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# Internet Jurisdiction Today

*Adria Allen\**

## I. INTRODUCTION

In 1984, William Gibson coined the word “cyberspace” to describe the boundless electronic system of interlinked networks of computers and bulletin boards that provide access to information and interactive communication.<sup>1</sup> Sixteen years later, access to cyberspace has become so widespread that it requires a whole new area of law to govern it; cyberlaw is the field of law dealing with computers and the Internet.<sup>2</sup> The Internet is unique because it allows communication across city, state and national borders.<sup>3</sup> The rapid growth and globalization of the Internet has been problematic for nations trying to exercise their laws in cyberspace.<sup>4</sup>

The Internet, by its very nature, is transnational. An Internet user in the United States, through the use of an Internet Service Provider,<sup>5</sup> is able to access websites around the world.<sup>6</sup> While, citizens from other countries are also able to access U.S. websites. The Internet has eliminated the link be-

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<sup>1</sup> Gibson, a U.S. writer, introduced the term “cyberspace” in his 1984 novel *Neuromancer*.

<sup>2</sup> BLACKS LAW DICTIONARY 392 (7<sup>th</sup> ed. 1999).

<sup>3</sup> See generally, *Nazis, Libel, Porn-The Web's Legal Minefield*, Reuters, Aug. 11, 2000, available at <http://www.zcnet.com/intweek/stories/news/0,41586,261456,00html> (last visited Oct. 19, 2000).

<sup>4</sup> See *id.*

<sup>5</sup> An Internet Service Provider (“ISP”) is an institution that provides access to the Internet. A computer will generally connect to an ISP through the use of a modem. ISPs are connected to the Internet with high-speed links. For more information about ISPs, see <http://www.isps.com>.

<sup>6</sup> The unique nature of the Internet makes it possible to access the Internet locally and visit a website based abroad.

tween traditional geographic barriers and the law.<sup>7</sup> Cyberspace has no geographic boundaries because “the cost and speed of message transmission on the Net is almost entirely independent of physical location.”<sup>8</sup> The problem that arises from the boundless nature of the Internet is that not all cities, states or countries have the same laws.<sup>9</sup>

This paper will use the *Yahoo* case to illustrate the unique jurisdictional dilemma posed by the Internet as countries try to enforce their laws in an era when laws may be broken, through the use of the Internet, from other countries with conflicting laws.<sup>10</sup> Part I of this paper will address the *Yahoo* case and its importance to Internet jurisdiction. Part II will explore traditional jurisdiction and apply it to the *Yahoo* case. Part III will identify two potential theories of Internet jurisdiction and investigate whether they are feasible solutions to the problem posed by the *Yahoo* case. Part IV will examine an alternative to the proposals for Internet jurisdiction put forth in section II and III.

## II. THE *YAHOO* CASE

The *Yahoo* case serves as an example of a nation struggling to exercise its laws in cyberspace.<sup>11</sup> Yahoo Inc., a California based company, provides Internet users with access to “on-line resources, including various communications tools, online forums, shopping services, personalized content and branded programming through its network of properties” (the “Service”).<sup>12</sup> “Yahoo! Auctions,” is one of the applications offered through the Service; it allows users to communicate through the use of the Service, to buy and sell items in an online auction.<sup>13</sup> Auction items range from baseball collectables, to antiques, to electronics, to automobiles; and, until recently, to Nazi memorabilia.<sup>14</sup>

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<sup>7</sup> See generally, David R. Johnson and David G. Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 *STANFORD LAW REVIEW* 1367 (1996) (Feb. 5, 2001), available at [http://www.cli.org/Z0025\\_LBFIN.html](http://www.cli.org/Z0025_LBFIN.html).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> An Internet Service Provider based in America can simultaneously abide by American law and violate the law in other countries, such as France, Germany or Austria.

<sup>10</sup> See *infra*, Part I of this paper, which will discuss the *Yahoo* case in detail.

<sup>11</sup> *Nazis, Libel, Porn- The Web's Legal Minefield*, *supra* note 3.

<sup>12</sup> *Yahoo! Terms of Service*, at <http://www.docs.yahoo.com/info/terms> (last visited Feb. 4, 2001). In order to use the service, individuals must obtain access to the World Wide Web. *Id.*

<sup>13</sup> “An auction is a public sale in which the price is determined by bidding, and the item is sold to the highest bidder. A potential buyer participates by bidding on an item that the seller has listed. The person who has offered the highest bid at close of auction wins the right to purchase the item at that price.” *What is an Auction? Yahoo! Auctions Tour*, at <http://www.auctions.yahoo.com.phtml/auc/us/tour/0-1-whatis.html> (last visited Feb. 4, 2001).

<sup>14</sup> See *Yahoo! Auctions*, at <http://www.list.auctions.yahoo.com> (last visited Feb. 4, 2001).

In the United States, the First Amendment to the Constitution protects the sale of Nazi memorabilia.<sup>15</sup> In France, on the other hand, the sale of Nazi items violates Article R645-1 of the French Penal Code.<sup>16</sup> Yahoo's French website, [www.yahoo.fr](http://www.yahoo.fr), abided by French law and did not sell Nazi memorabilia.<sup>17</sup> However, extensive Internet knowledge is unnecessary to access the United States "sister" site,<sup>18</sup> [www.yahoo.com](http://www.yahoo.com), which did contain Nazi and Neo-Nazi material for auction.<sup>19</sup> French citizens that logged on to the American Yahoo! Auctions site had access to over 1200 items of Nazi memorabilia.<sup>20</sup> The Union of French Jewish Students ("UEJF"), the Paris based International League against Racism and Anti-Semitism ("LICRA"), and the French Movement against Racism ("MRAP") filed a lawsuit, in France, against Yahoo for allowing Nazi memorabilia to be sold to French citizens by way of Yahoo! Auctions on the U.S. site.<sup>21</sup>

### A. Background

Judge Jean-Jacques Gomez, First Deputy Chief Justice of the Superior Court of Paris, presided over the *Yahoo* Case. On May 22, 2000, Judge Gomez ordered Yahoo to block French access to all sites where Nazi memorabilia were auctioned<sup>22</sup> or pay 100,000 Euros every day it delays.<sup>23</sup> Judge Gomez also ordered Yahoo France to warn any French web surfers that searches resulting in U.S. Yahoo! Auctions that display or sell Nazi memorabilia must be interrupted to avoid sanctions for violating French law.<sup>24</sup> On August 11, 2000 Judge Gomez ordered a French, a British and an

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<sup>15</sup> "Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof, of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>16</sup> See Article R645-1, C. PEN. (for a translation of Article R645-1 of the French Penal Code, see <http://www.lapres.net/html/codpen.html> (last visited Oct. 27, 2001)).

<sup>17</sup> *Nazis, Libel, Porn- The Web's Legal Minefield*, *supra* note 3.

<sup>18</sup> The French language Yahoo site, [Yahoo.fr.](http://www.yahoo.fr), has a link to the English language: its English counterpart [Yahoo.com](http://www.yahoo.com). A French citizen need only click on the link to have access to the American auction sites that sell Nazi memorabilia.

<sup>19</sup> *Nazis, Libel, Porn- The Web's Legal Minefield*, *supra* note 3.

<sup>20</sup> *Id.*

<sup>21</sup> See UEJF at <http://www.uejf.org/>. See also MRAP at [www.mrap.asso.fr/aorga.htm](http://www.mrap.asso.fr/aorga.htm); See also LICRA <http://www.licra.com>.

<sup>22</sup> *Internet Future in French Hands—Yahoo! France*, REUTERS, Aug. 11, 2000, available at <http://www.zdnet.com/intweek/stories/news/0,4164,2614693,00.html> (last visited Oct. 19, 2000). 100,000 Euros is equal to \$13,000. *Yahoo! Loses Ruling on Nazi Sites*, REUTERS, Nov. 20, 2000, available at <http://www.zdnet.com/zdnn/...stories/news/0,4586,2655972,00.html> (last visited Nov. 21, 2000).

<sup>23</sup> Tribunal D E Grande Instance De Paris, available at <http://www.gyoza.com/lapres/html>.

<sup>24</sup> See *id.*

American expert to look into ways of implementing his May ruling and set a hearing to examine their findings for November 6, 2000.<sup>25</sup>

On November 6, the team of Internet experts told Judge Gomez that it was possible to block some French Web surfers from Yahoo's U.S. auction site.<sup>26</sup> According to the experts, "computer servers automatically register the nationality of 70 percent of French surfers when they log on."<sup>27</sup> However, to regulate the other 30% of French users, Yahoo would have to rely on the voluntary submission of their nationality.<sup>28</sup> American expert Vintib Cerf noted, "A surfer can always lie."<sup>29</sup> Even though four California start up companies proposed technology and solutions to block French users from accessing Yahoo's American site, Yahoo previously argued that blocking French access was impossible.<sup>30</sup> The experts' conclusion in part concedes that any mechanism used to monitor or eliminate French access to Nazi websites would not be foolproof.<sup>31</sup> Yet, the experts' told Judge Gomez that it would be possible to block access to the Nazi sales for up to 90% of the people in France.<sup>32</sup>

The experts proposed a filter that would use certain keywords, such as "Nazi," to trigger page blackouts to French users.<sup>33</sup> However, this system could unwittingly prevent people from accessing World War II historical sites.<sup>34</sup> Even though the experts themselves expressed reservations about the proposed filtering system, on November 20, Judge Gomez ordered Yahoo to comply with the experts' findings within 90 days or be fined \$13,000 for every day thereafter that it fails to comply with the order.<sup>35</sup> Yahoo announced, on January 2, 2001 that it would no longer allow Nazi artifacts to

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<sup>25</sup> See *id.*

<sup>26</sup> See Katrina Nicholas, *Nazi Bans In Europe Do Not Sway Auction Sites*, SYDNEY MORNING HERALD, Nov. 8, 2000, at 32.

<sup>27</sup> *In French Yahoo Case, Experts say Nazi Auction Ban Impossible to Enforce*, Agence Fr.-Presse (Nov. 6, 2000).

<sup>28</sup> See *id.*

<sup>29</sup> *Id.*

<sup>30</sup> "Four companies have offered possible solutions, including New York firm Info Split and Montreal-based Internet security group Border Control." *Clock Reset in French Yahoo! Nazi Sales Battle*, *supra* note 13.

<sup>31</sup> *In French Yahoo Case, Experts Say Nazi auction ban Impossible to Enforce*, *supra* note 27.

<sup>32</sup> Crispian Balmer, *The End of the Borderless Net?* REUTERS, Nov. 20, 2000, available at <http://www.zdnet.com/zdnn/stories/news/0.4586,265654,00.html> (last visited Nov. 21, 2000). A filter system registering keywords, such as "Nazi" could block access to the offending sites for 90% of French Web surfers. *Yahoo! Loses Ruling on Nazi Sites*, *supra* note 22.

<sup>33</sup> *Yahoo Loses Ruling on Nazi Sites*, *supra* note 22.

<sup>34</sup> "For example, on Yahoo! when you type in the word 'Nazi' you find a lot of anti-Nazi material, such as Anne Frank's diary." *Id.*

<sup>35</sup> Balmer, *supra* note 32.

be listed on Yahoo! Auctions.<sup>36</sup> Effective January 10, 2001, Yahoo banned all items that “promote or glorify hatred and violence,” specifically addressing Nazi memorabilia.<sup>37</sup> Though this decision by Yahoo complies with the French court ruling, Yahoo officially denied that its new policy was a response to the November 20 order.<sup>38</sup> Even though Yahoo’s new anti-hate policy satisfies the French court order, the November 20 decision is not moot. Yahoo continues to fight the French court ruling in U.S. District Court in San Jose, California for a declaratory ruling that France did not have jurisdiction over Yahoo.<sup>39</sup>

### B. Yahoo’s Stance

Yahoo argued and continues to argue that the auction sites involved in the *Yahoo* case were aimed at the American market and “the U.S. First Amendment governing freedom of speech prevented it from shutting them.”<sup>40</sup> Though Yahoo has now removed Nazi artifacts from its Internet auction sites, Yahoo has not and will not drop its U.S. suit over the French ruling.<sup>41</sup> Yahoo maintains that its decision to ban Nazi items was motivated by customer requests, and not by the French ruling.<sup>42</sup> Yahoo attorney Greg Wrenn commented, “this whole attempt at jurisdiction really goes beyond reasonable limits.”<sup>43</sup>

Yahoo contends that Judge Gomez’s order violates the First Amendment and the Communications Decency Act’s immunization of ISPs from liability for third-party content.<sup>44</sup> The fact that Yahoo decided to remove Nazi items from its auction sites, thus appeasing the plaintiffs and the Court order in the *Yahoo* case, does not mean that Yahoo has backed down from its original position: Yahoo will fight the ruling that threatens to pin the

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<sup>36</sup> See David McGuire, *Yahoo Decision Won’t End Online Speech Debate*, NEWSBYTES, Jan. 4, 2001, available at <http://www.newsbytes.com/news/01/16002.html> (last visited Feb. 5, 2001).

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

<sup>38</sup> See *id.*

<sup>39</sup> See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et, L’Antisemitisme*, 2001 WL 640418 (order denying motion to dismiss). See also Keith Perine, *Yahoo Asks U.S. Court to Rule French Court Out of Bounds*, THE INDUSTRY STANDARD, Dec. 22, 2000, available at <http://www.thestandard.com/article/0,1902,21026,00.html> (last visited Feb. 5, 2001). Alan Davidson, attorney for the Center for Democracy and Technology (CDT), awaits a declaratory judgment saying that the French ruling could not be enforced “because of the protections afforded Yahoo under the First Amendment.” See McGuire, *supra* note 36.

<sup>40</sup> *Lawsuit Accuses Yahoo of Justifying War Crimes*, REUTERS, Jan. 22, 2001, available at <http://news.cnet.com/news/0-1007-200-4560537.html> (last visited Feb. 4, 2001).

<sup>41</sup> Lori Enos, *Holocaust Survivors Sue Yahoo! Over Nazi Auctions*, E-COMMERCE TIMES, Jan. 23, 2001, at <http://www.ecommercetimes.com/perl/story/6923.html> (last visited Feb. 4, 2001).

<sup>42</sup> McGuire, *supra* note 36.

<sup>43</sup> Keith Perine, *supra* note 39 (quoting Wrenn).

<sup>44</sup> See *id.*

“frontier-free Internet back behind national boundaries.”<sup>45</sup> Alan Davidson of the Center for Democracy and Technology (“CDT”), notes the importance of the distinction between Yahoo’s strategic decision to take Nazi memorabilia off Yahoo! Auctions, in order to pacify anti-hate groups and avoid paying the fines imposed by the November 20 judgment and setting legal precedent.<sup>46</sup> Even though Yahoo ultimately ended up complying with the French court order, its decision to comply is not binding and Yahoo continues to attack the legitimacy of the order in U.S. District Court.<sup>47</sup> Barry Steinhardt, associate director of the American Civil Liberties Union (ACLU), remarked that while Yahoo’s new policy may make the legal battle seem moot, he expects the same issues to “surface again and again as other nations seek to apply their national laws online.”<sup>48</sup>

### C. A French Perspective

The French government found Yahoo guilty of violating French law. In doing so, the French Court simply took the position that “no one should gain or lose rights merely by going online.”<sup>49</sup> According to this view, if Nazi artifacts cannot be sold offline, they should not be sold online.<sup>50</sup> French Minister of Justice Marylise Lebranchou reaffirmed, “The Internet is not outside the law. All existing legislation applies to Internet users, and a racist message circulated on the Web is an offense just as it would be in a newspaper or on radio or television.”<sup>51</sup> Because Internet users in France have access to Yahoo’s U.S. site, indeed all websites, they must follow French law.<sup>52</sup>

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<sup>45</sup> *Hate Foes Praise Yahoo Move*, REUTERS, Jan. 3, 2001, available at <http://www.wirednews.com/news/politics/0,1283,4095,00.html> (last visited Feb. 5, 2001).

<sup>46</sup> McGuire, *supra* note 36.

<sup>47</sup> *See id.*

<sup>48</sup> McGuire, *supra* note 36. National sovereignty and freedom of the Internet are in constant tension. This not only occurs when other countries try to enforce laws that conflict with speech protected by the U.S. Constitution, it occurs in a wide variety of settings. For example, Internet taxation, gambling, cybercrime, pornography, privacy rights, etc., all pose problems in the future of Internet law enforcement and jurisdiction.

<sup>49</sup> Ariel Tam, *Online Free of Speech is Not So Free*, ZDNET ASIA, Jan. 22, 2001, available at <http://www.zdnet.com/zdnn/stories/news/0,4586,2677192,00.html> (last visited Feb. 4, 2001) (quoting Dr. Ang Peng Hwa, Associate Professor in Division of Journalism, Nanyang Technological University): “To the extent that there is freedom of speech offline, there is freedom of speech online.”

<sup>50</sup> *Id.*

<sup>51</sup> McGuire, *supra* note 36 (quoting Lebranchou).

<sup>52</sup> Pimm Fox, *News Analysis: Can French law be imposed on an Internet company?*, COMPUTERWORLD, Nov. 28, 2000, at <http://www.computerworld.com/cwi/s> (last visited Feb. 4, 2001).

The problem that arises from this “when-in-Rome”<sup>53</sup> perception of Internet jurisdiction is that it could lead to the conclusion that any court anywhere in the world has adjudicative jurisdiction over the author, publisher, or provider of a web page.<sup>54</sup> Unlike traditional jurisdiction problems that might involve two or three conflicting jurisdictions, cyberlaw jurisdictional theorists are faced with the reality that a simple homespun web page could be subject to jurisdiction by all of the nearly three-hundred sovereigns around the world.<sup>55</sup> The unique reaches of cyberspace have led to the development of several Internet jurisdictional theories, which will be discussed further in parts II and III of this paper.

### III. TRADITIONAL DOCTRINES OF INTERNATIONAL JURISDICTION

#### A. Before the Internet

Traditionally international jurisdiction was based primarily in geographical terms.<sup>56</sup> Governmental power gave rise to three types of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.<sup>57</sup> Prescriptive jurisdiction is the power to apply legal norms to conduct; adjudicative jurisdiction is the power of tribunals to resolve disputes; and enforcement jurisdiction is the power of the jurisdiction to enforce.<sup>58</sup> Though all three types of international jurisdiction are relevant to the feasibility and legitimacy of applying laws to the Internet based on geographic boundaries, and all are important in any analysis of the *Yahoo* case, this paper will focus primarily on prescriptive jurisdiction.

In International law, six accepted theories under which a country may claim to have jurisdiction to prescribe a rule of law over an activity: 1) subjective territoriality exists if an activity takes place within a country’s territory, in which case, the country has the jurisdiction to prescribe a rule for the activity; 2) objective territoriality is invoked when an action takes place outside the territory of a country, but the primary effect of the activity is

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<sup>53</sup> *Id.* The “when-in-Rome” rule refers to the concept that a country can have jurisdiction over all websites merely because they are accessible from that country.

<sup>54</sup> Henry H. Perritt, Jr., *Jurisdiction and the Internet: Basic Anglo/American Perspectives Projects in the Coming 2000’s*, INTERNET LAW AND POLICY FORUM, July 26, 1999, available at <http://www.ilpf.org/confer/present99/perrittpr.htm> (last visited Feb. 26, 2001).

<sup>55</sup> Darrel Menhe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69 (1998) available at <http://www.mttl.org/volfour/menthe.html> (last visited Feb. 20, 2001). See also Perritt, *supra* note 54.

<sup>56</sup> Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998), available at <http://eon.law.harvard.edu/property00/jurisdiction/cyberanarchydit.html> (last visited Feb. 26, 2001).

<sup>57</sup> See Perritt, *supra* note 54; see also Agne Lindberg, *Jurisdiction on the Internet-The European Perspective*, AMERICAN BAR ASSOCIATION, July 20, 1997, available at <http://www.abanet.org/buslaw/cyber/initiatives/eujuris.html> (last visited Feb. 26, 2001).

<sup>58</sup> Perritt, *supra* note 54; Lindberg, *supra* note 57.



within the country; 3) nationality gives rise for jurisdiction where a country asserts the right to prescribe a law based on the nationality of the actor; 4) passive nationality basis jurisdiction on the nationality of the victim; 5) the protective principle allows a sovereign to punish actions committed in other territories solely because it feels threatened by those actions; and 6) universal jurisdiction, which covers only the most serious crimes.<sup>59</sup> The *Yahoo* scenario satisfies 5 of the 6 bases for French prescriptive jurisdiction.

According to the facts of the *Yahoo* case, France has the authority to prescribe its laws on cyberspace. First, subjective territoriality exists because Nazi items, in violation of Article R645-1, were being bought in France.<sup>60</sup> Second, objective territoriality is satisfied because, even if it was determined that the sale of Nazi items took place either in cyberspace, or the location of the seller, the primary effect of the transactions was felt in France.<sup>61</sup> Third, France has jurisdiction over French citizens that are buying Nazi memorabilia.<sup>62</sup> Fourth, the passive nationality theory applies because the victims of a breach of Article R645-1 are thought to be French citizens, some of which are holocaust survivors, offended by the sale of Nazi artifacts.<sup>63</sup> Fifth, the victim in the *Yahoo* case could be viewed not only as French citizens, but also as France itself, giving France jurisdiction to prescribe its laws over the Internet based on the protective principle theory.<sup>64</sup> Finally, though it is not applicable to this case, universal interest jurisdiction could be expanded to Internet law to deal with such areas as Internet piracy, computer hacking and viruses.<sup>65</sup>

A finding that France has jurisdiction to impose its laws in cyberspace would also lead to the conclusion that, in certain situations, France would have jurisdiction to adjudicate for breach of French law and jurisdiction to enforce.<sup>66</sup> As a general rule of International law, even where one of the

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<sup>59</sup> Menthe, *supra* note 55.

<sup>60</sup> Article R645-1, *supra* note 16.

<sup>61</sup> Menthe, *supra* note 55.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* It is evident from the facts of the case that the victims of Yahoo's actions are the French organizations that oppose racial hatred, LICRA, MRAP, and UEFJ, also those French citizens that are offended by the items. See Lori Enos, *Holocaust Survivors Sue Yahoo! Over Nazi Auctions*, E-COMMERCE TIMES, Jan. 23, 2001, at <http://www.ecommercetimes.com/perl/story/6923.html> (last visited Feb. 4, 2001). Furthermore, it is evident that French citizens were offended by Yahoo's actions since a group of Holocaust survivors filed suit against Yahoo, despite Yahoo's decision to take Nazi items off of its Internet Auction sites. *Id.* Charles Korman, the plaintiffs' attorney, asserted, "If you organize a system like an auction where people bid for the best price, you excuse these crimes, and they become common place." *Id.*

<sup>64</sup> See Menthe, *supra* note 55.

<sup>65</sup> *Id.*

<sup>66</sup> See Subcommittee on International Transactions, *Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction*, AMERICAN BAR ASSOCIATION, available at <http://www.abanet.org/buslaw/cyber/initiatives/prospect.html> (last visited Feb. 26, 2001).

bases of prescriptive jurisdiction is present, the exercise of jurisdiction must be reasonable.<sup>67</sup> The next section of this paper will discuss whether it is reasonable to grant France prescriptive jurisdiction over cyberspace, or whether the traditional model of international jurisdiction must be amended to account for the unique nature of the Internet.

*1. Reasonableness of granting France prescriptive jurisdiction over the Internet*

The traditional model of international jurisdiction would validate the French Tribunals order in the *Yahoo* case. A conclusion, such as this, could have far reaching implications for the development of the Internet and the future of cyberlaw. Internet jurisdiction is a subject of increasing debate. Opinions worldwide are “split between civil libertarians who want to uphold the freedom of Internet speech at all costs and lawyers and governments trying to find practical compromise that respects the open nature of the web whilst protecting vulnerable people.”<sup>68</sup> The Internet’s extraordinary growth and distinguishing ability to make information available to anyone, anywhere in the world with Internet access, has taken traditional national sovereignty by surprise.<sup>69</sup> While nations are trying to maintain sovereignty in cyberspace, companies, such as Yahoo, fear that the *Yahoo* case will be used as precedent; forcing Web sites to “self police all online content and activities and make them comply with any number of laws from any country or community.”<sup>70</sup>

**B. Proponents of Traditional Jurisdiction**

Proponents of applying traditional jurisdiction concepts to cyberspace argue that skeptics: “1) overstate the differences between cyberspace transactions and other transnational transactions, 2) do not attend to the distinction between default laws and mandatory laws, and 3) underestimate the potential of traditional legal tools and technology to resolve the multijurisdictional regulatory problems implicated by cyberspace.”<sup>71</sup> Jack L. Goldsmith argues, “[C]yberspace transactions do not inherently warrant any more deference by national regulators and are not significantly less resistant to the tools of conflict of laws, than other international transactions.”<sup>72</sup>

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<sup>67</sup> Menthe, *supra* note 55.

<sup>68</sup> *Nazis, Libel, Porn-The Web's Legal Minefield*, *supra* note 3.

<sup>69</sup> See generally *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>70</sup> Kenneth N. Cukier, *Virtual Exceptionalism: Cyberspace Meets Sovereignty*, Wall St. J. Eur. at 6, Aug. 17, 2000.

<sup>71</sup> Goldsmith, *supra* note 56.

<sup>72</sup> *Id.* at 1201.

Goldsmith asserts that regulation of cyberspace is both feasible and legitimate from the perspective of traditional jurisdiction and choice of law.<sup>73</sup>

Goldsmith claims that enforceability will operate for cyberspace the same as in real space.<sup>74</sup> Rather than being simultaneously subject to all national regulations, Internet users will only have to concern themselves with countries that are able to enforce their laws across geographic boundaries.<sup>75</sup> In the case of Yahoo, the California based corporation had a subsidiary operating in France, which could be used by France to enable enforcement of French Law. However, as seen by the experts' proposal in the *Yahoo* case, as technology increases, the threat of liability will lessen.<sup>76</sup>

Goldsmith opposes the "a-geographic" nature of the Internet altogether. Rather than concluding that providers, such as *Yahoo*, should be able to avoid jurisdiction because of the inability to prevent information flows from appearing simultaneously in every jurisdiction, Goldsmith asserts that "cyberspace information can only appear in a geographical jurisdiction by virtue of hardware and software physically present in the jurisdiction."<sup>77</sup> Hence, Yahoo could have used the filtering software prescribed by the French Court in order to simultaneously follow both French and U.S. law. Goldsmith maintains that skeptics do not believe that content providers should be liable for harms wherever information is distributed, as is true with newspaper publishers, because content providers cannot control the "geographical locus of publication and distribution."<sup>78</sup> On the other hand, as the cost of similar control continues to drop and technology improves, it will be appropriate in cyberspace, as in real space, "for the law to impose small costs on both types of publisher to ensure that content does not appear in jurisdictions and networks where it is illegal."<sup>79</sup>

Skeptics overstate the challenges posed on traditional international jurisdiction by the Internet.<sup>80</sup> First, the practical problems of jurisdiction will diminish when the substantive content of law in different sovereigns is the

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<sup>73</sup> *See id.* Though Goldsmith argues that regulation from the perspective of jurisdiction and choice of law is "legitimate and feasible", he does not argue that it is a good idea, and does not take a position on the merits beyond their jurisdictional legitimacy. Further, Goldsmith does not deny that the new cyberspace will lead to changes in governmental regulation, in the same way that the radio, television, telephone and satellite gave way to social and regulatory changes. *Id.*

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

<sup>75</sup> *Id.*

<sup>76</sup> "The threat of liability will lessen as content providers continue to gain means to control information flows." *Id.* at 1221.

<sup>77</sup> *Id.* at 1225-26.

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

<sup>79</sup> *Id.* at 1230.

<sup>80</sup> *Id.*

same.<sup>81</sup> When harmonization is not an option, the problems may be complex and genuine. However, Goldsmith asserts that they are not unique to cyberspace.<sup>82</sup> Though the new medium is “richer, more complex and much more efficient,”<sup>83</sup> it is no different than other forms of transnational communication.<sup>84</sup> Transactions over the Internet either involve real people in one territorial jurisdiction transacting with real people in other territorial jurisdictions, or engaging in activity that causes real-world effects in another territorial jurisdiction.<sup>85</sup>

Although skeptics argue that extraterritorial regulation of cyberspace could cause spillover effects in other jurisdictions, these effects are inevitable.<sup>86</sup> Because information flows over the Internet appear simultaneously in all territorial jurisdictions, regulation of local effects will sometimes affect the flow and regulation of web information in other countries.<sup>87</sup> For example, in the *Yahoo* case, Yahoo’s decision to remove Nazi items from all of its websites affects countries other than France, in that the disputed information is no longer available in any jurisdiction. Though, in the *Yahoo* case, technology was available to prevent only French access from the website and the French Court did not order Yahoo to remove the items from the Internet altogether, but only to bar it from being available to French users.<sup>88</sup> However, until technology becomes more economically feasible and easy to implement, rulings such as that in the *Yahoo* case will continue to have spillover effects.<sup>89</sup> The assumption made by skeptics that spillover effects are a reason to avoid regulation is false.<sup>90</sup> Skeptics argue that spillover effects justify self-regulation of the Internet.<sup>91</sup> Goldsmith argues that this assumption is erroneous because Internet users are no more self-contained

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<sup>81</sup> Perritt, *supra* note 54. However, this is not true for instances similar to the *Yahoo* case where French and American law are so different in “striking the balance between freedom of expression and the regulation of content likely to offend local values.” *Id.*

<sup>82</sup> “Identical problems arise all the time in real space.” Goldsmith, *supra* note 56, at 1234.

<sup>83</sup> *Id.* at 1240.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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

<sup>88</sup> See Tribunal D E Grande Instance De Paris, *supra* note 23.

<sup>89</sup> See Goldsmith, *supra* note 56.

<sup>90</sup> Goldsmith makes two assumptions with relation to spillover effects: 1) in the absence of consensual international solutions, prevailing concepts of territorial sovereignty permit a nation to regulate the local effects of extraterritorial conduct even if this regulation produces spillover effects in other jurisdictions; 2) such spillover effects are a commonplace consequence of the unilateral application of any particular law to transnational activity in our increasingly interconnected world. *Id.*

<sup>91</sup> *Id.*

than telephone users, corporations, and other groups with activities that transcend jurisdictional borders.<sup>92</sup>

### C. Critics of Traditional Jurisdiction

Though Goldsmith and others have argued that it is feasible and legitimate to apply traditional international jurisdiction to the Internet, it is not the most efficient method of Internet jurisdiction. First, the Internet is a unique forum of communication that requires a special regulatory model. Second, traditional jurisdiction, when applied to the Internet, could create inter-sovereign conflicts.<sup>93</sup> Third, applying traditional jurisdictional models to the Internet would be both over and under-inclusive.<sup>94</sup> Fourth, technology to monitor the Internet will increase at the same pace with evasive technology, making Internet regulation difficult.<sup>95</sup> Finally, finding Internet users susceptible to the laws of over 300 sovereigns could cause Internet self-censorship.<sup>96</sup>

### D. The Unique Nature of the Internet

Cyberspace is a combination of several hundred million computer networks and sites, which are interconnected throughout the world.<sup>97</sup> Cyberspace is everywhere and, at the same time, nowhere; "it exists in the smallest bursts of matter and energy and is called forth only by the presence of man through the intercession of an Internet provider."<sup>98</sup> The frontier-free Internet has "revolutionized daily lives, trade and entertainment only because it knows no borders."<sup>99</sup> Trying to limit the Internet to national frontiers would be disastrous to the further development of the Internet as a global medium.<sup>100</sup>

The *Yahoo* case is significant because it is delving into uncharted territory by directly addressing the question of whether political borders should exist in the free flowing Internet.<sup>101</sup> Civil liberties organizations in the U.S.

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<sup>92</sup> *Id.* at 1242.

<sup>93</sup> *Id.* at 1204-05.

<sup>94</sup> Perritt, *supra* note 54.

<sup>95</sup> George A. Chidi, *International Law Causes Headaches for U.S. Websites*, Mar. 2, 2001, available at <http://www.netgeo.com/news/20010302.htm> ("The synchronized growth of enforcement and evasive technology has been referred to as the high-tech arms race between lawmakers battling hackers for state of the art technology." *Id.*).

<sup>96</sup> *Id.*

<sup>97</sup> See *Licra and UEJF v. Yahoo! Inc. and Yahoo France*, order of Nov. 20, 2000 by the Superior Court of Paris, at [www.lapres.net/html/yahen11.html](http://www.lapres.net/html/yahen11.html) (last visited 3/14/02).

<sup>98</sup> Menthe, *supra* note 55, at 69-70.

<sup>99</sup> *Internet Future in French Hands—Yahoo! France*, *supra* note 22. (quoting Yahoo! France Managing Director Phillipe Guillanton).

<sup>100</sup> *Id.*

<sup>101</sup> See Jim Hu, *Yahoo: Auctions immune from French Laws*, Dec. 21, 2000, <http://news.cnet.com/news/0-1007-200-4234863.html> (last visited Feb. 5, 2001).

warn that allowing the French decision to stand will enable other governments to use the same tactics to impose their laws over the Internet.<sup>102</sup> Yahoo France Managing Director Philippe Guillaumont argued that allowing the *Yahoo* decision to stand would “be tantamount to saying the Internet as a whole would be turned back to a tool which is hemmed in by national frontiers ... a setback for the Internet and the progress it has brought to people.”<sup>103</sup>

### *1. Inter-sovereign conflicts*

From its inception, the Internet has been deemed as the last haven for free speech.<sup>104</sup> Representative David Dreier (R-CA) is sponsoring a bill that would protect ISPs, such as Yahoo, from criminal liability when their users commit crimes or traffic in illegal content.<sup>105</sup> Dreier stated that imposing liability on ISPs for content will impose costly burdens on a key part of America’s technology sector and will “seriously degrade the ease and speed of consumer access to the Internet; and it will expose American ISPs to control and regulation by foreign courts and governments, many of which don’t respect the First Amendment.”<sup>106</sup> The *Yahoo* case is a primary example of Dreier’s concern.

The implications of allowing the *Yahoo* case to stand as precedent, are vast and for the most part undesirable. While Yahoo may deserve applause for removing Nazi artifacts from its website, future attempts by governments to expand their laws beyond national barriers may prove less favorable.<sup>107</sup> For example, the province of Quebec in Canada could have jurisdiction over a physician in France, that diagnoses patients over the Web, on the grounds that he is practicing medicine without a license in Canada and thus jeopardizing the welfare of patients located in Quebec.<sup>108</sup> As Doug Isenberg, attorney, founder and editor of gigalaw.com points out, “if France can prevent Yahoo from hosting these auctions, could a conser-

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<sup>102</sup> “Civil liberties organizations in the United States have warned that if the French decision is allowed to stand, repressive governments could use the same tactic against Web sites run by democracy groups and human rights activists.” *Yahoo! Fights French Nazi Ruling*, ASSOCIATED PRESS, Dec. 22, 2000, available at <http://www.msnbc.com/news/507110.asp> (last visited Feb. 5, 2001).

<sup>103</sup> *Internet Future in French Hands—Yahoo! France*, *supra* note 22.

<sup>104</sup> Trevor Marshall, *Will Yahoo go to Jail*, Aug. 4, 2000, at <http://www.byte.com/column/byt20000803s0005>.

<sup>105</sup> Jay Lyman, *New U.S. Congress Tackles Tech Issues*, Jan. 5, 2001, at <http://www.ecommercetimes.com/perl/story/6481.html>.

<sup>106</sup> *Id.*

<sup>107</sup> See generally, Doug Isenberg, *Struggling with the French Yahoo Nazi-Auction Decision*, <http://www.gigalaw.com/articles/2001/isenberg-2001-01b-p1.html> (last visited Feb. 26, 2001).

<sup>108</sup> See Perritt, *supra* note 54.

vative Persian Gulf country hold drkoop.com liable for providing information about birth control?"<sup>109</sup>

### 2. *Over-inclusiveness*

Traditional jurisdiction doctrine is over-inclusive. The unique nature of the Internet allows a web page placed on an Internet server to be visible around the world and not just in the sovereign where the server is physically located.<sup>110</sup> While a sovereign may have legitimate interests in regulating the web page because it is visible and accessible by its own citizens, the same interests exist with respect to nearly 300 sovereigns around the world.<sup>111</sup> Traditional theories of jurisdiction would suggest that each sovereign is entitled to apply its own substantive law to the web page.<sup>112</sup> Further, the creator of the web page is aware of the global nature of the Internet, and in many instances, uses the Internet precisely for its global character.<sup>113</sup> Traditional law would suggest that, since the creator of the web page knew that it would be available throughout the world, any court around the world has adjudicative jurisdiction over the creator of the web page.<sup>114</sup> Thus, traditional jurisdiction analysis is over-inclusive because it allows for almost unlimited exercise of prescriptive and adjudicatory jurisdiction with resulting spillover effects wherever Internet activity occurs.<sup>115</sup>

### 3. *Under-inclusiveness*

Traditional jurisdictional analysis is under-inclusive because a country cannot enforce conduct occurring outside its borders without the willingness of other countries to cooperate or the ability to exercise its own coercive power to extraterritorially enforce its law.<sup>116</sup> To do so would create the inter-sovereign conflict addressed above. However, with the potential increase of technology, countries may be able to extend their enforcement jurisdiction beyond persons, things, or activities that are present in the enforcing jurisdiction.<sup>117</sup> Use of transnational technology to localize conduct and bend the Internet to conform to traditional jurisdiction is both difficult and expensive.<sup>118</sup> Thus, applying traditional jurisdiction to the

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<sup>109</sup> See Isenberg, *supra* note 107. Drkoop.com is a company, chaired by former Surgeon General of the United States Dr. C. Everett Koop, that offers healthcare informational services over the Internet. See [www.drkoop.com](http://www.drkoop.com).

<sup>110</sup> See Perritt, *supra* note 54.

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

Internet is under-inclusive because countries that want to regulate cannot effectively enforce their laws against “purveyors of harmful material through the Internet.”<sup>119</sup>

#### 4. Technology

Technology places more of a challenge on applying traditional jurisdiction to the Internet, than on being a tool in Internet regulation. Existing law cannot control the Internet, an inherently technological environment.<sup>120</sup> As governments try to use technology to regulate the Internet, evasive technology to skirt government regulation will also increase.<sup>121</sup> Further, if governments are somehow able to restrict their citizens from access to certain sites, or the Internet as a whole, they will eventually be left out of the information economy.<sup>122</sup> In this case, traditional applicable law would place a roadblock to progress by its inability to adapt to the Internet.<sup>123</sup>

Countries that try to impose the burden of technological regulations on Internet companies, such as Yahoo, encounter a similar problem of inhibiting progress. Though it is possible for content providers like Yahoo to take some control over information flows, this technology is costly and does not eradicate its targets.<sup>124</sup> For example, the filtering technology imposed by the French court in *Yahoo* could 1) be circumvented, and 2) filter more than the intended unlawful material.<sup>125</sup> Filtering technology can be outwitted by omitting letters from the names or titles of crude material, as has been the case with online pornography, or hackers will learn to bypass filtering mechanisms.<sup>126</sup> Filtering technology also has a tendency to be overly broad. The filtering technology proposed in the *Yahoo* case would not only eliminate Nazi artifacts, but also preclude users from accessing genuine WWII historical sites and anti-Nazi material, such as the Diary of Anne Frank.<sup>127</sup>

Imposing harsh rules on ISPs, such as Yahoo, may be counterproductive and expensive.<sup>128</sup> Peter Swire, former Chief Counselor for Privacy in the United States Office of Management and Budget, warns, “[T]he poison set for mice (small Internet enterprises that can escape regulation through

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<sup>119</sup> *Id.*

<sup>120</sup> Juliet M. Oberding & Terje Norderhaug, *A Separate Jurisdiction for Cyberspace?*, <http://www.ascusc.org/jcmc/vol2/issue1/juris.html> (last visited Feb. 26, 2001).

<sup>121</sup> See Chidi, *supra* note 95, at 12.

<sup>122</sup> Tam, *supra* note 49.

<sup>123</sup> See Oberding & Norderhaug, *supra* note 120.

<sup>124</sup> See generally Goldsmith, *supra* note 56.

<sup>125</sup> See generally Balmer, *supra* note 32.

<sup>126</sup> Peter P. Swire, *Of Elephants, Mice and Privacy: International Choice of Law and the Internet*, Aug. 23, 1998, at <http://www.acs.ohio=state.edu/units/law/swire1/elephants.htm> (last visited Jan. 26, 2001)

<sup>127</sup> See Balmer, *supra* note 32.

<sup>128</sup> See Swire, *supra* note 126.



traditional means and under traditional concepts) may kill our favorite pets.<sup>129</sup> And, even as the pets die off, new mice might emerge that are resistant to the poison.<sup>130</sup> "Search engines will let individuals find the hidden 'bad' sights they seek."<sup>131</sup> Not only will imposing the liability on ISPs, such as the French Court has tried to do with Yahoo, be overbroad and ineffective,<sup>132</sup> it may also sharply increase price and reduce the access to the many good things on the Internet.<sup>133</sup>

### 5. Internet Self-Censorship

Imposing traditional jurisdictional analysis to the Internet will create the problem of Internet self-censorship. If the *Yahoo* case is used as precedent, it could force Web sites to "self-police all online content and activities and make them comply with any number of laws from any country or community."<sup>134</sup> Larger companies such as Yahoo may voluntarily remove content from their web sites and use filter technology in order to avoid liability. In this instance, the threat of being dragged into court in a foreign jurisdiction could determine the prevailing law, rather than the law of the area being targeted by the web site or the location of the server. Less tolerant countries may dictate the law of the Internet as companies bow to their more repressive Internet standards out of fear of liability.<sup>135</sup> Smaller companies could be pushed out of the Internet economy altogether, less they assume that rules of other countries will be similar to their own, in which case the company or individual may unexpectedly find itself facing a lawsuit in a country halfway around the globe.<sup>136</sup>

Another problem that will lead to Internet self-censorship if the *Yahoo* case is affirmed is the lack of intent or purposefulness required to impose Internet jurisdiction.<sup>137</sup> In the United States, due process requires purpose-

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

<sup>130</sup> *See id.*

<sup>131</sup> *Id.* at 1022.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* In the aftermath of the *Yahoo* case, Yahoo began assessing fees of up to \$2.25 for auction listings. See Elizabeth Blakey, *Yahoo! No Longer Home of the Free*, E-COMMERCE TIMES, Jan. 10, 2000, <http://www.ecommercetimes.com/perl/story/6619.html> (last visited Feb. 4, 2001).

<sup>134</sup> Cukier, *supra* note 70.

<sup>135</sup> "If [U.S. Web sites] have to follow 200 country laws then [they] would have to follow the one that allows the least [freedom of] speech." David McGuire, *Group Blasts Yahoo Nazi Ruling as Setback For Civil Liberties*, NEWSBYTES, November 11, 2000, <http://www.infowar.com/law> (last visited Nov. 25, 2000) (quoting CDT policy analyst Ari Schwartz).

<sup>136</sup> See *Transnational Issues in Cyberspace: A Project On Law of Commerce in Cyberspace*, *supra* note 66.

<sup>137</sup> See generally Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. LAW & TECH. 3 (1997), available at [http://vjolt.student.virginia.edu/graphics/vol1/vol1\\_art3.html](http://vjolt.student.virginia.edu/graphics/vol1/vol1_art3.html) (last visited Feb. 26, 2001).

ful availment; however, Internet users “neither know nor care about the physical location of the Internet resources they access.”<sup>138</sup> Yahoo’s French web sites completely complied with French law; the web sites under fire were aimed at the American market.<sup>139</sup> Henry H. Perritt, Dean of Chicago-Kent Law School, observes that it is “difficult to make meaningful use of purposefulness of contact as a test for adjudicative jurisdiction when the inevitable result of publishing a Web page aimed at a Belgian audience intrinsically has as much contact with Brazil as Belgium.”<sup>140</sup> These are just a few of the reasons that traditional international jurisdiction should not be applied to the Internet and the *Yahoo* decision should not be affirmed.

#### IV. PROPOSALS FOR INTERNET REGULATION

Despite the problems associated with traditional jurisdiction as a means of regulating the Internet, the Internet must be regulated. Without regulation, the Internet can potentially be used to facilitate organized crime, evade tax laws, perpetuate fraud, sell child pornography and incite racial hatred.<sup>141</sup> This paper does not propose to abandon the concept of Internet regulation altogether, but merely asserts that traditional jurisdiction methods must be amended to account for the unique nature of the Internet. Allowing countries to prescribe local laws over the Internet will create “jurisdictional mayhem.”<sup>142</sup> This paper will evaluate two of the jurisdictional theories put forth to account for the transnational nature of the Internet.

##### A. Cyberspace: A place

David R. Johnson and David G. Post advocate a “fundamental rethinking of how jurisdiction works.”<sup>143</sup> They suggest that territorial authorities should defer to the self-regulatory efforts of Cyberspace participants.<sup>144</sup> Johnson and Post assert that Cyberspace should be conceived as a distinct place for purposes of legal analysis.<sup>145</sup> Entering the Cyberworld would automatically and fairly render a user under the jurisdiction of a distinct “law of Cyberspace.”<sup>146</sup> Signing on, transacting, and using the Internet would be the equivalent of passing a physical boundary between territorial

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<sup>138</sup> *Id.* at 44.

<sup>139</sup> See *Lawsuit Accuses Yahoo of Justifying War Crimes*, *supra* note 40.

<sup>140</sup> See generally Perritt, *supra* note 54.

<sup>141</sup> While “the vast majority of Internet content is for purposes of information for totally legitimate business or private usage, . . . , the Internet also carries a limited amount of potentially harmful or illegal content or can be used as a vehicle for criminal activities.” EUROPEAN UNION PREPARATORY ACTS, OJ C 48, Feb. 2, 1998, *available on* Westlaw.

<sup>142</sup> See Menthe, *supra* note 55, at 79.

<sup>143</sup> See Perritt, *supra* note 54, at ¶ 23.

<sup>144</sup> See Johnson & Post, *supra* note 7.

<sup>145</sup> *Id.* at 1378.

<sup>146</sup> *Id.* at 1379.

governments, and it would be fair to impose special laws of Cyberspace to users because, just like interstate or international travel, "no one accidentally strays across the border into Cyberspace."<sup>147</sup>

While it is agreed that one nation's, such as France's, legal institutions should not monopolize rulemaking for the entire Net,<sup>148</sup> it seems that putting the rule making and enforcement into the hands of the very people and companies likely to abuse or profit from the Net is equally dangerous. A new global communications media may be better equipped to enforce Internet regulations, since they are familiar with the Internet;<sup>149</sup> however, the proposal that the Internet should be self-governing does not reconcile the bona fide concerns presented by countries affected by the Internet. To construct and impose a consensually based set of rules for the Internet would be the equivalent of setting up international conventions of Internet experts from various countries to agree on some sort of Internet treaty, in which case, the Internet cannot be a self-contained regulator. Without a consensual set of rules, the Internet would be a form of anarchy for individuals using the Internet in countries where the proposed global communications media allows them more freedom than the geographic location from which they are accessing the Internet.

One of the fundamental ideas on territorial based laws is that, for the most part, an individual cannot be in two places at once. In the case of the Internet, users around the world are residing in a geographic country, while accessing the Web. While an Internet command center for creating, applying and enforcing laws over the Internet may be successful, Johnson and Post fail to appreciate the fact that Cyberspace is not a nation state.<sup>150</sup> For any type of cohesive Internet regulation system to work, it would have to be supported by nations, not self-governing. The type of Internet regulation proposed by Johnson and Post would have to derive power from nations, which have accrued their sovereign authority over time and will not be willing to surrender it to an autonomous Internet.

### B. International Spaces

Darrel Menthe also views Cyberspace as a place, though nonphysical and outside national boundaries, however, he proposes that it should be treated as "International Space."<sup>151</sup> International space includes areas such as Antarctica, outer space and the high seas; all of which base the jurisdiction to prescribe on nationality, rather than territoriality.<sup>152</sup> Menthe analogizes these spaces to the Internet based on their international, sovereignless

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1390.

<sup>149</sup> *Id.* at 1379.

<sup>150</sup> See Oberding & Norderhaug, *supra* note 120.

<sup>151</sup> See Menthe, *supra* note 55.

<sup>152</sup> *Id.*

quality.<sup>153</sup> Treaties are the primary source of law applied to international spaces.<sup>154</sup> Menthe purports that outside treaties on the Internet, the legal authority to govern cyberspace should be based on nationality.

Premising Internet jurisdiction on nationality raises two main concerns: 1) problems with anonymous users (which will not be addressed in this article); 2) Internet users access Cyberspace from physical locations. A theory of international spaces, applied to the Internet, would create the same potential conflict between nations as traditional jurisdiction and Cyberplace jurisdiction. For instance, under the theory of international spaces, a French citizen vacationing in the U.S., where the sale of Nazi artifacts is protected by free speech, that buys material online would be subject to French jurisdiction. However, France would not be able to enforce its law without U.S. cooperation. The U.S. would have a conflict of interest in prosecuting or extraditing a French citizen for committing an act that is legal in the United States, while in the United States. On the other hand, if a Korean citizen breaks U.S. law by posting information to alt.sex.bestiality, it seems as though it would be in the interest of the U.S. to prosecute.<sup>155</sup> If the theory of international spaces were to account both for the interests of the U.S. and Korea, then it would be no different than the current predicament traditional international jurisdictional theory is facing.

## V. THE CYBER RACE

National governments, Internet enterprises, and legal communities around the world are racing to find a remedy to the existing dilemma posed on international jurisdiction and the Internet. Traditional international jurisdiction is "behind the times."<sup>156</sup> Johnson's and Post's Cyberplace-based theory of Internet regulation corrects some of the difficulties encountered by applying traditional jurisdiction to the Internet, while creating a whole new set of problems of its own. Finally, the theory of international spaces gives a different name to the same debacle posed on international law by the Internet. This paper suggests that each of these approaches should be fused to entertain a new concept of international jurisdiction.

First, the theory of international spaces affirms that treaties should be the primary source of law for cyberspace.<sup>157</sup> This is in accord with current international jurisdiction practices. For the most part, broad based regulations, such as those on child pornography, will be reconcilable through treaties. Second, Johnson and Post suggest an autonomous Internet governing body, which as discussed above is not feasible or legitimate.<sup>158</sup> However, if

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<sup>153</sup> *Id.* at ¶ 41.

<sup>154</sup> *Id.* at ¶ 42.

<sup>155</sup> *Id.* at ¶ 67.

<sup>156</sup> See Oberding & Norderhaug, *supra* note 120 (quoting Oliver Wendall Holmes).

<sup>157</sup> See Menthe, *supra* note 55, at 85.

<sup>158</sup> See Johnson & Post, *supra* note 7.

governments around the globe banned together to establish an Internet regulation agency, composed of Internet technology experts and systems operators, to enforce International treaties from within the realm of Cyberspace, it may prove more useful than trying to enforce laws from a nation by nation perspective. Third, countries may traditionally try to resolve the remaining conflicts of law indirectly by prosecuting individuals within their national boundaries for abusing the Internet and breaking local laws.<sup>159</sup>

International treaties could not only include direct regulation of areas of law, such as child pornography, but could also create agreements between countries to help enforce each other's laws, even when they conflict. For example, the United States could make it illegal for an American to ship Nazi memorabilia to France in violation of French law. Though it does not affect the right to buy and sell such items in the U.S., it would help enforce French law and discourage both French and American citizens from making similar transactions. International treaties could also require ISPs to provide warnings on websites that users must obey their local laws, thus giving notice to users that they are subject to local jurisdiction even though they may be able to access certain sites.<sup>160</sup>

An Internet regulation committee could potentially use the Internet to enforce international treaties. It could also help governments to agree on and determine the rules best suited for the unique nature of the Internet.<sup>161</sup> Further, an Internet committee would have special knowledge of what mechanisms exist or need to be developed to regulate the Internet.<sup>162</sup> Such a committee could create a website for complaints or use the Web in order to police online transactions and information exchanges.

Finally, indirect regulation of the Internet may be the most effective means of control over the Internet for countries when their laws conflict with the laws of other sovereigns or are not governed by international treaties. Under traditional jurisdictional law, a nation can regulate people and property, such as Internet equipment, in its territory to control the local effects of extraterritorial activity.<sup>163</sup> For example, nations can "penalize in-state users who obtain and use illegal content or who otherwise participate in an illegal cyberspace transaction."<sup>164</sup> Countries are also able to regulate the local means through which foreign content is transmitted.<sup>165</sup> Regulating

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<sup>159</sup> See Goldsmith, *supra* note 56, at 1222-23.

<sup>160</sup> *Id.* Yahoo! places such a disclaimer on its website. Sellers and buyers "are responsible for researching and complying with any applicable laws, regulations or restrictions on items or manner of sale or exchange, that may pertain to transactions in which they participate." See *Yahoo! Auctions Guidelines*, at <http://user.auctions.yahoo.com/html/guidelines.html> (last visited Feb. 4, 2001).

<sup>161</sup> See Johnson & Post, *supra* note 7, at 1392.

<sup>162</sup> *Id.*

<sup>163</sup> See Goldsmith, *supra* note 56, at 1222.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1222-23.

domestic persons and property would make it more costly and difficult for local users to obtain content from, or transact with, regulation evaders abroad.<sup>166</sup>

## VI. CONCLUSION

This paper now revisits the *Yahoo* case to evaluate whether its outcome would have been different under the proposed alternative to traditional international jurisdiction.

Under the proposed method of Internet regulation, the *Yahoo* case would not have taken place because France would not have had jurisdiction over Yahoo. However, France would be able to enforce its law by targeting individual Internet users in France who have knowledge of the French law and nevertheless buy Nazi memorabilia from the auction site. France would also be able to force Yahoo's French counterpart to put warnings on the French language website or remove the link to the American site altogether. This would be a method of indirectly affecting the American site because removing the link could take away enough revenue to act as an incentive for Yahoo to revise its policies or to develop new technology that would allow it to simultaneously follow French and American laws. France could also cooperate with the U.S. to forbid the shipment of the items to France or to require warnings on the American site.

LICRA, MRAP and UEJF would also be useful tools in the fight against making Nazi memorabilia available to French citizens. Publicity is one method of indirect influence effective against Internet companies. "Yahoo constantly reviews and enhances its products based on consumer response and need."<sup>167</sup> Yahoo ultimately took Nazi artifacts off all of its websites. The outcome would probably be the same even if the *Yahoo* case had not taken place; other Internet leaders, such as Amazon.com and Ebay, have set a trend in banning hate materials from their websites.<sup>168</sup> Yahoo's ban on Nazi artifacts satisfies the French court's request, however, judicial intervention was unnecessary.

The *Yahoo* case is "precedent for a completely unworkable system."<sup>169</sup> Because Yahoo put up a website, it should not be responsible for the laws of all the countries in the world.<sup>170</sup> Yahoo was targeting Americans, and was completely complying with the law of the country in which it operates

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<sup>166</sup> *Id.* at 1223.

<sup>167</sup> Linda Rosencrance, *Yahoo to Ban Nazi Artifacts, Hate Material*, Jan. 3, 2001, <http://www.computerworld.com/cwi/s> (last visited Feb. 4, 2001) (quoting Tim Brady, Senior Vice President of Network Services at Yahoo!).

<sup>168</sup> See *Yahoo! To Fight French ruling*, REUTERS, Nov. 21, 2000, available at <http://www.zdnet.co.uk/news/2000/46/ns-19205.html> (last visited Nov. 21, 2000).

<sup>169</sup> *Id.* (quoting Greg Wrenn, Associate General Counsel for Yahoo!).

<sup>170</sup> *Id.*

and where its target audience is.<sup>171</sup> The French precedent creates a slippery slope in imposing liability on an Internet portal such as Yahoo. First, Yahoo merely created and implemented the auction service. It did not endorse or select the products sold on the website.<sup>172</sup> Second, the decision forced Yahoo to either prescribe the French law to its American website or implement filtering technology, which was both costly and flawed. Third, fear of potential liability could cause Internet portals, such as Yahoo, to censor themselves, thus significantly limiting the potential of the Internet to the whims of the most repressive governments.<sup>173</sup> Finally, the French decision supercedes U.S. law, thus creating an imbalance and potential chaos for future regulation of the Internet.

The *Yahoo* case is an example of how laws written for a physical world do not translate to a borderless net, unless 1) they are a subject of international treaties and enforced as such, or 2) they are enforced indirectly through the use of traditional jurisdiction over instate Internet users as a means of affecting the extraterritorial actors.<sup>174</sup> Traditional jurisdiction is outdated in the modern era of Internet technology. The theory of international spaces is useful only in the sense that it encourages international cooperation first and foremost in the regulation process. Internet self-regulation is unfeasible. However, when combined, these three theories of jurisdiction compose a workable system for Internet regulation and jurisdiction.

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<sup>171</sup> Balmer, *supra* note 32 (quoting Phillippe Guillanton, Managing Director of Yahoo!, France).

<sup>172</sup> *Yahoo! to Fight French Ruling*, *supra* note 168.

<sup>173</sup> See McGuire, *supra* note 36.

<sup>174</sup> *Id.*