

Global IT Law
Internet Jurisdiction
December 27, 2016

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Course evaluation

- Paper
 - Any topic (can discuss with me)
 - Due January 31, 2017
 - Minimum 2,000 words, No maximum
- Assigned Paper Topic
 - Will provide five specific questions or topics based on course materials
 - Due January 31, 2017
 - Minimum 2,000 words, No maximum

Jurisdiction Case Study

Innovatech is a Israeli-based firm in Herziliya that sells network devices used in complex industrial manufacturing. Several years ago, one of their engineers left the company and began using company trade secrets to sell competing products as VeryInnovative. Innovatech has used the court process to try to stop the competing activities, obtaining a series of court orders requiring VeryInnovative to stop the sales of competing products. VeryInnovative has regularly ignored the court orders and has proven difficult to shut down.

Frustrated by the situation, Innovatech seeks a court order requiring Google to stop including VeryInnovative in its search index for all users. Google objects to the proposed court order. It argues that:

- (1) It is based in Mountain View, California and should not be subject to Israeli jurisdiction.
- (2) Any potential order should be limited to Israelis accessing the search index through its Google.co.il site.

Jurisdiction Case Study

The judge in the case has limited knowledge of the Internet and new technologies. You have been asked to assist in the adjudication of the case. You have been asked to answer the following questions:

1. Can the court assert jurisdiction over Google?
2. If it can assert jurisdiction, what limits, if any, should govern the proposed court order?

competing visions of online commerce

- Whose law should apply in B2C e-commerce transactions?
 - The Law of the Consumer -- consumers won't shop online unless they enjoy local protections
 - The Law of the Seller -- businesses won't sell unless they enjoy legal certainty and limited liability

competing visions of the role of courts

- When should a court be entitled to assert jurisdiction over online activity?
 - Contracts with local consumers
 - Physical presence in the jurisdiction
 - Targeting the local jurisdiction via the web
 - Impact/effect on local jurisdiction
 - Mere availability of content
- Should we differentiate by issue -- is IP different from e-commerce?

“Borderless Internet”

<1>

You are in: [World](#): **Europe**

Tuesday, 23 May, 2000, 17:01 GMT 18:01 UK

France bans internet Nazi auctions



Yahoo France should stop access to Nazi sites

A French judge has ruled that the US Internet Service Provider Yahoo! Inc must make it impossible for French users to access sites auctioning race hate memorabilia.

In a landmark ruling, Judge Jean-Jaques Gomez gave Yahoo! Until 24 July to comply with his order.

Existing French law prohibits the selling or display of anything that incites racism.

Front Page
World



Africa
Americas
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South Asia

From Our Own
Correspondent

Letter From
America

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UK Politics
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 GO

Advanced search options

Launch console
for latest audio/video

BBC RADIO NEWS

BBC ONE TV NEWS

WORLD NEWS
SUMMARY

BBC NEWS 24 BULLETIN
PROGRAMMES GUIDE

See also:


- 11 Apr 00 | Europe
French anti-racists sue Yahoo
- 02 May 00 | UK
Cyber libel ruling threatens UK ISPs
- 13 Apr 00 | UK
Gagging the net in 3 easy steps
- 05 Apr 00 | Talking Point
Should there be free speech on the internet?

Internet links:

- Yahoo France
- Yahoo America

Judge Dismisses French Case Against Yahoo

By [Stephen Lawson](#), IDG News Service

Nov 9, 2001 6:00 AM | 

Judge Dismisses French Case Against Yahoo U.S. court says site can't be forced to comply with French laws that prohibit the sale of Nazi memorabilia. Stephen Lawson, IDG News Service

A U.S. District Court judge on Wednesday dismissed a case against Yahoo by French organizations that sought to penalize the company for allowing Nazi-oriented auction items and Internet links on its U.S. Web portal.

Yahoo cannot be forced to comply with French laws against the expression of pro-Nazi and anti-Semitic views, because doing so would violate its right to free expression under the First Amendment of the U.S. Constitution, writes Judge Jeremy Fogel of the U.S. District Court for the Northern District of California, in an order of summary judgment.

The case raised questions about which laws may govern how individuals and companies can use the Internet. Laws on issues such as obscenity, gambling, and political speech differ from country to country, but Internet content and services can be accessed anywhere in the world unless a particular government filters them.

Yahoo welcomes the judgment.

Countries could assert
jurisdiction over foreign-
based websites

<2>



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PST minus 3 hours



Internet borderless –
technological solutions
viewed as ineffective



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Hulu is committed to making its content available worldwide. To do so, we must work through a number of legal and business issues, including obtaining international streaming rights. Know that we are working to make this happen and will continue to do so. Given the international background of the Hulu team, we have both a professional and personal interest in bringing Hulu to a global audience.

<3>



The Passive versus Active Test - U.S.

Inset Systems v. Instruction Set (1996)

- Massachusetts co. owns Inset.com; Connecticut co. owns trademark
- Connecticut co. sues - court must determine jurisdiction
- Massachusetts co. with no real presence
- Court says Internet like a continuous ad - asserts jurisdiction

The Passive versus Active Test - U.S. *Bensusan Restaurants v. King* (1996)

- Battle of the Blue Notes - NY Jazz club vs. Columbia, MO local club
- Court examines Columbia club Web site - no online tickets; just information
- No jurisdiction - passive site does not meet level of foreseeability

The Passive versus Active Test - U.S.

Zippo v. Zippo Dot Com (1997)

- Cigarette lighter manufacturer (Pa.) vs. new Internet company (Cal.)
- Zippo Dot Com sells subscriptions to Pa. residents; no real space offices
- Court asserts jurisdiction - establishes passive vs. active analytical framework

The Passive versus Active Test - U.S.

Zippo v. Zippo Dot Com (1997)

PASSIVE SITE

- Information only
- Little interactivity
- Multiple jurisdiction claims not foreseeable
- Local site

ACTIVE SITE

- Full interactivity
- E-commerce oriented
- Sell or engage with multiple jurisdictions
- Global/National orientation

The Passive versus Active Test - Canada

Braintech Inc. v. Kostiuk (1999)

- B.C. Court of Appeal decision; leave to appeal to SCC denied in March 2000
- Postings on Silicon Investor chat site
- Braintech & Kostiuk both BC based
- Braintech sues in Texas for defamation
- Texas court awards \$400,000
- Braintech tries to enforce judgment in BC

The Passive versus Active Test - Canada

Braintech Inc. v. Kostiuk (1999)

ISSUE - DID TEXAS CORRECT PROPERLY ASSERT JURISDICTION?

- BC Court of Appeal says no
- Adopts Zippo analysis - chat posting passive in nature
- No strong ties to Texas; case should have been brought in BC

The Movement Toward a New Test

In Favour of Zippo

- Creates limits on Internet jurisdiction
- Based on foreseeability -- passive vs. active become proxy for whether jurisdiction was foreseeable
- Local laws matter

The Movement Toward a New Test

The Problems with Zippo

- Passive vs. Active often doesn't work
- Test encourages perverse behaviour by encouraging less interactivity
- Passive front end; Active back end
- Active sites becoming the norm
- Standards are constantly shifting -- test doesn't provide sufficient certainty

Post-Zippo

The Movement Toward a New Test

- *GTE New Media Services Inc. v. Bellsouth Corp.* (2000) - examine whether residents actually accessed site
- *People Solutions, Inc. v. People Solutions, Inc.*, (2000) - must have actual sales to Texas residents
- *Blakey v. Continental Airlines* (2000) - harassment on site caused effects within state
- *Nissan Motor v. Nissan Computer* (2000) - passive site meets effects test

The Movement Toward a New Test

American Information Corporation v. American Infometrics (D. Md. April 2001)

"a company's sales activities focusing 'generally on customers located throughout the United States and Canada without focusing on and targeting' the forum state do not yield personal jurisdiction. **Nor should a Web presence that permits no more than basic inquiries from Maryland customers, that has never yielded an actual inquiry from a Maryland customer, and that does not target Maryland in any way.**"

United States

Dudnikov v. Chalk & Vermilion (2008) 10th Cir.

- eBay power sellers and copyright infringement claim
- Purposeful direction test:
 - (a) an intentional action, that was
 - (b) expressly aimed at the forum state, with
 - (c) knowledge that the brunt of the injury would be felt in the forum state
 - (d) whether the plaintiff's injuries 'arise out of' the defendant's contacts with the forum; and
 - (e) that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice

United States

Johnson v. Arden (2010) 8th Cir.

- Defamatory statement on a review website
- Court says Zippo instructive but insufficient :
“The website's accessibility in Missouri alone is insufficient to confer personal jurisdiction.”
- Adopts effects-based approach

United States Zippo +

- Zippo still the starting point for most analysis
- Most courts amend by:
 - Something greater than mere interactivity
 - Targeting
 - Effects
- Stream of commerce narrowed

Beyond Zippo

Post-Zippo

- Gutnick v. Dow Jones (HCA, 2002)
 - Alleged defamation in Barrons (published by DJ)
 - Published in the U.S.; accessible in print and online in Australia
 - 1700 online subscribers in Australia; server located in NJ
 - Case launched in Australia
 - DJ has customer base (small) in Australia
 - Court asserts jurisdiction -- High Court rules Australia entitled to hear the case
 - Case criticized by U.S. interests -- fear publication chill

Post-Zippo

- Bangoura v. Washington Post (ONCA, 2005)
 - Alleged defamation in Washington Post
 - Published in U.S.; available online
 - Target lives in Africa; later moves to Ontario
 - Ontario lower court asserts jurisdiction -- “moving target” test?
 - Washington Post’s quantification of risk?

Post-Zippo

- Bangoura v. Washington Post (ONCA, 2005)
 - Appellate decision - overturns lower ct. decision

“it was not reasonably foreseeable in January 1997 that Mr. Bangoura would end up as a resident of Ontario three years later. To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation.”

Post-Zippo

- Crookes v. Yahoo! (BCCA, 2008)
 - Series of defamation cases
 - Initial case involving Yahoo! and Green Party members group

*“Yahoo is a foreign defendant with no ties to British Columbia. In order for this court to assume jurisdiction over Yahoo, there must be a **real and substantial connection** between the cause of action against Yahoo and British Columbia. In other words, the alleged defamation must have been committed in British Columbia.”*

Post-Zippo

- Crookes v. Yahoo! (BCCA, 2008)

“Mr. Crookes must show that alleged defamatory postings on the GPC- Members website, hosted by Yahoo on servers outside British Columbia, were accessed, downloaded and read by someone in British Columbia, thereby damaging his reputation in British Columbia. Mr. Crookes has neither alleged nor tendered any evidence that any individual in British Columbia has downloaded and read the impugned material posted on the GPC-Members website.”

Canada

Davydiuk v. Internet Archive Canada (FCA 2014)

- Pornographic images removed from original sites but remain available on Internet Archive
- IA raises Van Breda but court sticks to real and substantial connection test

I find that Internet Archive did reach into Canada to the InterCan website when they requested the web pages. Whether it was automated or not does not affect my finding. The action of “following a link” or “requesting pages” as described by Internet Archive requires Internet Archive to reach out to the Canadian servers that subsequently transmit back to the United States. The request and return transmission is not done with permission or on consent. The Canadian public can access the webpage and have it transmitted back to Canada.

Canada

Equustek Solutions

- Facts as in our case study
- Court issues court order
 - Asserts jurisdiction over Google
 - Global court order – applies to full Google search index wherever accessed
- Case heard by Supreme Court of Canada in December 2016

Israel

Klinghofer v. PayPal Pte. Ltd (2015)

- Class action vs. Paypal
- “The respondent is a corporation that provides, via the Internet, service to hundreds of thousands of Israeli citizens. For the purpose of providing such service [the respondent] operates an Internet site in Hebrew that is designed for Israeli citizens and even provides help services to its huge pool of customers in Israel. In this state of affairs, forcing Israeli PayPal customers to adjudicate in a court in Singapore (while preserving the respondent’s right to sue its customers in Israel) and according to Singaporean law is clearly a provision the objective of which is to block customers’ access to realization of their rights against the respondent.”

How Do You Deal With Jurisdiction?

- Contracts
- Technology - geo-blocking/targeting
- Country specific sites
- Currency
- Language
- Judgment proof