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THE CONFLICT BETWEEN FREE ACCESS TO INFORMATION AND THE USE OF FILTERING TECHNIQUES IN LIGHT OF THE YAHOO CASE

The exponential growth and explosion of Information on the Internet has given rise to several questions of socio-economic, political and legal nature, especially as regard to the issue of free access to information and possible limitations to this free use. Since the Internet is a global operating network exceeding therefore national territories, the problem of universal jurisdiction rises. The introduction of filtering techniques has been introduced to deal with this problem. However the use of filtering techniques poses several problems as well and can clearly have a chilling effect on free speech as well.

The exponential growth of information on the Internet

Since the Internet network was introduced to the general public in the mid-nineties, we have seen an exponential growth in information of all sorts which is available to Internet users.[1] This explosion of information has given rise to several questions of socio-economic, political and legal nature.

Indeed, the increasing flow of information and the abolition of national frontiers have given rise to substantial legal problems.[2]

The Internet is undeniably challenging the laws of territorial based states because of its intrinsic borderless character. States are continuously trying to

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[1] See also B. de Vuyst, K. Bodard, *Meta Tag Litigation: An Overview And Some Policy Conclusions*, E-Law, June 2002, Vol. 9, nr. 2, 10p. (available at: http://www.murdoch.edu.au/elaw/issues/v9n2/devuyst92nf.html)

[2] L. C. LEE, S. J. Davidson, *Intellectual Property for the Internet*, New York, Wiley Law Publications, 2000 Supplement, 56.

obtain some form of control on the basis of their national rules of jurisdiction on the significant flow of what is being considered as illegal information according to their national laws. These classical rules of jurisdiction may lead in practice to the establishment of universal jurisdiction as a general principle, which under the classical rules is on the contrary quite an exception. This in consequence leads also to some important practical problems as the national rules in different parts of the world when compared to each other are indeed often contradicting and therefore coming into conflict since various states in the world have repeatedly expressed a different idea of what is allowed under f.ex. the free speech concept.

Undoubtedly the possible conflicts between those different national laws based on the territoriality principle might arise in a great number.[3] The conflict between free access to information and possible limits to this free access when based on the concept of universal jurisdiction raises clearly questions about the legitimate character of these limits.

To meet the problem related to the different perceptions which exist within the different national states which are put on the forefront through the application of the universal jurisdiction principle the use of filtering techniques has been put forward.

The introduction of filtering techniques: solution to the likely extension of the universal jurisdiction principle?

The introduction of filtering techniques has been introduced as a solution to deal with those legal rules whose application is in principle limited within the territory of a state.

Filtering techniques can in first instance be introduced on a voluntarily basis. Several reasons exist why Internet users would want to make use of these kinds of techniques. This can be to avoid spam, to block certain information, to limit overload in information, to protect children from certain content, and so on... These are valid, legitimate reasons.

However with the use of techniques like PICS (Platform for Internet Content Section), ICRA (Internet Content Rating Association), ..., the standard or

[3] See also our observations in K. Bodard, *Global Electronic Commerce: Dealing with legal problems on an international level!*, in Marian Niedzwiedzinski (ed.), Electronic Data Interchange - Electronic Commerce, Materiały IX Krajowej Konferencji EDI-EC, Łódź-Dobieszków 2001, 19-27; and K. Bodard, *The challenge of global Internet regulation for global electronic commerce*, Acta Universitatis Lodziensis, 2002, Folia Oeconomica 157, 59.

rating scheme is not defined by the user, but basically by private organizations, which entails the risk of censorship.[4] When those rating systems are integrated in Internet browsers, the risk exists furthermore that all sites 'have to' be screened by the criteria used by these systems to avoid being blocked as the possibility might be integrated in those browsers that Internet users can automatically block those websites which were not rated by the website designers according to the criteria as employed in those rating schemes. This as consequence could lead to substantial loss of income resulting from advertising banners on websites as less Internet users would visit those websites.[5] Besides as current technology stands, legal information is blocked as well, which means that the free access to 'permissible' information is seriously hindered.

Another problem is that Internet users can be unaware of the fact that information is blocked by their ISPs, either out of a certain policy, either in response to court rulings or to avoid a court judgment. ISP's can indeed be 'forced' to block certain information in compliance with specific court rulings, even when the information they offer is not illegal in accordance with the laws applicable to their place of business. Again the problem of jurisdiction is apparent here. In most cases ISPs will even react automatically on an informal notice and take down procedure. Since a lot of these cases don't get public, the possible chilling effect on free speech and free access to information might be far greater than estimated.

This issue of mandatory or voluntarily blocking of access has been paramount in several cases, amongst which the Compuserve, Mitterand, Yahoo, Google and e-Bay cases got worldwide attention.

The blocking of information in Internet jurisdiction cases: the French Yahoo case as significant example

In the French Yahoo case judge Gomez ordered on 22 May 2000[6] the American mother company to take every measure possible as to disable every possible access to websites that auction or defend nazi-related items for the French market. French Internet users could access the information offered by the

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[4] L. Lessig, *Tiranny in the Infrastructure. The CDA was bad – but PICS may be worse*, <http://www.wired.com/wired/5.07/cyber_rights.html>, July 1997, 1-2.

[5] M. Klaver, *Geen rooie oortjes*, Informatie & Informatiebeleid, 1998, Vol. 16, No. 3, 5-6.

[6] Tribunal de Grande Instance de Paris, ord. Réf. (*UEJF et Licra c./ Yahoo ! Inc. et Yahoo France*), available at: <http://legalis.net/jnet/decisions/responsabilite/ord_tgi-paris_220500.htm>, and at: < http://www.juriscom.net/jurisfr/yahoo.htm >,

Yahoo company through its subsidiary Yahoo France but also through the direct link offered by Yahoo France to Yahoo.com, and via Yahoo.com. Not only was the local subsidiary therefore targeted, but also the mother company which basically directs its service to its American audience.

The report of the experts in this particular case came to the conclusion that only 90% of the information aimed at could be effectively blocked on the basis of geographical location. This criterion poses however also some problems since it is necessary that an Internet user confirms that he is a French national or operating from the French territory. This criterion also leaves the question open whether the French jurisdiction also applies to French citizens who are not residing in the French territory the moment they access the Internet.

Although a 100% filtering seems not to be possible and neither the origin from where an Internet user accedes the network can be determined with absolute certainty, it became already clear from this specific case that the geographical filtering of the Internet would increase which is indeed confirmed by later cases. Where the filtering in itself might not create the greatest problem, the problem may however lie in the fact that Internet companies have to introduce several tens of filters. When this becomes too complicated, Internet companies might just remove altogether the information offered creating a chilling effect on free speech.

Conclusion

As real harmonization of legal rules will undoubtedly take more time than the pace with which the information society has come to development yet and will in the near and distant future[7], the likely chance is that more cases will rise that deal with conflicting legal rules.

What became clear from the French Yahoo case is that the filtering technology is currently not faultless. The risk that too much information will be blocked ultimately is not imaginary. This in result could have a chilling effect on free speech. The removal of information altogether has undoubtedly a chilling effect on free speech.

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[7] P. Sirinelli, *L'adequation entre le village virtuel et la création normative - remise en cause du rôle de l'Etat?* in Katharina Boele-Woelki en Catherine Kessedjian (ed.), Internet. Which Court decides? Which law applies? Quel tribunal décide? Quel droit s'applique? (Proceedings of the international colloquium inhonour of Michel Pelichet), Den Haag, Kluwer Law International, 1998, 20.

It also obliges legal scholars to rethink certain concepts (f.ex. is a revision of the rules of jurisdiction necessary or is a re-interpretation sufficient?) and to come forward with solutions adapted to the new environment (f.ex. to limit a certain degree of the free chilling effect which is the result of the private notice and take down procedures, this procedure should be complemented at least by a notice and take back procedure which is integrated in the official legal system applicable to the liability position of ISPs, and which forms a part of the co-regulatory system predominantly present in dealing with legal problems around technological evolutions like the Internet concept[8]).

Technological evolutions in the near future might solve the current problem of deficiency of the existing techniques, putting less pressure on the need to come to global solutions as well, but are no way out for the present conflicts which have to be solved clearly in another way as suggested above.

The jurisdiction issue will certainly lead to and clearly needs more discussion in order to deal with the current issue of conflicting national rules.

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[8] For critical remarks on the shortcomings of the European Electronic Commerce Directive, and the need for introduction of notice and take down, and notice and take back procedures in the European Directive, read K. Bodard, *The need for harmonization of ISP liability*, publication *proceedings* 2nd European Conference on E-Commerce-Line 2001 (R&D Institute for Automation Bucharest (IPA SA) and Academy of Economic Studies Bucharest (ASE)), Bucharest, Romania, 24-25 september 2001, 112-115; and K. Bodard, *Aansprakelijkheid van ISP's: noodzaak tot regulering! De Europese Unie zet de lidstaten op het spoor, maar is dit voldoend*, Algemeen Juridisch Tijdschrift, 2001, nr. 14, 403-406.

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