

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

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Yahoo! Hits the Culture Gap: June 16, 2000

Less than a month after Judge Jean-Jacques Gomez handed Yahoo! its first defeat in the court case that opposed it to French anti-racist associations, the company's co-founder Jerry Yang gave an interview to reporter Edouard Lancet of *Libération* that made things worse. It appeared on June 16, 2000, under a bold-faced quote that Yahoo! executives say was taken out of context: "**The French court is very naïve.**" The introduction presented Yang in an aggressive, defiant light: "Okay, he'll respect the laws that apply to his foreign subsidiaries, but it's not okay to intervene on the site of yahoo.com [in] the United States. Not unless an American court so orders."

While an American might consider Yang's printed statements as refreshingly frank, to a French reader, they could easily appear "brutal" – that is, strikingly lacking in courtesy or respect. Asked if Yahoo! would obey the French court's orders, Yang replied: "This court wants to impose a judgement in a jurisdiction over which it has no control... Asking us to filter access to our content according to the nationality of an internaut is very naïve." He added:

"The Internet is bigger than the U.S. We don't think that American values should apply everywhere.... It happens that American style and business have been dominant until now. But not American values. I am not the advocate of "Americanism." We have good and bad points. Every culture should be able to defend itself. But you can't impose your values on the rest of the world. If we're talking about American imperialism, then why can't we talk about French imperialism in the LICRA case?... Can you imagine an American arriving in France and ordering, "French sites can't say this or that"?"

When asked what Yahoo! planned to do next, Yang declared: "We're not going to change the content of our sites in the U.S. just because someone in France asks us to." And he made a final, emotional plea on behalf of Yahoo!'s role as a neutral provider of an open, free cyberspace: "I would like people to understand: We can't favor one group of users over another."

For communications director Nathalie Dray, the session was "extremely courteous, and he [the journalist] wasn't aggressive."¹ It was only over the next few days that the full impact of Yang's words became clear. Said Wrenn: "It definitely made the PR worse. As a practical matter, it didn't make things worse with the judge. But it clearly affected him." Indeed, in a subsequent order, Gomez noted ironically that Yahoo! had not bothered to display even "a little good will."²

The interview offered fresh ammunition to Yahoo!'s adversaries. Yang had candidly admitted that "on Chinese soil, we respect censorship, including political matters." How,

¹ Interview, February 6, 2001.

² Tribunal de Grande Instance de Paris, "Ordonnance de référé, rendue le 20 novembre 2000 par Jean-Jacques Gomez," p. 17.

then, could Yahoo! claim to defend free speech? demanded the leader of the anti-racist coalition, Marc Knobel. “They want to give me a lesson,” he said later, “I’ll give it right back to them.”

He did just that in an editorial published by *Libération* before the next hearing in July:

“Are we dangerous, we who dream of a Net cleansed of [the] merchants of hatred?... Are we dangerous, or are the others? Those who normalize Nazism on the Net? Those who sell the weapons of barbarism as if they were selling socks?... Those who fall silent when these pages promote hatred, discriminate, call for murder?”³

Inside Internet Technology: July 24, 2000

In court on July 24, Yahoo! counsel Christian Pecnard declared that “Yahoo! Inc. cannot obey the ordonnance of May 22.”⁴ Gomez’s order ignored “the very nature of the Internet,” he added.⁵ Was not the Internet conceived and structured as “a space of freedom without central control?”⁶

In any case, blocking techniques based on the IP (internet protocol) addresses of netsurfers – a method Gomez had suggested on May 22⁷ – would not work perfectly, as the order explicitly required.⁸ And blocking methods based on keyword searches would mostly hurt sites “favorable to the cause of the struggle against racism and anti-semitism,” because they were indexed by the same keywords used by neo-Nazis.⁹

What, then, could or would Yahoo! do? It would advise French internautes that content on the U.S. site might violate their laws. It would encourage users to monitor sites, in order to “make actors and users more responsible”.¹⁰ It would contact the publisher of a web page that offered the notorious anti-Semitic forgery, “The Protocols of the Elders of Zion”, to see if

³ Marc Knobel, “Non à l’Internet de la haine.” *Libération*, 21 juillet 2000, p. 5.

⁴ « Conclusions pour la Société Yahoo ! Inc., A Monsieur le Président du Tribunal de Grande Instance de Paris », Audience de référé du 24 juillet 2000, p. 5.

⁵ Op. cit., « Conclusions pour la Société Yahoo ! Inc.... 24 juillet 2000 », p. 5.

⁶ Ibid., p. 6.

⁷ Tribunal de Grande Instance de Paris, Ordonnance de référé, UEJF et Licra c/ Yahoo ! Inc. Et Yahoo ! France, 22 mai 2000 (via www.juriscom.net).

⁸ Op. cit., « Conclusions pour la Société Yahoo ! Inc.... 24 juillet 2000, p. 8.

⁹ Ibid., pp. 12-13.

¹⁰ Ibid., p. 26.

he warned users that the content was fake. But Yahoo! Inc. refused to “act in one way or another as a censor.”¹¹

Following the hearing, Greg Wrenn waited outside the courtroom until Marc Knobel and Stéphane Lilti were done addressing the press, then invited them for a beer.

We sat down and I tried to engage a discussion. It was friendly. Ultimately we didn't make much progress. I said, “If what you're trying to do is get racism off the Net, even if you win and shut down Yahoo!, that won't solve the problem.... the nature of the Internet is that the sites will pop up elsewhere. What you need to do is win the battle for people's minds, and get out your message, and let them know the tools they can use to stop their children from seeing this. Why don't we talk about ways to get your ideas out – promote your sites, get better tools to users – instead of trying to shut these other things down?” Lilti said, “That's an American way of settling a dispute.” And Marc then said, “No, you'll find a way to do this blocking, and that's what we want.”

On August 11, Judge Gomez named a panel of international experts to study the technical issues. Yahoo!, which had helped create the Internet, had failed to convince the judge or the plaintiffs that it knew what it was talking about.

The Day of the Experts: November 6, 2000

The “college of experts” appointed by Judge Gomez included Vinton Cerf, an American considered among the founders of the Internet, François Wallon, a French Internet authority, and English Web expert Ben Laurie. In court on November 6, they agreed that no technical measures could ensure that Yahoo! would succeed in keeping all French Internauts away from Nazi writings or objects. Even the best combination of techniques, including IP address blocking, would filter a total of only 80% of French users. Moreover, wrote the experts, “It is not possible for Yahoo! to exclude objects [from auctions] which are not described by their owners as of Nazi origin.” But the technical possibilities should suffice to challenge the position of Yahoo! even if they were not 100%.

Under questioning, Vinton Cerf testified that he had not read the final report, and had written a separate report of his own. As he saw it, asking users to identify their locations, another technique suggested by the court, was futile and dangerous:

[Users] can choose to lie about their locations. [And] it might be considered a violation of the right of privacy of European users, including French users, to request this information. Of course, if this information is required solely because of the French Court Order, one might wonder on what grounds all users all over the world are required to comply.

Prosecutor Pierre Dillange likewise asked the court to retreat: “French justice should rule within the limits of what is possible and do-able.”¹² Marc Knobel was appalled:

¹¹ Ibid., p. 27.

“We create an object, the Internet. Is it because this object is at the disposition of everyone in the world, that the object is beautiful[,] because we make more money, more stock shares, we’re better dressed[,] that everything is fine?... These big companies can be irresponsible[.] It’s also their duty to decide from time to time what’s good and what is not.”

Yahoo! Takes Stock: November 2000

Well after midnight a few days after the November 6, hearing, Philippe Guillanton was standing behind the closed door of his apartment’s bathroom, hoping he wouldn’t wake up his kids, as he pursued a conference call with Yahoo!’s international leadership – CEO Tim Koogle, Greg Wrenn, Jerry Yang, European general director Fabrizio Rebono, and others.

The damage was extensive, they agreed. Their brand name was associated with Nazism. Their French subsidiary’s hard-built local identity had been sapped. Guillanton worried that “people who don’t understand [our position], and who aren’t yet on the Internet, will avoid us two years down the road.”¹³

Until now Yahoo!’s leadership had simply reacted to events. But as the conference stretched into the small hours of the morning, a strategy emerged. First, Yahoo!’s auctions would no longer be a free service, run by and for users. It would be a paying service, and Yahoo! would decide what was proper for sale. Commented Wrenn:

“We were already thinking of changing. We didn’t want to be seen as making money off these things directly. But we wanted to make it a quality shopping experience, less of a flea market.... We changed to get fees, and make it more attractive to sellers. We knew people would think it was because of the lawsuit. Then you just invite more lawsuits. We knew that would happen. But you can’t let that be the reason to avoid what’s right for your business.”

Yahoo! would also ban Nazi and other offensive items from its auction service. “Using combinations of keywords and other factors, if you try to post a Nazi medal, it’ll stop it, and you have to click a button to have a human look at it,” explained Wrenn. He added:

“We changed that for shopping, not the soapbox services [such as forums]. We still have the same policy there. You can say “Hitler is a great guy” in the U.S. [where such opinions are legal]. On the Chinese site, you don’t get a lot of time to say, “The Dalai Lama is right.”

A final question remained: Assuming that Gomez ruled against Yahoo! again, should the company appeal his decision in France? “This was a tough issue,” said Wrenn.

“The main issue was timing. You don’t get the order stayed while you appeal, you’re required to comply immediately. It’s not that we had no chance, but we

¹² Julie Krassovsky, “Procès Yahoo!, les experts, stars d’un jour. » www.transfert.net, Nov. 6, 2000.

¹³ Interview, February 6, 2001.

did not view the chances as favorable. And we're a public company. We felt more confident about our ability to resolve the questions in the U.S. courts."

Instead, Yahoo! Inc. would file a complaint for declaratory relief before the U.S. courts, who hold the sole power to enforce foreign judgements against an American corporation. Yahoo! Inc. has no assets in France that could be seized by the plaintiffs. And Wrenn thought it would be difficult for the French to win in Yahoo!'s home courts: "We have the First Amendment issue. If U.S. companies can be threatened by judgements in other countries, that has a chilling effect on free speech. Our First Amendment case is as strong as it gets." In the U.S., Yahoo! could shift the debate away from Nazism, and toward the rights of Americans.

The Judge's Last Word: November 20, 2000

On November 20, Judge Gomez dismembered Yahoo!'s arguments, one by one. Was its auction site aimed at Americans? No, said Gomez, "Yahoo knows it is [also] addressing the French, since it replies to a connection to its auction site from a computer in France with ad banners in French."¹⁴ And why, if Yahoo! could "already refuse human organs, drugs, or works and objects related to pedophilia on its auction site," could it not do the same with Nazi objects? Was doing so not consistent with "a moral and ethical exigency that all democratic societies share"?¹⁵

He spared Yahoo! France, which "had largely satisfied the letter and spirit" of his previous ruling.¹⁶ But he was severe for Yahoo! Inc., which was ordered to pay \$1390 to each of the plaintiffs, plus the expenses of the court and the plaintiffs, and to satisfy the terms of Gomez's previous ordonnance within three months, or pay a fine of \$13,900 per day thereafter.¹⁷

The ruling was international front-page news, usually accompanied by a headline linking the words "Yahoo!" and "Nazi." The *International Herald Tribune* called the ruling "certain to reverberate through the uncharted world of the Internet."¹⁸ The *Financial Times* quoted Nigel Hickson, head of the e-business unit at the Confederation of British Industry: "Despite the obnoxious nature of the [Nazi] material, this ruling sets a very bad precedent for the future development of services on the Internet."¹⁹ An accompanying editorial warned that "similar cases in other countries... would be a sure way to hinder the growth of Internet business."²⁰ The *Wall Street Journal* saw "disastrous implications for free expression around the world,"

¹⁴ Op. cit., "Ordonnance de référé rendue le 20 novembre 2000 par Jean-Jacques Gomez...", p. 4.

¹⁵ Ibid., p. 18.

¹⁶ Ibid., p. 21.

¹⁷ Ibid., pp. 20-21.

¹⁸ Victoria Shannon, "French Court Tells Yahoo to Block Nazi Items on Site." *International Herald Tribune*, Nov. 21, 2000, p. 1.

¹⁹ Jean Eaglesham and Robert Graham, "French Court Ruling hits Yahoo!" *Financial Times*, Nov. 21, 2000, p. 1.

²⁰ Anon., "Offensive Ruling." *Financial Times*, Nov. 21, 2000, p. 20.

and an open door “for other countries to hold independent web site publishers or large corporations outside their borders responsible under strict rules about illegal content.”²¹

The day following the ruling, Yahoo!’s share price on the Nasdaq exchange dropped from \$48.87 to \$41.68, and again to \$38.18 on November 22. It rebounded to over \$40 on November 27, and then slid below \$37 the following day, simultaneous with the announcement that a Munich prosecutor was investigating charges that Yahoo! Deutschland had sold copies of *Mein Kampf*, banned in Germany.²² Yahoo! executives dismissed the notion that the stock slides were related to its judicial woes.

On December 21, Yahoo! Inc. filed suit in U.S. District Court, asking for a ruling that Gomez’s orders “are not recognizable or enforceable” in the U.S., plus recovery of Yahoo!’s court costs and an injunction to prevent the French plaintiffs “from enforcing or attempting to enforce the Paris Court’s [rulings].”²³

Guillanton had called the LICRA before the suit was filed, and they “reacted violently,” he said. “We said, ‘Calm yourselves, we’re technically obliged to do this.’” Countered Knobel: “They’re still accusing French justice. [Supposedly] we’re in a banana republic, a totalitarian country. It’s consternating. It’s disgusting.”

Epilogue: Will it Ever End?

On January 22, 2001, another French group, the Association of Friends of the Deported of Auschwitz and the Camps of High Silesia, filed criminal charges against Tim Koogle, CEO of Yahoo! Inc., for “defending war crimes, crimes against humanity, or crimes of collaborating with the enemy [and] for having deliberately maintained auctions of Nazi objects.”²⁴ Attached to the charges was proof that the auctions had continued on January 5, 2001. On January 6, Yahoo! had announced the removal of all objects related to Nazism from its auction sites, except some 140 collectible coins, stamps, and anti-Nazi books and films. In January 2001, Tim Koogle resigned from Yahoo!, citing personal reasons.

As Vinton Cerf said in an interview with *Libération*, “We’re at the beginning of ten years of conflicts.”²⁵

21 Mylène Mangalindan and Kevin J. Delaney, “Yahoo! Is Ordered to Bar Nazi Material.” *Wall Street Journal*, Nov. 21, 2000, p. 1.

22 Steve Kettmann, “Germany’s Kampf Furor Renews.” www.wired.com, Dec. 1, 2000.

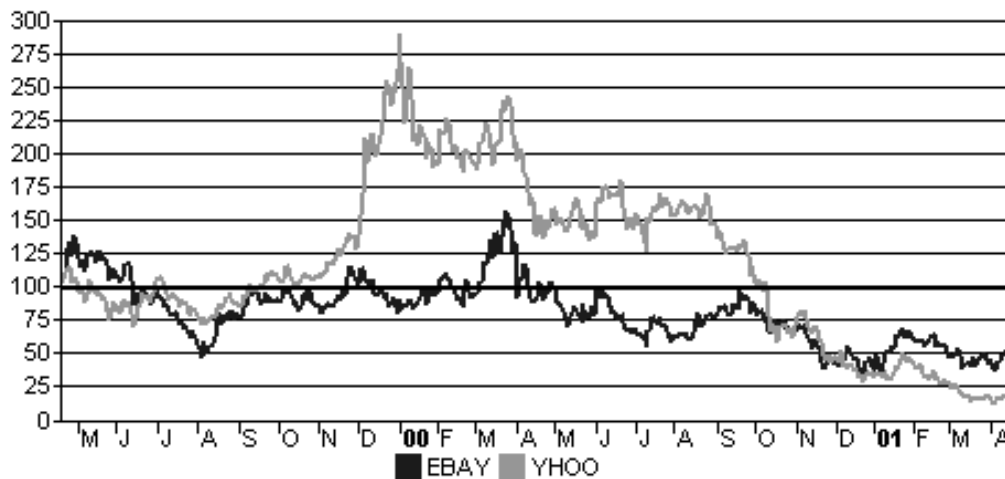
23 “Complaint for Declaratory Relief, Yahoo! Inc., a Delaware corporation, v. La Ligue contre le Racisme et l’Antisemitisme, a French Association, and l’Union des Etudiants Juifs de France, a French Association,” U.S. District Court for the Northern District of California, San Jose Division, Dec. 21, 2000, pp. 12-13.

24 Citation directed devant le Tribunal Correctionnel de Paris (17ème Chambre), à la requête de l’Association amicale des déportés d’Auschwitz et des camps de Haute Silésie, p. 8. The copy provided by Marc Knobel is undated, suggesting that he possessed a copy before the suit was filed.

25 Laure Noualhat, «Nous sommes à l’aube de dix ans d’affrontements». *Libération*, Nov. 10, 2000 (via www.liberation.fr).

Exhibit 1
Yahoo!'s Stock Market Fortunes, 2000-2001

Did the LICRA affair hurt Yahoo! Inc.'s stock price? No one can say for sure. Media and market analysts in the U.S. barely noticed the case for several months – and for most of 2000 the entire New Economy, and in particular advertising-dependent Internet companies like Yahoo!, registered more or less steady declines, as this Nasdaq chart shows:



Nonetheless, a comparison of key dates in the LICRA affair with Yahoo!'s share price suggests that at least some traders were following the case, with predictable effects on the stock price. The filing of the lawsuit was followed by a drop in the stock, and then a recovery. With one exception, succeeding court dates were preceded by a decline in share price, and then a recovery following each hearing, confirming the impression that traders were using these occasions to take quick profits.

Exhibit 1 (Cont'd)

Consider the following calendar (stock prices are drawn from www.nasdaq.com):

- 10 April, 2000: Yahoo! Inc. is trading at 141.938.
- 11-14 April: The lawsuit is filed in Paris, six hours ahead of New York. Yahoo! falls to 133.500. By 14 April, after rising to 136.188, Yahoo! falls to 116.000.
- 15 May-2 June: The first hearing in Paris takes place on 15 May, when Yahoo! is trading at 130.000. Over the following two days, it rises to 137.813, before falling to 120.313 on 19 May – the last trading day before Gomez's first ordonnance. It recovers to 126.250 on 22 May, when Gomez issues his order, then falls to 118.313 on 23 May. A week later, the stock breaks into the 130's again.
- 21-25 July: At the beginning of this period, Yahoo! is trading at 138.313. On 24 July, when Yahoo! claims in court that it cannot satisfy the judge's order, the stock falls to 132.563, before rising to 138.000 on 25 July.
- 7-11 August: Yahoo! loses an average of two points a day, declining from 136.500 to 128.625 on the hearing date of 11 August, when Judge Gomez appointed a college of experts to assist on technical issues. The first trading day following that decision, 14 August, Yahoo! stock rises to 132.375.
- 1-7 November: As the date for the court-appointed experts' report approaches, Yahoo! stock rises steadily to 68.750 on 3 November. It dips only slightly to 65.625 on the next trading day, 6 November, when the experts testify. Vinton Cerf, the most famous among them, offers potent arguments in favor of Yahoo!, which the prosecutor adopts. On 7 November, the stock rises to 68.500.
- 8-22 November: Yahoo! stock begins a steady decline. On 20 November, the day of Gomez's final ruling, the stock is down to 48.875, from 51.250 the previous day; on 22 November, following front-page headlines around the world, it falls to 38.188.
- 21-22 December: In a somber month for the Nasdaq, the announcement of Yahoo!'s counter-suit in California coincides with a rise in the stock, from 25.625 to 29.563.

Exhibit 2

Interview with Jerry Yang from Liberation (16-6-00) Article by Launet Edouard

Are you going to give in to the demands of the French justice system?

The French tribunal wants to impose a judgement in a jurisdiction over which it has no control. It seems difficult for the French justice system to ask an American society to do this or to do that. It will be very interesting to see how this affair is going to turn out. For us to be asked to filter the access to our content in function of the nationality of the internautes is very naïve. The court is not taking into account the technology and the very nature of the Internet. It seems to totally ignore the way our site functions. They have already asked a lot of things from us, but then, no precedent has been set for the French procedures.

Has there ever been another similar case to this?

We are currently present in 23 countries. Everywhere, we respect the local laws. Even in China or in Singapore, where the governments impose some restrictions on content, we are succeeding very well to work with the authorities. On Chinese soil, we respect censoring, as well as political matters. In France, on Yahoo.fr, we are sure all the time that everything we do is legal in this jurisdiction. But we are being asked to intervene in our American servers, and that, no, we have never seen before. The French are unique. (laughs)

What are you going to do?

With the exception of what they are imposing on us in an American court, there are not a lot of things that we are able to do. We are not going to change the content of our sites in the US just because someone in France is asking us to. Imagine an American visiting you [France] and saying: "French sites can't do this or that"? Allowing, or not, access to content is another story. If the government wants the internautes to be unable to see our content, then it would have to block all access, not only our site's access.

Then, you're not going to attempt to filter French access to yahoo.com?

No, not in the current state of things. We have a lot of respect for national sovereignty. And we also have a lot of respect for the Internet itself. We are not controlling it, we don't have the rights over it and over the people who use it. The Net poses a lot of technical problems and extremely complex rules. We have to be prudent then: it's one of the responsibilities of Yahoo, considering its position. I would like people to really understand this: we can't say that one group of users are right versus another.

The culture of the Internet, profoundly marked by American values, is about to change. Europe and Asia are gaining more and more importance on the Net and they hope that their own values are being respected. How is a company like Yahoo taking this situation into account?

Everyone has their own rules, that's normal. But you're missing an essential point. We don't see ourselves as an American business, but as a global company who adapts to the rules of each country where we are present. The Internet is bigger than the United States. We don't think that American values have to apply everywhere. If you think that yesterday the Internet

Exhibit 2 (Cont'd)

was American and that tomorrow will be different, you're wrong. It just so happens that *business* and the American style was present until now. But not American values. I am not the advocate of things "American". There is in America, some good and some bad. Each culture has to be able to defend itself. But you can't impose you own values on the rest of the world. If you talk about American imperialism, then don't we have to talk about French imperialism in the LICRA affair?

Are you defending American freedom of speech as one of the universal values of the Internet?

No. Why impose it on those who don't want it? The Chinese don't do it. It would be nice, but it's not like that. You French believe in censorship. Perfect, that's not a problem for me. Not to me, nor to the other Internet enterprises.

Some people are proposing to give the internauts "electronic passports", which would force a selective filter when accessing websites and thus to surf with respect to national legislation.

Conceptually, numeric certificates make sense, even if it will not be easy to define a standard. It's not stupid to try to better indentify the internauts, in particular to secure electronic commerce. But to give out electronic certificates to filter the access to certain content poses some questions of another order. For example, could an American see a site based in China without being submitted to the restrictions imposed to the Chinese surfers? Could he benefit from higher laws? And how do we handle that? It's clearly a political problem on the same order as the delivering of visas. It's not the private business' problem. If the governments decide to hand out electronic visas, we will respect their decision. But if that comes back to put up walls between countries on the Internet, I don't think that only one system will contribute to develop international dialogue. In Singapore, the government controls, via the access providers, all that leaves the country. They can block certain addresses, certain content. The technology is powerful, but it must be careful not to create more problems than it solves.

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