Of Yahoos and Dilemmas

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I. INTRODUCTION

In the spring of 2000, two French non-profit associations dedicated to fighting anti-Semitism attacked Yahoo! Inc. ("Yahoo") before the French courts for exhibiting images of Nazi symbols on its websites, as well as links to revisionist and anti-Semitic sites.\(^1\)

After losing a challenge over the French court's jurisdiction, Yahoo argued that a significant filtering system would be prohibitively expensive. But relying on a report compiled by a panel of internationally renowned experts which showed that a filtering system with an accuracy rate of about 70 percent could be achieved without incurring unreasonable costs, the French judge gave Yahoo until February 2001 to implement measures to close access from French territory to the disputed pages.\(^2\)

In the meantime, Yahoo announced that it would comply with the French court's order and did not appeal.\(^3\) However, in 2000, Yahoo obtained a declaratory judgment from the District Court of Northern California that the French court's
order was without effect in the United States since its enforcement would violate Yahoo's First Amendment right of free speech. The French associations have filed an appeal.  

I will argue that the decision of the French court was based on a doubtful foundation, both in terms of applicable rules of French private international law and in terms of public international law. My ultimate purpose is to treat the Yahoo affair as a case of the prisoner’s dilemma to illustrate how the approach adopted by the French court necessarily led to a sub-optimal resolution of the matter and to suggest, accordingly, that the approach should not be replicated elsewhere.

II. THE YAHOO CASE IN FRENCH PRIVATE INTERNATIONAL LAW

In French private international law, a court approaches a case with external elements ("éléments d’extranéité") by first determining that it has jurisdiction over the events and persons before it. In his order of May 22, 2000, the French judge held that allowing the display of objects in France for sale by an internaut established in France is a fault on French territory.  

Additionally, the Court made clear that it was acting pursuant to articles 808 and 809 of the New Code of Civil Procedure to bring about the cessation of "manifestly illicit nuisances," consisting of "an offence against the collective memory of the country," such as might be assimilated with a wanton infliction of suffering sanctioned by an action in tort grounded in article 1382 or 1383 of the Civil Code. Because the harm occurred in France, the Court held itself to be competent to hear the dispute pursuant to article 46 of the New Code of Civil Procedure.  

The Yahoo case thus involves conflicts between legislative jurisdiction (or national legislative competence) and personal jurisdiction (or judicial competence).

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7. LICRA v Yahoo (cited in note 3).
8. Id.
9. Id.
10. Article 1382 provides that anyone who through his fault causes harm to another shall be liable to remedy such harm. See Civil Code art 1382, available online at <http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode&code=CCIVILLE0&art=1382> (visited Sept 30, 2002).
11. Article 1383 provides that anyone who through his negligence or his imprudence causes harm to another shall be liable therefor. See Civil Code art 1383, available online at <http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode&code=CCIVILLE0&art=1383> (visited Sept 30, 2002).
A. THE CONFLICT IN APPLICABLE LAWS

1. The Rulings of the French Court and the US District Court

French rules, whether defined by judges or by academics, state that private international torts are governed by the lex loci delicti.

Insofar as article 3 paragraph 1 of the Civil Code provides that laws of police and security apply to all those living in the territory, the outcome of the Yahoo case before the French court turns upon the question of whether Yahoo's conduct occurred in France.

If the Court decides that such conduct did occur in France, then Yahoo would be clearly liable. The fact that Yahoo did not intend the offending images to be accessible in France might save Yahoo from criminal liability in France, but it would afford no shield against a civil action.

Under French criminal law, acts committed outside of France by a non-French citizen, which in his home country would not be a violation of its local criminal law, may not be prosecuted before the French courts unless the acts involve crimes against humanity or certain special crimes, such as false declarations by foreigners in foreign consulates or acts against the state (for example, espionage or terrorism).

Clearly, if the acts of which Yahoo was accused had been considered as performed outside of France, there would have been no violation of French criminal law; arguably however, justification to impose civil liability would have remained under the finding of an "offence against the collective memory."

The conflict of laws in the Yahoo case culminated with the judgments of district court judge Jeremy Fogel who, after having declared his court's jurisdiction over LICRA and the other defendants, ruled on November 7, 2001 that the order of the French court could not be enforced in the United States because it threatened Yahoo's right of freedom of expression as guaranteed by the First Amendment of the Constitution.

2. Critique of the Yahoo Rule for Choice of Law

a) Critique in French private international law

The solution implemented by the French court which resulted in the choice of French law to gauge the conduct of Yahoo is contrary to the trend of the local case law. French private international law recognizes rights vested abroad even in

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15. In 1873, the Cour de cassation ruled that without an exceptional basis, French law cannot give French courts the power to try foreign nationals for offenses committed outside French territory as such "exorbitant" jurisdiction would violate international law. Cass crim, Jan 10, 1873, Rec Gen Lois 1873, 141, note Fornage.
circumstances that amount to violations of French public policy ("ordre public"). For example, French courts have recognized the effect of a polygamous marriage valid under a foreign law, a divorce under conditions not admitted in French law and even a repudiation of a marriage despite its effects felt in France, subject to the applicability of the European Convention on Human Rights ("ECHR").

Given these precedents, it would seem appropriate for the French court in the Yahoo case to have at least considered the possibility that French public policy might efface itself in the presence of other, more important, external considerations. Moreover, if the values defended by article R645-1 of the Penal Code are of the same weight as equality of the sexes or the right to a fair trial, why are violations of the article sanctioned as mere petty offenses? The French court's decision also goes against the approach taken by the European Court of Justice, which has ruled that in matters of press defamation, the tort is deemed to occur in the state where the publisher is established and the harm occurs, wherever the publication is distributed and the victim is known.

b) Critique in comparative law

While it seems far from obvious, at least to this author, that the acts for which Yahoo was sanctioned by the French court may reasonably be considered as having occurred in France, the French judge is far from alone in sustaining his position.

For instance, in the case of United States v. Thomas, the operators of a site were convicted of having posted "obscene" images as judged by "contemporary community standards" in Tennessee, despite the fact that the operators were domiciled in California, and the site was stored in servers in California.

The Italian Corte suprema de cassazione has held that loading defamatory information onto a foreign server and displaying its contents on computer screens in Italy constitutes a single actus delicti of defamation under article 6 of Italy's Criminal Code, which defines the Code's scope of application as encompassing "all acts or omissions or even the effects of such action or omission which have occurred in whole or in part on Italian territory."

19. See also Petra Hammje, L'effet atténué de l'ordre public, in Eric Wyler and Alain Papaux, eds, L'extranéité ou le dépassement de l'ordre juridique étatique 87 (Pédonne 1999).
20. See note 2.
The original Restatement of Conflicts in applying a locus delicti test considered that the tort occurs in the state where the last act necessary to make the actor liable occurred (section 377). The rule allowed two exceptions. First, when the tort violates a standard of care, the applicable norm is that of the place of the behavior (section 380(2)). Second, any person obliged, prohibited or authorized to act in accordance with the law of the place of the act may not be held liable for the consequences in another state (section 382).24

Indeed, the acts sine qua non for the display of Yahoo’s disputed images on French computer screens occurred in France, but a French web surfer—not the Californian server operator—performed the acts. If the surfer does not turn on his computer, log onto the Internet and call up Yahoo’s auction pages, the disputed images would not appear on his screen. Also one step upstream from the screens of French surfers, the telecommunications operators own the lines over which the information travels in desegregated “packets,” which are reassembled into readable format at the destination by the surfer’s telecommunications equipment and computer.

The manner in which the disputed information is maintained on Yahoo’s servers in California does not constitute an exhibition of Nazi symbols because the source code of any of Yahoo’s auction web pages (which show the Nazi symbols) would not likely contain a recognizable Nazi symbol.

In any case, the conduct of placing information on servers and opening the servers to access around the world is passive, since the information is inert until accessed by active third parties.

Finally, what proved to be the downfall of the French associations’ case in the context of Yahoo’s federal suit, was that any measures to implement the French court’s order would have to be carried out on the Yahoo servers in California, which fall within the territorial jurisdiction of American laws and courts.

c) Critique of the Yahoo rule for choice of law by sectoral analogy

My purpose here is to look at solutions to the issue of jurisdiction to regulate the contents of international communications. On-line betting is of special interest because it evokes issues of morality. At least in America, prosecutors have not sought to attack operators of sites incorporated abroad and operating from servers located offshore, unless such operators tie themselves to American territory. Courts have found that such a tie can consist of advertising 800 or 900 numbers in the American press or on web sites popular in the United States (for example, www.sex.com) to attract players to bet on American sporting events.25

24. These issues are further developed in Roger C. Cramton, David P. Currie, and Herma H. Kay, Conflict of Laws: Cases—Comments—Questions 15–18 (West 1978).

25. Jay Cohen, an American citizen, was convicted and sentenced to twenty-one months in prison and fined $5,000. His firm had received 60,000 calls from the United States and had collected $5 million
Intellectual property provides another useful analogy to the Yahoo situation. Violations of intellectual property rights are generally tortious in nature, whether in the common law or in the civil law traditions, and under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which is under the aegis of the World Trade Organization, some such violations are to be made criminal offenses. However, in the United Kingdom, it may be possible to avoid the application of intellectual property laws by operating a foreign web site that is accessible in the United Kingdom. An operator of a foreign web site, enjoying the rights to copyrights at a discount relative to their cost in the United Kingdom, could presumably make access to its site possible from the United Kingdom without being held accountable to the British holders of the copyrights to the same works. Absent any conventional norms, English courts will not accept jurisdiction for violations outside their jurisdiction of foreign intellectual property rights.

It also bears noting that web radios already shop for forums where access to copyrights for web transmission and reproduction is less expensive than in their home countries. The phenomenon has been observed even within the European Union, where a major French web radio has set up its web operations in Italy to take advantage of lower levels of royalties for distribution over the web.

Such a staunchly territorial regime can, of course, lead to abuses. In French law, excesses are corrected by situating the violation of the intellectual property right in France and then applying local law. For example, in one case, a counterfeit of a French work of art was made and put into circulation in the United States; French courts held that this was a violation of "protected interests" in France, namely those of the heirs of the artist and, as such, was prosecutable under French law. Similarly, French courts held that the sale of a counterfeit Giacometti to an Englishman in Italy could be prosecuted in France because the widow of the artist lived in France.

between its foundation in 1996 and the date of the trial in 1998. US Department of Justice, Jay Cohen Convicted of Operating an Off-shore Sports Betting Business That Accepted Bets From Americans Over the Internet, available online at <http://www.cybercrime.gov/cohen.htm> (visited Sept 30, 2002). Also, in State by Humphrey v. Granite Gate Resorts, Inc., the Minnesota Attorney General cited a Nevada corporation and its President for fraud and false advertising under local laws prohibiting bets because the site promised surfers in Minnesota that they could legally place bets. The Court noted that site had received some seventy-five calls from Minnesota to its 900 number. 1996 WL 767431, *1, 6 (Minn Dist Ct Dec 11, 1996).

26. Article 61 requires enactment of criminal procedures and sanctions for deliberate acts of counterfeiting of trademarks or works of authorship carried on a commercial scale. Sanctions must include jail sentences and fines in amounts sufficient to be dissuasive and must be proportionate with sanctions applied to crimes of corresponding gravity. Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), art 61, WTO Doc No LT/UR/A-1C/IP/1 (1994).


Another example is *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, where a New York court ordered an Italian firm to stop posting on its Italian site images whose domestic dissemination in the United States had been prohibited by a court order fifteen years previously.  

The techniques used to resolve legislative jurisdiction and applicable law questions in the broadcasting industry might also be pertinent. The European Union "Television without Frontiers" Directive provides a case in point. Member States must not create obstacles to the free flow of other Member countries' broadcasts within the realms covered by the Directive. This rule is subject to limited exceptions, such as for the protection of minors against "manifest, serious and grave" provocations. For example, where a satellite television station is concerned, programs containing copyrights which spill over the borders of the territory targeted by the broadcaster's programs will not give rise to royalties to copyright holders in the territories covered but not targeted by the broadcaster (article 1). On the other hand, were the same programs to be passed over the second country's cable systems, then the local copyright holders would have claims to royalties (article 8). The Directive subjects advertising content to the regime that is applicable in the countries of origin, not that of the countries where the communications are received.

A useful analogy may also be drawn with regard to the regulation of financial information on the web. There can be little doubt that the provision of financial services online to persons located in a foreign country, or the raising of capital from such foreign-located persons, would give rise to jurisdiction of the foreign country to regulate the activity. But multiple exposures of financial sites to national regulations of countries with which they have minimal contacts are considered by the securities profession to be undesirable. The International Organization of Securities Regulators, as well as the American and the French authorities, have determined

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29. *939 F Supp 1032, 1040 (SDNY 1996).*
31. The Directive covers matters such as programming, advertising, sponsoring, tele-shopping, protection of minors, and the right of response. Admittedly, there are difficulties with extrapolating from television broadcasting to the web. For instance, their technological processes differ at least in one respect: whereas television involves communication from a sender to a receiver, in web communications senders and receivers are indistinguishable.
33. According to the International Organisation of Securities Commissions, competence of national regulators is grounded when offers or sales of securities are carried out within their territories or where the activities of the issuers or suppliers of financial services outside their territory have "a significant effect upon residents or markets in the regulator's jurisdiction." International Organisation of Securities Commissions, Securities Activity on the Internet: A Report of the Technical Committee, Part IV, ¶ 15 (Sept 1998), available online at <http://www.iosco.org/docs-public/1998-internet_security.html> (visited Sept 30, 2002).
that only communications on a financial web site that target persons in the territory of a country will be subject to the regulations of that country. The current trend is to limit the exercise of jurisdiction to those activities actually resulting in exchanges with foreign-located persons.36

The regulation of electronic commerce in the European Union ("EU") provides another pertinent analogy for solving the choice of law issue that arises in the Yahoo case. The Directive with respect to electronic commerce adopts the principle of host country jurisdiction over the activities falling within its scope.37 Nevertheless, Member countries may restrict the free-flow of information services to protect "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons."38

B. ON THE CONFLICT OF JURISDICTIONS IN FRENCH PRIVATE INTERNATIONAL LAW

Since 1962, the Civil Chamber of the Cour de cassation in France has formally projected onto the international plane its internal rules of jurisdiction.39 Under the New Code of Civil Procedure, any foreign defendant may be brought before a court in the jurisdiction where he is domiciled,40 but may also be brought before the court in the place where the act causing harm or any harm resulting from the act occurred.41 In cases of defamation through international press or radio broadcasting, the French

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35. According to article 4 of Regulation No 99-04 of the Commission des Opérations de Bourse with respect to the marketing in France of financial instruments negotiated on a recognized foreign market or on a regulated market within the European Economic Area of November 30, foreign advertisements falling within its scope of application are those promoting operations with customers on French territory. Commission des Opérations de Bourse, Reg No 99-04, art 4, available online at <http://www.cob.fr/doc/affiche.asp?id=4454> (visited Sept 30, 2002).
38. Id.
courts have declared themselves to have jurisdiction when the defamatory message is put into circulation on French territory.\footnote{CA Paris, Nov 6, 1981, D 1982, Inf 155, obs Julien (defamation via radio); Trib Paris, Apr 18, 1971, 281, note Bourel.}

Admittedly, the New Code of Civil Procedure is in sync with the case law relating to the European Union's Brussels Convention of September 27, 1968, with respect to judicial competence and the execution of European decisions in civil and commercial matters.\footnote{1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Consolidated Version), 1998 OJ (C 27) 1.} Article 5(3) of the Convention provides that if a beneficiary's obligation is based on an illicit act, he may sue either before the courts of the domicile of the defendant or at the place where the harmful act occurred. But the judgment in Handelswekerij GJ Bier BV v. Mines de Potasse D'Alsace SA\footnote{Case C-21/76, Handelswekerij GJ Bier BV v Mines de Potasse D'Alsace SA, 1976 ECR 1735, [1978] QB 708 (1976).},\footnote{See note 21.} posits that if the state where the harmful act occurs is not where the effects of the harmful act occur, then the plaintiff may come before the courts of either country. In Shevill v. Presse Alliance SA\footnote{Peter Schlosser, Jurisdiction in International Litigation – The Issue of Human Rights in Relation to National Law and to the Brussels Convention, 74 RDI 5, 16 (1991).},\footnote{Zippo Manufacturing Co v Zippo Dot Com, Inc, 952 F Supp 1119, 1125–26 (WD Pa 1997).} mentioned earlier, the European Court of Justice ruled that the effects of press defamation are considered to be felt wherever the publication is distributed and where the victim is known.

But the courts of the countries of the European Union also recognize themselves to be bound by the provisions of the ECHR. Particularly relevant to this case is article 6, which guarantees parties to civil and criminal proceedings the right to a fair trial.\footnote{Maritz, Inc v Cybergold, Inc, 947 F Supp 1328, 1333 (ED Mo 1996).} It may reasonably be supposed that a fair trial includes protection from harassment before a multiplicity of tangentially connected jurisdictions by overpowering, desperate, or forum shopping opponents.

Some plaintiffs' excesses will be corrected by courts refusing jurisdiction on grounds of lack of interest or connection. But the lesson of the Yahoo case is precisely that not all duplications of proceedings are abuses under the law, even though their result in economic terms is wasteful.

Certain commentators assimilate the requirement of a fair trial under the ECHR and the "due process" requirement of the Fourteenth Amendment of the Constitution. American courts have on several occasions considered the exercise of jurisdiction over web sites in light of the due process requirement. In terms of the low intensity of interactive exchanges evoked in Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,\footnote{Maritz, Inc v Cybergold, Inc, 947 F Supp 1328, 1333 (ED Mo 1996).} and considering that in Maritz, Inc v. Cybergold, Inc,\footnote{Zippo Manufacturing Co v Zippo Dot Com, Inc, 952 F Supp 1119, 1125–26 (WD Pa 1997).} 131 contacts sufficed to
find jurisdiction, Yahoo’s behavior might well have justified French judicial jurisdiction. In particular, the Court noted that Yahoo undertook certain initiatives tending to show that it had targeted French surfers, in ways that included addressing advertisements in French to its French visitors. In *Neogen Corp. v. Neo Gen Screening, Inc.*, the United States Sixth Circuit Court of Appeals approved the exercise of jurisdiction by courts in Michigan over a Pennsylvania corporation. The court emphasized the importance of the corporation’s commercial contacts, which were sustained over a long period of time, even though in the instant case there were only about fourteen contacts per year.

The problem with the *Yahoo* case is that the court did not rely upon such a test to ground its jurisdiction. Had it done so, it would inevitably have been led to inquire as to the number of actual contacts between the Yahoo Nazi memorabilia auction pages and visitors from France. Insofar as the plaintiffs appear not to have provided information on this matter, the court might have been led to dismiss the suit for want of actual contacts.

Also the French court did not fully consider that its logic about jurisdiction could be turned against French operators of websites. The risqué nature of some French websites acceptable in France might well be considered “obscene” by local “community standards” in many parts of the United States and in other countries.

### III. Public International Law and the Need for Legislative Reform

Unless the French courts take future action to limit both when it applies French law and when it exercises jurisdiction in cases involving the Internet, the French legislature may be forced to intervene, as the current judicial policy exposes France to pursuits grounded in public international law by other states whose citizens may be spoliated by French judicial overreach.

#### A. Legislative Jurisdiction

The problem of the *Yahoo* case lies at the intersection of public international law and private international law. French courts must apply French rules of procedure to the extent that the legislature has provided them. But nothing guarantees that such rules comply with the requirements of public international law.

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50. But in a case brought in defamation by a Pennsylvania resident owner of an offshore sports gambling operation against a Canadian web site, the District Court for Eastern Pennsylvania dismissed for want of personal jurisdiction since in matters of intentional torts, the forum must be the “focal point of the harm suffered by the plaintiff” and “the defendant must have expressly aimed the tortious conduct at the forum,” *English Sports Betting, Inc v Tostigan*, 2002 WL 461592, *3 (ED Pa 2002).*
The principle that a state may apply its criminal laws to events outside its territory has been accepted in public international law since the Lotus case in 1927.\(^51\) In that case, a French ship on the high seas struck a Turkish ship, causing the deaths of several Turkish sailors. The French officer who was on the deck of the French ship at the time of the collision was arrested by Turkish authorities and charged under Turkish criminal law with homicide. The Permanent Court of International Justice ("PCIJ") ruled that international law did not limit a state's legislative authority, even in relation to events occurring outside its territory. Thus, Turkish law could legitimately be applied to sanction the Frenchman for his acts aboard a French ship on the high seas.

The potential for abuses of such a liberal rule has led to a series of recognized limits on the exercise of sovereignty. Absent custom or convention,\(^52\) a state may not project its power onto the territories of other states.\(^53\) A state limits the exercise of its sovereignty to:

- Events occurring in its territory (which includes ships and aircraft flying the country's flag, as well foreign diplomatic missions);
- Events occurring partially in its territory and partially outside its territory;\(^54\)
- Events the effects of which are felt within its territory;\(^55\)
- Acts of its own citizens wherever they occur; and
- Violations of the general principles of public international law wherever and by whomever they are committed.

\(^{51}\) S.S. Lotus (France v Turkey), 1927 PCIJ (ser A) No 10 (Sept 7, 1927), available online at <http://www.worldcourts.com/pcij/eng/cases/lotus.HTM> (visited Sept 30, 2002).

\(^{52}\) An example would be measures adopted by Security Council of the United Nations under article 42 of the United Nations Charter.

\(^{53}\) While the PCIJ in the Lotus case called this proposition "the first and foremost restriction by international law upon a State," the United States Supreme Court has judged the exercise by the United States Government of its police power on foreign territory without authorization from the local government to be a legitimate exercise of authority under US law. See United States v Alvarez-Machain, 504 US 655, 663–64 (1992).

\(^{54}\) Article 113-2 of the French Penal Code provides that infractions are deemed to have been committed on French territory when any of their constituent facts occur on French territory. According to article 113-5 of the Penal Code, French criminal law applies to anyone who is guilty of having acted on French territory as accomplice of a crime committed abroad if the crime is punished both by French law and by the foreign law and if he has been convicted definitively by the foreign court. Penal Code art 113-2, available online at <http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?commun=CPENAL&art=113-2> (visited Sept 30, 2002); Penal Code art 113-5, available online at <http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?commun=CPENAL&art=113-5> (visited Sept 30, 2002).

\(^{55}\) The PCIJ ruled in the Lotus case that an offense is committed in any country where any of its constituent elements and "more especially its effects" has taken place. Lotus, 1927 PCIJ (ser A) No 10 (cited in note 51).
While states faced with onslaughts by fugitive sites launched from “data havens” (Sealand or North American Indian reservations, for example) must have the capacity to prevent sabotage of their normally applicable laws, the infinite permutations of situations make preemptive general solutions elusive. Still, the best sources on public international law refer to limits on the scope of state legislative capacity in terms of “material, direct and foreseeable effects of the foreigner’s harmful act within the court’s jurisdiction.”

When the effects of a behavior considered wrongful under local law are felt within a territory, its legislature may create regulations for the local courts to apply. For example, in the antitrust context, courts and enforcement authorities on both sides of the Atlantic have exercised jurisdiction over foreign companies if their acts, though having occurred entirely abroad, have had effects on domestic markets, for example, via the prices at which the products are sold on the territory of the court.

In assessing the extraterritorial reach of any national norm, attention should be given to the existence of other norms to which the defendant may be subject at the place of the actus delicti. It is acknowledged that under public international law no state may project its law beyond its borders if the result would impose upon persons abroad a behavior contrary to established domestic norms. However, the United States Supreme Court in *Hartford Fire Insurance Co. v. California* ruled that this limitation does not apply where the defendant can satisfy both national regimes; for example, two national regimes of prior registration for certain activities could co-exist.

The French courts have themselves had occasion to raise defenses against the extraterritorial projection of American legislative jurisdiction. In the *Fruehauf case,* they frustrated the effect of the American embargo on exports to the People’s Republic of China. Fruehauf Corporation’s French subsidiary had received a purchase order for vehicles from its French customer, Automobiles Berliet SA. Fruehauf admitted that the final destination of the vehicles was China. The United States Treasury Department had ordered the American parent company to suspend performance of the contract in France pursuant to the requirements of the laws against trading with nations on which the United States had placed an embargo. The vehicles were supplied anyway when the French subsidiary’s directors, representing the minority shareholders, petitioned the French courts for an order appointing

59. Accordingly, the Court applied American antitrust laws to foreign agreements lawfully concluded and implemented on the United Kingdom reinsurance market under applicable UK laws, but considered illegal under American law and having effects on the American insurance market.
provisional administrators of the company to oversee operations until delivery of the vehicles was completed. In rejecting American legislative jurisdiction, the French court specifically invoked the risks to the employment of some six hundred people in the event of nonperformance of the order.61

In the face of opposing national laws, one possible solution is for states to tolerate the effects that legislative, executive and judicial acts of other states may have on their territories. This result is sometimes solidified by undertakings in international conventions. For instance, article VIII section 2(b) of the treaty constituting the International Monetary Fund obliges the states subject to its regime to refuse to enforce otherwise valid contracts if they violate the foreign exchange regulations of another state subject to the same regime.62

Another solution to conflicts of national laws is the harmonization of the rules deciding such conflicts and/or the contents of national laws, including criminal laws. In addition to the criminalization provided by the TRIPS Agreement noted above,63 the European Union’s Directive of May 22, 2001 for the harmonization of the substantive rules governing copyrights within the EU imposes criminalization of certain violations.64 It has also been adopted in the Council of Europe’s Convention on Cybercrime.65

61. In another matter, in 1982, the American multinational Dresser Industries, Inc. intended to deliver compressors to the Soviet Union via its French subsidiary. The US Treasury Department suspended the export authorizations of the French subsidiary. The US parent then sued before the courts, which dismissed the case because of the grave interest of the United States; namely, its capacity to impose respect for its regulations which is an essential condition for implementing its foreign policy. In the end, the administrative obstacles were lifted and the goods were delivered. Still, the exercise of legislative jurisdiction seems contrary to public international law given that the French subsidiary had no contact with the United States other than its inclusion on the American corporate group and accordingly the sanctions applied against the parent were applied to an infraction having only “secondary” or “indirect” effects on the US. Also the French Government had expressly ordered the subsidiary to execute the contract. *Dresser Industries, Inc v Baldridge*, 549 F Supp 108, 110 (DDC 1982).

62. This assumes that the foreign exchange regulations conform with the requirements of the IMF.

63. TRIPS Agreement, art 61 (cited in note 26).


B. PERSONAL JURISDICTION

Even supposing that in the Yahoo case there were effects on France sufficient to justify the exercise of legislative jurisdiction, the French state has an obligation to impose upon its courts additional constraints on their exercise of judicial jurisdiction over defendants located abroad. While some observers may be tempted to trace the same perimeter for legislative and personal jurisdiction, a practical and decisive advantage of a differentiated approach is that the possibilities for conflicts of jurisdiction are reduced as the risk of their materialization increases.

In public international law, the judges of any state should avoid issuing orders imposing measures that would require the cooperation of foreign authorities for their execution. Thus, a court of one country should not declare a company that is incorporated in another country bankrupt, since its order would necessarily involve the cooperation of the trade registry of the country of incorporation. Generally, the judicial authorities of any state impose upon themselves a certain restraint in order to avoid provoking conflicts, even given the problems and inconveniences resulting from such restraint.

Thus arises the question of how the French judge’s injunction against Yahoo, subject to payment of 100,000 FF (about $15,000 at the time) per day of delay in implementing his order, would have been executed. The Yahoo French subsidiary’s royalties and other payments in favor of its parent could have been seized, and the shares of the subsidiary that were owned by Yahoo would also have been exposed. Those possibilities might be considered sufficiently disastrous in themselves. Of course any other assets of Yahoo in France would have been open targets against which to execute the injunction.

On the other hand, Yahoo’s assets outside of France would have been exposed only to the extent that courts of other countries would consider the exercise of jurisdiction by the French courts appropriate. The success of such procedures seems doubtful. For example, a court of the Canadian Province of British Columbia refused exequatur for a Texas judgment imposing damages on a resident of the Province for defamation via the Internet of a company with corporate offices in British Columbia.

66. In the Barcelona Traction affair, the International Court of Justice dismissed for lack of standing Belgium’s claim against Spain. Still, Spain’s violation of public international law through excessive exercise of jurisdiction by its courts seems, at least to this author, to have been demonstrated. Case Concerning the Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain), 1970 ICJ 3 (Feb 5, 1970). The French courts endorsed appointment by the French Banking Commission, “acting of its own initiative as needed,” of a provisional administrator of Bank of Credit and Commerce International Ltd. Overseas (BCCI Overseas), incorporated offshore with a registered office in Grand Cayman. BCCI Overseas v Forde et autres, Cass com, Apr 11, 1995, Rev Cirt Dr Privé, 84, 742, note Oppetit.
and Texas because it had not been demonstrated that the Canadian defendant had a "real and material connection" with Texas. 67

Execution measures tending to deprive Yahoo of its assets in France might be deemed to correspond to the pursuit of a lawful objective domestically by means considered illicit under public international law: specifically, the application of French law to acts carried out in the United States by an American company without violation of American law sanctioned by a gradual confiscation of foreign assets in France without prompt, adequate and effective compensation. 68

IV. THE SUBOPTIMALITY OF THE UNIVERSAL APPROACH TO JURISDICTION OVER THE INTERNET

A. THE PRISONER'S DILEMMA AND FORUM SHOPPING

In the hypothetical prisoner's dilemma, the police seek to elicit a confession to a serious crime from two suspects against whom they have no evidence for that crime other than the eventual confessions. The offer of the police is that the prisoner who confesses may receive a more lenient sentence for testifying against the other, and the one who has not confessed will then receive a long-term sentence. If both confess each gets a medium-term sentence. If neither confesses, each gets convicted of a lesser charge. While the best result for each suspect taken individually is to confess provided that the other does not confess, the optimal behavior is for each not to confess. But, for want of being able to make a reliable agreement between themselves, both suspects are led to confess and the result corresponds neither to their individual interests nor to their general interest.

The dilemma may be presented in table form. The numbers in parentheses represent years of incarceration for A and B, respectively. 69

<table>
<thead>
<tr>
<th>B Confesses</th>
<th>A Confesses</th>
<th>A Does Not Confess</th>
</tr>
</thead>
<tbody>
<tr>
<td>B Does Not Confess</td>
<td>(8, 8)</td>
<td>(15, 1)</td>
</tr>
<tr>
<td>(1, 15)</td>
<td>(2, 2)</td>
<td></td>
</tr>
</tbody>
</table>


68. The author of this article had occasion to comment on this question. Daniel Arthur Laprès, Principles of Compensation for Nationalized Property, 26 Int'l & Comp L Q 97 (1977).

Forum shopping by litigants works in a manner not unlike the prisoner's dilemma. Suppose A and B have potential claims against each other. Each party expects that the courts of its own country are likely to apply its own laws, which are presumed to be substantively favorable to the local party. Suppose that A is destined to be a net creditor and only the amounts of B's liability vary. If both sue preemptively at least legal costs are increased, and therefore whatever result is ultimately achieved will be burdened therewith and will be sub-optimal to such extent.

Forum shopping promises the best available outcome for each of the parties separately, absent some form of agreement on redistribution. But in practice it tends to produce neither the best solution for each of the parties nor the optimal solution overall. Assuming that A's chosen forum results in a gain of 20 over the optimal value of A's claim against B in a neutral forum, and that B's chosen forum results in a corresponding loss of 20 to the optimal value of A's claim, with legal costs for each party outside of a cooperative arrangement equal to 5 per forum, a generalized statement of the resulting net welfare loss might take the following form:

\[ V_0 = \text{optimal value of } A's \text{ claim against } B \]
\[ G = \text{gain from favorable forum} \]
\[ L = \text{legal costs} \]

<table>
<thead>
<tr>
<th>B RACES TO THE COURTHOUSE</th>
<th>A RACES TO THE COURTHOUSE</th>
<th>A WAITS TO FILE, IN AN ATTEMPT TO NEGOTIATE WITH B</th>
</tr>
</thead>
<tbody>
<tr>
<td>A WINS THE RACE</td>
<td>B WINS THE RACE</td>
<td>((V_0 - G - 2L), (-V_0 - G - 2L))</td>
</tr>
<tr>
<td>((V_0 + G - 2L), (-V_0 - G - 2L))</td>
<td>((V_0 + G - 2L), (-V_0 + G - 2L))</td>
<td>((V_0 - G - L), (-V_0 + G - L))</td>
</tr>
</tbody>
</table>

\[ V_0 = 100; G = 20; L = 5 \]

<table>
<thead>
<tr>
<th>B RACES TO THE COURTHOUSE</th>
<th>A RACES TO THE COURTHOUSE</th>
<th>A WAITS TO FILE, IN AN ATTEMPT TO NEGOTIATE WITH B</th>
</tr>
</thead>
<tbody>
<tr>
<td>A WINS THE RACE</td>
<td>B WINS THE RACE</td>
<td>((100 - 20 - 5), (-100 - 20 - 5)) or (75, -85) NET WELFARE LOSS: 10</td>
</tr>
<tr>
<td>(100 + 20 - 2(5), -100 - 20 - 2(5)) or (110, -130)</td>
<td>(100 - 20 - 2(5), -100 + 20 - 2(5)) or (70, -90)</td>
<td>(100 - 20 - 5, -100 + 20 - 5)</td>
</tr>
<tr>
<td>B WAITS TO FILE, IN AN ATTEMPT TO NEGOTIATE WITH A</td>
<td></td>
<td>NET WELFARE LOSS: 0</td>
</tr>
<tr>
<td>((100 + 20 - 5), (-100 - 20 - 5)) or (115, -125)</td>
<td></td>
<td>(100, -100) NET WELFARE LOSS: 0</td>
</tr>
</tbody>
</table>

\(100, -110\) NET WELFARE LOSS: 20
In short, each party is led to try to sue first, and the result obtained departs from the optimal net welfare of the parties due to the legal costs engendered by forum shopping.

B. THE COURTS IN THE FACE OF FORUM SHOPPING

In the presence of competing private interests, the optimal solution may be evaluated at the macro level of society or at the micro level of the parties. There may be solutions which are optimal at both levels; other times, the optimal solution at the micro level will not correspond to the optimal solution at the macro level. In a democracy, the solution optimal at the macro level should prevail over a second-best solution at the micro level, which by hypothesis would be more favorable to at least one of the parties.

As between the parties, a solution is optimal if it cannot be changed without at least one party suffering more than the other gained. No solution which can be improved for one party while not causing detriment to the other, will generally be adopted absent other considerations. A solution is considered optimal at the micro level if it is adopted by agreement of the parties, though it may not be optimal at the macro level.

It is within the nature of courts to resolve disputes by applying the law, not according to preponderances of interests. Still, presumably no one denies that, in some circumstances, the courts create legal norms of general application. The French rules of private international law are perfect examples of judicial creativity and of the status of at least certain of their judgments as sources of law.

When the rules of private international law create opportunities for forum shopping, they engender sub-optimal solutions at both the macro and micro levels. Where a party can tilt a case's likely result in its favor by suing before a certain forum, then it has an incentive to initiate legal proceedings in that forum, lest the other party proceed likewise in another forum, providing a more promising chance of resolution in its own favor. In principle, once the proceedings have been initiated, other courts will refuse to accept jurisdiction over the same matter. This is the so-called rule of litispendance. But that will often fail to dissuade a party who has nothing to lose or something to gain from starting a suit in the jurisdiction of its preference. The Yahoo case, in fact, provides a perfect example of how it is possible to obtain two judgments on the same dispute from different national courts, litispendance notwithstanding, and how the multiplied legal costs are wasted in the economic sense.

Of course, in the Yahoo case before the French courts, the plaintiffs were not forum shopping in the usual meaning of the term. But the court's ruling, which made information stored on foreign servers subject to French criminal laws, does create opportunities for litigants to use France as a forum for actions combating any acts on the Internet considered illicit in France, but not elsewhere—such as Nazi...
proselytizing—even at the expense of what are elsewhere considered undue constraints on free speech.

The public interest has suffered because the costs entailed by the initiation of the proceedings could have been avoided—for instance, by an agreement of the parties resolving their dispute, or, short of that, an agreement regarding a chosen jurisdiction. Of course, even if a legal action has been commenced, the parties can stop it, but the costs incurred in its initiation are lost forever.

If the action is pursued, the extent of the gain from forum shopping corresponds to the marginal value of the judgment for the party initiating the action, compared with that which would have been rendered by any other court, the jurisdiction of which might have been invoked, for instance, by a forum shopping adversary. Whether forum shopping is successful or not, and therefore the extent of its practice, depends on the reliability of the projection of choice of applicable law by the chosen court. Where the action is quasi-delictual, however, it is a foregone conclusion that the court will apply its own law if the litigious act is considered to have been committed locally and the act violates local criminal laws.

C. LESSONS FOR REGULATING INFORMATION ON THE INTERNET

In cases where information on the Internet violates the criminal laws of some countries but not those of others, opportunities will arise to forum shop in order to launch a quasi-delictual legal actions. For instance, since the TRIPS Agreement obliges its member states to criminalize certain violations of intellectual property rights, it may be expected that cases of trademark violation on the Internet would tend to be brought before the court most likely to consider the infraction to have occurred on its territory, and/or where the damage award would be calculated according to the formula most favorable to the party initiating the legal action.

If information stored on servers in one country is made subject to the criminal laws of every country where display of such information is possible, then forum shopping will be encouraged and the opportunities for achieving optimal results to disputes will be reduced. When the French court, or the courts in Tennessee or the Italian Corte de cassazione in the cases related above, treat such communication as having been carried out in the jurisdiction where the information is displayed, the latter's criminal law will necessarily be applicable. The reliability of forum shopping is thus improved and its practice better rewarded.

The exercise of legislative and personal jurisdiction against website operators, based on the display of offending information on computer screens in countries outside of the country where the server storing and operating the site is located will encourage forum shopping. This behavior orients the parties toward rational, but sub-optimal results whether judged at the micro or macro levels.
V. Conclusion

My purpose has been to show that the application of French criminal law to information stored on Yahoo's servers in California and accessible from computers located in France, as well as the exercise of jurisdiction over Yahoo by the French courts based on the effects of Yahoo's information in France, were justified neither in French private international law nor in public international law. The trend in other legal regimes is rather toward assumption of jurisdiction over foreign or out-of-state websites on the basis of targeting surfers located within the jurisdiction and of actual exchanges, especially when they are commercial, with local users.

Additionally, I have sought to demonstrate that the rule set down by the French court would tend to encourage forum shopping, a process which leads parties rationally to adopt behavior which is systematically sub-optimal, whether evaluated in terms of their own interests or in terms of the general interest. A rule that makes the display of information on computer screens in any country a sufficient justification for applying local criminal laws to passive foreign websites and sufficient to extend jurisdiction over such sites will encourage preemptive law suits seeking to gain the advantage of forums in which the criticized behavior is expected to result in judgments more favorable to the “first to sue.”