

# Internet e-ethics in Confrontation with an Activists' Agenda: Yahoo! on Trial.

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## Abstract:

A prolonged confrontation between Yahoo! Inc. and French anti-racism activists who ask for the removal of Nazi items from auction sites as well as restricted access to neo-Nazis sites is analyzed. We present the case and its development up to the decision of Yahoo! Inc. to remove the items from yahoo.com following a French court's verdict against the firm. Using a business ethics approach, we distinguish the legal, technical, philosophical and managerial issues involved in the case and their management by Yahoo! We conclude on the difficulty of governing relations with society from corporate and legal affairs departments at the headquarters level, and on the clash of two visions over the regulation of social freedom.

## Keywords:

e-business; e-ethics; auctions; legal compliance; Internet regulation; freedom of expression; media crisis.

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## Introduction

The crisis which shook Yahoo! Inc. and its French subsidiary in the early spring of 2000, when a Paris-based anti-hate activist launched a media and judicial attack on its business practices – specifically, the sale of Nazi items on Yahoo American auction sites – can with hindsight be seen as inevitable. When it erupted, concern over dubious content carried by Internet sites was evident worldwide, in spheres ranging from online and print media to political elites. Yet the Yahoo! case marked the first time that the Internet generated a profound conflict between a U.S. company and a foreign country.

The case can be read as a landmark in a continuing trend – namely, rising pressure on business to assume responsibility for the social consequences of commercial activities. And it raises several global business issues, including: multi-jurisdictional compliance, the technical specificity of the Internet, opposing conceptions of freedom of expression, the nature of e-business, coordination between headquarters and a foreign subsidiary, leadership, and relations with domestic and international media.

We contend that a business ethics approach can provide valuable insight into these issues. By a “business ethics approach”, we mean an effort to understand the social responsibility of firms *beyond the simple respect of legal constraints*. In this case, the laws governing the protagonists, like their ethical positions, were in conflict. It is thus of little use to contend that a firm in such a situation may simply go about making profits within the law. It may be more useful to ask whether the firm concentrates on respecting its principles or on gaining a practical benefit, and whether it is confronting or aligning itself with social pressure.

It is crucial to note that in this case, Yahoo! adopted mostly principled attitudes. The company’s actions cannot be explained solely by a more or less cynical search for profits. Our research suggests, on the contrary, that Yahoo! based its strategy on a sincere belief that it was participating in the making of a new (and better) society. Yet the principal results of this stance were sustained damage to the firm’s brand, and a humiliating defeat in the French courts. One might conclude that a company should not focus *only* on doing good.

In Part One, we review the context and history of the affair, beginning with a rising international wave of protests against hate literature on the Internet in the summer of 1999, and continuing through its judicial developments. In Part Two, we analyze Yahoo!’s responses to the different issues raised by the case, in terms of principled versus pragmatic attitudes, and conflict or alignment with social pressure. Two questions concern us: Could Yahoo! could have handled this affair in a way that generated less social conflict? And can a firm balance the defense of its principles with its economic interests – especially when, as in this case, the threatened principles embody the firm’s vision of its future?

## Part One: Yahoo! versus Licra: History of a Clash

### 1.1 Protests Against Hate For Sale On The Web, Aug. 1999-Feb. 2000

At the end of the last decade, the appearance of objects with a Nazi provenance in e-commerce sites became an object of outraged protest. Thus 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 of Los Angeles notified the German Ministry of Justice that the companies might be violating the Federal Republic's laws against hate literature.<sup>2</sup> Three months later the Wiesenthal Center attacked what it called the U.S.-based online auctioneer 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" – which is legal in the U.S. – and that they were "hesitant to perform the role of censor."<sup>3</sup> Similar arguments would later be employed by Yahoo! Inc.

In February 2000, a New York-based anti-hate group, BiasHELP, asked eBay to remove all listings of items related to the Ku Klux Klan, arguing that "the incredible size and reach of [eBay's] audience creates special responsibilities." Apparently hoping to forestall further protests, eBay announced that its site "will not become a platform for those who promote hatred toward their fellow man." 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.

Yahoo! Inc. also felt the rising heat. On Feb. 23, 2000, the Anti-Defamation League (ADL), an American non-profit group founded in 1913, accused Yahoo! Inc. of hosting an entire category of "White Pride and Racism" clubs. Noting that Yahoo "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 policy and us." Two days later, the ADL triumphantly reported that Yahoo! had "apologized for not

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<sup>2</sup> It is worth noting that a skilled Internet user could nonetheless find alternate sources for these materials, as the online magazine *Salon* reported: "While German extremists can't buy their books from the Internet's biggest vendors, they can find them if they dig a little deeper." (See Craig Offman, "Hate Books Still for Sale on the Web." *Salon.com*, August 17, 1999.) Indeed, the impossibility of enforcing absolute censorship on the Internet is a given among experts interviewed for this article, including all protagonists in the Yahoo! affair.

<sup>3</sup> One eBay manager compared the Center, known for pursuit of war criminals, to "a Nazi Gestapo force [that wants to] police everything that goes on the market." Needless to say, the irony of his remark was not appreciated. See Ed Ritchie, "No Tolerance for Nazi Items ." *Auctionwatch.com*, Dec. 1, 1999.

addressing the violations sooner,” and had encouraged the ADL's Internet Monitoring Unit to report such abuses.

The responses of Yahoo! and eBay 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 establish broad pre-emptive standards for user-generated content, Yahoo! and eBay removed materials that aroused significant protests from users or spokespeople for legitimate causes. Thus Internet companies could hope to avoid both heavy-handed government regulation that might harm their industry, and accusations of censoring their users.

## **1.2 The Public and Governments Intervene Against Hate on the Web, Jan.-Feb. 2000**

Meanwhile, the issue of Internet hate steadily widened into judicial and political spheres around the world. In January 2000, the United Kingdom's Internet Watch Foundation (IWF: [www.iwf.org.uk](http://www.iwf.org.uk)), 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.<sup>4</sup> 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.”<sup>5</sup>

Government leaders in other countries were calling for stricter regulation of Internet hate. 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.<sup>6</sup>

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.<sup>7</sup> Noting that access providers were

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<sup>4</sup> Lakshmi Chaudry, “British ISPs Crack Down on Hate.” Libertarian Alliance, Jan. 25, 2000 (via [www.codoh.com](http://www.codoh.com)).

<sup>5</sup> Interview with the authors, March 30, 2001. The whole interview is reproduced in Le Menestrel et Al. (2001a, exhibit 1). Useful information can be found on Roger Darlington personal site: <http://members.tripod.co.uk/rogerdarlington/index.html>.

<sup>6</sup> Kim Gamel, “Forum: Keep Neo-Nazis From Web.” Associated Press, Jan. 27, 2000.

<sup>7</sup> This is the substance of Article 43 of the Loi du 1er août 2000 « relative à la liberté de communication ». Even before the law was passed, a leading French access provider, altern.org, had paid ruinous damages when

increasingly accused of promoting “defamation, pedophilia, violations of authors’ rights, and incitation to racial hatred,” the daily newspaper *Libération* remarked that they “are trapped, at once guarantors of the freedom of expression and subject to the pressure of plaintiffs.”<sup>8</sup> This was the precise quandary into which Yahoo! was now plunged.

### 1.3 An activist sounds the alert: February 2000

Marc Knobel is a Paris-based researcher who tracked neo-Nazi groups for the Wiesenthal Center, and whose Jewish ancestors, he recalled in a bitter euphemism, had “tasted fascism in every flavor.”<sup>9</sup> 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. 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.

He acknowledged that this shift had greatly facilitated his own research. 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.”<sup>10</sup>

One day in February 2000, an American acquaintance called Knobel to ask if he were aware that yahoo.com’s auction site was selling Nazi goods. Knobel said that until then, he regarded Yahoo! as “the great community of Internauts where you find everything right away, and even better, for free. A wonderful new world.” On yahoo.com, after typing the word “nazi” into the auction site’s search window, he discovered 800 items for sale. He was particularly shocked by a box of Zyklon-B, the poison gas used at Auschwitz, identified as a “museum-quality replica.”<sup>11</sup> Though Knobel was aware that visitors to Yahoo site, and not the firm, were responsible for the objects on auction, he blamed the company for allowing the sale. In conjunction with a lawyer, Stéphane Lilti, he decided to pressure Yahoo! to stop these auctions, through the media:

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, ‘They’re Americans, they’ll understand that the French see this differently, that it

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French model Estelle Hallyday discovered her photographs on an unauthorized site that used altern.org’s server and sued. In effect, the new law confirmed and extended that jurisprudence.

<sup>8</sup> Florent Latrive, « Les hébergeurs priés de sévir ». *Libération*, April 7, 2000 (via www.liberation.com).

<sup>9</sup> Marc Knobel's quotes are drawn from an interview with the authors, February 6, 2001, and from follow-up telephone calls, unless otherwise indicated.

<sup>10</sup> Recent research on extreme right movements in Europe supports Knobel’s opinion; France’s National Front and its more radical satellites, for example, were the first political forces in France to establish a presence on the Internet. The promotional power of their websites can be disputed, but their utility as a communications tool within the movements seems clear.

<sup>11</sup> Comments Greg Wrenn, Yahoo 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 – or not offered to legitimate collectors who don’t want to forget the atrocities committed in World War Two.” Interviewed by telephone, March 29, 2001.

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.'

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. Their press campaign began 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 threat from Knobel: “It's up to Internet companies to regulate themselves. If not, we'll launch a boycott [of Yahoo!].”<sup>12</sup> The LICRA did so two days later, but the boycott had no immediate measurable effect on visits to yahoo.fr.

A subsequent article in *L'Express* was read with foreboding at Yahoo! France, the American firm's subsidiary. Its General Director, Philippe Guillanton, contacted Yahoo! Inc. immediately. No contact was made with the LICRA.

On April 5, 2000, Yahoo! France received a registered letter from the LICRA, warning that if the auctions of Nazi objects did not cease within eight days, charges would be filed in Paris. The letter was forwarded to Yahoo! Inc. for reply. Three days later, before Yahoo! Inc. could prepare its answer, Yahoo! France learned from the press that it and its parent were being sued.

#### 1.4 Yahoo! Stands Accused: April-May 2000

Under a special procedure called the *référé*, 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 every day the sales of Nazi objects continued. Further demands included removing all links to “negationist” (Holocaust denial) websites from Yahoo! France, and eliminating two sites, including one in French, that offered the text of *Mein Kampf* on Yahoo! Inc.'s geocities.com subsidiary.

Greg Wrenn immediately faxed LICRA president Patrick Gaubert, taking a principled stance:

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<sup>13</sup>.... 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.

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<sup>12</sup>François Labrouillère and Laurent Léger, «Quand Yahoo et eBay deviennent les supermarchés des souvenirs nazis», *Paris-Match* No. 2647, February 17, 2000.

<sup>13</sup> 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.

Following the first dispatches on the case, French online media, notably Transfert.net, began what turned into extensive coverage of the affair, including the posting of judicial documents. But outside France, coverage was non-existent, with the significant exception of a major Israeli newspaper, the *Jerusalem Post*.<sup>14</sup> Only scattered online media, like ZDNet News, picked up the Reuters coverage, while other leading online news sources, like *Hotwired*, remained silent. 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.

## 1.5 The First Hearings: May 15-22, 2000

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. In any case, it would be technically impossible for Yahoo! to block all access to its sites from France, noted Pecard. Consequently, 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."<sup>15</sup> Lilit 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."<sup>16</sup>

Jean-Jacques Gomez, who presided over the case, was concerned by two major points: Did French law apply to the case? And if so, did his court possess the means to apply it?<sup>17</sup> 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 "fault"] is evident." But the sales were nonetheless "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 order went far beyond the plaintiff'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 of Nazism or a contestation of Nazi crimes." A date of July 24 was set for Yahoo!'s presentation of those still-undefined

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<sup>14</sup> This statement is based on a review of the Lexis-Nexis database. It is interesting to note that 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.

<sup>15</sup> Christian Pecard'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. 4-10.

<sup>16</sup> « 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](http://www.juriscom.net)).

<sup>17</sup> Interview with the authors, March 2, 2001.

“measures.”<sup>18</sup> 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*<sup>19</sup> and *Los Angeles Times*<sup>20</sup> covered the story. There was no lasting impact on Yahoo share price, which dipped from 126 to 118 on May 23, rebounded to 122 the following day, and rose to 144 by June 7. However, damage to the brand was apparent, 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, rivals 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.” In short, the more publicity the case received, the more Yahoo! was isolated.

## 1.6 The Chief Yahoo! Speaks

In early June 2000, Jerry Yang arrived in Paris for the inauguration of Yahoo! France’s new offices, and was greeted by a call from the daily *Libération* requesting an interview. The subsidiary’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.

Yang’s interview with Eduard Launet appeared on June 16, 2000, under a bold-faced quote that Yahoo! executives say was taken out of context: “**The French court is very naï ve.**” 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.” In fact, this was not far from Yang’s remarks as reported. Asked if Yahoo! Inc. would obey the French court’s orders, Yang had replied: “This court wants to impose a judgment 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 went on to portray Yahoo! as a victim:

We don’t think that American values should apply everywhere.... It happens that American style and business have been dominant until now [on the Internet]. 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 answered that the company had no plans to filter French access to its sites. 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

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<sup>18</sup> 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](http://www.juriscom.net)).

<sup>19</sup> Associated Press, “French Court Says Yahoo Broke Racial Law”. *New York Times*, May 23, 2000, Section C, p. 27.

<sup>20</sup> 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 stock market strategy, a clear indication of the priorities of American readers.



can't favor one group of users over another."<sup>21</sup> In succeeding days, the interview was widely quoted in the French press, and "definitely made the PR worse," according to Greg Wrenn.

## 1.7 Inside Internet Technology: Summer, 2000

Judge Gomez's demand that Yahoo! "fender impossible" any and all consultation from France of Nazi-related content had been met with resigned disbelief by Yahoo! Inc. Said Wrenn, "We knew it was impossible to do it, and we knew we'd have to come back and say that." Christophe Pecnard did just that on July 24, when he informed the court that "Yahoo! Inc. cannot obey the order of May 22."<sup>22</sup> Gomez's order ignored "the very nature of the Internet," he added.<sup>23</sup> Was not the Internet conceived and structured as "a space of freedom without central control"?<sup>24</sup>

Instead, Pecnard offered a compromise. Yahoo! would advise French internauts 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".<sup>25</sup> 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 he warned users that the content was fake. But Yahoo! Inc. refused to "act in one way or another as a censor."<sup>26</sup>

Following the hearing, Wrenn invited Knobel and Lilti for a beer, and attempted to reach a settlement. But his offer was not what the plaintiffs wanted:

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 [Knobel] 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 pertaining to the filtering of French Internet users. Yahoo!, which had helped to create the Internet!, had failed to convince the court that it knew what it was talking about.

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 Nov. 6, they agreed that no technical measures could ensure that Yahoo! would succeed in keeping all French Internauts away from

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<sup>21</sup> A complete translation of the interview is available in Le Menestrel et Al. (2001b, exhibit 2).

<sup>22</sup> « 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.

<sup>23</sup> Op. cit., « Conclusions pour la Société Yahoo ! Inc.... 24 juillet 2000 », p. 5.

<sup>24</sup> Ibid., p. 6.

<sup>25</sup> Ibid., p. 26.

<sup>26</sup> Ibid., p. 27

Nazi writings or objects.<sup>27</sup> However, the experts maintained that up to 80 percent of French visitors could indeed be identified by through various techniques.

Under questioning, Vinton Cerf implied that the solutions envisioned by the court, such as asking users to voluntarily identify their locations, were 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, representing the State, likewise asked the court to retreat: “French justice should rule within the limits of what is possible and doable.”<sup>28</sup> The plaintiffs maintained their demands.

## 1.8 The Judge’s Last Word: Nov. 20, 2000

On Nov. 20, Judge Gomez asked, in his final order, how it was that Yahoo! Inc. could “already refuse human organs, drugs, or works and objects related to pedophilia on its auction site,” but could not do the same with Nazi objects. The firm, he said, was avoiding “a moral and ethical exigency that all democratic societies share.”<sup>29</sup> He allowed that Yahoo!’s French subsidiary “had largely satisfied the letter and spirit” of his previous ruling.<sup>30</sup> But Yahoo! Inc. was again 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 order within three months, or pay a fine of \$13,900 per day thereafter.<sup>31</sup>

The ruling was international front-page news, often accompanied by a headline linking the words “Yahoo!” and “Nazi.” However, Yahoo!’s belief that the affair was central to the future of the Internet was widely amplified by editorial commentators in major newspapers. The *International Herald Tribune* called the ruling “certain to reverberate through the uncharted world of the Internet”.<sup>32</sup> 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.”<sup>33</sup> An accompanying editorial warned that “similar cases in other countries.... Would be a sure way to hinder the growth of Internet business.”<sup>34</sup> The *Wall Street Journal*

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<sup>27</sup> Looking back on the event, Ben Laurie wrote that the use of current techniques offered nothing more than a “solution [that] is half-assed and trivially avoidable” by an experienced Internaut. The text is online at <http://www.apache-ssl.org/apology.html>.

<sup>28</sup> Julie Krassovsky, “Procès Yahoo!, les experts, stars d’un jour. » [www.transfert.net](http://www.transfert.net), Nov. 6, 2000.

<sup>29</sup> Ibid., p. 18.

<sup>30</sup> Ibid., p. 21.

<sup>31</sup> Ibid., pp. 20-21.

<sup>32</sup> Victoria Shannon, “French Court Tells Yahoo to Block Nazi Items on Site.” *International Herald Tribune*, Nov. 21, 2000, p. 1.

<sup>33</sup> Jean Eaglesham and Robert Graham, “French Court Ruling hits Yahoo!” *Financial Times*, Nov. 21, 2000, p. 1.

<sup>34</sup> Anon., “Offensive Ruling.” *Financial Times*, Nov. 21, 2000, p. 20.

saw “disastrous implications for free expression around the world,” 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.”<sup>35</sup>

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 Nov. 22. It rebounded to over \$40 on Nov. 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.<sup>36</sup> Yahoo! executives dismiss the notion that the stock slides were related to its judicial woes.<sup>37</sup>

## 1.9 Yahoo! Changes Jurisdiction: Nov. 2000-Jan. 2001

Before Gomez’s final ruling, Yahoo! executives in the U.S. and Europe had debated their future strategy. Assuming that Gomez ruled against Yahoo! again, should the company appeal his decision in France? According to 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 to get a stay, but we did not view the chances as favorable. And we’re a public company. We felt more confident about our ability to resolve the questions sooner in the U.S. courts.

Instead, Yahoo! Inc. would file a complaint for declaratory relief before the U.S. courts, which hold the sole power to enforce foreign judgements against an American corporation’s U.S. assets. 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 the U.S.: “Our First Amendment case is as strong as it gets.... If U.S. companies can be threatened by judgments in other countries, that has a chilling effect on free speech.” Thus Yahoo! could shift the debate away from Nazism, and toward the rights of Americans.

On Dec. 21, 2000, Yahoo! Inc. indeed 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 court costs and an injunction to prevent the French plaintiffs “from enforcing or attempting to enforce the Paris Court’s [rulings in the U.S.]”<sup>38</sup> Knobel was enraged: “They’re still accusing French justice. [Supposedly] we’re in a banana republic, a totalitarian country. It’s disgusting.”

In a move decided at the same time as its legal strategy, on Jan. 6, 2001, Yahoo! Inc. 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. However, on Jan. 22, another French group, the Association of Friends of the Deported of Auschwitz and the Camps of

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<sup>35</sup> Mylène Mangalindan and Kevin J. Delaney, “Yahoo! Is Ordered to Bar Nazi Material.” *Wall Street Journal*, Nov. 21, 2000, p. 1.

<sup>36</sup> Steve Kettmann, “Germany’s Kampf Furor Renews.” [www.wired.com](http://www.wired.com), Dec. 1, 2000.

<sup>37</sup> The curve of Yahoo!’s share price corresponds closely to that of the Nasdaq exchange in general, and of rivals like eBay. Some more details can be found in Le Menestrel et al. (2001b, exhibit 1).

<sup>38</sup> “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.

High Silesia, filed criminal charges against Tim Koogle, CEO of Yahoo! Inc., for “justifying war crimes, crimes against humanity, or crimes of collaborating with the enemy [and] for having deliberately maintained auctions of Nazi objects.”<sup>39</sup> Attached to the charges was proof that the auctions had continued until Jan. 5, 2001. In March and April 2001, Tim Koogle resigned as CEO and Chairman of Yahoo!, citing personal reasons. He remains a member of the board of directors.

As Vinton Cerf commented in an interview with *Libération*, “We’re at the beginning of ten years of conflicts.”<sup>40</sup>

## Part Two: A multi faceted analysis: Comparing principles with reality

From the moment Yahoo! France learned of the press campaign initiated by Marc Knobel in February 2000, the corporation took an essentially legalistic approach to the affair. We therefore propose to begin by analyzing multi-jurisdictional issues. We will then move to technical issues, followed by philosophical issues related to freedom of expression and its regulation on the Internet. Business issues will be treated next, with special attention to communication and managerial matters. For each type of issue, we present Yahoo!’s position and the arguments behind it, to evaluate whether it conflicts or aligns with activists’ demands, which in this case can reasonably serve as a proxy for social pressure. We then analyze the ethics and the efficiency (in terms of corporate goals) of each position.

### 2.1 Is multi-jurisdictional compliance equal to no compliance?

Yahoo!’s position on the legal issues was based on two key lines of argument: First, Yahoo! is not a content provider (and therefore not responsible for Nazi content on its sites); second, its local sites should be governed by local laws.

The argument that Yahoo! neither created nor endorsed Nazi items or neo-Nazi sites that were accessible through yahoo.com was not invented for the needs of its defense in this case. Yahoo! viewed itself and the Internet *as media freely created by their users*, and was prepared to fight for that concept. Said Guillanton:

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 [i.e., hate groups].

Likewise, Yahoo!’s position that content on local sites should be governed by the laws of the country where the site operates preceded the demands imposed by this case. Over the years, Yahoo! had developed nearly two dozen local sites around the world, aimed at specific

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<sup>39</sup> 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.

<sup>40</sup> Laure Noualhat, «Nous sommes à l’aube de dix ans d’affrontements». *Libération*, Nov. 10, 2000 (via [www.liberation.fr](http://www.liberation.fr)).

audiences. Content on these sites was calibrated to local legislation (and political reality). Thus, noted Wrenn, on Yahoo!'s Chinese site, "You don't get a lot of time to say, 'The Dalai Lama is a great guy.'" However, Yahoo! maintained that jurisdictions outside a given local site's home country could not regulate that site; therefore, American or French users were free to say whatever they pleased about the Dalai Lama, regardless of what the Chinese authorities considered permissible. "We can work around local groups and mores," said Wrenn. "What we can't do is make different countries happy with content on every site."

While Yahoo!'s principled reasoning is logically correct, it implicitly considers that all courts and political authorities everywhere possess the same power to impose their judgments. In practice, not all courts have the same powers. As Lilti pointed out in court, "American jurisdictions systematically retain the application of the law of the country of reception [of Internet-related content] – when the U.S. is concerned."<sup>41</sup> And they do so in confidence that their judgments will bear weight, because the U.S. is the major Internet market. Yahoo! would certainly not have faced an equally urgent situation should the Taliban have asked an Afghan court to force the company to remove all images of unveiled women from its various sites. Nor are all causes as inflammatory, from a social perspective, as the "right" to sell Nazi objects to a French public. The point is not that Yahoo!'s principles are invalid, but that as a practical matter, they are dependent on the context in which they are expressed and exercised.

In this case, Yahoo! seriously under-estimated the power of the French courts. It likewise overlooked certain contradictions in its "local content – local rules" principle, which were nonetheless identified by its adversaries. In an interview, Lilti said he was aware that Yahoo! Inc. had removed certain Nazi-related content from its sites at the demand of the ADL. If Yahoo! would do as much for an American non-profit group, why would it not do so for the French, who could also be considered part of the company's international public? Yahoo!'s failure to do so implicitly denied the specific importance of the activists' cause, precisely because they are not American. But for the activists, the spread of extreme right movements on the Internet is inescapably a *universal* problem – and that is precisely how Judge Gomez treated it in his rulings.

The French court's approach to this issue was to focus on the question of *access*. The court never denied that Yahoo! could host any content it wished in the U.S., but denied Yahoo!'s right to distribute materials to the French that are forbidden under French law. That stance effectively bypassed the question of whether Yahoo! is or is not a content provider. It also turned the fact that a French court holds no jurisdiction over the U.S. into an advantage for the plaintiffs: By the same token, the U.S. cannot force France to allow the distribution of materials the latter considers illegal. It was therefore Yahoo!'s responsibility to restrict access to these materials.

Yahoo!'s principled refusal to consider the spread of hate content on the Internet as a universal issue was thus doubly flawed, in a practical sense: It locked the company into a losing battle over jurisdiction, at the same time that it fuelled further opposition from its activist adversaries and public opinion. Likewise, Yahoo! would lose the battle over the issue of whether it was possible to restrict access by French Internauts to a U.S. site.

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<sup>41</sup> « 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](http://www.juriscom.net)). On the issue of multi-jurisdictional compliance, see Farhoomand (2000). On more general issues about law on the Internet, see Diamond and Bates (1995), Arkedniz et Al. (2000). A good synthesis has been published in The Economist, January 13<sup>th</sup>, 2001: The Internet and the Law. A seminal book is O'Reilly et Al. (1997).

## 2.2 Are perfect technical solutions necessary?

As we have seen, Judge Gomez's initial demand that Yahoo! "render impossible all consultation" of the contested services from France was arguably unfeasible. There is reason to believe that Gomez understood this point, not least because on May 22, 2000 he gave Yahoo! two months to propose solutions. During those two months, Yahoo! concentrated on developing arguments to show that obeying the judge's order *to the letter* was technically impossible. Thus in the following hearing, Christian Pecnard declared that blocking techniques based on the IP (internet protocol) addresses of netsurfers – a method Gomez had suggested on May 22<sup>42</sup> – would not satisfy the order as written.<sup>43</sup> Likewise, Pecnard argued that blocking methods based on keyword searches would mostly penalize 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.<sup>44</sup>

These arguments are true, so far as they go. But though they respond directly to the text of Gomez's order, they do not address its *spirit* – which is to hamper access to Nazi content from France. Thus, the possibility that *partial* access-blocking solutions might be feasible was not addressed by Yahoo! Instead, Yahoo! argued that since no technical solution could be guaranteed as completely effective (i.e., blocking access by all French users to Nazi materials), Yahoo! could not reasonably be expected to implement *any* solution. The obvious consequence was continued frontal conflict with the activists. Less apparently, Yahoo's position implicitly critiqued the judge's order: What is the rationale for ordaining a solution that does not exist and cannot exist?

Ironically, Yahoo!'s response reinforced the judge's position, as a matter of law and of public opinion. It virtually invited Gomez to appoint a neutral and irreproachable referee, namely the college of experts. Their role was defined in a way that foretold Yahoo!'s defeat, because they were asked not only *if* a technical solution were possible, but *to what extent*. The judge thereby indicated that a less than perfect solution – which Yahoo! had not proposed – was conceivably acceptable. At that point, the plaintiffs could not lose on technical grounds, assuming that a partial solution was indeed feasible. By the same token, the mere demonstration that a partial solution could be implemented made it possible to accuse Yahoo! – as Gomez did, explicitly, in his final order – of failing to demonstrate "even a little good faith."

Yahoo!'s position that any solution would be valid if, and only if, it complied perfectly with Gomez's first ordonnance may appear as a mere tactical error; but on an ethical level, it is absolutely idealistic. That does not make it less of an error; for example, the fact that no ideal solution exists to the problem of people murdering each other does not mean we should tolerate homicide. However, a similar line of argument is pervasive in business ethics – for example, in the notion that "business cannot be ethical because it cannot be perfectly ethical." The essence of such arguments is the reduction of ethics to perfect compliance with a rule or norm. This refers to a recurring ethical issue: Is a norm valid only if it is applicable in all practical situations? Conversely, should a norm be invalidated merely because it is not universally applicable?

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<sup>42</sup> 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).

<sup>43</sup>Op. cit., « Conclusions pour la Société Yahoo ! Inc.... 24 juillet 2000, p. 8.

<sup>44</sup> Ibid., pp. 12-13.

From the start of the case, Judge Gomez answered in the negative – first by holding that “the genuine difficulties encountered by Yahoo! do not constitute insurmountable obstacles,” and then by modifying his initial order in such a way that Yahoo! Inc. was no longer required to completely “render impossible” access by the French to Nazi-related content on yahoo.com. In so doing, he transformed Yahoo!’s technical concerns into an escape act, in which technical issues were used to avoid responsibility for the development of hate groups on the Internet. Along the way, Yahoo!’s credibility on technical issues was sacrificed.

Two elements contradict the conclusion that Yahoo! consciously used technical arguments here to avoid legal and social responsibility, however. First, it is extremely difficult for any company to use its capabilities for technological innovation to imagine solutions that would restrict its own activities. In general, private technological innovation is employed to generate private benefits. There may indeed be social benefits of the innovation, but they emerge indirectly, and do not inevitably serve as a primary motivation for the creative activity. In Yahoo!’s case, its indisputably innovative role in popularizing the Internet is subject to the necessity of creating profits for its shareholders. Conversely, it can be argued (as the activists did) that there is a globally positive impact for society in implementing a technology that *constrains* certain aspects of the Internet.

Our second argument follows from the first: It was difficult for Yahoo! to view the technical issues in any but an ideal sense, because its leaders (and most spectacularly, Jerry Yang) thought that it is *in principle* ethically wrong to try to restrain the Internet’s free development. Their position evoked the question: “Can it be good for society as a whole, directly or indirectly, to regulate the Internet in any sense?” As a French proverb says, “the question contains the response”: Technical solutions that might have partially satisfied the judge’s demands are not worth considering, because by circumscribing the freedom of individuals to use the Internet, they would have a negative impact on society.

### 2.3 Can freedom of expression be regulated?

It is striking that although most actors and observers of this affair interpreted it as a conflict centered on the issue of freedom of expression, Yahoo! dealt with the issue only briefly, and in passing, in its appearances before Judge Gomez. However, both in and out of court, Yahoo! repeatedly evoked its refusal to censor user-generated content.

The fact that much of Yahoo!’s content is indeed user-generated underlies the claim of executives like Philippe Guillanton that the portal bears no resemblance to a “traditional” medium. Yet Yahoo!’s insistence that it cannot “favor one group of users over another,” in Yang’s phrase, resides on classic U.S. free speech doctrine, which holds that offensive speech is the price a society must pay for freedom of expression.<sup>45</sup> Thus the First Amendment to the U.S. constitution provides that “Congress shall make no law [...] abridging the freedom of speech, or of the press.” In recent years the U.S. Supreme Court extended that protection to the Internet in particularly strong terms.<sup>46</sup> In the U.S., Yahoo!’s stance may be said to align

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<sup>45</sup> On the regulation of the Internet, see R. Darlington’s views on <http://members.tripod.co.uk/rogerdarlington/index.html#Internet> Regulation and the paper presented by L. Fekete during the 14<sup>th</sup> Annual EBEN conference in Valencia (Fekete 2001).

<sup>46</sup> 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 law, agreeing with a lower court that the Internet constitutes “the most

with society, rather than being socially controversial. The problem is that in the present case, the exact same stance appears idealistic, if not ideological.

Yahoo! Inc.'s reliance on these principles extended to French executives like Guillanton, who argued that the best defense against dangerous ideas is to subject them to open public debate – and in particular, that allowing hate groups on the Internet exposes, rather than promotes them. He said: “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.” Thus the same technology that makes Internet possible reinforces, *and can only reinforce*, the progress of truth.

The question, however, is not whether the position taken by Yahoo! in defense of free expression for its users is morally right or not. What matters here is that for Yahoo!'s adversaries, its stance was not credible. For example, during his interview with *Libération*, Jerry Yang candidly admitted that in operating Yahoo! China, “on Chinese soil, we respect censorship, including political matters.” Knobel later cited that passage to us from memory. Moreover, the activists argued that defending free speech could not justify avoiding responsibility for publicizing neo-Nazism. Noted Lilti, “The first thing I did [in preparing the case] was to read Yahoo!'s contractual conditions, which allow them to clean up their site.”

The free speech issue had another negative effect for Yahoo!: The firm could be – and was – accused by its adversaries of seeking to create an immoral confusion between neo-Nazis and anti-Nazi activists.<sup>47</sup> Its adversaries' convictions were enflamed by accusations, in the media and through private e-mails sent to Knobel and the LICRA, that they were promoting censorship. In an editorial published by *Libération* soon after Yang's interview in the same journal, Knobel demanded:

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?<sup>48</sup>

A further danger of relying on what can fairly be considered American principles was the loss of Yahoo! France's brand identity. Guillanton was clearly aware of it :

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.

The pre-eminence of Yahoo! Inc.'s role contributed to the impression that an American company was advancing irrelevant ideals in the face of “barbarism”. For Yahoo! Inc.'s ideals are neither universal nor universally admired, even where free speech is concerned. In France, as in most European countries, public speech is far more closely regulated than in the

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participatory form of mass speech yet developed,” and was thus entitled to “the highest protection from government intrusion.” 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. Further About the free speech in the U.S. and in France, see Le Menestrel et Al. (2001a, exhibit 3); Taylor (2000).

<sup>47</sup> For the rise, fall and rise of the extreme right in Europe, see Le Menestrel et Al. (2001a, exhibit 2).

<sup>48</sup> Marc Knobel, “Non à l'Internet de la haine.” *Libération*, 21 juillet 2000, p. 5.



United States. The free and open debate of ideas is tempered, in Europe, by the belief *and experience* that certain ideas can destroy public order, and with it any semblance of debate.

Thus 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. For example, it is illegal to discuss the private lives of public figures, or to insult the President and foreign heads of states. It is also illegal under article 645 of the Penal Code, the statute under which Yahoo! was prosecuted, to publish materials or to make public declarations that constitute an “apology” for Nazi crimes. Victims of Nazi crimes are permitted to initiate prosecutions by the State of violations of article 645, an exceptional privilege in French jurisprudence.

Yahoo!’s implicit assumption that familiarity with the Internet would predispose others to accept its position on free expression was belied by Judge Gomez. He had studied the Internet assiduously since Web cases started arriving in his courtroom in 1996, and had concluded that it was promoting false ideas – which demanded attention from authorities:

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.

Even companies that benefit from a positive public image are very unlikely to be considered credible when they justify their position in a conflictual situation by a philosophical or ethical stance. In particular, social responsibility does not alter the fact that the role of business is to make profits. Consequently, attempts by a company to portray its position as socially responsible may well be regarded as mere promotional campaigns, if not hypocrisy.<sup>49</sup> (Lilti told us flatly: “We’re not talking about free speech, we’re talking about commerce.”) To some extent, public suspicion about such attempts appears justified. As shown by Litman (1999), free speech is hardly a working standard for e-business in the United States. Far from sacrificing business interests in the defense of freedom of expression, New Economy companies act in concert with the government to pass laws that restrict free speech and protect their interests.

But was Yahoo! acting in defense of its sole interests? Put another way, were the business interests of Yahoo! effectively supported by its principled positions on legal issues, technical issues and freedom of expression?

## 2.4 e-business is still business

In a case of business ethics, it is unusual that most of the analysis can be conducted with little reference to the purely commercial aspects of the case. However, Yahoo! never communicated specifically on the business dimensions of this affair, as if to strengthen the notion that it was acting for moral reasons.

Yet at the moment this case erupted, the C2C (consumer to consumer) sector of the Internet, including online auctions between individuals – an outgrowth of the online forums that first

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<sup>49</sup> On the ambiguity of communicating about ethics when making profitable activities, see Le Menestrel (2001).

created a mass public for the Internet in general and Yahoo! in particular – was rising fast, led by eBay, QXL and iBazar. Within a single year, eBay's revenues, mainly derived from a 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, eBay's gross profit was \$225 million and net income reached \$39 million.<sup>50</sup> 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 percent of transactions taking place in C2C sites.<sup>51</sup>

Yahoo! referred only indirectly to this aspect of the case, while underlining two points: That visitors to its auctions placed objects on sale themselves, and that Yahoo! charged no fees or commissions on transactions (in contrast to eBay). Activity on the auction site could thus be considered user-generated content.

Marc Knobel was aware of these elements before launching his anti-Yahoo! press campaign, and was in no way deterred by them. In fact, it is not necessary to earn money directly from online auctions for such services to have direct business implications for an Internet content or access provider. Advertising revenues are crucial to auction sites, and in particular for Yahoo!, which in 1999 earned 90 percent of its overall revenues from advertising<sup>52</sup>. Among 25 auction sites surveyed by Forrester, advertising generated an average 22 percent 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.<sup>53</sup>

Knobel perfectly understood this aspect of Yahoo!'s business. Toward the end of his press campaign, during an interview with the French newsweekly *L'Express*, he suggested asking Yahoo advertisers what they thought about the Nazi goods. The reporter followed his advice:

Questioned and informed by *L'Express*, 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 demanded that Yahoo! stop this 'abusive use' [of Visa's ads].<sup>54</sup>

In short, the business dimension of the case was pervasive, continuous and unfavorable to Yahoo! This was implicitly conceded a few days prior to Gomez's final order, in Nov. 2000, when Yahoo!'s international leadership – CEO Tim Koogle, Greg Wrenn, Jerry Yang, European general director Fabiola Arrendondo, Philippe Guillanton, and others – held a conference call on how to limit further damage from the case. The first point they decided was that Yahoo!'s auctions would no longer be a free service, run by and for users. Auctions would be a paying service, and Yahoo! would decide what was proper for sale. Commented Wrenn:

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<sup>50</sup> Figures are taken from eBay's quarterly reports (form 10Q) to the Securities and Exchange Commission.

<sup>51</sup> 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 percent of the site's inventory, and 80 percent 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.

<sup>52</sup> 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.

<sup>53</sup> Op. cit., Omwando, pp. 3, 4.

<sup>54</sup> Cédric Gouverneur, « Internet: Comment éliminer les sites nazis? » *L'Express* No. 2541, March 16, 2000, p. 40+.

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.... 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. But you can't let that be the reason to avoid what's right for your business.

Until then, Yahoo! Inc. had avoided doing exactly that. It is tempting to conclude that Yahoo!'s belief that its principles were central to the future of the Internet, and therefore to its own growth, precluded a strategy based on a narrower interpretation of its business interests. In any case, that strategy would have led to the same resolution more quickly.

## 2.5 Internal and external communication: autonomy or control?

At the outset of the case, Philippe Guillanton and his Yahoo! France team were at once in the front lines and without authority. Guillanton recalled worrying, when the above-mentioned article in *L'Express* appeared, "This feels like a complicated affair." He added, "We could have called the LICRA to say, 'Listen, there's a problem, but *it's not something we control* [emphasis added], can we talk about it?'" He meant that Yahoo! neither created nor necessarily condoned user-generated content.

But it was also a fact that Yahoo! France did not determine corporate policy on user complaints. When Guillanton first contacted Yahoo! Inc. to discuss the matter, corporate headquarters replied that the company received "five letters like that every day," implying there was no major cause for concern. (One of the consequences of the case, Guillanton noted, was that requests from Paris for guidance now received closer attention.) Later, Yahoo!'s Paris staff wondered if Americans could appreciate the horrors of Nazism to the same extent as the French. Said Yahoo! Inc.'s international communications director, Scott Morris, whose mother is French: "From the cultural perspective, we [in California] didn't all understand how sensitive things would get when the word 'Nazi' was mentioned. In France, World War Two is yesterday."<sup>55</sup>

There is thus reason to think that in this case, corporate affairs and legal departments at the headquarters level were too preoccupied, and not sensitive enough to local issues, to appreciate the intensity of French concerns before the affair exploded. We can only speculate what might have happened if executives with authority to remove the Nazi items were in contact with the activists early on. However, Knobel said he was astonished that Yahoo! made no attempt to contact him during the press campaign that preceded his legal assault. Why did Yahoo! Inc. hold back? The answer may be inherent in the legal approach to the relation between business and society. From this perspective, any initiative that follows the direction set by activists may be a dangerous precedent. But a lawyerly perspective may nonetheless preclude the opportunity to use activists as objective allies, who provide early warning signs of social concerns.

Similar roadblocks appeared in Yahoo!'s relations with the media. Recall that in the early stages of the case, Yahoo! Inc. avoided public comment, in keeping with a corporate policy of silence toward pending litigation. Jerry Yang's interview in *Libération* was seen as an opportunity to regain the initiative lost through this policy. Said Wrenn,

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<sup>55</sup> Interview with the authors, March 2001.

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 assumption, in other words, was that Yahoo! could use the media to deliver a message. It is natural – and also standard counsel from media consultants – for a company leader to step forward and deliver such a message in a crisis. Clearly, no one within Yahoo! could defend the company's principles more articulately than Yang, who created them. However, in practical terms, Yang's intervention revealed an understandable but profound ignorance of the rules of public discourse in France. While to an American his words might have seemed refreshingly frank, for the French – and notably to Judge Gomez – they could appear merely brutal. Once again, Yahoo!'s principled efforts served to diminish its alignment with society.

## Conclusion

One cannot help being struck by the fact that if Yahoo! had removed the offensive items from its auction site in February 2000, instead of in January 2001, there would have been no case and no damage to the company. In theory, a company can neither respond to, nor give in to all pressures arising from society. But in practice, failure to appreciate the character of specific social concerns can have serious consequences, as in this case.

The Yahoo! case illustrates how the emergence of new technologies creates an array of problems that legislators and lawyers do not yet know how to regulate or solve. Often the absence of precedents leaves them ill-prepared to respond to pressure groups or societal demands. The same vacuum invites corporations and their leaders not only to sharpen their awareness of ethical dilemmas (to avoid being taken by surprise - particularly when one is operating in a *multi-cultural* global environment), but also to find a solution to those dilemmas outside regulatory mechanisms. Approaches based on compliance may not be adequate to handling such dilemmas within corporations.

By centralizing its response to the affair at the highest corporate and legal affairs level, Yahoo! Inc. implicitly reduced business ethics to a compliance issue, and prevented itself from responding adequately to new concerns voiced at the local level. This pattern is hardly limited to the New Economy: Many companies require employees to ask their headquarters before talking with journalists or activists, and approval may be difficult to obtain before damage is done. We should not underestimate the extent to which activists learn to play on such structural weakness. It is highly significant that as time went on, Yahoo!'s adversaries became increasingly expert in the art of finding the firm's weak points. Several Yahoo! executives commented on the superb publicity skills of Knobel, without realizing that at the outset, he lacked any experience of such confrontations. In effect, Yahoo! was training him.

This case allows us to identify a conflict between two ideological stances. The first, reflected by Yahoo!, could be summarized as *Good comes by itself, and this process should not be constrained*. The second, reflected by the activists' position, is that *the Evil occupies any vacuum, and this process must be constrained*. An ethical manager should be careful to avoid principles that lock him into one of these positions; a wiser course would be to navigate between the two. Principles are indeed necessary to guide such navigation. But in the case at hand, the principles advanced by Yahoo! were not accepted by all parties, nor were they efficient in terms of the firm's economic interests. A company can lose both the moral high

ground and profits by restricting its actions within limits imposed by principles that others may neither understand nor share.

## 2 Additional References

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