

fighting nazi and anti-semitic material on the internet: the yahoo! case and its global implications

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Introduction

THE Internet allows the free circulation of ideas but it also facilitates the spread of Nazi, anti-Semitic, revisionist, and otherwise racist speech. A large number of the racist websites and newsgroups are legally hosted here in the US under the shelter of the First Amendment of the Constitution. More than a year ago, a single French judge ordered Yahoo! Inc. to take actions in order to end the patent infringement of French law due to (1) the dissemination of Nazi and anti-Semitic propaganda and to (2) the selling of Nazi paraphernalia in France.

Soon after, the Yahoo! ruling became one of the most famous French decisions in the US. In Europe too, the Yahoo! case has been widely recognized. Somehow, it became a turning point in the European policy concerning Internet regulation in general, particularly, hate speech. Previously, the European authorities felt helpless because cyberspace, by its very nature, escapes the enforcement of domestic law. As a result, the authorities were powerless against racist organisations that set up their servers in the US. As we will see, this has all changed after the Yahoo! case.

Background of the Yahoo! case

Before looking at the current European legal battle against cyber hate-speech, let's wind the clock back and try to understand what was so special in the Yahoo! case.

In May 2000, two French NGOs, the French Union of Jewish Students and the League Against Racism and anti-Semitism, sued Yahoo! Inc. before a French court of emergency proceedings, called the “Tribunal de grande instance de Paris”.

They complained about several pro-Nazi, anti-Semitic and revisionist websites hosted by Yahoo! Inc. They pointed out literature such as *Mein Kampf* and a French version of the *Protocol of the Elders of Zion*, both of which could be downloaded free of charge from the Geocities portal hosted by Yahoo! Inc.¹

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The search engine of Yahoo! Inc. was also criticized because it displayed problematic key-words such as “revisionists” that linked to webpages that deny the horror of the Holocaust.

But chiefly, they denounced the Yahoo! Inc. auction website, because they claimed it was organizing a virtual market of more than a thousand explicit Nazi items and paraphernalia, including Nazi and SS flags, clothing, photographs, badges, and a wide range of items with printed swastika, like cushions, plates, mouse pads, knives — a complete Nazi outfit.

This Nazi paraphernalia was accessible by Internet users from French territory. Yet the display of Nazi items on French soil is firmly prohibited by the French Criminal Code.² Indeed, France along with most European countries bans racist, xenophobic, and ethnically objectionable speech altogether. This does not mean, however, that there is not a strong freedom of speech tradition in Europe. Legally, the European Convention for Human Rights and Fundamental Freedoms defines the right to free speech as a qualified right that “carries with it duties and responsibilities” and “may be subject to formalities, conditions, restrictions or penalties”.³ This Convention was adopted by the Council of Europe in 1950. After the atrocities of the Third Reich, the general spirit was, on the one hand, to protect the right to free speech, but, on the other, to reject Nazi and racist ideology altogether. Therefore, the European Convention refuses to protect speech that threatens, denies or even leads to the destruction of human dignity and human integrity. According to the European Convention, the persons and organizations that aim at the denial of basic human rights and liberties should never be granted the protection of the law for themselves.⁴

The case

Yahoo! Inc. and its managers were not prosecuted in a criminal trial in France. Rather, the Yahoo! case was a civil action led by French NGOs. Before the Court, Yahoo! attorneys presented various legal arguments that can be grouped into four categories:

1. The lack of jurisdiction
2. The passive role of Yahoo!
3. The First Amendment
4. Technical constraints

*Benoit Frydman***1. The lack of jurisdiction argument**

Yahoo! Inc. claimed that the French judge had no jurisdiction whatsoever over an American company doing business in the US.

However, Judge Jean-Jacques Gomez held that he had personal jurisdiction over Yahoo! Inc. because the company was doing business within the French territory. Not only could Yahoo! Inc. and Geocities websites be accessed from France, but items advertised on the Yahoo! Inc. auction site could also be bought from France.

Moreover, Yahoo! Inc. owned 70% of Yahoo! France, a subsidiary that aims to develop Yahoo! Inc. business in France. In addition, and this circumstance played an important role in the case, Yahoo! Inc. targeted the French audience by sending them advertising banners in French.

These facts presented clear evidence that Yahoo! Inc. had what American lawyers call “sufficient contacts” with the French forum. Similarly, US courts have, for instance, ordered a casino in Antigua to stop offering gambling over the Internet to New Yorkers.⁵ They also prohibited an Italian Web server to use the American trademark Playmen,⁶ and they applied the US anti-cyber-squatting Act to two Canadians who were fighting over the domain name ‘technodome’.⁷ What was surprising in the US was that this time, the situation was reversed. However, since more than 50% of the Internet ‘market share’ has taken place outside the US in the past two years, this kind of situation is likely to become more prevalent.

2. The passive role argument

Yahoo! Inc. emphasized that it does not endorse Nazi ideology and, in fact, firmly rejects those ideas. Yahoo! claimed that it was playing a passive role as a common carrier of goods, or a “mere conductor” of information. From its perspective, the content of the information going through its servers was somehow irrelevant and was, in any case, outside its command.

However, this argument was flawed in at least one respect: for as long as Yahoo! had been monitoring and editing the content of its auction website, it could not reasonably claim it was a “mere conductor” of information.

In any case, the European philosophy is to regulate the Internet via ISPs. So, from the French court’s perspective, it is not enough to argue that you are an ISP and then refuse to comply with a court injunction.

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3. The series of arguments based on the First Amendment

Before the Court, Yahoo! said that it could not afford to be a censor. It cited the First Amendment of the Constitution, which protects the freedom of speech and forbids censorship based on content. This is a grossly mistaken statement since anyone familiar with the US Constitution knows that the First Amendment only applies to public authorities, and that it does not prevent private censorship or content-based editorial control.

Yahoo! then argued that if it removed hate speech and Nazi items from its websites, it would be accused by its own US clients of denying their First Amendment rights. Again, this statement was misleading. In reality, Yahoo! had already banned a lot of items from its auction site such as live animals, especially pet hamsters, as well as drugs, weapons and, believe it or not, used underwear... Yahoo! also tried to convince the French judge that the US legal philosophy that guarantees an extensive protection of free speech is the best weapon against Nazism and racism. In other words, to combat obnoxious speech, the wisest course is to promote counter-speech, and let the truth win out.

To this end, Yahoo! compared the plaintiffs' vociferous request for compelling measures with what it assumed to be the more useful reaction of the Jewish American community, which has found other ways to fight revisionist theories and anti-Semitic discourses. But, on this matter, Yahoo! Inc. was only looking at one side of the coin. In fact, the pressure put on Yahoo! Inc. by the Jewish American community played a decisive role in the ban on most Nazi items from Yahoo!'s auction website.

Finally, Yahoo! told the judge that any injunction declared by the French court would never be enforceable in the US because of the First Amendment of the US Constitution.

This proved to be true. After an injunction was issued by the French judge, Yahoo! Inc. filed a counter-suit in a San José, California federal court requesting that the French decision be declared unenforceable because it was repugnant to the First Amendment. In November 2001, the California District Court issued the declaration Yahoo! Inc. was looking for. The French NGOs have launched an appeal against this ruling. They are, however, unlikely to succeed given the legal principles that prohibit the enforcement of foreign judgments when the latter are contrary to the public policy of the forum.

According to Judge Gomez, the fact that his decision was unlikely to be enforced in the US was irrelevant and should not have prevented him from applying the French law.⁸

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This statement could be thought to be idealistic if not illusory. In our opinion, it is the turning point of the case, making it a landmark decision in the European policy against cyber hate speech. Because of the impossibility of enforcing in the U.S. European decisions dealing with hate speech, European countries had more or less given up their own standards of free speech on the Internet. Judge Gomez' position was different. The display of Nazi items on Yahoo! auction site was in breach of French law. So, Yahoo! Inc. would have to take it down or to block access to them from the French territory.

In May 2000, the French Court ordered Yahoo! Inc. "to take all measures to prevent any access [from the French territory] to the Yahoo.com auction service for Nazi objects or to any other site or service that may be construed as constituting sympathy for Nazism or contesting the reality of Nazi crimes."⁹

4. The technical argument

Two months later, Yahoo! Inc. answered that it could not comply with the terms of the court order owing to technological limitations. Quoting a French expert, Yahoo! argued that the very nature of the Internet and its architecture prevent any efficient monitoring or control of the data transmitted via the network. The filtering of the French IP addresses would take more than 6 months and cost the company more than \$500,000. Such an added cost would put the company at risk.

Judge Gomez designated an international panel of 3 experts (from France, Britain, and the United States) to see whether the court order could be practically implemented. The experts' report was not too impressive. The experts barely asked AOL and the French access providers industry group any questions. They only paid a single visit to the Yahoo! auction site. The experts stated that "nearly 70% of IP addresses allocated to French surfers can be linked with certainty and be filtered."¹⁰ For the other 30%, two of the experts advised a "declaration upon honour of his nationality by the user", which could achieve a significant filtering success rate. Only V. Cerf, the US expert, expressed concern about the reliability of this measure (people may lie about their nationality). It could also invade privacy. In the end the judge held that the measures suggested by the experts allowed Yahoo! to "comply to a reasonable degree" with the court order. He finally gave Yahoo! three months to implement these measures.

Repercussions of the Yahoo! case

The Yahoo! case has changed the attitude towards hate.com. While the hate business continues to grow dramatically on the Net, the

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European authorities have realized that they should try to fight it wherever it exists.

Today, public prosecutors systematically are chasing the authors of hate sites. European citizens have been prosecuted and some convicted, notwithstanding the fact that they had posted the illegal material outside Europe. The most spectacular ruling came from Germany where a German-born Australian was sentenced to ten months in prison for denying the Holocaust, in revisionist websites located in Australia. His appeal was dismissed by the German Supreme Court. In Germany the President of the local Government of Düsseldorf ordered all the ISPs established on his territory to block access to a number of Nazi and racist sites based in the US, under the threat of a fine exceeding \$200,000. Since then, users trying to access the banned sites have been redirected to the government website where they are given information about German law and the local Government policy.

In Switzerland, an NGO representing the Children of the Holocaust managed to convince the federal Swiss police to take action against the US-based portal Front14.org, which was hosting hundreds of Nazi and racist sites on its server, free of charge. The police put the gateway on a “black list” voluntarily abided by Swiss ISPs.

In France, human rights activists asked Judge Gomez, the judge who had issued the Yahoo! ruling, to order the French access providers to cut access to the same Nazi gateway, Front14.org. But the judge appeared reluctant to go one step further than in the Yahoo! case and denied the motion. He said, “there is no law under which access providers are compelled to filter the access on the Net”. The French judge only asked the access providers (and this is very unusual) to “freely” determine which measures they consider necessary to prevent Front 14 from pursuing its illegal activity.

At the end of the day, the Nazi portal was dealt with in a more radical manner, in the shadow of the law: it was hacked last November and has since then entirely disappeared from the Web (at least under this name).

The European directive on e-commerce, which came into force last January, provides another weapon. The directive limits the liability of ISPs for the content they host or give access to. However, unlike the 1996 US Communication Decency Act, the European regime does not grant immunity to ISPs. While the access provider is more or less safe if it plays only a passive role, the story is different for the hosting provider. It could be held liable if after obtaining actual knowledge that it is hosting illegal data, it does not act expeditiously to remove the data or to make it unavailable. The ‘actual knowledge’ can be the result of a notice provided either by a public authority, such as the police or the prosecutor’s office, or by a private party, such

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a watchdog, an NGO fighting racism, or ordinary citizens. In other words, the European directive sets up a notice and take down procedure that could help to reach American hosting providers despite the First Amendment shield. This new tool does not work as a stick (like fines or court orders) but as a carrot. The idea is to grant the hosting provider immunity when it decides to comply with a warning that it is hosting illegal content.

This system will probably stimulate the removal of hate content from the Internet. It creates an economic incentive that ISPs, even American ISPs, as business operators, would be eager to secure. They would be anxious to ensure their immunity and are therefore likely to act promptly after being notified of an infringement. Moreover, American ISPs which act in such a way will be fully backed by US law, namely a clause of the Communication Decency Act called “the Good Samaritan provision”, which states that:

No provider (...) of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider (...) considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.¹¹

The combination of the European directive clause and the Good Samaritan provision make it possible for Europe to reach American Internet companies, despite the US Constitution.

The willingness to exploit this new tool is already evident. For instance, Germany, which chose not to prosecute the Yahoo! auction site, has recently taken action against E-Bay, which runs the world largest shopping website. In May 2001 and again in January 2002, the German Agency for the Protection of the Constitution has warned the Californian company about the sale of Nazi songs, books, clothing, and other paraphernalia on its “marketplace.” In each instance, Ebay reacted to the notice and disabled access to the controversial items without delay. In addition, the company formally declared that it “will no longer host the sale of memorabilia from the Nazi period or anything related to fanatical groups.”¹²

Europe is by now pressing for new legislation that would define hate speech and make its propagation a cyber-crime.

Last November, the Cyber-crime Convention was adopted by the Council of Europe and has already been signed by a large number of European States, as well as Canada, South Africa, Japan, and the US, who participate actively in the negotiations. The Convention

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fosters international prosecution of child pornography and copyright infringements. However, the final version does not extend to hate speech and incitement to violence. This is due to the objection of the US delegation, which made it clear that such a regulation is contrary to the First Amendment and would prevent the US from signing the treaty. As a compromise, the Council of Europe decided to make the hate-speech provisions the subject of an independent protocol that should be ready by mid 2002. The protocol will define and criminalize the dissemination of racist propaganda and abusive storage of hateful messages. It is expected to target “off shore” hosting that aims to circumvent less permissive European regulations.

Last November, the European Commission issued a proposal that intends to provide that racist and xenophobic conducts would be punishable in the same way in all Member States. The offences covered by the proposal include public incitement to violence or hatred for racist or xenophobic reasons and the dissemination of racist material by any means, including the Internet.¹³

Conclusions

Here is a brief summary of the European policy to regulate hate speech on the Internet:

- Europe has decided to assert its values and fight the spread of hate speech not only in Europe but also everywhere on the Internet. During the last few years, Europe has conceived interesting tools and strategies in order to achieve this goal despite the conflict with US law and the difficulty of reaching US-based Internet companies.
- Europeans do not favour the strategy of zoning or renationalising the Internet by ordering national access providers to block problematic sites.
- They prefer to pressure hosting providers by enjoining or inciting them to take down hate material posted on their servers.
- At the same time, Europe is pressing for international regulation that would make hate speech a cyber crime.
- At present, the outcome of this battle is uncertain and the hate business is still flourishing on the Internet.
- Finally, and this important issue is left open for the discussion, the European policy could well lead not only to the stamping out of racist speech but also to the suppression of legitimate controversial speech that should be protected by the right to free speech in any truly democratic country.

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1. In France, books like the *Protocol* or *Mein Kampf* are censored, except for scientific publications that ought to warn the reader about the fallacy and the dangers of their content.
2. Article R. 645-1 of the French Criminal Code, that prohibits the wearing and display in public of Nazi uniform or symbol, except in the context of historic presentation. The action was based on article 809 NCPC (“Nouveau Code de procédure civile”) which states that the judge of emergency proceedings has the power to put an end to a patent infringement of the law (“trouble manifestement illicite”).
3. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The entire provision reads as follows: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
4. Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent that is provided for in the Convention.”
5. *People v. World Interactive Gaming Corporation*, 714 N.Y.S. 2d 844 (1999).
6. *Playboy Enterprises, Inc. v. Chuckleberry Pub. Inc.*, 79 Civ. 3525 (SAS), 1996 U.S. Dist. LEXIS 8435, 1996 WL 337276 (S.D.N.Y., June 19, 1996).
7. *Heathmount A.E. Corp v. Technodrome.com*, 106 F. Supp. 2d (E.D. Va. 2000).
8. Third decision, November 20, 2000, p. 4.
9. First decision, May 22, 2000 (ruling).
10. 87% of surfers connect to the Internet through AFA members and 79,43% of the IP addresses assigned by AFA members can be located in France: $87 \times 80 = +/- 70\%$.

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11. CDA 47 USC. § 230 (c) (2) (A).
12. Statement issued in May 2001, quoted by A. Rosenbaum in “Nazi Items Gone From Ebay Under German Pressure”, *Newsbytes*. When trying to buy a Nazi propaganda book or a World War II German army uniform, the user is now given the following notice: “Dear User: Unfortunately, access to this particular category or item has been blocked due to legal restrictions in your home country. Based on our discussions with concerned government agencies and Ebay community members, we have taken these steps to reduce the chance of inappropriate items being displayed” and “Regrettably, in some cases this policy may prevent users from accessing items that do not violate the law. At this time, we are working on less restrictive alternatives. Please accept our apologies for any inconvenience this may cause you, and we hope you may find other items of interest on Ebay” (Rosenbaum, *o. c.*).
13. Proposal for a framework decision, November 28, 2001.