A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law

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A SOLUTION TO THE YAHOO! PROBLEM?
THE EC E-COMMERCE DIRECTIVE AS A
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COOPERATION ON INTERNET
CHOICE OF LAW

Mark F. Kightlinger*

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I. INTRODUCTION

In May 2000, a French court decided that a French law banning the
display of Nazi materials for sale applies to an auction website hosted by

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the material in this Article is adapted from Information Technology and Electronic Commerce:
Law & Practice, of which I am a co-author. Covington & Burling represents technology and
software industry companies and trade associations in Europe and the United States. In that
context, my colleagues at the firm and I participated directly as lobbyists and legislative coun-
sel in the policy-making processes that led to passage of many of the pieces of European
Union (EU) legislation discussed in this Article. Many of the views expressed in this Article
reflect my experiences as a participant-observer in the EU legislative process. These views are,
of course, entirely my own.
the California-based company Yahoo! Inc. The following year, at the request of Yahoo! Inc., a U.S. District Court declared that the French judgment was unenforceable in the United States because enforcing it would violate an important public policy—the First Amendment. These two cases have attracted considerable attention because they crystallize a difficult problem. The Internet is global. Every website potentially reaches every home on the planet. Thus, website content or activity that may be legal in the country where the website’s operator is based may reach countries where such content or activity is illegal. Which law or laws should apply to the website? Should a website be subject only to the laws of the country where the website operator is based? Or should a website be forced to comply with the laws of every country where the website may be accessible—potentially every country on Earth? In the Yahoo! case, the French court concluded that French law applies to a website regardless of the domicile of the website operator. While not rejecting the French court’s analysis of the problem, the U.S. court registered a caveat, essentially holding that at least some fundamental U.S. legal principles should apply to website operators based in the United States, regardless of where their websites may be accessible.

As the other contributions to this symposium suggest, much of the debate surrounding the French court’s decision and the U.S. court’s response has centered—not surprisingly—around whether the courts reached the correct conclusions, and what the implications of those conclusions might be for the future of the Internet. Instead of attacking or


defending the French or the U.S. courts, this Article proposes to focus on the Yahoo! case from a different perspective. As is argued in Section III.D below, disputes like the Yahoo! case over which country’s laws apply to a website and its operator seem likely to proliferate as Internet usage expands, demanding significant enforcement resources from countries and posing important compliance challenges for companies and other organizations operating on the Internet. Thus, it may be useful to consider developing an international agreement that would address, and in many instances resolve, such disputes about “jurisdiction to prescribe” rules for the Internet. In developing this argument, this Article uses as its point of departure a set of rules that already applies to France—one of the protagonists in the Yahoo! case.

As discussed in Part II, the European Union (EU) has adopted a legislative measure, called the E-Commerce Directive, that contains a rule delimiting the jurisdiction of EU Member States to prescribe rules for websites the operators of which are established within the EU. Among other things, the rule is supposed to ensure that a controversy such as the Yahoo! case cannot—or at least should not—arise between two EU Member States. After a brief discussion of the Directive’s legal context, Part II examines the Directive’s substantive provisions, focusing in particular on how they might apply to a scenario such as the Yahoo! case. Part III argues that the E-Commerce Directive may provide a model for a


6. Currently, there are fifteen Member States in the EU: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourh, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Ten countries are scheduled to join the EU on May 1, 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia.
broader international agreement delimiting national authority to regulate the Internet. Interested countries could develop such an agreement under the auspices of the World Trade Organization (WTO), thereby helping to establish a "free trade zone" on the Internet and, perhaps, avoid conflicts such as that presented by the Yahoo! case.

II. THE E-COMMERCE DIRECTIVE—A EUROPEAN ANSWER TO THE QUESTION OF WHO SHOULD REGULATE THE INTERNET

The E-Commerce Directive is part of a mosaic of legislation that the European Community (EC) has adopted since the late 1990s, targeting online services generally, and e-commerce in particular. To understand the E-Commerce Directive, it is important to see how it fits into the legislative context. Most of this legislation is aimed at harmonizing the laws of the Member States in particular areas, thereby ensuring that similar rules will apply to each online service provider in all fifteen Member States. As discussed in Section A below, this legislation covers such issues as transparency, e-signatures, copyright, data protection/privacy, and value added tax in the online environment. A key purpose of these measures is to prevent Yahoo!-type cases in which two Member States adopt dramatically different rules in a particular area, and force a website operator to comply with both regimes. Absent EC harmonization, each website operator might be expected to comply with as many as fifteen national laws (twenty-five after enlargement occurs in May 2004)—the Yahoo! scenario run amok. The EC also has adopted a regulation that

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7. In a similar vein, Perritt has suggested that the EU provides "the ideal forum in which to pioneer . . . international initiatives" on such issues as cybercrime and international terrorism affecting the Internet. Henry H. Perritt, Jr., Jurisdiction in Cyberspace, 41 Vill. L. Rev. 1, 125 (1996).

8. The EU encompasses what are commonly referred to as three "pillars": the European Communities (the European Community, the Coal and Steel Community, and Euratom), the Common Foreign and Security Policy, and the Cooperation in Justice and Home Affairs. For a brief discussion of the three pillars, see Koen Lenaerts, Federalism: Essential Concepts in Evolution—The Case of the European Union, 21 Fordham Int'l L.J. 746, 751 (1998). The most elaborate body of law, and the one that is relevant for purposes of this Article, has been developed by the European Community (EC). The terms "EC law" and "Community law" are used to refer to this body of law.

9. Under the EC Treaty, the European Community may adopt three types of binding measures: "regulations," which have direct effect in the Member States; "directives," which must be implemented or transposed by Member State governments in national law; and "decisions," which typically resolve cases or conflicts involving one or more parties. Treaty Establishing the European Community, Nov. 10, 1997 O.J. (C 340) 271 art. 249 (1997) [hereinafter EC Treaty].
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determines, among other things, which Member State’s courts will have jurisdiction to adjudicate cases arising out of online disputes.

Important though these EC legislative measures may be, however, they do not reach the broader universe of Member State commercial law or Member State content regulation. Instead of attempting to harmonize all areas of Member State law that might affect the Internet, the EC adopted a rule defining which Member State’s laws will apply to a particular EU-based website operator. As discussed in Section B below, the E-Commerce Directive declares that a website operator generally is subject only to the laws of the Member State in which the operator is established. Thus, with some important exceptions, in a dispute such as the Yahoo! case, a French court ordinarily would not be allowed to apply French law to a website based in a Member State other than France. In certain circumstances, however, when such a website violates an important French public policy, the French court could activate the E-Commerce Directive’s override mechanism, thereby launching discussions between French officials and officials of the other Member State about how best to regulate the allegedly illegal conduct. Application of French law to a website based outside of France should be a last resort.

A. Legal Context

The legal context of the E-Commerce Directive is the product of nearly five years of intensive work by the EC legislative institutions—the European Commission, the European Parliament, and the Council of Ministers. The first piece of Internet-related legislation adopted by the EC was a 1998 amendment to the so-called Transparency Directive.\textsuperscript{10} Under the amended Transparency Directive, with some exceptions, when a Member State is preparing to adopt a new law that affects the Internet, the Member State is required to notify the European Commission and observe a waiting period before making the new law final.\textsuperscript{11} The objective is to ensure that interested parties have an opportunity to review, and raise objections to, proposed laws that may affect their interests. The Directive’s effect is entirely prospective. Thus, Member States do not have to report existing laws, such as the one applied by the French courts in the Yahoo! case. If a Member State were to consider new content regulations affecting the Internet, however, it would be required to report the proposal and face scrutiny from the Commission and other Member


\textsuperscript{11.} \textit{Id.} at 22–23.
States. This Article argues below that it would be useful to include a provision such as the amended Transparency Directive in an international agreement addressing Yahoo!-type cases.\textsuperscript{12}

The EC also harmonized two areas of law—e-signatures and copyright—where significant differences existed at the Member State level that might have led to Yahoo!-type disputes over e-commerce services operating across national borders. The 1999 E-Signatures Directive harmonized Member State laws governing electronic signatures,\textsuperscript{13} requiring Member States to grant such signatures legal effect and admissibility in evidence.\textsuperscript{14} Absent the E-Signatures Directive, one Member State might have been able to declare invalid an e-signature that satisfied the laws of another Member State, thereby voiding the "signed" document. EU officials also were concerned that differences in Member State copyright laws might lead to a situation in which online copies that were illegal in one Member State were legal in another. The 2001 Copyright Directive\textsuperscript{15} harmonized Member State copyright laws in certain areas affecting the Internet, and implemented the World Intellectual Property Organization Copyright Treaty\textsuperscript{16} and Performances and Phonograms Treaty\textsuperscript{17} within the EU.\textsuperscript{18} As discussed in Section B, although the E-Commerce Directive generally allows a Member State to apply its laws only to website operators established within its territory, an exception allows each Member State to apply its copyright laws to every illegal copy on the Internet, regardless of the copy’s origin.

Data privacy is another field where the EC has adopted special Internet-related legislation intended to harmonize Member State laws and avoid conflicts like the Yahoo! case. In 1995, the EC adopted the Data Protection Directive, which regulates all processing of personally

\textsuperscript{12}See infra Section III.A.2.


\textsuperscript{14}Id. art. 5(2), at 15.


\textsuperscript{18}The Copyright Directive is in many respects similar to the U.S. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998), with one important exception. Unlike the DMCA, the Copyright Directive does not limit the liability of Internet service providers that carry illegal copies of copyrighted materials on their services. For complex political reasons, such liability limitations were inserted in the E-Commerce Directive. See infra note 28 and accompanying text.
identifiable data. Although the Data Protection Directive was intended to establish uniform rules for all sectors of the economy, some policymakers felt that it did not provide sufficiently robust protection for personal data collected using then-new digital telephone technologies. Thus, in 1997 the EC adopted the Telecommunications Data Protection Directive (TDP Directive), imposing special privacy rules on the telecommunications sector. In mid-2002, the EC updated the TDP Directive to reflect recent developments in communications technologies, including the Internet. The resulting Electronic Communications Data Protection Directive (ECDP Directive) regulates, among other things, the confidentiality of electronic communications, collection and use of traffic data, and unsolicited commercial communications. The E-Commerce Directive contains a carve-out for EC data protection legislation, including the ECDP Directive. Thus, in theory, Yahoo!-type disputes might arise over which Member State's laws apply to a particular website, but in practice such disputes should not affect the behavior of website operators because the pertinent national laws should be very similar.

Another subject carved out of the E-Commerce Directive is taxation. In 2002, the EC adopted a directive that changes the rules for applying value added tax (VAT) to electronic services (E-VAT Directive). Under the old rules, e-commerce services based in the EU were required to collect VAT on all transactions with consumers, regardless of whether the consumer lived in or outside the EU. E-commerce services based outside the EU were not required to collect VAT from consumers, again regardless of whether the consumer was in or outside the EU. Because this situation was believed to place EU service providers at a competitive disadvantage, the EC revised the rules to require collection of VAT on all electronic transactions with EU-based consumers, regardless of the service provider's location. At the same time, EU-based service providers no longer are required to collect VAT on transactions with consumers located outside the EU. The E-VAT Directive differs from the other laws mentioned above in that its primary focus is not eliminating

differences between Member State laws but eliminating perceived inequities between EU website operators and non-EU website operators. In effect, however, the E-VAT Directive almost guarantees that Yahoo!-type disputes will begin to pop up over whether a Member State has the authority to impose its VAT regime on a website operator based in a non-EU country, thereby forcing that operator to register with Member State tax officials, collect VAT, file returns, remit taxes, and so forth.

A final important piece of the legislative context for the E-Commerce Directive is the Brussels Regulation, which determines what Member State will have adjudicative jurisdiction over a legal claim in situations where more than one Member State might have jurisdiction. The Brussels Regulation also provides for relatively automatic recognition and enforcement of judgments throughout the EU. The Brussels Regulation contains special rules for resolving jurisdiction questions that may arise in cross-border disputes between consumers and businesses, particularly online businesses. If an organization in a Member State conducts commercial or professional activities in the consumer’s domicile or “by any means, directs” such activities to the consumer’s domicile and the organization enters a contract with the consumer in the course of those activities, the consumer may sue the organization in the courts of his or her domicile. This generally is referred to as a “country of reception” rule because the consumer’s country “receives” the online “activity” that originated in the seller’s home country. The Brussels Regulation does not apply to disputes between EU Member States and non-EU countries. Thus, had it been in effect when the Yahoo! case was filed, it would not have affected the French court’s jurisdiction over the claim. But the Brussels Regulation would govern such a claim if the plaintiff and defendant were domiciled in a Member State.

24. Id. arts. 32–56, at 10–12.
25. Id. arts. 15–17, at 6–7. The Brussels Regulation also provides jurisdiction rules for business-to-business disputes. Businesses enjoy broad authority to specify by contract which national courts will have jurisdiction over their disputes. Id. art. 23, at 8. In the absence of a contractual “choice of forum” clause, a business generally has a right to be sued in its home forum. Id. art. 2(1), at 3.
26. Id. arts. 15(1)(c), 16(1), at 6–7. During the period when the EU institutions were finalizing the Brussels Regulation, there was considerable debate about the provisions relating to consumers and whether to alter them. The people who drafted the consumer provisions intended to resolve questions about jurisdiction over the Internet within the EU, but political disagreements resulted in language that is less than clear. The key question is what it means to “direct” an activity to a Member State in the online context where every organization knows, or should know, that its commercial website is likely to be accessible from every computer in every Member State. The courts ultimately will have to answer this question.
in the EU. In most circumstances, a French court probably would be allowed to take jurisdiction over an online dispute if a French consumer were the injured party, regardless of where in the EU the website operator is domiciled. The French court’s judgment probably would be enforceable in the operator’s domicile.

B. The E-Commerce Directive

The E-Commerce Directive, adopted in 2000, was designed to fill the gaps in this legislative context.\(^{27}\) The Directive consists of several interlocking parts. As discussed in Subsection 1 below, the heart of the Directive is the so-called “country of origin” rule, which specifies that an Internet service generally is subject only to the laws of the Member State in which the service provider is based. This provision should help Member States to avoid intra-EU versions of the Yahoo! case. But Yahoo!-type disputes still may arise in areas that are exempt from the E-Commerce Directive generally or the “country of origin” rule in particular. These exemptions are discussed below in Subsection 2. Moreover, the Directive establishes an override mechanism that defines situations in which, for “public policy” or other reasons, one Member State may seek to regulate the conduct of a website operator in another Member State. As explained in Subsection 3 below, the override mechanism is designed to channel potential Yahoo! cases into negotiations between Member State governments. In addition to this “choice of law” regime, the Directive contains detailed liability exemptions for Internet service providers\(^{28}\) modeled on those in the U.S. Digital Millennium Copyright Act.\(^{29}\) The Directive also establishes (1) disclosure rules for website operators;\(^{30}\) (2) core e-contracting principles;\(^{31}\) and (3) basic rules for online commercial communications.\(^{32}\) The Directive contains provisions designed to encourage out-of-court dispute settlement, and facilitate litigation of claims related to the

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31. Id. arts. 9-11, at 11-12.

32. Id. arts. 6-8, at 11.
The following Sections focus, however, on the “choice of law” regime and how it might operate when confronted with cases such as Yahoo!. The final Part of the Article argues that this “choice of law” regime may provide a model for a broader international agreement defining the limits of national authority to regulate the Internet.

1. “Country of Origin” Rule

Rather than giving detailed instructions to the Member States on how to harmonize national laws affecting the Internet, the E-Commerce Directive establishes a “country of origin” rule, which limits the authority of Member States to regulate “information society services” that use the Internet and other electronic networks. An “information society service” is “any service normally provided for remuneration, at a distance, by electronic means, and at the individual request of a recipient of services.” Article 3(1) of the Directive requires a Member State to enforce its laws against an information society service provider established in that Member State—a system sometimes called “home country control.” Moreover, under article 3(2), with important

33. Id. arts. 16–18, at 13–14.

The requirement that an information society service be “for remuneration” should be construed loosely:

Information society services are not solely restricted to services giving rise to online contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service . . . .

E-Commerce Directive, supra note 5, recital 18, at 3.
35. Id. art. 3(1), at 9. The Directive does not provide rules for determining where an information society service provider is established. According to the Directive,

[t]he place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.
exceptions discussed below, other Member States are not allowed to impose their laws on services that the provider makes available in their territories via the Internet or other electronic networks. Thus, France is required to enforce its laws against organizations based in France, but is not allowed to enforce its laws against an organization based in Greece or Germany that sells products or offers products for sale within France via the Internet.

The E-Commerce Directive does not refer explicitly to the “country of origin” rule. Rather, it defines a so-called “coordinated field” and declares that “Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.” With some exceptions discussed below, the “coordinated field” comprises “requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.” The coordinated field includes national provisions related to the “taking up” of an information society service, the “quality or content” of the service, and the “behaviour of the service provider.” The coordinated field does not include requirements related to “goods as such,” “delivery of goods,” or “services not provided by electronic means.”

If we ignore for a moment the various exceptions and qualifications as well as the override mechanism (all of which are discussed in

Id. recital 19, at 4.

The Directive also indicates that:

[t]he Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

Id. recital 57, at 7.

Absent the case law and oversight authority of the European Court of Justice (ECJ), the issue of where a particular service provider is established could generate a threshold “choice of law” problem. If French and German law agree that a service provider is established in France, then there is no question that French law applies under the E-Commerce Directive. But if French and German law disagree about where a service provider is established, there would have to be a preliminary choice about which law applies to the issue of establishment before the Directive’s “country of origin” rule would come into play. The ECJ prevents this threshold problem from arising by imposing uniform rules regarding establishment across the EU.

36. Id. art. 3(2), at 9.
37. Id. art. 2(h), at 9.
38. Id.
39. Id.
Subsections 2 and 3 below), the potential application of the "country of origin" rule to the scenario in the Yahoo! case is clear. If a website selling Nazi materials were posted by a company established in a Member State that does not forbid such sales, the website ought to be permitted to offer such materials for sale in all fifteen Member States, including those such as France that forbid display of Nazi materials for sale. To the extent that a French law forbidding such sales or offers for sale applies to Internet content, it should fall squarely within the coordinated field. France would be required to apply the law to websites operators established in France. But applying the law to a website originating in another Member State would restrict the freedom of the website operator to provide an information society service into France from another Member State, and thereby violate the E-Commerce Directive.

As noted above, the coordinated field does not include requirements related to "goods as such" or "delivery of goods." Could France argue that a law banning display of Nazi materials for sale relates to goods (e.g., a hard copy of Mein Kampf), and therefore falls outside the coordinated field? Probably not. A recital to the E-Commerce Directive states that "[i]nformation society services span a wide range of economic activities which take place on-line; these can, in particular, consist of selling goods on-line." Thus, selling Mein Kampf online should qualify as an information society service. Another recital specifies the scope of the authority that Member States retain to regulate "goods as such" and "deliveries of goods." "[T]he coordinated field . . . does not concern

40. A service provider such as Yahoo! Inc., whether based in France or another Member State, might argue that it is exempt from French law under article 14 of the E-Commerce Directive, which states that a service provider is not liable under certain conditions for "information" stored "at the request of a recipient of the service." Id. art. 14(1), at 13. The allegedly exempt "information" would be the online displays of Nazi materials that the third-party "recipient" of Yahoo!'s services hopes to sell in France. I do not want to digress on the issue of service provider liability, but I believe the service provider's argument would fail for at least two reasons. First, a service provider such as Yahoo! Inc. carrying Nazi materials for sale probably would not qualify for the so-called "hosting" exemption because the service provider does more than simply host third-party content. The service provider operates an e-commerce service that sells goods and services for third parties. Second, even if the service provider qualified for the hosting exemption, it still might be required to take down unlawful content if it received appropriate notice. Id. Thus, the service provider could not evade application of the French law by citing article 14. In the remainder of this Article, I assume for the sake of simplicity that the EU-based service provider is the actual seller of Nazi materials rather than an auction site facilitating sales of such materials by third parties.

41. Under Community law, a recital functions in a manner that is similar to a statement of purpose in a statute adopted by the U.S. government or a state government. A recital is not binding, but courts will use recitals to interpret the operative provisions of a Community measure.

42. E-Commerce Directive, supra note 5, recital 18, at 3.
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Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products..."43

Thus, France retains the authority to regulate, for example, the quality of the binding of books, including Mein Kampf, or to ensure that the paper is resistant to aging. France also may regulate the way books are transported. France no doubt could ban shipment of Mein Kampf into or within France. These laws would regulate Mein Kampf as a good. But a French law that prohibits display of Mein Kampf for sale restricts the ability of a website operator to sell goods online, and therefore does not relate to "goods as such." Thus, the law should fall within the coordinated field and be subject to the "country of origin" rule.

It also has been suggested that the "country of origin" rule would not apply to France's prohibition on display of Nazi materials for sale because the "country of origin" rule does not cover content regulations.44 According to this argument, the coordinated field must be interpreted narrowly to include only prudential or technical rules related to the establishment and operation of online businesses. It is, of course, impossible to predict with certainty how the courts ultimately will interpret the "country of origin" rule. But the definition of the "coordinated field" states that rules related to the "quality or content" of a service are included.45 Moreover, as discussed in Subsection 3 below, the E-Commerce Directive establishes an override mechanism that allows a Member State to derogate from the "country of origin" rule and enforce certain types of content restrictions such as those enacted by France.46 It would make no sense to create a derogation from the "country of origin" rule for content restrictions if the rule itself did not cover those restrictions in the first place.47

43. Id. recital 21, at 4.
45. See supra note 38 and accompanying text.
46. See infra notes 65-78 and accompanying text.
47. Underlying this debate about the scope of the "country of origin" rule is a difficult question about whether and to what extent the EC Treaty empowers the EC to restrict Member State authority in the area of criminal law. Since France's prohibition on display of Nazi materials is a penal measure, some might argue that the EC has no authority to restrict France's application of the prohibition to materials originating in other Member States. A discussion of EC "constitutional" law is beyond the scope of this Article. For my purposes, it is sufficient to note that the E-Commerce Directive itself clearly assumes that it covers content restrictions as well as other issues that may be subject to penal rules. The Directive identifies "prevention, investigation, detection and prosecution of criminal offences" as a ground for triggering the
Before turning to the various limitations on the "country of origin" rule and how they might apply to the scenario in the Yahoo! case, it is important to make explicit a point that is implicit in the discussion thus far. An information society service provider such as Yahoo! Inc. that is established in the United States cannot rely on the E-Commerce Directive to protect itself from application of French law. Article 3(2), which contains the "country of origin" rule, prohibits Member States from "restrict[ing] the freedom to provide information society services from another Member State." Article 3(2) does not prohibit a Member State from restricting the freedom to provide information society services from countries such as the United States that are not members of the EU.\(^8\) At the same time, the E-Commerce Directive does not require Member States to discriminate between websites based in the EU and websites based outside the EU in deciding whether to apply their national laws. It simply permits them to do so if they wish, and, as the Yahoo! case suggests, some Member States are likely to wish to do so. International application of the "country of origin" rule probably would require an international agreement of the sort discussed in Part III of this Article.

2. Exceptions and Limitations

In the broader context of Community law, the E-Commerce Directive is quite unusual. Typically, when the EC introduces a "country of origin" rule or a form of home country control, it does so in connection with Community legislation that imposes detailed harmonization requirements. Thus, Member State A is expected to refrain from regulating a service originating in Member State B because the laws in Member States A and B are required to be very similar, if not identical. The Data Protection Directive\(^49\) provides what may be the best known override mechanism. \textit{Id.} art. 3(4)(a)(i), at 10. As recital 26 states, "Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings." \textit{Id.} recital 26, at 4 (emphasis added). The Directive also states that it is not intended to alter the substance of Member State criminal law. Its objective is "to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such." \textit{Id.} recital 8, at 2. Thus, the Directive does not require France to adopt new or different criminal laws, but it does purport to limit France's authority to criminalize the activities of service providers based in other Member States.


\(^{48}\)  
\(^{49}\)  

example of this approach. Member States agreed to permit the free flow of personal data across national borders, but only because every Member State was required to adopt strict rules covering all aspects of the processing of personal data. The E-Commerce Directive is different because it imposes a broad "country of origin" rule without harmonizing the relevant areas of law. As the European Commission stated, "[t]he approach is to interfere as little as possible with national legal rules and to do so only where it is strictly necessary for the proper functioning of the area without frontiers."50 Only once previously—in the Television Without Frontiers Directive51—had the Community adopted a broad "country of origin" rule without attempting more-or-less complete harmonization of the relevant area of law.

Not surprisingly, the Member States were hesitant about adopting a "country of origin" rule covering areas of the law that had not been harmonized, because it would limit their ability to use their laws to protect their citizens and businesses from Internet services based in Member States with different, possibly less restrictive regulatory regimes. Thus, they agreed to exclude several areas of law from the scope of the E-Commerce Directive in general and the "country of origin" rule in particular. They also included a mechanism by which a Member State may override the "country of origin" rule. These measures are discussed below in order to determine whether, and under what conditions, France might be permitted to apply a law forbidding display of Nazi materials for sale to a website operator based in another EU Member State.

a. General Exceptions to the Scope of the E-Commerce Directive

The E-Commerce Directive does not apply to several areas of law: (1) taxation; (2) data privacy; (3) "questions relating to agreements or practices governed by cartel law;" (4) certain activities of notaries; (5) activities of attorneys representing clients, particularly before courts; and (6) certain types of gambling activities.52 The first two areas already are heavily regulated under Community law, and the latter four are areas over which national governments, often backed by strong domestic interests, insisted on retaining local authority over services
provided from other Member States. A French law banning the display for sale of Nazi materials probably would not be exempt from the scope of the Directive under any of these provisions.

The Directive also contains a safe harbor for laws related to national and regional culture. The provision states: “[t]his Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.” France might argue that a law restricting the display for sale of Nazi materials is a measure in defense of pluralism because the law seeks to deter the rise of Fascist movements that are, among other things, totalitarian and explicitly antipluralist. This is a complicated issue that cannot be discussed in detail here. It is important to note, however, that there was considerable debate throughout the adoption process about the need to include language preserving the authority of Member States to enact legislation that protects the cultural and linguistic diversity of the EU. A lengthy recital reflects these concerns. Viewed against this backdrop, courts should interpret the provision of the Directive allowing Member States to act in defense of pluralism as referring to cultural and linguistic pluralism. Countries subject to the Directive thus would remain free to adopt laws that promote Internet access and use by cultural and linguistic subgroups. More controversially, countries may be allowed to impose language requirements on websites, including websites operated by organizations established in other EU Member States.

53. Id. art. 1(6), at 8.
54. The recital states that the Directive

should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

Id. recital 63, at 8.
55. The courts will have to confront a threshold question when interpreting the safe harbor provision for cultural legislation. The provision covers national laws adopted “in the respect of Community law.” Thus, it could be argued that the provision applies only to Member State cultural legislation that implements Community cultural legislation. Since France’s anti-Nazi laws do not implement EC law, the safe harbor would not apply. Countries seeking a broad cultural exclusion will argue that “in the respect of Community law” means “consistent with Community law,” and that France’s anti-Nazi laws pass the test. This issue cannot be resolved here. Suffice it to say that a case could be made for both readings.
56. In April 1998, for example, a French appellate court threw out a case against the Georgia Institute of Technology filed in 1996 by Défense de la Langue Française. Relying on the 1994 Loi Toubon which stipulates that all advertising in France should be in French, the complaint had
Countries probably would not be free, however, to apply to website operators based in other Member States laws that ban particular types of Internet content that allegedly undermine political pluralism and democracy.57

b. Exceptions to the "Country of Origin" Rule

In addition to the general exemptions from the scope of the E-Commerce Directive, there are several exceptions that are specific to the "country of origin" rule itself. The rule does not cover:58

- copyright,59 neighboring rights, and certain other intellectual and industrial property rights;
- the emission of electronic money by certain financial institutions;60

alleged that the Institute illegally used only English on its website. The court rejected the case on the technical ground that the public prosecutor had not been informed before the charges were filed. For discussions of the *Loi Toubon* and the Georgia Tech case, see Stacy Armit Feld, Note, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31 VAND. J. TRANSNAT'L L. 153 (1998); Christine Vanston, Note, *In Search of the Mot Juste: The Toubon Law and the European Union*, 22 B.C. INT'L & COMP. L. REV. 175 (1999).

57. While the E-Commerce Directive was being adopted, the Member States engaged in a lively debate over whether and to what extent the Directive would establish new rules of private international law, which in Continental countries serve essentially the same purpose as "conflict of laws" rules in the United States. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1–2 (3d ed. 2000). The result of this debate was article 1(4), which states that "[t]his Directive does not establish additional rules on private international law." E-Commerce Directive, *supra* note 5, art. 1(4), at 8. A recital reiterates the point, but adds an important caveat: "provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive." *Id.* recital 23, at 4. Reinforcing this caveat, another recital states: "National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive." *Id.* As discussed below, however, the Directive appears to impose a somewhat less burdensome regime on Member State authorities—perhaps including courts—that are involved in detecting and prosecuting violations of criminal law. *See infra* notes 68 and 75 and accompanying text. These complex and arguably inconsistent provisions on private international law reinforce a point made by Mathias Reimann: EC rules affecting private international law are complex and confusing, and often the "creatures of political preferences." MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 96–97 (1995). The relationship between the E-Commerce Directive and private international law is a topic that lies beyond the scope of this Article, but it is important to take note of the issue, because it could influence the ways in which courts interpret the "country of origin" rule. For additional discussion of the issue, see Pearce & Platten, *supra* note 27, at 374–76.


59. In the EU, copyright on the Internet is governed by, among other things, the Copyright Directive. *See supra* notes 15–18, and accompanying text.

certain provisions of EC securities law and insurance law;

the freedom of parties to choose the law applicable to their contract;61

contractual obligations concerning consumer contacts;62

the formal validity of real estate contracts where such contracts are subject to formal requirements in the Member State where the real estate is situated; and

the permissibility of unsolicited commercial communications by electronic mail.

In each of these areas, a Member State is permitted—but not required—to apply its national law to an online service originating in another Member State.

It does not appear that France would be able to take advantage of any of the exceptions to the "country of origin" rule if a scenario such as the Yahoo! case arose within the EU. Even if France were to recast the underlying prohibition, the law probably would not qualify as, for example, an intellectual property provision, or a provision related to securities, insurance, issuance of electronic money, or formalities in a real estate contract. One could imagine French courts refusing as a matter of policy to enforce a "contractual obligation" in an electronic contract to buy Nazi materials, but such a rule would not come into play unless a consumer sought relief from the contractual obligation.63 France's goal is not, however, to protect the innocent consumer of Nazi materials from unscrupulous online sellers. Rather, France wants to prevent all displays of such materials for sale in France.64

61. This exception preserves the preexisting right of businesses under the Rome Convention to determine which laws will govern the contracts that they enter with other businesses. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 5(2), 1980 O.J. (L 266) 1, 3. In the absence of a choice-of-law clause, and in noncontractual situations, the "country of origin" rule applies to businesses.

62. These "obligations" apparently include "information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract." E-Commerce Directive, supra note 5, recital 56, at 7.

63. I assume that there is an equivalent under French law to the U.S. doctrine that a contract term may be held unenforceable if it violates public policy. See, e.g., Restatement (Second) of Contracts § 178 (1981).

64. Article 1(3) of the E-Commerce Directive contains a partial exemption for Member State consumer protection legislation: "This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, . . . consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services." Id. art. 1(3), at 8. A recital adds that the "Directive is without prejudice to the level of protection for, in particular, . . . consumer interests, as established by Community
3. Override Mechanism

a. Outline of Mechanism

If France wishes to apply the prohibition on display of Nazi materials for sale to a service provider based in another EU Member State, France should activate the E-Commerce Directive's mechanism for overriding the “country of origin” rule. Under the override mechanism, Member State A may impose its laws on a service originating in Member State B if: (1) the objective that Member State A seeks to achieve is “public policy,” public health, public security, or consumer protection; (2) the service “prejudices,” or “presents a serious and grave risk of prejudice” to, one of these objectives; and (3) Member State A’s rules are “necessary” and “proportionate” to the objective. The Directive elucidates “public policy” as “in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons.”

The override mechanism requires Member States to follow specific procedural steps. Except in urgent cases, before Member State A can impose a particular law on a service originating in Member State B, Member State A must ask Member State B to take appropriate measures against the relevant service. Member State A should not act unless Member State B refuses to intervene or takes steps that are not adequate. Member State A also must inform the European Commission and Member State B that it plans to override the “country of origin” rule. Under the Directive, the Commission has the authority to “ask” Member State A not to take or to withdraw measures that are inconsistent with EC law, but the Commission cannot prevent Member State A from acting.

acts” and lists some thirteen consumer protection directives that remain fully operative after the adoption of the E-Commerce Directive. Id. recital 11, at 2. France’s ban on display of Nazi materials for sale clearly does not implement any of these EC consumer protection measures and thus the partial exemption for Member State consumer protection legislation probably would not block application of the “country of origin” rule.

65. Id. art. 3(4)(a), at 9-10.
66. Id. art. 3(4)(a)(i), at 9.
67. Id. art. 3(4)(b), at 10.
68. A Member State does not have to inform the Commission of the “investigative and other measures” that it may take to detect and prosecute crimes. Id. recital 21, at 4.
69. Id. art. 3(6), at 10. Under the Commission’s original draft of the E-Commerce Directive, the Commission apparently would have had the authority to order a Member State to refrain from taking, or to withdraw, a measure that the Commission had found to be incompatible with the Directive. See Proposed E-Commerce Directive, supra note 48, art. 22(3)(d), at 51. The Member States were not prepared to grant the Commission this power.
Rather, in a situation where Member State A disregards the Commission’s views, the Commission would have to issue a complaint (known as a “reasoned opinion”) against Member State A. If Member State A still refuses to change its approach, the Commission would have to take Member State A to the European Court of Justice (ECJ) on the theory that Member State A’s actions violate Community law. Member State B also would have the authority to take Member State A to the ECJ, although Member State B first would have to take the matter to the Commission.

b. Application of Override Mechanism to Yahoo! Case Scenario

In a Yahoo! case scenario, France could seek to use the override mechanism to impose on a seller in another Member State the ban on displays of Nazi materials for sale. France first would have to ask the pertinent authorities in that Member State to take action against the seller. If the seller is based in a Member State such as Germany that has laws restricting sales of Nazi materials, the Member State probably would respond by enforcing those laws against the seller, thereby ending the dispute. In effect, France would be asking the Member State to live up to its obligation under article 3(1) of the E-Commerce Directive to enforce its laws against service providers established within its borders. Thus, the outcome would reinforce rather than override the “country of origin” rule and home country control.

If, on the other hand, the Member State to which France directs a request for action is a country such as the United Kingdom that apparently permits sales of Nazi materials, the process may be considerably more complicated. Presumably, the U.K. authorities would refuse to take enforcement action on the ground that there is no relevant law to enforce. U.K. authorities might discuss the issue with the pertinent service provider, and perhaps generally encourage online sellers based in the United Kingdom voluntarily to stop selling and, if possible, displaying products in France that violate French law. Some U.K. sellers might agree to

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70. EC Treaty art. 226.
71. Id.
72. Id. art. 227.
74. The E-Commerce Directive requires Member States to “encourage . . . the drawing up of codes of conduct regarding the protection of minors and human dignity.” E-Commerce Directive, supra note 5, art. 16(1)(e), at 13–14. The United Kingdom thus could encourage sellers to adopt a voluntary code of conduct that prohibits sale of Nazi materials as an affront
change their behavior, if the U.K. government can persuade them that the alternative could be legal action in French courts under French law. Assuming, however, that the United Kingdom is not prepared to adopt legislation banning display of Nazi materials for sale, it seems likely that at least some U.K. companies would continue to take advantage of their freedom to sell such materials online to French consumers. Thus, France would be within its rights to take the next step under the override mechanism.

The next step would be for France to notify the European Commission and the U.K. government that it will enforce its ban on displays of Nazi materials for sale against U.K. companies. The Commission and the United Kingdom then would have the opportunity to review France’s action to determine whether it is consistent with Community law, including the E-Commerce Directive. Among other things, the Commission and the United Kingdom would look at whether (1) France’s objective falls within the category of “public policy” as defined in the E-Commerce Directive and (2) France’s action truly is “necessary” and “proportionate” to France’s objective. With respect to the first issue, an opponent to French action might argue that a ban on display of Nazi materials for sale is not an effort to prevent attacks on human dignity or incitement to racial and religious hatred. Rather, it is simply an effort to prevent French consumers from seeing displays for sale of artifacts that are of continuing historical and political interest. Seeing Mein Kampf displayed for sale will not incite French consumers to hate the people that Hitler hated, or so it could be argued.

Although it is too early to tell how the Commission or the various Member State governments will handle this type of debate, it is likely that they would favor the French position. In a brief discussion of the override mechanism in the original draft of the E-Commerce Directive, the Commission stated “[i]t would, for example, be out of the question for the Commission to prevent a Member State from applying a law which would forbid the arrival of racist messages.”\(^{76}\) The Commission likely would have little difficulty finding that the displays banned by

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75. In light of recital 21, supra note 68, it is not entirely clear when France—or a French court—would be required to notify the Commission of the possibility that a French criminal law might be imposed on a website operator based in another Member State. France clearly should inform the other Member State early enough to give the other Member State an opportunity to exercise home country control.

France communicate racist messages, and that the French government may take steps under the override mechanism to prevent their “arrival” in France. Despite the Commission’s efforts to liberalize the European advertising market, the Commission probably would not distinguish between a marketing message that encourages people to buy Mein Kampf and a political message that encourages people to agree with the views expressed in Mein Kampf. Moreover, in light of Europe’s historical experience, it seems unlikely that any Member State would publicly defend the right to display Nazi materials for sale on the ground that such display does not incite hatred or attack human dignity.

With respect to the second issue mentioned above—whether France’s action in pursuit of its objective is necessary and proportionate—the analysis would depend upon what action France takes. Thus, for example, if France were to enforce its law in a way that effectively prevents a U.K. seller from selling products within the United Kingdom that are lawful under U.K. law, the Commission and/or the U.K. government might conclude that France’s proposal is not proportionate to the objective of protecting residents of France from displays of Nazi materials for sale. The Commission and/or the United Kingdom then could ask France to modify its approach, and threaten to take France to the ECJ if France fails to comply with the E-Commerce Directive. The analysis would be much less clear-cut if France attempted—as it did in the Yahoo! case—to force a U.K. service provider to take technical steps to block access by Internet users located in France to offers for sale of Nazi materials. Assuming the technology is available to accomplish, at least in part, such blocking, France could argue that the proposed measure is proportionate to France’s objective of preventing French consumers from seeing Nazi materials for sale. France also could argue the measure is necessary to achieve France’s objective, because the only alternative is to allow French consumers to be exposed to materials that France does not want them to see.

Based on the author’s experience with officials in the European Commission responsible for overseeing the operation of the Internal Market, the author believes there would be an informal effort to persuade France not to attempt to force U.K. sellers to implement blocking technology. Rather, Commission officials might encourage France to focus on actual sales of Nazi materials within France. France could penalize a U.K. seller for shipping illegal products to France without requiring the

77. For a summary of the Commission’s efforts in this area, see Mark Kightlinger & Stephan Jaggi, A Liberal Regulatory Framework for Online Advertising in the EU, COMMUNICATOR (European Ass’n of Com. Agencies 2000), at 29.
seller to make expensive, technologically challenging changes in its website. France even could seek to penalize a seller for allowing French consumers to purchase and download Nazi materials (e.g., a digital copy of *Mein Kampf*). Presumably, Commission officials would point out that blocking technologies of the sort that France wants to impose will never prevent displays of Nazi materials from reaching France via the Internet. Even moderately sophisticated French consumers will be able to access such displays if they wish. Thus, the Commission might argue, France may succeed in imposing costly new technologies on a few website operators in the United Kingdom, but France will not succeed in preventing French consumers from viewing Nazi materials offered for sale on the Internet.

France may counter that it cannot be prevented from taking legal action against displays of Nazi materials emanating from other EU Member States simply because such legal action will not be 100 percent successful. Rather, France should be allowed to take steps that will reduce the volume of Nazi material available online to French consumers, and make it more difficult for consumers to access such material. Moreover, France can point out that stopping shipments of Nazi materials at the border, although important, will not achieve France’s broader legislative purpose—preventing the display of Nazi materials for sale in France. The E-Commerce Directive’s override mechanism allows France, not the European Commission or other Member States, to define the scope of French laws that seek to prevent attacks on human dignity and incitement to hatred on the basis of race or religion. France has decided to ban displays of Nazi materials for sale, and neither the Commission nor the United Kingdom may insist that France adopt a narrower or less aggressive law.

In light of these arguments, the European Commission may have difficulty building a legal case that France’s actions are unnecessary or disproportionate, if France insists on imposing a Yahoo!-type blocking requirement on U.K. service providers. Even if a plausible legal case could be constructed, the full Commission might not be prepared to take action against France—particularly if the two Commissioners from France oppose such action. As noted above, if the Commission fails to take legal action, another Member State could challenge France’s position in the ECJ. Thus, the United Kingdom could seek to defend service providers based in its territory against imposition of French law.

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78. In theory, members of the European Commission do not represent the Member States from which they originate. In reality, however, Member State loyalties influence the actions of Commissioners, particularly with respect to proposals to take particular Member States to court for violating Community law.
Whether the U.K. government would be prepared to do so, however, is not at all clear, given the legal hurdles outlined above and the political implications of being seen to support free speech for sellers and buyers of Nazi materials.

In this context, it should be noted that the E-Commerce Directive does not provide a mechanism through which a private organization can challenge a Member State for failure to abide by the "country of origin" rule. Thus, for example, if France takes an action that an organization established in the United Kingdom believes violates the organization's rights under the Directive, the organization may have to ask the United Kingdom for help or challenge France's actions in France's courts. A Member State's lower courts may, and a Member State's highest court must, refer a question of EC law to the ECJ, if the Member State court cannot decide the case without addressing the EC law question. The ECJ in turn may find that the Member State's actions violate the E-Commerce Directive, and declare them invalid. This process can take a considerable amount of time, and as with any litigation, may lead to results that are not satisfactory from the point of view of the organization challenging the Member State law.

c. Significance of Override Mechanism

From the analysis presented in the preceding Subsection, it might appear that the override mechanism would give France carte blanche to apply its anti-Nazi legislation to website operators in other Member States. Thus, it might be asserted, the E-Commerce Directive does not provide a European solution to the problem presented by the Yahoo! case. Indeed, it simply institutionalizes the problem. As Part III of this Article argues, however, it is precisely this effort to institutionalize the problem that may make the E-Commerce Directive a potential model for a broader international solution.

Leaving aside the international dimension, however, it is useful to imagine how the scenario in the Yahoo! case might unfold if there were no E-Commerce Directive. Within the general limits imposed by Community law, France would be free to take action against any service provider, foreign or domestic, for any violation of French law. Moreover, under the Brussels Regulation, France might be able to obtain more-or-less automatic enforcement of the judgment in every Member State.\footnote{EC Treaty art. 234. Needless to say, Member State courts have become adept at characterizing and recharacterizing alleged questions of EC law, depending on whether the courts do or do not wish the ECJ to become involved.}

\footnote{Brussels Regulation, supra note 23, arts. 32–56, at 10–12. France likely would not be able to rely on the Brussels Regulation to obtain cross-border enforcement within the EU of
France would not have to inform the European Commission or the affected Member States of any proposed action. The Commission and other Member States would remain free to challenge French actions in the ECJ, but there would be no explicit “country of origin” rule to limit France’s authority to restrict online services originating in other Member States. Thus, the scope of ECJ review of any French action would be limited. There probably would be little question under Community law of France’s authority to apply the ban on displays of Nazi materials for sale to website operators in other Member States. Thus, EU-based website operators would have to confront the real possibility that their websites might subject them to legal action under national laws in France and fourteen other Member States. Such legal action might occur not only under laws such as France’s ban on displays of Nazi materials, but under any economic or social legislation that a Member State (consistent with Community law) might have adopted or might choose to adopt. The need to navigate fifteen different legal regimes could generate countless Yahoo! cases and thus have a significant chilling effect on the development of European online services. The E-Commerce Directive was intended to address this problem by subjecting each online service to one Member State’s legal regime under most circumstances, and by creating an institutional mechanism for handling cases in which another Member State nevertheless may wish to impose restrictions on that service. The following Sections of this Article provide additional arguments in support of this general approach.

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81. A discussion of the possible legal bases for such a challenge is beyond the scope of this Article. Suffice it to say that a Member State might argue, among other things, that the French law violates the EC Treaty’s provisions protecting and promoting “free movement” of services in the internal market. EC TREATY arts. 3(l)(c), 14, 49-55. For a detailed analysis of these provisions and the case law interpreting them, see JUKKA SNELL, GOODS AND SERVICES IN EC LAW (2002). Typically, the EC supplements the provisions of the Treaty with secondary legislation such as directives and regulations in order to achieve “free movement” in particular service sectors. For a description of such secondary legislation in a particular sector (legal services), see D. Bruce Shine, The European Union’s Lack of Internal Borders in the Practice of Law: A Model for the United States?, 29 SYRACUSE J. INT’L L. & COM. 207, 226-45 (2002). The E-Commerce Directive itself is intended to implement the EC Treaty’s “free movement” objectives in the field of online services. See E-Commerce Directive, supra note 5, recital 8, at 2.

82. For a short description of the existing and proposed Member State legislation aimed specifically at the Internet at the time the Commission proposed the E-Commerce Directive, see Proposed E-Commerce Directive, supra note 48, at 8.
III. Proposal for an International Agreement Modeled on the E-Commerce Directive

Despite the caveats and uncertainties discussed in Part II about how the E-Commerce Directive will be interpreted by Member States and the ECJ, the Directive could provide a model for an international solution to the problems presented by the Yahoo! case. As discussed below, such a solution would take the form of an international agreement defining the limits of national authority to regulate the Internet. Section A argues that the agreement should incorporate the basic structure of the Directive: a “country of origin” rule coupled with home country control, a limited list of exceptions, and an override procedure. Section B discusses the potential stumbling blocks, again drawing on the experience of the E-Commerce Directive. Disagreements could arise over, among other things, cultural protection legislation, privacy, taxation, and consumer protection. Section C argues that the best path to compromise on some of the more contentious issues would be to rely more heavily than does the E-Commerce Directive on the override mechanism. Finally, Section D discusses whether an international agreement of the sort described in the previous Sections is worth pursuing. It argues that a properly crafted international agreement could prove beneficial for all concerned because it would increase the level of legal certainty and enhance compliance without preventing countries that participate in the agreement from enforcing their most important national policies against Internet services originating in other participating countries.

Before turning to these issues, however, it may be useful to make a couple of points about the practical advantages of using the E-Commerce Directive as a model for an international solution. The first point is that the E-Commerce Directive already is an international solution. Although there is some disagreement about what kind of legal entity the EU is,83 almost every observer would agree that the EU lies somewhere on the spectrum between the North American Free Trade Agreement on the one hand and a federal nation state such as the United States of America or the Federal Republic of Germany on the other hand. The Member States of the EU retain considerable national sovereignty and in that sense the EU is an international organization. Thus, the E-Commerce Directive, as a legislative act of the European Community, already is an international effort to define the limits on national authority to regulate the Internet.

83. There is an extensive literature on this issue. See, e.g., Ilann Margalit Maazel, What is the European Union?, 16 BYU J. Pub. L. 243 (2002); Lenaerts, supra note 8.
The second point follows from the first. Currently, fifteen countries are bound by the E-Commerce Directive. Soon, the number will rise to twenty-five. If an international instrument modeled on the Directive could retain the support of these twenty-five countries and gain five or six more key adherents (e.g., the United States, Canada, Japan, Australia, and perhaps one or two economically significant developing nations such as India and Malaysia), the instrument would cover most of the existing electronic marketplace. It is not suggested here that building an international agreement on top of the Directive would be an easy matter. Still, at least in theory, revising the E-Commerce Directive to attract new adherents may be easier than starting from scratch with an approach to which there are no adherents. Of course, the fact that the EU already has adopted the E-Commerce Directive could work against its use as a model for a broader international solution. U.S. representatives to the Hague Conference reacted negatively to suggestions by European countries that key provisions of the Brussels Regulation should provide the basis for a new global convention on jurisdiction and enforcement of judgments. The United States did not wish to be presented with a fait accompli by the Europeans. Moreover, there are precedents for developing a significant international convention in a genuinely multilateral manner. For example, the United Nations Commission on International Trade Law (UNCITRAL) developed the United Nations Convention on Contracts for the International Sale of Goods (CISG) through a Working Group representing different legal traditions in order to avoid following a particular regional approach that might limit acceptance of the final text. Even the UNCITRAL Working Group found it useful to draw on the earlier Uniform Law for the International Sale of Goods, which was "the product of the legal scholarship of Western Europe." As the CISG example shows, the E-Commerce Directive might serve as a model for an international agreement not because a large bloc of countries already adheres to the Directive, but because the Directive's substantive approach makes sense to a broader group of countries. The next Section outlines the key substantive elements of an international agreement modeled on the Directive and explains how they may assist in addressing the types of problems presented by the Yahoo! case.

86. Id. at 10.
A. Key Elements of an International Solution

Using the E-Commerce Directive as a model, the key elements of an international agreement defining the limits of national authority to regulate the Internet are forbearance and home country control, minimum harmonization, and the establishment of an administrative process for handling potential disputes. In order for such an agreement to function, it probably would have to be embedded in an institutional structure. The WTO may be the best institutional setting, although others such as the Organization for Economic Cooperation and Development (OECD) or the World Intellectual Property Organization (WIPO) should be considered. A discussion of possible exceptions to the principle of forbearance is deferred to Section B. The argument presented below is not intended to provide the details of a possible international agreement, let alone actual language, but rather to identify the likely key elements and explain how they relate to the Yahoo! problem.

1. Forbearance and Home Country Control

The centerpiece of an international agreement defining the limits on national authority to regulate the Internet would be a strong principle of forbearance combined with a principle of home country control. Participating countries would agree not to apply their national laws to websites operated by people or organizations established in other participating countries. At the same time, each participating country would agree to enforce its legal regime, and therefore oversee the online activities of organizations established within its national territory. Thus, at least in principle, the agreement would provide that in scenarios such as the Yahoo! case, the country of origin (the United States) should apply

87. To limit disagreements about where a website operator is established, participating countries also should agree on basic principles of establishment. The E-Commerce Directive endorses principles that the ECJ has developed to resolve such disagreements. See supra note 35. These principles might provide a basis for an international consensus. Without some agreement on principles for determining where a website operator is established, national authorities and courts will have to rely on existing national rules. This will require decisions about which country’s rules of establishment should apply in particular cases. This “choice of law” analysis could recreate the conflicting claims of authority to regulate the Internet that the hypothetical international agreement was intended to resolve. It is not clear, however, whether disagreements over where an organization is established will be a significant practical problem (as opposed to an interesting theoretical concern). The Yahoo! case, for example, did not trigger a debate about where Yahoo! is established. Everyone agrees that the Yahoo! parent company is established in California. The question was and is whether and to what extent France should be able to regulate Yahoo!’s conduct in spite of the fact that Yahoo! is not established in France. Presumably, Yahoo! still would be established in California under an international agreement based on the E-Commerce Directive, and France probably would not try to claim otherwise.
its laws to the service provider, and the country of reception (France) should refrain from applying its laws. As discussed below, whether this would be the result in practice would depend on, among other things, the scope of any exceptions to the principle of forbearance, and the flexibility of any override mechanism that the agreement may incorporate.

There is an important practical advantage to including a provision mandating home country control in an international agreement delimiting national authority to regulate the Internet. Participating countries could use such a provision as a standard by which to judge other countries that may wish to become signatories to the agreement. A country might be excluded if it cannot demonstrate that it has, for example, a functioning system of consumer protection laws backed by an effective administrative and judicial structure. Participating countries thereby could ensure that potential havens for scofflaws will not benefit from the agreement and the special online “free trade zone” that it establishes. In this connection, it is worth noting that concerns about, among other things, potential haven countries led the EU Member States to exclude copyright from the scope of the “country of origin” principle. Right holder organizations likely would insist on a similar exclusion from any international agreement defining the limits to regulate the Internet, at least until piracy rates and copyright enforcement efforts reach a uniformly high level in all participating countries.88

2. Minimum Harmonization

A second element of an international agreement delimiting national authority to regulate the Internet may be a requirement that participating countries harmonize certain provisions of national law. As discussed in Section B below, lack of harmonization may present several important stumbling blocks to an international agreement, and perhaps encourage participating countries to create exceptions to the principle of forbearance.89 Since these exceptions may generate conflicts such as the Yahoo! case, participating countries have an incentive to consider harmonization, wherever possible, as an alternative. The areas harmonized by the E-Commerce Directive—e-contracting, commercial communications, and service provider liability—may provide a starting point. In the first two areas, the Directive focuses on ensuring that electronic contracts are

88. Right holder organizations have demonstrated that piracy rates and copyright enforcement efforts vary dramatically from country to country, both within the EU and more generally. See, e.g., Business Software Alliance, Seventh Annual BSA Global Software Piracy Study (2002), at http://www.bsa.org/usa/policyres/admin/2002-06-10.130.pdf.

89. For a brief summary of international efforts to harmonize laws affecting cyberspace that already were underway in 1998, see Goldsmith, supra note 3, at 1230–32.
recognized under national law and requiring service providers to make adequate disclosures to users. Most, if not all, of the countries that might participate in an international agreement of the type under discussion here presumably recognize electronic contracts and impose at least some disclosure requirements, either by statute or through regulatory or judicial precedents. Thus, limited harmonization may be relatively straightforward, simply because there is little disagreement over the basic principles that should apply in such areas as e-contracting and online commercial communications, although there may be disagreements about how to implement and enforce these principles.

At first blush, the issue of service provider liability might seem like a bigger challenge. In fact, the issue is largely resolved and perhaps should not even be raised in the context of an international agreement delimiting national authority to regulate the Internet. The E-Commerce Directive’s provisions on service provider liability are based on similar provisions in the U.S. Digital Millennium Copyright Act. Thus, from the perspective of the EU and the United States, the issue of service provider liability is settled law. Whether the issue should be raised in a broader international context is essentially a political decision, but it is not clear why the EU or the United States would wish to do so. If the issue is raised, it would make sense for the EU and the United States to insist that other participating countries follow the EU–U.S. model.

As discussed in Section II.A, the E-Commerce Directive is one of several measures affecting the Internet that the EU has adopted in recent years. Although the Directive is linked to each of these other measures in important ways, its adoption was not contingent on the adoption of any of the other measures. Nevertheless, it may be important to consider including provisions similar to one of the other measures—i.e., the amended Transparency Directive—in a broader international agreement. The amended Transparency Directive requires EU Member States to notify the European Commission when they are considering legislative proposals that may affect the Internet, and to observe a standstill period before adopting such proposals into law. By including a transparency provision in an international agreement delimiting national authority to

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90. For a review of U.S. and other national laws applicable to e-contracting, online advertising, and online consumer protection, see INFORMATION TECHNOLOGY AND ELECTRONIC COMMERCE, supra note 28.
91. For political reasons, the service provider liability provisions in the E-Commerce Directive were linked to the Copyright Directive, and thus it might be accurate to say that passage of the former was a precondition for passage of the latter. See E-Commerce Directive, supra note 5, recital 50, at 7 (emphasizing that the E-Commerce Directive and the Copyright Directive should “come into force within a similar time scale”).
92. See supra note 10 and accompanying text.
regulate the Internet, participating countries would establish a mechanism for reporting to a central clearing house any relevant legislative proposals that they may be considering. Such a transparency provision might help to identify potential Yahoo! cases at their inception and prevent them from arising. Depending on how the clearing house is constituted, it could review the proposals for compliance with applicable law and agreements, or pass the proposals on to other participating countries for such review, or both. In effect, the transparency provision would be a sunshine rule, ensuring that all participating countries can watch when one of their number considers legislation that may affect their international rights and obligations.

3. Override Mechanism

A third key element of an agreement defining the limits on national authority to regulate the Internet would be a procedure for overriding the principle of forbearance. As the European Commission implicitly recognized in its original draft of the E-Commerce Directive, countries will agree to a “country of origin” rule in an environment where national laws have not been harmonized only if they have a procedure for overriding the rule in certain types of cases that, in their view, reflect important national policy objectives. Clearly, a similar compromise would be required in any broader international agreement that requires countries to refrain from imposing their national laws on Internet services originating in other countries.

Although the participating countries would have to design the override mechanism, the structure established by the E-Commerce Directive may provide a starting point. If Country A believes that a service provider in Country B is violating an important national policy of Country A covered by the override mechanism, Country A first would be required to ask Country B to intervene. If Country B refused, or took action that Country A considered inadequate, Country A would be required to notify Country B and the central clearing house that Country A plans to impose a national law on a service provider based in Country B. Country B, and any other interested country, then would have the opportunity to determine whether Country A’s action exceeds the scope of the override mechanism, and thus violates the agreement. The participating countries would have to define in advance what, if any, recourse to grant Country B if it concludes that Country A has violated the agreement. Depending on the international agreement’s institutional setting, alternatives might range from arbitration to a dispute settlement proceeding in the WTO.

Some might argue that establishing a robust override mechanism defeats the fundamental purpose of an international agreement defining the
limits of national authority to regulate the Internet. As was suggested in
the discussion of the E-Commerce Directive, by using the override
mechanism, a country such as France might be able to impose its law
prohibiting display of Nazi materials for sale on a service provider based
in another EU Member State. If France could override the forbearance
principle in an international agreement and impose its anti-Nazi legisla-
tion on website operators in other participating countries, including the
United States, would this not leave us back at square one (i.e., the Yahoo!
case)?

Yes and no. Yes, in the sense that France ultimately might succeed in
imposing its national laws on a case-by-case basis on foreign website
operators. No, in the sense that France would have to pass through a va-
riety of procedural hoops before doing so. If the international agreement
functioned properly, France would have to notify the United States as
soon as a case arose in which it was possible that a French law might be
applied to a U.S. website operator or other service provider. France
would have to ask the U.S. government to take action and thereby exer-
cise home country control. The U.S. government would have to review
the French request and determine what, if any, action it might take. Out-
side the high-pressure environment of a court case, U.S. and French
authorities might be able to achieve a reasonable, negotiated solution
with the website operator in question. The international agreement de-
scribed in this Article would provide them with an opportunity to do so.
The agreement would not solve the problem, but it might give the parties
time and space in which to craft a solution. Moreover, because the
agreement would require countries to put resources into discussing such
problems, countries would have an incentive to achieve workable solu-
tions and avoid allowing disputes to proliferate. The result should be an
increase in the number of amicable resolutions and a decrease in the
number of disputes.

Some might suggest that this line of argument is naïve and overly
optimistic. Why, they might ask, is there any reason to think that France,
the United States, and Yahoo! could have resolved the Yahoo! case
amicably? Isn’t this a matter of principle for all concerned? In the
author’s experience, companies such as Yahoo! generally prefer to avoid
engaging in legal disputes at a national or international level, even in
situations that might appear to involve matters of fundamental principle.
To illustrate this point, it may be useful to look briefly at the “Rules of
User Conduct” adopted by one of Yahoo!’s competitors in the online
marketplace, America Online (AOL). In exchange for the opportunity to use AOL's online services, users agree that they will not:

upload, post, or otherwise distribute or facilitate distribution of any content—including text, communications, software, images, sounds, data, or other information—that:

... .

2. victimizes, harasses, degrades, or intimidates an individual or group of individuals on the basis of religion, gender, sexual orientation, race, ethnicity, age, or disability . . . .

AOL does not state that it reserves the authority to take down Nazi content, or to revoke the access privileges of users who may post such content, but AOL probably could do so—or at least attempt to do so—under its Rules of User Conduct. What is clear, however, is that AOL has not adopted a broad principle of free speech similar to the First Amendment in regard to the use of its online services. Thus, there is no reason to believe that AOL or its competitors would insist on fighting with France over the principle of free speech, if in turn France were prepared to accept a solution that is not prohibitively expensive for online companies to implement. The override mechanism outlined above would give the interested parties an opportunity to discuss such a solution.

Of course, even the most starry-eyed optimist must recognize that some disputes are intractable. Thus, regardless of the terms of an international agreement delimiting national authority to regulate the Internet, France, Yahoo!, and the United States might reach an impasse, and France might authorize or permit legal action against Yahoo! (as it already has). In that situation, the United States would retain the right to review France’s action and, if appropriate, challenge that action in the forum agreed upon by the participating countries. Moreover, the United States would have a legal basis for such a challenge—the terms of the forbearance principle and the override mechanism in the international agreement—that it currently lacks. The United States might not prevail, but then the United States and Yahoo! would be no worse off than they are today. Moreover, the possibility that the United States—or another participating country—might take France to an international dispute

93. Reidenberg makes a similar point about Yahoo!’s terms of service. Reidenberg, supra note 3, at 265–66.


settlement forum should act as a deterrent, encouraging France to take action against foreign website operators only in clear-cut cases where important principles are at stake.

4. Institutional Setting

This Article is not the place to address in detail the question of the appropriate institutional setting for an international agreement defining the limits on national authority to regulate the Internet. It is useful, however, to provide a brief preliminary discussion of this issue in order to show that it is at least possible to find a "home" for such an agreement. Several such homes present themselves, including the WTO, the OECD, UNCITRAL, WIPO, or even the Council of Europe. Of these, the WTO seems the most likely candidate. The primary purpose of the agreement would be to eliminate national barriers to cross-border provision of electronic services of the sort presented by the Yahoo! case, and create a kind of online "free trade zone." This is essentially the same purpose that the E-Commerce Directive serves within the EU. The Agreement Establishing the World Trade Organization (WTO Agreement) allows WTO member countries to negotiate "plurilateral agreements" and declares those agreements to be binding on countries that accept them. The WTO Agreement also requires the WTO to administer plurilateral agreements. By characterizing as "plurilateral" an agreement delimiting national authority to regulate the Internet, the participating countries could take advantage of the WTO's infrastructure, without opening the door to countries that are not prepared to accept the burdens as well as the benefits of such an agreement (e.g., countries that are not prepared to require that online service providers adhere to certain basic disclosure requirements and comply with rules banning false and misleading advertising). Against website operators in such nonparticipating countries, the participating countries would retain full authority to take whatever measures their national laws may allow to protect domestic businesses and consumers.

One advantage of using the WTO is the availability of a well-developed dispute settlement infrastructure. Within the EU, the European Commission and the Member States can use the ECJ to enforce the E-Commerce Directive. Absent the EU's dispute settlement mechanisms, the Directive and other elements of Community law would


97. "The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them." Id. art. II(3).
A Solution to the Yahoo! Problem?

be little more than pieces of paper. Although different from the EU’s mechanisms for enforcing EC law, the WTO’s dispute settlement structure gives real teeth to the many trade agreements adopted under the WTO’s auspices. Thus, a country participating in a new plurilateral agreement defining the limits of national authority to regulate the Internet might request a dispute settlement panel in a case in which another participating country imposed a national law on a foreign website operator in violation of the agreement. The panel would hear arguments on both sides and deliver an interpretation of the agreement that is binding on both parties. The parties then would have a right to appeal the panel’s decision to the Appellate Body. Participating countries would not, however, have to rely entirely on the existing WTO dispute settlement infrastructure if they concluded that it was in some respects unsuitable. They could incorporate special dispute resolution provisions in the international agreement itself, and those provisions might be administered by the WTO institutions.

As indicated above, other possible homes for a new agreement delimiting national authority to regulate the Internet include the OECD, UNCITRAL, WIPO, and the Council of Europe. The OECD would not be ideal, because its institutional focus is information exchange. As noted below, the OECD has played a role in developing an international consensus around principles of taxation and consumer protection for the

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98. I do not mean to suggest that the WTO’s mechanisms for enforcing the WTO agreements are in any way similar to the EU’s mechanisms for enforcing EC law. Among other things, the WTO lacks a prosecutorial arm such as the European Commission with authority to investigate the activities of member countries and take them to court if they fail to comply with applicable agreements. Moreover, unlike the ECJ, WTO dispute panels do not function as courts of appeal from WTO members’ national courts. In addition, the EC Treaty authorizes the ECJ to impose fines on Member States that fail to comply with the ECJ’s judgments. EC TREATY art. 228; see Case C-387/97, Commission v. Hellenic Republic, 2000 E.C.R. I-5047 (ordering Greece to pay the Commission €20,000 per day for each day Greece fails to implement an earlier judgment of the ECJ). By contrast, the WTO agreements recognize the ultimate autonomy of the member countries by permitting them to back out of their WTO commitments and impose appropriate tariffs in cases where a WTO member refuses to abide by a dispute panel’s decision. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 22, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1999), 33 I.L.M. 114, 115 [hereinafter Dispute Settlement Understanding]. For a description of how this WTO process unfolded in a particular dispute between the EU and the United States, see Sean D. Murphy, Biotechnology and International Law, 42 HARV. INT’L L.J. 47, 82 (2001).

99. Dispute Settlement Understanding, supra note 98, art. 17.

electronic marketplace. Unlike the WTO, however, the OECD lacks a dispute settlement infrastructure. Rather, as Fabrizio Pagani recently suggested in an OECD-supported study, the OECD uses "peer review" and "peer pressure" to encourage member countries to adopt common approaches to key issues. Peer pressure alone will not give teeth to a new agreement delimiting national authority to regulate the Internet. Of course, the OECD could be redesigned to perform dispute settlement functions, but it is not clear why member countries would take that step if they could leave the OECD intact and address the same issues within the existing WTO infrastructure.

UNCITRAL may be an alternative to the OECD. UNCITRAL's goal is "to further the progressive harmonization and unification of the law of international trade." Moreover, UNCITRAL has had some success in preparing international agreements that facilitate international commerce, including e-commerce. In addition, UNCITRAL has an important advantage over the OECD. As a United Nations organization, UNCITRAL's membership is broadly based. The OECD, by contrast, remains something of a rich man's club, despite admitting members such as Mexico that fall outside the traditional circle of developed nations. But UNCITRAL shares the main disadvantage of the OECD—a lack of dispute resolution mechanisms. "UNCITRAL's mandate by the General Assembly does not extend to participation in either public or private disputes. Consequently, UNCITRAL does not nominate arbitrators, administer arbitrations, certify arbitral authorities, or offer legal advice in specific disputes." Countries wishing to negotiate an international agreement delimiting national authority to regulate the Internet have no compelling reason to ask the General Assembly to revise UNCITRAL's mandate if they can achieve their goals through the existing WTO infrastructure.

Unlike the OECD and UNCITRAL, WIPO and the Council of Europe do have dispute settlement infrastructures. WIPO provides
mediation and arbitration services for private parties with intellectual property disputes, and the Council of Europe operates the European Court of Human Rights (ECHR). WIPO probably would not be an appropriate home for a new international agreement of the sort under discussion, however, because WIPO deals exclusively with intellectual property issues. Although the new agreement might touch on such issues, it will focus on problems of applicable law, which lie outside of WIPO's traditional area of expertise. The ECHR resembles the WIPO dispute settlement system in one respect: it has a relatively narrow subject matter jurisdiction—protection of human rights under the European Convention on Human Rights. It seems more sensible to allow the ECHR to continue to focus on this important area, and let the WTO take on the responsibility for administering a new agreement that enhances free trade on the Internet. Moreover, the Council of Europe resembles the OECD in that it has a relatively narrow membership. The WTO, by contrast, has 145 members. Although the United States participates in the work of the Council as an observer, the United States is not a member, and the Council’s traditional focus has been European, not international issues.

It should not be assumed that the relevant members of the WTO would be enthusiastic about the idea of including within the WTO framework an agreement delimiting national authority to regulate the Internet. On the contrary, it is common knowledge that WTO members have made little headway in dealing with e-commerce issues. Indeed,
to date, WTO members have not even been able to agree on how to characterize many online products under the WTO legal regime. Moreover, unlike the EU, which has a real legislative process driven by the European Commission's views on what measures are needed to support the objectives outlined in the EC Treaty, the WTO has no formal legislative process or mechanisms. WTO agreements result from bargains among WTO members. In areas that WTO members do not consider a priority or on which they cannot find common ground, no agreement will occur. An international agreement addressing the Yahoo! problem might encounter precisely this fate. It is possible, however, that such an agreement could attract interest from members who currently are not sure what, if anything, the WTO can or should do about e-commerce. In a recent review of progress on e-commerce issues, several WTO members expressed interest in discussing a set of principles that would encourage development of the electronic marketplace. Thus, there may be opportunities in the WTO context for work on an international agreement of the sort under discussion here. If the WTO proves unable to work on this issue, it may be necessary to reexamine the OECD or WIPO as possible institutional homes. Alternatively, European countries could look to the Council of Europe for a European solution.

B. Potential Stumbling Blocks

There are many contentious issues that countries might encounter if they undertook to prepare an international agreement that deals with the type of problem presented by the Yahoo! case. These include cultural protection, privacy, application of taxes to the Internet, and consumer protection, among others. This Article is not the place to review these that electronic commerce "creates new challenges and opportunities," and "instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme." Id. Thus, after three years, the WTO was still thinking about how to deal with e-commerce issues, and not about the issues themselves.


116. WTO members also might bargain their way to an agreement that is too weak or vague to handle the Yahoo!-type cases that are likely to arise in practice. This is, of course, an ever-present problem in the WTO context. Nevertheless, as the steady volume of WTO dispute settlement activity suggests, WTO members are capable of reaching agreements with real impact in the world. See Dispute Settlement: The Disputes, at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2002 (last visited Feb. 21, 2003) (listing 281 disputes filed since 1995). There is no reason to believe that they could not do so here, if they wished.

117. See, e.g., Third Dedicated Discussion, supra note 115, at 2.
issues in detail, but it is useful to discuss them briefly because each area could generate *Yahoo!*-type conflicts between countries that are not subject to the E-Commerce Directive. Moreover, since each of these areas is excluded in whole or in part from the E-Commerce Directive, there would be considerable pressure to exclude them from a new international agreement. Clearly, however, if too many important areas are excluded, the agreement may not be worth negotiating, let alone adopting. Thus, EU Member States may have to decide up front whether they would be prepared to accept an agreement that covers more areas of the law (or excludes fewer) than the E-Commerce Directive itself. Other participating countries would have to determine how much of the Directive’s framework of exclusions they could accept. The Article returns to this issue in Section C, below, where it outlines a possible compromise that places greater reliance on the override mechanism than does the Directive.

Perhaps the primary stumbling block to an agreement delimiting national authority to regulate the Internet would be disagreements over whether it is necessary or appropriate to carve out an exception for national laws that purport to protect or promote culture. This issue proved notoriously divisive during the Uruguay Round negotiations over what became the WTO General Agreement on Trade in Services (GATS). Several European countries, with support from other quarters, insisted on retaining the right to apply cultural legislation to television, film, and other services. The United States, with strong support from domestic motion picture studios, fought for a regime that would have treated such cultural legislation as an illegal trade barrier. Ultimately, the United States backed down, after obtaining commitments that the issue would be revisited in the context of ongoing efforts to liberalize trade in services. This same issue arose within the EU itself, when some Member


120. CROOME, supra note 119, at 311. For further background on disagreements between the EU and United States over cultural legislation, see Tina W. Chao, Comment, *GATT’s Cultural Exemption of Audiovisual Trade: The United States May Have Lost the Battle but Not the War*, 17 U. PA. J. INT’L ECON. L. 1127 (1996).

States insisted on including an exemption for cultural legislation in the E-Commerce Directive,\(^\text{122}\) raising fears that Member States might enact content requirements for the Internet of the sort that have been adopted for television broadcasting.\(^\text{123}\) Given the strength of concern about cultural issues in some EU Member States and other countries, any effort to define the limits on national authority to regulate the Internet is likely to trigger a request for an exemption covering cultural legislation.\(^\text{124}\) Predictably, the U.S. government may reply that the principle of forbearance should apply to this field. As a practical matter, the only way to avoid another bruising battle over a "cultural exemption" may be to defer the issue to the ongoing Doha Round GATS negotiations.\(^\text{125}\) If WTO members successfully resolve the issue, their resolution should be crafted in a manner that would render it applicable to the Internet.

Privacy or data protection is another area that might prove contentious during negotiations over a possible agreement defining national authority to regulate the Internet. Most EU Member States now have adopted laws implementing the Data Protection Directive,\(^\text{126}\) and national data commissioners in each country are beginning to explore the territorial scope of these new privacy laws. A Working Party of the national data commissioners recently published a paper suggesting that in many instances, companies based outside the EU that collect personal information via the Internet from people living in the EU may be expected to comply with Member State data protection laws.\(^\text{127}\) The United States does not have a comprehensive national privacy law, and is unlikely to

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122. See supra notes 53–57 and accompanying text.
123. Television Without Frontiers Directive, supra note 51, arts. 5, 6 (requiring broadcasters to reserve a portion of their broadcast time to transmit "European works").
125. Currently, it appears that the EU and the United States may be headed toward an impasse over audiovisual services within the WTO negotiations as well. See Lamy Pledges to Protect Culture Rules, TECH EUR., Feb. 13, 2003, at V.3–4.
adopt one any time soon. Japan has been working on a national privacy law for several years. Australia and Canada have national privacy laws, but these differ from one another, and from the EU regime. Given these different national approaches, an impasse may be unavoidable if countries insist on addressing data privacy in an agreement delimiting national authority to regulate the Internet.

Taxation of the Internet already is a source of discord between the United States and the EU, and the issue could become a stumbling block during negotiations over an agreement delimiting national authority to regulate the Internet. A primary objective of the EU’s new E-VAT Directive was to ensure that non-EU organizations selling electronically to consumers within the EU would be required to collect VAT and remit it to EU Member States. Even before the EU adopted the new Directive, U.S. officials had issued statements criticizing elements of the plan and objecting to the EU’s decision to act unilaterally. The United States, by contrast, has imposed a “moratorium” on certain taxes related to the Internet through November 2003. In light of these different

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128. For an analysis of privacy laws in the EU, the United States, Japan, Canada, and Australia, see Mark F. Kightlinger et al., International Privacy, in INFORMATION TECHNOLOGY AND ELECTRONIC COMMERCE, supra note 28.

129. It would be ironic if the issue of data privacy blocked development of a broad agreement delimiting national authority to regulate the Internet. There actually is a high degree of consensus among developed nations about the basic principles that should govern collection and use of personal information. These principles were articulated in the early 1980s by the OECD and the Council of Europe, and reaffirmed in the 1990s, most recently in the EU-U.S. Safe Harbor Agreement. See Org. for Econ. Co-operation & Dev. [OECD], Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (Sept. 23, 1980), available at http://www.OECD.org/EN/document/0,,EN-document-43-nodirectorate-no-24-10255-29,00.html; Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981, Europ. T.S. 108, available at http://conventions.coe.int/treaty/EN/Treaties/HTML/108.htm; Safe Harbor Principles, 65 Fed. Reg. 45,666 (2000). The text of the Safe Harbor Agreement can be found on the U.S. Department of Commerce website. See Safe Harbor, at http://www.export.gov/safeharbor (last visited Jan. 13, 2003). The remaining significant disagreements relate to how these principles should be enforced and what limits an organization that accepts the principles should observe when transferring personal information to an organization that has not accepted the principles. As the Safe Harbor Agreement demonstrates, it is possible to address these disagreements once the parties understand the relevant national rules and the existing enforcement regimes.


approaches, participating countries could reach an impasse, if they broach the problem of taxation in a new international agreement.\textsuperscript{132}

Arguments about consumer protection in the online environment also could undermine efforts to fashion a new international agreement. Among other things, such disagreements have prevented participants in the Hague Conference from reaching consensus on an international agreement on jurisdiction.\textsuperscript{133} Disagreements over consumer protection also presented an important sticking point in the effort to move the E-Commerce Directive through the European Parliament and the Council of Ministers.\textsuperscript{134} In light of the debate within the EU, it seems unlikely that the Member States will be disposed to adopt an approach in a broader international setting that places tighter restrictions on their authority to impose their consumer protection laws on the Internet. At the same time, the United States seems likely to stick to its position in the Hague Conference that companies should be expected to comply with applicable laws in their home country. Given the depth of feeling on this issue, an impasse may be difficult to avoid.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{132} The OECD has made some progress in coordinating member country views on taxation of e-commerce. \textit{See}, e.g., OECD, \textsc{Electronic Commerce: Taxation Conditions Framework} (1998), \textit{available at} http://www.oecd.org/pdf/M000015000/M00015517.pdf. For a more general description of OECD's work in this area, see \textit{About: Tax and Electronic Commerce, at} http://www.oecd.org/EN/aboutlO,,EN-about-101-nodirectorate-no-no-no-29,00.html. In light of the OECD's ongoing efforts, it may be advisable to leave the issue of taxation within the OECD's portfolio.
\item \textsuperscript{134} European Commission officials ultimately brokered a compromise under which, among other things, the Directive reaffirms the applicability of the existing corpus of Community consumer protection laws, \textit{see supra} note 64, excludes from the scope of the "country of origin" rule national laws related to consumer contracts, \textit{see supra} note 62 and accompanying text, and includes consumer protection as a ground for triggering the override mechanism, \textit{see supra} note 65 and accompanying text.
\item \textsuperscript{135} Participating countries might avoid an impasse by building on the OECD's work on consumer protection. The OECD issued non-binding Guidelines for Consumer Protection in the Context of Electronic Commerce (OECD Guidelines) that embody an emerging international consensus on how companies should do business online. OECD Directorate for Sci., Tech. & Indus. Comm. on Consumer Policy, Guidelines for Consumer Protection in the Context of Electronic Commerce, C(99)184 final, \textit{available at} http://www.oecd.org/pdf/M000000000/M00000363.pdf. A new international agreement might require the OECD Guidelines to be incorporated appropriately in national consumer protection laws affecting the Internet. Alternatively, companies hoping to benefit from the forbearance principle might be required to commit to abide by the OECD Guidelines.
\end{itemize}
C. A Formula for Compromise?

Section B identified several contentious issues that almost certainly would demand attention during discussions about an international agreement defining the limits on national authority to regulate the Internet. This list is not intended to be exhaustive, and it seems likely that other issues also would breed serious disagreement. One way to “solve” this problem would be to take all contentious issues off the table by exempting them from the proposed international agreement. Participants in the Hague Conference currently are exploring this approach in an effort to develop a less ambitious convention on recognition and enforcement of foreign judgments than the one originally envisaged. The disadvantage of this approach is obvious: if every potentially contentious issue is removed from the international agreement, the final product may be too narrow to provide any real solution to the problem of conflicts in national authority to regulate the Internet. Disputes such as the Yahoo! case will proliferate in all of the areas that the international agreement fails to address. This result should hold little appeal for national governments or the organizations that they regulate.

An alternative approach may be available if, as this Article has recommended, the international agreement follows the basic model of the E-Commerce Directive. The solution would be to draw up a list of controversial areas and, instead of carving them out of the agreement through exemptions, place as many of them as possible within the framework of the override mechanism. Thus, for example, instead of leaving a participating country entirely free to apply its privacy or consumer protection legislation to website operators in other participating countries, the agreement might require the participating country to activate the override mechanism. The participating country then would have to notify the relevant foreign government, and engage in discussions about a possible solution based on the principle of home country control. If talks proved fruitless, the participating country could attempt to apply its law extraterritorially, and other participating countries would be free to bring a challenge in the appropriate international forum. Thus, an orderly procedure would replace the current, relatively anarchic situation, and each participating country

would retain some freedom to take measures to protect citizens and domestic businesses in appropriate circumstances.  

Relying on the override mechanism rather than broad exemptions would have a couple of additional benefits. First, it would recognize and take advantage of the fact that national approaches to many of the more contentious issues may be very similar, even if not identical. Similar legal results often might be achieved under quite different regimes, if enforcement authorities have an incentive to search for practical solutions that preserve home country control over domestic website operators. The override mechanism would give them such an incentive. Of course, the EU did not follow this approach, but instead carved out numerous exemptions from the E-Commerce Directive and the “country of origin” rule. Many of the exemptions relate, however, to areas that already are regulated by EC law, areas where free movement and some form of home country control or mutual recognition previously had been established. As noted earlier, the unusual thing about the E-Commerce Directive is that it attempts to subject broad stretches of Member State law to a “country of origin” rule without harmonizing the affected laws. The override mechanism is designed to deal with controversies in areas of lingering concern.

A second benefit of relying on the override mechanism rather than broad exemptions is that the actual rate of compliance should be higher under a system that promotes home country control. The point here is quite simple: All other things being equal, U.S. companies such as Yahoo! are more likely to comply with U.S. federal and state laws than with French laws. French authorities will be better able to address concerns raised by French citizens and companies, if French authorities work with U.S. federal and state authorities to obtain robust enforcement of U.S. federal and state laws. Thus, French citizens and companies actually should benefit from an arrangement that channels controversial issues into the override mechanism instead of carving them out for unilateral action by the French government. This is not to say, of course, that the override mechanism ultimately would resolve all disputes amicably. The Yahoo! case may exemplify the type of situation in which U.S. federal and state authorities could and would do relatively little to

137. Of the four stumbling blocks described in Section B of the text, taxation may be the only one that would not fit neatly within the override mechanism. Tax policy on the Internet will affect large numbers of business in many countries, and thus it would be difficult to deal with applicable law disputes on a case-by-case basis. Thus, participating countries may wish to exclude taxation from the proposed international agreement and instead focus their energy on the OECD’s efforts to develop internationally acceptable principles for Internet taxation. See supra note 132.
address the concerns of French citizens because of constitutional limits and, perhaps, disagreements over issues of principle. Nevertheless, it is possible that Yahoo! could have reached an accommodation with domestic officials that it would not be willing to reach with a foreign government. Even if the dispute ultimately proved intractable, Yahoo!, the U.S. government, and the French government would not be in a worse position for having tried to find a mutually agreeable solution than the position they are in today.

D. Is an International Agreement Worth the Effort?

Given the difficulties that must be surmounted, is it worth attempting to develop an international agreement defining the limits of national authority to regulate the Internet? Clearly, in one sense, the answer to this question depends upon the agreement. A bad agreement may be worse than no agreement at all. Moreover, different stakeholders may have different criteria for what would constitute a "bad" agreement. For example, the business community probably would object strongly to an agreement that left each company subject to national laws in a wide range of areas in all participating countries. By contrast, consumer groups may object to an agreement that appears to strip consumers of their right to rely on national consumer protection regimes. The best that can be said in answer to these kinds of objections to an international agreement is that they should be raised during the negotiating process. They do not constitute objections to an agreement per se.

Of greater interest is the argument that an international agreement defining the limits on national authority to regulate the Internet is unnecessary because the status quo—i.e., the Yahoo! case—reflects a sensible response to conflicting claims of jurisdiction to prescribe.\[138\] Although this argument takes different forms, it typically begins with the premise that the Yahoo! case really is nothing new or particularly shocking.\[139\] Indeed, the argument goes, the Yahoo! case actually reaches a sensible result because it allows France to try to apply its laws to limit the purportedly harmful effects within France of a U.S.-based Internet service. At the same time, under Yahoo! the U.S. courts will protect the U.S. service from any overreaching by the French within the United States. Moreover, the "system" is particularly well-suited to protect smaller U.S. online services because such services are essentially judgment proof

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138. For an example of this line of argument, see Goldsmith, supra note 3; see also Reimann, supra note 1, at 669 n.24.

139. Reidenberg, supra note 3, at 264 (stating "[o]n the surface, the Yahoo case is a mundane exercise in the analysis of territorial sovereignty and personal jurisdiction").
Thus, even if they are found by French courts to have violated French law or harmed French citizens, they can remain safe within U.S. borders and escape the reach of the French. An international agreement almost certainly would ruin this relatively cozy arrangement, by conceding to the French (and all other participating countries) some authority to impose their national laws on service providers located abroad.141

Responding fully to this argument would require a much longer Article. There are, however, several points that should be made. First, the issue is not whether the Yahoo! case is new or shocking, but whether the Yahoo! case represents the tip of an iceberg. Although cases such as Yahoo! did arise before the advent of the Internet without necessitating a new international agreement, these sorts of cases may proliferate as cross-border e-commerce expands.142 Indeed, each of the stumbling block issues mentioned above is a potential flashpoint for conflicts between national regimes. What used to be a trickle of cases affecting relatively

140. See Goldsmith, supra note 3; Reimann, supra note 1, at 669 n.24. Swire has suggested that national efforts to regulate the Internet will succeed against large, highly visible international organizations ("elephants") but not against small, more mobile players ("mice"). Peter P. Swire, Of Elephants, Mice, and Privacy: International Choice of Law and the Internet, 32 INT'L L. AW. 991, 1019-24 (1998). For a general discussion of the difficulties associated with enforcing judgments against website operators established in foreign countries, see Henry H. Perritt, Jr., Will the Judgment-Proof Own Cyberspace?, 32 INT'L L. AW. 1121, 1131-48 (1998).

141. A more radical line of argument would attack both the status quo (the Yahoo! case) and my proposal for an international agreement, supporting instead a more anarchic environment in which nation states do not attempt to impose their domestic laws on the Internet. Johnson and Post are the best-known exponents of this position. See Johnson & Post, supra note 3; Goldsmith, supra note 3, at 1199 n.3 (citing a string of articles by Johnson and Post pursuing this theme); Shamoil Shipchandler, Note, The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question, 33 CORNELL INT'L L.J. 435, 458-62 (2000) (arguing for "non-regulation as the solution"). Lessig and Goldsmith, among others, have criticized the Johnson and Post position. Lessig, supra note 3; Goldsmith, supra note 3. Although the anarchist view is interesting, I do not respond to it here because, as a practical matter, it almost certainly will not prevail. As the Yahoo! case shows, some countries will attempt to apply domestic laws to the Internet, including online services based in other countries. The real question is not whether we can persuade them to refrain from doing so (we cannot), but whether it is worth persuading them to enter into an international agreement that will force them to do so in a relatively sensible and predictable manner.

142. See, e.g., Reidenberg, supra note 3, at 269-71 (describing cases in which U.S. state and federal courts have applied domestic laws to foreign website operators); Patrick G. Crago, Note, Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union, 20 HASTINGS INT'L & COMP. L. REV. 467, 484-85 (1997) (describing Germany's efforts to enforce compliance with anti-Nazi legislation by foreign online services). The European Commission clearly was convinced that disputes among EU Member States over whose law applies to the Internet would be common enough and costly enough to warrant adoption of the E-Commerce Directive as a preventive measure. See Proposed E-Commerce Directive, supra note 48, at 7-10.
few people and businesses could become a flood. An international
agreement might serve as a levy to prevent or at least channel the flood.
Of course, if such cases remain relatively uncommon, an international
agreement might not be worth the effort.

Second, all other things being equal, companies large and small gen-
erally prefer predictable legal environments to unpredictable
environments. The current legal environment is extremely unpredictable
because it is anarchic. Any international agreement worth negotiating
should reduce considerably the unpredictability of the environment by
establishing guidelines in many areas where, currently, no guidelines exist.
This is not to suggest that everyone would be happy with the guidelines.
Indeed, each guideline is likely to make some stakeholders happier than
others. But at least all stakeholders would know what the guidelines are,
and they would be able to adapt their behavior accordingly.

Third, although the status quo may provide some comfort for large
multinational companies such as Yahoo! by protecting their assets in
their home countries, it essentially abandons them to the tender mercies
of foreign governments insofar as those companies maintain assets
abroad. An international agreement that imposed some restrictions on
foreign governments should represent a step forward from the standpoint
of a large multinational company. This would be true even if the agree-
ment did not entirely tie the hands of the foreign government, but simply
defined the areas in which the foreign government would and would not
be allowed to impose its laws on a multinational. Yahoo! might prefer an
arrangement that left it subject to a clearly defined 10 percent of French
law over the status quo, which leaves it subject—at least potentially—to
100 percent of French law.

Fourth, and last, the defense of the status quo outlined above seems
to presume that smaller online companies operating across borders via
the Internet are willing to be scofflaws in foreign countries as long as
they can remain safely hidden within their own borders. In the author’s
experience, most organizations wish to obey the law, and they will be
very troubled by an arrangement in which a company, or its officials, can
be “safely” convicted of a civil or criminal offense within France be-
cause the company has no assets within France. Moreover, U.S. lawyers

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143. Reidenberg identifies some of the assets that Yahoo! maintains in France that a
French court might have attacked in order to enforce its judgment. Reidenberg, supra note 3,
at 269.
144. The calculation might change if the international agreement also dealt with en-
forcement of judgments. Yahoo! might not support an arrangement under which it would be
subject to 10 percent of French law, if all French judgments within that 10 percent were fully
enforceable in the United States.
generally are forbidden by the rules of professional conduct from advising a client to violate the law.\textsuperscript{145} Thus, company counsel, both inside and outside, should resist any defense of the status quo that rests on a notion of "safe" unlawful conduct abroad. An international agreement could identify the areas where participating governments may regulate if they choose, and thus assist companies to determine in what areas they may have to modify their behavior to obey applicable foreign laws. Of course, even with an international agreement in place, some online companies may ignore the laws in foreign countries, and other online companies may implement technical measures to pull out of particular countries rather than obey the laws. In both situations, however, the international agreement would clarify the legal environment within which the company must formulate its plan of action.

In sum, the status quo does not represent a particularly appealing arrangement from the standpoint of large or small online companies. A well-crafted international agreement that increases the predictability of the legal environment should represent a step forward.

\textsuperscript{145} Model Rules of Prof'l Conduct R. 1.2(d) (2002); DC Rules of Prof'l Conduct 1.2(e) (2002).