

COMMENT

REGULATING SPEECH ACROSS BORDERS:
TECHNOLOGY VS. VALUES*Matthew Fagin**

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The disfavored status within international law of unilateral state-based regulations that target extraterritorial actors arises from the inherent challenges such actions represent to state sovereignty. In the context of the Internet, the complexity of choice-of-law analysis is heightened: regulations imposed by one state have the potential to effectively block communications to citizens of all states and undermine the conflicting regulatory aims of neighboring states. Early legal commentators built upon this cascading chilling effect of state-based regulation to proclaim both the futility and illegitimacy of state-based action in the online environment. Subsequent scholars have demonstrated the commensurability of state-based online regulation and the existing framework of international jurisdiction and choice-of-law analysis. However, having solved the jurisdictional puzzle and established the legitimacy of extraterritorial regulatory responses to local harm that originates abroad, these commentators have either left untouched or downplayed the impact of unilateral regulations in a networked environment. According to their assessments, the “spillover” impact of unilateral cyberspace regulation will not differ significantly from the impact of competing claims to regulate a single activity in real space. In apparent support for this position, recent technological developments that promise to geographically inscribe borders onto the Internet have been proclaimed as the harbinger of full-fledged state-based regulation and the end of the theoretical debate. This Article challenges the now-conventional assertion that in an era of bordering technologies the impact of unilateral regulatory moves in the online world can be effectively cabined.

*The Article utilizes a series of extraterritorial disputes to assess the increasing willingness of courts and states to regulate online activities and content across borders. In particular, it builds on the decision by a French court in the case of *LICRA v. Yahoo!*, which sought to “solve” the problem of offensive hate speech by mandating the use of filtering technologies that would block the transmission of content into the forum state. Following *Yahoo!*, a recent spate of extraterritorial disputes adjudicated by foreign courts over expressive regulation have adapted the *Yahoo!* template of effects-based jurisdiction as a means of maintaining*

national cultural and informational integrity. These cases both usher in and help create a new reality; responding to the commercial availability of geo-location technologies, they call for the implementation of filtering tools for the compliance of national content regulation. First, the Article reads Yahoo! and its progeny as the embodiment of an emergent European regulatory methodology, emphasizing human rights and regionalism. Second, it situates this methodology as a response to the perceived indirect unilateralism represented by the technical and informational hegemony of the United States from the early history of cyberspace through the 1990s. Through unilateral gestures, European states are rightfully staking a claim for the global medium to reflect heterogeneous cultural and technical values.

The Article then adapts a dynamic model of regulatory impact to elicit a reconsideration of the optimism accorded the future status of unilateral regulations. Such a model highlights the recursive nature of regulatory impact in a digitally networked globe—states can enter at either the level of law or technology to impact the system and establish rules for all online actors. The online regulatory framework represents a uniquely playable system, whereby states are just as likely to find their own regulatory goals stifled by the process of unilateral regulation as they are likely to see them fulfilled. Hence, it is in the interest not only of the international system, but also of individual states themselves, to adapt regulatory strategies of cooperation, such as international harmonization and national self-enforcement. Ultimately, an interconnected network is not an American interest, but a global interest; a geo-politically divided Internet would facilitate national governance, but at the cost of the World Wide Web.

INTRODUCTION

The case of *LICRA v. Yahoo!* captured the attention of the international community by putting a new spin on the jurisdictional uncertainties arising from the extraterritorial regulation of speech; raising the question of which nation, if any, has the power to regulate speech on the Internet?¹ The American company, Yahoo!, owner of the world's

1. *UEJF et LICRA v. Yahoo! Inc. et Yahoo France*, T. G. I. Paris, May 22, 2000, N° RG: 00/05308, obs. C. Bensoam & J. Gomez, translation available at, <http://www.lapres.net/html/yahen.html> (last visited Apr. 3, 2003).

most popular search engine and web directory, was sued by anti-hate activists in France for violating a national law that prohibits the exhibition of Nazi memorabilia. While such displays are illegal in France, they are constitutionally protected in the United States under the First Amendment. The French court reasoned that because the offensive materials were accessible on-line in France, the court could assert jurisdiction over Yahoo! in the U.S. for non-compliance with its domestic hate speech statutes. Having found Yahoo! liable, the French court ordered Yahoo! to filter for French users the display of Nazi memorabilia and images on Yahoo! auction sites hosted in the United States. Confronting the problem of offensive speech transmitted through a seamless communications medium, the *Yahoo!* case is part of a growing trend toward the imposition of geographical lines and locations—virtual borders—onto cyberspace.

Contrary to the wishes of American civil libertarians, free speech advocates and a characteristically libertarian technological community, the *Yahoo!* decision both ushers in and helps create a new reality; responding to the commercial availability of geo-location technologies, the decision calls for the implementation of filtering tools to ensure compliance with national content regulation. In this respect, it marked the transition in public consciousness of the Internet from a technology that reflected an American bias toward the open flow of information and free market forces, to one that must increasingly take into account divergent governmental approaches to Internet regulation. This “international democratization”² of the Internet brings with it new challenges for international law and policy.

In the context of a borderless medium, national regulation presents a unique problem for choice of law: regulations imposed by one state would effectively block communications to all. Within such a framework, regulations initiated in one state that conflict with the regulatory goal of another nation could be said to have unilateral impact.³ In theory, zoning the Internet could minimize the harm of communications in foreign states without necessitating that publishers alter their content

2. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

3. The disfavored status within international law of unilateral state-based regulations that target extraterritorial actors arises from the inherent challenges such actions represent to state sovereignty. As distinguished from a narrow understanding of unilateralism as “action against an established multilateral order,” the broader definition applicable in the context of the Internet is a “concern we might have when one nation acts to encode its values in a manner that transmits them as behavioral constraints on another nation that either does not share these views, or at the least does not share the determination that they should act as firm behavioral constraints.” Yochai Benkler, *Internet Regulation: A Case Study in the Problem of Unilateralism*, 11 EJIL 171, 172 (2000).

locally. Unilateral regulations that either directly or indirectly call for the creation of “virtual borders” would, thus, appear to resolve debates over such conflict of laws by mapping territorial boundaries onto the on-line world, constraining the regulatory “spillover” impact of non-universal national edicts. In turn, this could afford greater regulatory certainty for on-line publishers, provide courts with the knowledge that theirs is the appropriate forum, and ensure legislatures that their actions will reflect and impact only their own electorate. The *Yahoo!* decision suggests that courts and regulators have embraced this logic and are emboldened by the power of technological tools to enhance local values.⁴ Decisions following *Yahoo!* by other national courts demonstrate that the prior reluctance of states to extraterritorially regulate on-line actors and activities has been overtaken by a new readiness to extend jurisdictional reach.⁵

In this article, I analyze, in light of recent technological developments that make it possible for Internet publishers to control the geographic flow of content, the application of unilateral national regulations from the perspective of allocating international regulatory power. I build on scholarship that acknowledges the susceptibility of the on-line world to conventional legal rules, and then ask what architectural network decisions are best for the international system. Given the disfavored place of unilateralism within international law, the questions to address are: Will virtual borders eliminate concerns about unilateral national regulations on the Internet? Will they, in fact, obviate unilateral regulations by eliminating border-shattering offenses? Or, can we understand unilateral regulations that either directly or indirectly necessitate the use of bordering technology as themselves lying within the ambit of concern for international law? How, ultimately, can states take advantage of the commercial and expressive capacities of a global network, while at the same time protecting local values?

We lie at a transition point in the technological evolution of the Internet. Technologists will no longer be able to ignore national values in developing the technical architecture of cyberspace. At the same time, the value of the Internet as a global communications medium derives from its ability to lower the barriers of creation and exchange, and to facilitate the distribution of expression throughout the world. A fully or

4. Needless to say, the promotion of geographical filtering tools need not be direct, but can be achieved indirectly through the creation or application of regulations that necessitate their use by imposing a significant cost on cross-border harms.

5. See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERK. TECH. L.J. 1345 (2001); Associated Press, *Internet Extends Legal Reach of National Governments*, July 21, 2002 (describing the jurisdictional uncertainty faced by U.S. companies and content providers, following recent decisions by foreign courts).

substantially bordered Internet would nullify those attributes that render the Internet an open, decentralized, and arguably democratic network. Given that the network remains in its relative infancy, in my view, nations have a collective interest in not establishing unwarranted roadblocks that would serve to undermine the evolution of the medium.⁶ The question, then, is how to create a networked environment that utilizes technological methods to respect the rights of sovereign nations, while upholding the unique nature of the Internet as a forum for informational and cultural exchange.

While initial debates regarding this issue focused primarily on the efficacy and legitimacy of state-based regulation, it is only once we acknowledge that national regulation is both possible and legitimate that we can begin to consider its impact.⁷ Thus, while ardent free speech advocates may argue against regulation per se, I suggest that only by acknowledging the validity of recourse to unilateral regulations as the expression of political will can we begin an informed dialogue over the future shape of Internet law and policy.⁸ In particular, it is only when we inspect the motivation that lies behind extraterritorial gestures that we can respond to their application and define the proper jurisdictional scope of national laws—the predominant questions with which the international regulatory system of the on-line world must now be concerned.

In Part II, I outline the descriptive and normative claims made against state-based Internet regulation and, in particular, unilateral regulation aimed at Internet content originating abroad but causing local harm. In short, first-generation Internet critics argued that the Internet's lack of territoriality effectively immunized it from state-based regulation of this kind. Second, they argued that due to the inability of content providers to control the flow of information, the inevitable regulatory spillover impact on other states made state-based actions illegitimate. In presenting the counterarguments to that position, I discuss the various technological developments that are in the process of introducing geographic lines and borders onto the borderless Internet. I then examine the

6. See Catherine P. Heaven, Note, *A Proposal for Removing Road Blocks from the Information Superhighway by Using an Integrated International Approach to Internet Jurisdiction*, 10 MINN. J. GLOBAL TRADE 373 (2001).

7. In this spirit, Sanjay Mody urges critics who bemoan the illegitimacy of national based cyberspace regulations to “spend less time disputing the legitimacy of regulation and more time thinking about its effects.” Sanjay S. Mody, Note, *National Cyberspace Regulation: Unbundling the Concept of Jurisdiction*, 37 STAN. J. INT’L L. 365, 366 (2001).

8. See Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law* 11 EJIL 19, 20 (2000) (“By contrast with treaty actions, unilateral acts express the will of only one subject of law (*individual unilateral acts*) or a single group of subjects together in a collective body, generally itself endowed with legal personality (*collective unilateral acts*). . . . Their proper legal nature cannot be doubted.”).

work of scholars who defend national or unilateral regulation on the Internet. The proponents of state-based regulation build on the proposition that customary international law affirms the ability of states to enforce laws extraterritorially in response to local harms. More importantly, from this point of view, the spillover impact of unilateral regulations in cyberspace is no different from that of real-world regulatory conflicts and will threaten neither the development nor evolution of the medium.

In Part III, I apply this backdrop to the jurisdictional conflict of the *Yahoo!* case. I use *Yahoo!* as a case study for the conflict between technology and values, and, in particular, the difficulties of regulating speech carried across an interdependent global medium. My analysis of *Yahoo!* and similar disputes over national speech regulation demonstrates an increasing European dissatisfaction with the overly permissive free market approach of the United States to on-line content regulation—a dissatisfaction expressed through unilateral regulatory moves. *Yahoo!* demonstrates that state-based actions of this kind will in turn force the U.S.—and more specifically, U.S. companies with global reach—to take into account divergent national values.⁹

Having established the French court's decision as a lawful response to perceived local harm, I examine the consequences of this specific unilateral action. If the framework of international jurisdiction seeks to "systematically resolve conflicts [of political power] by allocating to particular states the competence to make or apply law to particular persons, things or events that are, simultaneously or sequentially, claimed by or subject to the control of two or more states,"¹⁰ does the *Yahoo!* decision meet that challenge and adequately take into account the interests of the international system? I find that, first, *Yahoo!*'s effects-based jurisdictional analysis sets a destabilizing precedent for the international system and, second, that the *Yahoo!* court's attempt to take the international system into account through the technological "fix" of geographic filtering should itself be understood as a unilateral regulatory move.

In support of these conclusions and so as to better assess the impact of unilateral speech regulations, in Part IV, I examine several decisions

9. I have chosen to focus primarily on the template of national speech regulation because it provides a particularly evocative model for analyzing the localized regulation of a global medium. In particular, due to the centrality of expressive regulation in defining the identity of regional communities, there exists great variance across cultures with regard to the proper contours of "free" speech. While it raises many of the same dynamics as other contemporary debates about Internet regulation, e.g., privacy, conflicts over expressive regulation present a more intractable problem, given the understandable resistance of states to forfeit their regulatory goals.

10. W. Michael Reisman, *Introduction to JURISDICTION IN INTERNATIONAL LAW*, at xi (W. Michael Reisman ed., 1999).

by national courts following *Yahoo!* that have adopted a similar approach to on-line speech regulation. Each court has used the across-border reach of an effects-based test to arrive at a finding of jurisdiction based on the visible impact of on-line content. In Part V, I read these decisions as re-assertions of local values in response to a global communications medium. In particular, I suggest that they are manifestations of a European regulatory methodology for the on-line world, focused on regionalism and an expansive consideration of human rights.

Understanding the motivation behind the trend toward effects-based jurisdiction, however, does not itself address the efficacy or efficiency of unilateral regulation. Thus, in Part VI, I utilize Yochai Benkler's model of dynamic regulatory impact to show that, in an era of virtual borders, unilateral regulations will continue to impact other nations extraterritorially and should remain a concern of the international community. Benkler's layered approach to communications networks stresses the interdependent and playable nature of a digitally networked globe. By acknowledging the mutually implicated nature of regulatory efforts at the intersection of law and technology, he highlights the need to favor a principle of cooperation, as contrasted to the broad application of nation-based rulemaking.

In conclusion, I suggest what such a principle of cooperation might entail by outlining tentative regulatory recommendations for states that seek to protect themselves from on-line harm. I offer an approach that seeks to be responsive to the concerns of local values, as well as to the distribution of the relative competency of states to make and apply their own law. First, I suggest that the preferred means of resolving on-line regulatory conflict should be a transition toward greater global harmonization and supranational decision-making. Undoubtedly, such cooperative decision-making is likely to implicate traditional difficulties of collective action. In matters such as transnational commercial exchange, however, the shared interest of nations suggests the possibility of their working together toward substantive agreements. In other areas, nations are likely to move toward a jurisdictional quid-pro-quo, wherein states will reciprocally assist each other in order to facilitate their own regulatory goals.

With regard to contested regulatory matters, such as politically sensitive subject-matter disputes, the abiding significance of national and regional norms coupled with the discretionary nature of international comity, suggests that nations are unlikely to reach the consensus necessary for collaborative action. In such instances, given the ineffectiveness and destabilizing impact of extraterritorial enforcement on the international system, states should soften unilateral actions. This will not, however, leave states without recourse. Ultimately, considerations of cooperation

within the international system favor a methodology of national self-regulation and the use of emergent technical solutions. Rather than attempt direct unilateral actions states should utilize media-specific techniques, such as filtering at the level of local Internet Service Providers (ISPs) and traditional enforcement mechanisms to resolve national concerns within their own borders. In an era of jurisdictional uncertainty initiated by new technologies, a technical solution arises which is less restrictive and intrusive than uncertain and inefficient judicially crafted case-specific remedies.

I. A SHORT HISTORY OF THE INTERNET REGULATION DEBATE

Arguments over the application of territorial-based expressive regulation to cyberspace have mirrored debates in other areas of cyberlaw, wherein the illusion of absolute free reign has been gradually displaced by the recognition that cyberspace can be shaped to condition and control citizens' behavior.¹¹ The theoretical backdrop of the Internet regulation debate has shifted towards the recognition that changes in the architecture of the Net make state-based regulation a reality. As the Internet has shown itself to be amenable to geographic regulation and hence nation-specific law, states are becoming increasingly confident in applying their existing and cyberspace-specific laws to the global medium.¹² At the same time, many commentators in the U.S. and in the technological community manifest an ongoing commitment to an earlier vision of the Internet and, as such, continue to express apprehension regarding the application of nation-specific laws to cyberspace.

A. *The "Regulation Critics" and the Borderless Net*

At first glance, the seemingly borderless, transnational scope of the Internet was thought to have made geography and traditional territorial-based regulation obsolete. First-generation Internet critics—those who might be termed "regulation critics" or "Internet separatists"¹³—embraced a libertarian ethos disfavoring governmental regulation. In its most radical strain, these proponents conceived of the technological landscape of the Internet as a distinct sovereign space. We can

11. In a parallel current, critics of recent developments in the law of intellectual property have cautioned against the capacity for digital technologies to expand the scope of intellectual property rights in favor of a content owner's ability to control all uses of their works. *See, e.g.*, LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

12. *See The Internet's New Borders*, *THE ECONOMIST*, Aug. 9, 2001.

13. I adopt the term "Internet Separatists" from Joel Reidenberg, *see Reidenberg The Yahoo! Case*, *supra* note 2, and the term "Regulation Critics" from Jack Goldsmith, *see Jack Goldsmith, Against Cyberanarchy*, 65 *U. CHI. L. REV.* 1199 (1998).

distinguish between the descriptive and normative claims underlying this vision: first, the overbold assertion that state-based regulations of cyberspace are futile and, second, the more legalistic claim that unilateral state-based actions applied to a global medium represent illegitimate uses of a sovereign state's power.¹⁴

1. A Medium Both Everywhere and Nowhere

Unlike prior media, the Internet was designed to be decentralized, interactive, and global in scope. These qualities led initial commentators to focus on the Internet's ability to cross borders, break down real-world barriers, and destroy distance. If cyberspace is a virtual universe of pure data unmoored to the real world, conventional regulation, it is argued, is a technical impossibility. This argument is rooted on several primary assumptions about the nature of this new communications media—in particular, the underlying geographic indeterminacy of the network architecture. As initially designed, Internet Protocol (IP) addresses did not necessarily correlate with physical location; for reasons of efficiency and security, the network was designed so as not to permit the flow of geographical information. As a result, generally speaking to this day, information that appears on the World Wide Web may be viewed anywhere in the world.

Given these technical conditions, the “regulation critics” assert that nations are powerless to control the flow of information across their borders. The descriptive argument takes literally the metaphor of the Internet as a “borderless medium,” and builds upon the characteristic nature of on-line activities as existing “everywhere, nowhere in particular, and only on the Net.”¹⁵ Inevitably, electronic communications, it is said, “play havoc with geographic boundaries.”¹⁶

These opponents of regulation argue that because the Internet is by definition impervious to the real-space laws that govern traditional geographic boundaries, attempts by nations to control on-line behavior would be futile. Because “individual electrons can easily, and without realistic prospect of detection, ‘enter’ any sovereign territory,” the argument goes, controlling the flow of electronic information across borders is impossible.¹⁷ While nations might attempt to control users, “the determined seeker of prohibited communication can simply reconfigure his

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

15. *Id.* at 1375.

16. *Id.* at 1367. See also James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 *UNIV. OF CIN. L. REV.* 177, 178 (1997).

17. Johnson & Post, *supra* note 14, at 1372.

connection,” to receive the prohibited content from a server located in a more permissive region.¹⁸

While this description of the Internet stems from a time when the network was simpler than it is now, simplicity had its virtues. Many commentators have equated the open and free flow of on-line information with the rapid growth and development of the network.¹⁹ The underlying simplicity and neutrality of the Internet’s infrastructure were critical design features that embodied the network’s defining attributes. As a technical approach, these characteristics are articulated as the “end-to-end” principle; a decentralized design model, which dictates that the network’s intelligence, i.e. decision-making and processing power, are restricted to its endpoints.²⁰ Through the use of common and open protocols, the type, be it email or WebPages, and the content of information, be it a personal message or copyrighted materials, is exchanged in an unmediated manner between users without agreement or permission by a central party.

Legal and technical commentators have convincingly argued that the Internet’s success as an egalitarian communications medium and its capacity for innovation stem from its construction as a medium with relatively few rules and lack of authority.²¹ By treating all parties and communications alike, unlike the centralized structure of mass media, the Internet provides content providers with the capacity to develop and new ways to organize and structure communications. The use of open protocols enables creators to experiment in the development and implementation of applications for the network unimpeded. By not discriminating among forms of content, the network’s openness permits

18. *Id.* at 1374. Typically, an Internet user can use an overseas proxy server to circumvent on-line blacklists and filtering mechanisms.

19. See, e.g., David Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70, 73–74 (2000) (“Could [the Internet] have been built any other way? My instinct is that it could not have, that only an ‘authority-free’ process . . . could have constructed this system, that *no one with the authority to build the Internet could have done so.*”).

20. See J. H. Saltzer, D. P. Reed, and D. D. Clark, *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS IN COMPUTER SYSTEMS 277–88 (Nov. 1984).

21. Communications theorists Lawrence Lessig and Yochai Benkler are among those who have refashioned the design principles of the original network as political principles rooted on equality of expressive and commercial opportunity. Their respective projects, however, pivot on distinct public values; where the enhancement of autonomy lies at the heart of Benkler’s analysis of the networked environment, Lessig’s work embodies a parallel preoccupation with fostering technical innovation. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 563 (2000) (arguing that we should “fashion[] regulatory policies that make access to and use of [informational] resources equally and ubiquitously available to all users of the network,” rather than concentrating control over such resources).

speakers both large and small to communicate with relative parity. Critically, these characteristics benefit from the interconnected nature of the network—its capacity to bring large populations of like-minded persons together within an interactive forum. As the economic theory of network effects instructs us, the Internet, like the telephone system before it, increases in economic and social value as more people connect to it.²² As the positive benefits of the Internet accrue with heightened connectivity, in assessing the impact of regulatory efforts that seek to alter the Internet's underlying architecture, "interconnectivity is an important goal that should not be sacrificed lightly."²³

That said, political and technological developments make clear that deviation from the above-described open and neutral model is inevitable. There are both valid political and commercial reasons for incorporating complexity into the network.²⁴ For one, despite its benefits, the openness of the network makes users vulnerable to unwanted electronic communications and susceptible to security holes that exploit the interconnected nature of individual users. While security can be achieved through technological tools implemented at the user-end, it would no doubt be more cost-efficient and hassle-free to introduce filtering services that monitor content transmitted to users or to zone the Internet into smaller entrusted and encrypted areas. Bearing in mind the benefits of innovation and the speech-empowering qualities of new communications media, however, we must engage cautiously as we incorporate additions onto the network.²⁵ A balanced approach would retain some measure of the original network's simplicity and lack of structure, and aspire toward alternatives that do not needlessly fragment on-line users and their communities.

22. See generally A. Douglas Melamed, *Does Regulation Promote Efficiency in Network Industries: Network Industries and Anti-trust*, 23 HARV. J.L. & PUB. POL'Y 147 (1999) (offering a general discussion of network effects and the role of law in the context of networked industries).

23. Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1007 (2001).

24. For a discussion of the variety of developments challenging the end-to-end open nature of the network, see Marjory Blumenthal & David Clark, *Rethinking the Design of the Internet: The End-to-End Arguments vs. the Brave New World* 1 ACM TRANSACTIONS ON INTERNET TECHNOLOGY 70–109 (Aug. 2001). For an argument advancing the preservation of the Internet's original values in light of this transition, see Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

25. See, e.g., Jonathan Zittrain, *Can the Internet Survive Filtering?*, CNET NEWS.COM, July 23, 2002 at <http://news.com.com/2010-1071-945690.html> (last visited Apr. 3, 2003) (discussing the need for heightened scrutiny and public dialogue as states and commercial entities begin to rely upon intermediaries in filtering online transmissions).

2. The Claim of Cyber-Sovereignty

Beyond proclaiming national regulations an exercise in futility, the “regulation critics” build on the geographic indeterminacy of the network to embrace normative claims regarding the illegitimacy of unilateral state-based action. In the extreme, the argument has been articulated as a claim that cyberspace constitutes a self-ruling jurisdiction, an autonomous realm within which Internet users should govern themselves. More commonly, it has been argued that the Internet’s structural indifference to geographic position is incongruous with the fundamental assumptions of personal jurisdiction and sovereignty at play in territorial-based law.²⁶ The claim of cyber-sovereignty is famously captured in the assertion directed at national governments by net-activist John Perry Barlow, in his *A Declaration of the Independence of Cyberspace*: “You have no moral right to rule [cyberspace] nor do you possess any methods of enforcement we have true reason to fear . . . Cyberspace does not lie within your borders.”²⁷ Such arguments have rightly been criticized as discounting the dependence of the Internet on persons identified by and subject to conventional law, as well as the existence of computational systems situated in the physical world.²⁸ It must also be remembered that the U.S. government funded the development of the initial Internet infrastructure, ARPANET, and that the Internet arose as a governmental solution to concerns about the security of the nation’s information infrastructure.²⁹

Another shade of argument takes a more realistic approach to opposing on-line regulation and focuses on the potential chilling effects of regulating on-line speech and conduct. Advocates of this position acknowledge that nations can regulate on-line activities within their own states and those that have local effects, but stress that the traditional basis for on-line regulation—the impact of actions upon a state—will result in a jurisdictional morass, an overabundance of jurisdictional claims, and an undesirable increase in the cost of online publication.³⁰ Because many on-line transmissions have can be said to have an effect on many nations, conventional jurisdictional analysis would permit every nation to regulate the same on-line activities. Due to variance among national laws, if

26. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996).

27. John Perry Barlow, *A Cyberspace Independence Declaration*, at www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration (last visited Apr. 3, 2003).

28. See, e.g., Amy Lynn Bomse, Note, *The Dependence of Cyberspace*, 50 DUKE L.J. 1717 (2001).

29. *Id.* at 1721–22.

30. See, e.g., Brief of Amici Curiae Chamber of Commerce of the United States, et al., *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal 2001) (No. C 00-21275 JF).

states regulated the Internet, online actors would inevitably be subject to inconsistent regulations. As a result, most unilateral national regulations of the Internet—especially the most restrictive—will have spillover impact, intruding upon the regulatory efforts of other nations and impacting the on-line activities of actors in other states.

Emblematic of these concerns is a 1999 German case involving the U.S. Internet Service Provider (ISP) CompuServe. CompuServe was threatened with indictment for carrying sex-related material in its on-line discussion groups in violation of German anti-pornography laws. Concerned about the prospect of prosecution, CompuServe blocked access to the groups. Given the network's structure, however, the action prevented access for all CompuServe users, the majority of whom were in the United States.³¹ The company's decision met with a cold reception within the free speech advocacy and technical community. As free-market adherents *The Economist* formulated the problem: "When Bavaria wrinkles its nose, must the whole world catch a cold?"³²

To those who oppose state-based regulation, because unilateral national action will unduly impact other nations, states should defer to status quo, with the inevitable consequence of having their regulatory goals frustrated. While couched in terms of "illegitimate" jurisdiction, the rhetoric of "chilling effects" is a thin veil for the fear that the regulatory activities of restrictive nations will endanger the free flow of on-line transmissions and consequently balkanize the net. The regulation critics' hostility is derived less from the alleged illegitimacy of state actions than "from the view that national regulation will lead to restrictions on cherished rights. . . . For the critics, the legal objection to national regulation, supports what is, at base, a certain normative view concerning limitations on a given rights-based activity."³³ Notably, the regulation critics' view signals a normative approach that aligns with the American predisposition for a permissive speech regime.

In place of chilling unilateral regulations, the opponents of regulation place their faith in private or self-enforced regulation of cyberspace as a preferable autonomy-enhancing alternative to state-based law. One scholar proposes the formation of non-governmental "cyberlaw" or "the common law of the internet" modeled upon the *lex mercatoria* of inter-

31. A German court subsequently found CompuServe liable and sentenced the head of the company's German division to a two-year suspended sentence. The conviction was later reversed. See *In the Name of the People Judgment of the Local Court Munich in the Criminal Case v. Somm, Felix Bruno*, translated at <http://www.cyber-rights.org/isps/somm-dec.htm> (last visited Apr. 3, 2003).

32. *Sex on the Internet*, THE ECONOMIST, Jan. 6, 1996, at 18.

33. Mody, *supra* note 7, at 371.

national business practice.³⁴ This *lex informatica* would originate in the private ordering of on-line participants and over time “new rules would emerge to govern cyberspace.”³⁵ Others make a similar claim that the net favors decentralized norm-based rulemaking—models in which “[t]he power to create and shape . . . rules is not concentrated in the hands of any individual group, or institution [and] is spread among various social agents.”³⁶ Justifying this postmodern brand of sovereignty, Johnson and Post, for example, point to the “erosion of national sovereignty in the modern world and the failure of existing system of nation-states to cultivate a moral connection between the individual and community (or communities) in which she is embedded.”³⁷ Downplaying the abiding significance of regional norms, the regulation critics proffer the decentralized emergent decision-making of the Internet as “a more promising basis for democratic politics.”³⁸

3. Free Speech and Free Markets

As described above, the initial topology of the Internet corresponded with a libertarian bias against governmental intervention. This ideology was in turn reflected by a network “architecture [that] has embedded rules for information flows that advance self-regulation and free market choice over public decision-making.”³⁹ This technological state-of-affairs was furthered by the United State’s unique position vis-à-vis Internet governance: the creation of the network by its scientists and academics ceded it control of the Internet’s technical standards and decision-making bodies. The distinctly American approach to regulation that drove the development of the medium expressed the confluence of two factors: first, a governmental bias toward deregulation in favor of the free market, and second, the compatibility of the permissive free flow of information and lack of content regulation with the perceived categorical mandate of the First Amendment.

While, as we have seen, technologists built the network to maximize the free and open flow of information, as the Internet became commercialized this “libertarianism shifted from its counter-cultural roots [in the technical community] to a free market philosophy.”⁴⁰ The deregulatory

34. See Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy through Technology*, 76 TEX. L. REV. 553 (1998).

35. Johnson & Post, *supra* note 14, at 1367.

36. See, e.g., Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, CHICAGO-KENT L. REV. 1155, 1161 (1998).

37. Johnson & Post, *supra* note 14, at 1397.

38. Johnson & Post, *supra* note 14, at 1398.

39. Reidenberg, *supra* note 2, at 273.

40. Bomse, *supra* note 28, at 1726.

approach was advanced by the Clinton Administration and the Federal Communications Commission's conviction that private industry should lead in the advancement of the computing industries and e-commerce.⁴¹ This free market approach to the Internet—contrasted with the regulation of other communications platforms, such as telephony and broadcast media—was credited with rapid commercial expansion of the network and the development and deployment of commercial applications.

The unimpeded flow of information was further reinforced by its compatibility with United State's speech-protective tradition. Most notably, when Congress sought to regulate the distribution of obscene materials on-line through the Communications Decency Act, the Supreme Court in 1996 overturned the statute, relying upon the technical properties of the medium.⁴² In effect, the Court's opinion interpreted cyberspace as the endpoint of American First Amendment jurisprudence.⁴³

In keeping with the above, in their treatment of jurisdiction, U.S. courts, deferred to the existing technological state of affairs. Accepting the network's absence of geographic boundaries, courts declined to impose national regulations on cyberspace transmissions emanating from beyond state or national borders.⁴⁴ In the words of one sympathetic court, which embraced the cascading logic of chilling effects:

[A defendant] cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise would be tantamount to a declaration that this Court, and every other court

41. The Clinton administration endorsed deregulation of the Internet in its Framework for Global Electronic Commerce. President William J. Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, available at <http://dcc.syr.edu/ford/course/e-commerce-framework.pdf> (July 1, 1997) (last visited Apr. 3, 2003) ("For [the Internet's] potential to be realized fully governments must adopt a non-regulatory, market oriented approach to electronic commerce.").

42. See, *ACLU v. Reno*, 521 U.S. 844 (1997). In contrast to the majority opinion, however, Justice O'Connor, concurring in part and dissenting in part, looked toward a future in which zoning was a technical reality, noting that the "transformation of cyberspace is not complete." *Id.* at 891.

43. In cyberspace, the Court noted:

through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Id. at 896–97 (citing *ACLU v. Reno*, 929 F. Supp. 824, 842 (1996)).

44. See, *e.g.*, *Digital Equipment v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) ("The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is everywhere where there is Internet access.") (emphasis omitted).

throughout the world, may assert jurisdiction over all information providers on the global World Wide Web.⁴⁵

Within the domestic context, this deference toward technology was reflected in decisions overturning state regulations of the Internet under the dormant commerce clause, most notably *American Library Association v. Pataki*.⁴⁶ In *Pataki*, the court overturned a New York state law that sought to regulate obscene content, noting, “the Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access.”⁴⁷

While American free speech advocates evince a deep attachment to this deferential approach to geographic indifference, from the perspective of the international community, a self-ordering approach to on-line regulation is both legally and politically unsatisfactory. It does not itself adequately protect regional interests and downplays the harms that arise from declining to regulate. Simply put, the protection of local values cannot be achieved without state-based regulatory intervention of some kind. As described below, the claims of the regulation critics against unilateral state-based action are no longer descriptively accurate and, given technological developments, the theoretical underpinnings of their normative arguments have been substantially weakened. The critics of the free market approach anticipate the introduction of state-based extraterritorial regulation, by emphasizing the compatibility of the existing framework of jurisdiction within international law and conflict-of-laws analysis to the on-line world.

B. *The Internet's New Borders*

While in the view of its most radical proponents the Internet changed everything, even they must acknowledge that one thing it did not change was local law. In contrast to the overstated rhetoric of the regulation critics, a more pragmatic approach has cautioned that the borderless nature of the Internet is not technologically predetermined. The next stage of Internet scholarship begins with the idea that the network's architecture is instead deeply contingent, and that the application of local regulations to behavior in cyberspace is both

45. *Playboy Enterprise v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996).

46. *Am. Library Ass'n v. Pataki*, 969 F. Supp 160 (S.D.N.Y. 1997).

47. *Id.* at 170.

unavoidable and legitimate.⁴⁸ The assertion that governments cannot regulate the on-line world has been shown to depend upon a particular set of decisions regarding the architecture of the network.⁴⁹ Complexity built into the network sets the stage for national regulation and permits established legal and social principles based upon territoriality—such as transnational legal doctrine—to find their way on-line. Contrary to the wishes of those “observers that . . . renounce the state as the legitimate actor of transnational cyberspace activity,”⁵⁰ these developments affirm the status of the nation-state in the networked world.

1. Geography’s Revenge

The intervention of states in attempting to control the information flow of the Internet is of course not a new thing.⁵¹ China, for example, has for many years sought to secure its “informational sovereignty” from Western websites by controlling access to the Internet through centrally regulated government servers or “firewalls.”⁵² An assortment of new technologies, however, has brought geography to the Internet as a widespread commercial and political reality. In particular, the development of geographic-location technologies provides information about the physical location of Web resources and the people that access them.⁵³ Generally speaking, these technologies pinpoint a user’s location by correlating their network address with their location in physical space. While these tools may initially have been spurred by the demands of the

48. See, e.g., LESSIG, *supra* note 11; ANDREW SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING THE WORLD WE KNOW* (1999); Neal Weinstock Netanel, *Cyberspace 2.0*, 79 *TEX. L. REV.* 447 (2000); Reidenberg, *supra* note 34.

49. LESSIG, *supra* note 11, at 25 (“There is no single way that the Net has to be; no single architecture defines the nature of the Net.”).

50. Moday, *supra* note 7, at 370.

51. See Leonard R. Sussman, *Censor DotGov: The Internet and Press Freedom 2000*, at <http://www.freedomhouse.org/pfs2000/> (last visited Apr. 3, 2003) (surveying restrictions on print and electronic journalists worldwide).

52. See, e.g., Peter H. Lewis, *Limiting a Medium Without Boundaries*, *N.Y. TIMES*, Jan. 15, 1996, at D1.

53. The Internet Engineering Task Force—the most prominent technical standards body with a hand in defining communications standards for the Internet—is encouraging the implementation of the next-stage Internet transmission protocol, Ipv6, which would uniquely identify devices attached to the network. See S. Deering & R. Hinden, *Internet Protocol, Version 6 (Ipv6) Specifications*, RFC2460 (Dec. 1998) at <http://www.ietf.org/rfc/rfc2460.txt> (last visited Apr. 3, 2003). The protocol was developed as a means of expanding the over-extended IP address system, but promises enhanced security and the capacity for informational targeting, by making users more easily identifiable by assigning serial numbers to each computer’s network-connection hardware. Privacy groups have expectedly raised concerns regarding implementation of an all-encompassing digital map, whereas on-line commercial entities support the initiative. See Patricia Jacobus, *Building Fences, One by One*, *CNET NEWS*, Apr. 19, 2001, at <http://news.com.com/2009-1023-255774-2.html> (last visited Apr. 3, 2003).

market, legislators and courts have predictably been attracted to such technologies as a means of imposing real-space limitations on the on-line environment.⁵⁴ The need to comply with national laws has in turn driven market demand for such services.⁵⁵

From a commercial perspective, the primary interest is the development of new tools for on-line advertising and other demographically oriented services. Marketing, like nation-based legal regulation, relies upon reaching targeted subsets of a given population.⁵⁶ Where before on-line advertising lacked the specificity necessary to target a local audience, commercial advancement of geographic tools will enable advertising to be aimed at persons within a given region.⁵⁷ More generously, geo-location technologies are intended to serve as a means of enhancing usability and efficiency for users.⁵⁸ Such tools could allow for content providers to offer content in local languages and provide geographically-specific subject matter, such as weather or sports reports. On the flipside, they will also permit publishers to increase profits by price discriminating among their customers for such customized services.

As suggested by the *Yahoo!* case, once in place, jurisdiction-targeting technologies will in turn be perceived by by governments and regulators as technologies of jurisdiction-avoidance, supporting the creation and implementation of state-based law in cyberspace. While states may be unlikely to directly mandate the use of such technologies, widespread adoption will leave policymakers and courts increasingly comfortable placing geographic limitations on on-line activity, especially

54. Lawrence Lessig has argued that it is the growth of commerce that is the principal engine of changes of network architecture. Lessig refers to the pre-commercialized Internet as "Net95," and has argued that the need for security and confidentiality brought with them the need for regulations and the technological capacity to make such features possible. See LESSIG, *supra* note 11.

55. See *The Internet's New Borders*, *supra* note 12.

56. Several companies have arisen to meet the demand for "geo-location" technologies as the next stage of e-commerce—both for enhanced commercial applications as well as to provide a shield from legal liability. Industry leader Quova's service, called GeoPoint, works by "continually updating a database that links Internet Protocol (IP) addresses to countries, cities and even postcodes." See *Putting It in Its Place: Geography and the Net*, THE ECONOMIST, Aug. 11, 2001. Quova's GeoPoint service determines the location of Internet users by mapping the Internet infrastructure of over 4 billion IP addresses. When a user visits a website that is equipped with GeoPoint software, his/her IP address is relayed to Quova's servers, which correlate the address with a geographical location. *Id.* This information can be used by content providers to modify content based on users physical location. Quova claims to be able to identify web users' country of origin with 98% accuracy, and their city of origin (at least for users in the United States) 85% of the time. *Id.*

57. *Id.* ("Once the user's location is known, existing demographic databases, which have been honed over the years to reveal what kinds of people live where, can be brought into play.")

58. See generally Blumenthal & Clark, *supra* note 24.

as they grow confident that the technologies will allow for practical and effective compliance with local law.⁵⁹ We can anticipate, for example, a swift reconsideration in the U.S. of the applicability of local taxes for on-line commercial transactions.⁶⁰

For commercial and governmental purposes, perfection of geo-location tools is not a necessity.⁶¹ While regulation skeptics criticize their technical accuracy and focus on the ability of users to circumvent geographically imposed restrictions, such tools need only be reasonably effective in order to facilitate the desired regulatory impact. Legislators and courts alike want to develop effective and reasonable standards for asserting jurisdiction over on-line activity; thus, technology need not be perfect or apply to each citizen in order to satisfy a state's regulatory goals. As Lawrence Lessig notes: "[Regulations] need not raise the cost of prohibited activity to infinity in order to reduce the level of that activity quite substantially. If regulation increases the cost of access to . . . information, it will reduce access to this information."⁶²

The imposition of local laws will raise the costs of on-line publication by pressuring content providers to reconsider the relative costs and benefits of publication against compliance. It will leave them with a

59. For example, in December 2001, the Canadian House of Commons adopted amendments to Section 31 of the Canadian Copyright Act with addresses the ability of Internet retransmitters to supply broadcast content on-line in a geographically specific manner. See The Canadian Intellectual Property Office, *Proposed Amendments to Section 31 of the Copyright Act*, Dec. 12, 2001 at http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_sec31_amend-e.html (last visited Apr. 3, 2003). The amendments respond to a prior "loophole" in Canadian law, which permitted Internet companies to retransmit broadcast content royalty-free. When the Canadian company ICraveTV adopted a business model based on the retransmission of content from captured signals from Toronto and New York, it was then subject to suits for the redistribution of content in the United States. The bill would establish a framework that will allow new types of distribution systems, including the Internet, to be used to retransmit broadcast signals if they meet appropriate conditions set out in the regulations. If adopted, the amendments would most certainly be implemented through regulations requiring retransmitters to limit their signals to Canadians or else cease doing business. See Steve Bonisteel, *Canada Unveils 'ICraveTV' Changes to Copyright Law*, NEWSBYTES, Dec. 23, 2001.

60. The Internet Tax Freedom Act, which was signed into law by President Clinton on October 21, 1998, reflected a national policy decision to keep the Internet unfettered by state and local taxation during the critical early formation period of the Internet. The Act's major provision imposed a three-year moratorium on state and local taxes of the Internet. In November 2001, the Senate approved an additional two-year moratorium passed by the House, extending the deadline to November 1, 2003.

61. See Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1405 (1996) ("A regulation need not be absolutely effective to be sufficiently effective. . . . If government regulation had to show that it was perfect before it was justified, then indeed there would be little regulation of cyberspace, or of real space either. But regulation, whether for the good or the bad, has a lower burden to meet."). See also Jack Goldsmith and Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 812 (2001) ("Regulatory slippage is a fact of life in real space and cyberspace alike.").

62. Lessig, *supra* note 61, at 1405.

choice: to publish freely and accept legal accountability; to keep some material off the Internet entirely, for fear of criminal and civil charges filed in different countries or even different states; or to give access only to certain viewers, by installing on-line gates and checkpoints around their sites. While civil libertarians and multinational commercial entities express concern about the chilling and self-censoring potential of content providers having to internalize the cost of complying with incompatible regulatory frameworks, a fair assessment of the overall impact of state-based laws will depend greatly on the (declining) cost of jurisdiction-avoidance and the extent to which publishers perceive state action to be a threat. As described below, those who defend the legitimacy of unilateral national regulation believe that, given the limited enforcement power of states, the impact of regulatory burdens on on-line content providers has been greatly exaggerated.

2. In Defense of Unilateral Internet Regulation

Alongside these technological shifts, scholars have reverted to doctrinal first principles to argue that traditional legal analysis grounded in transnational law and conflict-of-laws analysis may adequately address disputes that arise over the regulation of new communications technologies.⁶³ In this view, far from constituting a distinct “cyber-sovereignty,” persons interacting in cyberspace do things and cause harms that are regulated by states when they take place over other communications media, and the Internet should be no different. In the words of Michael Froomkin: “We do not find concepts such as ‘phonespace or ‘autospace’ helpful and for good reason; cyberspace is not a place, but only a metaphor—often an unhelpful one.”⁶⁴

The most vocal critic of the “regulation critics” has been Jack Goldsmith. Goldsmith has sought to dispel some of the common myths not only about the feasibility, but the legitimacy under international law, of state regulation of the Internet. In a series of articles, Goldsmith has presented a pragmatic approach to the problem of on-line regulation and extraterritorial jurisdiction, stressing the applicability of conflict-of-laws analysis to the on-line world.⁶⁵ Downplaying the novelty of on-line jurisdictional conflicts, Goldsmith has argued that national governments

63. See, e.g., Mody, *supra* note 7.

64. Michael Froomkin, *Symposium on the Internet and Legal Theory: The Empire Strikes Back*, 73 CHI-KENT L. REV. 1101, 1106 n.26 (1999).

65. See Goldsmith, *Against Cyberanarchy*, *supra* note 13; Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998); Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI-KENT L. REV. 1119 (1998); and Jack Goldsmith, *What Internet Gambling Teaches About Internet Regulation*, 32 INT'L. LAW 1115 (1998).

may lawfully regulate the global Internet, just as they do other communications media. Goldsmith describes the anti-regulation sentiment as being premised on three erroneous presumptions: first, that the application of regulation to acts that originate abroad is impermissibly extraterritorial; second, that unilateral regulation will illegitimately undermine the regulatory efforts of other nations; and, third, that foreign nationals will impermissibly lack notice of local regulations that they may find applied to them.⁶⁶

Regarding the first argument, Goldsmith argues that from the perspective of international law, the unilateral application of national law on extraterritorial actors is perfectly legitimate. He rightfully notes that international law has long grappled with the extraterritorial enforcement of national laws and the inherent challenges to sovereignty and governance that it represents. Over time, a jurisdictional framework, extending beyond the territoriality of the nation state, has developed to take account of transnational commercial enterprises. With the increasing economic interdependence of the international community, the framework for jurisdiction has come to acknowledge the need for states to protect their distinct sovereign interests against the conduct of actors located beyond their borders when such conduct results in local harm.

As Goldsmith shows, the claim that the extraterritorial enforcement of local regulations represents an illegitimate application of local law is rooted upon an anachronistic conception of jurisdictional scope—one in which sovereignty was taken to be an absolute principle of international law, and it was said that “no state has the right to intervene in the internal or external affairs of another.”⁶⁷ In contrast, under modern jurisdictional doctrine, prescriptive jurisdiction enables states to make their laws applicable to cases where the conduct “has or is intended to have substantial effect within its territory.”⁶⁸ On this analysis, the fact that harm is transmitted through cyberspace should have no impact on a state’s interest in protecting itself nor the underlying legitimacy of its actions.⁶⁹ Comparing

66. Goldsmith, *Against Cyberanarchy*, *supra* note 13, at 1204.

67. Convention on Rights and Duties of States, Dec. 26, 1933, art. 8, 49 Stat. 3097, 3100, 165 L.N.T.S. 19.

68. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

69. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, *supra* note 65, at 1121 (“Net users are not removed from our world. They are no more removed than telephone users, postal users, or carrier-pigeon users. They are in front of a screen in real space using a keyboard and scanner to communicate with someone else, often in a different territorial jurisdiction. And these real-space communications can cause real-space harms. Internet gambling can decrease in-state gambling revenues and create family strife; a book uploaded onto the net can violate an author’s copyright; a chatroom participant can defame someone outside the chatroom; terrorists can promulgate bomb-making or kidnapping tips; merchants can conspire

cyberspace regulation to the extraterritorial application of national law in other contexts, Goldsmith notes, nations have long applied local law to regulate broadcasts from abroad, pollution from offshore sources, local crimes initiated elsewhere, the harmful local consequences of out-of-state monopolistic behavior and alike.⁷⁰

As for the second concern, regulatory spillover, Goldsmith argues, “the legitimacy of a state’s exercise of prescriptive jurisdiction has never been held to turn on a measurement of its spillover effects.”⁷¹ Given that many regulations have spillover impact—indeed, it is a “commonplace consequence . . . in our increasingly interconnected world”⁷²—courts cannot defer from a finding of jurisdiction merely because it will have an adverse impact on other nations. Moreover, it is argued, the spillover impact of Internet regulations has been exaggerated, and is not likely to be substantially different from the impact that arises from conventional regulations of this sort.

It is this last point—that the impact of unilateral cyberspace regulation will be no different from regulation of real-space activity—that is critical to assessing the true impact of unilateral regulations. Goldsmith highlights that the actions undertaken by a particular foreign nation to protect its citizens do not imply that all Internet transactions can be regulated by all nations, as the argument focusing on chilling effects would assert. Rather, he argues, the true scope and power of a nation’s regulation is measured by its enforcement jurisdiction, not its prescriptive jurisdiction. While the prescriptive jurisdiction of a state may theoretically encompass the whole globe, a nation can enforce its regulations only against those that have local presence or assets. Thus, according to Goldsmith, national regulations will have a differential impact upon large and small actors. Multinational companies, Goldsmith argues, will engage in a cost-benefit analysis when considering whether

to fix prices by e-mail; a corporation can issue a fraudulent security; or a pornographer can sell kiddie porn.”).

70. *Id.*

71. Mody, *supra* note 7, at 383. While the existence of spillover effects does not per se invalidate the application of prescriptive jurisdiction, the Restatement (Third) of Foreign Relations Law lists as relevant factors: “the extent to which another state may have an interest in regulating the activity” and “the likelihood of conflict with regulation by another state.” *Restatement (Third) Foreign Relations Law of the United States* § 403(g) & (h) (1987). The “reasonableness” requirements of § 403, however, have been criticized as an inaccurate statement of the rules of customary international law, running contrary to the historical practice of national courts to find jurisdiction in all cases, other than those in which there are no local impact. *See, e.g.,* Stephen B. Burbank, *Case Two: Extraterritorial Application of United State Law Against United States and Alien Defendants (Sherman Act)*, 29 *NEW ENG. L. REV.* 588, 591 (1995) (“Few people . . . other than those who drafted the relevant sections . . . believe that section 403 states rules of customary international law.”).

72. Goldsmith *supra* note 13, at 1212.

to target particular states. The hypothetical burdens faced by multinational cyberspace actors represent, on this view, a cost of doing business, no different from the burdens those same entities face in real-space.⁷³ New technological innovations such as geo-location technology and the efficiencies of doing business on-line are likely to compensate for the perceived necessity of jurisdiction-avoidance.

The limitations of enforcement jurisdiction lead Goldsmith to conclude that the impact of unilateral regulations will not overburden online publishers or cripple the Internet—or, as James Boyle puts it, “if the King’s writ reaches only so far as the king’s sword, then much of the content of the Internet might be presumed to be free from the regulation of any particular sovereign.”⁷⁴ This point is essential to Goldsmith’s argument, for if true, it entails that “the vast majority of Internet content providers need worry only about the regulations of the nation in which they have some physical presence such as assets, bank accounts or employees.”⁷⁵ While states can—as they have for offshore actors in the past—use a variety of indirect mechanisms to protect themselves, smaller actors cannot directly be reached. As such, it is claimed that they will not find imposed upon them significant legal, and hence, behavioral constraints.

The third charge of the “regulation critics” is that Internet regulation inevitably creates a notice problem. Given the many states in which content is made available, it is inevitable that on-line actors will not know beforehand what transmissions will be perceived as unlawfully causing

73. It must be noted, however, that the interests of international business enterprises lie at the crux of competing claims of national jurisdiction and that increases in the cost of doing business internationally as such should not be underestimated. In 1987, a survey commissioned by the International Chamber of Commerce found that “extraterritorial applications of national laws and policies impose significant costs on some sectors of international business.” *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 3* (Dieter Lange & Gary Born eds., 1987). In particular, the study found that often countries were subject to inconsistent regulations, such that governments had required actions to be taken in foreign countries that were “prohibited by those foreign countries,” placing those countries in a position whereby they were forced to disobey one country’s laws and potentially incur fines and civil penalties. Uncertainty with regard to which nations laws would be applied to a particular course of action was felt to “discourage[] international businesses from engaging in productive trade and investment.” In conclusion, the report found that, “[t]he overall impact of the extraterritorial application of national laws is to discourage and prevent useful economic activity in the form of international investment, and to reduce the profitability of existing investment.”

74. Boyle, *supra* note 16, at 179. See also Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 *INT’L LAW* 1121, 1123 (1998) (“The real problem is turning a judgment supported by jurisdiction into meaningful economic relief. The problem is not the adaptability of *International Shoe*-obtaining jurisdiction in the theoretical sense. The problem is obtaining meaningful relief.”).

75. Jack Goldsmith, *The Internet, Conflicts of Regulation, and International Harmonization*, in *GOVERNANCE IN THE LIGHT OF DIFFERING LOCAL VALUES* 198, 199 (Cristoph Engel & Kenneth H. Keller, eds. 2000).

local harm in other territories.⁷⁶ Goldsmith is characteristically unsympathetic to a claim that ignorance of the law can be equated with illegitimacy. He argues that transnational law acknowledges no such notice requirement, which would cause local harms to be exempt from regulation merely because a defendant was unaware of the regulations.⁷⁷ Moreover, if, for the sake of argument a notice requirement exists, a court's assessment takes into account the reasonable foreseeability of the defendant's knowledge of the regulation; foreseeability is a "dynamic concept" that encompasses the type and nature of the offense.⁷⁸ In other words, courts will have the flexibility to rule that given the nature of new communications technologies the defendant had reason to know that the material would be available in the nation where the offense occurred, even absent explicit intent.

The upshot of Goldsmith's argument is that in our globally networked environment, as in the emergent global economy that predated it, international commercial entities will grapple with the competing claims of nations. When commercial entities attempt to use the distributional mechanism of the Internet to conceal or advance practices that they would otherwise be found liable for, courts should rightfully find such actions to lie within the harmed nations' bounds of jurisdiction. Over time, courts will develop an understanding that extends the template of the international jurisdictional framework to new communications technologies, and for large actors, geo-location technology will help to ease the burden of such regulatory measures.

Notably, Goldsmith's focus on the distinction between enforcement jurisdiction and prescriptive jurisdiction as a limitation on the direct impact of national regulations, reveals the flipside of unilateral regulation in practice: The effectiveness of national regulation is inevitably hampered by the limits of a state's ability to enforce its laws with respect to out-of-state actors. When it comes to smaller actors, the attempt to protect local values through national regulation simply does not work, as their ability to dodge enforcement affords them the opportunity to engage in regulation avoidance. Such "offshore" actors are unlikely to implement geo-location technologies voluntarily, and, without the influence of indirect state action, will remain beyond the effective reach of states.

76. See, e.g., Paul Meller, *Proposed Law Stirs Concern on Europe E-Commerce*, N.Y. TIMES, Feb. 8, 2001, at W1.

77. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, *supra* note 65, at 484–86.

78. Goldsmith, *supra* note 13, at 1243–44.

3. An Important Caveat

It is clear that law and technology are together altering the landscape of the Internet, making it increasingly amenable to national regulation. As we have seen, the regulation critics underestimate the architectural development of the network, the weight of regional norms, and the genuine harms caused by a failure to regulate. The above analysis suggests that objections to the application of national law on the Internet based upon technology are no longer descriptively accurate, and second, that national regulation of foreign entities is a legitimate and viable response for states to local harm originating abroad.

Yet, we must take note of certain limitations inherent in the seeming reconciliation of the sovereign state and the networked world. In particular, the claim that national regulations on the Internet are legitimate does not itself address the overall impact of unilateral actions, their progressive efficiency, or their effect upon the network's attributes. Goldsmith admits as such, in an "important caveat," stating in a footnote:

[I discuss] the regulation of the Internet from the perspective of jurisdiction and choice of law. This is an issue wholly distinct from the merits of any particular regulation of the Internet—for example, whether particular national regulations of the Internet promote democracy, or are efficient, or are good or bad for humanity. Resolution of these substantive regulatory issues turn on contested normative judgments and difficult context-specific, cost-benefit analyses that have little to do with jurisdictional issues.⁷⁹

As a response to the "sky-is-falling rhetoric" that extraterritorial regulation represents an unauthorized use of state power and will cripple the Internet, Goldsmith's work presents a measured response.⁸⁰ However, while he helpfully situates national cyberspace regulation within the international legal framework, having solved the "jurisdictional puzzle"⁸¹ he stops short of addressing the full impact of unilateral actions. While he asserts that large "offshore" content providers are unlikely to feel the impact of unilateral regulations, he fails to consider if significant changes in the network architecture are desirable for the international system overall. Failure to scrutinize this question causes him to stop short of accounting for what is distinct about on-line interactions, which

79. Goldsmith, *supra* note 75, at 200 n.10.

80. Jack Goldsmith, *Yahoo! Brought to Earth*, FINANCIAL TIMES, Nov. 26, 2000, at 27 ("A chorus of sky-is-falling rhetoric greeted the French court order requiring Yahoo! to block French users from accessing Nazi memorabilia on its U.S. website. France's action, we are told, constitutes illegitimate extraterritorial regulation.").

81. Goldsmith, *supra* note 75, at 200 n.10.

in turn impacts other aspects of his analysis. Even with geo-location technologies, cyberspace actors must strive to localize their on-line activities, and the use of such technologies entails a cost—a financial cost to content providers and the social cost of a network that is no longer open and neutral. Without assessing these factors, the impact of prescriptively legitimate unilateral exercises of jurisdiction upon the on-line community remains unclear.

We must consider, then, with a more careful eye, the claim that the spillover effects that are a relevant concern to international law are no different in the arena of online regulation than in real space. The potential shortcomings of Goldsmith's approach are made clear when we turn to consider an instance of the "substantive regulatory issues" he sets aside; the problem of national expressive regulation, undertaken in support of local values. In response to the on-line prevalence of culturally offensive content, states are increasingly willing to utilize an effects-based jurisdictional test to adjudicate claims against on-line content providers. The steady flow of extraterritorial disputes heard in national courts over expressive regulation provides the subject matter for assessing Goldsmith's tenets and, I would suggest, demonstrates the need to reevaluate Goldsmith's complacent optimism regarding the future status of unilateral regulations.

II. *YAHOO!* v. *LICRA*: THE INTERNATIONAL TRIUMPH OF EFFECTS-BASED UNILATERAL CYBERSPACE REGULATION

The Yahoo! litigation makes clear the willingness and capacity of states to find jurisdiction and apply nation-specific laws on the Internet. It marks the transition toward a network that incorporates geographic lines and borders, and locates the leading impetus behind that trend in a backlash response to the cultural and technological hegemony of the United States in the on-line world. *Yahoo!* demonstrates that "the demands of each territorial community, however it may be organized, [will] continue to be the predicate and driving force of the system of international jurisdiction."⁸² In the context of Internet regulation, it demonstrates

82. Reisman, *supra* note 10, at xiv. (Rejecting proclamations regarding the death of the nation state: "With [the] growth of transnational activity, the relevance, *raison d'être* and future of the state and the consequent law of international jurisdiction have been brought into question. But hold the funeral shroud! Anticipation of the demise of the state is premature. The exclusive territorial community to which the individual accords, and insists that others accord, primary loyalty is neither an atavistic nor transient nor pathological phenomenon. It is, rather, a response to a persisting set of human demands. There are cogent, 'rational' reasons why human beings stubbornly continue to organize themselves in exclusive rather than the

that individual territorial states are apt to be the driving force for further technical developments as well.

In effect, the *Yahoo!* court extends the jurisdictional template from other areas of extra-territorial enforcement into the arena of on-line speech. An analysis of the French court's opinion and the U.S. district court decision following it lay bare both the applicability and limitations of formulaically applying the framework of international jurisdiction in the context of new communications technologies. For while it suggests the abiding significance of regional values, the *Yahoo!* litigation at the same time demonstrates the unaccounted-for costs and inefficiencies of pure unilateral regulation.⁸³

A. *The Yahoo!.com French Case*

On May 22, 2000, Judge Jean Jacques Gomez of the County Court of Paris ordered Yahoo!, an American company to block access to Nazi materials that were judge illegal to display under French law, Article R. 645-1 du Code Penal. Under that section, France's penal code outlaws the wearing or public display of any uniform, insignia, or emblem of any organization or person responsible for crimes against humanity.⁸⁴ It classifies such offenses as "serious crimes against the people, the state and public safety."⁸⁵ In keeping with the principles of international human rights and the similar actions of other nations, France has sought such a democratically chosen rule to guarantee its own internal public order and the dignity of its citizens.⁸⁶

most inclusive of groups, why group boundaries are 'a functional necessity, not simply an inert artefact of primordial cultural identities.'").

83. *See id.* ("In more and more social sectors, activities that cross borders can no longer be regulated effectively by the parts of the state apparatus that have hitherto been responsible for them. Whether it is health, criminal activity—including terrorism and other forms of purposive political violence—economic organization, immigration or border control, protection of intellectual and material property or whatever, the state, acting alone, seems less and less able to accomplish what is expected of it without locking itself into increasingly complex and durable intergovernmental arrangements.").

84. *See* C. Pén. R. 645-1.

85. Reidenberg, *supra* note 2, at 5.

86. The liberal stance of the United States with respect to offensive speech contrasts markedly with European nations, for whom a commitment to equality and dignity demands that offensive speech is suppressed. For a discussion of these differences, touching on the *Yahoo!* dispute, see Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 487 (2001). Boyle locates the European compulsion within the context of twentieth century history. As contrasted with the U.S., in Europe, "hate speech was once mainstream speech. It was central to European culture. There were no 'hate groups' espousing racism and white superiority when it was in fact the official ideology or mainstream idea. Today's racists wear our castoffs, and we have a responsibility for what is done with those castoffs." *Id.* at 493. That said, Boyle characterizes the American and European approaches to hate speech as parallel strategies aimed at the same end: the eradication of speech

On April 5, 2000, the French organization, La Ligue Contre Le Racisme Et L'Antisemitisme (LICRA) sent a cease and desist letter to Yahoo!'s in Santa Clara, California, threatening to take legal action if Yahoo! did not cease the displaying Nazi objects for sale by third parties on its auction site. Subsequently, LICRA, along with L'Union Des Etudiants Juifs De France (UEJF), used the U.S. Marshal's Office to serve process on Yahoo! in California. LICRA and UEJF then separately filed civil complaints against Yahoo! in the Tribunal de Grande Instance de Paris, alleging a violation of a French criminal statute that bars the public display of Nazi-related "uniforms, insignia or emblems" in France.

In defense, Yahoo! claimed that its actions, committed in the United States, where such activities are routinely protected by the First Amendment, lay beyond French territorial jurisdiction. Unconvinced, the French court awarded prescriptive jurisdiction, and found, through the application of an effects-based jurisdictional analysis, the means to protect its own citizens. As drafted, the French criminal law applies to any crime or felony committed outside of France by foreign person when the victim is a French national at the time of the infraction.⁸⁷ Under French law, the competency or prescriptive jurisdiction of courts is permitted only to try cases in which an element of the infraction is committed on French territory.⁸⁸ Applying these principles to the facts of the case, the French court ruled that the "visualization" of Nazi objects in France constituted a violation of French law, and that the intentional transmission of Yahoo!'s communications into France provided adequate grounds for finding jurisdiction. While the court noted that Yahoo! had directed advertising in French to French users through technical honing mechanisms, it is important to note that its finding was based not on Yahoo!'s targeting of French citizens, but on the local impact of its actions.⁸⁹ In the view of the court, it was the offensive nature of the material in question, rather than the actions of the company who sponsored it, that supplied the rationale for the order.

that devalues persons on the basis of race, creed, or religion. *Id.* at 489–90. The difference can be traced to the divergent *means* of achieving the same goal. In the U.S., the favored metaphor of the marketplace of ideas, which supports the airing of the objectionable in the crucible of public opinion, stands as a bulwark against targeting speech of any kind based on its content. The history of Europe, however, elicits a bolder and more direct strategy.

87. *See* C. Pén. 113-7.

88. *See* C. Pén. 113-2.

89. In support of its assertion that Yahoo! American site was not targeting French users the company maintained a distinct French subsidiary, Yahoo! France, and a separate French web site hosted in France, which complied with French laws, and which the case against Yahoo! did not implicate.

Given that the nature of the offense consisted in the display of materials, it is unsurprising that the court concluded that the appropriate remedy was to block the content in question. Recognizing the capacity of new geo-location technologies, the court assessed the cost and efficacy of technological measures for filtering that permit blocking the material for one geographic region (the forum state, France), but not another (the host state, the U.S.). The trial was interrupted for weeks while court-appointed technical experts—one European, one American, and one French—tried to determine whether geo-specific filtering technology was practical. The experts' report indicated that approximately 70% of French users were identifiable by their Internet Service Protocol Addresses, and that the remaining ambiguous users could be identified by declaring nationality prior to the transmittal of Nazi material.⁹⁰

Based on this testimony, the court concluded that it would not be financially burdensome for Yahoo! to adapt filtering for French users. On November 20, 2000, the Tribunal de Grande Instance de Paris re-issued the preliminary injunction against Yahoo! to take all possible measures to dissuade and prevent French users from accessing WebPages stored on Yahoo!'s U.S.-based server that auction Nazi objects or that present any Nazi sympathy or holocaust denial. The court also established a fine of \$13,000 for each day the company did not comply with the order, following a three-month grace period.

The French decision captures the rapidly changing nature of the Internet's communications framework. While Yahoo! asserted that the French court's order "to filter our sites according to nationality was very naïve,"⁹¹ Yahoo!'s own behavior belied such a claim. As highlighted by the court, during the time of the offense, Yahoo! profiled French users to facilitate servicing them with advertisements in French. While the French court's decision focused on harm and not intent, inevitably this fact undermined Yahoo!'s opposition to France's application of jurisdiction on the grounds that it was technically infeasible. It also points to the desire for multinational companies to utilize geo-location tools as a means of enhancing business practices, while at the same time seeking to deny their capacity to conform with additional regulatory mandates and internalize their cost. Ultimately, the French court succeeded indirectly in achieving its goal. Rather than filter French users, Yahoo! privileged concerns of reputation and potential liability, and found it easier to revise its company policy with respect to the auctioning of Nazi memorabilia. Rather than implement geo-location

90. T.G.I. Paris, Od. En refere du 20 Nov. 2000.

91. Brian Love, *Can Neo-Nazis Yahoo! in France?*, REUTERS, Aug. 10, 2000.

tools for jurisdiction-avoidance, it achieved the change by monitoring its site and redrafting its user agreements.⁹²

Two years following the French decision, the impact of the *Yahoo!* case as a harbinger of changes in technology and in the attitudes of commercial actors continues to resound. In August 2002, Yahoo! voluntarily agreed to limit access to online content banned in China after signing the Internet Society of China's Public Pledge of Self-Discipline for the Chinese Internet Industry.⁹³ Under the provisions of the pledge, ISPs agree to "monitor the information publicized by users on web sites according to (Chinese) law and remove the harmful information promptly," and to refrain from "establishing links to web sites that contain harmful information so as to ensure that the content of the network information is lawful and healthy."⁹⁴ Critically, the provisions of the pledge are not limited to Web sites in China, but extend to the monitoring by service providers of all sites that are accessible in China and requires carriers to refuse access to foreign sites that disseminate harmful information. Upon agreeing to the pledge, Yahoo! faced harsh public criticism by Human Rights Watch and other civil liberties groups that they were catering to official censorship in a state where politically oppositional and religious views are routinely suppressed.⁹⁵ Yahoo!'s decision to broadly self-censor objectionable content, despite this backlash in the United States, dramatically illustrates the altered motivations of those doing business globally in a post-*Yahoo!* context.

Yet, notably, in the aftermath of the French decision, two of the technical experts utilized by the court expressed dissatisfaction with the court's decision and the wider impact of the case. The European expert, Ben Laurie, went so far as to issue an *Expert's Apology* on the web, expressing his consternation at the results.⁹⁶ For both Laurie and the

92. Shortly following the French decision, Yahoo!'s competitor, the American online auction company Ebay announced that it was going to revise its user policy to forbid the display and sale of hate-related items across the world. See Troy Wolverton, *Ebay to Ban Sale of Hate Items*, CNET NEWS.COM, May 3, 2001, at <http://news.com.com/2100-1017-256998.html> (last visited Apr. 3, 2003). While Ebay stated that the decision was not dictated by the *Yahoo!* litigation, the decision reflects a clear calculus by the company that its expansion into international markets would be facilitated through self-censorship.

93. Sumner Lemon, *Rights Group Slams Yahoo! over China Pledge*, ITWORLD, Aug. 12, 2002.

94. *Id.*

95. Human Rights Watch, *Yahoo! Risks Abuses Rights in China* (Aug. 9, 2002) at <http://www.hrw.org/press/2002/08/yahoo080902.htm> (last visited Apr. 3, 2003) (quoting Kenneth Roth, executive director of Human Rights Watch: "If it implements the pledge, Yahoo! will become an agent of Chinese law enforcement. It will switch from being an information gateway to an information gatekeeper").

96. Ben Laurie, *An Expert's Apology* (Nov. 21, 2000) at <http://www.apache-ssl.org/apology.html> (last visited Apr. 3, 2003).

American expert, Vint Cerf, their technical assessment, which emphasized the imperfect nature of filtering tools, deliberately avoided the political calculus undertaken by the French court; that is, they concerned themselves with technical feasibility rather than with the policy assessment of whether filtering should be mandated. According to both, the French court ignored the “limitations and risks” associated with the order, placing potential burdens on online content providers, yet overlooking the critical inefficiency of such tools or the ability for determined users to obtain offensive content.⁹⁷

B. *The Yahoo!.com U.S. Case*

Despite the lack of an asserted attempt by French authorities to secure damages from Yahoo! and a revision of Yahoo’s company policy on the matter, Yahoo! sought in some way to reject France’s jurisdictional authority. Mirroring the conceptual tenets of the regulation critics, Yahoo! straddled the fence; stepping beyond the claim of technological incapacity, it tried to shield itself behind the First Amendment. Whereas neither claim was accepted by the French court, within weeks of the French decision, Yahoo! brought an action in California district court seeking declaratory relief rendering the French court’s order unenforceable in the U.S., as an abrogation of free speech. Yahoo!’s stateside case embodied the alarm raised by the French decision in the on-line business community and among civil libertarians. The symbolic sentiment underlying the case is perhaps best captured in Yahoo! chairman Jerry Yang’s headstrong assertion that, “[w]e are not going to change the content of our sites in the United States just because someone in France is asking us to.”⁹⁸ Similarly, free speech advocates applauded Yahoo!’s efforts, supporting its use of the First Amendment as a “litigation strategy,” and a necessary stand against a dangerous precedent.⁹⁹

Ruling in favor of Yahoo!, the California court recognized the sovereignty of French law, but found the ruling repugnant to U.S. public policy.¹⁰⁰ It rejected the possibility of enforcement on First Amendment grounds, noting:

97. See Mark Ward, *Experts Question Yahoo! Auction Ruling*, BBC NEWS ONLINE, Nov. 29, 2000, at <http://news.bbc.co.uk/1/hi/sci/tech/1046548.stm> (last visited Apr. 3, 2003).

98. Janet Kornblum & Leslie Miller, *Yahoo Won’t Pull Nazi Memorabilia*, USA TODAY, June 19, 2000, at 3d.

99. See Brief Amici Curiae Center for Democracy and Technology, American Civil Liberties Union, et al. in Support of Plaintiff’s Motion for Summary Judgment, *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal 2001) (No. C00-21275 JF) (arguing that “enforcement of the French court order in the United States would fundamentally change the nature of the Internet as a medium of free expression”).

100. It is worth noting that prior to losing on the merits of the case, LICRA asserted that in fact the U.S. court lacked jurisdiction over them, given that LICRA maintained no contact

The French order's content and viewpoint-based regulation, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at a time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.¹⁰¹

The U.S. district court decision fell squarely within the public policy restriction on the enforcement of foreign judgments—according to which the enforcement of a foreign judgment is refused when the enforcing state's public policy is offended.¹⁰² Just as courts have the discretion to choose to adjudicate a claim upon a finding of jurisdiction, they have the discretion to decline to enforce edicts that run counter to the expressed values of local law and to refuse extradition of citizens to facilitate enforcement abroad.

This discretionary character of international comity was articulated by the Supreme Court in *Hilton v. Guyot*—comity, the Court said, “does not require, but rather forbids [recognition of a foreign judgment] where such recognition works a direct violation of the policy our laws, and does violence to what we deem the rights of our citizens.”¹⁰³ Similarly, the U.S. court in *Yahoo!* recognized the possibility for cooperative international decisions to alter an assessment of the issue, but found that

absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is

with the U.S. Given the impact of the standing order and the servicing of papers to Yahoo! in the U.S., the U.S. court was unconvinced.

101. *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181, 1192 (N.D. Cal. 2001).

102. See, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230, 247 (Md. 1997) (declining to enforce British libel judgment on grounds that it conflicted with First Amendment); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (1992) (same) (“There is no question that the U.S. has a paramount interest in the activity in question, which occurs within its territorial boundaries and is lawful here. The activity at issue is fully protected by the First Amendment, and the United States has an overriding interest in protecting such activity.”).

103. *Hilton v. Guyot*, 159 U.S. 113, 193 (1895) (internal quotations omitted).

outweighed by the Court's obligation to uphold the First Amendment.¹⁰⁴

The French parties have appealed the decision of the district court and the case is currently being reviewed before the Ninth Circuit Court of Appeals.

C. A Regulatory Impasse

The judicial stalemate of the *Yahoo!* case embodies the fundamental cultural tensions brought to light by the extraterritorial regulation of on-line speech. The American allegiance to the First Amendment is as central to the American perception of free speech as the moral imperative and commitment to "personal dignity" that underlies the French hate speech statute. This variance in approach does not detract from the fact that both are legitimate policies of sovereign democratic political systems. However, in the end, neither the technology of the Internet nor the system of international law gives one a greater claim to legitimacy than the other.

Given the ability of states who oppose expansive prescriptive jurisdiction to protect their own sovereignty and self interest by narrowly construing jurisdiction to enforce,¹⁰⁵ attempts to impose unilateral national content regulations—against a First Amendment harbor—raise inevitable friction.¹⁰⁶ The discretionary feature of comity, as applied in *Yahoo!*, represents a hurdle in the application of nation-based law on the Internet; demonstrating why the limitations of enforcement may curtail widespread liability for expressive conduct transmitted online. The application of public-policy discretion raises the transaction costs for foreign nations to impose local values extraterritorially. While it is true that *Yahoo!* adopted the behavior desired by the French court, smaller actors need not, even as their speech causes an equivalent regional harm. The *Yahoo!* litigation shows that for the overall protection of local values, taking into account the indirect alternatives available to states, unilateral application of local law is likely more costly than it is worth.

104. *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1193 (N.D. Cal. 2001).

105. Symposium, *The Internet Is Changing International Law*, 73 CHI.-KENT L. REV. 997 (1998).

106. See Joshua S. Bauchner, Note, *State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate*, 26 BROOKLYN J. INT'L L. 689, 693 (2000) ("Since one state's sovereignty and its rights thereunder, is defined by the reaches of another state's sovereignty in relation to it, only by acting to the peripheral limits of that power can a state maximize the scope of its sovereign rights. Conversely, a state also will act to protect the outer boundaries of its sovereignty from encroachment by another state. By doing so, a state can ensure the greatest breadth of sovereign rights.").

III. THE BIAS TOWARDS EFFECTS-BASED JURISDICTIONAL ANALYSIS

A. *Expanding Adjudicative Reach*

While the decision in *Yahoo!* conforms with Goldsmith's model of regulatory accountability for large commercial actors, *Yahoo!* must be situated within a wider trend: a heightened resistance to a free market and speech-permissive approach to Internet content regulation. As Michael Froomkin notes, "few if any nation-states are in a hurry to relinquish their freedom of maneuver (read 'control' or 'power') to decentralizing, democratizing, even anarchistic forces such as the Internet—at least not without a fight."¹⁰⁷ The French decision in *Yahoo!* forces the recognition of local values and national policies in an environment where they have previously been neglected. Responding to the fact that the "technological underpinnings of the network violate the assumptions embedded in prior law,"¹⁰⁸ it uses prior law to make the network adapt. The central mechanism of the French decision is the application of an effects-based analysis for international Internet jurisdiction, employed as a means of imposing the social cost of global Internet communications on content providers.

Within the U.S., the initial model for Internet jurisdiction relied upon a sliding-scale passive-versus-active test, which was intended to assess jurisdiction based on the nature and quality of the commercial conduct. The test was outlined in the Pennsylvania case, *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*¹⁰⁹ Prior to *Zippo*, jurisdictional assessments of on-line activities relied upon a conventional effects-test. Such a test created a predictable potential for jurisdictional findings in multiple jurisdictions and resultant uncertainty for on-line actors regarding potential liability. The *Zippo* test built upon the notion that Internet providers were unable to control the flow of content to distinguish between providers that merely place material on-line (passive sites) and those had actively established contacts with a particular state (active sites). Many American and Canadian courts subsequently adapted the *Zippo* test.¹¹⁰

107. Froomkin, *supra* note 64, at 1102.

108. Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1998).

109. *Zippo Manufacturing Co. v. Zippo Dot Com., Inc.*, 952 F. Supp 1119 (W.D. Pa. 1997).

110. Geist, *supra* note 5, at 1366–1371 (discussing post-*Zippo* case law that similarly adopts a test under which the "the likelihood that jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet") (emphasis in original).

Yet, as Michael Geist has pointed out, this test led to erratic results. Primarily, as a matter of definition, outside the context of commercial sites, whether to characterize a particular site as interactive or not is far from clear; “the majority of web sites are neither entirely passive nor completely active.”¹¹¹ Moreover, especially in the case of objectionable content, the “passivity” of the site does not adequately address the perceived impact of visual or textual materials that negatively impact a given state. Thus, it is not surprising that in response, more and more courts have begun to find the passive-versus-active too constraining and are moving toward an effects-based analysis for Internet jurisdiction.¹¹²

B. *Yahoo’s Progeny*

The willingness of the French court in *Yahoo!* to use an effects-based analysis to cast a wider adjudicative net and apply prescriptive jurisdiction anticipated similar gestures by other national courts hearing claims of extraterritorial harm arising from objectionable online content. Where before, perhaps given the understanding that unilateral action would have limited impact, courts deferred to the technological defaults of a geographically indeterminate network, they are swiftly altering course. In several recent cases concerning on-line speech regulations, judges have found the accessibility of material to be sufficient grounds for jurisdiction under an effects test. Yet, unlike *Yahoo!*, where the fact that the defendant targeted foreign users through language-specific advertising undoubtedly influenced the court’s analysis, in these cases the interactivity, nature, and intent of the site was deemed by the courts to be immaterial to the finding of jurisdictional competence. Rather, the courts focused solely on the perceived effects, intended or not, that the web site had in the impacted jurisdiction.

In one prominent example, in December 2000, the German Supreme Court, the Bundesgerichtshof, ruled that German hate speech laws, which prohibit the denial of the Holocaust and the spreading of Nazi propaganda, applied to on-line content and to non-Germans who post such propaganda “on the Internet on a foreign server that is accessible to Internet users in Germany.”¹¹³ The decision upheld the conviction of an Australian Holocaust revisionist, the German-born Frederick Toeben, for distributing leaflets in Germany denying the holocaust. The Bundesgerichtshof’s ruling overturned the decision of a lower court,

111. *Id.* at 1379.

112. *Id.* at 1371–80 (describing the shift away from *Zippo*).

113. See Ian DeFreitas, *Worldwide Web of Laws Threatens the Internet*, FINANCIAL TIMES, Jan. 9, 2001 (comparing the decision of the German Federal Court to the decision of the French Court in *Yahoo!*).

which acquitted Toeben on the grounds that it lacked jurisdiction to adjudicate claims relating to content dispersed on servers physically located in Australia. While the Bundesgerichtshof decision ordered his retrial, the German government made no request to extradite him to Germany, perhaps because he faced similar charges in his home state.¹¹⁴

Similarly, in January 2001, an Italian court held that it could enforce its libel laws against anyone who posts content on the Internet, even if the speaker is based in another country.¹¹⁵ The ruling stemmed from a claim filed by an Israeli man living in Italy against a foreign web site for slandering him in a report about a custody dispute.¹¹⁶ Finding that the offense of defamation is an “offense-event” that occurs upon sight, the Italian decision noted that for “offences against the person,” there are “no national boundaries for libel on the Internet.”¹¹⁷ Critically, the court approached the Internet’s open architecture as the medium’s main deficit, as “just the knot to be untied.”¹¹⁸

Whereas an Australian court declined extraterritorial enforcement of local laws regulating expression in 1999 due to the inevitable global reach of the network,¹¹⁹ a year later another Australian court found such

114. The Executive Council of Australian Jewry brought a suit against Toeben in Australia seeking the enforcement of a Human Rights and Equal Opportunities Commission (HREOC). The commission, a government body, ordered Toeben in October 2001 to remove Holocaust revision material from his Adelaide Institute website. Toeben refused to do so. *See Australian Faces Trial for Holocaust Denial*, REUTERS, Dec. 14, 2000.

115. *See* In the Matter of Moshe D., Italy, Cass., closed session, Nov. 17–Dec. 27, 2000, Judgment No. 4741 (“If confronted with a [defamatory statement] initiated abroad and terminated . . . in our Country, the Italian State is entitled to jurisdiction and the meting [out] of punishment.”).

116. *Id.* The disparity between the American and European approaches to hate speech is paralleled in the context of defamation and libel; with the European standard more rigorously protective of individual dignity. For example, whereas the American standard requires actual malice, see *New York Times Company v. Sullivan*, 315 U.S. 254 (1964), the English standard is rooted on strict liability and does not require the plaintiff to demonstrate that the defendant had the intent to defame. For a comparison of the English and American approaches to libel, see Eric P. Enson, Comment: *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 LOY. L.A. INT’L & COMP. L. REV. 159 (1999).

117. In the Matter of Moshe D., Italy, Cass., closed session, Nov. 17–Dec. 27, 2000, Judgment No. 4741, note 115.

118. *Id.* (“Information and images placed ‘on the Net’ relative to any person are (potentially) accessible anywhere in the world. But this is just the knot to be untied because, given the ‘transnational’ nature of the tool used, initially identification of the place where the crime committed ‘via the Internet’ was perpetrated may seem difficult. As a matter of fact, an injurious statement, a degrading picture, a not very flattering comment posted on a ‘web-site’ are subject to diffusion beyond all control there is no reasonable possibility of ‘stoppage,’ if not through the coercive means legally reserved to public authorities (provided technical instruments are available.”).

119. *See* *Macquarie Bank Ltd. v. Berg* (1999) NSWSC 526. In *Macquarie*, the court, in an unpublished opinion, refused, in light of the global nature of the Internet, to issue an injunction against material posted in the United States that was defamatory under Australian law.

jurisdiction to be lawful.¹²⁰ The latter case, *Gutnick v. Dow Jones & Co. Inc.*, illustrates the impact that litigation in a foreign forum can have on American businesses and captured considerable public attention.¹²¹ In *Gutnick*, Victorian Supreme Court Justice John Hedigan established jurisdiction over U.S.-based Dow Jones & Co. for a publication of the *Wall Street Journal* Web site, which carried an allegedly libelous article about the plaintiff, an American businessman living in Melbourne. The judge rejected Dow Jones' argument that a U.S. court was the appropriate forum for the case, finding that publication occurred wherever the article was downloaded, including, in this instance, Australia. In applying Australia's defamation law, the court found its analysis: "[T]he law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard, (i.e. made manifest to) and comprehended by the reader or hearer,"¹²² and, as such, "[b]old assertions that the Internet is unlike other systems do not lead to the abandonment of the analysis that the law has traditionally and reasonably followed to reach just conclusions."¹²³ The decision was upheld by the High Court of Australia on December 10, 2002.¹²⁴

The court noted that: "once published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of its publication." The court further explained: "The difficulties are obvious. An injunction to restrain definition in NSW [New South Wales] is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory, and country of the world. Yet that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation is coextensive with that of NSW, and indeed, one knows that it is not. It may well be that, according to the law of the Bahamas, Tashakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court." *Id.*

120. *Gutnick v. Dow Jones & Co. Inc.* (2001) VSC 305, available at <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html> (last visited Apr. 3, 2003).

121. See, e.g. Editorial, *A Blow to Online Freedom*, N.Y. TIMES, Dec. 11, 2002, at A34 ("Now comes a ruling from Australia's highest court in a libel case that could strike a *devastating blow to free speech online*. . . . *To subject distant* providers of online content to sanctions in countries intent on curbing free speech—or even to 190 different libel laws—is to undermine the Internet's viability. Publications must be held accountable for their actions where they operate. The Internet's universal reach should not be reason to force publishers to censor themselves.").

122. *Gutnick*, (2001) VSC 305, ¶ 60.

123. *Gutnick*, (2001) VSC 305, ¶ 70.

124. *Dow Jones & Company Inc. v Gutnick* (2002) HCA 56, available at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html (last visited Apr. 3, 2003).

C. *The Appeal and Limits of Effects-based Analysis*

As symbolic gestures asserting the import of national law in cyberspace, these displays of regulatory power collectively demonstrate that courts are emboldened and willing to extend jurisdiction to companies that do not expressly target or direct themselves toward a particular state. These cases give shape to the prediction that “courts and policy makers are likely to bias toward asserting jurisdiction where harm has been experienced locally.”¹²⁵ Yet, unlike the French court in *Yahoo!*, these decisions fail to consider or take into account the cost of indirectly mandating technological solutions to permit the avoidance of the relevant jurisdiction.

As a tool of the courts, the use of an effects-based test is most controversial when it arises in the context of expressive subject-matter disputes. Yet, it has been embraced beyond the context of speech by states in order to support their numerous communications-oriented regulatory goals. In many areas of global information regulation, in particular intellectual property, the U.S. has been particularly uncompromising when asserting jurisdiction upon foreign actors.¹²⁶ Because the effects-test permits the long-arm extension of the law, its application is compelling whenever the perceived local harm is seen by a court to be too great to ignore.

125. Geist, *supra* note 5, at 1357.

126. For example, in *Twentieth Century Fox Film Corp., et al. v. iCraveTV, et al.*, No. 00-120, 2000 U.S. Dist. LEXIS 1013 (W.D. Pa. Jan. 28, 2000), a U.S. court dismissed Canadian copyright law in ordering iCraveTV to cease broadcasting on the web. Similarly, the U.S. sought unsuccessfully to enforce the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) against a Russian software company on the grounds that the sale of a program that disabled encryption of Adobe eBook documents had violated a U.S. company's copyrights. *See Verdict Seen As Blow to DMCA, Wired, Dec. 18, 2002* (describing the U.S. failed effort to prosecute the Russian company, Elcomsoft, after having dropped charges against its employee, a Russian computer programmer who was the first person to be charged under the controversial digital-copyright law). From on-line gambling cases to domain name disputes, U.S. courts “have repeatedly applied U.S. law to foreign operators with little consideration for the governing law of the other jurisdiction.” Michael Geist, *Everybody Wants to Rule the Web*, 2 COMMUNICATIONS LAW IN TRANSITION NEWSLETTER, at http://pcmlp.socleg.ox.ac.uk/transition/issue2_2/geist.htm (last visited Apr. 3, 2003). Congress has also been willing to legislate extraterritoriality. The Children's On-line Protection Act establishes stringent requirements for websites that target children and applies not only to U.S. websites, but to foreign content providers that target U.S. children. Similarly, “the European Union's Data Privacy Directive prohibits the transfer of personal data to non-EU countries that do not employ adequate privacy protections,” and has spurred the development and enactment of national regulations elsewhere. *Id.* These developments have led one critic to note that the U.S. “cannot be hypocritical and condemn the *Yahoo!* decision and then only weeks later extend its jurisdiction over iCrave TV.” William Crane, *The World-wide Jurisdiction: An Analysis of Over-inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix it*, 11 J. ART & ENT. LAW 267, 307 (2001).

The trend toward effects-based analysis is made more troubling by the willingness of courts to apply jurisdiction without assessing the relative merits of other courts. As Michael Geist notes, combined with an effects-based approach for Internet jurisdiction, “is a lack of deference toward other courts and legal norms such as forum non conveniens and international comity. . . . [C]ourts worldwide are reluctant to surrender jurisdiction, particularly if doing so means that local law will either be applied by a foreign court or not at all.”¹²⁷ The widening scope of jurisdictional competency applied to the Internet may result in jurisdictional forum shopping, with plaintiffs seeking the jurisdictional forum of the country that is most plaintiff-friendly, rather than the one that is most appropriate for a given case.

While the effects-based test reflects the interconnected nature of a global network, it sets the groundwork for conflicting claims to competence.¹²⁸ The long-standing difficulty of a test which results both in jurisdictional uncertainty and overdetermination is heightened in the on-line environment, given the fluidity and rapidity of information transmission. Without preventive action limiting the reach of publication, Internet-based activity is polymorphous in impact and can be said to create some effects in most jurisdictions. Absent network-wide geographic filtering, “the Internet’s globalizing force [will continue to demand] an exponential increase in requiring the application of such principles.”¹²⁹ The value of the Internet as a vehicle for equalizing speech for small and large publishers alike should compel courts to be sensitive to the burdens of limiting, either indirectly or directly, the scope of on-line publication. While geo-location tools will be part of the solution, courts must take the ability of users to implement such tools into account, considering whether limiting the scope of targeting publication would be too burdensome.

127. Michael Geist, *The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute; An Interview with Professor Michael Geist*, JURISCOM.NET, Jan. 18, 2001, at www.juriscom.net/en/uni/doc/yahoo/geist.htm (last visited Apr. 3, 2003).

128. The obstacles inherent in the effects-test as a theoretically and practically deficient solution to extraterritorial disputes has long been noted, as W. Michael Reisman remarks: “[T]he effects theory only settles international jurisdictional conflicts when the vector of effects is unidirectional and originates in a normative vacuum. . . . The effects theory and its various epicycles—contacts and interests—cut to the core issue in jurisdictional conflicts, but ‘effects’ has proved less a theory for decision than a restatement of the essential problem. Moreover, the theory and its corollaries were premised on a bilateral paradigm: a dispute between two states over the competence to make or apply law to persons, things or events over which control was simultaneously or sequentially shared. The apparently inexorable advance of interdependence has rendered that paradigm obsolete as both an explanatory and deontological or prescriptive technique.” Reisman, *supra* note 10, at xvii–xix.

129. Bauchner, *supra* note 106, at 695.

In contrast to an effects-based test, a targeting-based approach—that measures the deliberate efforts of on-line content providers to target a given area—has been adopted by some courts as a more nuanced jurisdictional standard intended to permit greater certainty for content providers.¹³⁰ Like the passive-active sliding scale, a targeting analysis seeks to distinguish between the mere publishing of on-line material and “something more.” It recovers the ability of the passive-versus-active test to distinguish among the intent of on-line actors, but would appear to provide greater certainty regarding liability to content providers than a sliding scale.¹³¹ It could even take into account the attempts of content providers to jurisdictionally avoid targeting the forum state.¹³²

Flipped again, while a targeting test offers a seeming step forward toward providing greater certainty for on-line publishers, it fails to capture the true polymorphous impact (read: effect) of online communications. As a solution for commercial actors within the U.S., it would, within a system of uniform national law, represent a step forward in reconciling federalism and cyberspace. However, it demands too much forbearance by foreign states that no longer desire to be adversely impacted by culturally offensive content. Were disputes to hinge on whether a site was targeting a specific forum, regulatory uncertainty would merely shift toward a given court’s definition of “targeting” and a case-by-case assessment of the de-

130. For example, in *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000), a dispute over the “masters.com” domain name, the Ninth Circuit stepped beyond an effects-based analysis to require “something more,” namely “targeting”:

We have said that there must be “something more,” but have not spelled out what that something more must be. We now conclude that “something more” is what the Supreme Court described as “express aiming” at the forum state. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

Id. at 206. See also *American Information Corp. v. American Infometrics, Inc.*, 139 F. Supp. 2d 696 (D. Md. 2001) (finding that a web presence without targeting of the forum in question, Maryland, did not yield personal jurisdiction).

131. See Geist, *supra* note 5 (proposing a targeting-based approach to transnational jurisdiction). Similarly, the American Bar Association Internet Jurisdiction project, which released a report in 2000, recommended targeting as a means of addressing on-line jurisdiction. See American Bar Association, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created By the Internet* (2000) at <http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf> (last visited Apr. 3, 2003).

132. Geist suggests that a targeting-based approach would be a first step, standing alongside an assessment of 1) contractual agreements, such as forum selection clauses, 2) jurisdictional avoidance technologies rooted in geo-location, and 3) actual or implied knowledge, such as the exchange of information or commercial goods into a foreign forum. See Geist, *supra* note 5, at 1386. Together, Geist anticipates, rightly in my view, that these factors would better anticipate the ability of on-line actors to foresee the regulations imposed upon them relative to their actions.

defendant's actions. This discretion is likely to reintroduce the difficulties inherent in the subjective application of an effects-test, as courts will be likely to interpret "targeting" in a way that befits their own national interest. In the unlikely case that a common definition could be agreed upon, then sites that failed to "target" a forum state would be immunized, leaving states legally defenseless.

Despite its limitations, then, national courts assessing jurisdiction over local harm originating abroad are likely to continue to favor the broad jurisdictional reach of the effects-based test over more refined alternatives. On a case-by-case basis "courts and policy makers may have a bias towards protecting local citizenry from commercial or content-based harm," even if from a distanced perspective, "the issue is further complicated by the fact that all countries face the same concern."¹³³ Accordingly, while a country may wish to protect its own citizens by asserting jurisdiction over out-of-country entities, it would prefer that other countries not exert the same authority over its own citizens and companies. Theoretically, a jurisdictional quid-pro-quo might develop, whereby a reciprocal exchange and recognition of state sovereignty would balance efforts on both sides.¹³⁴

When it comes to local values, however, states are unlikely to yield on substantive aspects of law to some form enlightened collective interest. As we consider the integration of local regulations within the global network, it is fitting to interpret *Yahoo!* and its progeny as expressions of a European regulatory methodology, opposed to the United States' cultural and technological hegemony of the on-line world. Comprehending the impetus that drives the unilateral regulation of speech illustrates that the conflicting regulatory goals of states will continue to represent an intractable problem in the maintenance of a shared communications infrastructure.

133. Geist, *supra* note 5, at 1358.

134. Lawrence Lessig utilizes the example of Minnesota's desire to enforce state anti-gambling laws to illustrate the dynamic of a jurisdictional quid pro quo in which states support each others regulatory aims:

Why would any other jurisdiction want to carry out Minnesota's regulation? The answer is that they would not if this were the only regulation at stake. Minnesota wants to protect its citizens from gambling, but New York may want to protect its citizens against the misuse of private data. The European Union may share New York's objective; Utah may share Minnesota's. Each state has its own stake in controlling certain behaviors, and these behaviors are different. But the key is this: the same architecture that enables Minnesota to achieve its regulatory end can also help other states achieve their regulatory ends. And this can initiate a kind of quid pro quo between jurisdictions.

LESSIG, *supra* note 11, at 55.

IV. GLOBALIZATION AND THE REGULATION OF EXPRESSIVE COMMODITIES

A. *Redefining Pluralism and Public Order*

As Daniel Farber notes, “Internet issues are often, in the end, merely examples of the stresses of globalization.”¹³⁵ Disputes over international jurisdiction concerning subjective subject-matter disputes demonstrate that it is impossible to extricate international legal decision-making from the politico-economic and cultural aspects of globalization. The Internet throws into relief the diversity and dissonance of the perspectives that characterize our world, and in doing so heightens the difficulties autonomous nations face in striving to define themselves; forcing the international community “to face anew the tension between pluralism and order.”¹³⁶

The contests over the extraterritorial enforcement of on-line regulation mirror debates over the widening scope and intrusive impact of America’s extraterritorial enforcement of its domestic antitrust laws during the first half of the twentieth century. The development of antitrust laws provides an inverted case study for the expansion and retraction of state power and regulatory priorities across borders. Initially, American antitrust law was rooted in isolationism and courts interpreted the Sherman Act to extend only so far as the nation’s borders.¹³⁷ As the U.S. became increasingly implicated in the world economy, it sought to further its economic goals and the benefits of enhanced free trade. Isolationism was displaced, as American courts gradually extended their sphere of influence under the law. An effects-based jurisdictional test that connected actions in foreign states with their economic impact state-side enabled U.S. courts to redefine the relationship between U.S. judicial power and activities overseas.

The trend culminated in *United States v. Aluminum Co. of America*, (Alcoa)¹³⁸ in which Justice Holmes, sitting in designation for the Supreme Court, “extended the reach of antitrust legislation significantly, holding that wherever there is an action which, if performed within the United States, would be illegal, combined with an effect on U.S. imports or exports and the intention to produce that effect, then the application of

135. Daniel Farber, *Symposium: Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789, 808 (2000).

136. *Development: VI. Cyberspace Regulation and the Discourse of State Sovereignty*, 112 HARV. L. REV. 1577, 1703 (1999) [hereinafter *Cyberspace Regulation and the Discourse of State Sovereignty*].

137. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357–58 (1909).

138. 148 F.2d 416 (2nd Cir. 1945).

U.S. antitrust jurisdiction will be appropriate.”¹³⁹ The advancing extraterritorial stretch of U.S. law correlated with the apex of its global power:

This dramatic increase in antitrust scope as set forth in *Alcoa* and the many cases following it, was perfectly appropriate to the time period. The United States was at the peak of its power; therefore, antitrust statutes could reach farther than ever before. Since the United States was driving the world’s economy, it was logical for it to be able to impose its ideas of unfair competition as well. In defining and maintaining the marketplace, the United States added its own antitrust ideals.¹⁴⁰

The gradual expansion of American antitrust power through the use of the effects-test set the stage for the contemporary jurisdictional conflicts described here; which are equally rooted upon economic interdependence, cultural friction, and political differences. It is noteworthy that following the highpoint of broad American antitrust jurisdiction has followed in the present moment a period of nominal international cooperation and harmonization,¹⁴¹ along with the occasional expression of regulatory autonomy by European states.¹⁴²

In an era of new technologies, where American free speech advocates cheerfully note that the Internet is likely to increase “cultural diffusion,” *Yahoo!* and the related cases discussed above show that other cultures have seen new communications technology as part of “the assault of U.S. cultural imperialism.”¹⁴³ As we have seen, the development of the Internet as a global medium coincided with U.S. control of the technical infrastructure. While the initial technological state of affairs originated largely in technical and not governmental decisions, it should be no surprise that the technologies have been interpreted as exporting American values and that European states have reinvigorated the effects-test as countervailing mechanism.

Despite postmodern assertions that non-geographic communities will replace regional affiliations and values, *Yahoo!* reflects a future of on-line regulatory struggles that will proceed against the backdrop of an

139. Courtney G. Lytle, *A Hegemonic Interpretation of Extraterritorial Jurisdiction in Antitrust: From American Banana to Hartford Fire*, 24 SYRACUSE J. INT’L L. & COM. 41, 58 (1997).

140. *Id.* at 59.

141. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1992); *Timberlane Lumber Co. v. Bank of America Nat’l Trust and Sav. Ass’n*, 549 F.2d 597, 613–15 (9th Cir. 1976).

142. See, e.g., Case COMP/M.2220, *General Electric/Honeywell v. Commission* (2001), available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf (last visited Apr. 3, 2003).

143. Froomkin, *supra* note 64, at 1109 (citing Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI.-KENT L. REV. 997, 1035–36 (1998)).

Internet that continues to blend an at once borderless and nationally-divided globe. Joel Reidenberg notes:

The *Yahoo!* decision reflects a shifting economic and political power struggle on the Internet that suggests that the American [approach to regulation] is rapidly becoming a minority view. In fact, up until 2000, the United States had an absolute market share of Internet content and use. But, during 2000, non-U.S. use grew dramatically. At mid-year, only a slight majority of web use was in English. By the end of 2000, fifty-five percent of web traffic originated outside the U.S. And in France alone, the number of Internet users rose sixty-five percent to 6.8 million web users.¹⁴⁴

Given the diversification of the on-line population, France's protective action and the decisions following it can be understood as a response to the "indirect unilateralism" of the United States' governance of the Internet.¹⁴⁵ From the perspective of Europe, the Internet has been an American invention and medium—at both the underlying technical level and the substantive content level. It is not surprising that the intrusive nature of new communications technology has brought with it many of the familiar problems of globalization. As a conduit for commerce and information, the Internet may significantly impact the formation and maintenance of cultural norms: "By reducing communication barriers between people, it can have effects not unlike those of lowered trade barriers. Like World Trade Organization (WTO), the Internet is a powerful instrument of globalization . . . [at the same time] the Internet threatens what limited power local communities have to maintain their cultural integrity."¹⁴⁶

The cultural impact of new technology is heightened by the primary role of information goods within the global communications network. One cannot understand *Yahoo!* and the related rulings without acknowledging the privileged position of expressive commodities—"economically valuable information transmissions"¹⁴⁷—in the on-line environment. On-line transmissions that serve both a commercial and informational role collapse the boundary between speech and commerce.

144. Reidenberg, *supra* note 2, at 263 (citing *Les Internautes: Les Langues Utilisees Sur le Net*, LE JOURNAL DU NET, 2002, at http://www.journaldunet.com/cc/cc_inter_mde3.shtml (last visited Apr. 3, 2003); and *55 Percent of All Web Traffic Worldwide Comes from Outside of the United States*, STATMARKET, Jan. 23, 2001, at <http://www.statmarket.com/cgi-bin/sm.cgi?sm&eature&stat012301> (last visited Apr. 3, 2003)).

145. Franz C. Mayer, *Europe and the Internet: The Old World and the New Medium*, 11 EJIL 161 (2000).

146. Farber, *supra* note 135, at 792.

147. *Id.* at 789–90.

While “the commercialization of information is nothing new. What is new is the extent to which commerce now involves information exchanges rather than transfers of material objects.”¹⁴⁸ *Yahoo!* demonstrates the fact that “trade issues and emerging First Amendment issues are beginning to bear at least . . . a family resemblance,”¹⁴⁹ an overlap that complicates the question of extraterritorial Internet regulation.

Again, the common criticism that the U.S. is able through its relative power to “determine much of the public world order,” is heightened in the online context, where the United States has controlled the technological infrastructure of the medium.¹⁵⁰ Because of the pattern of the Internet’s growth, individuals from the United States and like-minded countries established most currently existing norms.¹⁵¹ Whereas before technologists “largely defined important information policy rules through technical choices and decisions without political intervention . . . *Yahoo!* shifts this rule-making power back to political representatives. In particular, Europe has demanded a place for its own regulatory methodology in considerations regarding the development of the network.”¹⁵²

B. A Safe Harbor for Hate Speech

It is no surprise that the European dissatisfaction with the U.S. approach to regulation finds its most vocal expression, exemplified by the *Yahoo!* case, in criticisms that the U.S. constitution affords a haven for hate speech.¹⁵³ This area represents in starkest terms the status of the United States as an outlier, at once a part of and removed from the international community. While the European community has developed a substantive body of law and international standards regarding the incite-

148. *Id.* at 807.

149. *Id.*

150. James C. Hathaway, *America, Defender of Democratic Legitimacy*, 11 *EJIL* 121, 123 (2000).

151. See Timothy Wu, Note, *Cyberspace Sovereignty? The Internet and the International System*, 10 *HARV. J. L. & TECH.* 647 (1997).

152. Reidenberg, *supra* note 2, at 272. In the context of privacy, the European community has taken a parallel collective stance in opposition to the United States with the adoption of stringent privacy regulations. See, e.g., Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals With Regard to Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281).

153. See, e.g., Lisa Guernsey, *Mainstream Sites Serve as Portals to Hate*, *N.Y. TIMES*, Nov. 30, 2000, at G1; see also Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 *SAN DIEGO L. REV.* 817, 838 (2001) (describing how “[h]ate groups have found a haven in the United States for their Internet sites because the Supreme Court has significantly limited the government’s ability to prohibit the distribution of racist, provocative materials”).

ment of hatred in the furtherance of equality, the United States has been at best a partial participant.

Although the United States has become a party to several international human rights conventions that require a more aggressive approach to bigotry and hate, as described below, it has done so consistent with its policy of adapting numerous reservations, understandings, and declarations (RUDs) to all treaties. The RUDs seek to contract out of the objectionable provisions of these instruments that might be deemed to conflict with the Constitution, in particular with regards to speech. For example, the United States has ratified the International Covenant on Civil and Political Rights,¹⁵⁴ an accord that is now ratified by or binding on over 140 of the world's states. The Covenant articulates under Article 20 an international standard in opposition to discrimination and bigotry, requiring that for all signatories, "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."¹⁵⁵ Faced with that duty, in 1992, some twenty-three years after this international treaty came into force, the U.S. government attached a reservation to its ratification of the treaty stating: "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."¹⁵⁶

Similarly, the *International Covenant on the Elimination of All Forms of Racial Discrimination*,¹⁵⁷ which has been in force since 1969, was not ratified by the United States until 1994.¹⁵⁸ Under Article 4 of the convention, states are required to make it an offense punishable by law to disseminate ideas based on racial superiority or hatred. It also requires states to declare illegal and to prohibit racist organizations and to make it an offense to belong to such associations. Unsurprisingly, the United States has entered a reservation with respect to Article 4. 41, that stands in the way of full implementation.¹⁵⁹ The reservation states that the

154. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

155. *Id.* art. 20, 999 U.N.T.S. at 178.

156. 138 CONG. REC. 8,070 (1992).

157. Mar. 12, 1969, 660 U.N.T.S. 195 [hereinafter Race Convention].

158. 140 CONG. REC. 12,185 (1994).

159. Article 4 provides in relevant part:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal

United States does not accept any obligations to restrict the rights of speech, expression, and association.¹⁶⁰

The friction between the United States' laissez faire approach to objectionable content and the European approach is reinforced as the European community strives to translate the distinct commitments of its regulatory framework and political ideals—a focus on localism and human rights—into the future.¹⁶¹ This perspective is articulated, for example, in the words of the French Council of State in a 1998 report on the regulatory options for Internet:¹⁶²

The point is to prove, once again, is the ability of our Old World to imagine tomorrow's world, given our continent's cultural diversity and attachment to the defense of human rights. The general philosophy behind this report might be summed up by the objective whereby digital networks become a space for "world civility," civility being defined as "the art of living together" From the European perspective, while the balkanization

Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Race Convention, *supra* note 157.

160. 140 CONG. REC. 12,185 (1994).

161. Notably, outside of Internet regulation, the U.S. has embraced an expressed commitment to localism as a foundational core of its communications regulatory policy. This normative significance of localism is evidenced, for example, in the "must-carry" rules at issue in the Turner Broadcasting cases. See *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) [hereinafter Turner I]; and *Turner Broadcasting System v. FCC*, 117 S. Ct. 1174 (1997) [hereinafter Turner II]. In the *Turner Broadcasting* cases, the Court split 5–4 in 1994, and again in 1997, on whether rules requiring cable operators to carry local broadcast signals on demand was content regulation. A majority of the Court found they were not, and sustained the regulations as justified by a substantial governmental interest. See *Turner I*, 512 U.S. at 662–63; *Turner II*, 117 S. Ct. at 1186–89, 1195–97.

162. Conseil d'Etat, *Internet et les réaux numériques* 14 (July 2, 1998) available at <http://www.internet.gouv.fr/francais/textesref/rapce98/accueil.htm> (last visited Apr. 3, 2003).

of the Internet might not be desirable, the American privileging of the market has had a detrimental impact of cultural integrity.¹⁶³

While the Internet may have been most closely associated with the United States, the transition away from U.S.-centric norms necessitates as well a shift away from the U.S. predominance over “Internet governance.” There is a mounting pressure for the American government to forfeit its control over the Internet’s technical infrastructure.¹⁶⁴ The *Yahoo!* dispute and similar cases “place pressure on the predominant economic rationale of the debate on Internet governance to take account of human rights and the regional dimension of Internet regulation.”¹⁶⁵ While virtual borders will serve as part of the transition toward the increased relevancy of national regulation, their impact should not be overstated. An interconnected network is not an American interest, but a global interest; a geo-politically divided Internet would be sure to facilitate national governance, but would come at the cost of the World Wide Web.

V. A DYNAMIC MODEL OF ONLINE REGULATORY IMPACT

A. Understanding Technology as a Regulatory Constraint

To return to our primary question: Can the use of extraterritorial jurisdiction to regulate speech on the Internet be both a manageable and efficient means of utilizing state power? As should now be clear, the approaching transitions in the on-line network infrastructure necessitate an integrated model that reflects the mutual interdependence of actors within a global network, the friction arising from competing policy-making agendas, and the variety of ways in which states are able to

163. *Id.* Within the European community, the importance of cultural integrity and localism has been reflected in another area of media regulation through the Television Without Frontiers Directive. The “Television without Frontiers” Directive, Council Directive No. 89/552, 1989 O.J. (L 298) 23 (amended 1997), establishes the legal framework for “the free movement of television broadcasting services in the European Union, in order to promote the development of a European market in broadcasting and related activities.” The European Commission, *Audiovisual Policy*, at http://europa.eu.int/comm/avpolicy/extern/coe_en.htm (last modified Feb. 19, 2001). Article 4 of the Directive has received considerable criticism for its programming quota provision, which calls for all channels to run at least fifty-one percent of television programming from sources within the EC. See Kevin M. McDonald, *How Would You Like Your Television: With or Without Borders and With or Without Culture—A New Approach to Media Regulation in the European Union*, 22 *FORDHAM INT’L L.J.* 1991 (1999) (discussing the effectiveness of television broadcasting regulations as a means to effectuate the promotion and protection of a pan-European culture). Confronting the transition to digitalization, the directive grapples openly with maintaining local values—here, the common culture of the European community—in confrontation with American cultural goods.

164. See, e.g., Mayer, *supra* note 145.

165. *Id.* at 169.

effectuate regulatory goals. A model that takes into account each of these factors will take us closer to a true assessment of the assertion that, in an era of bordering technologies, the impact of unilateral regulatory moves in the online world can be effectively cabined. Yochai Benkler offers us such a model, challenging us to reconsider the impact of state-based jurisdictional decision-making on the development of the network considered as a whole.¹⁶⁶

As Benkler shows, regulatory spillover arising from expressive regulation merits distinctive treatment within internal national policy given the interdependent nature of the digital network. Whereas the application of state-based law demonstrates that Internet users are not removed from the real world, the impact of national regulations on individuals will depend upon the extent to which cross-border on-line actors remain affixed to one another through the network. To the extent that they remain interconnected, the regulatory impact of national regulations will continue to be deeply felt by other states.

By approaching Internet regulation as a dynamic system, Benkler shows that on-line activities are controlled by the intersection of three factors: law, technology, and behavioral adaptations.¹⁶⁷ These elements interact with one another to “constrain the parameters of human behavior that is bound up with the technology.”¹⁶⁸ Such an approach, through its inclusion of technology’s ability to transmit values through behavioral constraints, adapts a broader definition of what constitutes regulation in the on-line world than the conventional assessment of legal regulation, with its focus on the interplay of law and behavior (and sometimes norms).

Stepping beyond Goldsmith’s inattention to the distinctive attributes of online communications, Benkler’s approach is founded upon the premise that the Internet is a global digital network, and that therefore “the incorporation of values of one nation into the technology of communication shared by many displaces those other nations, while a nation that refrains from such incorporation is exposed to communications that implement the values of another.”¹⁶⁹ Within a bilateral system, law and behavior constrain one another and spillover impact is relatively contained. In contrast, “the dynamic causal relationship between law and technology means that many more decisions about local law are trans-

166. Benkler, *supra* note 3.

167. *Id.* at 173–75.

168. *Id.* at 176. See also Yochai Benkler, *Communications Infrastructure Regulation and the Distribution of Control over Content*, 22 TELECOMM. POL’Y 384 (1998); and Yochai Benkler, *Overcoming Agoraphobia: Building a Commons in a Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998).

169. Benkler, *supra* note 3, at 174.

lated, in a digitally networked globe, into behavioral constraints in other nations.”¹⁷⁰ Critically, when technology serves as a “means of transmitting the values of one nation as behavioral constraints in another, it serves to alter the relationship of users throughout to information they seek.”¹⁷¹

Suppose, for example, that following the French prohibition Yahoo! elected to continue providing Nazi memorabilia. Jurisdiction-avoidance could be expected to raise the cost of material, due the internalization of Yahoo’s costs for filtering out French users. Goldsmith understands this cost—the internalization of social and financial costs of discrete actions by multinational actors—to be the main consequence of unilateral regulations. However, as Benkler points out, to effectively prevent materials from entering states where they are not permitted will require “extensive self-identification of users before they receive access to information.”¹⁷² This will “change how the server interacts with all users, from all jurisdictions, in order to keep the server safe from liability in a single jurisdiction.”¹⁷³ Regulatory spillover, therefore, occurs at the basic level of “the relationship that everyone, everywhere, has with the information.”¹⁷⁴ Not only does regulation make it more difficult for everyone to receive the material in question, but it makes it harder to sustain competing regulatory goals. For example, consider the impact that a national identification system implemented by on-line content providers would have on the competing regulatory principles of anonymity and privacy.

In a dynamic system like the Internet, such a “quasi-Coasian reciprocity of effect of encoding values as behavioural constraints is unavoidable.”¹⁷⁵ In a digitally networked environment, states can enter at either the level of law or technology to impact the system and establish rules for everyone. The important point is that, in a playable system, states are just as likely to find their own regulatory goals stifled by this process as they are likely to see them fulfilled. Our shared technological infrastructure entails that “regulatory costs that ordinarily affect only a particular jurisdiction’s residents, [on the Internet allow] a community to impose these costs on distant populations and individuals that adhere to differing normative frameworks.”¹⁷⁶

170. *Id.*

171. *Id.*

172. *Id.* at 178.

173. *Id.*

174. *Id.*

175. *Id.* at 174.

176. *Cyberspace Regulation and the Discourse of State Sovereignty*, *supra* note 136, at 1696.

B. *Yahoo! Reconsidered*

Benkler's model enables us to focus on the French court's recourse to technology in *Yahoo!*, and to conceptualize it as a fundamentally preferable means of regulating on-line behavior from the perspective of the harmed party. Yet, it qualifies the inherent attractiveness of "virtual borders" as a regulatory tactic for the international community by highlighting the deeper indirect impact of such a move. If our regulatory methodology incorporates technological constraints, geo-location technologies are an imperfect fix. By "imposing the development of technical capacity to accommodate competing democratically chosen rules in the network infrastructure,"¹⁷⁷ *Yahoo!* disturbs Goldsmith's presumption that Internet content providers will not be subject to any regulation other than in territories where they have a financial or physical presence. In other words, even virtual borders, when imposed on out-of-state actors, can be understood as a unilateral regulation impacting other states and their definition of free expression.

The dynamic model demonstrates the need for continued concern over unilateral actions, beyond mere First Amendment rationales focused on a regulatory race-to-the-bottom. From the perspective of efficiency, spillover minimization makes good policy as states contemplate a variety of regulatory endeavors in areas such as privacy and intellectual property as well as the control of expressive content. These regulatory "ventures are likely to result in dissension [among international players] regarding their appropriateness, necessity, applicability and impact, as each attempts to harness the power of the Internet according to the regulating state's own self-interest."¹⁷⁸ Without cooperation, such efforts "may result in the promotion of numerous antagonistic ideals each advocated by a [particular] sovereign state interest."¹⁷⁹

Ultimately, the interconnected nature of networked life, makes the structuring of the network a "valid normative concern for everyone,"¹⁸⁰ and favors an approach to the Internet as itself an international regime. The impending internationalization of Internet rules and design features necessitates a deeper consideration of the impact on the international system than recognized by decisions like *Yahoo!*. It requires an application of a principle of cooperation, a duty on the part of nations to include in both their legislative processes and judicial decision making—for

177. Reidenberg, *supra* note 2, at 272.

178. Joshua S. Bauchner, Note and Comment, *State Sovereignty and the Globalizing Effect of the Internet: A Case Study of the Privacy Debate*, 26 BROOKLYN J. INT'L L. 689, 716 (2000).

179. *Id.* at 717.

180. *Id.*

their own benefit—the effects of their actions on other nations. To take cooperation seriously, national courts should favor strategies that aspire to be least disruptive to the global network and the international regulatory system. The demand from the European community for the U.S. to acknowledge the Internet as a global medium—to concede that national governments have legitimate interests in regulating certain activities and content—entails a parallel acknowledgment that their regulatory actions overseas will have a recursive impact on all on-line regulatory players, including themselves.¹⁸¹

VI. BEYOND UNILATERALISM

To assess the impact of extraterritorial Internet regulation from the perspective of the international order is not to devalue the interests of states in protecting their respective domestic affairs. Rather, it is to ask how the application of the international law of jurisdiction may “best answer[] the institutional needs of the international judicial system” and most “effectively coordinate the allocation of international regulatory authority.”¹⁸² The standoff between America’s indirect unilateralism and the European response rooted in effects-based jurisdiction is unlikely to promote the overall collective good; instead, we should favor the technical evolution of the medium as a collaborative enterprise.

Clearly, as Goldsmith notes, “there is no legal or moral principle that requires [states] to yield local control over its territory in order to accommodate the users of the Internet in other countries.”¹⁸³ However, if even in a future era of virtual borders state decisions remain mutually implicated, the question becomes what is the most efficient and democratic means for states to control order within their territory. While unilateral prescriptions focused on an extraterritorial action’s local harm are legitimate under international law, they may still adversely impact the international system and its emergent development.

The likelihood is that, in the future, national courts will cease deferring to the technological capacity of the medium, as it exists. Yet, “[t]he

181. The inherent attractiveness to national courts of the effects-based test for matters of substantive normative conflicts can be flipped to capture the extension of national law into foreign forums. *See id.* at 695 (“By extension, the ‘effects test’ also can be used to gauge the effects of a foreign state’s laws upon another state, as opposed to an entity’s activity causing effects within a forum warranting jurisdiction. In this capacity, the “effects test” is used to determine infringements upon a state’s sovereignty vis-à-vis another state’s actions.”) (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976)).

182. Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT’L L. J. 373, 423 (1995).

183. Goldsmith, *supra* note 75, at 201.

resulting panoply of conflicting laws is not likely to further the technology's evolution or serve to benefit its users."¹⁸⁴ Ultimately, states must recognize that, "because of the global characteristic of information and its centrality to the modern economy, their own self-interest lies in compatible legal regimes, workable international standards, and global cooperation."¹⁸⁵

Admittedly nations face a difficult decision between over-inclusive and inclusive measures. If they under-enforce as before, they will find their regulatory goals are frustrated. If states choose to over-enforce, then they encourage legal and political conflicts with other players in the international system. However, a combination of cooperation, externally with other states, and restraint, as an internal public policy, may lead to enhanced cooperation overall.

In matters where consensus is possible, nations should come to agreement and in areas—such as subjective subject-matter disputes—where consensual substantive decision-making is unworkable nations should use a variety of mechanisms to insulate themselves. The absence of extraterritorial enforcement does not necessitate deferral to the permissive status quo; it favors instead the adoption of a regulatory methodology that utilizes technical means to achieve national self-regulation. Thus, future regulatory efforts, in order to conform with the principles of international law and prevent conflict among states, should depend in part upon state-based self-regulation toward the continued evolution of the medium.

A. *International Harmonization*

The preferred method for obviating international regulatory conflict is recourse to harmonization techniques and supranational decisions. As many have argued, international cooperation regarding the implementation of on-line rules is possible through agreements about responsibility for regulation or through harmonization of regulations themselves. In the future, Internet regulation will require international arrangements that transcend state borders and originate beyond independent state governmental processes; collective efforts that arise either through private enterprise by non-state entities, such as technical-standards bodies, or governmental collaboration. In these areas, the Internet encourages the internalization of international law.

Where the target of regulation is not controversial, consensus should enable international cooperation to be achieved rapidly and in a compre-

184. Bauchner, *supra* note 106, at 717.

185. Fred H. Cate, *Global Information Policymaking and Domestic Law*, 1 *IND. J. GLOBAL LEG. STUD.* 467, 487 (1994).

hensive manner. Already, various harmonization strategies are being employed to address the challenges within the international community of regulating on-line behavior. The most prominent example are the recent agreements in the arena of intellectual property, securing the protection of content holders rights in the on-line environment.¹⁸⁶ Similar efforts are underway through the Draft Convention on Cybercrime—an Act touted as the “first international computer crime agreement”—currently being negotiated by the United States and the 41-nation Council of Europe.¹⁸⁷ Furthermore, the necessity for clarity in commercial transactions has spurred international conversation about harmonizing jurisdictional law. The proposed Hague Convention on International Jurisdiction has sought, with opposition from U.S. business and consumer groups, to create a set of internationally accepted principles.

When there is wide accord on an issue, coordinated action might not be necessary. Thus, there are a handful of issues, such as child pornography and fraud, where there is widespread agreement on the need for government involvement. Such near universal agreement, has enabled “efforts by the [United States] Federal Trade Commission and other consumer protection agencies targeting Internet fraud, regardless of its origin, [to] meet with little global criticism.”¹⁸⁸

On the flipside, there are clear dangers inherent in harmonization. Some harmonization efforts reflect coercion on the part of powerful nations, rather than fair or efficient regulatory improvements. As we have seen, the Internet, far from being an emergent self-ordering system, is deeply dependent on the control of key players—in particular, those in control of the fundamental design decisions. In the future, the burdens of cooperation and restraint will likely fall upon the party with the most to lose, namely, the United States. Even where the U.S. participates in international decision-making, “Europeans suspect that public and private interests in the U.S. are aiming at structuring the use of and the behavior in the digital networks along American lines, which is associated with a purely economic rationale.”¹⁸⁹ The U.S. impact on the WIPO treaty has been criticized on precisely these grounds.¹⁹⁰

For the U.S. to protest the application of an effects-based test in the context of free speech smacks with hypocrisy at a time when U.S. courts

186. See World Intellectual Property Organization Copyright Treaty, Dec.20, 1996, art. 14(1), 36 I.L.M. 65, 72. (adopted by the Diplomatic Conference at Geneva, outlining provisions for protection of literary and artistic works in light of new technology).

187. See Jay Fisher, *The Draft Convention on Cybercrime: Potential Constitutional Conflicts*, 32 U. WEST. L.A. L. REV. 339 (2001).

188. Geist, *supra* note 126.

189. Mayer, *supra* note 145, at 150; and Conseil d’Etat *supra* note 162, at 13.

190. See Benkler, *supra* note 3, at 179–84.

have found it convenient and suitable to apply U.S. law to foreign entities, in the case of intellectual property offenses,¹⁹¹ domain name disputes,¹⁹² and on-line gambling cases.¹⁹³ Like their European brethren, in each category, U.S. courts have found jurisdiction and applied national law without regard for the conflicting governing law of the competing jurisdiction. In the future, to secure its own regulatory goals, the U.S. must play with an even and balanced hand—especially if it seeks to safeguard freedom of speech within its own borders.

B. *Strategies for National Self-Enforcement*

Harmonization will not be an effective or comprehensive response to conflicts among regulations that reflect local values, and in such areas, it can be said that “there are good reasons for regulatory differences among nations.”¹⁹⁴ When it detracts from distinct normative considerations, nations will understandably view harmonization at the substantive level to detract from their sovereign interests.¹⁹⁵ If there is indeed an intractable conflict between a First Amendment approach and the European approach that balances free speech against human dignity, zoning the net may represent a substantial part of the solution. However, countries that contest should be the ones to make the decision. If a

191. See *supra* note 126.

192. See, e.g., *CNN v. CNNNews.com*, 162 F. Supp. 2d 484 (E.D. Va. 2001) (ruling that under the Anticybersquatting Consumer Protection Act (the “ACPA”), a “.com” Internet domain name holder located abroad could be subject to United States in rem jurisdiction based on the location of the “.com” registry in the U.S., despite the fact that the registrant had no contacts with the U.S.).

193. In the first decision by a U.S. court that online gambling violates state and federal law, *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. County Sup. Ct. 1999) (finding jurisdiction over business offering Internet gambling to New York residents), the court reasoned that the company’s Website created a “virtual casino within the user’s computer terminal within the user’s computer terminal.” *Id.* at 852.

194. Reisman, *supra* note 10, at xvi (“A government’s fundamental purpose is to protect its community. Protection is often conceived of in territorial and military terms, but what is really at stake is the integrity of the social and economic processes that are the life of the national community.”).

195. Goldsmith argues that we may in fact transition toward more substantive harmonization on normative matters:

[W]e are likely to see soft harmonization of contested national regulatory regimes before we see hard harmonization. With issues like privacy, consumer protection, and free speech, the most feasible approach for harmonization in the short run is through informal means such as informal enforcement agreements, targeted goals, a softening of unilateral extraterritorial enforcement on a case-by-case basis and information sharing. These soft strategies can help to reduce regulatory difference, and can lead to hard harmonization agreements.

Goldsmith, *supra* note 75, at 206. Given the deeply incompatible normative positions of states exemplified by *Yahoo!*, I am less optimistic about the prospects for substantive internalization—soft or hard.

national government views regulation in the protection of local values as sufficiently important to impose costs on the reception of information for its citizens, then that government is the best situated to access the relative costs and benefits of regulation.

When local values are at issue, unilateral actions against selected Internet actors are likely to be inefficient and incomprehensive. Multinationals are likely to adapt behavioral practices and technological means to avoid undesirable jurisdictions. Yet, given the strict territorial limits on enforcement, small actors who are deliberate in maintaining no assets or contacts with a forum will continue to be a problem. As Michael Geist notes: "Shutting down Nazi memorabilia websites on Yahoo! will not eradicate Nazi materials from the Internet. The Internet is a vast space and if there is demand, Web sites will meet that demand no matter how objectionable the content."¹⁹⁶ Similarly, an additional and inevitable hurdle is the fact that some states will refrain from cooperation on regulatory agreements through extradition or enforcement of court decisions, entailing that harmonization will not itself be sufficient to protect states' regulatory interests.

Protective action and spillover minimization is possible through national self-regulation. In particular, for content regulation, indirect regulation enables states to protect their interests and community while minimizing impact on the system overall. First, states can enforce their laws against their own citizens and other persons within their territory, punishing them for accessing materials deemed harmful to civil society. Second, rather than mandate geo-location upon offensive publishers, it is easier (albeit difficult and possibly politically unpopular) for a country to limit its own citizens' access to the Internet. Some countries—such as China and Saudi Arabia—"maintain control through government servers that censor incoming news and information."¹⁹⁷ Citizens, in such states, are only allowed to access the internet through the government servers, and "[p]enalties including imprisonment await citizens who use faxes, cell phones, or codes to circumvent the government ISP."¹⁹⁸ European countries that found the extreme methods used by China and Saudi Arabia unpalatable could also explore less restrictive and more balanced measures, such as requiring all private ISPs or users to install blocking software that would screen for particular words. In short, nations can take significant steps to prevent their citizens from being exposed to materials it considers dangerous or offensive without exerting extraterritorial jurisdiction over foreign content providers.

196. Geist, *supra* note 127.

197. Sussman, *supra* note 51.

198. *Id.*

Thus, while new technologies challenge the autonomy of states they can also be flipped to reinforce “information sovereignty.” In areas such as speech—where the perceived harm is one of visibility and the publisher is unlikely to have dispersed assets—these approaches are particularly apposite. Given that on-line content regulation is intended to reinforce community integrity—the ability of communities to maintain the character of their public spaces without being confronted with certain material—a strategy of national self-regulation enables a more comprehensive and immediate alternative to extraterritorial enforcement. In *Yahoo!*, for example, a more effective and efficient strategy would be national filtering at the ISP-level. Threatened with being blacklisted *Yahoo!* could then chose to adapt its behavior if it valued access to French markets, while France’s public order would be protected regardless of its ability to enforce its laws extraterritorially.

Foreign countries, then, have several less restrictive means of protecting their interests when it comes to speech that fall short of seeking to directly regulate extraterritorial conduct. While nations have no obligation to abide by such less restrictive means, considerations of what is best for the international system recommend such approaches. The main advantage such methods offer is for nations to maintain the integrity of their own regulatory framework, without establishing undue and unnecessary burdens on competing sovereign entities.

C. *Recalculating the Costs of Unilateral Action*

Recognizing the inefficient and incomplete nature of the remedy offered by the French decision in *Yahoo!*, French hate-speech activists followed the *Yahoo!* suit by seeking an order in French court requiring French ISP’s to filter content from a U.S. hate speech portal, Front14.org, a Internet content provider lacking the reputation or commercial holdings of *Yahoo!*.¹⁹⁹ The portal hosts web sites for about 400 groups, some of which are European-based and post neo-Nazi, anti-Semitic and racist content in European languages. International Action for Justice (AIPJ), a French anti-racism group known as J’accuse, and other such groups filed a lawsuit seeking to compel 13 French ISPs, which include France Telecom and AOL France, to block the Front14.org portal and the Web sites it hosts. However, Judge Jean-Jacques Gomez, the same French judge who had earlier ordered *Yahoo!* to adopt technology to comply with French law, refused to order French ISP’s to filter content from the portal. Faced with the claim from the French ISPs that they should not be forced to act as on-line censors, the

199. Steve Kettmann, *Another Hate Site Trial in France*, WIREd, June 29, 2001.

judge again weighed whether censorship was desirable and technically feasible. However, having considered the technical and financial burdens of ISP filtering, Judge Gomez denied the request.

While Judge Gomez was comfortable in imposing geographic fixes upon Yahoo!, he chose not to order French businesses to absorb the cost of filtering. In part, this can be explained, by the fact that France, like other nations, has limited the liability of local ISPs. Viewing ISPs as conduits rather than publishers themselves, the French court decided that it was in the state's overall interest to not filter through intermediaries because it would have a detrimental impact on the general accessibility and provision of information, a conflicting aspect of French communications policy.

At some level, it may be said that this latter decision merits criticism, to the extent that it lies in tension with the expressed desire of the same court in *Yahoo!* to protect the French citizenry from culturally offensive content. Perhaps more importantly, however, it demonstrates the surprising difference in result that arises once the court was required to assess the value for the French people of imposing technical measures for compliance, as it was no longer able to rely upon the externalization of this burden. Given this change in perspective, we must ask what altered the court's measured assessment of the impact and importance of the regulatory measures as well as their cost?²⁰⁰

The Front14.org case derived from a shift in litigation strategy, originating in the perceived failure of direct unilateral regulation. The plaintiffs understood that the court could not reach out to touch the purveyors of hate speech nor could they rely on the publisher's desire to abide by French law, in the absence of any distinct commercial interest

200. Recent reports about the use of the Internet in China and Iran make clear the conflicting impulses that nations have regarding the integration of new communications technologies. See Erik Eckholm, . . . *And Click Here for China*, N.Y. TIMES, Aug. 4, 2002, Sec. 4, at 5; Nazila Fathi, *Taboo Surfing: Click Here for Iran* . . . , N.Y. TIMES, Aug. 4, 2002, Sec. 4, at 5. These accounts demonstrate that even those states that have been traditionally been sensitive to the intrusion of technology and open communications media are coming to accept the Internet as a entryway to the world—for commercial and cultural practices. In keeping with a history under Communism of information control, China was slow to permit its citizens to access to the Internet, only doing so with governmentally imposed filtration of certain sites. Yet, over time the Chinese government has loosened filtration and now given the proliferation of online cafes and web bars, it far easier to gain casual access to the Internet in China than in the U.S. Eckholm notes, "China is also desperate to catapult into modernity and be a key player in a globalized world, and the government has invested huge sums to wire the country with fiber optics and other advanced infrastructure." Eckholm, *supra*. Nazila Fathi offers a similar assessment of the emergent role of the Internet in Iran, noting, ". . . there is also a pragmatic recognition that the Internet holds a wealth of scientific and technological information, and therefore promises progress. The trade-off is exposure to ideas and forums that run counter to Iran's fundamentalist theocracy—a trade-off that the government, in spite of a few failed attempts to filter Web sites and restrict access, seems resigned to make." Fathi, *supra*.

in reaching French citizens. Yet, the refusal of the court to utilize, in the alternative, indirect means of filtering suggests that it properly understood that the evolution of state-based regulation in this context must remain sensitive to the transmission of technological constraints beyond a given dispute. Faced with the recursive and sweeping nature of a mandated techno-regulatory solution, the inherent appeal of a particular technological fix dissipated. Forced to consider whether or not to fashion virtual borders via national regulation from the inside-out, the French court favored an opposing communications policy: access. It chose to avoid the expansive costs imposed by the permanent imposition of legal and financial burdens on the providers of France's communications infrastructure. Judge Gomez's reconsideration suggests that the desire for states to remain an integral part of the global communications framework and online marketplace may itself lead states to favor a more open communications policy, even absent the embrace of a normative ideal of international cooperation. From the perspective of those who favor a network that privileges the free flow of information, this may serve as an encouraging prospect.

The failure, however, to protect the interests of French citizens in this instance may appear to return us to the technical and informational hegemony of the United States. Yet, may I suggest, this conclusion arises only if one takes a short-sighted and case-specific view of the online regulations framework—a perspective rejected by the Front14.org decision. The ongoing technological enhancements of the global network necessitates that all states, including the United States, begin to reconsider their relative regulatory needs more comprehensively. On balance, as nations consider their needs outside specific judicial disputes, they will be compelled to consider the difficulty of satisfying conflicting goals in an interlocking dynamic system and will be less inclined to favor rigid technical constraints. They may be inclined then to take the long view of a global communications framework and favor a perspective that sustains the network's identity as a cultural and commercial entryway. In turn, they may be inclined to favor flexible and emergent forms of cooperation and collective advancement.

CONCLUSION

Unilateral regulations of the Internet respond to and effectuate the transition beyond the information architecture policy of the United States and its free market bias. While legitimate as a response to local harm originating abroad, unilateralism inevitably impacts the international system and the development of the Internet as a shared global medium.

The privileging of unilateral moves over more comprehensive and effective means of regional protection fails to recognize that “today’s international law is conceived of, if not always practiced as, the international law of cooperation. [That this] is the alpha and omega . . . of general international law.”²⁰¹

The application of a principle of cooperation to cyberspace marks the proper expansion of the tenets of international law as applied to a distinctly international medium. A belief that international law may meet this challenge can perhaps be derived from the similarities between the international legal framework and the Internet itself. Like the Internet, international law is spun from the convergence of shared norms and rules—technical standards that help it operate. Like international law, the Internet is driven by the benefits of and beset by the challenges of a global coexistence. While a new medium, the Internet encourages the application of old strategies and demands of us the implementation of the underlying commitments and aspirations of the international legal framework—if we desire to maintain the benefits of interdependence we must work as one to forge workable solutions in support of our common goals.

201. Dupuy, *supra* note 8, at 23.