Yahoo! and Limitations of the Global Village

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The global explosion of information technology could usher in a new era signalling the end of the law of individual nations. In its place, the worldwide village may finally develop a body of rules that would alter the tradition of international relations. Some observers believe that this dream may have been destroyed by last fall's French court decision to stop auctions of Nazi memorabilia on Yahoo!. On November 20, 2000, Judge Jean-Jacques Gomez of the Tribunal de Grande Instance of Paris, in *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*, imposed criminal liability on the U.S.-based website for taking actions that did not violate the law in the United States. After months of litigation and testimony about the technology underlying the Internet, Yahoo! now has agreed to monitor its global auction site for Nazi-related objects and speech. As a consequence of this case and others like it, global websites are now increasingly concerned about whether their content will violate criminal laws of scores of nations.[1]

It would be a mistake, however, to conclude that this case is a step backward for France from recognizing the Internet's impact on free expression. On December 15, 1998, less than two years before the *Yahoo!* case was decided, the criminal court of Paris dismissed charges against five directors of newspapers who were accused of violating a French law against publishing political polls during the week before an election. The court determined that the law in question was incompatible with the guarantees of freedom of speech contained in Article 10 of the European Convention of Human Rights. The criminal court of Paris, which is not known for its leniency, determined that because the French public could see the polling data on foreign websites, the prosecutor's efforts to enforce the law against publication were invalid. In this case, then, a court of first instance took the liberty of refusing to apply clear and generally enforceable criminal rules because of the evolution of practices made possible, and even routine, by the technological breakthrough of the Internet.

These two cases are far from being contradictory. Rather, they are examples of the complexity that global media impose upon national legal systems. The *Yahoo!* case and the debate surrounding it represent one more step on the way to harmonizing speech rights on the Internet but also illustrate the limits of protecting freedom of speech on international media operating under the constraints of national laws.

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The *Yahoo!* Case

Yahoo! was accused of violating Article 24 *bis* of the 29 July 1881 Act and Article 645–1 of the French Criminal Code. Article 24 makes it illegal to contest the existence of one or more crimes against humanity. Article R. 645–1 prohibits the possession, sale, or public display in France of uniforms, insignias, or emblems worn by Nazi organizations before or during World War II. Courts have also held that the law prohibits "revisionist" statements and literature—in particular, those seeking to justify Nazism, disputing the reality of Nazi war crimes, or inciting racism or anti-Semitism.

The Union des Etudiants Juifs de France (UEJF) and the Ligue Contre le Racisme et L'Antisémitisme (LICRA) claimed that Yahoo! Inc. and Yahoo! France had violated Article 645–1 by operating from French territory and making available auction sites displaying and selling approximately 1,000 items of Nazi memorabilia to French residents. The UEJF also claimed that Yahoo! Inc. and Yahoo! France had violated the criminal code by making available to French residents, either directly or through hyperlinks, two "monuments of contemporary anti-Semitic literature" (*Mein Kampf* and *Protocols of the Elders of Zion)* as well as photographic depictions purportedly proving that the gas chambers operated by the Nazis never existed.

The complainants focused on actions taken by the U.S.-hosted site Yahoo.com, but Yahoo! Inc. also has a French subsidiary, with local assets, employees, and a commercial website. This is significant because there may be factual distinctions between companies with significant French contacts and those with no physical presence in France.

The Court's Decision

The Court of Grande Instance of Paris made its decision in several steps.

First, and most important to American websites operating abroad, the court immediately rejected arguments contesting its jurisdiction and standing to apply French law against Yahoo! Inc. The court found that French law could prohibit the offending website from being made accessible in France. This finding was made despite the facts that the Yahoo! website was hosted on servers located in the United States, is owned and operated by an American company, is addressed primarily to users in the United States, and the content at issue is protected under the First Amendment. Others in the French government, including Marylise Lebranchu, the Minister of French Justice, supported the court's position. Under current French jurisprudence, the court held, a French court is competent to apply French law to a website from the moment a site is accessible in France. According to the court, permitting access to Nazi-related content and the sale to French residents of Nazi memorabilia constitutes

> a wrong on the territory of France, a wrong, the unintentional nature of which is apparent, but which is the cause of harm to the LICRA and UEJF which both have the mission of pursuing in France any and all forms of banalization of Nazism, regardless of the fact that the activity complained of is marginal in relation to the entire business of the auction sales service offered on the Yahoo.com auction site.

Yahoo! has filed a declaratory judgment suit in California arguing that the French court exceeded its proper jurisdiction and is pressing ahead with that suit despite the apparent resolution of its issues with the judgment of the Paris court.

Since the French decision, this theory of jurisdiction has been followed by other European courts. On December 12, 2000, Germany's highest court, the *Bundesgerichthof*, held that a website based in Australia could be subjected to Germany's laws against pro-Nazi speech and denial of the Holocaust. The case was brought against Frederick Toben, a well-known Holocaust revisionist who was born in Germany but is now an Australian citizen.[2] In another case, an Italian court ruled that Italian libel laws could be applied to any online information that could be read by an Italian. Under this theory, the law of any country could be applied to any impact of content in that country. This presents an obvious problem for global websites that do not want to reduce the protection of their speech to the lowest common denominator.

Using technological means to prevent French Internet users from accessing Nazi content on the global Yahoo.com site remains controversial.

The second step the court took was to order Yahoo! "to take any and all measures of such kind as to dissuade and make impossible any consultations by surfers calling from France to its sites and services . . . which infringe upon the internal public order in France, especially the selling of Nazi objects." Even though the court recognized the technical difficulty of the order, Yahoo! Inc. was given two months to formulate compliance proposals.

Third, the court required Yahoo! France, the French-language website operated by Yahoo!:

> to warn surfers, by a banner, prior to the surfer's entry into the Yahoo.com site, that should the result of his search on Yahoo.com . . . point toward sites, pages or forums . . . which constitute violations of French law, such as is the case of sites which, whether directly or indirectly, intentionally or unintentionally, seek to excuse or justify Nazism, it must interrupt the consultation of the site in question.

Yahoo! was able to deal with some aspects of the court's order relatively easily. It removed, for example, links to *Protocols of the Elders of Zion.* Warnings were added to the "conditions of use" section of the Yahoo.fr site.[3] Yahoo! also drafted a French-language warning to be transmitted to any French user who instituted an Internet search that could be answered by any Nazi material or speech: "Warning: By continuing your search on Yahoo! US, you may be led to consult revisionist sites whose content is illegal under French law and whose consultation, if you continue, is punishable."

Using technological means to prevent French Internet users from accessing Nazi content on the global Yahoo.com site remains controversial. Yahoo! argued to the French court that it would be impossible under the current state of technology to implement the required measures without destroying the working quality of the proposed services. Facing these arguments, the court ordered the creation of a committee of experts, which included Vinton Cerf (one of the creators of the Internet) to study the feasibility of a filtering system to make Nazi-related content inaccessible to French users. The panel found that some 70 percent of French nationals could be blocked from the site by a screening technology based on the Internet protocol (IP) address of the users' computers. IP addresses often, but not always, reflect the geographic origin of a computer that is attempting to access a website. This percentage could be increased to almost 90 percent, the committee found, if Internet service providers asked users to complete nationality questionnaires.

In its November 2000 decision, the French court ordered Yahoo! to create a filtering system for content that is illegal under French law. Although it found that Yahoo! had complied "for the most part with the spirit and letter of the decision of May 22, 2000 [the court's prior order]," the court ordered Yahoo! to take additional steps. It also reserved the right to order a daily fine of some $12,000 per day for noncompliance.

In early 2001, Yahoo! announced that it would no longer allow the sale of Nazi-related items or links to Nazi-related speech on its global site. Yahoo! reported that it would use new filtering software and search engines as well as a staff of people to comb its site for possible offending messages and merchandise.[4] This screening system will seek not only material that would violate French law, but also other hate speech, including content relating to the Ku Klux Klan and other hate groups. Yahoo! is not alone; Amazon and eBay also have agreed to screen out certain items from among the millions of user-defined auctions that are posted on those sites each day.[5]

The *Yahoo!* case, and others like it, have led many to believe that filtering technologies will be the mechanism for erecting borders on the borderless Internet. As Stanford Law Professor Larry Lessig points out:

> If there's a filtering technology developed that can be 99 percent effective, the first person that's going to buy it is Yahoo!, so French citizens cannot buy things on Yahoo! that French citizens are not supposed to buy . . . . When the French buy it, then the Germans are going to buy it because the Germans want to subvert Nazism. When the Germans buy it, the Singaporeans are going to buy it because they want to limit people from getting access to stuff that's anti-Singapore . . . .These technologies that zone cyberspace on the basis of your location will flourish in the next 10 years.[6]

Lessons from *Yahoo!*

The *Yahoo!* case is enlightening in many respects. A superficial conclusion might be that French judges are being conservative by trying to strictly apply French law to the Internet. On the contrary, however, the solution taken by the French courts is original and innovative when measured against the French legal system. The focus on a technological solution to prevent Internet content from violating French law is a novel one. The fact that the French court preferred a technical filtering solution instead of shutting down the site or imposing strict limitations on French Internet users is a less obtrusive remedy than could have been ordered under French law. The court looked for a pragmatic solution rather than a perfect juridical solution, which might have included asking to close the American site or make it totally inaccessible to French users.

A more extreme approach has been followed elsewhere. In the *Toben* case, for example, a judge ordered a warrant of arrest for an Australian national (of German birth) for revisionist opinions held on his Australia-hosted Internet site. This decision is similar to the *Yahoo!* case in that the German court held that it had jurisdiction over a foreign website that could be reached by German Internet users, but it is less innovative than the *Yahoo!* decision. Instead of requiring German audiences to be kept from the illegal content by a filter or other means, the German court simply ordered the arrest of the site's author. Moreover, the contacts that Mr. Toben had with Germany were far more remote than the contacts that Yahoo! had with France.

Challenging Legal Traditions

The *Yahoo!* decision is symbolic of an evolution in the way European countries apply their laws. Modern legal history, of course, has been made by sovereign and independent states decreeing the laws applying on their territory and taking action to ensure that those laws are applied and respected there. Modern technology is challenging that infrastructure. Digital networks uniting telephone and data communications, satellite and cable television, and other telecommunications technologies that permit communications between any place in the world are available comparatively cheaply and without state control. Because of digital communication, all kinds of information circulates without regard to national borders. Unlike the telephone, with its technology of binary dialogue, or the television, still a largely one-way communication medium, new information technologies allow interactive exchanges, without mediators or controls, between a multitude of actors whose identification can be problematic.

The Internet is a political and legal challenge to all the countries of the world, and each one reacts according to its political tradition. In Europe, and particularly in France, the tradition of state control on civil society remains very strong. For a long time, access to inexpensive, powerful, and versatile communication media was seen as a potential threat to the French legal system. These new technologies have caused some consternation in France, and the government's traditional role has been challenged by the new information systems. The Council of State in France recognized this sea change by observing that "this world [the Internet] is not naturally the one of the law. The law, with its territorial application, is based on homogeneous and steady behavior and categories, all elements that are missing in the case of Internet."

This does not mean that the Internet is untouchable by the law. In the same report, the Council noted that, contrary to the views of some commentators, decentralized and borderless digital networks are not immune to legislative control. By exposing the insufficiencies of the substantive law, the Internet strongly affects France, where the expectations concerning the state's regulatory and protective powers tend to be higher than in many other democratic countries.

A Shift Toward Harmonized Rules

In western Europe, the Internet is not the first harbinger of a new transnational order that questions the classic theories of sovereignty. Individual European nations are becoming more accustomed to dealing with other legal systems because of the increasing ascendancy of European law, the progressive emergence of an international legal order and the multiplication of transnational organizations and institutions.

In France, as in the rest of Europe, the harmonization of law within the European Union has become the basic principle. With the development of information technology, harmonization is even more important and has a greater role in the social lives of Europeans.

This harmonization is, however, far from linear and homogeneous in European social life. There are three major types of difficult legal issues. First, some domains remain closely and deeply linked to the national history of a country. In such areas, no individual country will be willing to sacrifice its own values for the benefit of another country. This principle is illustrated perfectly by the Yahoo case, which dealt with the difficult national issue of Nazi-related speech. Second, there are areas of the law where the social stakes are not as high. In these areas, there is growing international consensus that makes possible compromises about how law should be applied. Third, some areas are suitable to negotiation on the harmonization of their framework laws because they do not question the foundations of the national social contract.

The Importance of National History

Because information circulates so quickly and broadly over the Internet and other media, conflicts of law arise in a new domain—public and individual liberties. Thus, when an American website makes available content of an anti-Semitic nature, it remains within the limits of its constitutional rights of freedom of speech, one of the founding principles of the democratic organization of the United States. When this content is made available in France or in Germany, however, French and German nationals may see it as constituting an intolerable attack on a founding democratic principle of their countries, dedicated by the law with regard to their nations' histories. The confrontation of these legal systems, contradictory but both legitimate, is unquestionably problematic and could even destabilize relations among countries. The criminal law does not lend itself well to a conflict of values coming from outside the country. In this respect, the emergence of an international criminal law, with universal values, is still as embryonic as the world community itself, and only takes into account the most horrible crimes. A detailed regulation of freedom of expression on the Internet, adapted to the different human communities touched by it, cannot be expected.

The *Yahoo!* case is not about the law that must be applied to the Internet in the commercial world but about the confrontation between contradictory but essential values of two countries. In this domain, harmonizing the laws will be difficult to achieve in the near or medium term. This difficulty contributes to the instinctive resort to censorship. The *Yahoo!* case demonstrates that other answers are possible, and it is for this innovative reason that the *Yahoo!* case deserves attention.

The difficulty of assigning liability on the Internet does not mean that all regulation of content, with respect public liberties, is impossible. On the one hand, as the French Council of State admits in its report, solutions that were not really appreciated in continental Europe, such as industry self-regulation, are now considered feasible. And the potential for technical solutions may

also be an important tool to reconcile various legal demands.

In the area of electronic commerce, the European Union has established a remarkably balanced system for determining the civil liability of Internet service providers (ISPs). It could serve as a model for a system of criminal liability. The EU's E-Commerce Directive[7] has determined that:

• The ISP should only be liable for illegal content when the ISP does not respect the demand of a competent authority to withdraw or stop access to that content, mirroring the "notice and takedown" procedure that will be familiar to American lawyers using the Digital Millennium Copyright Act.

• However, the responsibility of the ISP could arise from the moment the provider had actual knowledge of facts or circumstances showing the illicit character of the content—for example, if a private party sent a takedown request to the ISP based on, for example, an infringement on intellectual property.

A French law regarding freedom of communication, enacted in August 2000, follows the approach established by the E-Commerce Directive. It provides that the ISP may only be held criminally or civilly liable for the content of information hosted on its servers if, having been apprised of the illegality of the data by a judicial power, the ISP refuses to act expeditiously to prevent access to the illegal content.

These rules are not revolutionary. They establish a system of liability to assure that each country's regulatory authorities may have appropriate oversight over the distribution of information. By providing that the ISP must take action only upon notice from the appropriate authorities, the rules reintroduce a territorial logic essential for the effectiveness of the law without preventing the development of the Internet or undermining public liberties. (A contrary rule that would make an ISP liable for the content of communications of others hosted on its servers would stand in the way of the development of the Internet by increasing the risks and liabilities of ISPs.) No presumption of guilt weighs on the ISP, whose legal situation is clarified. Indeed, even the French government has shown a particular interest in a system of self-regulation by which the Internet industry would be in charge of determining means to ensure respect for the law through codes of conduct or technical systems. Such a position, which is quite innovative in the French legal system, demonstrates a willingness to find solutions that would meet the needs of both the industry and legal institutions.

In this domain, in short, it is less a question of harmonizing the rules than a question of ensuring that nations have the means to enforce their own national values in the world of information. Balancing this effort with the necessity to protect freedom of expression, of course, is a difficult task.

Universally Shared Values

Since the end of the Second World War, there has been much talk of universal values. One prime example is the Universal Declaration of Human Rights adopted by the United Nations in 1948; other examples include international conventions on the rights of children, the necessity of preventing organized crime, and the like.

These conventions most often exist when values among countries can be shared despite the extremely sensitive national area of criminal law enforcement. If consensus exists on the basic constituent elements of certain criminal behavior, the negotiations on how nations can collaborate to eliminate the behavior is less difficult. The conventions then provide a mechanism for multiple nations' legal aims to be pursued in concert. For example, all countries outlaw sexual abuse of children, and an international consensus in favor of strong enforcement exists. Such conventions allowed the Italian courts to charge 1,491 people for child pornography on the Internet, to begin the dismantling of an important epicenter of child pornographers in Russia, and to authorize the international "Wonderland" police effort that resulted in the cracking of a multinational ring of child pornography and sexual abuse.

In other areas, regional agreements are possible even if global agreements are not. For example, the protection of one's personal privacy is a principle shared by most Western countries. But intense discussions have been held at the international level to attempt to find a satisfactory compromise on privacy—not for a principle on which everyone would agree, but on a form of protection that could be addressed differently by different countries. Even if all Western states had a system assuring the principle of personal privacy on a national level, it would still be necessary to harmonize them in order to permit the growth of international communications. This harmonization was undertaken by European Union member states, which have adopted a directive on this topic, but the American tradition in the area of privacy has favored self-regulation rather than government imposed standards. In late 2000, the E.U. and the U.S. partially harmonized their approaches by adopting "safe harbor" principles for data privacy. This set of agreements took a subset of the principles on which the E.U. and the U.S. could agree and has made them more universally applicable.

Impact on the Social Contract

Finally, it is possible to reach consensus on international standards in some areas because these areas do not include a strong element of the national social contract. For example, since ancient times, international trade has brought together economic actors from different countries. In these cases, it became necessary to regulate legal conflicts to solve disputes between merchants of different cities or countries. The markets of ancient Greece, the maritime trade of the Roman Mediterranean, the fairs of the Middle Ages, and international trade as it developed in the nineteenth century all spawned legal actions and led to the development of many new legal instruments.

Today, of course, the next step is the development of digital networks over which commerce will be transacted electronically. This method of trade modifies two fundamental features of international commercial relations to which our regulatory systems must adapt:

• *The type of market participants:* Until now, cross-border commercial relations were essentially the domain of professionals—conducting sales and purchases of goods, undertaking financial transactions and using any form of international contract that was accepted in the industry. Now, however, Internet commerce is not only about relations between companies. Relations between consumers and companies, and the consumer protection laws that this implies, will become increasingly important.

• *The speed of the transaction:* Inter-

net commerce not only overcomes traditional geographical obstacles but also provides for instantaneous payments. These new features must be integrated into the legal tools created to control such market transactions. For example, the substantive law coming from conventions in Rome, The Hague, and Brussels (widened by the Convention of Lugano completed by the E.U.'s Brussels Regulation, adopted on December 22, 2000) applies to questions about legal enforcement and the competence of the judge in distance selling. Certain general principles are beginning to emerge, based largely on the status of the parties engaging in commerce.

• *Between companies:* The main rule is the goodwill of the parties. Countries that have signed international conventions recognize that the contracting parties should be free to choose the laws to which they will submit. On the other hand, in the absence of an agreement between the parties, the law of the seller's place of residence will be applied. The parties also can agree on the competence of a court to adjudicate disputes between them. In the absence of such agreements, the court of the defendant's place of residence or principal place of business will be competent.

• *Between companies and consumers:* In the absence of an agreement, the law of the consumer's country will be applied to trade with a company. Even if a contract designates a foreign law, a consumer can always have the benefit of the consumer protection laws in his or her home country. As to enforcement, the consumer also has the right to choose a court in his or her place of residence or a court in the place of residence of the company's principal place of business. In France, as well as some other countries, domestic law provides that a French national can always pursue a non-EU defendant in a French court.

Rules concerning the form and proof of electronic transactions have been harmonized through the E-Commerce Directive and the E.U.'s Directive on Electronic Signatures. These documents draw on legislation in other parts of the world as well, and there is growing international consensus on how electronic trade will be accomplished.

The problem of resolving of conflicts in which individual consumers are involved is, on the other hand, a more difficult one. The E.U. has attempted to resolve these issues in the manner set out above, but some e-commerce companies have opposed this basic structure because they believe that greater certainty is necessary for electronic trading—if any consumer can force a company to apply the law of the nation where the consumer resides, it is difficult for the e-commerce company to determine with certainty which legal system will govern its customer disputes. These principles also do not guarantee that any judgment achieved by the consumer will be enforceable in the country in which the vendor resides. The Brussels Regulation deals with this issue by simplifying the recognition and enforcement of judgments—at least among the fifteen member states of the European Union. International bodies outside the E.U. also are debating these principles in hopes of achieving a broader consensus.

Conclusion

Time will be required to harmonize the various approaches each country takes to applying its laws to Internet communications. Whether international norms can be established that will provide a predictable atmosphere for both discourse and trade on the Internet will depend largely upon what values are at stake. Strongly held national values—such as the right to free expression in the U.S. or the right to be free of anti-Semetic speech in France or Germany—will inevitably conflict, and those conflicts will be among the most difficult to reconcile. Other Internet developments, such as the prevention of crimes against minors and the facilitation of e-commerce, involve norms that are more universal and less subject to national barriers. Greater speed toward the harmonization of Internet standards will be possible in areas where distinctive national values are less strongly held.

Endnotes

1. *See, e.g.*, Lisa Guernsey, *Welcome to the World Wide Web. Passport, Please?*, N.Y. TIMES, Mar. 15, 2001, *available at* http://www.nytimes.com/2001/03/15/technology/15BORD.html); Ashley Gauthier, World Wide Worry, NEWS MEDIA & LAW, Winter 2001, at 12.

2. German law contains several provisions that address fascist speech. A section on "Incitement of the People" criminalizes incitement to violence by appeals to racial or ethnic hatred. A section on "Incitement to Racial Hatred" criminalizes the display of "documents which incite racial hatred" or depict violence against humanity in a positive light. A section on "Slander on Confessions, Religious Groups and Association of World Views" criminalizes slandering the views of religious groups in an attempt to breach the peace. Yet another provision includes a prohibition against the *Auschwitlfüge*, the denial of the Holocaust. These provisions are invoked relatively rarely, and the standard of proof is high—*mit an Sicherheit grenzender Wahrscheinlichkeit*, or "a probability amounting to certainty."

3. That warning states in French: "Lastly, if in the context of a search made on *www.yahoo.fr* based on a tree structure, key words, the results of this search were to lead to sites, pages or chats the title and/or the content of which constitute a breach of French law, in particular due to the fact that Yahoo! France cannot control the content of these sites and external sources (including the content referenced on other Yahoo! sites and services around the world), you should cease your consultation of the site concerned on penalty of incurring the sanctions applicable under French law or of having to respond to lawsuits brought against you."

4. *See* Troy Wolverton and Erich Luenig, *Can Filters Prevent Nazi Auctions?*, ZD Net, Jan. 3, 2001, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2670388,00.html.

5. A group of French concentration camp survivors filed suit in January 2001 against Yahoo! Inc., accusing it of "justifying war crimes and crimes against humanity."

6. Quoted in Brendan I. Koerner, *The Accidental Activist*, BUSINESS 2.0, Mar. 20, 2001, *available at* http://www.business2.com/content/magazine/indepth/2001/03/12/27868.

7. Directive 2000/31/EC of the European Parliament and of the European Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce).