

# Michigan Journal of International Law

---

Volume 24 | Issue 3

---

2003

## Introduction: The *Yahoo!* Case and Conflict of Laws in the Cyberage

Mathias Reimann

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Conflict of Laws Commons](#), [First Amendment Commons](#), and the [Internet Law Commons](#)

---

### Recommended Citation

Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT'L L. 663 (2003).

Available at: <https://repository.law.umich.edu/mjil/vol24/iss3/1>

This Introduction is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mjil.repository@umich.edu](mailto:mjil.repository@umich.edu).

# INTRODUCTION: THE *YAHOO!* CASE AND CONFLICT OF LAWS IN THE CYBERAGE

*Mathias Reimann\**

I. THE <i>YAHOO!</i> LITIGATION: A DRAMA IN TWO ACTS.....	663
II. CYBERAGE CONFLICTS: FIRST GENERATION ISSUES.....	665
III. THE <i>YAHOO!</i> CASE RECONSIDERED: SECOND GENERATION ISSUES.....	669

## I. THE *YAHOO!* LITIGATION: A DRAMA IN TWO ACTS

Three years ago, two French public interest groups, La Ligue Contre le Racisme et L'Antisemitisme (LICRA) and L'Union des Etudiants Juifs De France (UEJF), sued Yahoo! Inc., a Delaware corporation headquartered near Santa Barbara, California, in the Tribunal de Grande Instance in Paris. The undisputed facts underlying the complaint were that: Yahoo! Inc. operated, inter alia, an auction website on which various Nazi memorabilia (such as flags, stamps, and military souvenirs) were offered for sale; the respective Yahoo! Inc. website was accessible in France; and the display of the Nazi memorabilia was illegal under French law. The French plaintiffs sought an order prohibiting Yahoo! Inc. from displaying the memorabilia in France. The lawsuit triggered a drama in two acts, the first of which took place in France while the second was played out in California.

In Paris, the French tribunal found that it had (personal) jurisdiction in this case because Yahoo! Inc. had committed a wrong (under section R.645-2 of the French Criminal Code), and caused harm, in France. Applying French law, the court gave short shrift to Yahoo! Inc.'s argument that the website message was speech protected under the First Amendment to the U.S. Constitution. Most importantly, the court rejected Yahoo! Inc.'s argument that compliance with French law would require the complete elimination of the respective website worldwide. After consulting an international team of experts, the tribunal concluded that it was technically possible for Yahoo! Inc. to block access to surfers in France with a 90 percent success rate. It also found Yahoo! Inc.'s

---

\* Hessel E. Yntema Professor of Law, University of Michigan. As the Chair of the AALS Conflicts Section in 2002-03, the author was responsible for choosing the *Yahoo!* case as the Section topic for 2003 and for organizing the meeting on January 3, 2003 in Washington, D.C. Thanks to the members of the Executive Committee, Hannah Buxbaum, Graeme Dinwoodie, and Jim Nafziger, as well as to Symeon Symeonides, for their advice in selecting the topic and organizing the panel.

impossibility argument undermined by the fact that on its website, Yahoo! Inc. greeted French users with advertisement banners in French. The court thus ordered Yahoo! Inc. "to take such measures as will dissuade and render impossible any and all consultation on Yahoo.com of the auction service of Nazi objects as well as any other site or service which makes apologies of Nazism or questions the existence of Nazi crimes." It gave Yahoo! Inc. three months to comply with the order and imposed a daily fine (*astreinte*) of FF100,000 (US\$13,300) in case of noncompliance.<sup>1</sup> In January of 2001, Yahoo! Inc. banned Nazi memorabilia from its U.S. auction sites, claiming, however, that it was not acting in response to the French court order.<sup>2</sup>

Instead of pursuing an appeal in France, Yahoo! Inc. turned around and promptly sued the French plaintiffs in the United States District for the Northern District of California. Although the plaintiffs had made no effort to enforce the French order in California, Yahoo! Inc. sought a declaratory judgment that the French decision could not be recognized in the United States.<sup>3</sup> On June 7, 2001, the District Court found that it had personal jurisdiction over LICRA and UEJF because they had intentionally targeted a California party and purposefully availed themselves of California (and federal) law when they served Yahoo! Inc. with process.<sup>4</sup> Five months later, the court granted summary judgment on the merits in favor of Yahoo! Inc. Judge Fogel held that enforcing the French decision would be incompatible with Yahoo! Inc.'s First Amendment rights and thus violate U.S. public policy.<sup>5</sup> The French defendants appealed the jurisdictional ruling to the United States Court of Appeals for the Ninth

---

1. For the original order, see *LICRA & UEJF v. Yahoo! Inc.*, T.G.I. Paris, May 22, 2000, available at <http://www.lapres.net/yahen.html> (Daniel Lapres trans.), reprinted in LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS: CASES AND MATERIALS* 851-53 (5th ed. 2002). The final order, issued after the consultation of the expert team, is dated November 20, 2000. See *LICRA et UEJF v. Yahoo! Inc.*, Ordonnance Référé, T.G.I. Paris, Nov. 20, 2000, available at <http://www.lapres.net/yahen11.html> (Daniel Lapres trans.). For a summary of the decision, see BRILMAYER & GOLDSMITH, *supra*, at 853-54 (falsely dating the decision November 22). See also Margaret Khayat Bratt & Norbert F. Kugele, *Who's in Charge?*, 80 MICH. BAR J. 43 (July 2001).

2. See BRILMAYER & GOLDSMITH, *supra* note 1, at 854.

3. It is questionable whether the French plaintiffs would ever have tried to get the judgment enforced in the United States, and, had they tried, whether they ever stood a chance to succeed. Thus one may question whether Yahoo! Inc. felt seriously threatened or whether its action was rather a public relations move.

4. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

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

Circuit which held oral argument on December 2, 2002 and is expected to deliver its decision this spring.<sup>6</sup>

## II. CYBERAGE CONFLICTS: FIRST GENERATION ISSUES

The *Yahoo!* litigation strikingly exemplifies three major private international law issues that arose right at the dawn of the cyberage. While these issues are best considered separately, they are closely interrelated. The second can be viewed as a subset of the first, and the third as a subset of the first and second.

The first issue is the most general: Should cyberspace be considered a realm unto its own, beyond the reach of governments, or does it still belong to the real world of territorial sovereigns and their regulatory power? This question was the object of an intense scholarly debate in the mid- to late 1990s. One camp viewed cyberspace as transcending the sphere of traditional governmental power; accordingly, its regulation by States was not only ineffective, but undesirable as well.<sup>7</sup> The opposite camp emphasized that even virtual events and transactions have anchors in real (territorial) space: they involve real people, cause real harm, and trigger real State interests; thus cyberspace can, will, and should be regulated by governments.<sup>8</sup> Since the height of this debate, the development of law has by and large validated the second position. Governments increasingly do regulate cyberspace activities and the idea of a *laissez-faire* virtual world has turned out to be a pipe dream or, depending on one's views, a largely groundless nightmare.<sup>9</sup> The *Yahoo!* case illustrates the

---

6. There was also a criminal side show in France. French prosecutors indicted then Yahoo! Inc. CEO Timothy Koogle for violating French criminal law. Koogle was acquitted in February 2003 because he lacked the requisite intent. See *French Court Acquits Former Yahoo! Boss in Nazi Memorabilia Case*, AGENCE FRANCE-PRESSE, Feb. 11, 2003, available at 2003 WL 2728109; Scarlet Pruitt, *Yahoo Freed in Nazi Memorabilia Case*, Feb. 11, 2003, at <http://www.pcworld.com/resource/printable/article/0,aid,109307,00.asp>. On August 1, 2000, France had passed a new Law on Freedom of Communication which limited the (civil and criminal) liability of Internet service providers for content to cases in which they had failed to prevent access to the illegal material after they had been duly notified by judicial authority of their violations. See James H. Bergerson et al., *European Law*, 35 INT'L LAW. 899, 900-01 (2001).

7. See especially David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) [hereinafter Johnson & Post, *The Rise of Law in Cyberspace*]; David R. Johnson & David G. Post, *The Rise of Law on the Global Network*, in BORDERS IN CYBERSPACE 3 (Brian Kahin & Charles Nesson eds., 1997).

8. See especially Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996). See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

9. This is particularly obvious in the area of e-commerce, as the burgeoning literature on this field demonstrates. See, e.g., RONALD MANN & JANE K. WINN, *ELECTRONIC COMMERCE* (2002); J. CARL POINDEXTER & DAVID L. BAUMER, *CYBERLAW AND E-COMMERCE*

victory of the proregulation advocates. Neither the French tribunal, nor, for that matter, the United States District Court, seriously entertained the idea that Yahoo! Inc.'s activities were beyond the reach of established French or American law. Without doubt, Yahoo! Inc.'s website was subject to real space regulation, enacted and enforced by real territorial sovereigns.

The second issue pertains more specifically to the interstate or international nature of (many) cyberspace cases: if cyberspace is being regulated by territorial sovereigns, can its transboundary dimensions be handled by the traditional conflict-of-laws instruments?<sup>10</sup> Again, two fundamentally different views were proffered. The regulation skeptics cited above also doubted that traditional approaches to jurisdiction and choice of law can work in cyberspace. Since the Internet completely ignores state and national boundaries, so they argued, it renders obsolete our State-centered notions of jurisdiction and applicable law.<sup>11</sup> Most conflicts scholars, however, came to the opposite conclusion. While they did not deny the increased quantity and complexity of conflicts issues in cyberspace, they believed that established approaches to jurisdiction and choice of law can work quite well, at least if appropriately adjusted to the properties of the Internet.<sup>12</sup> In the last few years, the traditionalists have won this battle as well. Most courts have by and large managed to resolve cyberspace cases with the established tools, albeit occasionally in somewhat modified form.<sup>13</sup> The *Yahoo!* case fits that pattern. The Tribunal de Grande Instance found jurisdiction because the defendant had committed a wrong in France, and it applied French law because the harmful effects had occurred in its territory. The United States District

---

(2001); SUSAN SINGLETON, *eCOMMERCE: A PRACTICAL GUIDE TO THE LAW* (2001); BARRY B. SOOKMAN, *COMPUTER, INTERNET, AND ELECTRONIC COMMERCE LAW* (2000); JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* (2000); Gregory E. Maggs, *Regulating Electronic Commerce*, 50 AM. J. COMP. L. 665 (2002). On cyberlaw more generally, see RALPH D. CLIFFORD, *COMPUTER AND CYBERLAW* (1999); RAYMOND S.R. KU ET AL., *CYBERSPACE LAW* (2002).

10. For an early overview and an extensive discussion of jurisdiction, choice of law, judgment enforcement, and discovery issues, see Henry H. Perritt, *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996). For a more recent, exhaustive analysis reflecting the experience of the late 1990s and early 2000s, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

11. See, e.g., Johnson & Post, *The Rise of Law in Cyberspace*, *supra* note 7, at 1370-75, 1376 ("Because events on the Net occur everywhere but nowhere in particular . . . no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws.").

12. See generally, e.g., Goldsmith, *supra* note 8; Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167 (1998).

13. For a collection of leading cases, see BRILMAYER & GOLDSMITH, *supra* note 1, at 816-57.

Court essentially accepted these conclusions. Both are indeed traditional grounds and firmly established in American (and foreign) conflicts law.<sup>14</sup>

The third major issue is the most particular: it concerns the protection of free speech in transboundary disputes. Since the Internet is all about information, it is largely about speech, and First Amendment concerns loom large at every turn.<sup>15</sup> In international cases, these concerns raise a particularly thorny question: Who gets to define the freedom of speech on the Internet—the country of the information provider or the country (or countries) of the recipient(s)? Needless to say, reasonable people can and do differ about this issue as well. One position is that the provider State's law must govern: information put on the Internet can flow practically anywhere in the world; yet, so the argument goes, it is well-nigh impossible, or at least excessively burdensome, for the provider to comply with the laws of virtually every country in the world. To put it differently: if the recipient State's law governs, every country can censor the Internet as a whole.<sup>16</sup> The opposite position is that the recipient State sets the limits. According to this view, every country has the right to insist that those entering it comply with its laws. This is true even if the entry occurs electronically and even if the law restricts

---

14. From an interest analysis perspective, the *Yahoo!* case presented a true conflict because French law protected the plaintiffs and U.S. law helped the defendants. Breaking the tie by applying the law of the forum and/or of the place of the harmful effect is not unusual in American conflicts law either. *See, e.g.*, *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976); *see also* EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 706–07 (3d ed. 2000). It would also be safely within the constitutional limits on choice of law established by the U.S. Supreme Court in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) (requiring that a forum applying its own law have sufficient contacts and interests so that the choice of its law is neither arbitrary nor fundamentally unfair).

15. Even in purely domestic cases, the protection of free speech in cyberspace has been a major issue which has come before the U.S. Supreme Court twice in the last few years. *See* *Ashcroft v. Free Speech Coalition to Overturn Virtual Child Pornography Law*, 535 U.S. 234 (2002) (overturning regulation of child pornography as overbroad under the First Amendment); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (partially invalidating the Communications Decency Act of 1996 on First Amendment grounds). It has also spawned an extensive literature. *See also, e.g.*, MADELEINE SCHACHTER, *LAW OF INTERNET SPEECH* (2d ed. 2002); 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). For a sophisticated analysis and a suggested model of internet speech regulation, see Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999).

16. *See, e.g.*, Johnson & Post, *The Rise of Law in Cyberspace*, *supra* note 7, at 1367. *See also* the reactions cited by Berman, *supra* note 10, at 341 n.95; Bratt & Kugele, *supra* note 1, at 43–44; Mark S. Kende, *Yahoo!: National Borders in Cyberspace and Their Impact on International Lawyers*, 32 N.M. L. REV. 1, 5, 8 (2002) (citing others holding this view but disagreeing with them).

speech.<sup>17</sup> As with regard to the previous two issues, it seems that this second, more traditional, view reflects the emerging majority opinion, both among scholars and in the courts.<sup>18</sup> The French *Yahoo!* judgment points in the same direction. It decided the free speech issue in favor of the recipient country's law when it insisted that Yahoo! Inc. comply with French prohibitions. The United States Federal District Court did not deny the French tribunal's right to so insist in France; it simply refused to recognize the result in the United States.

As an illustration and combination of these first generation cyberage issues, the *Yahoo!* case is fast becoming a classic of early twenty-first century international conflicts law. It has served as the hypothetical of the 2001–2002 Jessup Moot Court Competition,<sup>19</sup> is making its way into the casebooks,<sup>20</sup> and has already elicited numerous scholarly comments.<sup>21</sup> At its core, the case vividly demonstrates the primary dilemma of Internet information providers: they need (or at least want) to operate on a worldwide basis but find themselves caught between conflicting national policies and regulatory regimes. It is no surprise that disputes triggered by this dilemma arise in countries all over the world.<sup>22</sup> As Judge Fogel

---

17. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002); Jack Goldsmith, *Yahoo! Brought to Earth*, FIN. TIMES, Nov. 26, 2000, available at <http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3W85A41GC&liv>.

18. Jack Goldsmith, Oral Presentation at the Meeting of the AALS Conflicts Section (Jan. 3, 2003) (transcript on file with author); see also Kende, *supra* note 16, at 8–9; Reidenberg, *supra* note 17. Several courts in the United States have approved restrictions under local law on Internet service providers operating in foreign countries with more permissive rules. See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999) (applying New York law to gambling offered on a website operated in Antigua). For further cases, see Reidenberg, *supra* note 17, at 269–71.

19. 2002 PHILIP C. JESSUP INTERNATIONAL MOOT COURT COMPETITION COMPENDIUM, Compromis 5–12 (2002).

20. See BRILMAYER & GOLDSMITH, *supra* note 1, 851–54; SCHACHTER, *supra* note 15, at 163–66; RALPH G. STEINHARDT, INTERNATIONAL CIVIL LITIGATION 655–61 (2002); see also MANN & WINN, *supra* note 9, at 282, 602–03.

21. See, e.g., Berman, *supra* note 10, at 337–42, 516–26; Dan Dietrich, *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 15 N.Y. INT'L L. REV. 83 (2002); Brendon Fowler et al., *Can You Yahoo the Internet's Digital Fences*, 2001 DUKE L. & TECH. REV. 12 (2001); Rinat Hadas, *International Internet Jurisdiction: Whose Law is Right?*, 15 FLA. J. INT'L L. 299 (2002); Kende, *supra* note 16; Sakura Mizuno, *When Free Speech and the Internet Collide: Yahoo!-Nazi-Paraphernalia Case*, CURRENTS: INT'L TRADE J., Winter 2001, at 56; Caitlin T. Murphy, *International Law and the Internet: An Ill-Suited Match*, 25 HASTINGS INT'L & COMP. L. REV. 405 (2002); Elissa A. Okoniewski, *Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet*, 18 AM. U. INT'L L. REV. 295 (2002); Reidenberg, *supra* note 17; Pamela G. Smith, *Free Speech on the World Wide Web: A Comparison Between French and United States Policy with a Focus on UEJF v. Yahoo! Inc.*, 21 PENN. ST. INT'L L. REV. 319 (2003).

22. See, for example, the cases in Australia, Canada, Germany, and Italy cited by Berman, *supra* note 10, at 339–42. See also Kende, *supra* note 16, at 5 (citing a German example). More recently, the Australian Supreme Court found jurisdiction in a libel case brought by an Australian plaintiff against Dow Jones & Co. on the basis of an article pub-

put it in his summary judgment for Yahoo! Inc.: "The implications . . . go far beyond the facts of this case."<sup>23</sup>

### III. THE *YAHOO!* CASE RECONSIDERED: SECOND GENERATION ISSUES

This almost symbolic significance of the *Yahoo!* case led to its selection as the topic of the Conflicts Section at the 2003 Annual Meeting of the Association of American Law Schools. Yet, the case was picked not only as a representative of the—by now almost traditional—problems mentioned above. It was chosen also because, upon closer inspection, it reveals that much has changed since the dawn of the cyberspace some years ago. Thus it raises new questions pointing into the future. In their papers for the Conflicts Section meeting, the panelists reacted to several more recent developments and explored three major second generation issues.<sup>24</sup>

The first development is that technology has advanced to the point where effective geographic filtering of information is becoming possible. In her contribution, Horatia Muir Watt, a leading French conflicts scholar, points out how this has changed the nature of the game.<sup>25</sup> The unbridled flow of information on the Internet, she shows, was never a natural principle but a result of the Internet's original architecture which itself reflects the American preference for freedom of speech and, one

---

lished in New Jersey but accessible and downloaded in Australia; see *Ruling in Australia May Have Big Impact on Web News Sites*, N.Y. TIMES, Dec. 10, 2002, at A1. A major challenge is the litigation arising from the activities of online file swapping system Kazaa, involving claims of copyright infringement. See Ariana Eunjung Cha, *File Swapper Eluding Pursuers*, WASH. POST, Dec. 21, 2002, at A1.

23. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

24. In addition to the panelists whose papers are published here, professor Jack Goldsmith, one of the leading experts in cyberspace conflicts law, also gave a talk. He ultimately decided, however, not to publish it, in part because of time constraints, in part because he felt that his presentation did not contain important ideas beyond those he had already published. Since participation in the panel clearly did not entail any obligation to publish a paper, this decision was entirely proper. Two aspects of his talk should be mentioned, however. First, in line with his previously published views, *supra* note 8, Professor Goldsmith agreed with the French court decision in the *Yahoo!* case, arguing that there is nothing unusual in requiring an American corporation to comply with foreign laws when using a foreign market. Second, Professor Goldsmith's presentation also went beyond the more traditional cyberspace questions and addressed second generation issues. In particular, he mentioned that in light of the increasing availability of filtering technologies, the major issue is no longer whether service providers can comply with foreign laws but who bears the burden of ensuring such compliance. This theme is further developed in the paper of Professor Horatia Muir Watt.

25. Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT'L L. 673 (2003).

might add, for *laissez faire* more generally. As technology has changed, however, such free dissemination is no longer a necessity but has become a matter of choice. After all, the French court order was based on the finding that Yahoo! Inc. could block access to its website in France quite effectively without having to shut it down worldwide. On the one hand, the new technology thus solves an old dilemma: If service providers can increasingly channel the flow of information, they can also increasingly comply with individual nations' laws and still operate on a worldwide level. On the other hand, the new technology immediately raises a follow-up issue: Who should bear the (technological and financial) burden of developing, implementing, and monitoring geographic filters—the sender or the receiving country? Professor Muir Watt acknowledges that it seems only fair to impose that burden, with the French tribunal, on the service provider as the cause of the problem. Yet, she argues, there is actually much to be said for putting the burden on the State that wants to protect itself. After all, that State may be in a better position to determine the desired level of regulation, to implement it, and to monitor its enforcement. Thus the answer to the question of cost distribution may depend on considerations familiar from the economic analysis of law.

A second development is that with the proliferation of cyberspace related lawsuits, judgments against Internet service providers have become routine even in transboundary cases. In a sense, this renders obsolete the older debate whether States can regulate cyberactivity at all and whether conflicts law can handle cyberspace issues. In another sense, however, it just pushes the issue of effective regulation to another level—that of judgment recognition. In the domestic context, such recognition is, of course, straightforward under the full faith and credit clause,<sup>26</sup> but in international cases, where the clause does not apply, it presents a serious issue.<sup>27</sup> To be sure, if the service provider has assets in the forum State, judgments can be enforced locally. In all other cases, however, effective enforcement depends on their recognition in the defendant's home country. Thus international judgment recognition becomes a core issue of effective cyberspace regulation. The American side of the *Yahoo!* litigation drives this point home. In particular, it raises the question whether

---

26. U.S. CONST. art. IV, § 1.

27. See Henry H. Perritt, *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121, 1123 (1998) (arguing that in transnational cyberspace cases, the main problem "is one of enforcement, not jurisdiction"). As Peter Swire has pointed out, enforcement problems will depend on the size and nature of the defendant. Large corporations, like elephants, can put up a tough fight but they cannot hide, while small-time players, like mice, may be easily defeated but they are hard to track down and eradicate. Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 993 *passim* (1998).

the United States should deny the recognition of a foreign judgment against an American service provider on free speech grounds. This issue is the topic of Molly Shaffer Van Houweling's paper.<sup>28</sup> Professor Van Houweling finds the U.S. court's decision unsatisfactory for at least two reasons. First, the opinion presumes that the enforcement of a foreign judgment amounts to a limitation of speech by the recipient State's government, appropriately triggering First Amendment protection. Such a proposition is hardly self-evident, and the opinion does little to explain it. Second, it assumes, but again fails to clarify, whether the First Amendment should apply extraterritorially, that is, to speech to foreigners in foreign countries. The more salient free speech concerns, Professor Van Houweling points out, may actually lie beyond the court's reasoning and may depend on the quality of available geographic filtering technology. Where such technology is relatively unreliable or too expensive for small-time users, information providers may worry about unintended overspill into foreign jurisdictions; the resulting fear of liability abroad can then chill their speech even at home. Reliable and readily available technology, however, may lead information providers strictly to limit the reach of their speech to the United States; this, in turn, could unduly impoverish the discourse on the international level. At the end of the day, a solid analysis of First Amendment issues in this context requires a more careful consideration of the technological state of the art than the district court provided.

Finally, as Internet access becomes widely available worldwide and international disputes arising from its use proliferate, the need to seek solutions through international cooperation becomes ever more obvious. Already in 2000, the European Union responded to this need when it enacted the so-called E-Commerce Directive.<sup>29</sup> The Directive is a regulatory regime governing cyberspace transactions among EU Member States.<sup>30</sup> It resolves the choice-of-law question principally in favor of the service provider's State but it also provides for a conflict resolution mechanism where other States are unwilling to accept this solution. Mark Kightlinger's paper explores the question whether the EC Directive can serve as a model for a broader international agreement.<sup>31</sup>

---

28. Molly S. Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT'L L. 697 (2003).

29. Council and Parliament Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1-15.

30. For a brief description, see also Saul Litvinoff, *The European Union and Electronic Commerce*, 62 LA. L. REV. 1221 (2002).

31. Mark F. Kightlinger, *A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law*, 24 MICH. J. INT'L L. 719 (2003).

Drawing on his extensive practical experience as counsel for major American clients in Europe, especially before the EC institutions in Brussels, Kightlinger points out both the inherent difficulties and the benefits of adopting such an agreement. In the end, he is guardedly optimistic that an accord might be possible and worth the effort. While Kightlinger consistently tests his hypothesis against the *Yahoo!* case, his article actually points beyond that dispute: it is not about how to resolve *Yahoo!*-type litigation but about how to avoid it in the first place.

Needless to say, these contributions do not exhaust the list of newly emerging issues in cyberspace conflicts law. Nor do they pretend to proffer final answers. Instead, they show that more discussion is needed and they are published in the hope to stimulate further reflection.