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international law of contemporary media

session 5 (interactive): should and can cyberspace be regulated?

mira burri, dr.iur., spring term 2011, 5 april 2011

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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 counterarguments (i.e. arguments that "destroy" the arguments of the opposing party)
- 2 minutes for in-group discussion and tactic-building
- 5 minutes for rebutting these counterarguments
- · the honourable jury decides on the case
- 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

The Balance of Contract of Contraction in Security (SCO), was a secured behavior of

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	cyber-libertarians versus cyber-realists	
I,	• Johnson & Post:	
ŀ	 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	
ŀ	 content providers in cyberspace subject to 	
	multiple regulation in multiple jurisdictions	
ľ	 cyberspace should be taken as a separate space, a "jurisdiction" on its own 	
	Trade of the of the order of the control of the con	
Γ		1
	cyber-libertarians versus cyber-realists	
ľ	 Goldsmith: territorial sovereignty supports national 	
ľ	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	
Į,	 regulation need not be perfect to be effective 	
	(i.e. heighten the costs of activity sufficiently	
	to achieve acceptable control) 5	
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	cyber-libertarians versus cyber-realists	
	Goldsmith (cont'd):	
ŀ	 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)	
ŀ	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.	
	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 <i>vs.</i> 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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	swiss national control of conjustance in research	
	case study: Yahoo! (1)	
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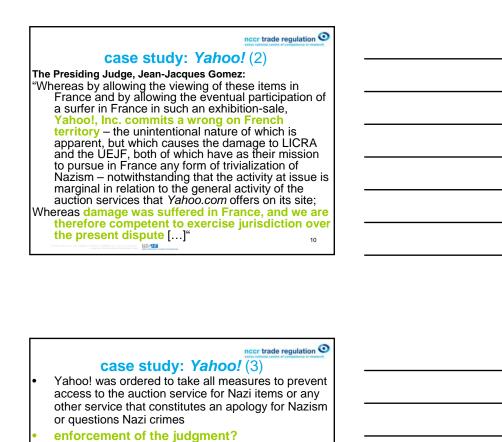
l'Antisémitisme v. Yahoo!, Inc., Superior Court of Paris, 22 May 2000
facts of the case:

 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 Nazirelated objects

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Yahoo!, Inc. v. La Ligue Contre le Racisme et I'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.

post-Yahoo Qs forum-shopping (JHH Weiler case) libel tourism in the UK general questions regarding standards applying on the int'l level: with Yahoo, we encounter the "lowest common denominator" argument: if websites are subject to the laws of all jurisdictions from which they can be accessed, the legal norms of the most restrictive community will prevail reversely: if foreign courts cannot reach websites located in other jurisdictions, will the legal norms of the least restrictive community prevail? In the context of Yahoo, if foreign courts cannot reach US-based entities, has the US then imposed its relatively unrestrictive First Amendment on global Internet speech? Is this also problematic? ■ US doctrine applied: A state may exercise personal jurisdiction over an out-of-state defendant, so long as that defendant has "sufficient minimum contacts" with the forum state, from which the complaint arises, such that the exercise of jurisdiction "will not offend traditional notions of fair play and substantial justice" (International Shoe, 356 US, 310 (1945)). ■ the Zippo test: a three prong (sliding) test: "likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet" (Zippo Manufacturing Company v. Zippo Dot Com, Inc., 935 € Zispp. 1118 (1987))		nccr trade regulation	
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