



Winter 2002

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### Recommended Citation

Mark S. Kende, *Yahoo!: National Borders in Cyberspace and Their Impact on International Lawyers*, 32 N.M. L. Rev. 1 (2002).

Available at: <https://digitalrepository.unm.edu/nmlr/vol32/iss1/3>

# YAHOO!: NATIONAL BORDERS IN CYBERSPACE AND THEIR IMPACT ON INTERNATIONAL LAWYERS

MARK S. KENDE\*

## I. INTRODUCTION

Cyberspace is often described as a unique technological medium that has facilitated globalization by breaking down national borders.<sup>1</sup> The U.S. Supreme Court endorsed this characterization in its one cyberspace free speech case, *Reno v. American Civil Liberties Union*.<sup>2</sup> Some commentators have relied on this notion of the borderless Internet to argue that international law and international lawyers will play an increasingly significant role in the new world information economy. Henry Perritt, Dean of the Chicago-Kent School of Law, asserts that "the Internet offers a new global market for learning about and acquiring goods and services produced outside one's own country"<sup>3</sup> and that the Internet therefore is likely to encourage:

exploration of new kinds of public international law matrices for private self-ordering because of the difficulties of regulating the Internet through conventional state-oriented means...The three most advanced examples involve negotiation of a safe harbor for personal data moving from Europe to the United States, the establishment of an internationally controlled private corporation to regulate Internet domain names and addresses, and rapidly spreading credit charge-back mechanisms.<sup>4</sup>

These same commentators argue that cyberspace can influence, and therefore alter, certain societies by exposing them to supposedly progressive U.S. values, such as

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1. See LAWRENCE LESSIG, CODE 5 (1999) ("Even at Yale [Law School in the mid 1990s]—not known for libertarian passions—the students seemed drunk with what James Boyle would later call the 'libertarian gotcha': no government could survive without the Internet's riches, yet no government could control what went on there. Real-space governments would become as pathetic as the last Communist regimes. It was the withering of the state that Marx had promised, jolted out of existence by trillions of gigabytes flashing across the ether of cyberspace. Cyberspace, the story went, could *only* be free."). The fundamental premises of Lessig's book, however, have been challenged. See, e.g., David Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439 (2000).

2. 521 U.S. 844, 851 (1997) ("Taken together, these tools constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."). The Court's enthusiasm for the Internet was perhaps partly due to the cyberspace tour that several Justices apparently received from their clerks in the U.S. Supreme Court library during the pendency of the case. Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A. See also American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("The Internet is wholly insensitive to geographic distinctions.").

3. Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 KY. L. J. 885, 920-21 (2000). Vinton Cerf, Senior Vice President at WorldCom, who is credited with designing much of the Internet's structure, has said that "[t]he Internet was designed without any contemplation of national boundaries....The actual traffic in the Net is totally unbound with respect to geography." See also Lisa Guernsey, *Welcome to the World Wide Web. Passport, Please?*, N.Y. TIMES, at <http://www.nytimes.com/2001/03/15/technology/15BORD.html> (Mar. 15, 2001).

4. Perritt, *supra* note 3, at 930.

the free market and human rights.<sup>5</sup> What I want to argue, however, is that these perceptions about the borderless Internet and about the role that international lawyers may play in the twenty-first century are not accurate.

A recent French court decision, holding the American corporation Yahoo! liable for permitting Nazi memorabilia to be displayed and auctioned off on its Web site, suggests that national borders are alive in cyberspace.<sup>6</sup> Thus, cyberspace will not result in a utopian world in which international lawyers facilitate their client's global business deals, and in which American values predominate. Instead, cyberspace has already caused some nations like France, Germany, Italy, and China to create new virtual borders, and this will mean that international lawyers will actually have increasingly litigious dealings, on behalf of their clients, with foreign governments and other foreign entities such as non-governmental organizations (NGOs).<sup>7</sup> In addition, the Yahoo! case illustrates that more conservative societies may end up dictating important cyberspace legal doctrines.

The body of this essay has three parts. Part II discusses the French court decision *The French Union of Jewish Students and The League Against Racism and Anti-Semitism v. Yahoo! Inc.*<sup>8</sup> Part III demonstrates how the decision's vindication of virtual international borders will affect international lawyers. And part IV addresses some of the criticisms leveled at the decision.

## II. THE YAHOO! DECISION

In early 2000, the French-based League Against Racism and Anti-Semitism and the French Union of Jewish Students brought a legal action against Yahoo! in the Tribunal de Grande Instance de Paris (hereinafter the court). Their petition claimed that Yahoo!'s display of Nazi memorabilia for sale on its U.S. auction site, as well as Yahoo!'s display of pro-Nazi propaganda, violated Section R 645-1 of the French Criminal Code.<sup>9</sup> That section generally prohibits the display in France of uniforms, symbols, or emblems of those organizations and persons responsible for crimes against humanity (such as the Holocaust). Yahoo! responded in part by arguing that the French court lacked jurisdiction and that the content of its Internet site was protected by free speech principles.

The French court on May 22, 2000, rejected Yahoo!'s defenses and embraced the petition in strong language:

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5. *Id.* at 910.

6. *The French Union of Jewish Students and The League Against Racism and Anti-Semitism v. Yahoo! Inc.*, The County Court of Paris (Orders of May 22 and Nov. 20, 2000). References in this article to the pages of the French court's decisions in the Yahoo! case are based on the English versions of the decisions that are appended to Yahoo!'s Complaint, which has been filed in federal court in California, *infra* page 4. The complaint is at <http://www.cdt.org/speech/international/001221yahoo.complaint.pdf>.

7. See generally Technology Section, *Some Courts Want Borders in Cyberspace*, N.Y. TIMES, at <http://www.nytimes.com/2001/03/15/technology/15SBOR.html> (Mar. 15, 2001) (describing recent court decisions from Germany and Italy that effectively create virtual borders in those countries). There have also been several articles about how China is trying to restrict Internet access for its citizens. See, e.g., Kristina M. Reed, Comment, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation of Internet Commerce*, 13 TRANSNAT'L LAW. 451, 460 (2000); Craig S. Smith, *The Wired Age: China Arrives at a Moment of Truth*, N.Y. TIMES, at <http://www.nytimes.com/2001/04/01/weekinreview/01SMIT.html> (Apr. 1, 2001).

8. The County Court of Paris (Orders of May 22 and Nov. 20, 2000).

9. Nov. 20 Order at 17-18 (discussing the Nazi propaganda materials available on Yahoo!).

Whereas the exhibition of Nazi objects for purposes of sale constitutes a violation of French law...and even more an affront to the collective memory of a country profoundly traumatized by the atrocities committed by and in the name of the criminal Nazi regime against its citizens and above all against its citizens of the Jewish faith;

Whereas by permitting these objects to be viewed in France and allowing surfers located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage to be suffered by LICRA (League Against Racism and Anti-Semitism) and UEJF (French Union of Jewish Students), both of whom are dedicated to combating all forms of promotion of Nazism in France, however insignificant the residual character of the disputed activity may be regarded in the context of the overall running of the auctions services offered on its Yahoo.com site; Whereas the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure....<sup>10</sup>

The Paris court therefore ordered Yahoo! to take "all measures to dissuade and make impossible any access by a surfer calling from France to disputed sites and services...especially the site offering Nazi objects for sale."<sup>11</sup>

At a later hearing, Yahoo! proffered evidence supposedly showing that it could not technologically comply with the order.<sup>12</sup> The court therefore appointed a panel of three international experts (from France, Great Britain, and the United States, respectively) to evaluate Yahoo!'s assertion.<sup>13</sup> On November 20, 2000, the court relied on a report from these experts to rule that Yahoo! should employ filtering software targeted at French Internet protocol (IP) addresses, trying to access the Nazi sites, and that Yahoo! should also require surfers to make a declaration of nationality. The court concluded that this combination of procedures would likely "achieve a filtering success rate approaching 90%."<sup>14</sup> The software would screen out the seventy percent of French cyberspace surfers with IP addresses that "can be matched with certainty to a service provider located in France"<sup>15</sup>; while the nationality declaration would hopefully block at least another twenty percent. The court also ordered Yahoo! to comply within three months or face a 100,000 francs per day penalty.<sup>16</sup>

In January of 2001, Yahoo! announced that it would try to block the Nazi auction memorabilia sites from French Web surfers.<sup>17</sup> But Yahoo!'s spokesperson

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10. May 22 Order at 4 (parentheticals added).

11. *Id.* at 4.

12. Nov. 20 Order at 3.

13. *Id.* at 3 & 5. The experts were Francois Wallon of France, Ben Laurie of the United Kingdom, and Vinton Cerf of the United States. Mr. Cerf is a chief officer of WorldCom.

14. *Id.* at 14.

15. *Id.* at 8.

16. *Id.* at 20.

17. Kristi Essick, *THE STANDARD, Yahoo Bans Nazi Goods*, at <http://www.thestandard.com/article/display/0,1151,21184,00.html> (Jan. 3, 2001). According to one report, "The groups have not yet asked that the daily \$13,000 fines be levied, in part because Yahoo [has] announced...a worldwide ban on material with hate-promoting references, including Nazi items, in Yahoo's auctions and classified and shopping areas....(Yahoo's

maintained that its announcement was unrelated to the Paris court directive.<sup>18</sup> Indeed, Yahoo! filed a federal court complaint in California seeking declaratory relief, to preclude enforcement of the French court decision, on the grounds that France lacks jurisdiction, and that the French ruling violates the First Amendment to the U.S. Constitution as well as the U.S. Code (which purportedly immunizes Internet Service Providers (ISPs) from liability for third-party content).<sup>19</sup> Yahoo!'s complaint even suggests that the French judge, Jean Jacques Gomez, was biased, and that the views of the English-speaking experts were essentially ignored.<sup>20</sup> In June 2001, the California federal court permitted the Yahoo! complaint to proceed after rejecting the French defendants' motion to dismiss, which had raised personal jurisdiction objections. The federal court's ruling, however, failed to accord the French judgment the comity due under international law.<sup>21</sup>

ban does not, however, apply to coins and stamps, an issue that the French court did not explicitly address. Nor does it apply to online forums, so the company is still in violation of the order." Guernsey, *supra* note 3. Yahoo! has also recently restricted access to its pornographic sites in response to various complaints. John Schwartz, *Yahoo Goes Beyond Initial Plan Against Adult Sites*, N.Y. TIMES, at <http://www.nytimes.com/2001/05/16/technology/16YAHOO.html> (May 16, 2001).

18. Essick, *supra* note 17.

19. Keith Perine, THE STANDARD, *Yahoo Asks U.S. Court to Rule French Court Out of Bounds*, at <http://www.thestandard.com/article/display/0,1151,21026,00.html> (Dec. 21, 2000).

20. Complaint Par. 25 (alleging that Judge Gomez gave an interview to a French magazine in which he said that the issue in the case was whether Yahoo! would conform to "a single line of morality acceptable to all.") and Par. 26 (alleging that the expert report was prepared in French by the French expert and that the English-speaking experts did not see an English copy of the report until after the November 20, 2000, ruling). There may be some basis for the complaint's implication that the English-speaking experts were displeased. For example, the British expert placed an apology on his Web site. Ben Laurie, *An Expert's Apology*, at <http://www.apache-ssl.org/apology.html> (last visited Nov. 26, 2001). Moreover, it was reported that the American expert "old-school Net guru Vinton Cerf wasn't happy with the idea of regulating Net content." THE STANDARD, *Borderless Net, RIP?*, at <http://www.thestandard.com/archive/NOV-2000.html> (Nov. 21, 2000).

21. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp.2d 1168 (N.D. Cal. 2001). The California federal judge acknowledged that the Ninth Circuit had never before found personal jurisdiction to exist over a foreign defendant, through use of the U.S. Supreme Court's "effects" test, except in tort cases. Yet the judge then made the extraordinary statement that

[w]hile filing a lawsuit in a foreign jurisdiction may be entirely proper under the laws of that jurisdiction, such an act nonetheless may be "wrongful" from the standpoint of a court in the United States if its primary purpose or intended effect is to deprive a United States resident of its constitutional rights.

145 F. Supp. 2d at 1175.

The judge here is not only failing to accord the French judgment comity—he's analogizing it to a tort. The importance of comity as a principle in international law has been stressed by many commentators. See, e.g., THOMAS BUEGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW 178 (1990). The court's justification for virtually ignoring the principle is that the French judgment possibly deprived a U.S. resident of constitutional rights. Yet U.S. courts have generally been very reluctant to use this kind of public policy exception as an excuse to avoid enforcing foreign judgments. See Glen W. Rhodes, *Enforcement of Foreign Judgments*, 34 INT'L LAW. 585, 586 (2000) (discussing cases); ABA Report, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1875 (2000). Indeed, most states in the United States have adopted the Uniform Money Judgments Recognition Act, 13 U.L.A. 261 (1962), which shows they generally view foreign judgments as deserving respect. *Id.* In addition, negotiations are ongoing over a multi-lateral treaty regarding jurisdiction as well as the recognition and enforcement of foreign court judgments. The prospective treaty is known as the Hague Convention. Emily Lanza, Note, *Personal Jurisdiction Based on Internet Contacts*, 24 SUFFOLK TRANSN'T'L L. REV. 125, 134 (2000). This further shows the widely accepted nature of the comity principle.

The California judge's decision is also inconsistent with the principle that American courts should be cautious about extending their personal jurisdiction reach to the international field. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 115 (1987). Ironically, the court pays homage to this caution

Subsequently, the California federal court granted summary judgment for Yahoo! reasoning that no U.S. court could enforce a French judgment contrary to the First Amendment.<sup>22</sup> Lawyers for the French defendants, however, have indicated they plan to appeal the court's jurisdiction ruling as erroneous.<sup>23</sup> In response to the French decision, U.S. Congressman David Dreier introduced legislation to immunize American Internet service providers from foreign content regulations.<sup>24</sup> The French *Yahoo!* decision created a media uproar. The *Times of London* declared the *Yahoo!* decision to be "the first attempt by any country to impose international censorship on the World Wide Web."<sup>25</sup> Unfortunately, this is not correct. The Bavarian Justice Ministry in 1995 threatened to prosecute the American Internet service provider CompuServe for hosting sexually explicit online discussion groups that violated German anti-pornography laws.<sup>26</sup> CompuServe responded by closing the sites temporarily to the whole world because CompuServe supposedly lacked the technology to simply block access in Germany.<sup>27</sup> Nonetheless, this *Yahoo!* case appears to be one of the first where an actual foreign court judgment bars an American Internet-related company's speech even when the speech would be protected under the U.S. Constitution.

### III. YAHOO!'S SIGNIFICANCE FOR INTERNATIONAL LAWYERS

The *Yahoo!* ruling casts doubt on the popular conceptions of cyberspace mentioned in the Introduction in several ways that are significant for international lawyers.

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principle, 145 F. Supp. 2d at 1176, but then ignores it by unconvincingly distinguishing a series of cases. *Id.* Moreover, the court fails to appreciate the heavy burden its decision imposes on the non-profit French defendants to litigate in California, and fails to understand France's powerful national interest in protecting its citizenry from the Holocaust's horrifying legacy.

22. *Yahoo! Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme*, 2001 WL 1381157 (N.D. Cal. 2001).

23. Lisa Guernsey, *Court Says France Can't Censor Yahoo Site*, N.Y. TIMES, at <http://www.nytimes.com/2001/11/09/technology/09YAHOO.html> (Nov. 9, 2001) ("Ronald Katz, a California lawyer representing the French groups, said that his clients would appeal the case to the United States Court of Appeals for the Ninth Circuit. He argued that the case should not have been heard in the federal court in San Jose in the first place. 'We don't think the court has jurisdiction over my clients,' he said. 'They have never been in San Jose, they have never even heard of San Jose.' Yahoo's headquarters is near San Jose.") See also Carl S. Kaplan, *Was the French Ruling on Yahoo Such a Victory After All*, N.Y. TIMES, at <http://www.nytimes.com/2001/11/16/technology/16CYBERLAW.html> (Nov. 16, 2001) (reasoning that the California court judgment favoring Yahoo! does little to diminish the significance of the French court decision).

24. William Crane, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. 267, 305 n.255 (2001).

25. *Borderless Net, RIP?*, *supra* note 20.

26. Jack L. Goldsmith, *Against Cyberanarchy*, OCCASIONAL PAPERS FROM THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO at 20-21 (August 13, 1999) (abbreviated version of article at 65 U. CHI. L. REV. 1199 (1999)).

27. *Id.* Professor Goldsmith elaborates: "The [Internet regulation] skeptics frequently recount this story to show how unilateral national regulation of cyberspace can have multijurisdictional consequences. But the rest of the story suggests a somewhat different lesson. After closing down transmission of the offending discussions, CompuServe offered its German users software that enabled them to block access to the offending discussion groups." Goldsmith adds that eventually a German CompuServe executive was prosecuted but only because German authorities alleged that the "company failed to implement a national-level filtering technology to prevent dissemination of other illegal information in Germany." For more information about this story, see Lothar Determan, *Case Update: German CompuServe Director Acquitted on Appeal*, 23 HASTINGS INT'L & COMP. L. REV. 109 (1999).

### A. Borders

First, the French decision shows that the supposedly boundaryless cyberspace actually has meaningful national borders. The virtual world is not so different from the real world. As Wayne State University Internet scholar Jessica Litman has stated,

The remedies contemplated by the courts deciding these cases are the use of technology to simulate national borders—requiring sites to come up with a way to deny access to browsers originating in complaining countries. If the trend continues, we may see the end of the borderless Internet, with virtual customs agents demanding virtual passports as electronic bits cross virtual borders.<sup>28</sup>

### B. Free Speech Standards

Second, the *Yahoo!* case demonstrates how the Internet may not bring about the hegemony of American values, as some had hoped, in areas such as freedom of expression. For example, contrary to the French court, the U.S. Supreme Court has ruled that racist hate speech is constitutionally protected<sup>29</sup> and that Internet speech deserves the strongest protection of any medium.<sup>30</sup> Moreover, American courts have rejected the precise idea of geographic filtering embraced by the French court. Thus, the U.S. Court of Appeals for the Third Circuit ruled in June 2000 that “Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.... Current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site’s content ‘from entering any [specific] geographic community.’”<sup>31</sup> The conflict between the French and American approaches could not be more stark.

28. Carl S. Kaplan, *Looking Forward to Technology Law*, N.Y. TIMES, at <http://www.nytimes.com/2000/12/28/technology/29CYBERLAW.html> (Dec. 28, 2000). See also Guernsey, *supra* note 3. Internet sites are also becoming less accessible as an increasing number of former free sites have started to charge access fees. See Saul Hansell, *Free Rides Now Passé on Information Highway*, N.Y. TIMES, at <http://www.nytimes.com/2001/05/01/technology/01FREE.html> (May 1, 2001). See also Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 825-26 (2001) (discussing the *Yahoo!* case).

29. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (“[T]he only interest distinctively served by the [ordinance barring such speech] is that of displaying the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.”).

30. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863 (1997) (upholding decision in which district judge concluded that “the Internet—as ‘the most participatory form of mass speech yet developed’—is entitled to ‘the highest protection from governmental intrusion’”) (internal citation omitted).

31. *American Civil Liberties Union v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000), *cert. granted sub nom. Ashcroft v. American Civil Liberties Union*, 532 U.S. 1037, 121 (U.S. May 21, 2001) (No. 00-1293). This Third Circuit decision, in my view, is just another example of American courts providing special treatment to the Internet. Besides casually dismissing the feasibility of geographic filtering in the case, despite contrary evidence, see Guernsey, *supra* note 3, the Third Circuit ruled that the Child Online Protection Act violated the First Amendment because of the Act’s “community standards” provisions. Yet American courts have long accepted the community standards approach as the best way to determine when, for example, sexually explicit speech goes too far and is therefore regulable. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (adopting community standards approach to obscenity regulation). A report on the U.S. Supreme Court oral argument concerning the Third Circuit Internet decision shows the focus was on the community standards issue. See Carl S. Kaplan, *Considering “Community Standards” and Internet Pornography*, N.Y. TIMES, at <http://www.nytimes.com/2001/11/30/technology/30CYBERLAW.html> (Nov. 30, 2001). For a detailed discussion of how American courts have been overly deferential to the Internet, see Mark Kende, *Lost in Cyberspace: The Judiciary’s Distracted Application of Free Speech and Personal Jurisdiction Doctrine to Cyberspace*, 77 OR. L. REV. 1125 (1998).

Now it is possible that the *Yahoo!* decision could be overturned if the European Court of Human Rights receives the case and determines the applicable French law violated *Yahoo!*'s free speech rights under Section 10 of the European Convention on Human Rights.<sup>32</sup> Decisions of that court are binding on signatory countries like France.<sup>33</sup> To date, however, *Yahoo!* apparently has not appealed the case there.<sup>34</sup> Moreover, some European Human Rights Court precedents have ruled, in line with French law, that racist speech is not protected, even if the speech does not seem to be inciting imminent lawlessness.<sup>35</sup> The United Nations Human Rights Committee has even ruled that France did not violate the freedom of expression guarantees of the International Covenant on Civil and Political Rights by prosecuting an individual who denied the Holocaust took place.<sup>36</sup>

In addition, the Convention on the Elimination of All Forms of Racial Discrimination of 1965 requires state parties to make punishable "all dissemination of ideas based on racial superiority or hatred."<sup>37</sup> Though the Convention lacks effective enforcement mechanisms, it has still been highly influential. For example, many recently enacted constitutions outlaw racist speech.<sup>38</sup> Thus, instead of American hegemony, France's less speech-protective approach has won out so far in the case.

### C. International Lawyers

Of course, what ultimately lies behind the French ruling, and helps make it so important, is its broad jurisdictional approach, given that *Yahoo!* apparently posted its controversial content on American servers at American locations, and yet was still subject to the French judgment. The breadth of the jurisdiction asserted is further revealed by the fact that *Yahoo!* had prohibited its French subsidiary from

32. The European Convention on Human Rights, available at <http://www.hri.org/docs/ECHR50.html> (last visited Feb. 13, 2002). Section 1 of Article 10 says that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." But Section 2 says that "[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such...restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals...."

33. LOUIS L. HENKIN ET AL., INTERNATIONAL LAW 657 ("Everyone whose rights are violated shall have a remedy.") & 653-62 (1993).

34. One scholar reports that *Yahoo!* decided not to appeal "because under French law the judgment would remain in effect pending the appeal." Denis T. Rice, *A Cyberspace Odyssey Through U.S. and E.U. Internet Jurisdiction over E-Commerce*, 661 PLI/PAT 421, 430 (2001).

35. *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A), 19 E.H.R.R. 1, European Court of Human Rights (1994) (upholding the criminal conviction of an anti-immigrant group for making racist remarks and concluding the group was not protected by Article 10, but also finding that the journalist who reported the remarks was protected by Article 10's free expression guarantees). See also LOUIS HENKIN ET AL., HUMAN RIGHTS 1005 (1999) ("One of the strongest contrasts between international human rights law and U.S. Constitutional law concerns the treatment of racial hate speech.").

36. *Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993, Human Rights Comm. (1996).

37. Article 4(a) of the Convention adds that such punishment should also be applicable to "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 racial activities, including the financing thereof." For an interesting recent analysis of hate groups on the Internet, see CASS SUNSTEIN, REPUBLIC.COM 62-65 (2001).

38. Chapter 2 Section 16(2) of the South African Constitution is an example of such a provision. Chapter 2 Section 39 of the South African Constitution also says that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum...must consider international law; and may consider foreign law."



auctioning or displaying Nazi merchandise from its French server in an effort to avoid problems with French law.<sup>39</sup> Yet this caution was not enough.

What does this all mean for international lawyers? Well, until there is an international agreement regarding freedom of expression standards, which has never been proposed, companies engaged in cyberspace business will likely need more advice from counsel who are knowledgeable about international law conventions and customs, foreign legal approaches to jurisdiction and free speech, and other matters we probably can't even imagine.<sup>40</sup> In short, litigation, not just smooth business transactions, undoubtedly will arise due to these new virtual borders. That's why cyberspace will have a significant impact on the practice of international lawyers. This trend regarding borders is evident regarding other countries as well such as Italy, Germany, and China.<sup>41</sup>

#### IV. THE CRITICS

Critics of the French court decision have argued that it means that the world's lowest common denominator in free speech will control.<sup>42</sup> This view is flawed because the French court specifically avoided closing down Yahoo!'s Nazi auction sites worldwide. The court instead issued a limited order seeking only to bar access to the sites in France.

Moreover, as University of Chicago law professor Jack Goldsmith has explained, if American corporations such as McDonald's must comply with foreign regulations to set up restaurants abroad, then American corporations selling their wares in cyberspace should also be subject to foreign laws.<sup>43</sup> In addition, several American states have prosecuted foreign entities for facilitating Internet gambling.<sup>44</sup> Thus, American authorities see no problem with aggressively employing restrictive

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39. Carl S. Kaplan, *French Nazi Memorabilia Case Presents Jurisdiction Dilemma*, N.Y. TIMES, at <http://www.nytimes.com/2000/08/11/technology/11CYBERLAW.html> (Aug. 11, 2000).

40. Thus, these companies may, for example, wish to hire in-house attorneys who have international law or comparative law experience or training. The American Society for International Law also can provide companies with the names of law firms, individual attorneys, and academics who possess this background. The need for more specialists in these areas should further cause American legal education to have a greater global focus and should cause more national law firms to hire international lawyers. It is no accident that the American Association of Law Schools' annual 2001 meeting focused on globalization and that prestigious law schools like NYU have established global legal studies programs.

41. *Supra* note 7.

42. Margaret Bratt, Norbert Kugele, *Who's In Charge*, 80-JUL MICH. BAR J. 42, 43 (2001) (criticizing French assertion of jurisdiction in the Yahoo! case); Carl S. Kaplan, *Ruling on Nazi Memorabilia Sparks Legal Debate*, N.Y. TIMES, at <http://www.nytimes.com/2000/11/24/technology/24CYBERLAW.html> (Nov. 24, 2000) (quoting Yahoo! attorney Michael Traynor as saying, "One country is purporting to exercise and impose its standards on a worldwide conversation....It's fundamentally an interference with freedom of speech and expression.").

43. Goldsmith, *supra* note 26, at 2.

44. *Id.* (discussing use of New York law to prosecute Antigua-based Internet gambling casino). Minnesota also had a state government Internet site that posted an announcement to Internet surfers that their foreign cyberspace status did not immunize them from state legal action. 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, 378 n.38 (2001).

American laws toward foreign Web sites.<sup>45</sup> The shoe is just on the other foot in the Yahoo! case.

Other critics have raised the jurisdiction issue and argued that an American Internet site should not be subject to suit abroad unless it is purposefully targeting a particular country's consumers.<sup>46</sup> Some American courts have agreed.<sup>47</sup> Yet Yahoo's Nazi auction site actually ran advertising banners in French targeted at French computers accessing the site.<sup>48</sup>

Despite the flaws in these particular criticisms, the French decision could have the problematic practical effect of deterring cyberspace commerce because it impliedly validates a patchwork of inconsistent national laws. This absence of uniformity boosts business costs and liability risks. Is there any solution? Well here is where international lawyers can again come to the rescue, at least regarding jurisdictional standards. After two years of study, an American Bar Association committee issued a lengthy report recommending that a multi-national commission be established to draw up legal standards governing jurisdiction over international cyberspace transactions.<sup>49</sup> International lawyers are especially well trained to lead the way in drafting and lobbying for such a convention.<sup>50</sup>

## V. CONCLUSION

The U.S. Supreme Court on more than one occasion has been reluctant to adhere to international legal principles and to use comparative law sources.<sup>51</sup> For example, Justice Scalia in one case cited the *Federalist Papers* to support his isolationist position that foreign constitutional law decisions should generally not be examined in American domestic constitutional law cases, even where similar issues are involved.<sup>52</sup> Justice Breyer strongly disagrees.<sup>53</sup> But it looks as if cyberspace may make an isolationist approach hard to defend. Instead, it is precisely because foreign

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45. *Courts Want Borders*, *supra* note 7 (describing how American entertainment companies aggressively litigated against Canadian company, iCrave, that was rebroadcasting American television signals via the Internet without permission).

46. Kaplan, *supra* note 39 (quoting Dean Perritt to such effect).

47. See, e.g., *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907 (Ore. 1999) (ruling that a company cannot be globally subject to jurisdiction just because its Web site is accessible globally). See generally Kende, *supra* note 31.

48. Nov. 20 Order at 4 ("Whereas YAHOO is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language.").

49. Bratt & Kugele, *supra* note 42 (discussing recommendations in the study drawn up by an international group of lawyers headed by Thomas Vartanian of Fried, Frank, Harris & Shriver in Washington, D.C.). The report is titled *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, and it can be found at 55 BUS. LAW. 1801 (Aug. 2000).

50. A possible resource for this multinational commission to examine is the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. (1987). Sections 401-403 advocate a balancing of interests approach to resolving jurisdictional and choice of law conflicts.

51. The classic example is *United States v. Alvarez-Machain*, 504 U.S. 665 (1992) where the U.S. Supreme Court rejected the defendant's efforts to obtain dismissal of the criminal indictment, despite acknowledging that the actions of U.S. agents in abducting the Mexican defendant from Mexican territory violated customary international law.

52. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997). Justice Scalia has also dismissed the relevance of international and comparative legal standards in several other cases. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1988), *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1989).

53. *Printz*, 521 U.S. at 976-78 (discussing European approaches to federalism).

countries are establishing more borders in cyberspace that foreign and international law may have such an influence on American legal doctrine.<sup>54</sup>

Cyberspace will also undoubtedly heighten the importance of international law counselors and scholars, but not because they will only be facilitating global business transactions and contacts. Instead they will be increasingly embroiled in litigation on behalf of their clients with hostile governments and foreign entities.

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54. See, e.g., Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 490 n.389 (2000).