

# WORLDWIDE PRESCRIPTIVE JURISDICTION IN INTERNET CONTENT CONTROVERSIES: A COMPARATIVE ANALYSIS\*

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## 1 INTRODUCTION

The global medium of the Internet offers global challenges. “While some of the conflicts now arising in cyberspace bear a familiar aspect, such as those arising in the course of electronic commerce, and require little more than mere technical adjustment of rules or methods applicable in analogous real-world situations, a growing number of conflicts involve clashing fundamental public values in the international arena.”<sup>1</sup> This is particularly true for Internet content regulation.

In respect of the Internet activities there are multiple overlapping conflicting jurisdictions<sup>2</sup> and the discussion is heated on how far the state can go in exercising its authority over authors of online material. On the one hand, it is asserted that “under the objective territorial principle, a court cannot assert extraterritorial jurisdiction over a foreign national simply on the basis that the foreign national's website contains images or data that violate the forum state's laws and that are accessible to users within the forum state;”<sup>3</sup> on the other hand it has already happened, supported by the arguments that “it seems clear that customary international law, . . . permits a nation to apply its law to extraterritorial behavior with substantial local effects.”<sup>4</sup>

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<sup>1</sup> Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT'L L. 673, 674 (2003).

<sup>2</sup> Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 543 (2002).

<sup>3</sup> Walter C. Dauterman, Jr, *Internet Regulation: Foreign Actors and Local Harms – at the Crossroads of Pornography, Hate Speech, and Freedom of Expression*, 28 N.C. J. INT'L L. & COM. REG. 177, 201 (2002).

<sup>4</sup> Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1208 (1998).

Interestingly, exactly Western states provided first examples on subjecting to their laws users from foreign jurisdictions. The first case was initiated by Germany that prosecuted Toben, an Australian national, on his short trip to Germany for Holocaust denial online.<sup>5</sup> The example was followed by France,<sup>6</sup> Italy,<sup>7</sup> Canada<sup>8</sup> and Australia that went even further and delivered defamation judgment when the respondent was not even present in the country except on the Internet.<sup>9</sup> At the same time this approach was not unquestionably followed everywhere. For example, in the online defamation controversy similar to the Australian one, the US court refused to hear the case for lack of jurisdiction.<sup>10</sup>

As Cassese noticed, “international law is a realistic legal system. It takes account of existing power relationships and endeavors to translate them into legal rules.”<sup>11</sup> No doubt, the argument of Goldsmith that “there is nothing extraordinary or illegitimate about unilateral regulation of transnational activity that affects activity and regulation in other countries”<sup>12</sup> is absolutely true but another question is whether the Internet jurisdiction should develop to sustain the pervasive version of it, especially in speech-related controversies.

This article examines the cases that appeared on the international arena in the area of Internet content regulation paying attention to the current legal debate and to emerging rules, and offers suggestion on the possible limits of extraterritorial jurisdiction in Internet content cases – it demonstrates the necessity for the states to accept the role of the Internet as a borderless medium and to keep their judicial activities within reasonable limits. The article argues for limitation of the effects principle when applied to Internet content controversies and claims that wide application of the territorial and active nationality principles of jurisdiction provides adequate and sufficient means to deal with objectionable Internet content. The discussion is not deliberately limited to particular

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<sup>5</sup> See *infra* Part 2.3.1.

<sup>6</sup> See *infra* Part 2.3.2.

<sup>7</sup> See *infra* Part 2.3.5.

<sup>8</sup> See *infra* Part 2.3.4.

<sup>9</sup> See *infra* Part 2.3.3.

<sup>10</sup> *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

<sup>11</sup> ANTONIO CASSESE, *INTERNATIONAL LAW* 12 (2001).

<sup>12</sup> Goldsmith, *supra* note 4, at 1240.

states but the US and Germany are in the focus of the comparative analysis as representatives of two different legal systems.

## 2 APPLICATION OF TRADITIONAL PRINCIPLES

“International law sets little or no limit on the jurisdiction which a peculiar state may arrogate to itself;”<sup>13</sup> however, several established principles are more or less recognized by all. The Internet, the borderless medium, challenges traditional views and calls for the necessity to revisit and reinterpret the doctrines, first of all because of the geographically unlimited effects of Internet activities. No doubt, “a similar phenomenon occurs in many domestic and international conflicts contexts”<sup>14</sup> but one can hardly disagree that the Internet raised it to the qualitatively new level.

In spite of many claims at the beginning of the Internet wide usage that cyberspace avoids traditional regulation methods,<sup>15</sup> many states were reluctant to make “an exception of the Internet” in their control of domestic activities as well as of foreign activities with local effects. Disregarding practical complications, the states persistently asserted jurisdiction in Internet-related disputes extending traditional principles of jurisdiction and modifying legal theory to meet to the emerging cyber-environment. Some Internet controversies fit perfectly to the traditional principles; for example, states' rights to exercise jurisdiction over their nationals wherever they are is a long established nationality principle for exercising jurisdiction over the person; similarly, the situation when material was put online on the server in the state's territory fits nicely in the traditional territorial principle. However, several particular problems remain; the most outrageous among them is the extension of the effects principle to assert jurisdiction over a foreign national for the material placed on the server abroad but as the Internet makes unavoidable accessible for local users. As a result, a mere webpage may be enough to be subjected to jurisdiction of every state.

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<sup>13</sup> J. G. STARKE, STARKE'S INTERNATIONAL LAW 183-84 (11th ed., 1994).

<sup>14</sup> Goldsmith, *supra* note 4, at 1211.

<sup>15</sup> For more detailed description of the early debate *see*, generally Goldsmith, *supra* note 4.

## 2.1 Territorial Principle

The territorial principle of jurisdiction “originally derived from an assumption about the absoluteness of boundaries and sovereign power within them.”<sup>16</sup> The state territory was a natural limitation to the state authority to prescribe law, providing opportunity to define addressees of the norms and to ensure foreseeability of legal order.<sup>17</sup> Under the territorial principle a state has jurisdiction over property, persons, acts, events within its territory.<sup>18</sup> This principle produces little controversy for no one questions the power of the state to prescribe laws to the conduct in its territory.<sup>19</sup> At the beginning there were several attempts to reduce application of the territorial principle to cyber-activities but they were quickly rejected by courts. For example, the British court easily asserted jurisdiction over a UK citizen who tried to argue that the pornographic content placed on the US server “was outside British jurisdiction.”<sup>20</sup> All over the world the early arguments that activity occurs in “cyberspace,” which is different from physical space and thereby avoids regulatory claims did not succeed.

The issue of jurisdiction under the territorial principle is double-sided. On the one hand, it seems that it does not give much power to the state for control of Internet activity, most of which occurs transnationally with participation of foreign actors without any tangible contact with a given forum. On the other hand, the territorial principle should not be underestimated. First, it confers jurisdiction over residents of the state, both individual users and corporations, the latter ranging from online businesses to ISPs that may be held liable for hosting of or for providing access to objectionable material. Further, financial intermediaries (such as credit card companies, etc.) can also be obliged

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<sup>16</sup> *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1824 (2000) [hereinafter *A Report on Global Jurisdiction Issues*].

<sup>17</sup> See, e.g., KARSTEN BREMER, STRAFBARE INTERNET-INHALTE IN INTERNATIONALER HINSICHT: IST DER NATIONALSTAAT WIRKLICH ÜBERHOLT? [CRIMINALIZED INTERNET CONTENT IN INTERNATIONAL RESPECT: IS THE NATION-STATE REALLY OUTDATED?] 114-15 (2001).

<sup>18</sup> See, Restatement (Third) of Foreign Relations Law 402 (1987) [hereinafter Restatement of Foreign Relations]; § 3 STRAFGESETZBUCH [Penal Code (of Germany)] [hereinafter StGB]; STARKE, *supra* note 13, at 184-87.

<sup>19</sup> The sub-set of the territorial principle that covers harmful effects produced on the territory on the state (the effects principle) is examined separately in Part 2.3.

<sup>20</sup> Chris Nuttall, *Police hail Net porn ruling*, BBC NEWS, July 1, 1999, available at <http://news.bbc.co.uk/2/hi/science/nature/382152.stm> (last visited April 26, 2004).

to act in accordance with local policies abstaining from facilitating infringement on them.<sup>21</sup> Second, namespace provides a tool for regulation.<sup>22</sup> Although theoretical grounds for this conclusion were not extensively addressed in legal discussion, the authority of a country to administer its own Country-Code Top-Level-Domain space (ccTLD) may fall under the territorial principle of jurisdiction. Even ICANN, the main body on Internet names management does not have a big say in how a state should manage its ccTLD.<sup>23</sup> “By threatening to exclude namespace users and service providers that do not adhere to namespace contracts or policies, namespace providers can enforce their interests in an over-efficient manner.”<sup>24</sup> Registrars of domain names can cancel them following the court order or informal request extending territorial jurisdiction as was done, for example, in respect of the sites `vote-auction.com` and `voteauction.com` – the registering US company cancelled the name as a co-defendant of a lawsuit, the Swiss registrar did the same after informal request.<sup>25</sup> Quite logically, registrars of ccTLD have to comply with the official country policy in most cases; for example, the manager of the German ccTLD “de.” would not register domain name `www.heil-hitler.de` or the like.<sup>26</sup>

## 2.2 Nationality Principle

Nationality (or personality) principle allows the state to exercise jurisdiction irrespective of the territory where the act was committed because of the nationality of the actor (active nationality principle) or because of the nationality of the victim (passive nationality principle).<sup>27</sup>

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<sup>21</sup> See, e.g., Jack Goldsmith, *Unilateral Regulation of the Internet: A Modest Defence* 11 EJIL 135, 137 (2000).

<sup>22</sup> Stefan Bechtold, *Governance in Namespaces*, 36 LOY. L.A. L. REV. 1239, 1254 (2003).

<sup>23</sup> See e.g., CENTR Statement on ICANN (July 30, 2002), available at <http://www.centr.org/news/CENTR-ICANN-statement.html> (last visited April 26, 2004).

<sup>24</sup> Bechtold, *supra* note 22, at 1259.

<sup>25</sup> *Id.* at 1241.

<sup>26</sup> RAINER FROMM, RECHTSEXTREMISMUS IM INTERNET: DIE NEUE GEFAHR [RIGHT-EXTREMISM ON THE INTERNET: THE NEW DANGER] 22 (2001).

<sup>27</sup> See, e.g., STARKE, *supra* note 13, at 210-11; Antonia Z. Cowan, *The Global Gaming Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 251, 262 (2003).

### 2.2.1 Active

Active nationality principle is recognized in many legal systems. For example, according to the US Restatement of Foreign Relations a state has jurisdiction to prescribe the activities, interests, status, or relations of its nationals outside as well as within its territory;<sup>28</sup> German criminal law prescribes liability for a limited number of acts committed abroad if the offender is a German national (such as trade in human organs,<sup>29</sup> sex tourism,<sup>30</sup> and some others).<sup>31</sup>

The ambition of states to have full control over its nationals is not surprising; indeed, as Shapiro commented, “many governments will be reticent about letting their citizens go online if they believe that they have no jurisdiction over what their citizens do there.”<sup>32</sup> Nevertheless, active nationality principle is not a generally applicable rule but rather depends on the type of activity. For example, by engaging in child sex tourism a person may be liable upon return under the laws of home country,<sup>33</sup> in gambling usually not.<sup>34</sup> Both approaches deserve consideration.

On the one hand, proposal to make citizens liable for their Internet activities wherever they are<sup>35</sup> would solve many problems. It would help Europeans in combating hate speech<sup>36</sup> without intrusion into expression preferences of others (considering that many of the US-based white supremacist sites are managed by German neo-Nazis); it would exclude forum-shopping<sup>37</sup> and lessen spillover effects of prosecution into other jurisdictions.<sup>38</sup> “At least one country, Australia, has made Internet casino gambling legal for everyone except its own citizens.”<sup>39</sup> This approach equals the Internet to a new independent space, like the Moon or the Antarctic region where exercise of jurisdiction is

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<sup>28</sup> See Restatement of Foreign Relations, *supra* note 18, 402 (2).

<sup>29</sup> § 5 (15) StGB.

<sup>30</sup> § 5 (8) b StGB.

<sup>31</sup> See, generally, § 5 StGB.

<sup>32</sup> Andrew L. Shapiro, *The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703, 715 (1998).

<sup>33</sup> § 5 (8) b StGB.

<sup>34</sup> See, e.g., Cowan, *supra* note 27, at 256.

<sup>35</sup> See, e.g., BREMER, *supra* note 17, at 222 .

<sup>36</sup> See, e.g., *id.* at 233.

<sup>37</sup> See, e.g., *id.* at 234.

<sup>38</sup> See, e.g., *id.* at 240.

<sup>39</sup> Cowan, *supra* note 27, at 267.

based on the active nationality principle.<sup>40</sup> On the other hand, there is an argument for restrained application of the active nationality principle – a person can integrate into foreign legal system without fearing prosecution of his motherland.<sup>41</sup>

Anyway, even if the active nationality principle is somewhat problematic it is less problematic than extending jurisdiction to everyone. Application of the active nationality principle to Internet-related controversies is furthermore convenient because whatever the preference of a particular state is, whether for broad or restricted interpretation of this principle, all approaches can coexist since the actor is supposed to be familiar with the laws of his or her home country and at the same time it does not produce spillover effects on other actors.

### 2.2.2 Passive

The passive nationality principle is applied quite rarely, often on a condition that the act is criminalized both in the prosecuting state and in the state where the offense was committed.<sup>42</sup> Besides, it is hardly applicable to Internet communication and so far there have been no cases where it would be applied to extraterritorial Internet content controversies.<sup>43</sup> In case when a victim of the Internet communication is a real person – defamation, for example, – the courts tend to determine jurisdiction according to the effects principle discussed in the next Part.

## 2.3 *Effects principle*

The effects principle allows the state to exercise jurisdiction if the conduct has a substantial effect within the state's territory.<sup>44</sup> Although it was derived from the territorial

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<sup>40</sup> See the Moon Treaty opened for signature at New York on 18 December 1979, art.12, available at [http://www.greaterearth.org/laws/moon\\_try.htm](http://www.greaterearth.org/laws/moon_try.htm) (last visited April 26, 2004); the Antarctic Treaty art.VIII, available at <http://www.nsf.gov/od/opp/antarct/antrtry.htm> (last visited April 26, 2004). See also BREMER, *supra* note 17, at 234.

<sup>41</sup> See, e.g., BREMER, *supra* note 17, at 223.

<sup>42</sup> For Germany see, § 7 (1) StGB; for French discussion see Estelle De Marco, *Le Droit Pénal Applicable sur Internet [Criminal Law Applicable on the Internet]* § 58-59 (1998), at <http://www.juriscom.net/uni/mem/06/crim01.htm> (last visited April 26, 2004).

<sup>43</sup> To the best of knowledge of the author.

<sup>44</sup> See, e.g., Restatement of Foreign Relations, *supra* note 18, 402 (1) c; § 9 (1) StGB.

principle and is often regarded as its subset,<sup>45</sup> the meaning of the effects principle is crucial and independent, particularly for the borderless communication enabled by the Internet. On the international level the principle was recognized by the Permanent Court of Justice in S.S. Lotus case;<sup>46</sup> on the national level it is also widely accepted and most jurisdictions consider their laws applicable to extraterritorial Internet content cases on its basis.<sup>47</sup>

The main question is how far the state would go in interpreting the effects principle. The US offers “reasonableness” requirement as a yardstick for applicability of national law to extraterritorial activities.<sup>48</sup> German scholars sometimes mention “reasonable link” when constructing the “harmful effect” clause<sup>49</sup> for application of the German law to the acts committed abroad.<sup>50</sup> In practice, in several cases involving objectionable Internet content the courts tend to apply the effects principle broadly, easily subjecting Internet content publishers to their jurisdiction.

### 2.3.1 Germany

Germany was among the first to deal with the Internet content illegal under its laws but perfectly legal abroad where it was hosted and made accessible via the Internet. In 1998 it prosecuted and sentenced Felix Somm, the manager of a subsidiary of the American company CompuServe, for distribution of online pornography in its newsgroups.<sup>51</sup> In 1999, however, the case was reversed on the appeal on the grounds that the manager was totally subordinated to the mother company and could not technically restrict access to the illegal content.<sup>52</sup> The case got much attention and caused

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<sup>45</sup> See, e.g., Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT'L L.J. 157, 161 (2003).

<sup>46</sup> *Id.*

<sup>47</sup> BREMER, *supra* note 17, at 132.

<sup>48</sup> See Restatement of Foreign Relations, *supra* note 18, 403 (1).

<sup>49</sup> § 9 StGB.

<sup>50</sup> See, e.g., Ulrich Sieber, *Internationales Strafrecht im Internet [International Criminal Law on the Internet]*, NJW 1999, 2065, 2068.

<sup>51</sup> AG München, Urteil vom 28.5.1998 “CompuServe” [München District Court, decision of May 28, 1998], available at [http://www.netlaw.de/urteile/lgm\\_12.htm](http://www.netlaw.de/urteile/lgm_12.htm) (last visited April 26, 2004).

<sup>52</sup> LG München, Entscheidung vom 17.11.1999, NJW 2000, 1051 [München Land Court, decision of Nov. 11, 1999].

CompuServe to alter its content policy to some extent<sup>53</sup> but it was not particular surprising in respect of jurisdiction. Quite naturally that Germany asserted jurisdiction over its national for actions that were presumably committed on its territory (even if content was on the servers of the mother company) apart from any harmful effects. Much more controversial was the Toben case,<sup>54</sup> which got somewhat less publicity in the US, probably due to involvement of non-US actors only.

On the trip to Germany Frederick Toben, an Australian citizen, was prosecuted and sentenced for Holocaust denial on the Internet – he was the author of various revisionist articles placed on the site of Adelaide Institute located on the Australian server. The case passed several judicial instances and ended up in the German Federal Court of Justice that upheld the conviction and elaborated most thoroughly on the effects principle as applied in the case. The Court started by determining that the content of the website passed exactly to what was covered by section 130 of the German Penal Code – ranging from clearly untrue statements of facts (Toben claimed that not more than 800 thousand Jews died in the Holocaust) to seditious and insulting statements capable to wake negative feelings to Jews in general and to German Jews in particular (such as assertions that Jews were using the Holocaust to enslave Germans in the feeling of guilt, etc.).<sup>55</sup> Because of the dissemination opportunities of the Internet this illegal content was easily accessible in Germany.<sup>56</sup> Interesting, one of the elements of the offense prescribed by section 130 is the actual ability of the communication to disturb public peace<sup>57</sup> and the court took pains to find it in the case. It examined the legislative intent of the norm, which was to avoid contamination of the political climate by belittlement of Nazi crimes;<sup>58</sup> it explained that the reasonable fear that the communication would disturb public trust in common security would be sufficient to fulfill the requirement;<sup>59</sup> it established that the addressees of the revisionist articles were Germans (notwithstanding

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<sup>53</sup> For example, newsgroups containing child pornography were removed in the result of publicity, *see id.* “Tatbestand” [Facts].

<sup>54</sup> BGH 46, 212, Urteil vom 12.12.2000 [Decision of the Federal Court of Justice of Dec. 12, 2000] [hereinafter Toben case].

<sup>55</sup> *Id.* part D. I. 1.

<sup>56</sup> *Id.* part D. I. 2 & part D. I. 6 (a).

<sup>57</sup> *Id.* part D. I. 5.

<sup>58</sup> *Id.* part D. II. 3 (a).

<sup>59</sup> *Id.* part D. I. 5 (d).

the fact that the articles were in English);<sup>60</sup> and, finally, it concluded that the harmful effect was present and it was legitimate to assert jurisdiction under sections 3 and 9 of the German Penal Code<sup>61</sup> (combination of the territorial and effects principles).

The German legal theory distinguishes the so called “abstract danger offences” that can happen on the Internet without obvious effect on the territory – such as dissemination of pornography, racist materials, extreme violence, etc.<sup>62</sup> Scholars are divided on the proper interpretation. Some stand for the “restrictive theory” – since such offences do not have a specific location where effect took place, jurisdiction should be restricted to the actual place of action of offender; others support “extensive theory” – effect should be considered to happen everywhere where the abstract danger could realize;<sup>63</sup> there are also suggestions to seek for the objective link; to examine the final interest of the actor; and to introduce the push-pull test similar to the US targeting requirement.<sup>64</sup> The Toben Court was most close to the extensive theory, although it classified section 130 as “the abstract-concrete danger offence” because of the requirement of actual ability for disturbance of peace;<sup>65</sup> the Court even mentioned that theoretically it was possible to argue that the Holocaust denying statement did not have this ability<sup>66</sup> but provided no hint as to what kind of argument that could be. Thus, there is no clear guidance, except that the author of a website illegal under German laws will be prosecuted if he or she appears within Germany’s reach.

### 2.3.2 France

Article 113-2 of the French Criminal Code makes French criminal law applicable to all offenses that are committed within its territory, hereby it is not necessary that the offence is committed exclusively on the French territory, it is enough that one of its constituting elements is present.<sup>67</sup> This provision subjects the majority of Internet

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<sup>60</sup> *Id.* part D. I. 6 (c).

<sup>61</sup> *Id.* part D. II.

<sup>62</sup> *See, e.g.,* Sieber, *supra* note 50, at 2066-67.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2068.

<sup>65</sup> *See* Toben case, *supra* note 54, part D. II. 3.

<sup>66</sup> *Id.* part D. I. 5 (b).

<sup>67</sup> *See* De Marco, *supra* note 42, § 40.

activities to French jurisdiction. The most notorious illustration of this principle is the Yahoo! case.<sup>68</sup> The case ended up in the Californian court that refused to enforce the French order on the First Amendment grounds, yet a brief overview of the reasons the French court used in exercising jurisdiction over Yahoo! is meaningful for the present analysis.

In the first instance the justification for exercising jurisdiction was quick and not at all problematic for the French court – it dedicated one paragraph to criminalization of the sale of Nazi memorabilia objects and another short paragraph to the conclusion that the harm was present on the French territory since French users could easily view the auction site.<sup>69</sup> On the appeal the court elaborated a little more thoroughly. It acknowledged that the Yahoo site “is in general directed principally at surfers based in the United States having regard notably to the items posted for sale, the methods of payment envisaged, the terms of delivery, the language and the currency used;” nevertheless, it refused to develop the argument further, stating that “the auctioning of objects representing symbols of Nazi ideology... may be of interest to any person”<sup>70</sup> and “the simple act of displaying such objects in France constitutes a violation of Article R645-1 of the Penal Code and therefore a threat to internal public order.”<sup>71</sup> For the court it was a sufficient basis to assert jurisdiction over the case and to rule on the matter.

Interestingly, it was pointed out in the proceedings to the possible enforcement problems. The court refused to consider seriously this argument – “any possible difficulties in executing our decision in the territory of the United States,... cannot by

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<sup>68</sup> Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F.Supp.2d 1181 (N.D.Cal. 2001).

<sup>69</sup> See Tribunal de Grande Instance de Paris, Ordonnance de référé du 22 mai 2000, Association “Union des Etudiants Juifs de France”, la “Ligue contre le Racisme et l'Antisémitisme” / Yahoo! Inc. et Yahoo France [The County Court of Paris, Interim Court Order, May 22, 2000, Association “The French Union of Jewish Students”, the “League Against Racism and Antisemitism” v. Yahoo and Yahoo France], available at [http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet\\_responsabilite.htm](http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_responsabilite.htm) (last visited April 26, 2004).

<sup>70</sup> See Tribunal de Grande Instance de Paris, Ordonnance de référé du 20 novembre 2000, Association “Union des Etudiants Juifs de France”, la “Ligue contre le Racisme et l'Antisémitisme” / Yahoo! Inc. et Yahoo France [The County Court of Paris, Interim Court Order, Nov. 20, 2000, Association “The French Union of Jewish Students”, the “League Against Racism and Anti-Semitism” v. Yahoo and Yahoo France], the English translation available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited April 26, 2004).

<sup>71</sup> *Id.*

themselves justify a plea of incompetence.”<sup>72</sup> What are the practical consequences of such a judgment is examined later in Part 3.1 of the article.

### 2.3.3 Australia

In the presumably first Internet defamation with a foreign defendant that was not present in the country except on the Internet the High Court of Australia dealt thoroughly with jurisdiction concerns.<sup>73</sup> The case involved defamatory statements with regard to Joseph Gutnick, an Australian resident, that appeared on the Internet site of the US-based magazine *Baron's Online*.<sup>74</sup> The Australian court asserted the jurisdiction under the effects principle – “activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place.”<sup>75</sup>

More particularly, in determining jurisdiction the court looked at two issues. First, it examined what was the place of publication of the statements of which Mr. Gutnick complained.<sup>76</sup> For the analysis the court distinguished between two meanings of “publishing” – “the (publisher's) act of publication and the fact of publication (to a third party)”<sup>77</sup> and asked, “[i]f the place in which the publisher acts and the place in which the publication is presented in comprehensible form are in two different jurisdictions, where is the tort of defamation committed?”<sup>78</sup> The conclusion was that since any material placed on the Internet “is not available in comprehensible form until downloaded on to the computer of [the end user, i]t is where that person downloads the material that the damage to reputation may be done.”<sup>79</sup> Consequently, the tort of defamation may be considered committed in Australia. The second issue the court dealt with was whether it was necessary to create the exception of the Internet.<sup>80</sup> The court answered in the negative, noticing that “[w]hilst the Internet does indeed present many novel

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<sup>72</sup> *Id.*

<sup>73</sup> *Dow Jones & Company Inc v. Gutnick* [2002] HCA 56.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* § 24.

<sup>76</sup> *Id.* § 9.

<sup>77</sup> *Id.* § 11.

<sup>78</sup> *Id.* § 28.

<sup>79</sup> *Id.* § 44.

<sup>80</sup> *Id.* § 123-38.

technological features, it also shares many characteristics with earlier technologies that have rapidly expanded the speed and quantity of information distribution throughout the world... Generally speaking, it is undesirable to express a rule of the common law in terms of a particular technology.”<sup>81</sup>

Like the French colleagues, the Australian court remained unimpressed by the enforcement argument of the appellant that the difficulty or impossibility of enforcement the judgment in another jurisdiction “may amount to a practical reason for providing relief to the objecting foreign party on one or more of the grounds of objection raised in this case.”<sup>82</sup>

### 2.3.4 Canada

Most recently the Ontario Superior Court of Justice followed the similar logic in *Bangoura v. Washington Post*<sup>83</sup> explicitly mentioning the Australian decision.<sup>84</sup> The court asserted jurisdiction over the US defendant Washington Post with no assets in Canada but with articles published on the Internet. The court started carefully, mentioning that “the mere fact that communication to a third party occurs in a particular jurisdiction does not as such make that jurisdiction the place of tort... There must be a substantial connection between the tort and the jurisdiction as well.”<sup>85</sup> But at the end the court had no difficulty in finding the connection – the plaintiff resided in Canada for two years even though he was not present at time of publication and the impact on his reputation would be in Canada;<sup>86</sup> besides, according to the court, there was no unfairness to the US defendant since “the Post is a newspaper with an international profile”<sup>87</sup> and it “should have reasonably foreseen that the story would follow the plaintiff wherever he resided.”<sup>88</sup>

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<sup>81</sup> *Id.* § 125.

<sup>82</sup> *Id.* § 121.

<sup>83</sup> Decision of Jan. 27, 2004, available at <http://www.scrawford.net/courses/Bangoura%20v.%20Washington%20Post.html> (last visited April 26, 2004).

<sup>84</sup> *Id.* § 19 (8).

<sup>85</sup> *Id.* § 15.

<sup>86</sup> *Id.* § 18.

<sup>87</sup> *Id.* § 19 (3).

<sup>88</sup> *Id.* § 19 (2).

Thus, the Canadian court in its turn established a precedent that “[t]he dissemination of defamatory statements over the Internet can give jurisdiction to the court where damage is sustained by the plaintiff no matter where publication has taken place.”<sup>89</sup> *Inter alia*, the court produced one remarkable statement, “publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication”<sup>90</sup> – surprisingly speech-chilling argument.

As in the extraterritorial cases described above, the enforcement argument was rejected, “the Washington Post defendants' home jurisdiction's unwillingness to enforce such an order is not determinative of whether the court should assume jurisdiction... It is for the plaintiffs to weigh the advantages and disadvantages of commencing an action in Ontario knowing that it may not be enforced.”<sup>91</sup>

### 2.3.5 Italy

One more country that employed the effects principle for asserting jurisdiction in the Internet content case was Italy. The Italian case originated because of online publications injurious to reputation and privacy of Dulberg Moshe and his two daughters, presumably posted online in Israel by Moshe’s ex-wife and her husband.<sup>92</sup> The court of the first instance did not assert jurisdiction over the case because the statements under discussion were published abroad, i.e. the offence was committed outside the national territory.<sup>93</sup> The Court of Cassation disagreed and remanded the case for further consideration in accordance with its guidelines.<sup>94</sup>

Like the Australian court, the Italian Court of Cassation makes a distinction between the act of the sender publishing defamatory statements online and the perception of these statements by a third party.<sup>95</sup> Further, mere availability of the injurious statements on the Internet is not sufficient, actual perception of them by a third person is

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<sup>89</sup> *Id.* § 16.

<sup>90</sup> *Id.* § 19 (8) d.

<sup>91</sup> *Id.* § 20.

<sup>92</sup> Moshe D., Italy. Cass., closed session, Nov. 17–Dec. 27, 2000, Judgment No. 4741, *available at* <http://www.cdt.org/speech/international/001227italiandecision.pdf> (last visited April 26, 2004).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

required.<sup>96</sup> Hypothetically it is possible to argue that the offence is not committed even if the material is online if, for example, nobody visits the web-site.<sup>97</sup> This is of course a very hard thing to argue and in practice it does not narrow the final conclusion of the court. Once “‘perception’ of the injurious contents of the messages took place in Italy, the offence must be deemed to have been perpetrated on the national territory”<sup>98</sup> and the Italian state is entitled to jurisdiction.<sup>99</sup>

### 2.3.6 Findings

Currently the effects principle as applied in asserting jurisdiction in Internet content controversies is employed most broadly, capable to justify almost anything. It knows no limits and it offers no support for legal certainty or foreseeability of online communication activities. If the Internet content falls within concerns of a particular country, its accessibility alone provides a sufficient link for jurisdiction according to the interpretation of the effects principle of many national courts.

### 2.4 USA: Targeting-Based Analysis

The targeting-based analysis is not a completely new doctrine, it was already applied in defamation cases in printed media both in the US<sup>100</sup> and Europe.<sup>101</sup> In the Internet settings, however, the United States alone favors its application. The Restatement of Foreign Relations provides that the jurisdiction in extraterritorial disputes must be reasonable.<sup>102</sup> The comprehensive description of the factors to determine reasonableness offered by the Restatement is neither exhaustive nor mandatory,<sup>103</sup> and the targeting-

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g., Keeton v. Hustler* 465 US 770 (1984). For more examples on jurisdiction in pre-Internet media *see, e.g., Denis T. Rice & Julia Gladstone, An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 615-16 (2003).

<sup>101</sup> *E.g.,* in a libel case *Shevill v. Presse Alliance SA* 1995 ECJ CELEX LEXIS 9163, § 33, the European Court of Justice held that the plaintiff can sue where the publication is knowingly distributed.

<sup>102</sup> Restatement of Foreign Relations, *supra* note 18, 403.

<sup>103</sup> *Id.* comments a & b.

based analysis accepted in interstate disputes by many US courts following *Zippo*<sup>104</sup> is likely to be applied in international disputes as well.<sup>105</sup>

The *Zippo* court reflected on jurisdiction issue in an interstate trademark dispute. Most importantly, it stated that 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 personal jurisdiction,”<sup>106</sup> and distinguished two other categories – when there is “the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper;”<sup>107</sup> in the middle “a user can exchange information with the host computer [and] the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information”<sup>108</sup> – also called the “sliding scale” analysis.<sup>109</sup>

The test was developed further in numerous US interstate cases.<sup>110</sup> For example, in *Young v. New Haven Advocate* the Virginian court did not assert jurisdiction over Connecticut newspapers in respect of online articles defaming a Virginian prison warden;<sup>111</sup> in *Neogen Corp. v. Neo Gen Screening, Inc.* the court concluded that the granting of passwords to and collecting personal information of Michigan users was sufficient proof of purposeful availment of the privilege of conducting activities within the forum and asserted jurisdiction over the Pennsylvania corporation.<sup>112</sup> Not all cases are consistent and there are some additional problems in international respect. For example, the Canadian Internet broadcaster iCraveTV had sought to limit its distribution to Canadians by conditioning access on passing through three stages of verifications and clickwrap agreements; nevertheless it was dragged into the US court.<sup>113</sup> Besides, there are

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<sup>104</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997).

<sup>105</sup> See e.g. Henn, *supra* note 45, at 192.

<sup>106</sup> *Zippo*, 952 F.Supp. at 1124.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> For more examples see, e.g., Beverley Earle & Gerald A. Madek, *International Cyberspace: From Borderless to Balkanized*, 31 GA. J. INT'L & COMP. L. 225 (2003).

<sup>111</sup> 315 F.3d 256 (4th Cir. 2002).

<sup>112</sup> 282 F.3d 883, 890-91 (2002).

<sup>113</sup> *Twentieth Century-Fox Film Corp. v. iCraveTV*, 2000 U.S. Dist Lexis 11670 (W.D. Pa. 2000). See also Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345,1351-52 (2001).

many examples of the US prosecuting foreign actors for computer crimes.<sup>114</sup> Certainly, copyright or computer system security issues are different from content-related controversies but they are not completely irrelevant. At the moment there is not a big probability of an international Internet content dispute originated in the US due to the strong First Amendment protection but the possibility is not unimaginable – for example, in respect of child pornography or obscenity if the COPA or its successor passes the Supreme Court.

#### 2.4.1 Discussion

Is the targeting-based analysis an adequate approach for determining jurisdiction in Internet content controversies? For some authors, “targeting is a key ingredient in the effects test.”<sup>115</sup> Indeed, many would readily agree that “if an Internet content provider has taken some action to target citizens of a particular country, that country may assert jurisdiction for the content placed on that website.”<sup>116</sup> Targeting is relatively easy to detect when commercial activity takes place but when a passive website merely provides information on objectionable subjects the targeting of a particular jurisdiction is far from obvious. What objectively perceivable factors can be distinguished for the targeting analysis of mere expression?

Interactivity or “the willingness to deal with persons in the forum state”<sup>117</sup> could be appropriate for the analysis of commercial transactions but it is hardly applicable to a static website. Another proposal is to regard the use of a foreign language as “a primary test for a non-interactive web site... that would indicate a desire for citizens of a foreign jurisdiction to read the web page.”<sup>118</sup> This one is certainly more suitable for

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<sup>114</sup> See, e.g., U.S. Department of Justice, *Russian Man Sentenced for Hacking into Computers in the United States*, Press Release, July 25, 2003, at <http://www.usdoj.gov/criminal/cybercrime/ivanovSent.htm> (last visited April 26, 2004) [hereinafter U.S. Department of Justice Press Release 2003]; U.S. Department of Justice, *Russian Computer Hacker Sentenced to Three Years in Prison*, Press Release, Oct. 4, 2002, at <http://www.usdoj.gov/criminal/cybercrime/gorshkovSent.htm> (last visited April 26, 2004) [hereinafter U.S. Department of Justice Press Release 2002].

<sup>115</sup> Rice & Gladstone, *supra* note 100, at 649.

<sup>116</sup> Henn, *supra* note 45, at 158.

<sup>117</sup> A Report on Global Jurisdiction Issues, *supra* note 16, at 1828.

<sup>118</sup> Henn, *supra* note 45, at 175.

communication analysis but there are several problems as well. First, there are languages officially used in many jurisdictions (English, Spanish, etc.) and it would be problematic to determine, for example, whether an English-language website targets the US, the UK, Australia, or a number of other countries. Second, the globalization process on the Internet is prominent and the use of several languages for a website is not unusual, even without particular targeting intent. Anyway, the language factor would offer at least some restriction of unlimited application of the effects principle.

One more sound proposal is that “a web site that uses software technologies to target advertising toward the specific user should also be considered to have submitted to the jurisdiction of the specific user.”<sup>119</sup> Quite logical, targeting advertising helps to derive financial and other benefits from a particular location and thus provides a link to foreign jurisdiction. Notably, there are many otherwise passive websites that have commercial advertising banners on them.

Targeting-based analysis could be a solution to the unlimited application of the effects principle if the courts could agree to accept it in a consistent form. However, currently there is not much prospect of it. European courts refuse to consider the use of foreign language as a factor for restricting jurisdiction (Toben and Yahoo case); for the US courts the problem is on the side of recognition of foreign judgments – Yahoo! used geographic identification technologies to target French citizens with French language banner advertisements but the French decision was not enforced by the US court.<sup>120</sup> Besides, there are still too many sites that do not expressly target anyone but welcome all interested surfers. Targeting-based analysis would exempt them from the states' control – the result the states cannot assent to.

## 2.5 *Protective Principle*

According to the protective principle a state can exercise jurisdiction over activities of non-nationals whether these activities occur inside or outside its territory for

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 176.

protection of important state interests, usually security or economy of the state.<sup>121</sup> The application of the protective principle is quite limited, for example, in the US it covers conduct “directed against the security of the state or against a limited class of other state interests,”<sup>122</sup> in Germany the offences that can be prosecuted under protective principle – “conduct directed against internal interests of the state” – are specifically enumerated in the Penal Code.<sup>123</sup> In the Toben case, for example, the German Federal Court of Justice mentioned that the international law allowed to assert jurisdiction for protection of important internal interests<sup>124</sup> but did not really rely on it.

In fact, if the protective principle were to apply broadly, many communication activities on the Internet would fall under jurisdiction of some state of the world. For example, insult of the Federal president is among offences specifically enumerated for application of protective principle in Germany,<sup>125</sup> bomb-making information on the Internet infringes on the laws and security interests of the United States.<sup>126</sup>

## 2.6 Universal Jurisdiction

The universal jurisdiction is recognized by international law for protection of international interests only in very limited, even unique occasions, such as piracy, war crimes and some others – “conduct sufficiently heinous to violate the laws of all states.”<sup>127</sup> The application of the universal jurisdiction to Internet content controversies could arguably be conceivable when the Internet is used, for example, to incite genocide in violation of international law.<sup>128</sup> The scope of crimes covered by the universal jurisdiction is not strictly determined. The best international codification effort so far is the UNO of Draft Code of Crimes against the Peace and Security of Mankind;<sup>129</sup> national laws can expand the scope. Thus, German law justifies universal jurisdiction in several

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<sup>121</sup> STARKE, *supra* note 13, at 211.

<sup>122</sup> Restatement of Foreign Relations, *supra* note 18, 402 (3).

<sup>123</sup> § 5 (1-5) StGB.

<sup>124</sup> Toben case, part D. II. 4.

<sup>125</sup> § 5 (3) StGB.

<sup>126</sup> *See, e.g.*, 18 U.S.C. § 842.

<sup>127</sup> STARKE, *supra* note 13, at 212.

<sup>128</sup> *See, e.g.*, Dauterman, *supra* note 3, at 208.

<sup>129</sup> Draft Code of Crimes Against the Peace and Security of Mankind, *available at* <http://www.un.org/law/ilc/texts/dcodefra.htm> (last visited April 26, 2004).

additional cases, including distribution of violent, animal and child pornography<sup>130</sup> – no doubt applicable to Internet communications as well but not yet tested in real life prosecution of a foreign offender.

### 3 INTERNET-SPECIFIC CONSIDERATIONS

#### 3.1 *Jurisdiction to Enforce*

The power to prescribe the law and adjudicate the dispute does not always correlate with the possibility to enforce the judgment. Among the three layers of jurisdiction - jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce<sup>131</sup> – the weakest layer in respect of Internet controversies that actually limits the power of the state to regulate Internet communication is undoubtedly jurisdiction to enforce. As Goldsmith convincingly argues, “the true scope and power of a nation's regulation is measured by its enforcement jurisdiction, not its prescriptive jurisdiction.”<sup>132</sup>

“In general a nation can only enforce its laws against: (i) persons with a presence or assets in the nation's territory; (ii) persons over whom the nation can obtain personal jurisdiction and enforce a default judgment against abroad; or (iii) persons whom the nation can successfully extradite.”<sup>133</sup> “In the real world, discrepancy between prescription and enforcement traditionally causes various inefficiencies, including evasion of the law,”<sup>134</sup> in cyberspace the effect is even more extreme. First, in Internet disputes the proportion of persons with a presence or assets in the nation's territory in comparison to all involved is remarkably low so that a state is often not capable to enforce the judgment without external help.<sup>135</sup> Second, extradition for enforcement is rare, mostly based on

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<sup>130</sup> § 6 (6) StGB.

<sup>131</sup> See, e.g., Restatement of Foreign Relations, *supra* note 18, 401.

<sup>132</sup> As described by Matthew Fagin, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 417 (2003).

<sup>133</sup> Goldsmith, *supra* note 4, at 1216.

<sup>134</sup> Watt, *supra* note 1, at 690.

<sup>135</sup> There are areas of criminal law where the US tries to enforce its laws by all means, up to setting up a fake firm to get the criminals on the US sole but it is not likely to happen in speech cases. See U.S. Department of Justice Press Release 2002, *supra* note 114. “This prosecution demonstrates the ability and resolve of the Department of Justice to vigorously investigate and pursue cybercriminals who attack

treaties and almost never of a state's own national; besides it is even less likely to occur in speech disputes because of costs and values clashes.<sup>136</sup> The third point of enforcement of a judgment abroad deserves particular consideration.

### 3.1.1 Enforcement of Foreign Judgments

There is no general obligation of states to enforce foreign judgments under international law,<sup>137</sup> although there are several international and regional conventions and treaties addressing the issue.<sup>138</sup> Usually the judgment will be enforced if a number of prerequisites are present. The most common are that the foreign judgment is rendered under proper jurisdiction;<sup>139</sup> in compliance with procedural rules of the issuing court that are compatible with general requirements of due process of law;<sup>140</sup> reciprocity is often required.<sup>141</sup> There are also differences from country to country; for example, the US would rather enforce a foreign money judgment than a foreign injunction<sup>142</sup> the latter being considered “far more difficult and intrusive upon a national sovereignty”<sup>143</sup> but for Germany or France the distinction does not matter.<sup>144</sup> On the other hand, American

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American computer systems. We are committed to tracking down and prosecuting those individuals wherever they may be”, see U.S. Department of Justice Press Release 2003, *supra* note 114.

<sup>136</sup> For example, on the extradition request of the Thai government in respect of a Thai woman who displayed the Thai national flag on her pornographic website in the UK it was commented, “it is unlikely the British government would not take action over such minor charges”. See Silicon.com, *Porn web woman faces extradition from Britain*, Dec. 08 2003, at <http://www.silicon.com/networks/webwatch/0,39024667,39117237,00.htm> (last visited April 26, 2004).

<sup>137</sup> See, e.g., Lothar Determann & Saralyn M. Ang-Olson, *Recognition and Enforcement of Foreign Injunctions in the US*, SEVENTH ANNUAL INTERNET LAW INSTITUTE 189, 191 (2003).

<sup>138</sup> See, e.g., list of Hague Conventions on Private International Law, available at <http://www.hcch.net/e/conventions/index.html> (last visited April 26, 2004).

<sup>139</sup> For Germany see § 328 (1) 1 ZIVILPROZESSORDNUNG [Civil Process Code] [hereinafter ZPO]. For the US discussion see, e.g., 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, 699 (2003); *A Report on Global Jurisdiction Issues*, *supra* note 16, at 1875-76.

<sup>140</sup> For Germany see § 723 (2) ZPO [the decision must legally in force in compliance with rules of the court that made it], § 328 ZPO (1) 2 [the defendant was not properly served], § 328 ZPO (1) 3 [no contradiction with previous decisions] or generally see Determann & Ang-Olson, *supra* note 137, at 197. For the US discussion see, e.g., Houweling, *supra* note 139, at 699; *A Report on Global Jurisdiction Issues*, *supra* note 16, at 1875-76.

<sup>141</sup> See, e.g., § 328 ZPO (1) 5.

<sup>142</sup> See Determann & Ang-Olson, *supra* note 137, at 193.

<sup>143</sup> *Id.* at 195-96.

<sup>144</sup> *Id.* at 198.

punitive damages are not accepted in Germany.<sup>145</sup> But the particular problem of enforcement of foreign judgments in context of Internet content controversies is represented by the public policy exception secured in many legal cultures.<sup>146</sup> The US is especially well-known for its reluctance to enforce foreign judgments in speech cases due to the First Amendment protection<sup>147</sup> thereby considerably limiting the enforcement expectations of other states – frequently one of the parties in Internet content controversies resides in the US.

### 3.1.2 Should Prescribe If Cannot Enforce?

The courts are aware of the practical limits of enforcement of judgments entered against persons abroad, nevertheless, they expressively reject the enforcement argument.<sup>148</sup> They feel reluctant to openly admit the limits of their power but the reality prevails and judgments remain unenforced. Remarkably, after the Yahoo! successful litigation in the US that declared unenforceable the order of the French court, there was a twist of the French anti-racist policy and the approach to Internet content controversies changed in practice – the efforts to ensure the hate-free society and the hate-free Internet for local users concentrated on local ISPs instead of on foreign content providers. Thus, in 2001 a case appeared in a French court with plaintiffs almost identical to in the Yahoo! case that complained of the accessibility in France of a number of white-supremacy sites, particularly to those hosted under [www.front14.org](http://www.front14.org).<sup>149</sup> This time the anti-racist organizations did not venture into the meaningless race after the American hosting provider. Rather, that wanted to judicially oblige French ISPs to block access to the

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<sup>145</sup> See HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT [INTERNATIONAL CIVIL PROCEDURE LAW] 373 (2003).

<sup>146</sup> For Germany see § 328 ZPO (1) 4 that secures protection of fundamental principles of German law, particularly when in connection to basic human rights. For the US discussion see, e.g., Houweling, *supra* note 139, at 699; and *A Report on Global Jurisdiction Issues*, *supra* note 16, at 1875-76.

<sup>147</sup> See, e.g., Houweling, *supra* note 139, at 700-01.

<sup>148</sup> *Inter alia*, in the above described cases.

<sup>149</sup> Tribunal de Grande Instance de Paris, Ordonnance de référé du 30 octobre 2001, Association “J'accuse!...action internationale pour la justice” (AIPJ), La Licra, et autres c/ Association Française d'Accès et de Services Internet (AFA), 13 fournisseurs d'accès et prestataires techniques d'Internet [The County Court of Paris, Interim Court Order, Oct. 30, 2001, Association “I accuse!... international action for justice” (AIPJ), La Licra, and others v. French Association of Internet Access and Service (AFA), 13

site.<sup>150</sup> Considering technical limits of effective blocking measures the litigation resulted in a general obligation on French ISPs to work out a workable technical solution in cooperation with the plaintiffs.<sup>151</sup> Interestingly, before going to court LICRA and other plaintiffs contacted the Alaska-based host ISP that agreed to terminate hosting of hateful material.<sup>152</sup> However, the site found another host in Boston that remained insensitive to LICRA's demands.<sup>153</sup>

The practice proves that impossibility to enforce is a highly important matter; the question, however, is how to use this conclusion. On the one hand, there are suggestions that inability to enforce may amount to a practical reason for not extending jurisdiction too much;<sup>154</sup> on the other hand, there are views that on the contrary it may serve as justification for extensive prescriptive jurisdiction – since most entities have no assets other than in their “home” territory, there is no reason to worry and to exaggerate spillover effects of broad prescriptive jurisdiction.<sup>155</sup>

One could question, what is the purpose of useless prescription? It produces litigation costs and no real result. Policy and value statements of the country are anyway apparent from criminal codes and other laws. At the same time worldwide jurisdiction contributes to legal uncertainty – even if it is not a meaningful factor anymore,<sup>156</sup> it remains a value. The powerless victims of the worldwide jurisdiction would be end-users that would have to check the laws of every country they travel to if they happen to have placed something on the Internet.

The point is, one have to look reality in the face. The courts regard it beyond their dignity to accept the enforcement argument; however, for a change they could worry on recognition of and respect to their judgments. The French court stated that it could not create exception of the Internet but ended up in measures on home ISPs. The ability to

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Internet access providers and technical providers], *available at* [http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet\\_responsabilite.htm](http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_responsabilite.htm) (last visited April 26, 2004).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., Tatjana Höernle, *Pornographische Schriften im Internet: Verbotsnormen im deutschem Strafrecht und ihre Reichweite* [Pornographic Materials on the Internet: Prohibiting Norms in German Criminal Law and their Scope], NJW 2002, 1008, 1013.

<sup>155</sup> See, e.g., Goldsmith, *supra* note 21, at 139-40; Watt, *supra* note 1, at 691.

<sup>156</sup> See, e.g., Fagin, *supra* note 132, at 419.

enforce should always be taken into consideration when asserting jurisdiction. It remains to hope that common sense prevails and courts would listen to the arguments similar to this one of a German commentator, “enforcement of German law against content providers abroad is illusionary... In the long run the capitulation before the power of reality and the adjustment of German law to the internationally enforceable minimal standards are unavoidable.”<sup>157</sup>

### 3.2 *Consent to Jurisdiction*

Within the discussion on jurisdiction in cyberspace there are suggestions that private regulations will be crucial not only in determining jurisdiction as well as in Internet dispute resolution altogether.<sup>158</sup> “A more formal method to establish private legal orders in cyberspace is to condition access to particular networks on consent to a particular legal regime.”<sup>159</sup> Two main problems arise from this suggestion, one of a general character, the other relating to the subject matter of the article (Internet content controversies).

First, “[t]he validity of [the] contract, in which no positive assent is obtained and the Web site visitor is unlikely to have read the terms, stands on shakier ground.”<sup>160</sup> It is very doubtful that legal notices hidden among thousands of pages like “by accessing this web site both you and Netscape agree that the statutes and laws of the state of California, without regard to the conflicts of laws principles thereof, will apply to all matters relating to use of this web site,”<sup>161</sup> may constitute informed consent. The user may not even be aware that there is such a notice. (In fact, the author of this article was not able to find this statement independently starting from the Netscape home page and had to follow the link provided in another article.)<sup>162</sup> Several US courts already held that “it cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract

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<sup>157</sup> Höernle, *supra* note 154, at 1013.

<sup>158</sup> See, e.g., Goldsmith, *supra* note 21, at 146.

<sup>159</sup> Goldsmith, *supra* note 4, at 1214.

<sup>160</sup> Geist, *supra* note 113, at 1382.

<sup>161</sup> Netscape, *Applicable Laws*, at [http://wp.netscape.com/legal\\_notices/laws.html](http://wp.netscape.com/legal_notices/laws.html) (last visited April 26, 2004).

<sup>162</sup> August, *supra* note 2, at 546-47, footnote 85.

with any one using the web site.”<sup>163</sup> Moreover, even in clearly contractual matters clickwrap agreement is not always valid. “In business-to-business contracts, choices of forum clauses are generally enforced in the United States, the E.U., and Japan. Their validity, however, may be problematic when one party is a consumer.”<sup>164</sup> Thus, EU regulation allows a consumer to bring a suit in the courts of a place where the consumer is domiciled.<sup>165</sup>

Second, disputes involving Internet content controversies are clearly distinct from commercial transactions. Usually they involve either defamation lawsuit or criminal prosecution by the state for dissemination of illegal material where contractual consent doesn't play any role. Even Goldsmith, one of the main proponents of the “consent” approach mentions that “it is doubtful whether these private regulations will accord with the mandatory laws of territorial governments,” and it is not really a panacea.<sup>166</sup> Certainly, it doesn't matter for the government if it is asserted that the criminal act was committed under the laws specified on the respective webpage and it doesn't matter for a claim of a third-party who did not agree to any terms. In short, consent theory does not help in Internet content controversies.

### 3.3 Zoning Argument: Technology

In the recent years there appeared a wave of technology arguments led by Goldsmith claiming that “it is already possible for content providers to take measures to achieve significant control over information flows... As such control becomes more feasible and less costly, personal jurisdiction over cyberspace activities will become functionally identical to personal jurisdiction over real- space activities.”<sup>167</sup> According to them, the law should not be alone in protecting local values, “once harnessed to the law, technology can facilitate the exercise of prescriptive jurisdiction in the international arena, by providing the means to ensure perfect compliance with regulatory claims over

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<sup>163</sup> Ticketmaster Corp. v. Tickets, 2000 U.S. Dist. LEXIS 4553, 8; the same conclusion was held in *Mendoza v. AOL*, 90 Cal. App. 4th 1. (Cal.App. 1 Dist. 2001) on the terms of AOL member agreement.

<sup>164</sup> *A Report on Global Jurisdiction Issues*, *supra* note 16, at 1860.

<sup>165</sup> Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 16.

<sup>166</sup> Goldsmith, *supra* note 21, at 146.

cyberspace, by the use of filtering techniques<sup>168</sup> An interesting issue comes up, is it an argument for responsibility *if zone* or for obligation *to zone*? In the former case it would be an additional helpful factor for determining targeting within the effects test; in the latter case, however, it would require transformation of the Internet as we know it.

Obviously, for many commentators there is nothing extravagant in the obligation to zone, for them the claim that content providers should not be liable for harms everywhere where the content appears is justified only as long as “the content provider cannot control the geographical and network distribution of his information flows.”<sup>169</sup> Once adequate means to control information flows are available, they must be employed and the provider cannot complain of liability in a foreign state.<sup>170</sup>

Today it is not contested that the quality of the Internet as a free borderless medium does not lie in its “nature“ but is determined by the computer code.<sup>171</sup> There are various tools to identify the geographical location of the user<sup>172</sup> and many companies routinely do that for targeting advertising purposes. Moreover, some companies already exercise regional self-censorship – Google and Yahoo were forced to stop running online casinos advertisements under the US prosecution threat but Yahoo limited this decision for the US territory.<sup>173</sup> Undoubtedly, “the rapid development of filtering and “zoning“ techniques, now used for purely commercial reasons such as targeting advertising to a particular public, provides clear evidence that geographical indeterminacy on the Internet is not inevitable, but results from ideological choice.”<sup>174</sup>

Some fear that “to effectively prevent materials from entering states where they are not permitted will require “extensive self-identification of users before they receive access to information.”<sup>175</sup> In fact, this concern could be avoided with a slight change in

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<sup>167</sup> Goldsmith, *supra* note 4, at 1218 -19.

<sup>168</sup> Watt, *supra* note 1, at 695.

<sup>169</sup> Goldsmith, *supra* note 4, at 1230.

<sup>170</sup> *Id.*

<sup>171</sup> For detailed description see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

<sup>172</sup> See, e.g., Geist, *supra* note 113, at 1395.

<sup>173</sup> Matt Richtel, *Web Engines Plan to End Online Ads for Gambling*, NEW YORK TIMES, April 5, 2004, available at <http://www.nytimes.com/2004/04/05/technology/05yahoo.html> (last visited April 26, 2004).

<sup>174</sup> Watt, *supra* note 1, at 683.

<sup>175</sup> Fagin, *supra* note 132, at 445, citing Yochai Benkler, *Internet Regulation: A Case Study in the Problem of Unilateralism*, 11 EJIL 171, 178 (2000).

the architecture of the Web, for example, introduction of geographical indicator in the IP number of every computer would enable an easy check of the location of every site visitor and could make the site inaccessible for users from specific jurisdictions. The only real question is whether the Internet architecture should develop in this direction, which is a policy question. Throughout the recent history the Western world tried to promote its ideas to those who did not have access to them. The zoning argument, on the contrary, totally disregards the effect on freedom of speech.

### 3.4 *Costs and Effect on Speech*

Whether broad prescriptive jurisdiction in respect of Internet content cases may be effectively realized or not, is not the only question that should be examined. “Without assessing [other] factors [such as costs, overall impact on speech, and democracy] the impact of prescriptively legitimate unilateral exercises of jurisdiction upon the on-line community remains unclear.”<sup>176</sup> What would happen if states continue to insist on broad exercise of jurisdiction in Internet content matters?

#### 3.4.1 **With Zoning Technologies**

In one scenario, broad exercise of jurisdiction would undoubtedly be legitimate if cyberspace were zoned and every author could control the spread of it creation. From the technical point of view, the architecture of the Internet is developed by people and any direction of its development is possible.<sup>177</sup> But do we really want, do we really need the “zoned” cyberspace? “Since the 1940's the United States has deployed anti-jamming technologies to make Voice of America and other United States government sponsored broadcasting available to people in nations with governments that seek to block news and information.”<sup>178</sup> Similarly, twice in the past three years the US Congress dealt with the bill on Global Internet Freedom proposed for the same purpose – to promote freedom of

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<sup>176</sup> *Id.* at 421.

<sup>177</sup> *See, generally, LESSIG, supra* note 171.

<sup>178</sup> Elaine M. Chen, *Global Internet Freedom: Can Censorship and Freedom Coexist?* 13 DePaul-LCA J. Art & Ent. L. 229, 233 (2003).

expression on the Internet.<sup>179</sup> Zoning of the Internet would lead to an exactly opposite result. Not only would it make much of valuable content unavailable but it would also significantly raise the costs of Internet activities for all concerned – “in order to implement this technological solution, a multi-national actor must reconsider its relationships with *all* its users, regardless of national origin.”<sup>180</sup> That could lead to a particular speech-averse result - “assuming that technology continues to improve, it may become easier to withhold speech from foreign countries than to sort out inconsistent foreign laws that specify what counts as harmful where.”<sup>181</sup>

The insistence on general zoning would completely alter the current status of the Internet as a cheap, easily accessible medium enabling free flow of ideas worldwide as we know it and as many cherish it. The Internet would stop to be the medium of users – few private authors have the means to control the spread of their work and few Internet companies would provide free or cheap services when burdened by the obligation to employ geographical filtering in respect of content placed by their customers. Fortunately, this dark development is not probable to occur on a big scale;<sup>182</sup> first of all because the US companies that enjoy the First Amendment protection are not likely to assume the additional costs without effective enforcement threats. Nevertheless some regional adjustments are possible and already in force, mainly due to regional business interests.<sup>183</sup>

### 3.4.2 Without Zoning Technologies

In another scenario which is more similar to what is happening today, the courts will continue exercising worldwide jurisdiction but with limited success mainly due to the enforcement problem. One could reflect what would subjecting users to the laws of every country lead to? Would it lead to less objectionable content on the Internet? It is

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<sup>179</sup> The bills were not adopted but the fact is significant anyway. See H.R. Res. 12, 107th Cong. (2001); H.R. Res. 48, 108th Cong. (2003).

<sup>180</sup> Yochai Benkler, *Internet Regulation: A Case Study in the Problem of Unilateralism*, 11 EJIL 171, 174 (2000).

<sup>181</sup> Houweling, *supra* note 139, at 714-15.

<sup>182</sup> See, e.g., Fagin, *supra* note 132, at 415.

<sup>183</sup> Human Rights Watch, *Yahoo! Risks Abusing Rights in China* (August 9, 2002), at <http://www.hrw.org/press/2002/08/yahoo080902.htm> (last visited April 26, 2004).

very doubtful, considering that the user is innocent under his or her local laws (if otherwise, the problem may be solved by the respective state, on the state's own initiative or on the notice of others). The only thing it can lead to would be the increasing amount of warnings like they appeared after the Toben case – “Travelers alert!... Stay out of prison! Stay out of Germany!”<sup>184</sup>

Under the logic of effects principle as applied by many Western states in asserting jurisdiction over out-of-state actors, producers of swimming suits fashion or erotic could be arrested on their trip to Islamic states as infringing the morality of the country.<sup>185</sup> In fact, journalists, politicians, scholars, writers, enthusiasts, and anyone speaking in cyberspace would face the same risk – multiplied by the fact that it is not always obvious that the speech is objectionable and where exactly it is objectionable. Perhaps, one could maintain a database of all possible objectionable topics to make it certain not to experience prosecution process on a vacation trip. Irony apart, so far Islamic states did not to extend jurisdiction to foreigners with no connection to a state<sup>186</sup> fighting with objectionable content by local filtering measures but would they refrain from it long if Western states provide so many examples? It appears, Western states are less tolerant to Internet speech than Islamic societies traditionally criticized for oppression of freedom of expression.

### 3.5 *International Solution*

International agreement on jurisdiction in Internet-related issues would certainly be the best choice. One of the challenges for negotiating such an agreement is that the Internet activities involve too many topics (commerce, speech, criminal, civil, etc.) that were traditionally dealt with by different means. So far, there are many conventions on jurisdiction in non-Internet-related issues, all of them quite specific and not particularly

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<sup>184</sup> See, e.g., statement at <http://www.zensurfrei.com/germanyinformation/> (last visited April 26, 2004).

<sup>185</sup> HERBERT TRÖNDLE, STRAFGESETZBUCH UND NEBENGESETZE [PENAL CODE AND RELEVANT LAWS] 60 (2003).

<sup>186</sup> BREMER, *supra* note 17, at 122.

applicable to Internet controversies.<sup>187</sup> The Internet jurisdiction was shortly addressed by the Convention of Cybercrime but in no clear way.<sup>188</sup>

The situation is further aggravated by the fact that among other topics speech issues imply clashes of values. Even regional cooperation efforts that are looked upon as a possible guidance<sup>189</sup> have their shortcoming for application on the international level. Thus, the EU E-Directive offers a combination of home country control (the website operator will be liable in the home state)<sup>190</sup> with an override procedure (the state can assert control over a foreign operator in enumerated exceptions (like public policy issues) but before taking measures should contact another Member State and notify the EU Commission).<sup>191</sup> It may be a good solution for a region with more or less commonly shared values but it would hardly work for the whole world<sup>192</sup> – there is little prospect to agree on something when countries do not have much in common from the beginning. Moreover, negotiations between governments on every Internet dispute involving public policy will be too burdensome. The conclusion seems to be that the solution may be found on the national level only, the world is not ready for the international solution yet.<sup>193</sup> The realistic goal could be to concentrate on harmonization of existing and developing rules in respect to jurisdiction in Internet disputes and to try generalizing them into customs of international law, establishing common principles not from “above” but from below.<sup>194</sup>

### 3.6 *Towards Clarity of Rules*

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<sup>187</sup> See, e.g., Henn, *supra* note 45, at 173, see also *supra* note 138.

<sup>188</sup> Thus, art. 22 (4) of the Convention on Cybercrime provides that the “Convention does not exclude any criminal jurisdiction exercised in accordance with domestic law”.

<sup>189</sup> See, generally, 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).

<sup>190</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), art. 3 § 1, 2000 O.J. (L 178), available at <http://europa.eu.int> (last visited April 26, 2004).

<sup>191</sup> *Id.* art. 3 § 4.

<sup>192</sup> See, e.g., Kightlinger, *supra* note 189, at 747.

<sup>193</sup> See BREMER, *supra* note 17, at 242.

<sup>194</sup> See *id.* 176-77, 201.

Foreseeability of rules and of the governing law is not a popular argument in discussing Internet transnational issues nowadays<sup>195</sup> but it used to be important. “Asserting jurisdiction over a nonresident or a person not physically within the state would “offend traditional notions of fair play and substantial justice,” the court said once.<sup>196</sup> The statement is not completely outdated.

“All other things being equal, companies large and small generally prefer predictable legal environments to unpredictable environments,”<sup>197</sup> the same being true for private users as well. As David Post argued, “[s]cale matters... Rules and principles that may be quite reasonable at one scale may become incoherent and unreasonable at another.”<sup>198</sup> In a more recent decision the same idea was expressed by the court – “it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet.”<sup>199</sup>

Since every state has its own local policy to protect “all should be ready to subscribe, *ex ante*, to a rule of reason, under which the benefit from being able to ensure protection of local policies should balance out the concessions made to other States' conflicting regulatory claims.”<sup>200</sup> The pragmatic question whether a state *can* unilaterally prescribe laws governing Internet activities can be answered in the affirmative – yes, it can though with very limited success. But it is not enough; the second question should follow, whether a state *should* do it. “Jurisdiction should not be exercised merely because it is permissible under principles of international law.”<sup>201</sup>

#### 4 CONCLUSION

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<sup>195</sup> See, e.g., Fagin, *supra* note 132, at 419.

<sup>196</sup> Cowan, *supra* note 27, at 265, *describing* International Shoe Co. v. Washington, 325 U.S. 310 (1945).

<sup>197</sup> Kightlinger, *supra* note 189, at 764.

<sup>198</sup> David G. Post, *Against "Against Cyberanarchy"*, 17 BERKELEY TECH. L.J. 1365, 1378 (2002).

<sup>199</sup> Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1372 (1995).

<sup>200</sup> Watt, *supra* note 1, at 692.

<sup>201</sup> *A Report on Global Jurisdiction Issues*, *supra* note 16, at 1821.

With several exceptions, states tend to apply the effects principle in asserting jurisdiction over foreign actors in Internet content controversies. A little simplified, the justification provided is as follows – “what you say matters to us. Since we can hear it we have jurisdiction.” While the validity of the effects principle as such is not contested, it is necessary to revisit its meaning in respect of Internet content disputes. “A world in which the Effects Principle returns the result “No Substantial Effects Outside the Borders“ when applied to the vast majority of events and transactions is not “functionally identical“ to a world in which application of the same principle to the vast majority of events and transactions returns the opposite result.”<sup>202</sup> Potential accessibility of a website is not a proper link for application of national law.<sup>203</sup>

The US interstate cases with targeting-based analysis provide only limited guidance. First, interstate jurisdiction is different from international extraterritorial jurisdiction, primarily because of the absence of enforcement concern. Second, it is not clear what would be the application in extraterritorial criminal cases, such as child pornography or obscenity prosecution (the latter being a theoretical example so far). Targeting-based analysis could help but even in the US it is not used consistently. Besides, there are not too many objective indicators of targeting and the risk of their arbitrary application reducing the outcome to nothing cannot be ignored.

The realistic proposal would be to apply the territorial principle and the active nationality principle for determining jurisdiction in Internet content matters. They both can be interpreted quite broadly comprising hosting ISPs and content providers on the state’s territory (from businesses to private users), registrars of respective ccTLD names and nationals of the state, thereby giving substantial playground to the state to protect its interests. It would provide foreseeability of legal order and at the same time it would adequately answer the enforcement concern limiting the jurisdiction to the controversies that the state can effectively enforce.

Before the Internet raised many new legal issues the universal jurisdiction was recognized on very limited occasions. Now many states refuse to see the limits of their authority in Internet speech regulation and unrestrained application of the effects

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<sup>202</sup> Post, *supra* note 198, at 1383 (2002).

<sup>203</sup> See Sieber, *supra* note 50, at 2068.

principle equals pure speech to the most hideous crimes. Even if some Internet content could arguably fall within the universal jurisdiction (such as child pornography), it should not be generalized to cover any case when Internet content is not in line with local preferences.