Reexamining the Yahoo! Litigations: Toward an Effects Test for Determining International Cyberspace Jurisdiction

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> Citizens want their government to prevent them from harming one another on the Internet and to block Internet harms from abroad. Companies need a legal environment that guarantees stability in the network and permits Internet commerce to flourish.
>
> Jack Goldsmith and Tim Wu[1]

THE INTERNET HAS POSED A NEW RIDDLE for international jurisdiction disputes. Before the Internet, parties facing suit in foreign jurisdictions often had significant and purposeful physical contacts that justified the foreign country's exercise of jurisdiction.[2] But growing use of the Internet has created a world where an actor may cause harm in another country through contacts that are entirely electronic.[3] Further, the online conduct the foreign country views as harmful may be entirely legal and without liability in the jurisdiction where the actor resides.[4] The Internet allows an actor to reach out across cyberspace, contacting a broader audience than the one toward which the actor targets the bulk of its content. While these contacts may be intentional insomuch as the actor makes a conscious choice to

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1. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD, at viii (2006). The authors, Jack Goldsmith and Tim Wu, are among the preeminent scholars in the field of cyberspace law.

2. *See, e.g.*, Asahi Metal Indus. Co., Ltd. v. Super. Ct., 480 U.S. 102, 112 (1987); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

3. Many content and service-oriented sites are based solely in one country but are accessible in many. These sites do not sell products to parties in other countries. Instead, they rely on advertising revenues as a source of income.

4. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1202 (9th Cir. 2006); *see also* discussion *infra* Part I.

use the Internet as a medium of communication, they are not "purposeful" as courts have previously defined the concept.[5]

If foreign countries exercise jurisdiction over internet actors based on the perceived harm from electronic contacts alone, then every internet actor may find it necessary to tailor its online activity to the legal confines of the most restrictive country, which it reaches electronically.[6] As a result, these countries may inadvertently help to create an Internet of the lowest common denominator, a failure of the grand experiment in cyberspace.[7]

For example, imagine an Internet where a regime with restrictive regulations on speech, such as China, exercises control over internet content available to users throughout the world.[8] Such an imposition could severely restrict internet speech outside the physical borders of the country itself, potentially curtailing the activities of those who reside in localities with strong free speech protections. The results of Yahoo!'s litigation in France suggest that such a reality may soon exist,[9] and in some respects it is already upon us. In 2002, Yahoo! signed a document called the *Public Pledge on Self-Discipline for the Chinese Industry,* promising to "inspect and monitor the information on domestic and foreign Websites" and to "refuse access to those Websites that disseminate harmful information" to the internet users of China.[10]

To avoid the ill effects of "contacts only"[11] jurisdiction as described above, this Comment proposes that courts should use an ef-

5. *Asahi,* 480 U.S. at 112 (plurality opinion) (finding that the "'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*" (citations omitted) and that "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State").

6. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace,* 48 STAN. L. REV. 1367, 1394 (1996) (explaining that "territorially local claims to a right to restrict online transactions . . . should be resisted"); *see also* John T. Delacourt, *The International Impact of Internet Regulation,* 38 HARV. INT'L L.J. 207 (1997).

7. *See* Johnson & Post, *supra* note 6, at 1394–95 (arguing that the actions of territorial sovereigns may harm the ability of "the Net to realize its full promise").

8. GOLDSMITH & WU, *supra* note 1, at 9. China has demanded that companies, such as Yahoo!, "filter materials that might be harmful or threatening to Party rule." *See id.*

9. *See infra* Part I.

10. GOLDSMITH & WU, *supra* note 1, at 9. The executive director of the Human Rights Watch does not approve of Yahoo!'s actions that help "to identify and prevent the transmission of virtually any information that Chinese authorities or companies deem objectionable." *Id.*

11. This Comment uses the term "contacts only" to denote instances where a court, without inquiring into intent, bases jurisdiction on one or more contacts perceived to have caused harm within the country. "Contacts only" jurisdiction requires power on the part of

fects test when deciding international civil disputes involving solely cyberspace harms.[12] Such a test would permit jurisdiction only when an actor (1) commits an intentional action, (2) directed at the forum country, and (3) causes harm that the actor knew was likely to be suffered in the forum country.[13] In other words, a potential litigant must prove elements of (1) "intent," (2) "targeting," and (3) "foreseeable harm" in order to hail an internet actor to a foreign jurisdiction.

Part I of this Comment outlines the history of Yahoo!'s battle with La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and the Ninth Circuit's interpretation of the *Calder* effects test.[14] Part I also advances the effects test as a possible solution for jurisdiction disputes based on cyberspace harm. Part II takes this Comment outside the scope of the Yahoo! litigations, reviewing other possible jurisdictional approaches and analyzing their benefits and detriments. Part III argues that the Ninth Circuit's effects test for determining jurisdiction over a foreign party offers more benefits than other approaches while still being capable of implementation. Part III also analogizes the relevance of the effects test in cyberspace disputes to its relevance in antitrust disputes, and it illustrates how other countries have used the effects test. This Comment concludes that courts can and should use the effects test.

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a sovereign to enforce a judgment against the actor. *See infra* Parts I.A., II.A. This term differs from the minimum contacts test mentioned *infra* Part II.B. as it fails to take comity interests, specifically that of courtesy between nations, into account and lacks a place for a normative judgment on reasonableness. Some commentators refer to a "contacts only" method of establishing jurisdiction as an effects test. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1208 n.36 (1998). However, those commentators' version of an effects test differs from the one proposed here, as it does not require intentional conduct or targeting. It only requires harmful effects to have been felt in the forum. *Id.*

12. This Comment does not advance the "effects test" as a workable solution for criminal violations of law. A country arguably has a greater interest in exercising jurisdiction to the full extent of its sovereign power when, for example, an actor perpetrates fraud or the exploitation of children via the Internet.

13. The original version of this test appears in the defamation case, *Calder v. Jones*, 465 U.S. 783, 789 (1983) ("Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California.").

14. *See id.*

I. The Yahoo! Litigations: A Paradigm Outlining One Application of the *Calder* Effects Test

A. Yahoo!'s Legal Trouble in France—The French Approach to Cyberspace Jurisdiction

Mark Knobel, a French activist who has devoted his life to fighting anti-Semitism and neo-Nazism, made it his business to ensure that those who provide internet services in France obey French laws concerning the promulgation of racist speech.[15] In 1998, he discovered hate sites on America Online ("AOL") and threatened a public relations war.[16] Fearing negative publicity, AOL quickly pulled the sites.[17] Two years later, while engaging in a search of the Web for content illegal in his country, Knobel found Nazi memorabilia on the auction site of Yahoo.com.[18] Knobel thought that if he acted in coordination with LICRA (which, when translated, means the "International League against Racism"), Yahoo! would respond in a manner similar to AOL.[19] He was wrong. Yahoo!'s management held the belief that while there are "many countries and many laws," there is "just one Internet."[20]

In early April 2000, LICRA sent Yahoo! a cease and desist letter, threatening litigation against Yahoo! in France within eight days.[21] The letter directed Yahoo! to remove all material considered illegal under French law from Yahoo.com and Yahoo.fr or face litigation.[22] Only five days later, LICRA filed suit against Yahoo! and its French subsidiary in the Tribunal de Grande Instance de Paris ("the French court").[23]

LICRA advanced a simple claim: "French law does not permit racism in writing, on television or on the radio, and [we] see no reason

15. GOLDSMITH & WU, *supra* note 1, at 1–2.

16. *Id.* at 1.

17. *Id.*

18. *Id.*

19. *Id.* at 2.

20. *Id.* at 2.

21. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1202 (9th Cir. 2006) (en banc).

22. *Id.* The letter stated in part that "[u]nless you cease presenting nazi objects for sale within 8 days, we shall size [sic] the competent jurisdiction to force your company to abide by the law." *Id.*

23. *Id.* The Tribunal de Grande Instance acts as the basic French trial court of general civil jurisdiction. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1262–63 n.407 (2005).

to have an exception for the Internet."[24] The French court agreed and summarily found that the presence of Nazi memorabilia on Yahoo!-hosted internet sites caused sufficient harm for France to exert jurisdiction over Yahoo!.[25] The court imposed a fine of one hundred thousand euros on Yahoo! for every day that the Nazi memorabilia remained accessible through Yahoo.com and Yahoo.fr.[26]

Acknowledging the ability of the French court to liquidate the assets of its French subsidiary, Yahoo! removed the offending material from both its France and United States based sites.[27] The litigation between LICRA and Yahoo! then took another turn as Yahoo! went on the offensive.

B. Yahoo! Sues in the United States—The Ninth Circuit's Approach to Cyberspace Jurisdiction

In December 2001, Yahoo! filed suit against LICRA in the Federal District Court for the Northern District of California, seeking a declaratory judgment that the French court's orders were unenforceable in the United States.[28] Once again, jurisdiction was an issue, but now LICRA faced adjudication in a distant forum.[29]

After the district court ruled that it properly had jurisdiction over LICRA, the French group filed a timely appeal to the Ninth Circuit Court of Appeals.[30] On its first appeal, LICRA won dismissal of Yahoo!'s action; a Ninth Circuit panel held that the district court "had no personal jurisdiction over the French parties and that France had every right to hold Yahoo! accountable in France."[31] However, the

24. GOLDSMITH & WU, *supra* note 1, at 5 (citing Lee Dembart, *Boundaries on Nazi Sites Remain Unsettled in Internet's Global Village*, INT'L HERALD TRIB., May 29, 2000, at 7).

25. T.G.I. Paris, May 22, 2000, *translated in* PATRICIA L. BELLIA ET AL., CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE 105 (2d ed. 2004). The French court stated: "Whereas the damage was suffered in France . . . [this court is] therefore competent to exercise jurisdiction over the present dispute . . . ." *Id.*

26. *Yahoo!*, 433 F.3d at 1203. The French court later reduced the penalty to 100,000 francs per day. *Id.* at 1204; *see also* GOLDSMITH & WU, *supra* note 1, at 8 ("[Yahoo!] had until February 2001 to comply before facing fines . . . .").

27. GOLDSMITH & WU, *supra* note 1, at 8; *see also Yahoo!*, 433 F.3d at 1204 ("The court 'reserve[d] the possible liquidation of the penalty' against Yahoo!.").

28. *Yahoo!*, 433 F.3d at 1204.

29. *Id.*

30. *Id.* at 1205 (LICRA's appeal also involved issues of ripeness and abstention).

31. Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1952 (2005); *see also* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120, 1126 (9th Cir. 2004).

panel decision was not the Ninth Circuit's final say on the matter as the court agreed to rehear the decision en banc.[32]

At the en banc hearing, the only issue a majority of the court agreed upon was that the district court had personal jurisdiction.[33] Of the eight judges who found jurisdiction, only five thought the case was ripe for adjudication.[34] Overall, a majority of six judges voted to dismiss: three on the basis of lack of jurisdiction and three on the basis of lack of ripeness.[35]

For the jurisdictional analysis, LICRA asked that the Ninth Circuit use the *Calder* effects test,[36] a proposition with which the Ninth Circuit agreed.[37] In *Calder*, the Supreme Court found that the defendants' intentional, and allegedly tortious, actions were expressly aimed at the forum state, making jurisdiction in that forum proper.[38]

LICRA argued that the district court improperly exercised jurisdiction because LICRA's contacts with California were not "tortious or otherwise wrongful,"[39] which it viewed as a requirement of the effects test.[40] The Ninth Circuit disagreed with LICRA on that point, noting "we do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts."[41] The court then found that the act of obtaining interim orders from the French court, which directed Yahoo! to change its website in California, satisfied the effects test.[42] It was on this basis that the majority held jurisdiction proper in California.[43]

32. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 399 F.3d 1010 (9th Cir. 2005) (granting rehearing en banc); *Yahoo!*, 433 F.3d at 1201.

33. *Yahoo!*, 433 F.3d at 1201.

34. *Id.*

35. *Id.* LICRA claimed it had no immediate intention of enforcing its judgment against Yahoo!. *Id.* at 1204.

36. *Id.* at 1206. Interestingly, LICRA argued for a jurisdiction test that, had it been applied in France, might not have resulted in LICRA being able to obtain jurisdiction over Yahoo! in France.

37. *Id.* at 1207.

38. Calder v. Jones, 465 U.S. 783, 789 (1983).

39. *Yahoo!*, 433 F.3d at 1207.

40. *Id.*

41. *Id.* at 1208.

42. *Id.* at 1209–11.

43. *Id.* at 1211.

C. Comparing the Approaches—Determining Jurisdiction Using the Effects Test

The Ninth Circuit's endorsement of the effects test for cyberspace disputes is noteworthy. While the court did not require "wrongful acts," it required more than the French court, which based jurisdiction solely on the harm suffered and failed to reflect on the intent of the foreign actor.[44] The Ninth Circuit considered three elements before finding personal jurisdiction proper,[45] interpreting the *Calder* effects test as providing a basis for jurisdiction when: "[T]he defendant . . . [has] (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."[46]

Prior to the Ninth Circuit's *Yahoo!* decision en banc, one prominent commentator on the *Yahoo!* cases, Joel Reidenberg, suggested, "[T]o 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."[47] Although this standard appears similar to the effects test, Reidenberg further elaborated that "[i]n this context, the French decision is an ordinary exercise of a widely accepted practice in the United States" and that "[a] U.S. court faced with the same facts would yield a similar result."[48]

Reidenberg accurately described the Ninth Circuit panel's approach in *Yahoo!* as finding jurisdiction where an actor "strived to target," or rather, purposefully directed its actions at the forum.[49] However, the French court failed to engage in similar analysis. The court, in its May 22, 2000 order, specifically recognized that the "unintentional nature" of Yahoo!'s wrong in France "is apparent."[50] Thus, contrary to Reidenberg's prediction, if the French court had used the Ninth Circuit's test, LICRA likely would have failed to establish juris-

44. For a discussion of the harm from Yahoo! that France perceived, see *supra* note 25 and accompanying text.

45. *Yahoo!*, 433 F.3d at 1206, 1211.

46. *Id.* at 1206 (citations omitted). This Comment refers to the three elements as (1) intent, (2) targeting, and (3) foreseeable harm.

47. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 271 (2002) (emphasis added).

48. *Id.*

49. *Id.* The Ninth Circuit refers to the *Calder* test as both "the effects test" and as the test for "purposeful direction." *Yahoo!*, 433 F.3d at 1206, 1208. One of the test's elements requires targeting. *Id.*

50. BELLIA ET AL., *supra* note 25, at 105 (translating the French order).

diction because Yahoo!'s actions met neither the intent element nor the targeting element.

Yahoo! did not "strive to target" France with racist speech. Instead, Yahoo!'s United States based site, Yahoo.com, primarily targeted an American audience. The language of the Yahoo.com portal proves this fact: it is in English, not French.

Moreover, Yahoo.com's American audience enjoys the protections of the First Amendment, including the right to view many forms of content that are illegal in other countries.[51] When an actor (such as Yahoo.fr) purposefully directs its actions at a forum (in this case France) and causes harm in the forum (by displaying racist speech, for example), it seems equitable for the actor to face suit in that forum. On the other hand, when an actor (such as Yahoo.com) purposely directs its actions to its home forum (which is the United States) and incidental harm is felt elsewhere (in this case France), it seems unfair to subject that actor to suit in that incidental forum.

The French court deviated from this precept when it exercised jurisdiction over Yahoo!'s United States focused company (as well as its French subsidiary) based on incidental harm alone. Yahoo!'s portal, Yahoo.fr, immediately took steps to abide by French law to a level acceptable in France by removing all of the illegal material from its site.[52] However, Yahoo! also removed all of the offending material from its United States based site.[53] While the French court subsequently found that Yahoo! complied with its order "in large measure,"[54] free speech in the United States suffered as a result.[55]

If Yahoo!'s response to the litigation in France is simply a precursor to a broader trend of self-censorship wherein internet companies submit to the standards imposed by distant forums based on incidental contact alone, such constraints will create an Internet of the lowest

51. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

52. *See Yahoo!*, 433 F.3d at 1204 ("The court specifically stated that it was not awarding any expenses or costs against Yahoo! France . . . .").

53. GOLDSMITH & WU, *supra* note 1, at 8.

54. *Yahoo!*, 433 F.3d at 1204; GOLDSMITH & WU, *supra* note 1, at 8.

55. For a discussion of the harm from Yahoo! that France perceived, see *supra* notes 24–27 and accompanying text. Yahoo! removed the offending material from its website even though the material likely would have received protection from the First Amendment in the United States. *See* GOLDSMITH & WU, *supra* note 1, at 8.

common denominator.[56] The most restrictive laws will be the laws of cyberspace.[57] New internet content and services may be stifled, abandoned, or tied up in litigation if courts continue to hold foreign internet actors accountable for unforeseeable harms to unintended audiences.

In the instant case, France benefited from Yahoo!'s compliance with its laws, but next time it could be French companies and citizens that suffer when hailed to the United States for actions they did not direct at American internet users. To avoid a future such as this, courts in cases involving cyberspace harm by a foreign actor should use an effects test like the one formulated by the Ninth Circuit when it considered *Yahoo!* en banc.[58]

Other possible approaches for finding jurisdiction exist, but they may stymie the potential of cyberspace. Other tests often disproportionately punish large content owners with assets abroad or create analytical and notice problems. As seen above, they may also threaten internet speech. International solutions, when effective, may fail to enfranchise those subject to their determinations. Although, as illustrated below, the alternatives do have some merits, which bear consideration, the effects test nonetheless remains the best choice.

II. Alternative Approaches for Establishing International Cyberspace Jurisdiction

Some have considered cyberspace a separate realm and have advocated that it be regulated by an adjudicatory system divorced from territorial governments;[59] but, by and large, courts have not adopted this view.[60] Instead, as Jack Goldsmith correctly forecast,[61] territorial

56. "Internet firms and users confronted with a bevy of conflicting national laws could reasonably be expected to comply with the strictest among them in order to avoid legal jeopardy." GOLDSMITH & WU, *supra* note 1, at 6.

57. *Id.*

58. *Yahoo!*, 433 F.3d at 1206; *see supra* note 46 and accompanying text.

59. Johnson & Post, *supra* note 6, at 1367.

60. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998) (finding jurisdiction in a United States trademark case); Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austl.) (finding jurisdiction over a United States corporation in an Australian defamation case); Richardson v. Schwarzenegger, [2004] EWHC (QB) 2422 (Eng.) (finding jurisdiction over California residents in the United Kingdom); BELLIA ET AL., *supra* note 25 and accompanying text (finding jurisdiction over Yahoo! for harms caused in France).

61. Goldsmith, *supra* note 11, at 1200–02.

governments have asserted control over internet actors,[62] especially when they perceive these actors to have caused harm within their countries.[63] The subsections below consider alternative approaches to the effects test, which the courts of a territorial sovereign may use for determining jurisdiction over foreign internet actors.

In addressing the benefits and detriments of these approaches, this section places the alternatives along a continuum with respect to how well each addresses concerns traditionally associated with comity. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[64] The first jurisdictional approach this section discusses, which utilizes presence and quasi in rem, obeys the ideals of comity the least. The second approach, minimum contacts, provides only a slightly better solution in terms of comity. The last approach, international agreement, arguably best addresses comity concerns.

As discussed below, although each alternative has something to recommend it, none performs as well as the effects test at promoting comity interests and other benefits while avoiding problems of implementation.

A. Presence and Quasi In Rem—Jurisdiction Based on the Power to Enforce

A territorial sovereign has the power to control persons and property located within its territory.[65] By using that power, "[a] nation retains the ability to regulate the extraterritorial sources of local harms through regulation of persons and property within its territory."[66] Effectively, the power to enforce a legal judgment is the power to decide a legal issue. The Yahoo! litigation in France demonstrates the two levers a nation may use to attain jurisdiction to serve its own interests; Yahoo! feared the French court's power over its property and employees.[67] The company knew that the French court could liquidate its

62. For a discussion of how France has exercised jurisdiction over an internet company from the United States, see *supra* Part I.A.

63. *See, e.g.*, BELLIA ET AL., *supra* note 25, noting the harm from Yahoo! that France perceived; *see also* Reidenberg, *supra* note 47, at 271.

64. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

65. *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877).

66. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 481 (1998).

67. *See* GOLDSMITH & WU, *supra* note 1, at 8.

assets in France and that its executives would be subject to process while traveling within France's borders.[68]

In the United States, jurisdiction derived from power over property is traditionally known as quasi in rem,[69] and jurisdiction derived from power over a person is known as presence.[70] Both are old means of establishing jurisdiction in the United States, and the more modern minimum contacts analysis has largely supplanted them in United States courts.[71]

The Supreme Court's decision in *Pennoyer v. Neff*[72] set the stage for the long lasting practice of determining interstate jurisdiction based on physical presence.[73] As the Supreme Court later stated in *International Shoe Co. v. Washington*:[74] "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding on him."[75] *Pennoyer* also set the stage for quasi in rem jurisdiction in the United States. In *Pennoyer*, the Supreme Court noted: "The State, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property."[76]

In the United States, a jurisdictional approach based on presence and quasi in rem would fail to advance present-day comity interests because it would be rooted in decisions issued over one hundred years

68. *Id.*

69. This Comment uses the term quasi in rem to refer to a jurisdictional scheme wherein a sovereign holds property "for ransom" in order to exercise power to decide a legal issue unrelated or only tenuously related to the property (exactly the type of enforcement power the French court's order threatened against Yahoo!). *See, e.g.*, GOLDSMITH & WU, *supra* note 1, at 8; BELLIA ET AL., *supra* note 25, at 105 (translating the French order). True in rem jurisdiction, wherein a sovereign exercises jurisdiction over property solely to settle issues directly relating to the property (such as succession), is arguably a more legitimate exercise of jurisdiction. *See* Cable News Network L.P. v. CNNews.com, 162 F. Supp. 2d 484, 490–91 (2001). Currently, in the United States, quasi in rem jurisdiction denies due process unless a minimum contacts test is also satisfied. *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

70. *See generally Pennoyer*, 95 U.S. at 714; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

71. *See infra* Part II.B.

72. 95 U.S. 714.

73. *Id.* at 724.

74. 326 U.S. 310.

75. *Id.* at 316 (italics omitted) (citing *Pennoyer*, 95 U.S. at 714).

76. *Pennoyer*, 95 U.S. at 714.

ago.[77] At that time, communities within the United States were relatively isolated and independent.[78] As advances in communications and transportation developed, presence and quasi in rem did not grant jurisdiction in cases where an actor caused harm in a forum but did not reside or have property in the forum.[79] Further, absent from the analysis in such an approach is whether jurisdiction should attach based on the relationship with the sovereign from whence the actor hails. The approach also raises substantial due process and fairness issues because it does not provide actors, who are present or have personal property in the forum, any means by which to challenge jurisdiction.[80] For these reasons, in the United States, jurisdiction based on presence largely gave way to the more robust system of minimum contacts, and the Supreme Court abolished quasi in rem jurisdiction.[81]

Courts, such as the French court in the Yahoo! litigations, often rely on jurisdiction in international disputes based on presence and quasi in rem because the approach only requires that a territorial sovereign have the power to enforce a judgment.[82] This reliance allows courts to ignore the difficult task of determining whether exercise of that power is normatively desirable.[83] Yet, as the United States and the world have become more interconnected and territorial sovereigns now have significant overlapping powers of enforcement,[84] such a "might makes right" system defies logic. If territorial sovereigns all exercise jurisdiction to the full scope of their power, international actors may well view the sovereigns as being protectionist. Protectionist actions could serve to hamper the global trade upon which future prosperity may depend.[85] Thus, international relations and the success of

77. *Pennoyer* was decided in 1877. *Id.*

78. "America during the nineteenth century was a society of island communities." ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877–1920, at xiii (1967).

79. This loophole was not really closed until the advent of the effects test. *See infra* Part III.

80. *Int'l Shoe*, 326 U.S. at 316.

81. *Id.*; Shaffer v. Heitner, 433 U.S. 186, 207, 210 (1977).

82. *See* Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 285–87 (1983).

83. *Id.* at 338 ("[A] legal order [that views jurisdiction in terms of power] will simply want to ensure that its arsenal of jurisdictional bases is sufficiently large and varied to permit the legal order to assume jurisdiction whenever it has power and is concerned with a party or the underlying controversy.").

84. The United States and France had overlapping jurisdiction in the Yahoo! litigation. *See supra* Part I.

85. *See* Richard Stevenson, *Global Trade Strengthens Economies, Greenspan Says*, N.Y. TIMES, Nov. 15, 2000, at C2 (noting how Greenspan used his address to emphasize that global trade strengthens economies).

the global economy could suffer as international actors fear the undue influence of these protectionist actions.

The Internet creates even greater potential for overlapping powers of enforcement as "[b]order-crossing events and transactions, previously at the margins of the legal system . . . have migrated, in cyberspace, to the core of that system."[86] Some have argued that real-space limitations will attenuate any harm caused by cross-border enforcement because "governments can use their coercive powers only within their borders and can control offshore internet communications *only by controlling local intermediaries, local assets, and local persons.*"[87] Yet, these powers are significant, and pose a real risk to many internet actors, including individuals.

For example, most European countries restrict free speech in ways United States courts would likely deem unconstitutional.[88] If a European country exercises jurisdiction based on presence to the full extent of its power, it could serve and detain an American tourist for speech uttered online, which the tourist did not intentionally direct at the country. Worse yet, the country's authorities could detain the tourist for the speech of others.[89] As one prominent commentator noted, this type of approach "could easily have a chilling effect on travel."[90] However, jurisdiction based on power to enforce through presence and quasi in rem puts more at risk than merely one's ability to travel.

Jurisdiction over all perceived harms under this approach, what this Comment refers to as contacts only jurisdiction, also poses the most significant threat to the Internet itself.[91] It allows countries with

86. David G. Post, *Against "Against Cyberanarchy"* 17 BERKELEY TECH. L.J. 1365, 1383 (2002).

87. GOLDSMITH & WU, *supra* note 1, at 159.

88. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1209–11 (2004).

89. *Cf.* Edmund L. Andrews, *Germany Charges Compuserve Manager*, N.Y. TIMES, Apr. 17, 1997, at D19 (detailing how German authorities indicted a Compuserve manager for failing to prevent content considered illegal in Germany from reaching German citizens through a Compuserve message board).

90. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 409–10 (2002).

91. This Comment refers to quasi in rem and presence as "contacts only" forms of jurisdiction. As in the French *Yahoo!* decision, quasi in rem based jurisdiction can give the power to enforce a judgment rendered over a single harmful "contact." In that case, the French court stated that it was competent to exercise jurisdiction because there was a harm suffered in France, and even though the court recognized the harm was not intentional, the court noted it could liquidate Yahoo!'s assets to enforce the judgment. *See supra* note 25 and accompanying text.

the strictest legal regimes to impose their norms on the Internet as a whole.[92] The approach disproportionately affects large service or content providers that have significant assets or employees in many forum countries.[93] Under it, countries may seize assets and employees of any local subsidiary even if it is not directly involved in the dispute.[94]

Contacts only jurisdiction also creates problems of overinclusiveness and underinclusiveness. The approach allows countries to enforce a judgment in any case of perceived harm regardless of whether an actor intentionally targeted the forum. Meanwhile, purposeful contact directed at the forum by a smaller internet actor may go unpunished, leaving victims uncompensated, because presence and quasi in rem provide no basis for jurisdiction when the defendant is absent and holds no assets in the forum.

B. Minimum Contacts—Jurisdiction Based on Reasonableness

The minimum contacts approach for jurisdiction better serves the interests of comity between sovereigns[95] and arose to replace the aging and troublesome approach of presence and quasi in rem based jurisdiction in the United States.[96] The test improves upon the presence and quasi in rem approach by performing two related functions. "It protects the defendant against the burdens of litigating in a distant or inconvenient forum[,]"[97] and it ensures that "[s]tates, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns . . . ."[98] Under a minimum contacts analysis, a state "may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum" such that it is reasonable to require the actor to defend against suit there.[99] Because it has a more limited scope and reserves a place for a normative judgment on reasonable-

92. *See supra* notes 8–10 and accompanying text.

93. *See, e.g., supra* notes 8–10 and accompanying text.

94. *See supra* notes 67–68 and accompanying text; *see also* GOLDSMITH & WU, *supra* note 1, at 8.

95. Under the general rules of comity: "A foreign nation judgment will not be recognized in the United States unless the American court is convinced that the foreign court had jurisdiction and that 'there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . .'" RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1971) (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)).

96. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

97. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

98. *Id.*

99. *Id.* at 291.

ness, minimum contacts allows for greater cooperation and communication among sovereigns than contacts only jurisdiction.

Courts may find minimum contacts analysis helpful for determining jurisdiction over an internet actor, especially when the actor also has substantial physical contacts with the forum in addition to its online contacts. In that instance, a court may consider an online contact along with the actor's other significant contacts to support a finding of jurisdiction.[100] However, the approach poses significant analytical problems in instances when an actor's contacts occur solely over the Internet.

Minimum contacts analysis alone may be ill equipped to deal with those situations in which an actor does not maintain physical contacts with the forum country. If courts establish jurisdiction based exclusively on an actor's online contacts without further inquiry, then actors engaging in passive conduct, legal in their forum, could be subject to jurisdiction in more than one distant forum simultaneously, much like Yahoo! was and likely still is. Consequently, some courts in the United States have determined that passive conduct on the Internet fails to constitute sufficient minimum contacts for establishing jurisdiction.[101] Effectively, these courts have formed a threshold requirement, which exempts online actors who do not engage in active or purposeful conduct. The active conduct requirement helps to preserve the reasonableness standard of minimum contacts, but it creates a ponderous additional level of inquiry. Under it, courts must ascertain whether conduct is active or passive.[102]

In *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,[103] the District Court for the Western District of Pennsylvania developed a "sliding scale test" to determine whether conduct was active or passive.[104] *Zippo* involved a trademark infringement suit by the manufacturer of Zippo brand lighters against a news service that used "zippo" in several of its do-

100. *See, e.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004) (analyzing defendants contacts, which included a website accessible in California, and finding that the contacts were not sufficient for California to have jurisdiction over the defendant).

101. *See, e.g.*, Machulsky v. Hall, 210 F. Supp. 2d 531, 544 (D.N.J. 2002) (finding that a single transaction on eBay did not confer jurisdiction on the seller's forum because it was too passive); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999) (finding that a post on a listserv was too passive for establishing jurisdiction).

102. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

103. *Id.*

104. *Id.*

main names.[105] In weighing whether personal jurisdiction over the defendant was proper, the district court noted, "[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[106]

The district court explained that, on either extreme of the sliding scale, whether the court has jurisdiction would be easy to assess.[107] But the court recognized that for cases falling in the middle ground, it would be necessary to examine "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[108] Yet, the court described neither how this analysis should take place nor where exactly the line falls as to whether jurisdiction should be granted or not, leaving future courts to figure out the analysis on their own.

The blurry standard as to what constitutes minimum contacts creates significant notice problems. Outside the cyberspace context, despite substantial case law on the subject, courts in the United States have not determined a bright-line test for minimum contacts.[109] The sliding scale test developed for situations involving online contacts also lacks a clear standard.[110] Without a clear line as to whether certain actions meet jurisdictional requirements, an internet actor may not know if its actions will subject it to jurisdiction in a distant forum until after the fact. This approach may cause internet actors to avoid interactive or commercial content that would put them in the middle of the sliding scale, as such content would make jurisdiction in a distant forum a possibility. In this way, the lack of notice as to what does, and what does not, meet minimum contacts requirements could harm future development of the Internet.

105. *Id.* at 1121.

106. *Id.* at 1124.

107. *See id.*

108. *Id.*

109. This statement is generally true for minimum contacts analysis regardless of whether the test is used for determining jurisdiction in the offline or online context. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (noting that in order to determine whether hailing defendant to the forum is reasonable may require inquiry into other relevant factors). However, some courts have attempted to make the test more definite. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1205–06 (9th Cir. 2006).

110. *See Zippo*, 952 F. Supp. at 1124; *see also supra* notes 103–108 and accompanying text.

Minimum contacts presents a better, more adaptable solution than quasi in rem and presence based jurisdiction because it allows for inquiry into reasonableness. International recognition of minimum contacts analysis means barriers to implementing the approach could be low.[111] However, a minimum contacts analysis is not without problems. Although the test works reasonably well for large service or content providers with significant physical contacts in the forum,[112] under a theory of general jurisdiction, a court may still force those companies to face financial risk for actions not intentionally directed at the forum.[113] Additionally, jurisdiction based on minimum contacts fares much worse when all of the contacts with the forum take place through the Internet. As illustrated above, the test may present analytical problems for courts and notice problems for the actors whose contacts occur online.

C. International Treaty and Adjudication—Jurisdiction Based on Agreement

In terms of comity, the most legitimate approach to establishing international jurisdiction would be through the use of a binding international agreement. An international agreement could either establish international substantive law or an international organization to hear cyberspace disputes.

As one potential solution to the problems presented by cyberspace jurisdiction disputes, countries could enter a binding international agreement, establishing the method that the courts of signatories would apply to determine jurisdiction. A well-known commentator in the field of cyberspace law once noted, "if a universal substantive law were applied around the world, many of the concerns about borders, conflicting law, and impermissible extraterritorial reg-

111. Europe also has its own form of contacts analysis. *See* Reidenberg, *supra* note 31, at 1955 ("Similar standards exist in foreign states where a court's competence to hear the case depends on the defendant's nexus with the forum state" as shown through the "various forms of contact between defendants and the state asserting jurisdiction.").

112. *See, e.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004) (noting that Fred Martin had contacts with California in addition to its internet site, including the use of sales contracts with choice-of-law provisions specifying California law, the retaining of a California-based direct-mail marketing company, and the hiring of a sales training company incorporated in California).

113. *See generally* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.* at 414 n.9.

ulation would disappear."[114] However, two fundamental problems interfere with the establishment of an international agreement on jurisdiction: first, most agreements of this nature lack effective means of enforcement; and second, agreements that include effective enforcement provisions rarely, if ever, achieve international consensus.

Of the few international treaties that currently exist to deal with transnational disputes, most have weak enforcement mechanisms.[115] A simple reason for the weakness exists—signatory countries are unwilling to relinquish any of their sovereign power to enforce.[116] For instance, the Berne Convention,[117] a copyright treaty, sought to establish a set of minimum requirements to which all signatory states must adhere, but, when the final form of the treaty was realized, the actual minimum requirements were easy to meet.[118] Although these minimal requirements eased implementation, they resulted in a mere codification of laws already adopted by the member states.[119] In essence, treaties like the Berne Convention sound nice on paper but accomplish little international reform.

In the unlikely event that a treaty is to have real bite, such as a robust enforcement or adjudication mechanism, little likelihood exists that countries would ratify and implement the treaty. For example, the Hague Convention on foreign judgments in civil and commercial matters,[120] which represents an attempt to harmonize international enforcement of judgments, has failed to garner an international consensus for fifteen years.[121] Some of the points of contention concern

114. Berman, *supra* note 90, at 392.

115. *See, e.g.*, Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, concluded July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. The Berne Convention only requires signatory countries to grant foreign authors the same rights as nationals have, a practice that was already common in developed countries. *Id.* at 35; *see also* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 490–93 (2000).

116. *See* Dinwoodie, *supra* note 115, at 490 (noting that the Berne Convention "intruded only marginally on the autonomy of signatory states to establish national copyright policy").

117. Berne Convention, *supra* note 115.

118. Dinwoodie, *supra* note 115, at 490–91.

119. *Id.* at 493 ("Those agreements that [the Berne Convention] produced were, in large part, codifications of commonly held, and already nationally implemented, copyright policies . . . .").

120. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249 (commonly known as the Hague Convention).

121. *See, e.g.*, Paul Hofheinz, *Birth Pangs for Web Treaty Seem Endless*, WALL ST. J., Aug. 16, 2001, at A11.

the test for jurisdiction, generally, and the test for jurisdiction over online disputes, in particular.[122]

As another potential solution to the problems presented by cyberspace jurisdiction disputes, countries could enter a binding international agreement, establishing an international body to oversee international cases involving cyberspace harms. However, such a body may pose a new set of problems, as it may fail to enfranchise the masses subject to its jurisdiction.[123] Unlike parliaments or Congress, international bodies like the World Trade Organization are said to have a "'democratic deficit' because [their] lawmakers lack electoral responsibility" to the people, and yet these lawmakers, often political appointees, wield considerable power.[124] Further, an organization with jurisdictional power over international cyberspace disputes may inhibit or even quash regional development of the Internet because "a decision of [an international] dispute resolution body may not only establish international norms, but also may entrench those norms, freezing them in place and preempting the ability of various countries to experiment with different approaches."[125]

The future may reveal a more feasible, democratic approach for establishing international adjudicatory regimes and enforcement bodies, but until that time, countries must choose whether to adopt a solution for their peoples on an individual basis, which serves their interests at home and abroad. A failure to do so could leave those countries powerless to address harms that occur within their territories. Thus, the effects test warrants consideration because it presents perhaps the best way for countries to address cyberspace harms; it maximizes the benefits of the alternative approaches considered above, while remaining capable of implementation.

III. The Effects Test as a Way to Avoid the Ill Effects of Other Jurisdictional Approaches, Without Sacrificing Their Benefits

The Ninth Circuit's effects test, as applied in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, should be the primary means

122. Berman, *supra* note 90, at 395.

123. David Post has said, "I don't see any good solutions, right now at least, to how we build global institutions that have the trust of the people who are subjected to their rules and regulations." Thomas E. Baker ed., *A Roundtable Discussion with Lawrence Lessig, David G. Post & Jeffrey Rosen*, 49 DRAKE L. REV. 441, 443 (2001).

124. Berman, *supra* note 90, at 398–99.

125. *Id.* at 400.

by which countries establish jurisdiction in international cyberspace disputes. The effects test provides a better means by which to determine cyberspace jurisdiction because it recognizes that the nature of the Internet may lead to situations where users access content in unexpected jurisdictions. It also has more pros and fewer cons than other schemes for determining jurisdiction in the online context. Courts could implement the effects test without facing significant barriers, as comity would ease adoption. Further, courts in the United States have already acknowledged the effects test in other areas of law, and it continues to gain currency worldwide in the online context.

A. The Effects Test—Fewer Problems and a Better Solution

The effects test presents a substantial improvement over other tests for determining jurisdiction in cases of online conduct. The United States Supreme Court originally designed the test to deal with situations where as little as one contact with a distant forum supports the exercise of jurisdiction and specifically allowed for that contact to occur through a media service.[126] Thus, the effects test suits cyberspace disputes particularly well because it allows for jurisdiction even when there are no physical contacts with the forum.[127]

Under the Ninth Circuit's formulation, the effects test has three simple elements: intent, targeting, and foreseeable harm.[128] To meet the first element of the test, a plaintiff that seeks to hail a foreign defendant to its home forum would first have to show that the defendant subjectively intended for its online contacts to reach that forum.[129] To meet the second element, the plaintiff would have to show that the contact displayed characteristics, evincing that the plaintiff targeted the forum, or rather, adapted its contact in such a way as to elicit an improved response from the forum.[130] While the analysis of these two related elements may sound cumbersome, an actor's online contacts readily provide the circumstantial evidence needed to prove or disprove the elements. For international cases, one aspect of the

126. *See generally* Calder v. Jones, 465 U.S. 783 (1984) (finding jurisdiction when the contact with the forum was through a newspaper article that allegedly defamed the plaintiff).

127. The defendant in *Calder* caused harm through an article written and edited in Florida but viewable in the forum state. *Id.* at 785.

128. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006). For an explanation of how this Comment matches up short terms for the elements with the court's actual language, see *supra* note 46.

129. *See Yahoo!*, 433 F.3d at 1209.

130. *Id.*

contacts would be dispositive: whether an internet actor's contact addressed users of a distant forum in their native language as opposed to the language of users in the actor's home forum.[131]

The last element of the effects test, that of foreseeable harm,[132] provides a shield to prevent an actor from being unreasonably hailed to defend suit in a distant forum. This "shield" makes the effects test even more unlike contacts only jurisdiction, which allows a court to redress harms whether foreseeable or not. Thus, the test creates a relatively bright-line rule, and it dispenses with the need to evaluate the vague notions of active or passive contacts. Taken together, the elements provide for jurisdiction to decide only those matters directly relating to an internet actor's intentional contacts and the natural consequences thereof, but not for unintentional or unforeseeable harms. In this way, the effects test establishes superior notice as each element of the test requires some level of culpability. The heightened notice provides a rule whereby a defendant who meets the test cannot claim a contact with the forum was accidental,[133] a benefit that some of the other approaches for establishing cyberspace jurisdiction lack.

Another benefit of the effects test is that it requires countries to rise above some of their petty differences and to look beyond their self-interested motivations for exercising jurisdiction. But this benefit may also be the effects test's biggest detriment, and it could significantly hinder implementation. Under the test, countries may have to forgo the tangible benefit of redressing all harms caused by actors against which they would have power to enforce a judgment. Instead, these countries would have to trust in intangible benefits, such as better international business relations and protection of domestic actors from suit for their unintended foreign harms.[134] It may prove difficult for any government to look beyond the immediate detriment of losing some of its power to enforce judgments against any and all harms it perceives within its borders and instead to focus on future intangible benefits. Yet, the effects test calls for just that.

131. In terms of Yahoo!'s actions, the question would be whether Yahoo!'s site addressed French users in French as opposed to American English.

132. *Yahoo!*, 433 F.3d at 1206.

133. *Id.* at 1206, 1209–11.

134. *Cf.* Gary B. Born, *Reflections on Judicial Jurisdiction in International Case*, 17 GA. J. INT'L & COMP. L. 1, 29 (1987) ("[E]xorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, [and] these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields.") (citations omitted).

Hence, the effects test may not be perfect, but it does solve many of the problems of the alternative approaches. The bright-line rule established by the test serves to enhance notice to online actors and to make analysis less burdensome for the courts. The test also addresses the problem of overinclusiveness because, unlike contacts only jurisdiction, which is based on the power to enforce, the effects test denies jurisdiction for perceived harms that result when an actor's services or content "leak" across borders accidentally.[135] The test thereby inhibits the extraterritorial enforcement of laws, preventing the restriction of online conduct legal in the intended forum. Yet, the test also addresses the problem of underinclusiveness by awarding jurisdiction for harms that result from intentional conduct targeted at the forum, regardless of whether the actor has assets in the forum.[136] As illustrated below, an additional benefit of the effects test is that it does not pose the problems of implementation inherent to the international agreement approach.

B. The Effects Test—Implementation Through Comity

Unlike a formal international agreement, countries could implement the effects test through the already prevalent ideal of comity between nations. As a commentator once explained, one aspect of comity "relates to the forum [country's] self-interest in making [jurisdiction] decisions that will further the development of an effectively functioning international system."[137] Most countries have an interest in applying their laws to extraterritorial actors that cause harms within their borders.[138] Likewise, most countries want to protect their resident citizens, companies, and organizations from the extraterritorial reach of other nations' laws.[139] The effects test balances these two interests when the harm occurs in cyberspace. It allows a country to apply its laws beyond its borders to internet actors when they engage in intentional conduct directed at the forum, but protects internet actors

135. The intent and knowledge elements help to avoid a finding of jurisdiction where content or services are accidentally available in the forum. *See supra* notes 46, 129–34 and accompanying text.

136. *See, e.g., Yahoo!* 433 F.3d at 1201–02 (finding jurisdiction over LICRA in California because it intentionally targeted Yahoo!'s United States based online business with a court order).

137. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982).

138. *See, e.g.*, BELLIA ET AL., *supra* note 25, at 105.

139. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (finding jurisdiction over LICRA and finding that the French order is unenforceable).

whose conduct reaches the forum unintentionally, even if the actors have assets in the forum.[140]

Comity also solves the problem of enforcement of judgments under the effects test by encouraging reciprocal enforcement. As one of its central tenets, comity "bears on the maintenance of amicable external relations with other nation-states and stresses the importance of extending courtesy to other sovereigns and reciprocal recognition of national governmental interests."[141] Countries that enact jurisdictional policies based on an effects test can choose to enforce judgments rendered in other countries that have faithfully applied a similar test. To do so would show "courtesy" to that country in the advancement of comity concerns, fostering favorable relations between sovereigns.[142] Such a means of implementation would bear similarities to the position once advocated by Lawrence Lessig, a well-known scholar in the field of cyberspace law, whereby territorial sovereigns agree to enforce the laws of others so that their laws may likewise be enforced.[143] Each country with domestic and foreign internet actors can gain something from streamlining jurisdictional determinations. The effects test provides the best means to accomplish that type of reform while allowing for implementation one country at a time. Some jurisdictions already recognize its benefits, and the process of adoption has already started.

C. The Effects Test—A Few Practical Applications

While notable, the Ninth Circuit's characterization of the effects test hardly showed true novelty. In the United States, courts already apply the test to other areas of law, while courts in foreign jurisdictions have used the test for some types of international cyberspace disputes. These applications of the effects test demonstrate the viability of the approach.

140. *See supra* Part II.B.

141. Maier, *supra* note 137, at 283.

142. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

143. Under Lessig's concept of reciprocal enforcement, "[e]ach state would promise to enforce on servers within its jurisdiction the regulations of other states for citizens from those other states, in exchange for having its own regulations enforced in other jurisdictions." LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 55 (1999). However, the effects test does not require active policing by the state where the actor resides as Lessig's model does. *Id.*

1. Some Examples of the Effects Test in the United States

As noted above, the Ninth Circuit borrowed heavily from the Supreme Court's *Calder* decision to formulate its version of the effects test. That decision, rendered in 1983, sits as one of the first instances where a nation's high court validated an effects test approach to jurisdiction.[144]

In *Calder*, the respondent brought suit in California Superior Court, claiming an article in the National Inquirer, written and edited in Florida, had libeled her.[145] As it heard the case, the Supreme Court considered whether jurisdiction in a distant forum could be proper when the defendant only maintained a single contact with the forum.[146] There, the single contact was the content of the allegedly libelous article.[147] The Court noted that the National Inquirer had a broader subscription base in California than it did in Florida.[148] Thus, the Court found that the defendant intentionally aimed the content of the article, and therefore the wrongful acts, at the forum.[149] It held, "Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California."[150]

More recently, in *Hartford Fire Insurance Co. v. California*,[151] the Supreme Court addressed whether an effects test applies to international violations of the antitrust laws of the Sherman Act.[152] *Hartford* involved a cartel of reinsurers that agreed to boycott general liability insurers that used nonconforming forms.[153] There, the Court found that "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States" is sufficient for establishing jurisdiction.[154]

144. *See* William J. Knudson, Jr., *Keeton, Calder, Helicopteros and Burger King—International Shoe's Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 819–20 (1985). However, it should be noted that, arguably, the Supreme Court first validated an effects test approach in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), as the Supreme Court certified that case to be heard by the Second Circuit. Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151, 160 n.42 (2004).

145. Calder v. Jones, 465 U.S. 783, 784 (1984).

146. *See id.* at 788.

147. *Id.* at 788–89.

148. *Id.* at 790.

149. *Id.* at 789–90.

150. *Id.* at 789.

151. 509 U.S. 764 (1993).

152. *Id.* at 796.

153. *Id.* at 776.

154. *Id.* at 796.

It is worth noting that *United States v. Aluminum Co. of America* ("*Alcoa*")[155] first advocated an effects test requiring an intent factor for alleged violations of the Sherman Act and that the reasoning of the Second Circuit's decision in *Alcoa* arguably obeys the comity principles this Comment advances far more than the *Hartford* decision does.[156] Nonetheless, before the Supreme Court's decision in *Hartford*, court decisions differed on the level of effects necessary for a court to find jurisdiction.[157] While the *Alcoa* court required intentional effects, some courts determined jurisdiction in a contacts only fashion.[158] But the Supreme Court settled the issue, adopting a test very similar to the one the Ninth Circuit used in *Yahoo!*.

The *Hartford* effects test's requirements for conduct that was "meant to produce" and that "did in fact produce" an effect in the United States mirror the intent and targeting elements of the Ninth Circuit's test, and the requirement for a "substantial effect" provides a shield similar to the foreseeable harm element. The similarity of the two tests suggests the overarching usefulness of the effects test. If it works for determining jurisdiction in antitrust disputes, it may work just as well for determining jurisdiction in cyberspace disputes. After all, both types of disputes have the potential for international scope.

155. 148 F.2d 416 (2d Cir. 1945).

156. S. Lynn Diamond, Note, Empagran, *The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 812–14 (2006). The high point for comity was *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). But *Timberlane* involved a cumbersome test that put judges in the role of making political choices, as it weighed the following: (1) "the degree of conflict with foreign law or policy," (2) "the nationality or allegiance of the parties and the locations or principal places of businesses or corporations," (3) "the extent to which enforcement by either state can be expected to achieve compliance," (4) "the relative significance of effects on the United States as compared with those elsewhere," (5) "the extent to which there is explicit purpose to harm or affect American commerce," (6) "the foreseeability of such effect," and (7) "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Id.* at 614. Unlike *Timberlane*, this Comment advances principles of comity as a means to aid implementation, not as a means for determining jurisdiction itself.

157. *See, e.g.*, Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 268–76 (1927); *see also Hartford*, 509 U.S. at 796 (noting that the application of the effects test was, in earlier days, "not always free from doubt").

158. *See, e.g.*, United States v. Hamburg-Amerikanische Packet-Fahrtactien-Gesellschaft, 200 F. 806, 807 (C.C.N.Y. 1911).

2. Some Examples of How the Effects Test Is Gaining Currency Worldwide

While the Ninth Circuit sits among the few courts in the United States to have applied the effects test in the online context, courts in other countries have also applied the effects test to determine cyberspace jurisdiction. For example, the High Court of Australia used an effects test analysis in *Dow Jones & Co. v. Gutnick*,[159] and the High Court of Justice in the United Kingdom used a similar analysis in *Richardson v. Schwarzenegger*.[160]

Gutnick involved an article posted on Barron's Online, which allegedly defamed Mr. Gutnick, a resident of Australia.[161] Barron's Online houses its content on a United States based server.[162] Nevertheless, because the article directed statements at Mr. Gutnick and caused alleged harm in Australia,[163] the Australian court found jurisdiction appropriate over Dow Jones, the parent company of Barron's Online.[164]

Richardson involved another instance of online defamation.[165] The plaintiff alleged that Arnold Schwarzenegger's campaign manager falsely accused her of lying.[166] Schwarzenegger's campaign manager allowed himself to be quoted for an article that appeared on a newspaper website, wherein he intimated that the plaintiff made up a claim that Schwarzenegger "groped" her.[167] The English court found the statements sufficient to establish jurisdiction because they were targeted at the plaintiff and had arguably harmed her reputation in the United Kingdom.[168] *Richardson* is particularly important because it shows that courts outside the United States can use the effects test to establish jurisdiction over individual online actors, even when they do not have significant assets in the forum country.[169]

These cases illustrate the successful adoption of the effects test in jurisdictions other than the United States. Both the United Kingdom

159. (2002) 210 C.L.R. 575.
160. *See* Richardson v. Schwarzenegger, [2004] EWHC (QB) 2422 (Eng.).
161. *Gutnick*, 210 C.L.R. 575 ¶ 2.
162. *Id.* ¶ 17; Reidenberg, *supra* note 31, at 1956.
163. *Gutnick*, 210 C.L.R. 575 ¶ 100.
164. *Id.* ¶ 102.
165. *Richardson*, [2004] EWHC (QB) 2422.
166. *Id.* at [3]–[4].
167. *Id.* at [3].
168. *Id.* at [21], [22], [31].
169. The defendants in *Richardson* were all individuals domiciled in California. *Richardson*, [2004] EWHC (QB) 2422 [1].

and Australia have used the test, and they have experienced success with it. Other countries should now follow suit.

Conclusion

The version of the effects test that the Ninth Circuit used in *Yahoo!* provides a superior means of establishing jurisdiction in cases of cyberspace harm. It raises the bar so that jurisdiction will not be found in a contacts only fashion, where only the harmful effects matter, and the intent of the actor is irrelevant. The test also enhances notice to internet actors, lowers analytical complexity for the courts, and avoids punishing accidental harms. Further, comity interests would ease adoption of the effects test, allowing for countries to experiment with using the test before implementing it full scale.

As noted above, the current debate over international cyberspace jurisdiction mirrors a similar debate that occurred over the past century. In those earlier days of globalization, commentators argued about the proper test for determining when a country could legitimately engage in extraterritorial enforcement of its antitrust laws.[170] In the United States, the Supreme Court decided an effects test, much like the one this Comment advocates, would be the most appropriate means for establishing jurisdiction over a foreign corporation that had violated the Sherman Act, answering the call of the commentators.[171] Now the Internet has caused courts across the globe to face a new quandary, but the answer is the same. The effects test can and should be the standard by which all countries determine jurisdiction for international disputes in the online context.

170. *See generally* Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 299–300 (1992).

171. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).