

**u<sup>b</sup>**  
UNIVERSITÄT  
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nccr trade regulation  
swiss national centre of competence in research

**international law of contemporary media**  
**session 5 (interactive):**  
**should and can cyberspace be regulated?**

mira burri, dr.iur.,  
fall term 2009/2010, 13 october 2009

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**moot court: the rules of the game**

- **15 minutes** per group for the presentation of the arguments
- **5 minutes** per group for counter-arguments (i.e. arguments that “destroy” the arguments of the opposing party)
- **5 minutes** for rebutting these counter-arguments
- the honourable jury decides on the case
- a brief follow-up discussion.

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**structuring the debate**

- 2 questions asked: **should** and **can** cyberspace be regulated?
- sum-up of arguments
- **cyber-libertarians** *versus* **cyber-realists** (as broadly defined schools of thought)
- **cyber-skepticism (exceptionalism)** *versus* **cyber-unexceptionalism**
- **Johnson & Post** *versus* **Goldsmith**

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## cyber-libertarians *versus* cyber-realists

- Johnson & Post:
- cyberspace destroys the link between geographical location and: (1) the **power** of local governments to assert control over online behaviour; (2) the **effects** of online behaviour on individuals or things; (3) the **legitimacy** of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give notice of **which sets of rules apply**
- content providers in cyberspace subject to **multiple regulation in multiple jurisdictions**
- cyberspace should be taken as a separate space, a "jurisdiction" on its own

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## cyber-libertarians *versus* cyber-realists

- Goldsmith:
- territorial sovereignty supports **national regulation of persons** within the territory who use the Internet; supports **national regulation of the means of communication** (Internet hardware and software) located in the territory; finally, a nation's prerogative to control events within its territory entails the **power to regulate the local effects of extraterritorial acts**
- regulation need not be perfect to be effective (i.e. heighten the costs of activity sufficiently to achieve acceptable control)

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## cyber-libertarians *versus* cyber-realists

- Goldsmith (cont'd):
- although some harmful effects cannot be intercepted at the border, they **can be regulated ex post through legal sanctions** (or **ex ante** through the threat of such sanctions)
- nation state retains the ability to **regulate the extraterritorial sources local harms through regulation of persons and property within its territory** (indirect extraterritorial regulation)
- enforcement?

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## regulation in real- and in cyber-space

- **4 modalities of regulation (Lessig):**
- **law**
- **social norms**
- **markets**
- **architecture**
- architecture in cyberspace is not given; code can be modified
- e.g. passwords/no passwords; monitoring/no monitoring; open access/ restricted access, etc.

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## regulation in real- and in cyber-space

- **code displaces law (example: intellectual property law and digital rights management systems, DRM)**
- e.g. book vs. ebook and click-wrap contracts vs. normal contracts
- **the most effective way to regulate cyberspace can be through code or through the institutions that produce that code**
- **but is this right? is it legitimate and transparent?**

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## case study: **Yahoo!** (1)

- ***La Ligue Contre le Racisme et l'Antisémitisme v. Yahoo!, Inc.***, Superior Court of Paris, 22 May 2000
- **facts of the case:**
  - Nazi items available on Yahoo.com auction site through which various private parties could purchase items from each other
  - the Jewish Students' Union of France (UEJF) and the League Against Racism and Antisemitism (LICRA) sued Yahoo! for violating the French Penal Code which prohibits the public display of Nazi-related objects

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### case study: *Yahoo!* (2)

The Presiding Judge, Jean-Jacque Gomez:

“Whereas by allowing the viewing of these items in France and by allowing the eventual participation of a surfer in France in such an exhibition-sale, **Yahoo!, Inc. commits a wrong on French territory** – the unintentional nature of which is apparent, but which causes the damage to LICRA and the UEJF, both of which have as their mission to pursue in France any form of trivialization of Nazism – notwithstanding that the activity at issue is marginal in relation to the general activity of the auction services that *Yahoo.com* offers on its site;

Whereas **damage was suffered in France, and we are therefore competent to exercise jurisdiction over the present dispute [...]**“

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### case study: *Yahoo!* (3)

- Yahoo! was ordered to take all measures to prevent access to the auction service for Nazi items or any other service that constitutes an apology for Nazism or questions Nazi crimes
- **enforcement of the judgment?**
- ***Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme***, US District Court, 2001, 169 F.Supp.2d 1181
- Yahoo! stated that banning Nazi-materials would infringe its rights under the First Amendment
- Yahoo! sought a declaratory judgment that the French Court's orders are **not cognizable nor enforceable** under US law

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### case study: *Yahoo!* (4)

- **the extent to which the US honours the judicial decrees of foreign nations is a matter of choice governed by “the comity of nations”** (which is “neither of matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other” (*Hilton v. Guyot*, 159 US 113 (1895)))
- “absent a body of law that established int'l standards with respect to speech on the Internet (...), **the principle of comity is outweighed by the Court's obligation to uphold the First Amendment**”.
- In 2006, this judgment was **reversed by the US Court of Appeals** – not on First Amendment grounds; dismissal for lack of jurisdiction.

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