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CAN YOU YAHOO!?: THE INTERNET'S DIGITAL FENCES

The Yahoo! auction case illustrates the problems inherent in the lack of a common Internet jurisdictional structure. This iBrief argues that the application of local law allowed France to win a victory against domestic hate groups, but dealt a blow to free speech everywhere.

Introduction

¶1 On November 20, 2000, the County Court of Paris entered final judgment in a case against Yahoo!, Inc. in a suit relating to the online giant's auction feature. The suit, brought by the League against Racism and Anti-Semitism ("LICRA")¹ and the French Union of Jewish Students ("UEJF")² focused on whether French law allows the exhibition or sale of items that cause or promote racial hatred. Justice Gomez, referring to an earlier order dated May 22, 2000, held that Yahoo! must block French users from accessing such materials or face penalties of 100,000 francs a day (approximately US \$13,948).³ Yahoo!'s French mirror site⁴ already blocked French users from accessing controlled materials, but the final order extends this ban to Yahoo!'s United States sites as well. While acknowledging the protection given to the material in the United States under the First Amendment, and Yahoo!'s aim at users in the United States, the French Court held that jurisdiction existed based on the existence of French advertisement banners keyed to French users on the U.S. site.⁵

¶2 Based on this jurisdictional inference, the court stated "the simple act of displaying such objects in France constitutes a violation of Article R645-1 of the [French] Penal Code and therefore [constitutes] a threat to internal public order."⁶ The effect of the order, as envisioned by Justice Gomez, is to require Yahoo! to police both the information placed on its websites by private third parties, and the geographical location of the parties who subsequently access that information.

¶3 In response to Judge Gomez's order, Yahoo! filed for a declaratory judgment in a U.S. District Court in San Jose, California stating that the French government lacks jurisdiction over the California-based company. In addition to the jurisdictional argument, Yahoo! also asserted that the French Court's order violates the First Amendment and the Communication Decency

Act's immunization of ISPs from liability for third-party content.⁷

¶4 Moreover, Yahoo! argued that the ban required by the French Court is technologically impossible to enact given the structure and nature of the Internet. While it is possible to block those individuals accessing the site from French domains, individuals redirected through third-party servers in other countries would require that the digital barrier desired by the French Court extend to the subject matter itself, not the means of access. Thus, Yahoo! argues that the only way to ensure that no French users can access information on an international website is to ensure no one can.

Digital Fences and Culture Clash

¶5 The Yahoo! case illustrates the growing difficulty of reconciling the growth of the Internet with international laws. Recently, Yahoo!'s German subsidiary was also investigated for offering sales of Hitler's "Mein Kampf", and Germany's Central Council of Jews is currently threatening to sue an estimated 800 ISPs that allow German citizens to access neo-Nazi websites.⁸ The Wisenthal Center, which tracks hate crimes, recorded that the number of websites promoting "hate" doubled to 3,000 in 1999 alone, many of them European extremist groups going online as their countries become more wired to the Internet.⁹ The laws enacted by individual countries are fundamentally tied to the history of each nation, a fact acknowledged by Hans-Gertz Lange, a spokesman for Germany's Federal criminal agency the Verfassungsschutz. Just as America's reverence for the First Amendment stems from its long history, Germany's "laws against incitement to racial hatred are tied up with [theirs]."¹⁰

¶6 This clash of cultures led Mark Weitzman, director of the Wisenthal Center, to remark, "I don't think one society should be able to impose its values on another."¹¹ Yet does such decoupling mean that one country should not affect the values of another via the Internet, or via laws applied in response to the Internet? Neither? Both? Should companies operating internationally be subject to all laws, or to none? Unless a uniform treaty is created, the answer appears as much tied to jurisdiction as to technology.

Internet Jurisdiction

¶7 The Yahoo! case also illustrates the lack of clear jurisdiction on the Internet. No international court exists to assert jurisdiction over websites and Internet content providers, resulting in a legal tennis match between some or all of the potential forums and parties involved. In this case the motivations of the parties are noble - France wants to ensure its

citizens are protected from offensive material, and United States companies want to ensure they are not subject to liability in a foreign country simply because they operate a website. However, there is no good claim by either party about which forum should have jurisdiction over this controversy.

¶8 Judge Gomez spoke in vague terms when stating that the Paris Court had jurisdiction over Yahoo!, and the issue itself, is probably just as vague as his language. If the controversy was purely inside the U.S., and France was assumed to be a state in the U.S., Yahoo! may not be subject to suit in that state because Yahoo! might not have "minimum contacts" with the forum state.¹²

¶9 Generally speaking, the operation of a website does not generate sufficient minimum contacts with any given forum simply because citizens in the forum state access the site.¹³ However, upon examination of "the nature and quality of commercial activity that an entity conducts over the Internet"¹⁴ a court may find jurisdiction if a defendant operates an "interactive" website.¹⁵ However, these cases dealt with websites that were interactive in that the company sold items to consumers. For Yahoo! though, the transactions are between two individual consumers and not between Yahoo! and a consumer because the sales are auctions.

The First Amendment and The Internet

¶10 If the U.S. District Court in San Jose finds that the French courts lack jurisdiction over Yahoo!, the online giant will likely prevail on First Amendment grounds. The First Amendment permits a very narrow window of speech regulation, generally false, misleading, or imminently threatening speech. Hate speech, although repugnant, does not fit into this window of regulated speech.

¶11 The Supreme Court has held that any attempt to criminalize bias-motivated speech or symbolic speech is unconstitutional.¹⁶ It seems apparent that this decision will be carried over into hate speech on the Internet, since the Internet is not giving way to any less strict scrutiny of speech regulation.¹⁷

¶12 Protected hate speech falls away from its protection, however, when this speech becomes a "true threat" - any hate speech directed at a specific person in the form of a threat of abuse or violence.¹⁸ 18 U.S.C. 875(c) states that "whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years or both."

Evidentiary proof is required to show that a reasonable person would perceive the defendant's transmitted message as a serious expression of an intention to inflict bodily harm.¹⁹ In applying this law to messages sent on the Internet, a hate-laden message would have to be directed at a specific person and the message would have to contain a specific threat.²⁰ This standard set a very high bar and the specificity required by the court makes it impossible for many cases to succeed.

¶13 Although the government is weary of regulating hate speech, private organizations are creating regulatory-type measures and systems serving the purpose of regulation. Organizations such as the ACLU, The Anti-Defamation League, The Simon Weisenthal Center, The Leadership Conference of Civil Rights, The Southern Poverty Law Center, and hatewatch.org, have all created various means to block, filter, or simply respond on their websites to the information posted on the many hate-filled websites worldwide. Additionally, websites can be blocked or filtered by way of programs such as Net Nanny, Cyber Patrol, and Safe Search that provide a private alternative to government intrusion. These blocking programs, however, have been criticized for being too crude and for blocking more than the harmful content.

¶14 The question still persists as to how far the First Amendment can insulate the actions of a U.S. company in an international forum and how far any country should be allowed to restrict speech on the Internet. By allowing one country to impose its restrictive laws upon the Internet, the door has been opened for any and all other countries to further constrain Internet speech. If all websites were subject to all the restrictive laws of every nation, the Internet would be forced to bow to the laws of the most restrictive nations. Judge Gomez won a victory against hate groups in France, but dealt a blow to free speech groups everywhere by applying local law to an international website.

Conclusion

¶15 While Yahoo! continues to resist the French Court's ruling, it recently began prohibiting items "associated with groups with promote or glorify hatred and violence", such as those affiliated with Nazism or the Ku Klux Klan, from its commercial websites.²¹ A spokesperson for Yahoo! denied that the French Court prompted the universal ban²² but the looming specter of lawsuits in every nation, subject to different laws in each court, can hardly be discounted.

¶16 The Yahoo! case illustrates many of the problems facing both foreign and domestic companies expanding into the Internet. The motivations of the parties involved are well

developed, but the law is not. Serious questions remain as to jurisdiction and the choice and breadth of law applicable on the Internet.

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Footnotes

1. <http://www.licra.com>, (visited April 2, 2001)
2. <http://www.uejf.org>, (visited April 2, 2001)
3. http://www.istf.org/archive/yahoo_france.html, (visited April 2, 2001)
4. <http://www.yahoo.fr>, (visited April 2, 2001)
5. Interim Court Order, No. 00/05308, The County Court of Paris (J. Gomez) (http://www.istf.org/archive/yahoo_france.html) (visited April 2, 2001)
6. See id.
7. Communications Decency Privacy Act of 1996, Pub.L.No. 104-104, 110 Stat. 137-39 codified at 47 U.S.C. §230 (1996)), <http://www.thestandard.com/article/display/0,1151,21026,00.html> (visited April 2, 2001)
8. <http://www.cnn.com/2001/WORLD/europe/germany/02/19/internet.jews/index.html>, (visited April 2, 2001)
9. <http://www.cnn.com/2000/TECH/computing/12/15/german.laws.on.web.idg/index.html>, (visited April 2, 2001)
10. See id.

11. See *id.*

12. See *International Shoe Co. v. Washington*, 326 U.S. 315, 66 S. Ct. 154 (1945)

13. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 420 (9th Cir. 1997)

14. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997)

15. See *Multi-Tech Systems, Inc. v. Vocal Tech Communications, Inc.*, 112 F.Supp.2d 1046, 1050 1051 (D. Minn. 2000) (Interactive website in which forum state residents could download software established minimum contacts with forum state); *The Sports Authority Michigan, Inc. v. Justballs, Inc.*, 97 F.Supp.2d 806, 812 (D. Minn. 2000) (Interactive website allowing forum state residents to purchase sporting equipment and contact business via email established minimum contacts with the forum state); *Park Inns International, Inc. v. Pacific Plaza Hotels, Inc.*, 5 F.Supp.2d 762, 765 766 (D. Ariz. 1998). (Interactive website that accepted online reservations from forum state residents established minimum contacts with the forum state).

16. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

17. See *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (Holding that the Communications Decency Act unconstitutionally limited the ability of adults to access indecent materials). Congress countered this decision by passing the Child Online Protection Act (CDAII) in 1998 (Pub. L. No. 105-277, 1401, 112 Stat. 2681 (1998)).

18. See *R.A.V.*, 505 U.S. at 393

19. See *U.S. v. DeAndino*, 958 F. 2d 146, 148 (6th Cir. 1992)

20. See *U.S. v. Alkhabaz*, 104 F. 3d 1492, 1505 (6th Cir. 1997)

21. <http://www.infoworld.com/articles/hn/xml/01/01/04/010104/hnnaziban.xml>, (visited April 2, 2001)

22. See *id.*