

## **CYBERSPACE, LEX INFORMATICA**

by Laura Jennings and Susan McCoy

As cyberspace networks increasingly interact, the new contacts and information flow are redefining prior understanding of state sovereignty. Even though global communications are pervasive, there is not yet a corresponding cyber jurisdiction which can adjudicate cyber disputes; from Austin Texas to Athens Greece, the courthouse on Main Street continues to be the forum for the enforcement of claims arising from cyber-based activities. E-commerce as a business method has potential to create the legal norms and standards in cyber law. In other areas, especially with respect to laws affecting freedom of expression, states may be faced with strong challenges to the status quo. The nature of cyberspace turns the concept of jurisdictional boundaries inside out. A single act can have consequences whose effects can be felt in many jurisdictions at once. For a brief moment it seemed that the law of the place of the injury or the server may have bearing on a decision of what law applies or where a claim should be tried, but with the advent of technology such as gnutella and web crawlers, linked and networked relationships can create a situation where a cyber-activity has no single point of reference.

In October 2001 the First World Congress on Cyber law adopted the "Resolution of Quito" in an attempt to establish Internet norms and fundamental freedoms. Principle 4 of this declaration states:

**Freedom of information.** No State and no International Organization shall prohibit through legislative or technological means any individual or any organization to publish information in the Internet. No State and no International Organization shall through legislative or technological means prohibit access to information in the Internet. However, any State or any International Organization may limit access to pre-identified information if necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The initial sweeping assertion of information rights is hedged by the second clause exempting enumerable

cultural and country specific pre-identified information. The enforcement of an individual's rights to publish and receive information will be in conflict with the State's limited right to control information flow. States will employ filtering and blocking technology as a means to enforce law about information content; States will have a hard time forcing other States or individuals from other States to bear the cost of utilizing technology to prevent access from within a State.

In the case of Yahoo!, Inc., v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F.Supp.2d 1181 (N.D. Cal. 2001), Yahoo!, a California-based Internet Service Provider, sued La Ligue to have a French court order declared unenforceable in the U.S. courts. The French court order required Yahoo! to block French citizens' access to a particular Yahoo Internet auction site. In this case, U.S. sellers placed for sale on the Yahoo Website, Nazi-related items, the sale of which is illegal in France. The French court ordered Yahoo! to take all necessary measures to prevent French citizens' access to the auction site as long as it contained Nazi-related items. In response, Yahoo! agreed to post a warning on the French regional version of Yahoo! (Yahoo.fr); however, it informed the court that it was technologically impossible to completely prevent French citizens from accessing the U.S. website. The only way Yahoo! could fully comply with the French court order would be to completely ban any Nazi-related material from the website. As Yahoo! pointed out, this would violate the company's First Amendment rights under the U.S. Constitution. Despite this fact, Yahoo! voluntarily banned items that glorified or were directly associated with "hate groups" such as the Nazis or the Ku Klux Klan from the auction site.

The U.S. court ruled it had jurisdiction in the case based on La Ligue's contacts with the state of California relating to its claim against Yahoo!. The court then granted Yahoo's motion for summary judgment finding the French court order to be a content-based restriction which was inconsistent with the Constitution and laws of the U.S. The French court order was viewed as an attempt to regulate the speech of a U.S. citizen within the U.S. The court said "absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation

addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment." La Ligue is appealing the US court jurisdiction over the decision and French courts have charged the Yahoo CEO with criminal violations.

In Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 939 F.Supp. 1032 (S.D. NY 1996), Playboy Enterprises filed charges against an Italian company (Tattilo Editrice, S.p.A.) that published a men's magazine called "Playmen" and maintained a website under the same name. The Playboy Chuckleberry dispute goes back for over 20 years. Tattilo began publishing the Italian language magazine in Italy in 1967. In 1979, the company announced plans to publish an English language version of magazine for the American market. Playboy filed a lawsuit for injunctive relief which was granted in the U.S. in 1981, although Italian courts ruled the "Playboy" trademark was weak and not entitled to protection in Italy. The U.S. court permanently enjoined Tattilo from using the word "Playmen" as a trademark for any magazine or other publication printed, published, distributed, or sold in the U.S. In this earlier case, the court did not address use of the Internet to distribute the magazine.

Then in January 1996, Playboy discovered Tattilo had created a website using the "Playmen" name that contained photographs similar to those in the Italian magazine. Although the photographs were placed on the website in Italy, and the Internet address clearly indicated the website was located in Italy, website users anywhere in the world could download the images. The website also allowed users to purchase "Playmen" products and to a subscribe to a version of the website containing "racier" material. To subscribe, users would fax an order form with credit card information to Tattilo, and a password and login name would be returned to the user via e-mail.

The U.S. court considered whether allowing users in the U.S. to download information constituted distribution or sales, and whether this violated the 1981 injunction. Although Tattilo is an Italian corporation without any assets in the U.S. and without contact with the U.S. other than the Internet website, the U.S. court ruled it had jurisdiction over Tattilo to enforce the 1981 injunction. In reaching its decision, the court considered the Playboy

Enterprises, Inc. v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993), ruling that the unauthorized posting of copyrighted images on a website with the knowledge that other users would download them constituted distribution and sufficient contact for jurisdiction. The court found that the use of the English language in a number of sections, posting the subscription price in U.S. dollars, and the use of the "Playmen" name, was an effective violation of the 1981 injunction. While the court clearly distinguished the fact that the injunction did not bar Tattilo from maintaining its website in Italy, the court ruled Tattilo had to refrain from accepting U.S. subscriptions and customers and had to return all profits generated from U.S. customers to Playboy. The Court reasoned that Tattilo can not be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise would amount to a declaration that this court and every other court throughout the world may assert jurisdiction over all information providers on the global World Wide Web.

Yahoo! is similar to Playmen in that the activity in question was legal in the country of origin but not in the country of destination. Control over information flow can occur at different times. Technology can be employed to stop the flow or lawsuits can be brought to enjoin activity or collect fines and damages. As a response to cross-border disputes, drafters for the Hague Convention on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters have been attempting since 1992 to solve the problem of enforcing foreign judgments. If drafters reach consensus and the treaty is ratified, it could have a significant impact on international on-line freedom of speech, trade, and copyright protections. The current draft would require the 52 signatory nations to agree to the reciprocal enforcement of laws on designated topics, even when the actions in question do not violate local laws. The narrowest law on any given topic could effectively become the international standard. To mitigate protests the draft treaty includes a public policy exception that would allow courts to refuse to enforce foreign judgments that are manifestly incompatible with public policy. The key will be to balance internal enforcement of local community standards without impairing the flow of information elsewhere.

Some experts believe that Hague Convention could cause U.S. courts to enforce foreign laws simply to ensure U.S. laws are enforced overseas. Other commentators believe the use of the public policy exception clause would simply result in the enforcement of few foreign decisions worldwide. Many believe the solution lies in the development of effective blocking technology to filter out users at either access points or server points. Who should bear the cost and burden of censorship? The publisher or the State regulating the information flow to citizen-users? The task is gargantuan anyway you look at it. The common sense approach is to put the burden and cost on the party seeking censorship. The presumption should be in favor of information flow. In theory, blocking technology can be applied to keep local citizens from internally gaining access to illegal information that may be legal in the country of origin and elsewhere. Depending on the jurisdiction, mandated Internet filtering may raise questions about the unconstitutionality of attempts to control the content and information flow.

U.S. courts have found that blocking technology is an unconstitutional content-based restriction on speech. In Mainstream Loudoun, et al. v. Board of Trustees of the Loudoun County Public Libraries, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998) the local libraries installed blocking software on computer terminals in order to block access to pornographic sites. The Court ruled that the use of the X-Stop blocking software was unconstitutional and violated the First Amendment right to free speech because less restrictive means could have been used and that the use of the filter was a prior restraint. A similar conclusion was reached in American Library Association v. United States, 201 F.Supp.2d 401 (E.D.Pa., 2002), where the court ruled Sections 1712(a)(2) and 1721(b) of the Children's Internet Protection Act (CIPA) were facially invalid under the First Amendment. CIPA required public libraries to comply with an order mandating the use of filtering software in order to receive federal subsidies. In reaching its decision, the court reviewed current capabilities of filtering technologies and found that over-blocking and under-blocking substantially limited the effectiveness of the software.

Cyberspace is an international space. It is a fusion of two paradigms for seeing the world: territorial boundaries based on geographic and cultural integrity and

ubiquitous and instant information flow across global networks. Technology will play a role in integrating the two constructs. As a result of worldwide information flow, cultural norms regarding information policy will evolve. State efforts to restrict flow will be an upstream struggle and will confront legal challenges when attempting to enforce a policy outside their own physical boundaries.📁