INTERNATIONAL CYBERSPACE: FROM BORDERLESS TO BALKANIZED

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I. INTRODUCTION

Cyberspace, heralded as the new frontier, offered the vision of a borderless space on which no nation’s Neil Armstrong would plant its flag. Although this virtual world without boundaries offered limitless possibilities, it also posed challenging legal problems. Courts around the world have grappled for years with resulting jurisdictional questions such as when sufficient contacts within

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1 Cf. Henry H. Perritt, Jr., 6 INTERNET NEWSLETTER, Nov. 2001, at 5 (stating, "[i]f you balkanize the Net, you lose its global effect"); Jerry Kang, Cyber-Race, 113 HARv. L. REV. 1131, 1174 (2000) ("Balkanization should concern us in cyberspace, as in real space; on balance, however, cyberspace does not pose any greater threat. If we want environments of cooperation in cyberspace, then we must intentionally design and build them—as in real space. Cyberspace does not intrinsically encourage cooperation: That would be an error of technological determinism. However, the fact that cyberspace enables people to join together based on common interests, experiences, and fates provides a substantial foundation upon which we can build environments of cooperation.").

2 For an interesting discussion of issues, see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) (looking at the interplay between code and commerce, and commenting “cyberspace presents something new for those who think about regulation and freedom. It demands a new understanding of how regulation works and of what regulates life there. It compels us to look beyond the traditional lawyer’s scope—beyond laws, regulations, and norms... The regulator is... Code... In real space we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace we must understand how code regulates—how the software and hardware that make cyberspace what it is regulate cyberspace as it is... Code is law.").
a state constitute "doing business" for purposes of jurisdiction and how to take established legal principles and apply them to cyberspace. One oft quoted court in 1997, in Zippo Mfg. Co. v. Zippo Dot Com, Inc., found it easy to answer such questions:

\[\text{The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet . . . .} \]

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper (e.g. CompuServe, Inc. v. Patterson (citations omitted)). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction (e.g. Bensusan Rest. Corp. v. King (citations omitted)). The middle ground is occupied by the interactive Web sites where the user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site (e.g., Martiz, Inc. v. Cubergold, Inc. (citations omitted)).

However, this court's veneer of apparent simplicity merely shrouded the argument raging among academicians and courts as well. Some argued that

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3 See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also International Shoe Co. v. Washington, 326 U.S. 310 (1945).


5 Stuart Biegel, Beyond Our Control: Confronting the Limits of Our Legal System in the Age of Cyberspace 17, 22-23 (2001) (discussing the conflict about the regulation of cyberspace and likening the conflict to the one presented in the classic movie Shane between the ranchers who wanted fences and the cattlemen who wanted open space. Biegel states: "... in Shane, fences are not necessarily a good thing. Shane himself ultimately fights on behalf of fences, but he does so in an ambivalent and hesitant manner, and arguably for reasons having nothing to do with his feelings regarding the true value of fenced-off land. In
cyberspace was no different than physical space and could be treated as a physical location had historically been treated, while others argued that cyberspace was unique and needed new rules to govern it. Any hope of a developing consensus concerning jurisdiction over cyberspace was recently

LIBERTY VALANCE, fences are central to the development of the garden of civilization, whereas, in CIMARRON, they represent the first step toward crass industrialization and a not entirely positive view of progress. The answer is no simpler in cyberspace." Biegel also quotes Robert Frost in Mending Wall.

6 See Jack L. Goldsmith, Against Cyberanarchy, 65 U. CHI. L. REV. 1199, 1202 (1998) (arguing cyberspace can be regulated by nations and that sketching "a model for grounding cyberspace transactions in real-space law"). He concludes:

[c]yberspace transactions are no different from "real-space" transnational transactions. They involve people in real space in one jurisdiction communicating with people in real space in other jurisdictions in a way that often does good but sometimes causes harm. There is no general normative argument that supports the immunization of cyberspace activities from territorial regulation. And there is every reason to believe that nations can exercise territorial authority to achieve significant regulatory control over cyberspace transactions. Resolution of the choice of law problems presented by cyberspace transactions will be challenging, but no more challenging than similar problems raised in other transnational contexts.

Id. at 1250.

7 See David R. Johnson & David Post, Surveying Law and Borders: Law and Borders—The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1402 (1996) (arguing cyberspace is a distinct place which requires special rules). The authors state:

[but when "persons" in question are not whole people, when their "property" is intangible and portable, and when all concerned may readily escape a jurisdiction they do not find empowering, the relationship between the "citizen" and the "state" changes radically. Law, defined as a thoughtful group conversation about core values, will persist. But it will not, could not and should not be the same law as that applicable to physically, geographically defined territories.

Id.

8 Compare id. (arguing cyberspace is a distinct place which requires special rules), with Goldsmith, supra note 6, at 1202 (arguing cyberspace can be regulated based on real-space law models), and Sanjay S. Moody, Note, National Cyberspace Regulation: Unbundling the Concept of Jurisdiction, 37 STAN. J. INT’L L. 365 (2001).

[n]ational regulation of cyberspace is no more problematic, from a jurisdictional perspective, than national regulation of real-world, land-based modes of transnational activity. Second, the regulation critic’s failure to differentiate between two types of jurisdiction—jurisdiction to prescribe and jurisdiction to enforce—leads them to overstate the efficacy of national cyberspace regulation. Given the territorial limits on enforcement jurisdiction and a state’s lack of obligation to enforce foreign judgments, the actual impact of national cyberspace regulation is far less than the critics presume. Whether
shattered by both a United States case, involving a dispute over Yahoo!’s offering of Nazi memorabilia for sale,\(^9\) and several foreign cases dealing with similar issues.\(^{10}\)

In the United States case, *Yahoo! v. La Ligue Contre Le Racisme et L’Antisemitisme* (LICRA),\(^{11}\) the court considered the question: Can one country or state control the flow of information into its territory via the

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or not national cyberspace regulation is “legitimate” ultimately rests not on jurisdictional factors but on a case-specific normative judgment: whether a particular rights-based activity deserves special protection from regulation. Thus in the cyberspace speech example, the relevant question is not whether a state may lawfully prescribe rules governing speech, but instead whether speech constitutes a privileged activity warranting a departure from a state-based regulatory framework. ... [T]ransnational cyberspace commentators must grapple with the “what” question that, until now, has mainly been the preoccupation of domestic commentators: what substantive laws should govern cyberspace activity. Given the greater diversity of normative perspectives in the international (relative to the domestic) context, finding a satisfactory answer to this question will be very difficult indeed.

*Id.* at 390. Other authors have struggled to make sense of cyberspace and regulation. *See, e.g.*, BIEGEL, *supra* note 5 (chronicling the different view of academics on cyberspace and articulating twenty principles for consideration in future regulation). *See also* LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 264 (2001) (expressing concern about control and wanting decentralization). Lessig warns, “[w]e are a democracy increasingly ruled by judges.... And we are a culture that deep down believes in counterrevolution: that strangely thinks that this increase in control makes sense.” *Id.* at 267. The Sept. 11, 2001 terrorist attack has only increased many people’s willingness to allow increased control in the interest of security. Lessig continues:

> [t]he irony astounds. We win the political struggle against state control so as to retrench control in the name of the market. We fight battles in the name of free speech, only to have those tools turned over to the arsenal of those who would control speech. We defend the ideal of property and then forget its limits, and extend its reach to a space none of our founders would ever have imagined.... Those threatened by the technology of freedom have learned how to turn the technology off. The switch is now being thrown. We are doing nothing about it.

*Id.* at 268.


\(^{10}\)  *See generally* Lisa Guernsey, *Welcome to the Web. Passport, Please?*, *N.Y. TIMES*, Mar. 15, 2001, at G1 (discussing cases from Germany, Italy, France and Canada).

\(^{11}\)  *See Yahoo!*, 169 F. Supp. 2d at 1181.
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Yahoo! was seeking a declaratory judgment against the French organization, LICRA, to clarify that this organization could not enforce a French order in the United States. Judge Fogel stated the jurisdictional problem thus: "[w]hat is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation."

This Article will explore jurisdiction in cyberspace from a number of perspectives. First, the Article will examine recent attempts to limit the reach of the Internet as well as concurrent efforts of some states and countries to impose liability over Internet transmissions considered to have violated host laws. Second, the Article will examine technological solutions, including

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12 See BIEGEL, supra note 5, at 39. Biegel discusses John Perry Barlow, former writer for The Grateful Dead and founder of the Electronic Frontier Foundation. Barlow wrote the "Declaration of the Independence of Cyberspace" in 1996 on the day of the enactment of the Communications Decency Act stating:

[cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot ... you do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions ... . You claim there are problems among us that you need to solve ... . Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to conditions of our world, not yours. Our world is different. Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in a web of our communications.

Id. at 39 (quoting from http://www.eff.org/~Barlow/Declaration-Final.html (last visited Aug. 28, 2000)). Biegel also notes that U.S. District Court Judge Nancy Gertner discussed the problem of jurisdiction and the Internet in Digital Equipment Corporation v. AltaVista Technology:

[the change is significant. Physical boundaries typically have framed legal boundaries, in effect creating signposts that warn that we will be required after crossing to abide by different rules. ... To impose traditional territorial concepts on the commercial uses of the Internet has dramatic implications, opening the Web user up to inconsistent regulations throughout the fifty states, indeed, throughout the globe. It also raises the possibility of dramatically chilling what may well be "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen" (citation omitted). As a result courts have been, and should be, cautious in applying traditional concepts.

Id. at 36 (quoting 960 F. Supp. 456 (D. Mass. 1997)).

13 See Yahoo!, 169 F. Supp. 2d at 1181.

14 Id. at 1186.
geolocation software, which might permit the control desired to determine whether this technology offers a way to circumvent the problem of expanding jurisdiction. Third, the authors will examine existing international efforts to address these concerns and propose several solutions.

II. CASE LAW

Societal developments, whether commercial, technological or biological, challenge legal systems to expand to accommodate the new reality. Oftentimes, it may take a number of years for one nation's law to evolve or develop. It may take many more years for an international consensus to emerge, if such a consensus ever does develop.15 A look at national developments in cyberspace jurisdiction within several countries will identify patterns and conflict.

A. Yahoo!: The U.S. and French Cases

Yahoo!'s auction site became a battleground between the French law, which prohibits the sale or display of Nazi memorabilia, and Yahoo!, which operates under the broad protection of the United States Constitution's First Amendment, which has been interpreted to allow offensive speech and the unfettered display of symbolic speech.16

On April 5, 2000, the California-headquartered Yahoo! corporation received a "cease and desist" letter telling Yahoo! to stop offering Nazi objects for sale within eight days.17 In addition, La Ligue Contre Le Racisme et L'Antisemitisme (LICRA) filed a civil complaint in France for Yahoo!'s violation of the French criminal statute which ordered Yahoo! to:

[e]liminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags;
1. Take all necessary measures to dissuade and make impossible any access via yahoo.com to the auction service for Nazi

17 Yahoo!, 169 F. Supp. 2d at 1181.
merchandise as well as to any other site or service that may be construed as an apology for Nazism or a contest to the reality of Nazi crimes.

2. To insure that all Internet surfers, even before they use the link enabling them to proceed with searches on Yahoo.com, see a warning informing them of risks involved in continuing to view such sites.

3. Post a warning to French citizens on Yahoo.fr that any search through Yahoo.com lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user.18

On November 20, 2000, the French court affirmed its May 22 order and instructed Yahoo! to “comply with the May 22 order within three (3) months or face a penalty of 100,000 Francs (approximately U.S. $13,300) for each day of non-compliance.”19 After deciding to try to comply with the French order (although it steadfastly asserted its legal right to do otherwise), Yahoo! posted a warning and amended its auction policy to prohibit “[a]ny item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan.”20 Yahoo! claimed that these changes were not in reaction to the French case but “grew out of its decisions to start charging auction listing fees and not ... to be associated with businesses profiting from hate materials.”21 If this claim is true, Yahoo! made a business decision, irrespective of the thorny legal issue of jurisdiction. In fact, Yahoo! may also have been trying to maintain its legal position to avoid being bullied into removing other material about which it would not be so compliant. In response to Yahoo!’s actions, Judge Gomez, the French judge who had initially ordered Yahoo! to remove the Nazi items, commented, “Yahoo went 10 times farther than I asked.”22

18 Id. at 1184.
19 See Yahoo!, 169 F. Supp. 2d at 1185.
20 See id. at 1185.
22 See id. Judge Gomez ruled against students in 1996 that distributed copyrighted music on the Web. He also ordered a hosting company could be ordered to shut down a Web site as an example for posting nude pictures of someone without their permission. He believes strongly
However, having capitulated to the ruling of Judge Gomez and seemingly facing no further proceedings in France, Yahoo! nevertheless filed a motion for summary judgment, seeking a declaratory judgment in United States District Court clarifying that the First Amendment "precludes enforcement within the U.S. of a French order intended to regulate the content of speech over the Internet." LICRA first tried to have the case dismissed for lack of jurisdiction and then argued that there was no real controversy because Yahoo! had substantially complied with the court order. In reality, Yahoo! saw the threat of future prosecution as real because it felt it could not fully comply with the French order. The Court granted summary judgment for Yahoo! on November 7, 2001, noting that there was an actual controversy and a threat to Yahoo!'s constitutional rights.

In his decision, Judge Fogel clarified what the case was NOT about:

[i]this case is not about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French republic in enacting the underlying statutes and of defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here.24

23 See Yahoo!, 169 F. Supp. 2d at 1193.
24 Id. at 1186.
Then, Judge Fogel proceeded to frame the actual issue as follows:

[w]hat is at issue here is whether it is consistent with the Constitution and the laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China’s laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom’s restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court’s analysis?25

Judge Fogel recognized he could sidestep the jurisdictional issue because, as the French argued, it was no longer a “controversy,” since Yahoo! was in “substantial compliance” with the French court order and there was no “present intention of taking legal action” against Yahoo!26 However, Judge Fogel noted that just because LICRA would have to institute further legal proceedings in France to collect any fine “does not mean that Yahoo does not face a present and ongoing threat from the existing French order.”27 After all, it is still possible to access Mein Kampf via Yahoo!.28 The Judge noted that this U.S.-based action was not an attempt to relitigate the French action or “disturb the French court’s application of French law or its orders with respect

25 Id. at 1186.
26 Id. at 1188.
27 Id. at 1191.
to Yahoo!'s conduct in France." Thus there was no need for abstention as is the case in some forum shopping situations.

Judge Fogel also discussed the obligation and limits of comity. He noted the precedent where "the court is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests." The judge noted that there were precedents for limiting comity in this area of speech:

[w]hat makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same 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.

Judge Fogel then cited the Matusevitch v. Telnikoff case as support. Although not an Internet case, Matusevitch did "declin[e] to enforce British libel judgment because British libel standards ‘deprive the plaintiff of his constitutional rights.’ " Judge Fogel found that the First Amendment precluded enforcement of the French order within the United States, just as the Matusevitch court had refused to enforce the British libel judgment. Concerned with the "chill[ing] of Yahoo’s First Amendment rights," Judge Vogel found a declaratory judgment was necessary and granted a summary judgment for plaintiff.

At the conclusion of this case, Yahoo!’s senior corporate counsel, referring to the French court’s order, commented, “who needs that hanging over your head? To get some comfort that we would not be subject to fines, we got the

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29 See Yahoo!, 169 F. Supp. 2d at 1191.
30 See id. at 1191 (discussing forum shopping in Supermicro Computer, Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147 (N.D. Cal. 2001)).
31 See id. at 1191.
32 See id. at 1192.
33 See id.
36 Id.
37 Id. at 1194.
court here to rule on the matter." But University of Chicago Professor Jack Goldsmith noted, "[t]he Yahoo! suit in California is unnecessary to prevent enforcement of the judgment and was just, in my opinion, a PR ploy," because U.S. courts would not have enforced the French order anyway.

LICRA has appealed. Its lawyer, Katz, argued, "There is this naïve idea that the Internet changes everything. It doesn’t change everything. It doesn’t change the laws in France." Katz added, "The real question here is, ‘who controls the Internet?’" Supporting this view of the Internet as having borders, Michael A. Geist commented, "We are now seeing geographical zoning online that mirrors geographical zoning offline. The view of the Internet as borderless is dying very quickly." Summing up the status of the case, Katz noted:

[r]ight now we have a situation where the French parties won in France, and the US parties won in the US courts. But why should the US law win out here? No one country can rule the Internet. Eventually, this will have to lead to a Treaty of some sort between countries. That’s what we’re hoping will be the ultimate goal.

The Association of Deportees of Auschwitz and Upper Silesia recently sued the former chief executive of Yahoo, Tim Koogle, in France for "justifying war crimes and crimes against humanity." Koogle was sued for one franc. The Court of Appeals has not ruled on LICRA’s appeal to date.

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39 Id.
40 Id.
41 See Guernsey, *supra* note 10, at 1.
42 See Summer, *supra* note 38, at 58. Katz wants the higher court to decide that a U.S. judge cannot have jurisdiction over his clients, in effect reopening the door to attempts to enforce the French judgment should the need ever arise.
B. Other U.S. Cases: Pornography, Gambling, Hate Speech and Libel

The issue of jurisdiction over the Internet has arisen within the United States in a number of contexts. However, the U.S. position on jurisdiction in cyberspace is not consistent from one issue to the next. Thus, when the United States is trying to control an activity such as gambling or the distribution of child pornography, the approach is much different from the earlier *Yahoo!* case, and the concern about stepping on jurisdictional toes seems to evaporate. These cases, however, create precedents that may not be distinguishable in other cases.

1. Pornography

In 1990, the Supreme Court ruled in *Osborne v. Ohio*[^46] that possession of child pornography inside the privacy of the home could still be a crime under the law. Since the transport and importation of obscene material, including adult pornography, is a more serious offense than simple possession,[^47] the intersection of the Internet and obscenity presented the courts with new dilemmas. The Ohio Supreme Court in *State v. Maxwell*[^48] addressed the downloading of Internet pornography and the issue of jurisdiction. Mark Maxwell, 27, from Ohio, began corresponding with a thirteen-year-old girl over the AOL instant messenger. They had planned to meet and discussed engaging in sexual acts. However, the thirteen-year-old informed police and met Maxwell wearing a wire. During the meeting, Maxwell did not say anything incriminating but was subsequently arrested. The police, with a search warrant, searched his computer and car and found child pornography, which had been downloaded via AOL 's servers in Virginia.[^52] Maxwell was tried and convicted of numerous charges, including "compelling prostitution,


[^47]: See United States v. Orito, 413 U.S. 139, 147 (1973) (holding that transportation of child pornography is a crime), United States v. Twelve, 200 foot Reels, 413 U.S. 123, 130 (1973) (holding that importation of child pornography for private use is a crime).


[^50]: *Id.*

[^51]: *Id.*

[^52]: *Id.*
disseminating matter harmful to juveniles, pandering obscenity involving a
minor, and illegal use of a minor in nudity-oriented material or performance.\textsuperscript{53}
The more serious charge of “pandering obscenity” criminalizes acts that “bring
or cause to be brought into this state any obscene material that has a minor as
one of its participants or portrayed observers.”\textsuperscript{54}

The Ohio Court of Appeals found for Maxwell because the defendant might
not have known he was importing the child pornography.\textsuperscript{55} In turn, the Ohio
Supreme Court reversed the Appeals court, finding that the statute “demon-
strates the clear intent of the General Assembly to impose strict liability on the
act of bringing child pornography into the state.”\textsuperscript{56} The court found that the
fact that the statute was enacted before the advent of the Internet was not a
reason to refrain from applying the statute. The dissent in the case argued that
importing child pornography carries a harsher penalty than simple possession
and, in this case, the defendant had no knowledge he was importing. Justice
Evelyn Lundberg Stratton also noted that “as frightening as it is, innocent users
can possess pornography of any type, child pornography or other, with no
intention of doing so by receiving email attachments or through a mistaken
search on the Web.”\textsuperscript{57} However, the defendant in this case was not the
innocent recipient of an email attachment or a mistaken Web search caused by
a mistyped name. Thus, the majority of the Court agreed that this was
importation in violation of the statute.\textsuperscript{58}

In another Internet pornography case, \textit{Ashcroft v. ACLU;}\textsuperscript{59} the Supreme
Court, in 2002, blocked enforcement of the Child Online Protection Act
(COPA) pending further review at the lower court. COPA criminalizes placing
on the Internet material of a sexual nature that “is harmful to minors,” and
places civil penalties on violators. The statutory standard “applies contempo-
rary community standards” and is triggered if violators intend to profit from
the activity. Justices Breyer and O’Connor advocated for a “national
standard”\textsuperscript{60} whereas Justices Kennedy, Ginsburg and Souter expressed concern
that the statutory test “subjects every Internet speaker to the standards of the

\textsuperscript{53} \textit{Id.} at 245.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Importation, supra} note 48.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} 535 U.S. 564 (2002); \textit{see also} \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002)
(finding law that bans animated child pornography unconstitutional).
\textsuperscript{60} \textit{Ashcroft v. ACLU}, 535 U.S. at 586-87.
most puritanical community in the United States.\textsuperscript{61} It will be several years before the Supreme Court decides with finality whether to apply a national standard for deciding obscenity. A national standard raises a difficult issue for small towns that do not want to be governed by a New York or Los Angeles standard. This question may be asked at an international level as well. Given the structure of the Internet, an international standard for obscenity may make the most sense, but for the reasons stated above is extremely unlikely.\textsuperscript{62}

2. Gambling

The courts have also addressed Internet gambling. While Nevada allows land-based gambling, New York does not. The Attorney General of New York became aware of Internet gambling operating in Antigua and initiated the case, \textit{People ex rel. Vacco v. World Interactive Gaming Corp.}\textsuperscript{63} World Interactive Gambling Corporation (WIGC) is a Delaware corporation which is headquartered in New York. WIGC has a subsidiary corporation, Golden Chips Casino, Inc. (GCC), in Antigua. GCC has servers in Antigua and a Web site that allows people to log on, download interactive software, and gamble from home.\textsuperscript{64} WIGC was also engaged in improper solicitation of securities offerings. WIGC sold $1,843,665 worth of investments to 114 investors, including $125,000 to New York residents.\textsuperscript{65} If someone from New York logged on, he would be denied gambling permission, but, if he changed his address to Nevada, access would be granted.\textsuperscript{66} WIGC argued that "the transactions occurred offshore and that no state or federal law regulates Internet gambling."\textsuperscript{67} WIGC asserted that cyberspace gamblers were actually visiting Antigua where gambling is legal. The court looked at the standard articulated in \textit{Burger King Corp. v. Rudzewicz}, defined as "purposefully engaged in significant activities such that he has 'availed himself of the privilege of conducting business [in the forum state].'"\textsuperscript{68} The court dismissed WIGC's argument, stating in part:

\begin{itemize}
  \item \textsuperscript{62} \textit{See id.}
  \item \textsuperscript{63} 714 N.Y.S.2d 844 (Sup. Ct. 1999).
  \item \textsuperscript{64} \textit{Id.} at 854.
  \item \textsuperscript{65} \textit{Id.}
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} \textit{See id.} at 848.
  \item \textsuperscript{68} \textit{Id.} at 849 (quoting \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 276 (1985)).
\end{itemize}
[g]ambling conducted via the Internet from New York to Antigua is indistinguishable from any other form of gambling since both the [Federal] Wire Act and Travel Act apply to the transmission of information into a foreign country.69

The court issued an injunction and noted that restitution payments, as well as penalties and costs, were warranted.70 The court also noted that each individual defendant was liable because the court pierced the corporate veil.71

The court did not seem troubled about blocking New York residents' access to what the state officials deemed illegal activities. Yet, there was no attempt to go after the Antiguan entity and shut down their online gambling operation. In fact, technology offers another way to block residents' forays into activities deemed illegal by the state. One San Diego company, Virtgame.com, found a way to block United States-based people from gambling on an offshore Web site.72 The company's founder, Bruce Merati, noted, "[t]he Internet is worldwide with no boundaries, no ownership and no legal jurisdiction. Our technology establishes boundaries on the Internet."73 The prospect of technological solutions mooting the jurisdictional questions will be discussed in Part III of this Article.

3. Hate Speech

The Yahoo! case addressed France's problem with Yahoo!'s auction site offering Nazi memorabilia for sale in violation of French law. Yahoo! capitulated in France and essentially complied with the French court's order.74 Had Yahoo! not done so, the French court would have had no difficulty imposing a daily fine until the company complied. The law in France, as in many other European countries, is clear with regard to hate literature.75 The

69 Vacco, 714 N.Y.S.2d at 852.
70 See id.
71 See id. at 854.
73 See id.
75 See id.
76 See, e.g., Alexander Tsesis, Hate in Cyberspace: Regulating Hate Speech on the Internet, 38 SAN DIEGO L. REV. 817, 853 (2001).
United States, in contrast, has espoused a different set of values that places freedom of speech as the ultimate value, the "first" of many.77

However, the United States Supreme Court may soon have a chance to revisit the issue of balancing one speaker's First Amendment rights, particularly in an Internet forum, against another's right to be free from intimidation and threats. Two recent cases may reshape the legal standards in the United States on this issue:78 Planned Parenthood of Columbia v. American Coalition of Life Activities79 and Black v. Commonwealth.80

In the first case, the 9th Circuit Court of Appeals overturned their previous ruling by a 6-5 vote in American Coalition Life Activists v. Planned Parenthood.81 The court found that Web sites which "greyed-out" abortion doctors who had been injured by an anti-abortion activist and "blacked-out" those who had been killed were "true threats" and thus not protected by the First Amendment.82 The Court noted that, "[v]iolence is not a protected value nor is a true threat of violence with intent to intimidate."83 The District Court initially awarded $109 million in damages to the plaintiffs but the Court of Appeals overturned the Award of Damage and ordered reconsideration of the award and a review of whether the award is excessive. This case likely will be appealed to the Supreme Court and will present the Court with an

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77 See, e.g., id. at 838-49.
78 See id. Tsesis argues for a criminal law, albeit imperfect, to address hate speech. He comments on private efforts through PICS, or Platforms for Internet Content Selection, systems and notes that China blocks access to U.S. government sites. Id. at 867. He distinguishes free speech thus:

[c]riminal penalties should be imposed on persons who intend harm and violence against identifiable groups. . . . Tolerance and egalitarianism should not be sacrificed at the altar of an absolutist free speech doctrine. It is in the public interest to manifest disapprobation for hate speech and to distinguish it from legitimate forms of political dialogue. False statements about identifiable groups do nothing to further mutual respect for inalienable rights. Government should not allow Internet users to foment worldwide intolerance and inequality. Instead, it should realize the potential global threats posed by hate speech on the Internet, the very purpose of which is to destroy democracy. . . .

Id. at 873-74.
79 Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
81 Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999), vacated by 244 F.3d 1007 (9th Cir. 1001), aff'd in part, rev'd in part by 290 F.3d 1058 (9th Cir. 2002).
82 See id.
83 See id.
opportunity to consider how to evaluate Internet threats. Although in the past, courts have given wide berth to this type of speech,\textsuperscript{84} in the aftermath of Columbine and the September 11 terrorist attacks, there may be heightened sensitivity to the reality of threats and the deleterious impact that they have in chilling the freedoms of targeted individuals. In this context, the United States may be more willing to join with the international consensus that hate speech is the new obscenity which nations can live without.

In the second case, \textit{Black v. Commonwealth}, the United States Supreme Court agreed to review Virginia's Supreme Court decision to strike down a state law that forbids cross burning. The court noted:

\textit{[t]he General Assembly (in 1952) acted to combat a particular form of intimidating symbolic speech- the burning of a cross. It did not proscribe the burning of a circle or a square, because no animating message is contained in such an act . . . Government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed.}\textsuperscript{85}

In contrast, Virginia officials argued that:

\textit{[t]he Virginia statute does not ban cross burning only in situations when it targets minorities. The law is broader, criminalizing cross burning any time it is done to intimidate anyone. Today a burning cross-standing alone and without explanation—is typically understood in our society as a message of intimidation. This is so regardless of the race, religion, or other characteristics of the individual targeted.}\textsuperscript{86}

Reviewing this case will allow the Supreme Court to revisit the issue from its 1992 case, \textit{R.A.V. v. St. Paul},\textsuperscript{87} and perhaps bring the U.S. position on hate speech into closer alignment with other countries which often have a different approach to this issue.

\textsuperscript{84} See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982) ("If we catch any of you going in any of them racist stores, we're gonna to break your damn neck.").

\textsuperscript{85} \textit{Black}, 553 S.E.2d at 776, 779.


\textsuperscript{87} See \textit{R.A.V. v. City of St. Paul}, 505 U.S. 377 (1992) (limiting regulation of free speech to "fighting words").
Many other Western countries view hate speech as pernicious and deleterious to the population. Of course, these countries watched as Nazism came to power virtually unchecked in some places, and they want to correct what they perceive as their mistake in allowing this to happen. The International Convention on the Elimination of All Forms of Racial Discrimination, signed by the United States in 1966, requires signatories to criminalize "all dissemination of ideas based on racial superiority and hatred and incitement to racial discrimination." To date, it does not seem that the United States has taken this commitment seriously. However, the ease with which hate speech can cross national boundaries via the Internet means that the U.S. may now feel increasing pressure to take a more aggressive stance against hate speech.

4. Libel

The Internet did not create the issue of enforcement of foreign judgments in the United States. In fact, what is considered libelous in one country may be protected speech in the United States. The classic case is the frequently cited Matusevitch v. Telnikov, where a United States court refused to enforce a British libel judgment against one man who accused another of making an anti-Semitic comment. In Matusevitch, the Court noted that such an enforcement action is not required by comity and would conflict with United States constitutional guarantees. However, the Internet surely poses some new challenges in the libel arena.

In June of 2002, the Virginia case Stanley Young v. New Haven Advocate was argued before the United States Court of Appeals for the 4th Circuit. In 1999, Connecticut prisons began sending inmates to prisons in Virginia. Two reporters for the papers each wrote articles about Wallens Ridge prison, noting the "harsh conditions" and "mistreatment" by prison guards. The articles appeared on two Web sites as well. Stanley Young, the warden at Wallens

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88 See Tsesis, supra note 76, at 858.
90 Id.
93 See Kaplan, supra note 92.
Ridge, alleged defamation. The district court found there was jurisdiction. The question for the court was whether the alleged defamation occurred in Connecticut where the material was published and placed on the Web site, or in Virginia, where it was downloaded by Young and others.

In *Calder v. Jones,* the United States Supreme Court addressed jurisdiction over a Florida-based publisher that sent over 100,000 copies of a magazine into California. The Court stated that:

> [t]he allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation was suffered in California. In sum, California is the focal point both of the story and the harm suffered. Jurisdiction over petitioner is therefore proper in California based on the "effects" of their Florida conduct in California.

Although this was not an Internet case, the principles are still relevant and applicable.

Daniel Burk of the University of Minnesota commented:

> the law views a publisher as intentionally directing harm to the place where the libel victim's reputation matters—where he or she lives, and where his or her friends read the articles. The mere posting of a possibly libelous article is enough to merit jurisdiction in the state where the plaintiff resides. I'd love the Supreme Court to revisit that but as the law stands now that is what it says.

In the *Young* case, Young claimed that the articles "conveyed to the community at large that Young was a racist who advocates and tolerates racism and abuse of inmates by the correctional officers under his control." The case

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95 Id. at 788.
97 See *Young*, 184 F. Supp. 2d at 503.
case turned on the interpretation of the Virginia Long Arm Statute, which states in part that personal jurisdiction is appropriate if that person is:

(3) Causing a tortious injury by act or omission in this Commonwealth; or (4) causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth.98

Secondly, the jurisdiction must not offend the notion of due process. The court noted that “[t]o meet the minimum contacts requirement, the out-of-state individual must have purposefully directed his or her activity toward the forum state.”99

Judge Williams began the analysis by framing the question as follows:

[ultimately], this case revolves around the interesting question of where acts or omissions conducted in cyberspace actually occur. Therefore, this court must first determine whether the defendants, either acting directly or through an agent, caused an injury from an act or omission within Virginia or outside of Virginia (citation omitted). If the court finds that the acts or omissions which are alleged to have caused injury occurred in Virginia, the court may exercise jurisdiction over these defendants . . . . If the court finds that these acts or omissions occurred outside of Virginia, the court must then determine if the defendants regularly did or solicited business or engaged in any other persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in Virginia (citation omitted). Next, the court must determine if the exercise of personal jurisdiction in this case would exceed the limits of due process100 (citation omitted).

98 Id. (citing VA. CODE ANN. § 8.01-328.1(A)(3), (4) (Michie 2000)).
99 Id. (citing Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945 (4th Cir. 1994)).
100 Id. at 503-04.
offending material is circulated." Ten to fifteen thousand copies of Hustler were circulated in New Hampshire each month. The plaintiff also cited *Calder v. Jones* which focused on the "intentional actions of the writers." The *Calder* court noted that the defendants in that case "aimed their activities at California as the defendants knew their article would cause substantial harm or injury to the plaintiff in California."

The defendant in *Young* tried to distinguish these cases by noting that they did not involve the Internet. The defendant had cited two Internet cases from other jurisdictions where the courts found insufficient contacts or, borrowing from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, found a passive Web site without sufficient contacts to trigger jurisdiction.

Judge Williams did not accept the New Haven Advocate's argument and approvingly cited the *TELCO Communications v. An Apple A Day* case, noting "[t]he TELCO court refused to distinguish between mailing paper letters and the use of a computer with access to the Internet to read information." Judge Williams then joined this line of cases and concluded, "this court agrees with TELCO in that information placed on the Internet Web site should be subjected to multistage jurisdiction."

Judge Williams then examined the ruling in *Christian Science Board of Directors of the First Church of Christ v. Nolan* where the Court of Appeals for the Fourth Circuit upheld the ruling of a North Carolina court which found jurisdiction over two men, one from North Carolina and the other from Arizona, who maintained a Web site critical of the Christian Science church. The judge concluded that in this case there was "purposeful availment," and that the "acts were neither fortuitous nor unintentional." Judge Williams,

102 *Id.* at 777 (citing Restatement (Second) of Torts § 577A cmt. a (1977)).

103 *Id.* at 772.


106 *Id.*

107 *See id.* at 506-07 (discussing Schapp v. McBride, 64 F. Supp. 2d 608 (E.D. La. 1998)).


110 *Id.* at 508.

111 *Id.*

112 259 F.3d 209 (4th Cir. 2001).

113 *See Young*, 184 F. Supp. 2d at 509 (discussing Nolan).

114 *Id.* at 510.
The judge concluded that in this case there was "purposeful availment," and that the "acts were neither fortuitous nor unintentional." Judge Williams, finding that there was "purposeful availment 'and that the acts of the defendants were not fortuitous or unintentional, concluded that jurisdiction was consistent with due process in the Young case and denied the motion to dismiss. The Young case was argued on appeal before the Fourth Circuit in June 2002, and was reversed.

Judge Michael found that the court "cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their Web sites or their posted articles at a Virginia audience." Looking at the record, Judge Michael concluded that "the overall content of both Web sites is directly local." The main point of the articles encompassed the Connecticut prison transfer policy and "encouraged a public debate in Connecticut." The judge concluded that the "newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them." The court expressed concern that an opposite ruling would leave anyone posting material on the Internet "subject to personal jurisdiction in every state" thus subverting traditional due process guarantees.

In an earlier case, ALS Scan, Inc. v. Digital Service Consultants, Inc., the same Fourth Circuit denied jurisdiction in Maryland over an Internet service provider from Georgia. The ISP, Digital, allowed its customer, Alternative Products, Inc. to place photos that were apparently taken from ALS Scan, Inc. on the Internet and thus derive revenue form this action. Digital maintained that it played no role in the copyright infringement scheme, it simply provided bandwidth. It also asserted that it had no contacts with Maryland. The court noted:

[w]e are not prepared at this time to recognize that a state may obtain general jurisdiction over out-of-state persons who

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114 Id. at 510.
115 See id.
116 315 F.3d 256, 258-59 (4th Cir. 2002) (citing ALS Scan, Inc., Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002)).
117 Id. at 263.
118 Id. at 264.
119 Id.
120 Id. at 263 (quoting from ALS Scan, Inc. v. Digital Service Consultants, Inc.).
decide today what that "something more" is because ALS Scan has shown no more.\textsuperscript{122}

This case is the proverbial easy case because the ISP had no connection to the enterprise of Alternative Products. The more difficult case would be if Digital was both a publisher and an ISP.

In a California Appeals Court case, \textit{Pavlovich v. Santa Clara Superior Court},\textsuperscript{123} a student at Purdue University posted on a Web site codes that could be used to break DVD encryption of movies so they could be copied.\textsuperscript{124} DVD Copy Control Association sued defendants in Santa Clara Superior Court. Pavlovich asserted that California did not have jurisdiction over him because he had no contacts with the state.\textsuperscript{125} The Appeals Court reasoned that, because Pavlovich knew of the dominant presence of the movie and technology industries in California, he knew or should have known that his actions would affect those California industries.\textsuperscript{126} Robert Sugarman, Attorney for the Petitioners, dismissed "doomsday rhetoric" concerns about the dangers of "extend[ing] California law to any place with an Internet connection."\textsuperscript{127} Sugarman also stated, "[t]he lower courts merely upheld established legal principles that allow states to protect their citizens from illegal acts aimed at them from beyond their borders."\textsuperscript{128}

On November 25, 2002 the sharply divided Supreme Court of California reversed and remanded the case.\textsuperscript{129} Justice Brown noted that Pavlovich had no contracts with California. The court applied an "effects test."\textsuperscript{130} The only contact was the posting of source code on the Web site that could be accessed by someone from California. The court had to confront whether this was sufficient to meet the requirement of "purposeful availment."\textsuperscript{131} The court acknowledged that the "question is close,"\textsuperscript{132} but found that it was not sufficient to confer jurisdiction. The court noted then the remaining question:

\textsuperscript{122} 293 F.3d at 715 (emphasis added).
\textsuperscript{124} See Pavlovich, 109 Cal. Rptr. at 909.
\textsuperscript{125} See id. at 911.
\textsuperscript{126} See id. at 916.
\textsuperscript{127} See Gavin, supra note 123.
\textsuperscript{128} Id.
\textsuperscript{129} Pavlovich v. Superior Court, 127 Cal. Rptr. 2d 329.
\textsuperscript{130} Id. at 338.
\textsuperscript{131} Id. at 340.
\textsuperscript{132} Id.
Thus, the only question in this case is whether Pavlovich's knowledge that his tortious conduct may harm certain industries centered in California—i.e. the motion picture, computer and consumer electronics industries—is sufficient to establish express aiming at California.

The court concluded "this knowledge by itself cannot establish purposeful availment under the effects test." The court clarified that this was a very narrow decision. The court stated:

[w]e merely hold that this knowledge alone is insufficient to establish express aiming at the forum state as required by the effects test. Because the only evidence in the record even suggesting express aiming is Pavlovich's knowledge that his conduct may harm industries centered in California, due process requires us to decline jurisdiction over his person.

The court noted that the plaintiff had the resources to sue Pavlovich in Indiana or Texas and thus this ruling did not preclude his "fac[ing] the music."

The dissent argued that the defendant should not be able to "shield themselves from suit simply by using the Internet . . . as a means of inflicting the harm." Judge Baxter noted that a ruling affirming jurisdiction would not expose the defendant to "universal and unpredictable jurisdiction. He faces suit only in a particular forum where he directed his injurious conduct, and where he must reasonably anticipate being called to account." Judge Baxter disputed that this was akin to a passive Web site.

In another Internet case, Nam Tai Electronics v. Titzer, the California courts acted once again. Nam Tai, a British Virgin Islands company doing business in Hong Kong, filed suit against Colorado resident Joe Titzer, who allegedly posted defamatory messages about Nam Tai on a Yahoo! message board. The trial court found no jurisdiction. The California Appeals Court agreed. Titzer used "seven aliases [and] posted 246 messages on Yahoo!

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133 Id.
134 Id. at 343.
135 Pavlovich v. Superior Court, 127 Cal. Rptr. 2d 329.
136 Id.
137 Id. at 351.
138 Id. at 352.
139 113 Cal. Rptr. 2d 769 (2001).
140 See id. at 771.
141 See id.
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Internet message boards about Nam Tai's stock."\(^{142}\) Titzer had agreed to Yahoo!'s terms of service which included a provision that the laws of California should govern the relationship between Yahoo! and the individual user and that the subscriber agreed to submit to California jurisdiction.\(^{143}\) The Court noted that Nam Tai had no particular connection to California and analogized the Nam Tai case to another California case, Jewish Defense Organization, Inc. v. Superior Court.\(^{144}\) The Court in Jewish Defense Organization held that:

[plaintiff] failed to establish he had any clients in California, or that the alleged defamatory statements herein would impact a business interest or reputation in California . . . . There is an insufficient basis in this record to conclude that California is [plaintiff's] principal place of business, or that the alleged defamation was targeted at California or would cause the brunt of the harm in California. Accordingly, there is not sufficient evidence showing defendants' minimum contacts with California under the analysis set out in cases dealing with defamation by nonresidents.\(^{145}\)

The Nam Tai court found that the defendants' comments posted on Yahoo! were not directed at Californians.\(^{146}\) The court distinguished the Pavlovich case where the out of state student targeted the California motion picture industry.\(^{147}\) The only connection Nam Tai could argue existed between the company, California, and Titzer, was that because Nam Tai stock trades on NASDAQ and California is a populous state, investors might be hurt.\(^{148}\) The court noted:

[the issue is not whether the company that makes the Web sites available is incorporated or based in California . . . . The determinative question is whether the Web sites themselves are of particular significance to California or Californians such that the

\(^{142}\) Id.

\(^{143}\) See id. at 1305.

\(^{144}\) 85 Cal. Rptr. 2d 611 (Cal Ct. App. 1999).

\(^{145}\) 113 Ca. Rptr. 2d at 775 (quoting court in Jewish Defense Organization, Inc. v. Superior Court, 85 Cal. Rptr. 2d 611, 620 (Cal. App. 2 Dist. 1999)).

\(^{146}\) See id. at 776.

\(^{147}\) See id. at 778 (discussing Pavlovich, 109 Cal. Rptr. 2d 909 (Cal. App. 2001)).

\(^{148}\) See id. at 778 (discussing Pavlovich, 109 Cal. Rptr. 2d 909).
The issue is not whether the company that makes the Web sites available is incorporated or based in California. . . . The determinative question is whether the Web sites themselves are of particular significance to California or Californians such that the user has reason to know the posting of a message will have significant impact in this state.149

Titzer did sign an agreement when he registered with Yahoo! that all disputes would be heard in California, but this agreement did not unambiguously apply to third parties.150 Further, the appellant failed to prove the existence of a relationship between the state and the injury, thus the court declined jurisdiction.151 This outcome is analogous to a non-Internet case, *Asahi Metal Industry Co. v. Superior Court of California,*152 where the court ruled that there would be no jurisdiction over a non-resident defendant for simply putting an item (a tire valve) into the stream of commerce.153 It is interesting to note in that case that the California resident had already settled his claim and so California's interest between Japanese and Taiwanese manufacturers was slight.154 The Supreme Court has not definitively answered the question of when Internet contacts rise to the level of "sufficient minimum contacts" for purposes of jurisdiction.155

C. Germany

There has been legal fallout from the *Yahoo!* cases in other countries.156 The German railways pressured Yahoo!, AltaVista and Google to remove a site that detailed how to sabotage trains, although this information had been available for five years.157 A Dutch judge ruled the Web site, "Little Guide to

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149 *Id.* at 776.
150 *Id.* at 777.
151 *Nam Tai*, 113 Cal. Rptr. 2d at 778.
153 *See id.*
154 *Id.*
156 *Cf.* Delaney, supra note 21 (noting a German court convicted the head of CompuServe of distributing child porn in 1998 because the company did not block illegal postings. A higher German court later overturned that decision. This poses dramatic business implications for a company. PSINet, Inc. shut down its business in Germany because of fear of what happened to CompuServe).
157 *See* Martin Bensk, *German Rail Chiefs Foil the Internet Saboteurs*, DEUTSCHE PRESSE-
transshipments of radioactive waste and are willing to do anything to stop these shipments, including serious tampering with rail lines.\textsuperscript{159} The problem is that one can still buy books detailing sabotage strategies. Deutsche Bahn lawyer Christian Schreyer stated, "[w]e're talking here about a [web] site which incites people to sabotage the railways. This [sic] has nothing to do with stopping free speech."\textsuperscript{160}

In another German case, a Mannheim district court found that German law does not have jurisdiction over online publications.\textsuperscript{161} This case involved hate speech posted on an Australian Web site. Specifically, this Web site contained material denying that the Nazi Holocaust was a systematic attempt by the German government to exterminate Jews.\textsuperscript{162} This revisionist historical material contained inferences which could clearly be construed as anti-Semitic and which would likely cause distress to Jewish people and others who accessed the site. In Australia, Dr. Fredrick Toben, the founder of the site, was found to have violated a local anti-discrimination statute, but in Germany, the problem was more complex and raised a jurisdictional issue.\textsuperscript{163} Because of the role of Germany in the Holocaust, the German government is hyper-vigilant about any signs of Neo-Nazism. This vigilance has resulted in a law which makes "denying the Holocaust" illegal in Germany.\textsuperscript{164} Thus, Germany claimed that, even though the objectionable material was originally posted in Australia, Dr. Toben's Web site violated German law.\textsuperscript{165}

In denying jurisdiction, the Mannheim court relied on the premise that the place of publication determined jurisdiction.\textsuperscript{166} Thus, since the material originated in Australia, Germany had no jurisdiction in this case. The court also supported its decision by emphasizing that to access this material, a German citizen would have to actively decide to enter this site and download the objectionable material.\textsuperscript{167} Here, the German court seems to stress, as did the U.S. court in \textit{Yahoo!}, that, if tolerance for abusive free speech is different

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} See \textit{German Court Sentences Australian Holocaust Skeptic (Fredrick Toben)}, 18 J. HIST. REV. 2 (1999), available at http://www.ihr.org/jhr/v18/v18n4p-2_Toben.html (visited January 21, 2003) [hereinafter \textit{German Court}].
\textsuperscript{162} See id.
\textsuperscript{163} See id.
\textsuperscript{165} See \textit{German Court}, supra note 161.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
where the material is published from where it is received, jurisdiction is tied to where the Internet material is published.

D. Italy

A recent Italian case\textsuperscript{168} also considered whether place of publication of objectionable Internet material determines where jurisdiction resides. However, this case concerned a libel suit resulting from Internet postings. In this case, the Italian court found that Italy had jurisdiction over a Web site in Israel which posted "extremely negative defamatory opinions" on the character of the plaintiff, who resided in Italy, and on the conduct of Italian judicial authorities.\textsuperscript{169} The Italian court found that if the libelous material can be accessed where the defamed party resides, that court has jurisdiction.\textsuperscript{170} Unlike the German court in the Toben case,\textsuperscript{171} the Italian court did not find the place where the Internet material was published to determine jurisdiction.\textsuperscript{172}

The Italian case resulted from a custody dispute over two minor children.\textsuperscript{173} When the mother of these children came to fear that the Italian courts would remove the children from her custody due to the father's complaints about their Orthodox Jewish upbringing, she left Italy and took the children to Israel to live.\textsuperscript{174} There she continued to bring her daughters up as Orthodox Jews.\textsuperscript{175} When the father located his children in Israel, the Israeli court relinquished the children to his custody, acknowledging that the custody dispute had to be decided where it had originated, in the Italian court.\textsuperscript{176} Once the children were removed from Israel, several Web sites in Israel began posting what the father saw as libelous material, including suggestions that Jews should "free" the girls from captivity by their father.\textsuperscript{177}

In asserting jurisdiction in this case, the Italian court cited the "theory of ubiquity," which allows them to deal with a crime which was initiated

\textsuperscript{168} No National Boundaries for Libel on the Internet, Court of Cassation, Judgment No. 4741 (Dec. 27, 2000), \textit{at} http://www.cdt.org/speech/international/001227italiandecision.pdf.

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{See German Court, supra note 161.}

\textsuperscript{172} \textit{See supra note 168.}

\textsuperscript{173} \textit{See id.}

\textsuperscript{174} \textit{See id.}

\textsuperscript{175} \textit{See id.}


\textsuperscript{177} \textit{See No National Boundaries for Libel on the Internet, supra note 168.}
elsewhere but whose effects are felt in Italy. Here, the court applied Italy’s libel law to the unique environment of the Internet. In this high tech environment, the court reasoned, the actual crime of libel does not occur when the defamatory material is posted on the Internet. Rather, the offense occurs when this material is viewed by “third parties,” since the posting itself does not defame the individual. In other words, viewing the material and assimilating its meaning causes the defamation. Hence, although the libelous material in this case was posted in Israel, the actual libel occurred in Italy (as well as in other countries around the globe) and so the Italian courts had jurisdiction.

The court found that the same libel laws which apply to other media, such as print and media broadcasts, could be applied logically to libel which takes place via the Internet. If anything, this court felt that libeling someone via the Internet was more pernicious than libeling someone via other forms of media since the Internet can disseminate material much more widely and much more quickly. In this context, then, the Italian court felt that claiming jurisdiction provides an important protection for its citizens.

E. Canada

A Canadian Human Rights Tribunal recently acted upon a complaint from Sabina Citron, the founder of the Canadian Holocaust Remembrance Association, about Ernst Zundel’s Web site which denied the holocaust. The Commission found a violation:

[b]ased upon our view that the Zundel site materials characterize Jews as liars, cheats, criminals and thugs who have deliberately engaged in a monumental fraud designed to extort funds, we regard it as highly likely that readers of these materials will, at a minimum, hold Jews in very low regard, viewing them either with contempt, scorn and disdain, or hatred, loathing and revulsion.

\[178\] Id.
\[179\] Id.
\[180\] Id.
\[181\] Id.
\[183\] Id.
The Commission ordered Zundel to cease and desist.\(^{184}\) Unfortunately, Zundel then moved to Tennessee.\(^{185}\)

In another incident, ICrave, a Canadian company, created the concept of "TV on the Internet."\(^{186}\) The concept was to let people in their office watch TV. The company started in November 1999 and had 800,000 hits in the first month. The Motion Picture Association, NFL and NBA sued ICrave in Pittsburgh, which was where ICrave had registered its domain name. On February 8, 2000, the United States District Court issued a preliminary injunction preventing ICrave from broadcasting in the U.S. Since there was no technology to stop the signal leaking, the company was compelled to shut off broadcasting. The involved parties reached a settlement on February 29, 2000.\(^{187}\) ICrave believed rebroadcast was legal in Canada but settled issues. They have a new technology called "iWall" which supposedly prevents "leaking" into the United States.\(^{188}\)

F. Australia

Australia has had to deal with the issue of jurisdiction over the Internet in several high profile cases. Like France, it does not have a problem limiting access to some material or penalizing those who post material deemed in violation of law. In May of 2002, a high profile case, Dow Jones & Co. v. Gutnick, was argued before the High Court.\(^{189}\) Joseph Gutnick sued Dow Jones for defamation. The article had "implied that he (Gutnick) had laundered money through jailed Victorian money laudner Nachum Goldberg."\(^{190}\) The lower court said the matter should be heard in Victoria, Australia, because Gutnick downloaded the article there from a subscriber-only

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\(^{184}\) Id.


\(^{186}\) See Greg Grazin, Breaking Into the Big Internet Bucks, EDMONTON SUN, June 28, 2000, at 53.


\(^{189}\) See [2001] V.S. Ct. 305; see also Katherine Towers, Media’s Big Guns Try to Intervene in Gutnick Case, AUSTL. FIN. REV., May 15, 2002, at 3.

\(^{190}\) Towers, supra note 189, at 3.
Web site. Dow Jones wanted the case heard in New York or New Jersey because that is where the material was put on the server.

The Web site had 550,000 subscribers with 1700 people, several hundred in the Victoria area, paying by credit card from Australia. The plaintiff also had affidavits from people who downloaded the article. Judge Hedigan found that publication occurred where it was downloaded. The judge noted that many of the arguments on the other side are "policy driven," "perhaps by a belief in the superiority of the United States' concept of freedom of speech over the management of freedom of speech in other places and lands."

The court then turned to the forum non-conveniens issue. The defendant claimed that the location of the servers in New Jersey was the appropriate forum and warned that the danger of libel actions might lead businesses to ignore Australia for fear of expensive litigation. The court did an extensive review of case law and concluded:

[w]eighing up and balancing all of these factors, I reach a clear conclusion that the State of Victoria is both the appropriate forum and convenient forum for the deposition of the litigation commenced by the plaintiff. Many of the defendant's claimed difficulties are more imagined than real, but, at the end of the day, the most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State, in respect of a defamatory publication published in this State, suing only upon publication in this state and disclaiming any form of damages in any other place.

This case was argued before the High Court and a decision issued December 10, 2002 affirming the lower court and dismissing the appeal. The High Court of Australia noted, "Mr. Gutnick's claim was thereafter a claim for

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192 See Maria Moscaritola, Internet Test Case, ADELAIDE ADVERTISER, May 29, 2002, at 28.
194 Id.
195 Id. at 74.
damages for a tort committed in Victoria, not a claim for a tort committed outside the jurisdiction."

The question is: where has publication occurred? Certainly France and Germany had no difficulty finding the action occurred when the material was downloaded in Australia. This means that companies could face worldwide liability. Yet do they not already in some ways? The Internet just seems to magnify what has existed already. Even if there is a judgment, the plaintiff still must collect and, as other plaintiffs have discovered, enforcing a foreign judgment in the United States, particularly a libel judgment, can be next to impossible. Dow Jones has found many companies who apparently perceive their economic self-interest as well as business publishing future to be at stake, to join in the case. However, it would be too narrow to paint those siding with Dow Jones as motivated solely by money or self-interest. Some are clearly motivated by a desire to maintain the Internet as borderless and either self-regulated or without government imposed regulation.

III. TECHNOLOGICAL SOLUTIONS

While the international community struggles with the concept of jurisdiction and whether one country can enforce the delisting of offensive Internet auction items or the restriction of speech, technology offers a way that may circumvent this problem. Some countries have already tried to block access to certain sites. Countries which seek to block Internet access do so for a variety of reasons, from objection to pornography to fear of political dissidents. For example, Saudi Arabia, where public access to the Web only started in 1999, blocks pornography, material defamatory to the royal family, Internet chat rooms and certain explicit anatomy sites. Some citizens respond in Saudi Arabia by playing cat and mouse with the government, using anonymizing software to evade the block. This may work for several months only to have another block placed by the Saudi government, and the game starts over. One example, Safe Web, allowed people from Saudi Arabia to log on and then view any Web site. Saudi Arabia shut down the Web site. Traffic dropped from "70,000 to 0," but Safe Web simply e-mailed new

198 See Matusevitch, 877 F. Supp. at 34.
200 See id.
technology which was capable of evading the government's block. It is interesting that technology has cut a way through these blocking devices:

[a]most all the censoring governments exercise control through central gateways. Saudi Arabia spent two years developing the hardware and software necessary to filter almost all Web data entering the country through a central server. Residents can circumvent government controls by connecting to the Web through foreign-based servers and through satellite phones or by using the file transfer protocol. But these methods require either money or some computer expertise.

These anonymizing devices not only work for the innocently curious who are eager to evade their countries' prudish restrictions, but also for would-be terrorists who want to navigate the Web, get information and share plans without detection.

Newer technology offers more opportunities to countries and businesses. One commentator describes this technology:

[The] only “passports” to the Internet are IP addresses, a string of numbers that have no direct correlation to the location of a user's computer. Geolocation technology, initially developed to facilitate geographically targeted advertising, purports to be able to determine location but the products are relatively new and their claims untested.

Geo-targeting may be most useful to countries and those industries that “must frequently respect national or state boundaries where they do business.” Both pharmaceutical companies and pornography merchants will be interested in this technology. The music business, with its concern about copyright and

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202 See id.
203 See id.
204 See id. (noting that people who use this new technology have no way of knowing what passes through their computer and that governments cannot block this information).
205 Tamara Loomis, Jurisdiction: Yahoo Decision Affords Internet Companies a Temporary Respite From Worry, 6 No. 8, INTERNET NEWSLETTER 5, Nov. 2001.
206 See Bob Tedeschi, E-Commerce; Borderless Is Out; Advertisers Now Want to Know If a Customer Lives in Cairo, Egypt or Cairo, Ill., N.Y. TIMES, Apr. 2, 2001, at Cl0.
207 Don Bauder, Deck Seems Stacked Against Local Net Gaming, SAN DIEGO UNION TRIB., Apr. 21, 2002, at H2; Balint, supra note 72, at A-1.
distribution rights, will also be an early tester of this technology. As mentioned previously, Virtgame.com, a San Diego based company, found a way to block persons residing in the U.S. from gambling on offshore Web sites. Its founder, Bruce Merati, noted, “The Internet is worldwide with no boundaries, no ownership and no legal jurisdiction. Our technology establishes boundaries on the Internet.”

Technological innovation will reshape this area. Already, designers like Tim Berners-Lee of the new “semantic web,” offer promise of technology with unfathomable capability.

Cass Sunstein, the prolific professor from the University of Chicago, raised concerns about a technological response to the Internet regulation problem. In his recent book Republic.com, he addressed his concern that “perfect filtering,” which would allow Internet users not to see anything they wished to avoid (or their government chose for them not to see) would have a deleterious impact on democracy. Dan Hunter rebutted Sunstein’s Republic.com in his recent law review and identified “perfect filtering” as “a hypothetical technology [beyond NetNanny and CyberPatrol] enabling a person to receive only the media content that she or he desires, by filtering out all other material.” Hunter fundamentally disagreed with Sunstein on several fronts. First, Hunter argued that “perfect filtering” is “technologically implausible.” Secondly, he argued that, even if such technology existed, it would not differ from the filtering we have in media now and would not necessarily lead to any more political extremism than exists today. Hunter concluded with an affirmation that “the Internet is the greatest communications medium we have ever seen. Its benefits are great, and its risks to democracy slight.”

Whether or not Sunstein proves correct and “perfect filtering” does develop, the technological developments offer individuals and businesses the opportunity to further target their audience as well as to filter messages that reach them.

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208 See Tedeschi, supra note 206, at C10 (giving as an example Vivendi Universal Music group who has been using this technology to trace a user’s location to better enable them to comply with each jurisdiction’s laws).

209 Balint, supra note 72.


212 Id.

213 See id.

214 Id. at 616.
For example, development of the VCR, which allowed individuals to record TV shows and watch them later when they could fast forward through the commercials, led businesses to try to integrate commercials into the actual contents. As a result, we now see increased product placements in movies as advertising. The visions of the Jetsons that many grew up with on television are becoming a reality.

The debate to date has been framed as a legal one over jurisdiction but the role of technology and its potential to reframe the debate must be acknowledged. Lawrence Lessig, a noted cyber-scholar, has stated, "[t]his is a battle at the level of the architecture. It is the code of cyberspace that gives privacy and takes it away."215 The role of code and technology as the bricks of the 21st century is clear.

IV. INTERNATIONAL EFFORTS

There have been a number of efforts to deal with these issues internationally. The most significant was the Council of Europe's opening for signature of the Convention on Cybercrime,216 which the United States, Japan, Canada and South Africa have already signed. The Convention has three main parts: harmonization, coordination of criminal investigations and prosecutions, and effectiveness of operations.217 One of the key features is the focus on jurisdiction. This will be a major development if and when the Convention is implemented internationally. The Convention states that each country must establish its jurisdiction when an offense is committed within its territory, on board a boat or a plane registered in that country or when one of its nationals commits an offense that does not come within the jurisdiction of any other country.218 Twenty-six countries signed the Treaty on its opening.219 Others have followed and will continue to do so.220 Although the Convention ducked

215 See Lee, supra note 199.
217 Id.
218 Id.
219 Id. Those signing Treaty are Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom. Non-Council members also signed including Canada, Japan, South Africa, and the United States.
220 See Fergus Cassidy, Retention of Privacy; ETHOS, SUNDAY TRIB. (Ireland), Feb. 9, 2003,
the issue of when something is committed within a given country's territory, it implies agreement that this could take place either where the actor acted or where the victim received the message. This is recognized worldwide as a significant development.221

The Council of Europe is drafting an accompanying side agreement or Protocol which "will make racist and xenophobic propaganda via computer networks an offence."222 The United States did not want this included in the Convention as a whole and insisted it go to a side agreement.223 The United States has a long history of tolerating offensive speech as part of a broad view of the protection of freedom of speech. However, as suggested earlier, two cases being considered in the next term by the Supreme Court may revisit this issue.224

Another convention, the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,225 proposed by the Hague Conference on Private International Law and adopted by special commission on October 30, 1999, addressed many issues including defamation on the Internet.226 However, this is unlikely to be ratified because of nations' concerns about preserving their own national approach to law.

Before an international consensus can be reached, there first needs to be independent national consensus. Groups such as the American Bar Association are helpful in beginning this discussion. The American Bar Association Global Cyberspace Jurisdiction Project: London Meeting Draft was an important step in the international discussion.227 Change and consensus building can occur despite pundits who posture that it is impossible to effect an international consensus. One need only examine the history of the

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223 Id.; see also Council of Europe Moves to Ban Internet Hate Speech, INFO. STRATEGIC BUSINESS INFORMATION DATABASE, Nov. 18, 2001.

224 For discussion of cross burning and abortion doctor Web site cases, see supra notes 81-87 and accompanying text.


movement from the United States Foreign Corrupt Practices Act\textsuperscript{228} to the International Convention Combating Bribery of Foreign Public Officials in International Business Transactions.\textsuperscript{229} The drafters of the ABA report concluded:

\begin{quote}
[b]eyond private ordering the harmonization of substantive laws across state and national lines can obviate at least one of the jurisdictional issues, that of prescriptive jurisdiction. To the extent the law of all fora related in any way to the dispute is the same, it matters little which is applied. In many instances, of course, such harmonization will be exceedingly difficult; different states, with different understandings of the needs and rights of those they protect, will argue for very different results with respect to such things as consumer protection, gambling and libel etc. On the other hand, there is likely to be agreement that fraud in the offering of securities is to be prevented. The greater the common understanding, even if laws are not identical, the greater is the likelihood that differences will matter little to the parties, (and) compliance with both will flow more easily from compliance with one.\textsuperscript{230}
\end{quote}

Following this logic, the greatest potential for success will stem from those areas internationally where there is the most common ground. In a post September 11 world, the world community may agree on the need for a uniform approach to dealing with terrorism, trafficking in nuclear materials and weaponry and terrorist threats. Even the United States and its Court may be willing to interpret the Constitution to accomplish this goal.

\section*{V. CONCLUSIONS: SUGGESTIONS FOR CHANGE}

The cataclysmic events of September 11, 2001 forever changed\textsuperscript{231} the landscape in the United States, and the legal, social and psychic reverberations

\textsuperscript{228} See Foreign Corruption Practices Act of 1977, 15 U.S.C. § 78 (adding §§ 78dd-1 and 78dd-2 and amending §§ 78m and 78ff); see also Symposium, supra note 15.


\textsuperscript{230} See Report, supra note 227, at 176.

\textsuperscript{231} Hans Christian Krueger, Deputy Head of Council of Europe, commented, "after the events of September 11, life has changed for everyone in our countries." Therese Jauffret, Cybercrime Pact to Target Terrorists, AGENCE FRANCE PRESSE, Nov. 23, 2001.
will be felt for many years to come. Prior to this date, the Supreme Court of the United States supported virtually unfettered freedom of speech and, as a consequence, the Internet existed unregulated and unmonitored. Post September 11, the United States has moved closer to many other Western countries in permitting the balance to shift from protecting civil liberties from governmental intrusion to a posture of oversight and regulation to promote security. Although this balance is being debated and will be tested in the courts for years to come, the events of September 11 will no doubt have an impact on the debate about borders on the Internet.

The Cybercrime Treaty was an important first step towards convergence. As an international community, we must find some common legal ground on censorship. The Protocol on Hate Crimes may be a starting point, particularly if the Supreme Court clarifies the limits of free speech on the Internet this term. Child pornography and securities fraud offer other possible areas of agreement.

The market itself may find new ways to address what first presented itself as a jurisdictional issue. Geolocation technology will develop and will allow the approximation of "perfect filtering." Governments have always chosen to use existing means to block access to some information for citizens. Companies will use this technology to insulate themselves from liability, making clear that they took reasonable efforts to block certain groups' access to their sites. Businesses may also amend user agreements so there is a consent to jurisdiction by anyone who posts information via the server vis-a-vis anyone who downloads the posting. The "chill" of forcing people to accept the consequences of what they post in cyberspace is not necessarily a bad outcome since the potential damage in cyberspace is so much greater; a cyberspace whisper can literally reach millions of people.

Absent a treaty, countries will still have different standards. In problematic contexts, as when Australia advanced a tough defamation standard, businesses

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233 See Jonathan Este, Worldwide Whispers, WEEKEND AUSTL., Apr. 7, 2001, at 26 (telling the story of Claire Squire, a dotcom manager in London who wrote her boyfriend a graphic email praising his sexual prowess. He sent the email to about 6 friends and within a week 10 million people had received the message); Tom Rawstorne, Trader Who Emailed Himself Out of A Job, DAILY MAIL, May 31, 2001, at 37 (providing another example the "Squire Effect," where an email description of a sexual act gets forwarded around the globe in a short period of time (hours). In this case, a young man, sent to South Korea, e-mails his sexual exploits to friends. Because his email was forwarded, so widely, he resigned from his $100,000 position).
will not sell to subscribers in that country. Then, subscribers will have to use alternate technological solutions to order anonymizer software, to buy access.

Courts around the world are embracing a broader view of jurisdiction, not only in Internet related matters but also in other cases when conduct affects persons within its borders. While this may threaten the concept of the borderless Internet, it offers new opportunities to protect intellectual property rights.234

It may be inevitable in cyberspace, as it was on terra firma, that fences will be erected. The fences are the legal demarcations of crossing into a different zone with different rules. However, these fences will still be permeable, analogous to the situation where those who desire to visit Cuba can easily circumvent the United States travel ban to Cuba. The new cyberspace will have open spaces too, where people can meet in the equivalent of international waters.

Cyberspace will continue to be a focus of overlapping jurisdictions, just as other business transactions may be subject to multiple jurisdictions. This overlap has never halted commerce before and will not now. While companies may have the right to peddle trash, they may choose not to. Ethical self-regulation may forestall some of the push for additional legal regulation of the Internet.

There is no escaping the uneasy balance between regulation and freedom, especially when the regulation is done in the name of security. As a nation, we must struggle with how to handle the new frontier of cyberspace along side our international neighbors. Our experience in space may be a good beginning. We must proceed slowly, working together, finding areas of agreement, tolerating national differences, and adjusting as technology changes the entire landscape in ways we never contemplated.

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