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international law of contemporary media
session 5: internet governance (part two)

mira burri, dr.iur.,
fall term 2015, 28 october 2014

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goals of the day

- **internet governance as broadly conceived**

- **understanding regulation in cyberspace**

- **the state and state jurisdiction in cyberspace**

- **case-law**

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IG: infrastructure

inner circle (strong, direct impact on the internet)
- **root server system, interconnection, routing**
- **names and numbers**
- **technical standardization**
- **network security**

outer circle (less direct/narrowly bounded impact)
- **international telecommunications**
- international trade in services and goods
- **international radio frequency spectrum**
- **international satellite regime**
- international development programmes
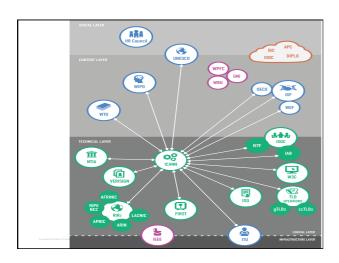
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IG: communication and commerce

inner circle (strong, direct impact on the internet)
- information content and cross-border flows
- cyber-crime and cyber-security
- intellectual property
- international trade in services
- e-commerce (contracting, authentication, taxation, jurisdiction/choice of law)

outer circle (less direct/narrowly bounded impact)
- information content and cross-border flows
- privacy protection
- spam and consumer protection

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state sovereignty and the internet (1)

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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state sovereignty and the internet (2)

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 (1)

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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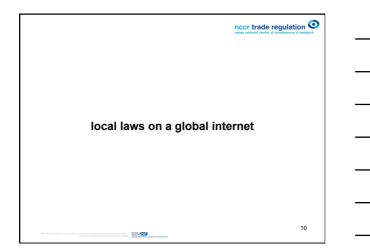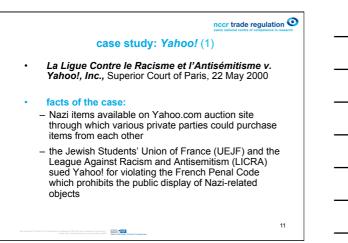## regulation in real- and in cyber-space (2)

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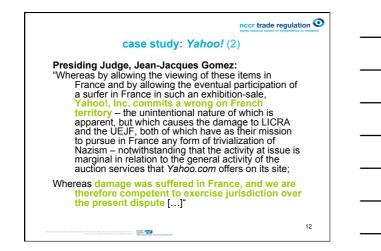- e.g. book *vs.* ebook and click-wrap contracts *vs.* normal contracts
- **the most effective way to regulate cyberspace can be through code or through the institutions that produce that code**

- **but is this right? is it legitimate and transparent?**

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local laws on a global internet

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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)

Presiding Judge, Jean-Jacques 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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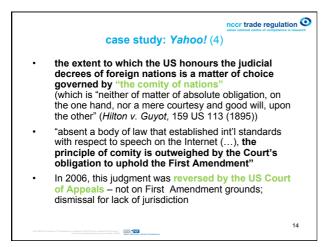swiss national centre of competence in research

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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post-Yahoo Qs

- **forum-shopping (JHH Weiler case)**
- **libel tourism in the UK**
- **general questions regarding standards 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?

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extending jurisdiction (1)

US doctrine:
- 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*, 326 U.S. 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., 952 F.Supp. 1119 (1997))

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extending jurisdiction (2)

EU law:
- COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in force until 2015)

- **update:** REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012
  on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

    – establishes a general rule that individuals are to be sued in their state of domicile
    – diverse exceptions
    – recognition of judgements made in other countries

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case study: regulation of data protection and its beyond border implications

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interactive sessions: 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)
- **2 minutes** for in-group discussion and tactic-building
- **5 minutes** for rebutting these counter-arguments
- a day before: arguments in a key-word-fashion description; no more than 1 page

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- thank you.
- contact: mira.burri@wti.org

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