

Business e-Ethics: Yahoo! on Trial (A)

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Introduction: Calling Jerry Yang

On a fine day in June 2000, Jerry Yang, the co-founder of Yahoo!, arrived in the Paris offices of his company's French subsidiary. The previous evening, fresh from a conference in London sponsored by *Fortune* magazine where he was among the star speakers, he had joined in the inaugural bash for Yahoo! France's new building in an elegant quarter of Paris. Upholstered in Yahoo!'s purple and orange team colors with a soda machine offering free drinks, and five-point yellow stars bearing the names of new employees on the walls, the place evokes a magically perfect American high school, except that the youthful employees work very fast, long and hard.

As Yang settled in, a reporter for one of France's major newspapers, *Libération*, called to request an interview on a painfully sensitive subject. Since April, French anti-racist groups had been suing to block access by French net surfers to Yahoo.com's site, on the grounds that Yahoo! provided the opportunity to buy Nazi objects online, which is illegal in France. Yahoo! had lost the first round in May, when the court issued a preliminary ruling in accord with the plaintiffs' demands. The next hearing was scheduled for mid-July.

Yahoo! France's employees, at least one of whom had been pressured by her family to leave the company over the issue, urged Yang to meet the reporter. Though his operational responsibilities are limited, the creator of the online portal concept is still the company's inspirational leader, with the title of "Chief Yahoo!". He and his colleagues believed that the freedom of not only Yahoo!, but also of the Internet, might be affected by this case. They saw themselves as defending the right of Internauts everywhere to free expression, and the right of Internet companies to do business according to the laws of their home nations.

The decision was quickly made: The combination of *Libération*'s prominence and Yang's celebrity would assure a wide hearing. But what could he say to the reporter that would clearly explain Yahoo!'s position on the case and its implications for the Internet?

An Activist Sounds the Alert: February 2000

The events that preceded the reporter's call were set in motion by Marc Knobel, 39, a Parisian, doctor of history, and a researcher who earns his living by tracking hate groups for the Simon Wiesenthal Center in Los Angeles, California. Ever since his Jewish ancestors were driven from the Ukraine by Czarist pogroms, recalled Knobel in a bitter euphemism, "My family has tasted fascism in every flavor."¹ He had lost relatives in the Nazi extermination camps, where six million European Jews were systematically murdered in the Shoah, or Holocaust, before the fall of the Third Reich in 1945. For Knobel, the atrocities of genocides never ended: they continued in Rwanda, Bosnia, and anyplace else where a given people decides to annihilate another.

¹ Marc Knobel's quotes are drawn from an interview, February 6, 2001, and from follow-up telephone calls, unless otherwise indicated.

Since 1997, when he began conducting his research online, he had become convinced that the Internet was changing the landscape of hate for the worse. American extremists who previously risked arrest when they carried their propaganda to countries like France or Germany could now distribute their wares safely over the Web. Said Knobel:

“The Internet didn’t invent anything. These groups existed, they distributed their propaganda, forged bonds among themselves, met with each other. That hasn’t changed. But before Internet, they were largely confined to specific geographical zones. What’s new is the very great ease which allows me today to connect to the web pages and sites created by these groups, and to see what they distribute, who they are, what they’re doing, and to have access to their very essence.”

Ironically, he acknowledged that this shift had greatly facilitated the work of researchers like himself. And yet, said Knobel, “I would prefer, frankly, to never see a site that was created by the extreme right. Every time we leave open ground to the extreme right, it moves in.” One of his lawyer friends, Stéphane Lilti, agreed: “The day we shut them down, and there are less of them, it’s a victory.”²

One day in February 2000, an American acquaintance called Knobel to ask: “Are you aware that on Yahoo!, they’re selling Nazi stuff?”

Knobel’s first reaction was disbelief. Yahoo!, for him, stood for “the great community of Internauts where you find everything right away, and even better, for free. A wonderful new world.” He opened Yahoo.com’s home page, clicked on the link to auctions, typed the word “nazi” into the search window, and discovered 800 items for sale. He kept clicking until, he recalled, “I came across a box of Zyklon-B.” This was the poison gas used to kill his people at Auschwitz and other Nazi extermination camps.

The item was identified as a “museum-quality replica.” Noted Greg Wrenn, Yahoo!’s associate general counsel for international affairs: “The vendors didn’t say, ‘Throw this at your Jewish neighbor and scare him.’ Nothing to indicate they were offered by Nazi supporters.”³ But for Knobel, the object in itself was intolerable.

Knobel understood that it wasn’t Yahoo!, but visitors to the site, who sold and bought these things, and that Yahoo! earned no commissions or fees from auctions. Still Knobel felt betrayed by Yahoo!’s “nice image.”

His goal was now to stop these sales. In conjunction with Stéphane Lilti, he decided that the first step would be a campaign in the Paris press. If that failed, they would turn to the French courts. Unlike the U.S., where the First Amendment to the Constitution broadly protects free speech, French law sets numerous limits on public discourse (see Exhibit 2) but he doubted it would come to that.

“I thought I could make Yahoo! understand that it’s no big problem if they take these things off the site. They’d get the idea, they’d contact me. I said to myself,

² Interviewed by telephone, March 13, 2001.

³ Interviewed by telephone, March 29, 2001.

‘They’re Americans, they’ll understand that the French see this differently, that it isn’t good to sell this stuff. It’s their responsibility and it’s in their power to do something.’ And I said to myself – not to them – ‘Maybe they will. I’ll give them two months.’”

Early Warnings in the Press: February 17-April 5, 2000

Knobel convinced the UEJF (Union of Jewish French Students), and the LICRA (International League Against Racism and Anti-Semitism), where he sat on the executive board, to join his cause. Lilti tried to recruit other lawyers, with no success. “It isn’t very smart for a lawyer specialized in the Internet to attack Yahoo!,” he commented ironically. “It doesn’t help him get clients.”

Their press campaign took off on Feb. 17, 2000 in the weekly *Paris-Match*, which announced its “discovery” of Nazi goods on the Internet – “nearly 500 on Yahoo!, and over 3,500 on eBay,” noted the reporters. An illustration of a Waffen SS, a member of the Nazi party’s armed forces, was captioned: “On Yahoo! Auctions: A mouse pad glorifying the SS troops.”

The article ended with a quote from Knobel: “It’s up to Internet companies to regulate themselves. If not, we’ll launch a boycott.”⁴ The LICRA did just that two days later.

During an interview with the leading French newsweekly, *L’Express*, Knobel suggested asking Yahoo!’s advertisers what they thought about the Nazi goods. The reporter followed his advice:

“Questioned and informed by *L’Express*, the companies Ford and Visa declared themselves stupefied to discover that their banners are displayed on the same page as the SS. “We aren’t indifferent,” said Ford, “but what can we do? The laws governing the Web are so complex.” The London-based managers of Visa, however, claimed they had demanded that Yahoo! stop this ‘abusive use’ [of Visa’s ads].⁵”

L’Express also quoted a spokesperson for Yahoo! France:

“To censor [Nazi goods] would create a dangerous precedent. But we respect a certain morality: there are no live animals sold at auction.”

“If they can do that, why not purge their site of Nazis?” thought Knobel. And why, he and Lilti wondered, had Yahoo! made no attempt to contact them? In March, the LICRA wrote to Yahoo! Inc., but received no reply.

⁴ François Labrouillère and Laurent Léger, « Quand Yahoo et eBay deviennent les supermarchés des souvenirs nazis, » *Paris-Match* No. 2647, February 17, 2000.

⁵ Cédric Gouverneur, « Internet: Comment éliminer les sites nazis? » *L’Express* No. 2541, March 16, 2000, p. 40+.

However, the article in *L'Express* had been read with foreboding at Yahoo! France, whose General Director, Philippe Guillanton, remembered thinking: "This feels like a complicated affair." He contacted Yahoo! Inc., which replied that the company received "five letters like that every day." Looking back, he said, "We could have called the LICRA to say, 'Listen, there's a problem, but it's not something we control, can we talk about it?'" But very soon the opportunity would be lost.

As the press campaign lost momentum, Knobel and Lilti prepared a legal assault. In France, the display for sale of Nazi objects is a crime under Article 645 of the Penal Code. Lilti had successfully used that law to obtain the conviction of French "revisionist" Robert Faurisson, whose denials of the Holocaust, illegal in France, had been published on a Swedish website. "The court ruled that when the content is received in France, French law applies," noted Lilti.⁶ He added, "I never take on a case without knowing that I'll get a good result. With Yahoo!, we were going to annoy them badly, if not worse."

On April 5, 2000, Yahoo! France received a registered letter from the LICRA. Postmarked April 3, it warned that if the auctions of Nazi objects did not cease within eight days, charges would be filed. Thus Yahoo! had less than a week to resolve the problem before it went to the courts. Lilti, who was preparing a similar lawsuit for the UEJF, gave Yahoo! no advance warning whatsoever.

The Rise of the Online Auction Business: 1998-2000

Online auctions are among the fastest-growing and most profitable sectors of e-commerce. As early as 1998, B2C auction sites attracted 1.2 million purchasers in the U.S., according to Jupiter Communications. Jupiter predicted that by 2002, online B2C auctions in the U.S. would total \$3.2 billion in annual sales, and draw 6.5 million customers for goods ranging from toys to technology.⁷

Yet the C2C sector – an outgrowth of the online forums that first created a mass public for the Internet – was rising even faster, led by eBay, QXL and iBazar. Within a single year, eBay's revenues, mainly derived from a variable fee on transactions, practically doubled, from \$150 million through the first nine months of 1999 to \$297 million for the same period in 2000. In the latter period, gross profit was \$225 million and net income reached \$39 million.⁸ In January 2001, Forrester Research reported that online auctions in Europe had passed the billion-Euro landmark, and would attain 8.8 billion Euros by 2005, with 62% of transactions

⁶ For the judgement, see Tribunal de Grande Instance de Paris, 13 novembre 1988, Faurisson c/ Ministère public.

⁷ "Jupiter: Online Retailers Must Embrace Auctions as New Platform for Discounts", press release, New York: Jan. 25, 1999 (through www.jup.com).

⁸ Figures are taken from eBay's quarterly reports (form 10Q) to the Securities and Exchange Commission.

taking place in C2C sites.⁹

Advertising revenues are also crucial to auction sites, especially Yahoo!, which earned no direct commissions or fees on its auction services in 2000, and gained 90% of its revenues from advertising.¹⁰ Among 25 auction sites surveyed by Forrester, advertising generated an average 22% of revenues, second only to commissions. Auctions help to sell ad banners: The average visit on eBay lasts 50 minutes, compared to 20 minutes for conventional online retailers.¹¹

By the spring of 2000, daily auction listings on Yahoo.com totalled some 2.5 million items. On any given day, a search of the auction site using the keyword "Nazi" would turn up some 1,000 objects, ranging from anti-Nazi films and books to the Zyklon-B replica that revolted Knobel.

Protests against Hate for Sale on the Web: August 1999-February 2000

The appearance of objects of Nazi provenance in online auctions was predictable, given the experience of brick-and-mortar auctioneers. In 1985, the Attorney General of the State of New York opened an investigation into Sotheby's sale of rare books that had formerly belonged to the Hebrew Theological Seminary of Berlin, destroyed by the Nazis. The vendor claimed that he had been given title to the works in exchange for smuggling them out of Germany in 1943, at the height of the Holocaust. Sotheby's settled the case.¹² Christie's sold a painting publicly listed as stolen by the Nazis from the Schloss collection of Old Masters in France, at the company's New York showroom in 1989. The buyer later returned the work to France, where he was indicted and convicted on charges of receiving stolen goods.¹³

Related conflicts arose on the Internet at the end of the 1990s. Online booksellers Barnesandnoble.com and Amazon.com stopped selling Adolf Hitler's *Mein Kampf* to German customers in August 1999, after the Simon Wiesenthal Center notified the German Ministry of Justice that the companies might be violating the Federal Republic's laws against hate literature. Nonetheless, reported the online magazine *Salon*, "While German extremists can't

⁹ Hellen K. Omwando et. al., "Europe's Online Auction Prize: SME's." Forrester Research, Jan. 2001, pp. 1, 2, 6. The report quotes a competitor of eBay who estimates that 10% of the site's inventory, and 80% of its gross auction value, is accounted for by businesses posing as consumers (p. 4). The masquerade is presumably designed to profit from the fad for C2C auctions.

¹⁰ According to its quarterly SEC filings, Yahoo! Inc. earned \$799 million through the first nine months of 2000, of which \$722.8 million came from advertising.

¹¹ Op. cit., Omwando, pp. 3, 4.

¹² For a detailed account of this incident, see Mark Hunter, *Le Destin de Suzanne: La véritable affaire Canson*. Paris: Fayard, 1995, pp. 63-65. It is worth noting that until the Attorney General of New York, Robert Abrams, filed suit against Sotheby's, the identity of the vendor of the books was kept secret by the company, in accord with the auction industry's traditional practice and privilege of "client confidentiality." The anonymity of buyers and sellers is likewise assured by online auction sites.

¹³ See Mark Hunter, "Nazi Theft Still Haunts the Art World." *Wall Street Journal Europe*, March 27, 1996, p. 7.

buy their books from the Internet's biggest vendors, they can find them if they dig a little deeper."¹⁴

Three months later the Center attacked what it called "eBay's current policy of marketing Nazi memorabilia", adding that it intended to ask German leaders to "review existing anti-Nazi laws and possible legal actions." Executives at eBay argued that its German subsidiary "adheres to German law and does not allow the posting of Nazi items," and that they were "hesitant to perform the role of censor." One eBay manager complained, "They [the Wiesenthal Center] are worried about crazies having and buying these things, but the way to alert the crazies is to act like that." He compared the Center, known for its pursuit of war criminals, to "a Nazi Gestapo force [that wants to] police everything that goes on the market."¹⁵

In February 2000, eBay came under fire from a New York-based anti-hate group, BiasHELP, which asked the auctioneer to remove all listings of items related to the Ku Klux Klan, infamous for its lynchings of Afro-Americans since the late 19th century. The group suggested that "the incredible size and reach of [eBay's] audience creates special responsibilities." A reporter for Auctionwatch.com noted that "the request puts eBay in a no-win situation, especially considering the family image the site works hard to present." Richard Bondira, president of the Indiana Historical Society and an expert on the Klan, commented that "selling original collectibles has nothing to do with bias, it's a piece of history."¹⁶

But the next day, eBay announced that its site "will not become a platform for those who promote hatred toward their fellow man." Kevin Purslove, vice president of communications, denied that the protests had been a "catalyst", but admitted: "It's fair to say they were one component that helped us come to a decision on this." The company's new policy attempted to balance the interests of legitimate collectors against the concerns of protestors:

"Relics of groups such as the KKK or Nazi Germany may be listed on eBay, provided that they are at least 50 years old, and the listing is not used as a platform to glorify or promote the organization or its values... eBay will judiciously disallow listings or items that promote hatred, violence or racial intolerance, including items that promote organizations with such views. eBay will review listings that are brought to its attention by the community, and will look at the entire listing to determine whether it falls within this rule."

¹⁴ Craig Offman, "Hate Books Still for Sale on the Web." Salon.com, August 17, 1999.

¹⁵ Ed Ritchie, "No Tolerance for Nazi Items ." Auctionwatch.com, Dec. 1, 1999.

¹⁶ Ed Ritchie, "BiasHELP Wants Klan Items Banned from eBay." Auctionwatch.com, Feb. 3, 2000.

The Public and Governments Intervene against Hate on the Web: Jan.-Feb. 2000

Meanwhile, the issue of Internet hate steadily widened. In January 2000, the United Kingdom's Internet Watch Foundation (IWF), an industry self-regulatory group established in 1996, announced that it was extending its authority to hate materials on the Internet. Under an agreement with the British government, the IWF investigated complaints received on its hotline, to determine if pages on a given site contained illegal hate content. If so, the IWF would ask the service provider to take down the site. Providers that complied were guaranteed immunity from criminal prosecution, though not from civil actions.

For British civil liberties activists like Chris Ellison, founder of Internet Freedom, the IWF's goal was to "extend their ability to censor," at a moment when the Blair government sought to improve its "politically correct" image.¹⁷ But for IWF chairman Roger Darlington, self-regulation, and not censorship, was the issue: "We have no formal legal powers – Parliament hasn't legislated this. The strength [of the IWF] is that the industry is more sensitive to a body it set up, and it works faster than a public body. The weakness is that [its actions] could still be challenged in the courts."¹⁸

Government leaders in other countries were calling for stricter regulation. On Jan. 27, 2000, German Chancellor Gerhard Schroeder, inaugurating the first International Forum on the Holocaust in Stockholm, asked for international cooperation to keep neo-Nazis off the Internet.¹⁹

The debate over misuse of the Internet was particularly intense in France, where a new "Law on the Liberty of Communication" was under debate in the National Assembly. The law held Internet service providers responsible for illegal content that transited by their servers, exactly as printers could be held responsible under French law if the authors and publishers of a defamatory printed work could not be located. A leading free access provider, *altern.org*, had already paid ruinous damages after French model Estelle Hallyday discovered her photographs on an unauthorized site that used *altern.org*'s server and sued. Noting that access providers were increasingly accused of promoting "defamation, pedophilia, violations of authors' rights, and incitation to racial hatred," *Libération* remarked that they "are trapped, at once guarantors of the freedom of expression and subject to the pressure of plaintiffs."²⁰

Yahoo! Inc. likewise felt the rising heat. On Feb. 23, 2000, the Anti-Defamation League (ADL), an American non-profit group founded in 1913, charged Yahoo! with hosting an entire category of "White Pride and Racialism" clubs. Noting that Yahoo!'s "Terms of Service" agreement prohibited users from posting content of a "racially, ethnically or otherwise objectionable" nature, the ADL demanded that Yahoo! cease to "ignore its own

¹⁷ Lakshmi Chaudry, "British ISPs Crack Down on Hate." Libertarian Alliance, Jan. 25, 2000 (via www.codoh.com).

¹⁸ Interview, March 30, 2001.

¹⁹ Kim Gamel, "Forum: Keep Neo-Nazis From Web." Associated Press, Jan. 27, 2000.

²⁰ Florent Latrive, « Les hébergeurs priés de sévir ». *Libération*, April 7, 2000 (via www.liberation.com).

policy and us.” Two days later, the ADL triumphantly reported that Yahoo! had “apologized for not addressing the violations sooner,” and had encouraged the ADL’s Internet Monitoring Unit to report such abuses.

Yahoo!’s response reflected an emerging consensus among leaders of the New Economy, to deal with offensive materials largely through a policy of “notice and take down.” While refusing to act as a censor by establishing broad pre-emptive standards, Yahoo!, like eBay and members of the Internet Watch Foundation, removed materials that generated significant protests from users or spokespeople for legitimate causes. Thus Internet companies could hope to avoid heavy-handed government regulation that might harm their industry.

In Darlington’s opinion, notice and take down is an insufficient solution: “It will work for defamatory libel and copyright issues, but it will not solve all the problems of the Internet.” But Greg Wrenn, Yahoo!’s international affairs counsel, contends that it is the best available means of keeping illegal or offensive content off the Web:

“A couple of issues come into this – first, what’s the policy, what are the criteria? A second issue is, how is the policy enforced? It’s not self-executing. You either have to monitor and catch it, or do creative things with tools, automatic systems. [But] when you have 180 million active visitors – Geocities [a Yahoo! subsidiary] has 15 million pages added per month – there’s no way a company can have enough people to read all that stuff before it goes on.... Or, you can do notice and take down. That’s a do-able system, in terms of reality. We’ll always have to rely on users for that, to spot things they think are inappropriate.”

Prior to Knobel’s press campaign, Wrenn had contacted Inktomi, which provides Yahoo! France with web page search results, to ensure that the sub-contractor would remove sites considered illegal in France from its index. “It’s an automatic system – they’d find French-language sites and index them,” explained Wrenn. “They don’t do human reviews.” The group at the origin of the complaint, which was successfully resolved, was the LICRA.

Yahoo! Stands Accused: April 2000

Even before the nominal six-day delay expired, Yahoo! France was served with notice that it and Yahoo! Inc. were being sued on April 8, 2000. Under a special procedure called the *reféré*, which allows a judge to ordain immediate preventive measures against a defendant without a full trial, the plaintiffs demanded that Yahoo! be fined 100,000 Euros (\$90,000) for each day that the sales of Nazi objects continued. The UEJF further demanded that Yahoo! Inc. “suppress, on any listings accessible from French territory,” all links to negationist websites, and eliminate from its Geocities.com subsidiary two sites, including one in French, that offered the text of *Mein Kampf*.

Greg Wrenn immediately faxed LICRA president Patrick Gaubert:

“Yahoo! applauds the mission of your organization and in no way does Yahoo! endorse anti-Semitism or racism of any sort. In fact, as you may recall, Yahoo! France has cooperated extensively this year with LICRA regarding your concerns

about Nazi-related sites.... Within the bounds of the law of the 23 different countries in which our international properties are located, we promote freedom of expression and choice and Yahoo! believes it should not act as a political censor...in the U.S., the removal of such items would be considered censorship and treated by many as more offensive than the isolated postings themselves.”

Explained Guillaanton, “The reaction of the Americans was, ‘We can’t censor what goes on the site. We’re not content providers.’” He and his Paris team wondered if Americans could appreciate the horrors of Nazism to the same extent as a nation that was occupied by the Nazis from 1940-44. It was a reasonable question, said Yahoo! Inc.’s international communications director, Scott Morris, whose mother is French: “From the cultural perspective, we didn’t all understand how sensitive things would get when the word ‘Nazi’ was mentioned. In France, World War Two is yesterday.” But for Greg Wrenn, who served as liaison between Paris and Santa Clara, the weight of the Nazi question was evident:

“We were developing our strategy on the assumption the boat was going to sink. We went through the issues with our French counsel, and we did not start out thinking we had great cards.... We were American, that was one strike. The second was Nazi-related content. It’s such an emotional issue in France. I knew that, from knowing the history of the Second World War. You could also see from the complaints we get – the users that complain most about Nazi-related material come from France and Germany.”

Both Yahoo!’s teams were fully committed to a vision of the Internet, which Guillaanton defined:

“We don’t work the same way as a traditional medium. We’re not a minority of specialists who create content for a passive majority. In most cases, we put tools at the disposition of people so they can communicate; they’re the stars. So groups form around little centers of interest, like sports cars, and in certain cases, around opinions like these.... Sure, Internet is a medium where a minority can fabricate content for a greater number, but what’s most interesting is that the greater number can publish what they want.”

Consequently, said Guillaanton, “The Internet forces everyone to have a more skeptical approach, to be wary. There’s a lot of crap, and the Internet forces you to put it aside. The tool imposes this revolution.” He believed that the ultimate effect was to expose neo-Nazis, not to promote them: “[Our adversaries] say that Internet banalizes these groups. But it banalizes them so much that they’re merely banal, they aren’t dangerous anymore. What counts is that people have the right to form their own opinions.”

“We’re not talking about free speech, we’re talking about commerce,” countered Lilti. “The first thing I did was to read Yahoo!’s contractual conditions, which allow them to clean up their site.” He added, “We knew that the ADL had challenged them.” If Yahoo! Inc. could concede the point of an American association, why not in France?

The reason was simple, from Wrenn’s standpoint: “We can work around local groups and mores. What we can’t do is make different countries happy with content on every site.” But Yahoo!’s adversaries were no longer willing to discuss the issues out of court.

The Initial Response of the Media and the Market: April 11-May 15, 2000

The first dispatches on the case were filed by Reuters and the Agence France Presse (AFP) on April 11. The AFP, France's leading press service, reported that an "American giant" was accused of "banalizing Nazism", doubly attacking the Yahoo! brand name. French online media, notably Transfert.net, devoted extensive coverage to the affair.

But outside France, coverage was non-existent, with the sole exception of the major Israeli newspaper, the *Jerusalem Post*. In an April 17 story on "Weaving the Web in Paris," *Business Week* found it more interesting that in France, unlike Silicon Valley, "the locals smoke cigarettes in Internet cafés." Likewise, when CNN's Internet-savvy "New Show" discussed the international strategies of Yahoo! and eBay on April 25, the Paris affair never came up. Only scattered online media, like ZDNet News, picked up the Reuters coverage, while other leading online news sources, like *Hotwired*, remained silent. And like the English-language media, market analysts in London and New York apparently saw no significance in the case, which appeared in not a single analyst's report through the spring.

Yahoo! Inc. indirectly contributed to the silence by following its established policy of refusing to comment about ongoing judicial proceedings. At Yahoo! France, Guillanton took an optimistic view of the decision to come:

"We thought the judge might order us not to put links to Yahoo.com, which would be fine for us, since we do everything possible to keep surfers on Yahoo.fr, to increase the value of the audience."

Yahoo! Makes Its Case: May 15, 2000

For Yahoo! Inc., simply showing up in a French court could be interpreted as admitting its competence over the case. However, said Wrenn, "The company felt strongly, on a PR basis, that a response was needed – to explain what the content was for, and why Yahoo! didn't take down the items when they were identified." Most crucially, Yahoo! Inc. felt obligated to defend the position that content originating in the U.S. should be governed by U.S. law. Said Wrenn, "It was clear from the beginning that there was a principle on regulation we had to deal with. We would've been thrilled if it was another company. But we felt, 'We can't let this go. We can't afford, and the industry can't afford, to lose.'"

Thus at the first hearing in the *Tribunal de Grande Instance de Paris* on May 15, defending counsel Christophe Pecard argued that "Internet users who go to Yahoo.com undertake a virtual voyage to the U.S.," and so no offense could be said to take place in France. Even if the contrary were true, it would be technically impossible for Yahoo! to block all access to its sites from France, noted Pecard. Thus, he declared, "The plaintiff has picked the wrong enemy, and finds himself, unjustly and in spite of himself, putting Internet on trial instead of neo-Nazi propaganda."

Pecard emphasized that the company "deeply deplores having to oppose, for the legitimate cause of its own defense, the ideas of the plaintiffs... Yahoo! Inc. has never, in any way, subscribed to the ignoble ideas of Nazism or neo-Nazism in any form." Nor, Pecard noted,

had Yahoo! been offered the opportunity, as it still desired, to engage in a constructive dialogue with the coalition out of court.²¹

Lilti counter-attacked that “Yahoo! Inc. has not seen fit, since the delivery of the lawsuit, to remedy the problems that were denounced, which it maintains in full awareness.” He noted that “the First Amendment to the U.S. Constitution cannot forbid Yahoo! Inc. to apply restrictions to the liberty of expression that are freely consented by its users,” and which allowed Yahoo! to take down offensive content. As for the tribunal’s competence, said Lilti, “American jurisdictions systematically retain the application of the law of the country of reception – when the U.S. is concerned.”²²

The Judge and the Ruling: May 22, 2000

Jean-Jacques Gomez, who presided over the case, resented the fact that his personality became a subject for the French media – and a matter of deep concern to plaintiffs and defendants alike. Like many French judges, he became a magistrate because he could not afford to open a private law office, which made the Republic his benefactor as well as his employer. Though he noted that a higher court could overturn any of his opinions, he believed that as a judge, he could influence society: “When you read a judgement,” he said, “sometimes you remember one sentence on a great principle, and that’s an encouragement to follow the principle.” He deliberately sought to maintain “a down-to-earth mentality, what they used to call a ‘peasant’ mentality. Why get philosophical when you can do things simply?”²³

He had studied the Internet assiduously since Web cases started arriving in his courtroom in 1996, and was proud that on one occasion, a reporter who accused him of ignorance was forced to admit that Gomez knew more than a little about the subject. And he had concluded that the Internet was promoting lies:

“From 1996 to 1999, people said that if you regulate the Internet, you’ll kill it. My answer resides in a very simple example: If you want to upload an application on the Web that enables someone to get my credit card number, I don’t agree.... Some people try to make Internauts believe that the Web is totally free, without any obligation – and we all know it’s not true. In real life, my freedom stops where the freedom of others begins. On the Internet, it’s the same thing.”

Lilti was concerned that Gomez might refuse to rule on the case, by sending it on to a full trial: “We said to ourselves, ‘A judge can get scared.’” Only a trial, argued Pecnard – and not the urgent procedure of the *référé*, which is designed to stop disruptions of public order while awaiting trial – could determine the responsibility under French law of an American company

²¹ Christian Pecnard’s quotes are drawn from « Conclusions pour la Société Yahoo ! Inc., A Monsieur le Président du Tribunal de Grande Instance de Paris », Audience de référé du 15 mai 2000, pp. 4, 6, 7, 10.

²² « Conclusions en réplique de L’Union des étudiants juif de France, A Monsieur le Président du Tribunal de Grande Instance de Paris », Audience de référé du 15 mai 2000 (via www.juriscom.net).

²³ Interview, March 2, 2001.

“that acts in conformity with the judicial norms of its home country for an activity on the Internet.”²⁴ As it happened, four years earlier Gomez had cut short a *référé* involving the Internet, on the grounds that the case demanded fuller debate.

Now, two points concerned him: Did French law apply to the case? And if so, did his court possess the means to apply it?

On May 22, Judge Gomez answered yes to the first question: “In permitting the visualization in France of [Nazi] objects and the eventual participation of a French Internaut in such a sale, Yahoo! Inc. commits a fault on French territory.” True, said the judge, “the unintentional character [of Yahoo!’s “fault”] is evident.” But for the judge, the sales were “an offense to the collective memory of a nation profoundly wounded by the atrocities committed in the name of the Nazi criminal enterprise... and especially to its Jewish citizens.”

Could the ruling be applied? Yes, declared Judge Gomez: “[T]he genuine difficulties encountered by Yahoo! do not constitute insurmountable obstacles.”

His ordonnance went far beyond Lilti’s demands: Yahoo! Inc. must now “take all measures of a nature to dissuade and to render impossible all consultation on Yahoo.com of the online sale of Nazi objects and of any other site or service that constitutes an apology for Nazism or a contestation of Nazi crimes.” A date of July 24 was set for Yahoo!’s presentation of those still-undefined “measures.”²⁵

For Wrenn, satisfying such a broad and categorical order was an unthinkable task. “We knew it was impossible to do it, and we knew we’d have to come back and say that.”

In the meanwhile, Gomez ordered Yahoo! to pay the costs of the hearing, including the legal fees of the plaintiffs’ lawyers, plus \$1,390 in provisional damages to the LICRA and the UEJF.

The ruling turned the case into an international affair. For the first time, leading English-language media like the *New York Times*²⁶ and *Los Angeles Times*²⁷ covered the story. The LICRA declared that the judge had “rendered a service to the Internet,” which was turning into an “outlaw zone.”²⁸ There was no apparent impact on Yahoo!’s share price, which dipped from 126 to 118 on May 23, rebounded to 122 the following day, and rose to 144 on June 7.

²⁴ Op. cit., Conclusions pour la Société Yahoo ! Inc.

²⁵ Tribunal de Grande Instance de Paris, UEJF et LICRA c. Yahoo ! Inc. Et Yahoo ! France, Ordonnance de référé, 22 mai 2000 (via www.juriscom.net).

²⁶ Associated Press, “French Court Says Yahoo Broke Racial Law”. *New York Times*, May 23, 2000, Section C, p. 27.

²⁷ Bloomberg News, “Yahoo Launches Stock Purchase Plan”. *Los Angeles Times*, May 23, 2000, Part C, p. 3. Coverage of the French case constituted the second half of an article consecrated mainly to Yahoo!’s stock market strategy, a clear indication of the priorities of American readers.

²⁸ Op. cit., “French Court Says Yahoo Broke Racial Law”.

However, damage to the brand was inevitable, particularly in Europe. As Wrenn said, “We’re a global brand, not just a U.S. brand. And a lot of people just kept seeing ‘Yahoo!-Nazi’.” Within the industry, Yahoo! found no defenders. Rivals like eBay profited from Yahoo!’s troubles to promote their own auctions, while content providers, said Wrenn, “were not publicly behind us, because of the Nazi issue – they were saying, “it’s a good fight, Yahoo! Go to it! We’re quietly behind you.””

For Guillanton, there was a sense of personal loss, after four years of around-the-clock work to create a thoroughly French version of Yahoo!:

“One of our greatest successes in France was to have managed to insert ourselves perfectly into the local tissue. The site is very “Frenchy.” Up until this affair, when we asked focus groups questions about our identity, one in four people thought we were a subsidiary of France Telecom, one in four thought we were American, and the other half didn’t know.... It was terrible to be attacked [as American] when we were really pioneers of localization.”

By the time Jerry Yang arrived in France in June, Yahoo!’s management had realized that silence was no longer a viable tactic. “There was a moral issue,” said Wrenn:

“We needed people to understand that we didn’t do this thoughtlessly. We realized we were getting beat up. LICRA and the others were very good – they didn’t want a settlement, they wanted press and publicity for the issue. So we had to get more aggressive about doing interviews and getting the word out.”

The Chief Yahoo! Prepares his Case

As Jerry Yang prepares to meet his interviewer, he is aware of a major constraint: the possible effects his statements may have on his company’s and his shareholders’ fortunes. Yet it is time to explain clearly that trying to prevent French users from going on Yahoo!’s site in the United States is technically unrealistic. And he is concerned by the risk that regulating the U.S. site on the basis of French law could open the door to Internet regulation by restrictive – and highly politicized – national laws.

On another level – symbolic, but no less real – Yahoo! and Jerry Yang represent crucial promises of the Internet, as a vehicle of free expression and an engine of the New Economy. He must thus carry the issue to a higher level: If individuals cannot express themselves on the Internet, and are denied the opportunity to form bonds of their choice across national and social borders, the attraction of the Web – for users as for investors – will inevitably decline.

In one sense, Jerry must choose what kind of leader he wants to be today.

- How should he address the business, technical, legal, cultural and possibly philosophical questions of the journalist?
- Which principles make these answers legitimate? Which principles are violated?

- What consequences might be expected from these answers? What are the risks associated with them?
- What are the dilemmas that can no longer be avoided? Might they have been avoided, and if so, how?

Exhibit 1*An Interview with Roger Darlington, Chairman of the Internet Watch Foundation*

The Internet Watch Foundation (IWF) was founded in the United Kingdom in 1996, at the initiative of the U.K.'s Internet service providers (ISP). In four years of operation, it has served to remove 28,000 illegal images from the U.K.'s Internet sites.

Mark Hunter: First, should the Internet be regulated?

Roger Darlington: The short answer, in the broadest sense, is that it does have to be regulated – but it's so different from traditional media, we have to do it in distinct ways. It's not like the telecommunications networks, though some ISPs argue that they're just common carriers. Hosting a website is not the same as carrying phone conversations. On the other hand, it's not like a newspaper, where the publisher can be expected to review content in advance. The Internet falls in between.

The second major difference is that we're talking about a global medium, accessible to 400 million people, and every user can put their own site online. It isn't possible for one government to regulate it. But I don't think many ISPs realize that it's no longer the same Net. The origins of the Net are free speech, free expression. Now it's a mass medium. A different consumer base, different concerns.

MH: How did the IWF begin?

RD: What's peculiarly British is that this is an industry initiative to create a self-regulating formula. In the U.K., in 1996, the Metropolitan Police indicated a concern for the growing amount of child porn on the Net. In the U.K., possession of child porn is a criminal offense, and so is having an image on your screen or server. The police said, "If you don't get your act together, we'll prosecute." They listed a number of newsgroups they thought should be closed down. The ISPs wanted to avoid prosecution and also the Draconian approach of closing newsgroups. The U.K. government favors self-regulation, where that is seen to work.

MH: How does it work?

RD: Through a hotline. ISPs say they can't proactively monitor all the contents. I agree. There are two billion websites, and no way providers can know what they're hosting. So people report, they phone or write, or almost invariably, e-mail us through the IWF site. Our staff is trained by the police, they know the law. If it's illegal, we see where it's hosted. If it's in the U.K., we notify the provider, who takes it down. Formally, it's a recommendation. But in effect, it's an order. If they don't take it down, they don't stand a chance in court.

We have no formal legal powers. In theory, we could be challenged in the courts. It's possible that someone who posted content that we'd recommended be removed could say it's not illegal, and sue. But it hasn't happened. It [the IWF] *has* combatted child porn, and avoided prosecutions.

MH: You are now extending operations to hate literature. Why?

RD: The American view is that words themselves aren't illegal – only actions. The European view is that words of a particular kind can of themselves lead to consequences – so words like denial of the Holocaust can be illegal. U.K. laws don't make Holocaust denial illegal – but

Exhibit 1 (Cont'd)

incitement to racial violence *is* illegal. The overwhelming majority of race hate material is in the U.S. – partly because there *is* a lot of race hate, and partly because of the First Amendment. In the U.K., they've been careful to stay just this side of the law. Our judgement is that it's unlikely the Attorney General would prosecute, or that prosecution would succeed.

But the issue is real. People in the past who propagated race hate had physical constraints. A printer wouldn't print it, a bookshop wouldn't put it on the shelf. There's no doubt the Internet has provided a cost-free way to publish and distribute it anonymously. In my view, we've seen an increase in race hate material on the Net. Not just in the U.S., but in France and Germany, which had horrific experiences of the outcome of such views, and in countries that are havens of tolerance, like Switzerland.

MH: Is there a better way to get it off the Net?

RD: Even if the IWF got it all off the Net in the U.K., it would still be in the U.S. If we persuaded all the ISPs in the U.S. not to host it, it would *still* be hosted somewhere. Some of these people host their own material on their own servers. A server isn't expensive. And they can put it on all sorts of uninhabited islands – this is already happening – or on a ship or a satellite. A second set of problems is techniques, peer to peer [P2P] that mean you won't be able to locate geographically where this material is. So it can't happen. We have to operate on that assumption. We won't eliminate it, but we'll contain it.

Governments have to set a legal framework: What's illegal offline should be illegal online. ISPs have obligations, especially with material focussed on children, to take a special interest in the content. Parents have an obligation to use the filtering software. And society as a whole has to raise the level of knowledge and understanding – so we recognize that all sources of information are not equally valid. I'm in favor of self-labelling on websites, so the content is electronically marked. Porn sites don't *want* children to access them – it causes problems, and the kids have no money. Once you have labelling, then filtering software can act more effectively.

MH: Will the measures ordained by the French courts against Yahoo! work?

RD: No. The problem was sales of Nazi memorabilia. The court's solution won't solve that. And I wouldn't trust my government – and I voted for it – to decide what I can see on the Net.

MH: Are you afraid that your model will be perverted toward censorship?

RD: The IWF model has already been distorted by Saudi Arabia, where the government makes clear to ISPs what is or isn't acceptable. But sooner or later we'll see that governments which try to control the Net will fail. The Internet is designed to withstand nuclear attack – and to find a way around obstacles.

Exhibit 2
Free Speech in the U.S. and France

Two different conceptions of free speech were in explicit conflict during the Yahoo! case. In the U.S., the right of “free speech” is predicated on the notion that in an open marketplace of ideas, the best will sooner or later drive out the worst. In France, as in most European countries, public speech is regulated on the assumption that if certain ideas can destroy society, and with it all pretense of a democratic debate.

Contrary to popular belief (especially among Americans,) even in the U.S. free speech is not an ironclad right. What’s true is that it is at the heart of the historic Bill of Rights, in the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Thus in theory, any and all religious, political, or personal speech cannot be subjected to legal interdiction. However, the U.S. courts, which have the sole right to interpret the Constitution, have never established a final or comprehensive definition of which speech should be protected by that guarantee. Thus the right of free speech is constantly evolving.

Political speech of a rare virulence, including barely-masked appeals to violence or racial hatred, is indeed legal under current jurisprudence. In April 2001 the Supreme Court upheld the right of an anti-abortion website to publish a “hit list” of doctors who perform abortions, and to mark their photographs with a red cross when they died – or were murdered, which had in fact occurred.

The Court’s basic test for the legality of such materials was formulated in the late 19th century: One does not have the right to scream “fire” as a joke in a crowded theater. Thus, speech that is specifically aimed at producing harm to others is not protected. But celebrating the murder of one’s enemies, and publicizing the names of others whose disappearance would be welcomed, is legal.

It often occurs that the American public enacts restrictions on its own – sometimes with the active assistance of prosecutors, who at the state and local levels are elected officials, and thus highly alert to public opinion. At the height of the Vietnam War, publishers of “alternative” newspapers were regularly arrested or harassed by police, and beaten up by pro-war citizens. In the 1970s, the expansion of the pornography industry into mainstream distribution venues (such as convenience stores) met with violent reactions from feminist groups such as the Preying Mantis Women’s Brigade of Santa Cruz, California, which initiated a national campaign of attacks on newsstands. And in the 1980s, the Reagan administration co-opted feminists into a national anti-pornography campaign that resulted in the prosecution in several states of not only producers of porn films, but also their actors.

Among the first and most successful websites and forums, as the Internet expanded in the mid-1990s, were those offering pornography. Responding to public concern over the issue, President Bill Clinton signed the Communications Decency Act of 1996, which outlawed “indecent” communications online. But the Supreme Court unanimously struck down the

Exhibit 2 (Cont'd)

law, agreeing with a lower court that the Internet constitutes “the most participatory form of mass speech yet developed,” and was thus entitled to “the highest protection from government intrusion.”

An indirect result of the Court’s decision was the explosive growth of the market in “blocking” software, which enables parents to set limits on materials that can be accessed by their children from a home computer. The American Civil Liberties Union, the most important defender of free speech in the U.S., went repeatedly to court to stop use of these applications in public libraries. Ironically, among the victims of blocking software was the American Family Association (AFA), an arch-conservative group that found itself blacklisted by the popular software CyberPatrol because of the AFA’s outspoken hostility to homosexuals.

In France, the Declaration of the Rights of the Man and Citizen – a crucial summation of the principles behind the Revolution of 1789 – guarantees the right of free speech, “except in cases foreseen by the law,” which are in practice fairly numerous. The importance of “public order” frequently takes precedence, in the French penal and civil codes, over the rights of individuals to express themselves. For example, it is illegal to discuss the private lives of public figures, or to insult the President, or foreign heads of states. It is also illegal to publish materials or to make public declarations that constitute an “apology” for Nazi crimes, including the denial of the Jewish genocide, or an incitement to racial hatred. And while it is legal in the U.S. for Nazis to demonstrate in Jewish neighborhoods, in France the organizers of the demonstration could be convicted of various crimes, and their group banned (as happened to several extreme right groups in the 1970s).

Conversely, the French government did little to stop the explosion of so-called “pink” – i.e., pornographic – services on the Minitel, the telematic predecessor of the Internet in the 1980s. Observers noted that the Minitel represented a major commercial gamble for then government-owned France Telecom, and that pornography did a great deal to build its public.

In 2000, as the Yahoo! affair was generating headlines, the Socialist government of France pushed through a “Law on the Freedom of Communication” requiring service providers to demand the identities of publishers of web pages using their servers. Service providers who did not comply with this requirement could be prosecuted for crimes (such as defamation) committed by the publishers, in the event the latter could not be found and brought to trial. A similar provision already applies to printers of defamatory books whose authors or publishers cannot be located. However, after concerted protests from the Internet industry and criticism from the Constitutional Council, France’s Parliament enacted a glaring loophole: While service providers must collect identifying information from web page authors, they are not required to verify it, and cannot be held responsible in place of the authors if it turns out to be false.

Exhibit 3*The Rise, Fall and Rise of the Extreme Right in Europe*²⁹

The concept of Left and Right was born with the French Revolution of 1789, in which anti- and pro-monarchy representatives to the National Convention sat on opposite sides of the assembly hall. France remained the battleground of these forces through successive empires, monarchies, and three republics. It was here that the extreme right began to take its modern form, through the Dreyfus Affair at the end of the 19th century – a case in which a Jewish army officer was falsely accused and convicted of espionage, with the approbation of anti-semites and Catholic royalist intellectuals like Charles Maurras, who invented the label “nationalist” for his allies.

Following World War I, the triumphant emergence of Benito Mussolini’s Fascists in Italy established a new paradigm of the extreme right: a union of the State, industry, and an elite, based on an ideology that proposed a total unity of the nation and the individual (hence the term “totalitarianism”). In this schema, as in Sovietism, the rights of the Nation completely dominate those of the citizen. It was during this period that the first major anti-racist citizens’ groups, such as the LICRA in France (founded in 1927), began to mobilize. Throughout the 1980s and 1990s, such citizens’ groups took the lead in combating the resurgence of the extreme right. Their activities included prosecuting violations of French anti-racist laws, training activists, and compiling extensive documentation on the extreme right. In Germany, as depression and hyper-inflation ravaged the population, Adolf Hitler launched the National Socialist (Nazi) party at the end of the decade. Condemned to prison for the abortive “Beer Hall Putsch”, he composed a master plan, *Mein Kampf*, that became a best-seller. It called for the subjugation of Germany’s Jews, and the conquest of Europe. It later became the blueprint of the Third Reich.

In 1933, after a determined program of assassination and other crimes directed at opponents within and outside the Nazi party, Hitler became Chancellor of Germany, and began the military buildup that led to World War II. By the mid-1930s, fascist movements were underway in Spain, where the *Generalissimo* Francisco Franco (aided by Italy and Germany) emerged victorious from a brutal civil war, and in France, where the left-wing government of the Popular Front was nearly overturned by street battles with extreme right movements.

Following the Nazi conquest of France in 1940, nearly all of these movements were absorbed into the Pétain government, also called the Vichy State, which abrogated the Republic and voluntarily “collaborated” with the Nazi “Occupant”. In 1942, the Nazis launched their “Final Solution” to the “Jewish question” – a program of mass extermination, involving the deportation and murder of six million Jews (and an equal number of other ethnicities, such as Gypsies, and political opponents) in concentration camps, of which the most infamous is Auschwitz. The surviving Jews gave this catastrophe the name of “Shoah,” or Holocaust. It is generally conceded that while other genocides have occurred and continue to occur, the singularity of the Shoah resides in the industrial organization of the massacre of a people.

²⁹ This note is adapted from Mark Hunter, *Un Américain au Front : Enquête au sein du Front National* (Paris : Stock, 1998).

Exhibit 3 (Cont'd)

After the defeat of Nazi Germany in 1945, fascists were hunted down, imprisoned, and executed throughout the former Third Reich, and their political parties were banned in France and Germany. Only in the 1970s, when Italian neo-fascists materially aided the founding of a French party, the National Front (FN), were the conditions for a Continent-wide resurgence of the extreme right established. They included a new cadre of young militants, and a new body of ideological doctrine, organized on the principle of “national identity” and the tactics of populism.

By the end of the 1980s the FN was represented in the European Parliament and municipal and regional councils across France – and more important, had created a body of doctrine and militant practice which it exported to similar populist movements like Germany’s Republikaners, the Vlaams Blok in Belgium, and the Austrian Freedom Party (FPO) of Jorg Haider. The increasing success of these movements was based on two key factors: permanent militant activity in public spheres (such as markets, cafés and bars, and even soccer stadiums) that had been abandoned by media-savvy traditional parties, and increasingly professional images. Where its mainstream opponents thought in terms of demographics, like marketing executives, the extreme right thought like an infantry division, in terms of seizing and holding territory.

Even Le Pen’s scandalous 1987 declaration that the Holocaust was a mere “detail of the Second World War,” and his party’s subsequent “demonization” did not stop its rise. Since 1985, when the epochal “Single Act” started to open Europe’s national borders to the free flow of persons, goods and services, the European Union had mainly benefitted big business, at the expense of the working class and small businesses. At the beginning of the 1990s, unemployment reached three million in France, and four million in Germany, while the providential social benefits put in place after the Second World War were abrogated from the top down, in order to meet the stringent budgetary criteria of the European Monetary Union. Simultaneously, taxes reached historic levels – in Germany, 45% of the GDP, and 44.7% in France. As corruption wracked Europe’s political elites in one country after another, the extreme right found a sympathetic hearing for other aspects of its programs – and notably, the idea that immigrants were responsible for the Continent’s hard economic times. It was a direct (and in Haider’s case, explicit) adaptation of Hitler’s argument that Jews were taking away Germans’ jobs. The revived extreme right also provided a safe harbor for the unrepentant veterans and nostalgics of Hitlerism, who, behind the cover of legal parties, developed far more explicitly totalitarian, anti-semitic, and racist doctrines.

These neo-Nazi forces were among the first political elements in Europe to understand and exploit the potential of the Internet. The Web offered literally hundreds of groups an opportunity to export their news and doctrines – in particular, the denial of the Holocaust – and to establish regular contact with movements as widespread as the American Militias, the neo-Pagans of Nouvelle Résistance, and the Russian “brown-and-red” nationalists who flourished after the collapse of the Soviet state. Ironically, the Web also enabled enemies of the extreme right to track its movements with unprecedented ease. But that was cold comfort to those who had never forgotten that the ravings of a would-be dictator could lead, within a decade, to the slaughter of millions.

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