See Yahoo! Drops Net Gambling Ads, USA TODAY, Dec. 14, 2000, available at <http://www.usatoday.com/life/cyber/tech/cti914.htm>.

23. See Steven Bonisteel, *Yahoo Sheds Porn, Swears Off X-Rated Advertisers*, NEWSBYTES, Apr. 13, 2001, at 2001 WL 2817635.

24. T.G.I. Paris, May 22, 2000, Ordonnance de Référé, available at <http://www.juriscom.net/txt/jurisfr/citi/tgiparis20000522.htm>.

25. See Netanel, *supra* note 15, at 491; Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 825–26 (2001).

26. See *supra* note 24.

27. T.G.I. Paris, Aug. 11, 2000, Conclusions de la Défense, available at <http://www.juriscom.net/txt/jurisfr/citi/tgiparis20000811-cc-def.pdf>.

to express reprehensible ideas and policies within the United States. But this right is a national right and does not extend extra-territorially beyond the U.S. border. The American right does not apply to the dissemination of web pages in France to French web users.

With respect to the competence of foreign courts to judge Yahoo's actions launched from California servers, Yahoo's extensive efforts to reach foreign users from the United States gives foreign countries the power to adjudicate the company's activities. Yahoo had an active presence in France that was specifically linked to the display of Nazi memorabilia. Yahoo carefully developed a plan to reach web users worldwide and boasted that "Yahoo! Inc. (including its subsidiaries, 'Yahoo!' or the 'Company') is a global Internet communications, commerce and media company that offers a comprehensive branded network of services to more than 120 million users each month worldwide."<sup>28</sup> Yahoo represented to shareholders that "[t]he Company's principal offering, [www.yahoo.com](http://www.yahoo.com), provides the flagship product for its global Internet media network."<sup>29</sup> Also, Yahoo regularly stated that the company "remained committed to broadening its global footprint and maintaining a leadership position worldwide."<sup>30</sup> The business strategy includes close business ties to France and direct profits from France. For the year 2000, Yahoo reported that "non-U.S. operations represented 15 percent of total consolidated revenues."<sup>31</sup> In fact, Yahoo owned 70% of the French subsidiary, Yahoo France, and exerted substantial control over the subsidiary's web activity.<sup>32</sup> According to the intercorporate license agreement between Yahoo and its French subsidiary, Yahoo dictates the links and some of the content on the French site.<sup>33</sup> Under the license agreement, Yahoo's French subsidiary was even required to maintain a link to the U.S.-based server. These actions in conjunction with the transmission into France for the display in France of material contravening the French criminal code certainly establish the constituent elements for competence under Article 113-7 of the French Penal Code.

More specifically, Yahoo's argument contesting the competence of the French court was disingenuous. Because Yahoo targeted French users with advertisements in French,<sup>34</sup> the company could not seriously contend that it sought only to reach an American audience with the U.S.-based web services and that

---

28. Yahoo! Inc., 1999 Annual Report Form 10-K, filed with the Securities and Exchange Commission, Mar. 30, 2000, *available at* <http://www.sec.gov/Archives/edgar/data/1011006/0000912057-00-014598-d1.html>.

29. *Id.*

30. Press Release, Yahoo! Inc., Yahoo! Reports Fourth Quarter, Year End 2000 Financial Results, Jan. 10, 2001, *available at* <http://docs.yahoo.com/docs/pr/4q00pr.html>.

31. *Id.*

32. Yahoo! Inc., 1999 Annual Report Form 10-K, *supra* note 28.

33. Yahoo! Inc., Annual Report Form 10-K, Exhibit 10.33, *Yahoo! France License Agreement Dated November 1, 1996 By and Between Yahoo! Inc. and Yahoo! France*, art. 3, filed with the S.E.C., Mar. 30, 1997, *available at* <http://www.sec.gov/Archives/edgar/data/1011006/0000912057-97-011353.txt>.

34. T.G.I. Paris, Nov. 20, 2000, *Ordonnance de Référé*.



Yahoo did not intend to profit from French web surfers. Indeed, Yahoo has even reported that “[m]ost of our revenues are currently derived from agreements with advertisers or sponsorship arrangements.”<sup>35</sup> The display of Nazi objects for sale with banner advertising in French for a French audience was part of Yahoo’s business model. The record in the case does not establish whether these advertisements were specifically targeted toward those French web users interested in Nazi objects. Such a factual showing would make the case even stronger.

Once Yahoo’s conduct came within the prescriptive jurisdiction of France and the competence of French courts, the French court faced several interesting options to resolve the violation. One possibility was to order Yahoo to remove any Nazi memorabilia items offered on its U.S.-based auction site. This choice would have significant extraterritorial effects within the United States by limiting the availability in the United States of legally permissible material. The alternative was to order that Yahoo block access to such material by French web users. This choice could be accomplished in a variety of ways that would not limit the availability in the United States of Nazi material. The court chose the less intrusive filtering solution and ordered Yahoo to take all possible measures to block the display of those web pages in France.<sup>36</sup> However, the court’s order did not require 100% accuracy and does not hold Yahoo responsible if users affirmatively sought to circumvent responsible measures put in place by Yahoo. Instead, the court ordered a reasonable level of compliance with French law in connection with the transmission of web pages into France. The court recognized, for example, that Yahoo could not exclude objects from the auction site if the sellers did not identify them as Nazi origin.

Jerry Yang, a Yahoo co-founder, however, complained that “to ask us to filter access to our web sites according to the nationality of web surfers is very naive.”<sup>37</sup> The arrogance of this position was not lost on the French court since Yahoo had no difficulty initiating such filtering for its commercial advertising directed to French web users. Nevertheless, in the face of Yahoo’s impossibility defense, the court appointed experts to determine the technical merits of filtering. The experts found that approximately 70% of French users were readily identifiable by their Internet service providers and Internet Protocol addresses while the remaining ambiguous users could be geographically isolated by requesting a declaration of nationality prior to transmitting any Nazi material.<sup>38</sup> The experts predicted that these techniques would account for 90% of French Internet users, and the court noted that there was no evidence to suggest that the technical mechanisms to accomplish this filtering would be financially onerous for Yahoo.

---

35. Yahoo! Inc. Quarterly Report Form 10-Q, filed with the SEC, Mar. 31, 2000, *available at* <http://www.sec.gov/Archives/edgar/data/1011006/0000912057-00-018245-d1.html>, at 16.

36. T.G.I. Paris, May 21, 2000.

37. *Yahoo Faces Fines for Nazi Items Auctions*, USA TODAY TECH REPORT, Aug. 10, 2000, *available at* <http://www.usatoday.com/life/cyber/tech/CTI374.htm>.

38. T.G.I. Paris, Nov. 20, 2000, *Ordonnance de Référé*.

The French court's decision, in the end, sought to force Yahoo to respect French law while doing business on the web in France. Nevertheless, Yahoo continued to look for ways to deny the jurisdictional authority of France. In December 2000, Yahoo sought a judgment in U.S. federal district court declaring the French order unenforceable in the United States.<sup>39</sup> Since the French judgment was based on an underlying violation of criminal law, the complaint served most for public relations. Yahoo seemed intent on obscuring its true actions: the pursuit of a business model that relied in part on selling Nazi memorabilia on a worldwide basis including France. American law routinely rejects the enforcement of foreign penal judgments.<sup>40</sup> In fact, the American complaint seriously misstates the French court's ruling. Yahoo represented that it had no assets in France and therefore the French judgment and fines could only be enforced in the United States. Yahoo failed, however, to inform the U.S. court that its 70% stock ownership interest in Yahoo-France and its royalty interests arising from the licensing agreement between the U.S. parent and French subsidiary could be seized in France to satisfy any fines. Yahoo argued that the U.S. Constitution is applicable to its activities worldwide and that the French judgment violates the First Amendment. Nevertheless, even American courts have doctrines similar to the French decision concerning jurisdiction and competence over cases involving parties acting on the Internet.

## B. Similar Internet Sovereignty Decisions in American Courts

The French court's exercise of sovereignty has support in the decisions of American courts. The United States has long faced the problem of territorial jurisdiction and choice of law in disputes involving parties in different states. The Constitution requires that the exercise of a state court's territorial jurisdiction be reasonable and fair to the defendant.<sup>41</sup> The basic test is whether the foreign party engaged in "purposeful activity" with the forum state.<sup>42</sup> To the extent that a foreign party purposefully availed itself of the opportunities in the forum, then the forum can judge the conduct of the foreign party.<sup>43</sup> Courts must assess the factual situation to make this determination.<sup>44</sup>

The Internet does not change the principle, but the courts have struggled to determine if an Internet site actively sought to target the forum state. A series of important cases are consistent with the French decision. For example, in *People*

---

39. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

40. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-15 n.17 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1986); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 cmt. 2 (1969); *Huntington v. Attrill*, 146 U.S. 657 (1892).

41. *See, e.g., World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1107-08 (1996); Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1039 (1999).

42. *See Hanson v. Denckla*, 357 U.S. 235 (1958); Geist, *supra* note 25.

43. *See supra* note 42.

44. *Id.*

*ex rel. Vacco v. World Interactive Gaming Corp.*,<sup>45</sup> a New York court ordered a casino based in Antigua to stop offering gambling over the Internet to New Yorkers.<sup>46</sup> Although the gambling activities were legal in Antigua, they were not permitted under New York law.<sup>47</sup> The court found the close contact between the casino in Antigua and its U.S. parent provided a sufficient nexus to support personal jurisdiction and the application of New York law.<sup>48</sup> Likewise, Yahoo had an extremely close relationship with the French subsidiary and actively targeted French web users. And, like the New York case, Yahoo's activity was prohibited where the users were located, but legal where the servers were located.

Similar results have been reached in enforcing intellectual property rights. In *Twentieth Century Fox v. iCraveTV.com*,<sup>49</sup> a Canadian website, iCraveTV.com, retransmitted certain television shows on the Internet.<sup>50</sup> The transmissions originated from the United States but were captured just over the border in Canada, and then "webcast."<sup>51</sup> In Canada, the webcasting was purportedly legal.<sup>52</sup> However, in the United States, where users could access the Internet broadcast, the retransmissions were alleged to violate U.S. copyright law.<sup>53</sup> The district court issued a preliminary injunction that prohibited iCraveTV from transmitting the copyrighted programming into the United States.<sup>54</sup> Like the French court, the U.S. court decided that the local law of the user's place of access should govern the foreign conduct, and that the retransmission back into the United States was sufficient to confer jurisdiction on the American court.<sup>55</sup>

Two trademark cases provide similar results. A New York district court, in *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*,<sup>56</sup> enjoined the use of the American trademark "PLAYMEN" by an Italian web server that made a "male sophisticate magazine" available in the United States through the Internet.<sup>57</sup> The Italian publisher, Chuckleberry, had the legal right to publish PLAYMEN in Italy but had previously been enjoined from selling the magazine in the United States.<sup>58</sup> To circumvent this prohibition, Chuckleberry established a web site in Italy and solicited customers to the Italian site from the United States.<sup>59</sup> Much like the

---

45. 714 N.Y.S.2d 844 (Sup. Ct. 1999).

46. *Id.* at 854.

47. *Id.* at 850-54.

48. *Id.* at 848-50.

49. 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000).

50. *Id.* at 1834.

51. *Id.*

52. *Id.* at 1837.

53. *Id.* at 1834.

54. *Id.* at 1832-33.

55. *Id.* at 1834-36. Before the court rendered a final decision, iCraveTV settled and agreed to stop its webcasting of U.S. content. Steven Bonisteel, *iCraveTV Settlement Leaves Legal Issue Open*, NEWSBYTES, Feb. 29, 2000, available at 2000 WL 2273895 (last visited Mar. 11, 2002).

56. 939 F. Supp. 1032 (S.D.N.Y. 1996).

57. *Id.* at 1034.

58. *Id.*

59. *Id.* at 1034-35.

French court in the *Yahoo* case, the U.S. court required that Chuckleberry block access to U.S. users. Similarly, the Ninth Circuit Court of Appeals, in *Panavision International, L.P. v. Toeppen*,<sup>60</sup> held that an Illinois resident who registered the trademark "Panavision" as a domain name in Illinois was subject to suit in California.<sup>61</sup> The federal appeals court determined that it would have specific jurisdiction to hear the case if there were "'something more' [than a passive web site] to demonstrate that the defendant directed his activity toward the forum state."<sup>62</sup> The court accepted the "effects doctrine," where the effects of an action are directed at a forum state, as a basis for jurisdiction.<sup>63</sup>

These decisions show a number of important principles for the protection of territorial jurisdiction on the Internet. The cases reveal that, to the extent that an Internet actor strives to target users in a foreign jurisdiction, the foreign forum can assert territorial jurisdiction and apply the forum's law. While a number of the cases involved protecting the intellectual property of parties in the forum, the vice cases illustrate that the principle applies equally to issues of public order. Courts assert territorial jurisdiction to protect values held in the forum. In this context, the French decision is an ordinary exercise of a widely accepted practice in the United States.<sup>64</sup> A U.S. court faced with the same facts would yield a similar result.

## II. THE DEMOCRATIZING IMPACT ON INTERNET ARCHITECTURE

As the Internet matures from an American phenomenon to a truly international infrastructure, the Yahoo decision has important implications for a pluralistic democracy on the global network. Less than one-third of the world's Internet users are located in the United States,<sup>65</sup> and a minority of Internet content originates in the United States.<sup>66</sup> When a major democratic country in a significant economic market requires that Internet companies respect local laws and that

---

60. 141 F.3d 1316 (9th Cir. 1998).

61. *Id.* at 1323.

62. *Id.* at 1322 (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)).

63. *Id.* at 1321.

64. In fact, the United States has recently legislated this practice in the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6502(1)(A)(i) (2001). COPPA specifically applies to non-US web sites collecting information about children in the United States. The proposed Hague Convention on International Jurisdiction seeks to create a set of internationally accepted principles. *See, e.g.*, Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, June 22, 2001, at <http://www.hcch.net/e/workprog/jdgm.html> (interim text). But, for the moment, the U.S. delegation is interested in narrowing the scope of the convention. *See, e.g.*, Notice Announcing Public Roundtable on Consumer Aspects of Hague Convention on Jurisdiction and Foreign Judgments, 66 Fed. Reg. 64264, 64267 (Dec. 12, 2001).

65. CyberAtlas, *The World's Online Populations*, at [http://cyberatlas.internet.com/big\\_picture/geographics/article/0,,5911\\_151151,00.html](http://cyberatlas.internet.com/big_picture/geographics/article/0,,5911_151151,00.html) (Mar. 12, 2002) (estimating that two-thirds of all Internet users are outside the United States).

66. Dick Kelsey, *Study—55% of World's Web Traffic Non-U.S.*, NEWSBYTES, Jan. 23, 2001, available at 2001 WL 2814564.

technologies offer the capability for network participants to comply with local rules enacted by the country's elected representatives, the ramifications for the development of the Internet's infrastructure are profound. States prove that sovereignty still matters in cyberspace. Technologists have largely defined information policy rules through technical choices and decisions without political intervention.<sup>67</sup> The *Yahoo* case shifts this rule-making power back to political representatives. The decision raises the risks for companies who use technologies that ignore national laws and creates new incentives for developers to design policy-compliant products. Internet companies and developers of infrastructure technology will be forced to recognize and accommodate varying national public values. The decision imposes the development of the technical capability that accommodates competing democratically chosen rules in the network infrastructure. The French court, along with the consistent U.S. decisions, promotes the democratization of Internet rules and design features.

### A. Public Values Embedded in Internet Architecture

*Yahoo* shows clearly how certain public values are embedded in the current Internet architecture. Yahoo, in essence, sought refuge in the Internet's technical protocol to obtain immunity for its worldwide behavior. Yahoo argued that it could not filter out French web users because of the geographic indeterminacy of data transmissions on the Internet.<sup>68</sup> This defense highlights the extent to which technological choices have established information policy rules.

These key technological rules have, however, been heavily influenced by American and Internet Separatist values. In particular, as Yahoo tried to assert, the First Amendment plays an important role in the current Internet architecture. The modern First Amendment jurisprudence establishes a standard of an unfettered flow of information as the basic rule. Internet separatists similarly argue that "information wants to be free."<sup>69</sup> Ben Laurie, one of the computer experts consulted by the French court, boasted of this bias in values. He commented that "what is being fought over is literally what people think. No one should be able to control what I know or what I think. Not the government. Not the Thought Police. Not my family. Not my friends. The Internet is pure

---

67. See generally LESSIG, *supra* note 5; ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW (1999); Neil Weinstock Netanel, Book Review, *Cyberspace 2.0*, 79 TEX. L. REV. 447 (2000); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998).

68. T.G.I. Paris, May 15, 2000, Audience de Référé, *Conclusions de la Soc. Yahoo!, Inc.* § 4.1.

69. Roger Clarke, *Information Wants to Be Free* (Feb. 24, 2000), at <http://www.anu.edu.au/people/Roger.Clarke/II/IWtBF.html> (tracing the history of the phrase) (last modified Aug. 28, 2001).

information.”<sup>70</sup> Laurie endorses the American concept of free expression over the legal rules of his own country, the United Kingdom.<sup>71</sup>

The U.S. cultural value of the free flow of information is embedded in the technical rules of data transmission over the Internet. Current Internet architecture seeks to make distance and geographic location irrelevant for the transmission of information. Data transmissions depend on a technique called “packet switching” and the use of numeric addresses known as “Internet Protocol” (IP) addresses. These numbers, much like a telephone number, enable the switching of bits of data from one point on the Internet to another. Under the transmission control protocol, any single message may be divided into multiple packets of data, and each packet of data travels a different path to reach the destination where the message is reassembled. The effect of this design is to minimize borders and barriers to the free flow of information on the Internet. This philosophy matches the American belief in information freedom and the Internet Separatist view of the global network. Nevertheless, these embedded rules do not reflect more subtle policies of information freedoms found in other democracies and in international human rights law.<sup>72</sup> As the French ruling illustrates, other democracies give more weight to other fundamental human rights and interests, including racial, ethnic and religious freedoms, privacy and reputation, when those rights and interests conflict with free speech.<sup>73</sup>

Concurrently, the Internet architecture has embedded rules for information flow that advance self-regulation and free market choice over public decision-making. For the moment, the advertising models on the Internet are based on targeting users’ identified and presumed interests. This targeting requires the collection of large quantities of personal information often without the users’ participation or consent. Transmission protocols increasingly enable the hidden collection of users’ personal data. For example, just as “cookies” technology

---

70. Ben Laurie, *An Expert's Apology*, Nov. 21, 2000, at <http://www.apache-ssl.org/apology.html> (last visited Mar. 11, 2002).

71. The U.K., for example, allows greater restriction on the media. See, e.g., Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FED. COMM. L.J. 621 (1997).

72. For example, the United Nations’ International Covenant on Civil and Political Rights requires restrictions on hate speech as does the European Convention on Human Rights and Fundamental Freedoms. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); see also Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT’L L. 327 (2000); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 3 (1996); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

73. See, e.g., Christopher McCrudden, *The Impact on Freedom of Speech*, in *THE IMPACT OF THE HUMAN RIGHTS BILL ON ENGLISH LAW* 85 (Basil S. Markesinis ed., 1998).

became more widely understood, websites began using hidden web bugs.<sup>74</sup> In the United States, corporations face few legal constraints in gathering personal data, and technical tools such as cookies and web bugs have become prevalent. This U.S. preference for marketplace privacy solutions is opposed in the rest of the world. Outside the United States, however, comprehensive laws protect privacy.<sup>75</sup> Internet protocols favor the U.S. market approach and subtly undermine the public law found in other countries.

With respect to intellectual property, network rules are increasingly at odds with each other. The U.S. values are inconsistent by favoring the free flow of information against data privacy and speech restrictions, but not against intellectual property. U.S. intellectual property right holders have embedded intellectual property protection tools into certain aspects of the architecture.<sup>76</sup> Unique identifiers such as the Microsoft "Globally Unique Identifier" can fingerprint software to limit use to a single identified machine or can track the distribution of software or documents.<sup>77</sup> In opposition, technologists have launched "open source" software to defeat the existing popular proprietary systems,<sup>78</sup> and there is a backlash underway against the Internet Corporation for Assigned Names and Numbers (ICANN) for the attribution of domain names in a way that purportedly favors trademark holders.<sup>79</sup>

To Yahoo and the Internet separatists, the embedding of public values in the technical infrastructure assures that the United States' architectural philosophy and free market bias will prevail over all other architectural choices. Yet, it is wishful thinking to assume that geographic indeterminacy will prevail and that the

---

74. Privacy Foundation, *New Proposal: Make Web Bugs Visible* (Sept. 13, 2000), available at <http://www.privacyfoundation.org/privacywatch/report.asp?id=40&action=0>. "A Web bug is a graphic on a Web page or in an e-mail message designed to monitor who is reading the page or message. Web bugs are often invisible because they are typically only 1-by-1 pixels in size. In many cases, Web bugs are placed on Web pages by third parties interested in collecting data about visitors to those pages." *Bugnosis FAQ*, available at <http://www.bugnosis.org/faq.html> (last visited Mar. 27, 2002).

75. See, e.g., Council Directive 95/46/EC, 1995 O.J. (L 281) 31; *Hearings on the EU Data Protection Directive: Implications for the U.S. Privacy Debate Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Energy and Commerce Committee*, 107th Cong. (2001), available at <http://www.house.gov/commerce/hearings/03082001-49/08082001.htm>.

76. Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161 (1997).

77. See, e.g., Microsoft Corp., *Globally Unique Identifier*, at [http://msdn.microsoft.com/library/psdk/automat/chap8\\_025b.htm](http://msdn.microsoft.com/library/psdk/automat/chap8_025b.htm) (Dec. 5, 2000); *Fingerprinting of Office 97 Files*, at <http://users.rcn.com/rms2000/privacy/office97.htm> (last visited Mar. 11, 2002); Microsoft Corp., *Combined Updater for Office 98*, at <http://www.microsoft.com/mac/download/office98/Off98Updater.asp> (including a Unique Identifier Patch) (last visited Mar. 27, 2002).

78. LESSIG, *supra* note 5, at 7-8, 100-08; *The Philosophy of GNU*, <http://www.gnu.org/philosophy> (last visited Mar. 27, 2002).

79. See generally ICANNWatch, at <http://www.icannwatch.org/article.php?sid=588> (last visited Mar. 27, 2002).

Internet is pure information. Regulation and market pressures are already changing the Internet. Intellectual property right holders have insisted on enlarging their legal and public rights to exclude others from information,<sup>80</sup> and commercial models are driving the move toward user localization for product customization and marketing.<sup>81</sup> The code is not static. In fact, this recognition has led Larry Lessig to an insightful discussion of the capability of government to regulate cyberspace and of how constitutional values may be adapted for this regulation.<sup>82</sup> Lessig argues that open code, as opposed to proprietary code, reduces the government's capacity to impose requirements on its citizens. This reflects the Internet Separatist value of *sui generis* network governance. At the same time, open code offers a challenge to the predominance of Separatist values. While open code might make it harder for government to control the myriad of software developers around the world, open code can also facilitate the capability of government to impose particular software modules for products sold in its territory. This capability aptly illustrates the countervailing values that might be accommodated in network architecture.

## **B. The Empowerment of States to Protect Local Values**

The *Yahoo* case has valuable implications for democratizing technological development and advancing democratic pluralism on the Internet. Until now, Internet separatists have had a relatively free rein to define the infrastructure rules, and the technological choices reflected U.S.-centric norms. Yahoo challenged the legitimacy of foreign public law when the company argued that the geographic indeterminacy of web-based data transmission should provide immunity for the company's worldwide behavior. The French rejection of this position shows that Internet companies cannot supplant the rule of law as established by elected representatives. This position promotes democratic pluralism on the Internet by requiring technological developments that allow states to enforce their local laws.

France has forced the recognition of French public values in dealing with French web users. At a time when Neo-Nazi websites flock to the United States to benefit from the constitutional protection accorded to hate-mongering,<sup>83</sup> this determination of liability enables France to preserve its democratically chosen public order law.

---

80. See 17 U.S.C. § 512 (2001); *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

81. Stefanie Olsen, *Quova Upgrade Pins Down AOL Users*, CNET NEWS.COM, Feb. 13, 2002, at <http://news.com.com/2100-1023-836138.html>; Bob Tedeschi, *Borderless Is Out; Advertisers Now Want to Know If a Customer Lives in Cairo, Egypt, or Cairo, Ill.*, N.Y. TIMES, Apr. 2, 2001, at C10.

82. See LESSIG, *supra* note 5, at 53-61; Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).

83. See Lisa Guernsey, *Mainstream Sites Serve as Portals to Hate*, N.Y. TIMES, Nov. 30, 2000, at G1, available at <http://www.nytimes.com/2000/11/30/technology/30HATE.html>; Martin Stone, *Neo-Nazi Web Sites Flee to the US*, NEWSBYTES, Dec. 21, 2000, available at <http://www.newsbytes.com/news/00/159663.html>; *Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (giving constitutional protection to a neo-Nazi march through a town with a large population of Holocaust survivors).



Public accountability under national law rejects the Internet separatists' view that technologists should determine the network rules for democratic society. As technical rules are not immutable, local liability gives states a voice in the embedded values of the Internet architecture. *Yahoo* forces technological recognition of democratically adopted laws.

National liability for local conduct obligates a form of policy zoning for the Internet that allows states to protect their values in their own territories.<sup>84</sup> Under the *Yahoo* decision, Internet companies will be required to make structural changes in their system architecture. France has called for geographic determinism on the Internet and has overturned the technologists' decision to embed the political value of geographic ambiguity for the origin of Internet data transmissions. In a corollary discussion, Jack Goldsmith and Alan Sykes note that one cannot "assume that imperfections in Internet identification and filtering technologies render these technologies useless. Regulation works by raising the cost of the proscribed activity."<sup>85</sup> For *Yahoo* to keep selling pro-Nazi items, the company must develop technical measures to identify French users and block their access, thereby enabling France to protect its citizens in accordance with the country's chosen public policies. Interestingly, the French court did not require 100% accuracy in blocking French user access, but only held *Yahoo* to a reasonable standard.<sup>86</sup>

Nevertheless, instead of filtering French users, *Yahoo*'s response was to suppress the offensive material.<sup>87</sup> Many critics argue that this effect is a socially destructive, extraterritorial censorship of the Internet. Yet, *Yahoo* and the technical architects of the Internet have no particularly compelling claim to hold the power to subvert democratically chosen values supporting the prohibition of the glorification of Nazi ideology in France and other European countries.<sup>88</sup> The concern over censorship and the potential chilling effect on Internet speech seems overrated. Internet actors must have sufficient contact with the foreign country to

---

84. For a discussion of Internet zoning and free speech in the American context, see Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999).

85. Goldsmith & Sykes, *supra* note 25, at 812.

86. The court only required reasonable efforts by *Yahoo* to prevent French user access. The experts' report indicated that 70-80% of French users were readily identifiable and the remaining could easily be geographically isolated by requesting a declaration of residence before they could connect to the Nazi offerings. In fact, the decision does not hold *Yahoo* responsible if users affirmatively seek the circumvention of reasonable measures put in place by *Yahoo*. T.G.I. Paris, Nov. 20, 2000, *Ordonnance de Référé*.

87. See Troy Wolverton & Erich Luening, *Will Yahoo's Ban on Auctioned Nazi Items Work?*, CNETNEWS.COM, Jan. 3, 2001, available at <http://news.cnet.com/news/0-1007-200-4361243.html?tag=r1tdnws>; *Yahoo Interdit les Enchères D'objets Nazis*, NOUVEL OBSERVATEUR, Jan. 3, 2001, available at <http://archquo.nouvelobs.com/cgi/idxlist?a=art&aaaammjj=20010103&num=000000074&m1=yahoo&m2=&m3=&host=http://quotidien.nouvelobs.com> (reporting that *Yahoo* announced that the auction web site would prohibit the sale of Nazi objects).

88. See, e.g., Netanel, *supra* note 15, at 492 ("to deny Germans the possibility of applying their law to the web site operators would frustrate their fundamental expression of democratic self-rule.").

make that country's law applicable and to make prosecution and enforcement of a final judgment a realistic threat. If that is the case, then it is very hard to justify exempting these actors from local requirements where they do business. Yahoo, in fact, actively sought global business from its websites in the United States and had significant activity in France through ownership and control of its French subsidiary.

Several other considerations diminish the concern over potential adverse effects on free expression in countries other than the state imposing the restriction. 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. And, under the *Yahoo* principle, liability is not imposed on the foreign Internet company if local citizens try to circumvent geographic filters.

Other more troubling avenues are available for states wishing to impose censorship on network participants. When governments can create spy systems such as Carnivore<sup>89</sup> and Echelon,<sup>90</sup> the deployment of cyber-enforcement agents cannot be far behind. States might easily sponsor denial-of-service attacks to shut down foreign websites<sup>91</sup> or develop viruses to cripple particular foreign computers. These would appear to be greater threats to free speech than a democratic country seeking to enforce its laws within its own territory.

Despite the democratizing benefits of geographic determinism for countries to assure their values in their territories, the technical community does not like this goal. After the *Yahoo* decision, Ben Laurie, one of the French court's own experts and a well-known Internet pioneer, issued an "apology" and harsh critique of the ruling.<sup>92</sup> Laurie has great authority to address the technical questions, but his critique makes policy prescriptions in total ignorance of established legal and social principles in democratic societies.

Laurie was troubled that France will require Yahoo to filter out French web users. Although he admitted that existing technology can be used for a high level of filtering and noted that users could seek to circumvent any such filtering, he called the solution adopted by the French court "half-assed and trivially avoidable."<sup>93</sup> The comment reflects a disturbing view often found in the technical community that only technologists know what is best for society. While Laurie's point regarding today's technology is important, he ignores three critical factors. First, no legal system in a democracy can assure full compliance with all laws. For example, drivers routinely exceed highway speed limits. Yet, no democratic state

---

89. *Hearing on Internet and Data Interception Capabilities Developed by FBI before the Subcomm. on the Constitution of the House Judiciary Comm.*, 106th Cong. (2000), available at <http://www.house.gov/judiciary/con07241.htm>.

90. See Echelon Watch, at <http://www.echelonwatch.org> (last visited Mar. 26, 2002).

91. For information on denial of service attacks, see CERT\* Advisory CA-2000-01: Denial-of-Service Developments, Jan. 3, 2000, available at <http://www.cert.org/advisories/CA-2000-01.html>.

92. Laurie, *supra* note 70.

93. *Id.*

tries to put a policeman on every corner to assure perfect compliance with the speed limit. Such an action would be totalitarian. Instead, democratic states frequently rely on law to shape social expectations and behavior.<sup>94</sup> Second, democracies do not typically hold third parties liable for the illegal acts of citizens. If users misstate their nationality or seek to circumvent French law, then Yahoo can hardly be faulted for those acts of web users.<sup>95</sup> Lastly, Laurie assumes incorrectly that the legal rule will have no effect on technological evolution.

In contrast to the enforcement problems created by the Internet's locational ambiguity, geographic identification empowers states to implement a variety of public policies within their territories, including the enforcement of intellectual property rights, consumer protection, and data privacy through geographic filtering. The alternative, the incapacity of states to enforce such regulations on the Internet, vitiates the basic ideal of democratic society—allowing citizens to choose their governing rules.<sup>96</sup>

### C. Constraints on Non-democratic States

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. Indeed, the inability to ascertain geographic origins will not prevent dictatorial regimes from blocking Internet activities in their jurisdictions. Other more invasive technical options are available. For example, China has created a national subnetwork to monitor international Internet traffic and has imposed a licensing regime on Internet service providers that provides the government with direct control of domestic Internet use.<sup>97</sup> Geographic determinacy does not alter this capability.

The real issue is the local law's legitimacy under international law. International law requires the recognition and respect for the sovereignty of nations. The U.N. Charter explicitly protects "the principle of the sovereign

---

94. Like many technologists, Laurie does not want the behavioral significance of the decision recognized. In the *Yahoo* case, users could bypass the controls required by the French court only if they misrepresented their nationality or if they affirmatively sought to circumvent French law by establishing off-shore web accounts.

95. Indeed, if such user behavior became widespread, the civil disobedience within France would have political implications for the underlying French law.

96. For a thorough treatment, see Netanel, *supra* note 15.

97. See, e.g., William Yurcik & Zixiang Tan, *The Great (Fire) Wall of China: Internet Security and Information Policy Issues in the People's Republic of China*, PROCEEDINGS OF THE 24TH TELECOMMUNICATIONS POLICY ROUNDTABLE CONFERENCE (1996), available at <http://www.tprc.org/abstracts/tan.txt>; see also Jennifer Lee, *Punching Holes in Internet Walls*, N.Y. TIMES, Apr. 26, 2001, at G1, G7 (reporting on other national restrictions).

equality of all its Members.”<sup>98</sup> At the same time, international legal norms may constrain the ability of a country to implement particular domestic policies<sup>99</sup> and may constrain the interpretation of domestic law.<sup>100</sup> To the extent that the laws of a non-democratic state do not violate international law, the recognition of that state’s sovereignty compels the recognition of that state’s right to govern behavior within its borders. An Internet architecture that includes geographic localization supports this fundamental principle of international law without giving recognition to governance decisions that are illegitimate under international law.

A rogue state can already impose licensing and surveillance import barriers at Internet access points and can exercise police authority over anyone within the state’s physical borders. For Internet actors outside the borders of the rogue state, geographic determinacy will not help the state enforce its illegitimate policies against those sending data into the rogue state. The violation of international law by the rogue state will preclude any foreign assistance that furthers the violation.<sup>101</sup>

Although counterintuitive, geographic determinacy can even facilitate the work of human rights organizations by making it easier for activists to identify the “willing audience” or those places where communications are censored. In addition, geographic determinacy can assist new ways to deliver political messages to the intended recipients. For example, suppose a country represses all political dissent in blatant violation of international human rights principles. Geographic determinacy enables the creation of technical measures that might identify certain web navigational data streams from the repressive country and then divert users to other political web pages.

Geographic determinacy may help promote international economic norms against rogue nations. For example, the United States maintains that many countries are havens for the piracy of U.S. intellectual property and that those countries violate international legal obligations.<sup>102</sup> Geographic determinacy would enable U.S. intellectual property rights holders to distribute their content on the Internet and block access to countries that do not adequately protect American rights.<sup>103</sup>

---

98. U.N. CHARTER art. 2(1), available at <http://www.un.org/Overview/Charter/chapter1.html> (last visited May 1, 2002).

99. See Curtis A. Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN. L. REV. 399 (2000) (discussing the legality of US reservations to international human rights norms).

100. See, e.g., *F.T.C. v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (noting the international law limitations on the F.T.C.’s power to subpoena foreign witnesses).

101. See, e.g., *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (refusing to recognize the legitimacy of Cuba’s expropriation of U.S. property).

102. See, e.g., OFFICE OF U.S. TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2001), available at [http://www.ustr.gov/html/2001\\_contents.html](http://www.ustr.gov/html/2001_contents.html) (detailing the deficiencies in intellectual property protection in various countries).

103. Attempts to circumvent the blocking by routing intellectual property through non-boycotted countries might also be thwarted by technical tools.

In essence, then, geographic determinacy and local accountability do not alter the underlying principles of international law applicable to non-democratic states. Indeed, in some areas, this choice of architecture furthers the ability of international law to promote international norms in rogue states. An Internet boycott enabled through geographic determinacy would provide enforcement of the international legal norm against the rogue nation.

---

The development of the Internet is at a critical threshold for democratic societies and countries committed to the rule of law. The *Yahoo* decision reflects a maturing of the regulatory framework for the Internet and the beginning of a new "effects" doctrine. As Michael Geist noted, "[W]e are beginning to see courts . . . moving toward an 'effects based' analysis for Internet jurisdiction."<sup>104</sup> The implications for technological development are profound. No longer will technologists be able to ignore national policies in the architectural values of the Internet. The technical instrument of geographic determinacy will allow multiple policies and values to co-exist. At the same time, the constraints of international law and the technical capability to boycott rogue nations will protect against the implementation of repressive policies in a nation's Internet rules. States will regain their voice in the global network as participants in a pluralistic international democracy.

---

104. Michael Geist, *The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute*, JURISCOM.NET (Jan.-Mar. 2001), available at <http://www.juriscom.net/en/uni/doc/yahoo/geist.htm>.