

Case Analysis of *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v Yahoo! Inc. (USA), Yahoo France, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000.*

Citation: [2001] Electronic Business Law Reports, 1(3) 110-120.

By Yaman Akdeniz*

Copyright (c) 2001 Yaman Akdeniz.

This version published at http://www.cyber-rights.org/documents/yahoo_ya.pdf

The Decision

The Court ordered Yahoo! Inc to comply with an earlier court ruling (22 May 2000) within three months. The Court stated that if Yahoo! Inc did not comply with the order within the given time, it would be fined 100,000 francs (approximately £10,000) for each day after the deadline.

The Case and the May 2000 Order

In May 2000, the League Against Racism and Anti-semitism (LICRA) and the Union of French Jewish Students (UEJF) brought an action against Yahoo! Inc. and Yahoo France. They alleged that Yahoo! Inc hosted an auction website which contained for sale thousands of items of Nazi paraphernalia and that Yahoo France provided a link and access to this content through the Yahoo.com website.

The French Court in its initial judgment held that access by French Internet users to the auction website containing Nazi objects constituted a contravention of French law and an offence to the 'collective memory' of the country and that the simple act of displaying such objects¹ (e.g. exhibition of uniforms, insignia or emblems resembling those worn or displayed by the Nazis) in France constitutes a violation of Article R645-1 of the Penal Code and is therefore considered as a threat to internal public order.

Therefore, in 22 May 2000, the Tribunal de Grande Instance de Paris ordered Yahoo! Inc. to take all necessary measures to dissuade and make impossible any access via yahoo.com to the auction service for Nazi memorabilia as well as to any other site or service that may be construed as an apology for Nazism or contesting the reality of Nazi crimes. Furthermore, Yahoo France was ordered to issue to all Internet surfers, even before use is made of the link enabling them to proceed with searches on yahoo.com, a warning informing them of the risks involved in continuing to view such sites.

Yahoo! Inc. argued that the Court of Paris is not competent to make a ruling in this dispute and lacked jurisdiction over the defendant as its services are offered in the US.

* CyberLaw Research Unit, Faculty of Law, University of Leeds, Leeds LS2 9JT. E-mail: lawya@leeds.ac.uk. See also Akdeniz, Y, Walker, C., Wall, D., (eds), *Internet, Law, and Society*, Addison Wesley Longman, December 2000. Note also the author's websites <<http://www.cyber-rights.org>> and <<http://www.cyber-rights.net>>.

¹ Or offering for sale objects or works whose sale is strictly prohibited in France.

But the Court responded that despite any possible difficulties in executing its decision in the territory of the United States, this claim was rejected. Yahoo! Inc. also argued that there were no technical means capable of satisfying the terms of the order of 22 May 2000. Furthermore, Yahoo! Inc. on the assumption that such means existed, argued that their implementation would entail unduly high costs for the company, and might even place the company in jeopardy and would to a degree compromise the existence of the Internet, being a space of liberty and scarcely receptive to attempts to control and restrict access.

Yahoo! Inc. argued through-out the trial that its services are directed essentially at surfers located in the territory of the United States of America, and its servers are based in the USA, and that “a coercive measure instituted against it could have no application in the United States given that it would be in contravention of the First Amendment of the United States Constitution which guarantees freedom of opinion and expression to every citizen.”

Yahoo France however did not challenge the May 2000 decision and to some extent complied with its obligations under the May 2000 order.

Issues related to Yahoo! Inc.

A panel of experts was appointed² by the Court following the May order to suggest possible solutions which Yahoo! Inc. could implement to prevent French Internet users from accessing the offending web pages. According to the panel of experts, in order to satisfy the terms of the court order requiring it to prevent access to auction services for Nazi objects, Yahoo! Inc. has to :

- 1) know the geographical origin and nationality of surfers wishing to access its auctions site,
- 2) prevent French surfers or surfers connecting from French territory from perusing the description of Nazi objects posted for auction, and even more importantly to prevent them from bidding.

The panel estimated that 70% of the IP addresses assigned to French surfers can be matched with certainty to a service provider located in France, and therefore can be filtered. But this finding was not without numerous exceptions as a large number of these, in the order of 20%, stem from the multinational character of the access provider or from the fact that they use the services of an international ISP or a private communications network. America Online (“AOL”) was the significant example to the exceptions as the dynamic IP addresses assigned by AOL to its users including those in France appear as being located in Virginia, USA. In this situation, the workstations of users residing in French territory appear on the Web as if they are not located in French territory as the experts wrote. This could also happen to French users who hide their real address on the Internet by using anonymizing technologies (see for example <http://www.anonymizer.com> and <http://www.safeweb.com>).³

² “Experts testify in French Yahoo! case over Nazi memorabilia,” Associated Press, 06 November, 2000, at <<http://www.cnn.com/2000/TECH/computing/11/06/france.yahoo.trial.ap/>>.

³ See generally Akdeniz, Y., “Anonymous Now,” *Index on Censorship*, The Privacy Issue, 2000 (3), June, pp 57-62.

Two of the consultants, Laurie⁴ and Wallon considered that in addition to the geographical identification already practised by Yahoo Inc. to target its advertising, it would also be desirable to ask surfers whose IP address is ambiguous to make a declaration of nationality. According to the experts:

“This declaration, given on honour, would only be required of surfers whose IP address cannot be identified as belonging to a French ISP... At the discretion of Yahoo, this declaration could be made on the home page of the auctions site, or only in the context of a search for Nazi objects if the word ‘Nazi’ is included in the user’s request, immediately before the search engine processes the request.”

In these circumstances, the consultants considered that it cannot be reasonably claimed that this would have a negative impact on the performance and response time of the server hosting the Yahoo! auctions service. Therefore, according to the two experts, the combination of two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%. However, according to Vinton Cerf, the third expert, there were several potential problems with the identification approach:

“For one thing, users can choose to lie about their locations. For another, every user of the website would have to be asked to identify his or her geographic location since the web server would have no way to determine a priori whether the user is French or is using the Internet from a French location.”

Furthermore, according to Cerf, there may also be privacy concerns with this approach. For these and many other reasons, “it does not appear to be very feasible to rely on discovering the geographic location of users for purposes of imposing filtering of the kind described in the Court Order.” But Cerf approved the final report of the other two experts.

The Court in its November 2000 decision, by taking into account the experts’ report, stated that it should be borne in mind that Yahoo! Inc. already carries out geographical identification of French surfers or surfers operating out of French territory and visiting its auctions site. This is evidenced by the fact that Yahoo! Inc. routinely displays French advertising banners in the French language targeted at the French Internet users. Furthermore, the Court requested Yahoo! Inc. to include checks on the place of delivery of items purchased through the Yahoo auction website.

Moreover, the Court pointed out that Yahoo! Inc. is currently refusing to accept through its auctions service the sale of human organs, drugs, works or objects connected with paedophilia, cigarettes or live animals. In the views of the French Court, it would “most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies.”

⁴ See further Laurie, B., An Expert’s Apology, 21 November, 2000, at <<http://www.apache-ssl.org/apology.html>>.

Therefore, according to the French Court, Yahoo! Inc. does have the opportunity of satisfying the injunctions contained in the order of 22 May 2000 in respect of the filtering of access to the auctions service for Nazi objects and to the service relating to the work *Mein Kampf* which was included in the wording of the aforementioned order by the phrase “and any other site or service constituting an apology for Nazism” with the combination of these technical measures at its disposal and the initiatives which it is able to take in the name of simple public morality.

Issues related to Yahoo France

As far as Yahoo France was concerned, it modified and amplified its terms of use accessible by clicking on the link “Find out about Yahoo!” appearing at the bottom of each page on the site.⁵ Yahoo France also put in place a warning when a search by tree structure (categories) is requested, worded as follows:

“Warning : if you continue this search on Yahoo! US, you could be invited to view revisionist sites of which the content contravenes French law and the viewing of which could lead to prosecution.”

The above warning was systematically displayed in the context of a search by category (e.g. holocaust) through the Yahoo France website.

November 2000 Decision

The Paris Court rejected the plea of incompetence reiterated by Yahoo! Inc.; and ordered Yahoo! Inc. to comply within 3 months from notification of the present order with the injunctions contained in its order of 22 May 2000 subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.⁶ As far as Yahoo France was concerned, the Court stated that the initiatives undertaken by Yahoo France are technically capable of satisfying in large measure the terms of its order of 22 May 2000, with the proviso however that the warning is given every time the link is displayed “even before use is made of the link” to yahoo.com pages within 2 months following notification of the present order.

Reaction to the November 2000 Case

Yahoo! Inc. announced in January 2001 that it will no longer allow Nazi and Ku Klux Klan memorabilia to be displayed on its Web sites and a more proactive approach with a monitoring or filtering system would be in action. The new policy which also includes a ban on other forms of hate material took effect on January 10, 2001.⁷ However, Yahoo! Inc. also asked the U.S. District Court in San Jose to declare the French ruling

⁵ The following paragraph has been added: "Finally, if in the context of a search conducted on www.yahoo.fr from a tree structure or keywords, the result of the search is to point to sites, pages or forums whose title and/or content contravenes French law, considering notably that Yahoo! France has no control over the Content of these sites and external sources (including Content referenced on other Yahoo! Sites and Services worldwide), you must desist from viewing the site concerned or you may be subject to the penalties provided in French law or legal action may be brought against you"

⁶ See the English Translation of French ruling, Nov. 20, 2000, at <http://www.cdt.org/speech/international/001120yahooofrance.pdf>.

⁷ “Yahoo! Will Ban Hate Material and Charge Fees on Auction Sites,” *Wall Street Journal*, 03 January, 2001, P. B2; “Yahoo changes tack, to monitor hateful content,” *National Post*, January 4, 2001.

in violation of the First Amendment and that the French court does not have jurisdiction over content produced by a US business.⁸ This was followed by LICRA filing a motion with the San Jose Court to dismiss Yahoo Inc.'s case⁹ which was denied by the US District Court for the Northern District of California in San Jose in June 2001.¹⁰

Conclusion

The Yahoo case is an example of the nation-states desire to enforce and apply their national laws to a global and multi-national medium such as the Internet. The French approach in that sense is similar to the German approach in which CompuServe¹¹ was found liable under German criminal law for the distribution of illegal content over the Internet (mainly child pornography). The decision came despite the efforts of the Prosecution who agreed with the defence that "it was technically impossible to filter out all such material" over the Internet.¹² While there is more consensus on the issue of child pornography as illegal content,¹³ the same is not true for hate speech¹⁴ and the viewing or advertisement of nazi memorabilia is not illegal in many states, and certainly not in the USA where Yahoo! Inc. offers its services.

With the advancement of new technologies and the Internet, the cultural, moral, and legal differences are more evident than ever. While such differences are legitimate and acceptable, enforcement of such local and national standards to a company based in another country remains problematic and therefore "states within Western Europe should especially avoid pandering to the lowest common denominator where the least tolerant [such as France and Germany] can set the pace."¹⁵ This is especially true when the decision involves thought policing rather than for example requiring Yahoo Inc. only to monitor or ban the shipment of nazi memorabilia items to French citizens living in France.

Although European Union member states are prevented from imposing a monitoring obligation on service providers with respect to obligations of a general nature under the

⁸ "Yahoo! asks U.S. court to block French ruling on Nazi auctions," *Associated Press* (San Jose, California), December 22, 2000.

⁹ "French anti-racism group, Yahoo back in court," *Upside Today*, February 8, 2001.

¹⁰ See <<http://www.cdt.org/jurisdiction/010607yahoo.pdf>>.

¹¹ See the Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An English version of the case is available at <<http://www.cyber-rights.org/isps/somm-dec.htm>>.

¹² "Ex-CompuServe Executive Convicted," *Associated Press* (Berlin), 28 May, 1998. But the decision was eventually quashed in November 1999. "Germany clears Net chief of child porn charges," *The Independent*, 18 November 1999. Another related case is the prosecution of Frederick Toben, a German-born Australian Holocaust revisionist (with an Australian passport) who denied the Holocaust, by the German Bundesgerichtshof (German Federal High Court). This was despite the fact that Toben's website was published and maintained in Australia. See Chidi, G., "Web law blocks growth When in Rome," *InfoWorld*, Vol. 23, Issue 10, March 5, 2001; Gold, S., "German Landmark Nazi Ruling," *Newsbytes*, December 12, 2000.

¹³ Akdeniz, Y., "Child Pornography," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, 231-249.

¹⁴ Steinhardt, B., "Hate Speech," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, 249-272.

¹⁵ Brackets added by the author. Walker, C., & Akdeniz, Y., "The governance of the Internet in Europe with special reference to illegal and harmful content," [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, pp 5-19, at page 14.

recently published EU Directive on electronic commerce,¹⁶ this “does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.”¹⁷ So perhaps the decision of the French Court may also be justified under the EU regime in relation to illegal Internet content. Furthermore, the ICRA action against Yahoo Inc. was also supported by the French government and Marylise Lebranchu, French Minister of Justice stated that “the information highway must not be, cannot be and never will be a paradise for such people (proponents of hate ideology). While space may be virtual, responsibility is very real.”¹⁸

But two important points and facts need to be emphasised in relation to the Yahoo case.

First, it remains as an important fact that Yahoo! Inc., a US company offering services in US has not committed a crime in the United States where it provides its services and it is certainly unreasonable to expect companies all around the globe to respect various national differences. However, an additional protocol (pushed forward by the French government) to the Council of Europe’s draft Cyber-Crime Convention on the dissemination of racist and xenophobic propaganda is expected before the draft Convention is finalised,¹⁹ and in the near future there may well be common standards in this field. But if the international norms are developed by adhering to the rules and laws of the lowest common denominator, then such actions including the Yahoo decision itself will have a chilling effect on cyber-speech and will lead into censorship of Internet content which is not deemed as illegal in the country of origin.

Secondly, the great appeal of the Internet is its openness, ease of access, and publishing. Efforts to restrict the free flow of information on the Internet, like efforts to restrict what may be said on a telephone, would place unreasonable burdens on well established principles of privacy and free speech. Censorship nor the French thought policing will help the development of this exciting medium. The value of the Internet as a “social, cultural, commercial, educational and entertainment global communications system the legitimate purpose of which is to benefit and empower online users, lowering the barriers to the creation and the distribution of expressions throughout the world”²⁰ should have been recognised by the French Court. Additionally, the value of attempting to ban content any government find offensive on a global environment is highly

¹⁶ Directive 2000/31/EC of the European Parliament and of the 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”) OJ L 178 17 July 2000 p.1

¹⁷ See paragraph 47 and 48 of the preamble of the Directive on electronic commerce and article 15 of that Directive.

¹⁸ Marylise Lebranchu, French Minister of Justice, Racism on the Internet: is it inevitable? Colloquium of the International League Against Racism and Anti-Semitism, 16 November, 2000, at <<http://www.info-france-usa.org/news/statmnts/netracis.htm>>.

¹⁹ See footnote 15 in relation to article 9 (content related offences) of the Council of Europe Draft Cyber-Crime Convention, PC-CY (2000) Draft No. 25 Rev, Strasbourg, 22 December, 2000 (Public version – Declassified). Note also the Council of Europe Parliamentary Assembly motion for a recommendation on Racism and xenophobia in cyberspace, Doc. 8886, 7 November, 2000.

²⁰ Cyber-Rights & Cyber-Liberties (UK) statement for the Seminar for the Media on the Convention against Transnational Organized Crime (Palermo, Palazzo dei Normanni) within the E-media: An avenue for communication or cyber-crime? session, United Nations Convention Against Transnational Organized Crime, Palermo, Italy, 12-15 December, 2000, at <<http://www.cyber-rights.org/reports/palermo.htm>>.

questionable. “Top-down” censorship efforts not only fail to prevent the distribution of material to users in the local jurisdiction as in the Yahoo case in France, but constitute a direct assault on the rights and other interests of Internet users and service providers in other jurisdictions, who are not subject to the “censorship” law in question.