CATO INSTITUTE BRIEFING PAPERS

Caught in the Seamless Web

Does the Internet's Global Reach Justify Less Freedom of Speech?

by **Robert Corn-Revere**

No. 71 **July 24, 2002**

A federal appellate court will decide this year whether French anti-discrimination law can restrict freedom of speech on U.S.-based websites that are accessible in France. A Paris court ruled in 2000 that the Yahoo! website violated French law because its users offered for sale certain Nazi artifacts. However, to force compliance with the order, French plaintiffs must seek enforcement from a U.S. court. In response, Yahoo! sought a declaratory ruling and a federal district court held that enforcing the French order would violate the First Amendment. The matter is now on appeal.

The Yahoo! case presents the question of whether the Internet should be governed by myriad local censorship laws from around the world. U.S. courts have held uniformly that the Internet should receive the highest degree of First Amendment protection. They have been influenced profoundly by the medium's global reach and have invalidated most restrictions so as not to interrupt the "never-ending worldwide conversation" that the Internet makes possible. A contrary result in the Yahoo! case would embrace a very different philosophy—that Internet speakers must "show their papers" at each nation's borders to ensure that their speech is acceptable to local authorities.

Other nations may treat their citizens as fragile children if they wish, or worse, as enemies of the state. But U.S. courts should not permit the seeds of foreign censorship to be planted on U.S. soil by finding that such restrictions are enforceable here.

Robert Corn-Revere, an adjunct scholar with the Cato Institute, is a partner at Hogan & Hartson in Washington, D.C., where he practices First Amendment law. He wrote, along with Ann Brick of ACLU of Northern California, an amicus brief in Yahoo!, Inc. v. LaLigue contre le Racisme et l'Antisemitisme, *Case No. 01-17424 (9th Cir.). This paper is based, in part, on that brief.*

The history of censorship is inextricably intertwined with technological progress.

Introduction: Technologies of Freedom

> An instance of the inexplicable conservatism and arrogance of the Turkish customs authorities was recently evidenced by the prohibition of the importation of typewriters into the country. The reason advanced by the authorities for this step is that typewriting affords no clew to the author, and that therefore in the event of seditious or opprobrious pamphlets or writings executed by the typewriter being circulated it would be impossible to obtain any clew by which the operator of the machine could be traced. . . . The same decree also applies to the mimeograph and other similar duplicating machines and mediums.
>
> *Scientific American*
> July 6, 1901

The history of censorship is inextricably intertwined with technological progress. From the printing press, through television, and on to the Internet, innovations in communication inevitably have prompted official efforts to limit or control new media. The United States was the first nation to provide formal protection for freedom of the press. Nevertheless, despite America's foundational commitment to liberty for the technology of print, policymakers and courts in the United States historically have been slow to extend the same freedom to newer innovations.

The Internet bucked that trend. In the brief time between 1996 and the present, U.S. courts were presented with a number of significant cases involving attempts to restrict information available on the Internet and World Wide Web.[1] That growing body of law required courts to devote significant attention to the nature of the Internet as a medium of communication and to assess its importance to the American system of free expression. As a result of this review, virtually every federal judge who was asked to rule on direct censorship of protected expression on the Internet held that such restrictions violate either the First Amendment to the U.S. Constitution or the Commerce Clause, or both. The U.S. Supreme Court struck down key portions of the Communications Decency Act, and federal courts have invalidated similar laws in New York, Michigan, Virginia, New Mexico, Arizona, and Vermont.[2] Most recently, the Supreme Court held that restrictions on Internet speech based on community standards did not necessarily invalidate a federal law targeting such speech, but the Court kept in place an injunction blocking the law's enforcement while lower courts grapple with other difficult issues, including whether the law bans too much speech, is unconstitutionally vague, or supplants less restrictive alternatives.[3]

The consensus thus far is that the Internet fulfills the ultimate promise of the First Amendment and should receive the highest level of constitutional protection. The Supreme Court found that the information available on the Internet is as "'diverse as human thought'" with the capability of providing instant access to information on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls."[4] Judge Stuart Dalzell of the U.S. District Court for the Eastern District of Pennsylvania characterized the Internet as "a never-ending worldwide conversation" and "the most participatory form of mass speech yet developed."[5] Judge Lowell Reed wrote that in "the medium of cyberspace . . . anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined."[6] Another district court judge, noting that "[i]t is probably safe to say that more ideas and information are shared on the Internet than in any other medium," suggested that it may be only a slight overstatement to conclude that "the Internet represents a brave new world of free speech."[7]

One key aspect of this "brave new world" that has played a central role in the decisions to fully protect Internet speech is the global nature of the medium. The Supreme Court

described the Internet as a "'unique and wholly new medium of worldwide human communication'" that makes information available "'not just in Philadelphia, but also in Provo and Prague.'"[8] As it more recently noted, "One can use the Web to read thousands of newspapers published around the globe" and "can access material about topics ranging from aardvarks to Zoroastrianism."[9] Cyberspace has no particular geographical location, has no centralized control point, and is available to anyone, anywhere in the world with access.[10] It is "ambient—nowhere in particular and everywhere at once."[11] That quality makes geography "a virtually meaningless construct on the Internet."[12] Accordingly, U.S. courts have been strongly influenced by the "unique character of these new electronic media."[13]

Such a reaction is not unexpected where a free and open medium of communication is compatible with a political system predicated on the free exchange of ideas. But that also is the very reason the Internet is seen as a threat in societies that lack the same free speech traditions as the United States. Other nations have responded to the advent of the Internet in various ways, ranging from open hostility to attempts to regulate it in the same way as traditional electronic media. Such divergent national responses to technology and political freedom are nothing new and historically have had little impact on the United States. But when such differences are applied to a global medium of communication, the resulting legal conflict can have significant ramifications for freedom of speech in this country.

The Yahoo! Case

A decision by a county court in France has crystallized questions arising from the application of national standards to an international medium. The case began in April 2000, when La Ligue contre le Racisme et l'Antisemitisme (LICRA) and L'Union des Etudiants Juifs de France (UEJF), two organizations opposed to racism and anti-Semitism, sent a "cease and desist" letter to the California headquarters of the Internet service Yahoo!, demanding that "unless you cease presenting Nazi objects [on the U.S. online auction site] within 8 days, we shall size [sic] the competent jurisdiction to force your company to abide by [French] law." The law on which the demand was based, Article R645-1 of the French Criminal Code, prohibits the display of any symbol associated with an organization deemed criminal, such as the Nazis.[14]

Yahoo! is an Internet service provider that operates various websites and Internet-based services that are offered through its main U.S. servers as well as through servers operated by foreign subsidiaries. Yahoo! subsidiary corporations operate regional services in 20 countries (for example, Yahoo! India and Yahoo! Korea) through websites that use the local region's primary language, direct their services to the local population, and abide by local laws. Yahoo!'s services include an automated auction site, online shopping, e-mail, a search engine, personal webpage hostings, Internet chat rooms, and club listings. The auction site allows users to post items for sale and to solicit bids from other users from around the world. In short, Yahoo! epitomizes the type of worldwide communication made possible on the Internet. Yahoo!'s home website (http://www.yahoo.com) is accessible globally, even though its services are in English, are oriented toward a U.S. audience, and are hosted entirely on servers located in the United States.

That the Yahoo! U.S. site can be reached by French citizens was the basis of the demand by LICRA and UEJF. They did not send a cease and desist letter to Yahoo! France, the regional subsidiary that serves the local population, because that service complies with French law, including Article 645-1. Instead, it was sent to Yahoo!'s U.S. service, which is, like all Internet-based services, available internationally for those who seek it. When Yahoo! declined to alter its U.S.-based service in response to the demand, the French groups filed suit in Paris.

In May 2000 the French court ordered

Other nations have responded to the advent of the Internet in various ways, ranging from open hostility to attempts to regulate it in the same way as traditional electronic media.

Yahoo! to "dissuade and render impossible" any access via yahoo.com by Internet users in France to the Yahoo! Internet auction site displaying Nazi artifacts, including objects, relics, insignia, emblems, and flags. It also ordered Yahoo! to block access by French citizens to personal webpages displaying text, extracts, or quotations from such works as Adolf Hitler's *Mein Kampf* and *The Protocols of the Elders of Zion*, the anti-Semitic report of the czarist secret police. After an interval during which the court heard evidence on the technical feasibility of its order, it reaffirmed its directive for Yahoo! in November 2000 and ordered it to "take all necessary measures to dissuade and make impossible any access via Yahoo.com to the auction service for Nazi merchandise as well as to any other site or service that may be construed as an apology for Nazism or contesting the reality of Nazi crimes."[15] The French court held that "the simple act of displaying [Nazi artifacts] in France violates Article R645-1 of the Penal Code and therefore [is] a threat to internal public order."[16] It described the mere availability of such information as "a connecting link with France, which renders our jurisdiction perfectly competent to rule in this matter."[17]

In specific terms, the order of the Paris county court directed Yahoo! to (1) reengineer its content servers in the United States and elsewhere to enable them to recognize French Internet protocol (IP) addresses and block access to Nazi material by end users assigned such IP addresses, (2) require end users with "ambiguous" IP addresses to provide Yahoo! with a declaration of nationality when they arrive at Yahoo!'s home page or when they initiate any search using the word "Nazi," and (3) implement these changes within three months or face a penalty of 100,000 francs (approximately $13,300) for each day of noncompliance. The French court order also provided that the penalties assessed against Yahoo! Inc. may not be collected from Yahoo! France. In other words, if the plaintiff groups want to enforce the judgment, they must persuade a U.S. court to recognize it and apply it against Yahoo!'s U.S. service.

The French Yahoo! decision cuts sharply against the grain of the emerging jurisprudence in the United States that strongly protects Internet speech because of its global reach. The French view is not that geography is "a virtually meaningless construct on the Internet" but that geography is all-important and should determine what information should be available online. It envisions a world in which Internet surfers must "show their papers" at the border, even when that border exists in a server located wholly outside the nation whose law would be applied. Accordingly, the French Yahoo! decision represents a direct attempt by a foreign nation to apply its law extraterritorially to restrict the freedom of expression of U.S.-based online speakers who are protected by the First Amendment.

The French view is that geography is all-important and should determine what information should be available online.

You Say That Like It's a Bad Thing

The French Yahoo! decision has its defenders—not just among Europeans who sneer at America's "free speech fetish." Supporters include people who evidently would like to see the Internet get its comeuppance. Sebastian Mallaby of the *Washington Post*'s editorial page staff cited the Yahoo! case to support his conclusion that "the real story on the Net these days is that the cyberanarchists are losing." He noted the existence of technology "that can pinpoint the geographic whereabouts of cybernauts." "Once that is done," he concluded, "French surfers can be blocked from Nazi sites while leaving Americans to enjoy the full freedoms of the First Amendment." Such creative use of law and technology debunks "[t]he old cyberanarchist nostrum that national governments can no longer expect to enforce national laws."[18]

Mallaby's repeated use of the word "cyberanarchist" as an epithet brings to mind the recent Vatican position paper decrying the "radical libertarianism" of the Internet.[19] The paper notes that a consequence of deregulation has been "a shift of power from national states to transnational corporations" and that the Internet has produced "a mindset

opposed to anything smacking of legitimate regulation for public responsibility." That has led to an "exaggerated individualism" and a view of cyberspace as a "new realm" where "every sort of expression was allowed and the only law was total individual liberty to do as one pleased."

In the Vatican's view, "[T]he only community whose rights and interests would be truly recognized" would be "the community of radical libertarians." Such thinking "remains influential in some circles," according to the Vatican paper, "supported by familiar libertarian arguments also used to defend pornography and violence in the media generally."[20] Describing the "ideology of radical libertarianism" as both mistaken and harmful to "legitimate free expression in the service of truth," the paper concludes that the Internet "is no more exempt than other media from reasonable laws against hate speech, libel, fraud, child pornography and pornography in general." Accordingly, it calls for "international cooperation in setting standards and establishing mechanisms to promote and protect the common good."[21]

Coming, as it did, just as stories were breaking about the pedophilia scandals in the Catholic Church and decades of cover-ups, the Vatican paper's theme of "freedom" versus "truth" might seem a bit hypocritical.[22] Nevertheless, the pontifical pronouncement dovetails with Mallaby's conclusions that "government must act as the ultimate enforcer" of norms in cyberspace[23] and that the "real debate will not be whether you can enforce rules on the Net but how the enforcers should adapt to the new medium."[24] In addition to discussing the French Yahoo! case, Mallaby pointed out that the Chinese dictatorship has found new ways to stifle dissent online: "The regime blocks out much of the content it dislikes, official news agencies get a new way of disseminating the party line and dissidents become the victims of Web-enabled smear tactics."[25] As for regulating pornography, Mallaby notes, "Scary offshore porn sites won't seem so scary anymore. If a government wants to block them, it can tell credit card companies not to process payments to them."[26]

Mallaby has recognized that applying myriad national laws to cyberspace could cause the Net to "lose some its borderless appeal" and that we risk converting the World Wide Web to "Numerous National Nets."[27] He notes, for example, that an online magazine oriented toward teens could violate the law in countries with severe restrictions on advertising to children. But from the perspective of other countries, Mallaby concludes, there is no reason to abandon local regulation. "If a European country feels strongly about marketing to kids, why should it let American publishers subvert its policies? Countries have varying regulations for the good reason that cultures vary. The Internet won't change that."[28]

Professor Jack Goldsmith of the University of Chicago School of Law agrees with this assessment: "When French citizens are on the receiving end of an offshore communication that their government deems harmful, France has every right to take steps within its territory to check and redress the harm."[29] Although Goldsmith assumes incorrectly that "[a] country can enforce its regulations only against companies with assets in its territory," he describes the French Yahoo! decision (which applies primarily to Yahoo! in the United States and not to Yahoo! France) as a "reasonable middle ground." He argues that it is legitimate to force offshore content providers to use filtering technology "to identify recipients of information by geography and screen out content to them."[30] Goldsmith acknowledges that such measures will "marginally raise the cost of doing e-business" but concludes that geographical filtering will "force Yahoo! to take account of the true social cost of its auction activities."[31]

A Little Bit Pregnant

Goldsmith's balancing approach assumes that cross-border regulation of the Internet can be carefully calibrated by using technology to keep information out of restrictive juris-

Under the logic of the French Yahoo! decision, an Internet publisher or web host must create filters to block access to any content that is illegal in the jurisdictions in which its service is available—that is, everywhere.

dictions while allowing its free availability everywhere else. Unfortunately, the real world is not so amenable to such neat solutions that sound plausible only in academic journals (or in France). The sheer volume of information, much of it posted by third parties, and the fact that it is constantly changing distinguish the type of communication available on the Internet from most traditional communication. Attempting to restrict the availability of information in certain countries on Yahoo!'s auction website is not the same thing as declining to publish a book in England because of its plaintiff-friendly libel laws or refusing to mail an adult video to Tennessee for fear of its Bible-belt obscenity standards.

The People's Republic of China severely restricts communication via the Internet, including all forms of dissent and the free reporting of news.

Under the logic of the French Yahoo! decision, an Internet publisher or web host must create filters to block access to any content that is illegal in the jurisdictions in which its service is available—that is, everywhere. The publisher need not preclude access to all offending content in all jurisdictions but may use geographic filtering to coordinate its blocking decisions with local laws. Even assuming this is technically possible, it presents web publishers with a daunting task. At least 59 different countries limit freedom of expression online.[32] Theoretically, publishers would have to code each item of information they posted (or otherwise made available) to meet each of the national standards, and set their geographic filters to block access to the content in the relevant jurisdictions. A few examples illustrate the widely varying restrictions that would apply.

China

The People's Republic of China severely restricts communication via the Internet, including all forms of dissent and the free reporting of news. The so-called Measures for Managing Internet Information Services are regulations that prohibit private websites from publishing "news" without prior approval from Communist Party officials.[33] Another set of laws, known as the Seven No's, bars the publication of materials that negate "the guiding role of Marxism, Leninism, Mao Zedong and Deng Xiaoping's theories," go against "the guiding principles, official line or policies of the Communist Party," or violate "party propaganda discipline." Chinese law also bans "content that guides people in the wrong direction, is vulgar or low."[34] Armed with that authority, Chinese officials are trying to stop online protest messages available on overseas websites, particularly those located in the United States, from which so much pro-democracy speech emanates.[35] Such restrictions pose a particular threat to groups like VIP Reference (also known as Dacankao), the leading Chinese pro-democracy electronic newsletter. Although it is based in Washington, D.C., VIP Reference is read by countless individuals in mainland China.[36] If U.S. courts begin enforcing foreign speech standards such as the French law that gave rise to the judgment against Yahoo!, Chinese authorities could pursue similar quasi-civil penalties in the hopes of silencing other pro-democracy speech.

Singapore

The Singapore Broadcasting Authority maintains strict control over the free speech activities of that country's Internet users. A U.S. human rights audit explained that the SBA has regulated access to content on the Internet since 1996 by licensing both domestic websites and ISPs. Service providers must install "proxy servers" that filter out content that the government considers objectionable. The SBA directs service providers to block access to webpages that, in the government's view, undermine public security, national defense, racial and religious harmony, and public morals. In 1997 the SBA announced an Internet Code of Practice to block access to material that contains pornography or excessive violence or that incites racial or religious hatred.[37] In July 2001 the government of Singapore imposed new restrictions on political content, which led at least one organization, Sintercom, to shut down its online activities.[38]

Saudi Arabia

Saudi Arabia bans publishing or even accessing various types of online expression,

including "[a]nything contrary to the state or its system," "[n]ews damaging to the Saudi Arabian armed forces," "[a]nything damaging to the dignity of heads of states," "[a]ny false information ascribed to state officials," "[s]ubversive ideas," and "[s]landerous or libellous [sic] material."[39] All 30 of the country's ISPs are linked to a ground-floor room at the Riyadh Internet entranceway, where all of the country's web activity is stored in massive cache files and screened for offensive or sacrilegious material before it is released to individual users.[40] The central servers are configured to block access to "sensitive" sites that might violate "the social, cultural, political, media, economic, and religious values of the Kingdom."[41] Several key overseas websites have received special scrutiny and blocking, including the Movement for Islamic Reform in Arabia—a group based in England. Saudi Arabian authorities have also issued a fatwa against Pokémon, claiming that the popular children's games and cards possess the minds of children while promoting gambling and Zionism.[42]

Syria

Syria bans many types of content on the Internet, such as statements that would endanger "national unity" or otherwise divulge "state secrets"—categories that include pro-Israeli speech.[43] Syrian citizens can be jailed for sending e-mail to people overseas without government authorization. Syrian authorities enforce the bans in several ways, including by intensive surveillance. Online access is severely restricted. There is only one Internet service provider in the country, which is government run and imposes heavy blocking and monitoring schemes.[44]

Australia

The Australian government has issued regulations that bar many forms of expression on the Internet. Amendments to the Broadcasting Services Act require Australian-based content hosts to deny access to sites that lack content-based classifications or are X-rated. In addition, the scheme is designed to deny Australian minors access to any R-rated websites. Specifically, access to Internet content hosted outside Australia may be prohibited if the Internet content has been classified RC or X by the Classification Board.[45] The list of subjects that can be banned as unsuitable for minors includes suicide, crime, corruption, marital problems, emotional trauma, drug and alcohol dependency, death and serious illness, racism, and religious issues.[46] Violators may be subject to website shutdowns and other criminal penalties.[47]

Italy

Italy restricts both online and offline speech in various ways. The Italian constitution contains broad language that forbids "[p]rinted publications, performances, and all other exhibits offensive to public morality."[48] Italy also allows law enforcement agents to seize questionable "periodical publications" under certain conditions.[49] The ability of the state to regulate speech gains added significance in light of a recent court decision declaring that those standards should be applied globally—not just in Italy. A Roman tribunal held that it has the power to shut down foreign websites to the extent they can be viewed in Italy.[50] The court found that "if confronted with a [defamatory statement] initiated abroad and terminated . . . in our Country, the Italian State is entitled to jurisdiction and the meting [out] of punishment."[51] The court added that "the use of the Internet for defamatory statement embodies one of the cases of aggravation described in Article 595 of the penal code" and that in this case "the sender deserves to be meted a more severe form of punishment."[52] The court's decision may well have been influenced by the fact that the speech at issue contained not only statements about a private party but also "extremely negative defamatory opinions" about "the work of the Italian judicial authorities."[53]

Sweden

Swedish laws ban several types of Internet speech, including "illegal description of violence" and "racial agitation."[54] Those stric-

The Australian government has issued regulations that bar many forms of expression on the Internet.

The Yahoo! case presents special problems since enforcing the judgment here would have practical and legal ramifications that extend far beyond one nation's law or a single court order.

tures require the proprietors of "electronic bulletin boards" to remove or make inaccessible such content.[55] In March 2002 a Swedish court applied those rules to the website of the country's biggest newspaper, *Aftonbladet*, and fined the website's editor for anonymous statements posted to the newspaper's online comment forum.[56]

France über Alles

Because the French Yahoo! decision applies to Yahoo! U.S., the plaintiffs in that case must seek enforcement of the order by an American court. Normally, courts will enforce such foreign judgments as a matter of international cooperation. However, the Yahoo! case presents special problems since enforcing the judgment here would have practical and legal ramifications that extend far beyond one nation's law or a single court order. It would establish a legal framework wherein all websites on the global Internet potentially are subject to the laws of all other nations, regardless of the extent to which such a requirement conflicts with the law of the place where the speakers are located. Any finding that the French order may be enforced in the United States portends the development of an international law under which any nation would be able to enforce its legal and cultural "local community standards" on speakers in all other nations. In such a regime, Internet service providers and content providers would have no practical choice but to restrict their speech to the lowest common denominator in order to avoid potentially crushing liability.

The impact of such a lowest common denominator approach is not measured by counting the number of nations that already have sought to apply their laws beyond their borders, although that number is growing. It is determined by assessing the effects on website operators, considering how the challenged rule "may interact with the legitimate regulatory regimes of other [nations] and what effect would arise if not one, but many or every, [nation] adopted similar legislation."[57] By that standard, web publishers could be forced to block access to information that "sabotages national unity" in China, undermines "religious harmony and public morals" in Singapore, offends "the social, cultural, political, media, economic, and religious values" of Saudi Arabia, fosters "pro-Israeli speech" in Syria, facilitates viewing unrated or inappropriately rated websites in Australia, or makes available information "offensive to public morality" in Italy—to cite just a few examples.

Many web publishers and service providers likely would cease offering content that could run afoul of such restrictions. But assuming it even is possible to monitor the various national requirements as they might apply to all of the information available via a particular site, and to calibrate filters accordingly, the impact on Internet communication would be significant. In the international arena, inconsistent regulation of Internet content acts like a "customs dut[y]."[58] A 1997 White House report on electronic commerce called for a minimum of international government regulation and warned that content regulation "could cripple the growth and diversity of the Internet." It described content regulations as nontariff trade barriers.[59] Similarly, the U.S. Department of Commerce has said, "Full realization of the economic promise of information technology depends on the development of the same safeguards and predictable legal environment that individuals and businesses have come to expect in the offline world."[60]

By contrast, refusing to enforce the French judgment would in no way undermine the rule of law in France. France has full authority to regulate the behavior of its citizenry and to require that citizens limit their web browsing to conform to local norms, just as other nations do. Countries such as China, Singapore, and Saudi Arabia permit their citizens to see only officially approved websites and use technology to try to block access to nonconforming sites. Such policies may offend American notions of free expression

and respect for the individual, but if other nations want to treat their citizens like fragile children, that is not the concern of the U.S. government. Such repressive policies present a significant problem here only if the American government is enlisted as a partner in enforcing foreign speech restrictions on U.S.-based speakers.

Yahoo! Take Two

After the French court reaffirmed its initial order, Yahoo! took preemptive action in the United States. It filed a declaratory judgment action in the U.S. District Court for the Northern District of California, seeking a ruling that the French judgment is unenforceable because it is inconsistent with U.S. constitutional law and policy. While the judge in Paris had reasoned that requiring Yahoo! "to extend its ban to symbols of Nazism" would satisfy "an ethical and moral imperative shared by all democratic societies," the question Yahoo! raised in the U.S. forum is whether that "moral imperative" includes censoring disfavored speech.

Judgments of foreign courts are not entitled to automatic recognition or enforcement in American courts. Whether a U.S. court will honor a foreign judgment is determined by principles of international respect and cooperation.[61] Among those is the rule that a court need not enforce a foreign judgment if to do so will offend the public policy of the nation where the court has jurisdiction.[62] A classic example of a foreign judgment that will not be enforced on public policy grounds is a ruling that unconstitutionally impairs individual rights of personal liberty.[63] This includes a judgment based on laws or procedures that do not comport with fundamental First Amendment principles.[64] Similarly, judgments cannot be enforced if they violate an explicit public policy expressed by Congress.

The Yahoo! order highlighted the stark differences in the way nations value freedom of expression. The French law prohibiting the mere viewing of Nazi insignia, including its display on plainly expressive items such as books or flags, flies in the face of fundamental principles of free expression. In the United States, the Supreme Court has held that the most stringent protections of the First Amendment protect marching in Nazi uniforms, displaying the swastika, and even "[d]istributing pamphlets or displaying . . . materials which incite or promote hatred against persons of Jewish faith or ancestry, race or religion."[65] That is because our constitutional jurisprudence is based on the following understanding:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.[66]

As the Supreme Court explained recently, "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."[67]

Constitutional law does not stringently protect such "low-value" speech because of a belief that "one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable." Rather, the First Amendment protects such speech "precisely so that opinions and judgments, including esthetic and moral judgments about art and literature [and politics], can be formed, tested, and expressed." In our system, "these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."[68]

On the basis of those principles, U.S. courts have refused to enforce defamation judg-

The Yahoo! order highlighted the stark differences in the way nations value freedom of expression.

ments based on foreign law because of the strict First Amendment limits of American libel law.[69] For example, in *Telnikoff v. Matusevitch*, the Maryland Court of Appeals held that enforcement of an English libel judgment would be contrary to public policy as embodied in the First Amendment even though the allegedly defamatory statements were published only in the *London Daily Telegraph*.[70] Similarly, in *Ellis v. Time, Inc.*, a plaintiff brought suit in the United States under both American and English law and argued that the court should apply the more restrictive English defamation law for articles published in England. The court disagreed, holding that applying English law in the United States would violate the Constitution.[71] The court held that "United States courts must apply rules of law consistent with the Constitution, regardless of where the alleged wrong occurs."[72]

Judicial decisions extending First Amendment protections to the Internet, as well as congressional recognition of the value of free expression online, further distinguish the United States from other nations. For example, it is the statutory law of the United States that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[73] Section 230 of the Communications Act establishes the clear policy that the public interest is best served by "promot[ing] the continued development of the Internet and other interactive computer services" and by "preserv[ing] the vibrant and competitive free market" for these services, "unfettered by Federal or State regulation."[74] Accordingly, Congress has created "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[75] U.S. courts have applied this statutory immunity broadly.[76]

There are significant differences between U.S. policies and those of other nations with respect to third-party liability for Internet service providers.

Such immunity from liability for third-party content is not the international norm. In *Godfrey v. Demon Internet, Ltd.*, for example, an English court held that an ISP could be held responsible for defamatory postings by a third party to the extent it made newsgroups containing the postings available. The court considered U.S. authorities, including Section 230, and concluded that British law "did not adopt this approach or have this purpose."[77] It also noted, "The impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law."[78] As in the traditional defamation cases, there are significant differences between U.S. policies and those of other nations with respect to third-party liability for Internet service providers.

The U.S. District Court for the Northern District of California considered the significant differences between U.S. and French law regarding free expression and held that the Yahoo! order could not be enforced in the United States. Judge Fogel wrote that "the French order's content and viewpoint-based regulation of the web pages and auction site of Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States."[79] "Although France has a sovereign right to regulate what speech is permissible in France," he reasoned, "this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders."[80]

Judge Fogel's decision was unaffected by the French court's shaky finding that Yahoo!'s auction site could be "filtered" geographically to block access to forbidden items only to French citizens. Noting that the foreign order would affect Yahoo!'s actions "in the United States" and how it "configures and operates its auction and Yahoo.com sites," he found the question of whether Yahoo! "possesses the technology to comply with the rule" to be "immaterial."[81] Judge Fogel wrote that the French order would require Yahoo! not only to "render it impossible for French citizens to access the pro-

scribed content" but also "to interpret an impermissibly overbroad and vague definition" of what is prohibited. Accordingly, he found that enforcement of the French order against Yahoo! would be inconsistent with the First Amendment because compliance would involve an impermissible restriction on speech.[82]

And the Beat Goes On . . .

The district court's decision was an important milestone in securing First Amendment protections on the global Internet, but it is by no means the end of the story. The French parties appealed the decision to the U.S. Court of Appeals for the Ninth Circuit and argued that the lower court should not have exerted jurisdiction over them since they were taking actions only in France to vindicate their rights under French law. Seemingly oblivious to the fact that the French court's order seeks to limit speech on Yahoo's servers in the United States, they complain, without a trace of irony, that Judge Fogel's decision would "give United States Courts worldwide jurisdiction over any non-forum conduct that has the potential of offending local sensibilities."[83] The court of appeals may decide the case by the end of 2002 or early 2003.

Meanwhile, the civil court findings in France have become the basis for a criminal prosecution of Yahoo!'s former CEO Timothy Koogle, who resides in the United States, under the French Press Law of 1881.[84] In February 2002 the Paris Criminal Court declined to dismiss the charges, based on facts similar to those in the earlier civil case, and held that the case could go forward.[85] The court was unimpressed by Judge Fogel's ruling in the United States and noted, "Following the example of the district judge for the Northern District of California, the French judge is free to adopt his own principles of international criminal jurisdiction to sanction offenses that are completely or partially committed abroad and are likely to threaten national interests" to the extent that "the website's message or contents are made accessible, through the Internet, within French territory."

The court held that providing public access to an auction site offering Nazi articles "and which Internet users can access by virtue of the mere existence of a 'search' link inviting them, establishes" the predicate element of "publicity" for the crime of justifying war crimes and that it is not necessary "that the Internet users be specifically solicited by the owner of the website."[86] The court deemed irrelevant the fact that Yahoo.com is "based in the United States and intended for the American public." Rather, the court concluded that it is appropriate to apply French criminal law "even if the alleged offense is not prohibited by the criminal laws of the country of origin of the presumed operator of the acts or the country where the website's host is geographically located."[87]

Although Timothy Koogle left his job at Yahoo! in May 2001, the court found that he may still be found liable for offending auction postings under French law. If convicted, he could face up to five years in prison and fines of approximately $40,000. The principal effect of criminal action in France, however, is that Koogle should not plan on vacationing in Paris any time soon.

The effect of such laws will become more widespread under a proposed side agreement to a European treaty on crime in cyberspace. The 43-member Council of Europe (CoE) last November ratified a Convention on Cybercrime, the first international treaty on criminal offenses committed through the use of the Internet and other computer networks. Although the CoE is comprised of European nations, the United States was one of four nonmember signatories to the convention.

The main aim of the convention, according to its preamble, is to "pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime" and to take measures such as "adopting appropriate legislation and fostering international co-operation." The convention

The district court's decision was an important milestone in securing First Amendment protections on the global Internet, but it is by no means the end of the story.

deals in particular with offenses related to infringements of copyright, computer-related fraud, and child pornography and offences connected with network security. It also covers a series of procedural powers such as searches for and interception of material on computer networks.

An additional protocol to the convention, expected to be finalized soon, would oblige signatories to "adopt legislative and other measures as may be necessary" to criminalize "distributing or otherwise making available racist or xenophobic material to the public through a computer system"; "insulting publicly, through a computer system, persons for the reason that they belong" to an ethnic, racial, national, or religious group; and distributing material "which denies, grossly minimizes, approves or justifies . . . genocide or crimes against humanity." It also would require the adoption of laws prohibiting "aiding or abetting the commission of any of the offenses established in accordance with this Protocol, with intent that such offense be committed."[88] A draft explanatory report makes clear that those provisions are intended to apply to, among other things, the exchange of racist and xenophobic material in Internet chat rooms or by postings on newsgroups and discussion fora.[89] The protocol was developed as a side agreement so as not to impede ratification of the main convention by the United States and other nations that might have a conflict with the new provision. Although the United States is not expected to sign it, the protocol will exacerbate the problems presented by the French Yahoo! case.

The adoption of the protocol by CoE members will place added pressure on the United States to go along, but that pressure should be resisted. It may be extremely doubtful that the United States could find a way to comply with the protocol that would survive First Amendment scrutiny in any event, but this country should affirm its commitment to constitutional principles by rejecting the protocol categorically. Although such measures are vulnerable under American law, they become less so if we begin to entertain the notion that it is legitimate for governments to dictate matters of individual conscience. As Supreme Court Justice Robert Jackson warned, "[T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[90]

Epilogue

The struggle between government authorities and the technologies of free expression is hardly new. A century ago, Turkish customs officials sought to quell seditious pamphlets by keeping typewriters out of the country. Even now, the North Korean dictatorship of Kim Jong Il directs government officials to "tighten controls over use of typewriters and photocopiers."[91] Jamming of Western radio broadcasts was widely practiced in the Soviet bloc during the Cold War until the practice was terminated officially in November 1988. Such technical measures, while initially effective, were abandoned eventually as futile. Lech Walesa wrote: "When it came to radio waves, the iron curtain was helpless. Nothing could stop the news from coming through—neither sputniks nor mine fields, high walls nor barbed wire. The frontiers could be closed; words could not."[92] Whether jamming was effective or not, the costs were colossal. In 1956 the jamming operation in Poland alone cost $1.4 million and used enough electricity to supply a medium-sized town. In 1981 the BBC estimated that the cost of four days of jamming by the Russians was equal to the annual budget of BBC's Russian radio service.[93]

The Internet has upped the ante on these issues by empowering individuals to communicate instantly with others across the planet.

The Internet has upped the ante on these issues by empowering individuals to communicate instantly with others across the planet. This unprecedented power of the medium to transmit and receive information has increased the sense of urgency on the part of some in authority to limit disfavored speech, whether that speech takes the form of prodemocracy writings, Nazi memorabilia, or sexually explicit imagery. The technology of

the Internet makes this extremely difficult, for as Internet pioneer John Gilmore has said, "The Internet treats censorship as system damage and routes around it." Yet, while the nature of the medium makes it inherently difficult to prevent Internet speech, a number of governments have focused on restricting the speakers themselves.

In this regard, the ability to impose "futile" censorship regimes can have a significant effect. With radio jamming at least, the governments that sought to block foreign messages bore their own costs, a factor that contributed to the demise of the practice. But if foreign judgments can be used to impose costs on U.S.-based Internet speakers, either by requiring the use of filtering systems or by levying fines, they may lead to widespread restrictions on speech regardless of the ineffectiveness of the technical "fixes." Professor Goldsmith may characterize this as forcing Yahoo! "to take account of the true social cost of its auction activities,"[94] but the effect would be to change fundamentally the open nature of the medium by allowing foreign governments to "tax" free speech. For that reason, Judge Fogel held correctly that enforcement of the French Yahoo! judgment in the United States would be repugnant to First Amendment values, and his decision should be upheld on appeal.

One final point about futility is worth mentioning. French laws prohibiting the display of Nazi artifacts and restricting speech generally have done nothing to prevent the recent burnings of synagogues in France, nor have they forestalled frustrations that led to the rise of right-wing politicians like the National Front's Jean-Marie Le Pen. To the contrary, restrictions on speech may contribute to such phenomena by impairing the social safety valve that free expression provides. While nothing requires the French to embrace the First Amendment's philosophy that society is better protected by more speech than by enforced silence, our constitutional traditions should prevent France from exporting its parochial restrictions here.

Notes

1. The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world; the World Wide Web is a publishing forum consisting of millions of individual websites that may contain text, images, illustrations, video, and animation. While recognizing that they are distinct entities, this paper refers to the Web and the Internet collectively as the "Internet" for the sake of simplicity.

2. See, for example, *Reno v. ACLU,* 521 U.S. 844 (1997), aff'g, 929 F. Supp. 824 (E.D. Pa. 1996) (*"Reno I"*); *Cyberspace Communications, Inc. v. Engler,* 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F.3d 1149 (10th Cir. 1999), aff'g, 4 F. Supp. 2d 1024 (D.N.M. 1998); *PSINet, Inc. v. Chapman*, 167 F. Supp. 878 (W.D. Va. 2001); *ACLU v. Napolitano,* Civ. 00-505 TUC ACM (D. Ariz. February 21, 2002); *American Bookseller's Foundation for Free Expression v. Dean,* No. 1:01-C-46 (D. Vt. April 18, 2002); and *American Libraries Ass'n. v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997).

3. *Ashcroft v. ACLU,* 122 S.Ct. 1700 (2002).

4. *Reno I* at 851, 852 (quoting 929 F. Supp. at 842).

5. Ibid. at 883.

6. *ACLU v. Reno,* 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), aff'd, 217 F.3d 162 (3d Cir. 2000) (*"Reno II"*), rev'd and remanded on other grounds, *Ashcroft.*

7. *Blumenthal v. Drudge,* 992 F. Supp. 44, 48 n. 7 (D.D.C. 1998) (citation omitted).

8. *Reno I* at 849, 854 (quoting 929 F. Supp. at 844).

9. *Ashcroft* at 1703

10. *Reno I* at 851.

11. *Reno II* at 169 (quoting *Doe v. Roe,* 955 P.2d 951, 956 (Ariz. 1998)).

12. *Pataki* at 169.

13. *Reno II* at 168.

14. Art. R645-1 provides: "The act, other than for the purposes of a film, show or exhibition incorporating an historical theme, of wearing or exhibiting in public a uniform, insignia or emblem recalling uniforms, insignia or emblems worn or exhibited either by the members of an organisation declared to be criminal under Article 9 of the statutes of the International Military Tribunal annexed to the London Agreement of 8

While the nature of the medium makes it inherently difficult to prevent Internet speech, a number of governments have focused on restricting the speakers themselves.

August 1945 or by a person declared to be guilty by a French or international court of one or more crimes against humanity . . . shall be liable to a fine provided for in respect of Class 5 offenses."

15. *La Ligue contre le Racisme et l'Antisemitisme v. Yahoo! Inc.*, No. RG: 00/05308 (November 20, 2000).

16. Ibid. at 4 (emphasis added).

17. Ibid.

18. Sebastian Mallaby, "Taming the Wild Web," *Washington Post*, March 12, 2001, p. A17.

19. Pontifical Council for Social Communications, "Ethics in Internet," February 22, 2002, www.vatican.va/roman_curia/pont.../rc_pc_pccs_doc_20020228_ethics-internet_en.htm.

20. Ibid., sec. II.

21. Ibid., secs. III–IV.

22. See, for example, "Sins of the Fathers," *Newsweek*, March 4, 2002, pp. 42–52.

23. Sebastian Mallaby, "Taming the Wild Web," *Washington Post*, April 2, 2001, p. A19. Mallaby apparently liked the title "Taming the Wild Web" so much that he used it for two different columns in the space of three weeks.

24. Mallaby, "Taming the Wild Web," March 12, 2001.

25. Ibid.

26. Ibid.

27. Sebastian Mallaby, "The Tangled Web of E-Commerce," *Washington Post*, April 30, 2001, p. A17.

28. Ibid.

29. Jack Goldsmith, "Yahoo! Brought to Earth," *FT.com*, November 26, 2000, http://news.ft.com/ft.../ftc?pagename=View&c=Article&cid=FT3W85A41GC&liv%20e=tru.

30. Ibid.

31. Ibid. See also Jack Goldsmith, "Against Cyberanarchy," *University of Chicago Law Review* 65 (1998): 1199–1250; and Jack L. Goldsmith and Alan O. Sykes, "The Internet and the Dormant Commerce Clause," *Yale Law Journal* 110 (2001): 785–834.

32. Reporters sans Frontieres, *Enemies of the Internet* 5, 2001, www.rsf.org/enemis.php3. Reporters Sans Frontieres compiled a report on repressive measures worldwide, ranging from outright bans on the Internet (e.g., North Korea) and government control over the network (e.g., China and Saudi Arabia), to laws restricting disfavored content (e.g., France). See also Leonard R. Sussman, *Censor Dot Gov: The Internet and Press Freedom* 2, 2000, www.freedomhouse.org/pfs2000/sussman.html (reporting that countries in all regions restrict domestic and transnational news flows).

33. See People's Republic of China, Ministry of Information Industry Regulation, Managing Internet Information-Release Services, November 7, 2000, www.mii.gov.ch/mii/index.html (in Chinese); see also "China Issues Regulations on Managing Internet Information-Release Services," *China Online*, November 13, 2000, www.chinaonline.com/issues/internet_policy/NewsArchive/Secure/2000/November/C00110604.asp. Other restrictions target a variety of disfavored groups, particularly supporters of the Falun Gong spiritual movement. See "China Passes Internet Security Law," *China Online*, December 29, 2000, www.chinaonline.com/issues/internet_policy/NewsArchive/Secure/2000/December/C00122805.asp.

34. See "You Don't Say: China Forbids Publication of Seven Types of Content," *China Online*, August 13, 2001.

35. Sussman, pp. 2–3.

36. See Complete Archives of *Dacankao Daily News*, www.bignews.org (visited April 12, 2002). Chinese government agents shut down Xinwenming, a China-based pro-democracy website, www.hrichina.org/ Xinwenming/index.htm (last visited February 27, 2001).

37. U.S. Department of State, *Country Reports on Human Rights Practices, Singapore 2001* (2002).

38. Ibid.; see also "Singapore Net Law Dismays Opposition" *BBC News*, August 14, 2001, http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1490000/1490425.stm; and John Aglionby, "Singapore Plans Purge of Net Politics," *Guardian*, July 27, 2001, www.guardianunlimited.co.uk/internetnews/story/0,7369,528129,00.html.

39. Saudi Arabia, Council of Ministers Resolution, Saudi Internet Regulations, February 12, 2001, www.al-bab.com/media/docs/saudi. htm; see also Brian Whitaker, "Losing the Saudi Cyberwar," *Guardian*, February 26, 2001, www.guardianunlimited.co.uk/elsewhere/journalist/story/0,7792,443261,00.html.

40. Ibid.

41. Human Rights Watch, *World Report 1999: Freedom of Expression on the Internet*, www.hrw.org/

hrw/worldreport99/special/internet.html.

42. See "Adieu Pikachu," *ABC News.com*, March 26, 2001, www.abcnews.go.com/sections/world/DailyNews/pokemon010326.html.

43. See Syrian Constitution, Art. XXXXII; and Reporters sans Frontieres, p. 101.

44. Ibid., pp. 101–2.

45. Australia, Broadcasting Services Act, 1992 (amended 1999), part 15, § 216B, sched. 5, part 3, div. 1.

46. See, for example, Australian Office of Film and Literature Classification, *Guidelines for the Classification of Films and Videotapes,* September 18, 2000.

47. Australia, Broadcasting Services Act, part 15, § 216B, sched. 5, part 4.

48. Italian Constitution, Art. XXI, § 6.

49. Ibid., Art. XXI, § 4; see also Art. XIII, § 3.

50. *In the Matter of Moshe D.*, Italy. Cass., closed session, November 17–December 27, 2000, Judgment No. 4741.

51. Ibid.

52. Ibid.

53. Ibid.

54. Sweden, Lag (1998:112) om ansvar för elektroniska anslagstavlor [Act (1998:112) on Responsibility for Electronic Bulletin Boards], Art. V, § 1 (1998), http://dsv.su.se/jpalme/society/ swedish-bbs-act.html.

55. Ibid.

56. See Drew Cullen, "It's Bloody Hard to Run a Forum (in Sweden)," *Register* (United Kingdom), March 8, 2002, www.theregister.co.uk/content/6/24352.html.

57. *Pataki* at 175 (citation omitted).

58. Ibid. at 174.

59. White House, *A Framework for Global Electronic Commerce*, July 1997, p. 18, http://216.239.51.100/search?q=cache:QbYQn4KDbVcC:iitf.doc.gov/eleccomm/ecomm.htm++%22a+framework+for+global+electronic+commerce%22&hl=en&ie=UTF8.

60. U.S. Department of Commerce, *Digital Economy 2000*, December 2000, p. 22, http://www.esa.doc.gov/de2000.pdf.

61. *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997), cert. denied, 523 U.S. 1074 (1998).

62. *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986); *Laker Airways Ltd v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929, 931, 937, 943 (D.C. Cir. 1984); and *Yuen v. U.S. Stock Transfer Co.*, 966 F. Supp. 944, 948 (C.D. Cal. 1997). See *Hilton v. Guyot*, 159 U.S. 113 (1895) (outlining fundamental principles of comity).

63. *Ackermann* at 841; see *Hilton* at 164, 193; and *Somportex Ltd v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

64. See, for example, *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995), aff'd on other grounds, 159 F.3d 636 (D.C. Cir. (1998) (Table); and *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

65. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam).

66. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring).

67. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

68. Ibid. at 818.

69. See, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

70. *Telnikoff v. Matusevitch*, 702 A.2d 230, 238–39, (Md. 1997). See also *Bachchan* at 665 (protections of free speech "would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution").

71. *Ellis v. Time, Inc.*, 1997 WL 863267, 26 *Media Law Reporter* 1225 (D.D.C. 1997).

72. Ibid. at 1235. See also *DeRoburt v. Gannett Co.*, 83 F.R.D. 574, 580 (D. Haw. 1979) ("the public policy of the United States requires the application of the First Amendment to libel cases brought in the courts of this country").

73. 47 U.S.C. § 230(c)(1).

74. Ibid., §§ 230(b)(1), (b)(2).

75. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

76. Ibid. at 327 (AOL not liable for postings to bulletin board by third party); accord *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000) (AOL not liable for incorrect information avail-

able through its Quotes & Portfolios service), cert. denied, 121 S. Ct. 69 (2001); *Blumenthal* at 50 (AOL not liable for defamatory material appearing in publication made available to subscribers to its service); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001) (Kinko's not liable for allegedly defamatory statements transmitted by renter of its computer); *Does v. Franco Prods.*, 2000 WL 816779 (N.D. Ill. June 22, 2000) (GTE and PSINet not liable in their capacities as website hosts for material originating with others); *Schneider v. Amazon.Com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (2001) (Amazon not liable in tort for unflattering review of plaintiff's book posted on its website); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772, 776, 781 (2001) (public library not liable for providing unrestricted Internet access); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (America Online not liable for third party's sale via AOL of child pornography depicting plaintiff's son); *Doe v. Oliver*, 755 A.2d 1000, 1003 (Conn. Super. Ct. 2000) (AOL not liable for e-mail sent by one of its subscribers using AOL's e-mail service).

77. *Godfrey v. Demon Internet, Ltd.*, 3 ILR (P&F) 98 (Q.B. 1999).

78. Ibid.

79. *Yahoo!, Inc. v. La Ligue contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001).

80. Ibid.

81. Ibid. at 1194.

82. Ibid.

83. Brief for Appellants, *Yahoo!, Inc. v. La Ligue contre le Racisme et l'Antisemitisme*, Case No. 01-17424 (9th Cir., filed March 22, 2002) at 19.

84. Article 23 of the Press Law of 1881, as amended, prohibits making "an apology of . . . war crimes, crimes against humanity or crimes or misdemeanours of collaboration with the enemy" using "any means of audio-visual communication."

85. Tribunal Correctionnel de Paris, *L'Amicale des Deportes d'Auschwitz v. Yahoo!*, www.foruminternet.org/telechargement/documents/tgi-par20020226.pdf (February 26, 2002).

86. Ibid.

87. Ibid.

88. Council of Europe, Draft of the First Additional Protocol of the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist or Xenophobic Nature Committed through Computer Systems, March 26, 2002, www.coe.int/T/E/Legal%5Faffairs/Legal%5Fco%2Doperation/Combating%5Feconomic%5Fcrime/Cybercrime/Racism_on_internet/ PC-RX(2002)15E.pdf.

89. Ibid., ¶ 31.

90. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

91. John Larkin, "Behind the Tyrant's Mask," *Far Eastern Economic Review*, May 2, 2002, www.feer.com/articles/2002/0205_02/p012region.html.

92. Lech Walesa, foreword to *War of the Black Heavens: The Battles of Western Broadcasting in the Cold War*, by Michael Nelson (Syracuse, N.Y.: Syracuse University Press, 1997), p. xi.

93. Ibid., p. 24.

94. Goldsmith, "Yahoo! Brought to Earth."

Published by the Cato Institute, Cato Briefing Papers is a regular series evaluating government policies and offering proposals for reform. Nothing in Cato Briefing Papers should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before Congress. Additional copies of Cato Briefing Papers are $2.00 each ($1.00 in bulk). To order, or for a complete listing of available studies, write the Cato Institute, 1000 Massachusetts Avenue, N.W., Washington, D.C. 20001, call (202) 842-0200 or fax (202) 842-3490. Contact the Cato Institute for reprint permission.