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**YAHOO!, INC. V. LA LIGUE CONTRA LE RACISME
ET L'ANTISEMITISM:**

**COURT REFUSES TO ENFORCE FRENCH ORDER
ATTEMPTING TO REGULATE SPEECH
OCCURRING SIMULTANEOUSLY IN THE U.S.
AND IN FRANCE**

Evan Scheffel[†]

What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, 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.¹

I. INTRODUCTION

In this landmark case, the United States District Court of California held that the enforcement of a French order prohibiting the sale or display of Nazi propaganda and artifacts through the use of a Web site owned by the U.S.-based Internet service provider Yahoo!, Inc. ("Yahoo!") violated the First Amendment.² The court remarked that this case presented a unique context for the application of free speech principles given the simultaneous occurrence of speech in

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1. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (emphasizing the significance of its decision and impact on future cases involving First Amendment issues in the cyberspace context).

2. *Id.* at 1194. Yahoo!, Inc., a Delaware corporation, is an Internet service provider operating various Web sites from its principal place of business located in California. *Id.* at 1183.

different countries through the use of the Internet.³

In reaching its conclusion, the court relied on well-settled First Amendment law to declare that while France could regulate speech occurring in France consistent with its cultural and social values, it could not regulate speech that impermissibly violates the First Amendment by imposing content or viewpoint-based regulations on speech that also occurs within U.S. borders.⁴ On this basis, the court refused to enforce the French order attempting to regulate speech—however offensive—occurring in the United States, despite its simultaneous occurrence in France.⁵

The court carefully explained that its decision did not involve a determination of the moral acceptability of the speech because of the sensitivities implicated in the decision of whether to enforce another nation's orders, particularly given the repugnant nature of the speech at issue.⁶ In fact, the court showed great respect towards France's effort to provide a mechanism to quash such speech in light of the horrific suffering inflicted by those espousing Nazi views.⁷ However, the court stated that while honorable, such efforts effectively imposed content-based regulations which, on balance, are overridden by the free speech protections built into the First Amendment.⁸

This Case Note examines the court's reasoning for refusing to enforce the French order prohibiting Yahoo! from selling or displaying Nazi related propaganda and artifacts on and through the use of its Web site.

II. FACTUAL AND PROCEDURAL BACKGROUND

Although Yahoo! specifically targets certain Web sites to Internet users residing in specific regions, any of Yahoo!'s Web sites can be accessed by users virtually worldwide.⁹ For example, Web pages that are located on Yahoo!'s yahoo.com Uniform Resource Locator (URL) are written in English and target U.S. residents, while Web pages that are located on its yahoo.fr URL are written in French and target French residents.¹⁰ Although Yahoo! provides many

3. *Id.* at 1192.

4. *See id.* at 1189–91.

5. *Id.*

6. *Id.* at 1186–87.

7. *Yahoo!*, 169 F. Supp. 2d at 1186.

8. *Id.* at 1187.

9. *Id.* at 1183.

10. *Id.*

Internet-related services, its automated auction site is the subject of the issues that are raised in the instant action.

Any user can post an item for sale on the auction site and can solicit bids from any other user irrespective of location.¹¹ Yahoo! is only responsible for providing an avenue for the exchange of identification, payment, and shipping information to both the highest bidder and the seller.¹² The buyer and seller, rather than Yahoo!, are solely responsible for the completion of the transaction.¹³ Other than prohibiting users from selling certain illegal items (e.g., body parts and illegal drugs) and informing users that they cannot sell items to buyers in jurisdictions where the sale of such items violates that jurisdiction's laws, Yahoo! does not actively regulate the auction site or the content posted.¹⁴ As a consequence, users have posted, and continue to post, items that many may consider highly offensive, including the Nazi related items at issue in this action.¹⁵ In this case, the items that were posted included Nazi and Third Reich related goods.¹⁶

In April of 2000, La Ligue Contre Le Racisme Et l'Antisemitisme and L'Union Des Etudiants Juifs De France (collectively "LICRA") sent a "cease and desist" letter to Yahoo! at its California headquarters, in which LICRA requested that Yahoo! refrain from selling Nazi and Third Reich related items on and through its Web-based auction site.¹⁷ When Yahoo! failed to comply with LICRA's request, LICRA filed a civil lawsuit against Yahoo! in the French court.¹⁸

On May 22, 2000, the French court determined that Yahoo!'s yahoo.com Web site, which offered for sale certain items of Nazi propaganda and artifacts, violated a French criminal code provision which prohibited the display or sale of such items.¹⁹ Having further determined that yahoo.com was either directly accessible to French citizens or accessible through Yahoo!'s yahoo.fr Web site, the French

11. *Id.* at 1184.

12. *Id.*

13. *Yahoo!*, 169 F. Supp. 2d at 1184.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* LICRA is French non-profit organization that is designed to combat anti-Semitism and Nazi recidivism. *Id.* at 1183.

18. *Id.* at 1184. The French court is known as the Tribunal de Grande Instance de Paris. *Id.*

19. *Yahoo!*, 169 F. Supp. 2d at 1184.

court issued to Yahoo! the following four orders for immediate compliance therewith to avoid the imposition of daily monetary sanctions:

(1) prevent all French citizens from accessing the yahoo.com auction site (either directly or through yahoo.fr) which sells the prohibited items; (2) prevent all French citizens from accessing any yahoo.com website referencing or quoting certain publications which promote or glorify Nazism; (3) post on the yahoo.fr site a warning advising that the viewing of certain web pages on yahoo.com is prohibited by the French criminal code and may result in criminal penalties; and (4) delete from all browser directories and hyperlinks headings entitled "negationists."²⁰

Significantly, the French court further ordered that Yahoo! "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."²¹ At Yahoo!'s request, the French court reconsidered the technological feasibility of compliance with the May 22 order and on November 20, 2000, on the basis of "expert opinion," reaffirmed its order.²²

Yahoo! subsequently attempted to implement measures to comply with the French court's order.²³ Specifically, Yahoo! posted the required warnings and prohibited from the yahoo.fr Web site all displays which violated the French criminal code, except for a few auction items that appear to violate the code.²⁴ Yahoo! also amended its auction policy to prohibit individuals from auctioning specified hateful or violent materials or publications.²⁵ Notwithstanding these measures, Yahoo! had not implemented any action to prevent access to other Web sites which arguably violated the French order.²⁶ Yahoo! claimed that it could not fully comply with the French order because it simply did not have the technology to block French citizens from accessing yahoo.com, or banning French citizens from accessing Nazi-related matter on yahoo.com without banning this material altogether would have the effect of violating Yahoo!'s First

20. *Id.* at 1184-85.

21. *Id.* at 1185.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Yahoo!*, 169 F. Supp. 2d 1185.

26. *Id.*

Amendment rights.²⁷

Accordingly, Yahoo! filed an action in a United States court seeking declaratory relief from the French court's order on the basis that the order (in its entirety) was not enforceable under the U.S. Constitution.²⁸ Yahoo! subsequently filed a motion for summary judgment.²⁹

III. HOLDING, RATIONALE AND DISCUSSION

A. The Court Dismissed LICRA's Contentions That the Doctrines of Abstention and Comity Preclude the Court from Reaching the Merits of the Action

In its Opposition to Yahoo!'s Motion for Summary Judgment, LICRA argued that the French order should have remained undisturbed based on the application of the principles of abstention and comity.³⁰ Specifically, LICRA argued that Yahoo!'s initiation of a declaratory relief action in the United States was a classic example of international forum-shopping in an effort to obtain a more favorable result.³¹ Similarly, LICRA argued that the U.S. Constitution required the court to give full faith and credit to the order issued by the French court.³²

As to LICRA's abstention argument, the court stated that LICRA did not establish a sufficient basis for which it should refrain from issuing an opinion because Yahoo!'s suit for declaratory relief did not attempt to re-litigate or disturb the French court's order or determination that Yahoo!'s speech in France violated French law.³³

27. *Id.* at 1185–86.

28. *Id.* at 1186. LICRA initially filed a motion to dismiss on the basis that the U.S. court lacked personal jurisdiction. *Id.* See also *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001). The court denied LICRA's motion and refused to certify its jurisdiction determination for interlocutory appeal until after the disposition of Yahoo!'s motion for summary judgment. *Yahoo!*, 169 F. Supp. 2d at 1186.

29. *Yahoo!*, 169 F. Supp. 2d at 1186. In addition to opposing the motion on its merits, LICRA also filed a motion under Federal Rule of Civil Procedure 56(f) to postpone the disposition of Yahoo!'s motion pending the completion of further discovery on the issue of the technological feasibility of compliance with the French court's order. *Id.* at 1193. The court denied LICRA's Rule 56(f) motion reasoning that the technological feasibility of compliance is immaterial to the disposition of Yahoo!'s motion because enforcement of the French order depended on its constitutionality under U.S. law. *Id.* at 1193–94.

30. See *id.* at 1191–93.

31. *Id.* at 1191.

32. *Id.* at 1192.

33. *Id.*, see *infra* p. 1191 and note 10.

Rather, the court noted that Yahoo!'s declaratory relief action attempted to resolve whether the French order was enforceable in the United States without violating the free speech protections afforded by the First Amendment.³⁴ The facts simply did not substantiate LICRA's forum-shopping argument.³⁵

With regard to LICRA's comity argument, the court explained that U.S. courts readily give great deference to foreign orders except to the extent that such orders violate the U.S. Constitution, laws, or policy.³⁶ As applied in this instance, the court stated that since the French order imposed content-based regulation of non-violent (albeit offensive) speech appearing on Yahoo!'s Web pages and auction site, enforcement would have violated the First Amendment.³⁷ The court further explained that given the lack of international legislation relating to speech on the Internet, the court's obligations to uphold First Amendment protections outweighed its discretion to apply comity.³⁸

B. The Court Determined That the French Order Created an Actual Controversy

LICRA argued that for several reasons, Yahoo!'s action did not present an "actual controversy," which is a prerequisite to receiving declaratory relief pursuant to the Declaratory Judgment Act.³⁹ LICRA first argued that Yahoo! could possibly prevail on its appeal of the initial order of May 22 or that the French court might conclude that Yahoo! substantially complied with its order.⁴⁰ Alternatively, LICRA argued that it may elect not to pursue the lengthy and complicated penalty phase of the litigation and that there was no order to enforce in the U.S. until after completion of the penalty phase.⁴¹ LICRA then argued that it did not intend to enforce the French order against Yahoo! in the United States because it appeared that Yahoo!'s

34. *Id.* at 1191-92.

35. *Yahoo!*, 169 F. Supp. 2d at 1192.

36. *Id.*

37. *Id.* at 1192-93.

38. *Id.* at 1193.

39. *Id.* at 1188. The Declaratory Judgment Act allows a federal court to pre-determine potential defendants' legal rights and obligations provided an actual controversy exists between the parties. *Id.* at 1187 (citing 28 U.S.C. 2201). The party seeking declaratory relief must prove that the actual controversy is imminent and more than a possibility. *Id.* (quoting *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956), *cert denied*).

40. *Id.* at 1188.

41. *Yahoo!*, 169 F. Supp. 2d at 1188.

revised policies and removal of certain offensive material constituted substantial compliance with the French order.⁴²

The court concluded that the facts did not support LICRA's arguments suggesting that no actual controversy existed and that the threat to Yahoo!'s constitutional rights was real and immediate.⁴³ As to LICRA's first argument, the court noted that Yahoo! had withdrawn its appeal of the May 22 order.⁴⁴ The court additionally noted that in its November 20 order, which Yahoo! did not appeal, the French court held that Yahoo! had the technology to comply with the May 22 order and that it faced a daily fine of \$13,000 for non-compliance of that order.⁴⁵

Additionally, the court was not persuaded by LICRA's position that there was no order to enforce in the U.S. because the penalty phase had not yet occurred.⁴⁶ The court determined that an actual controversy existed unless or until the French court absolved Yahoo! of any potential for the imposition of a daily penalty, which it could have applied retroactively, or it could have withdrawn its order altogether.⁴⁷

The court concluded that LICRA's determination that Yahoo! substantially complied with the French order by revising its policies and removing certain offensive material was immaterial.⁴⁸ Significantly, the French court had not found Yahoo! in compliance with its order nor had LICRA requested the French court to make such a finding.⁴⁹ The court noted that the "the fact that Yahoo! does not know whether its efforts to date have met the French court's mandate is the precise harm against which the Declaratory Judgment Act is designed to protect."⁵⁰

C. The Court Determined that the French Order Created a Real and Immediate Threat to Yahoo!'s First Amendment Rights

LICRA presented two alternative grounds, both of which the court rejected, in support of its contention that Yahoo!'s declaratory relief action did not present a real and immediate threat. First, rather

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Yahoo!*, 169 F. Supp. 2d at 1188-89.

48. *Id.* at 1189.

49. *Id.*

50. *Id.*

than arguing that the French order could have been enforced in the United States in a manner consistent with the First Amendment, LICRA argued that no real and immediate threat existed because the French court had not yet imposed a penalty on Yahoo! for its failure to comply with the French order.⁵¹

In support of this contention, LICRA cited the holding in *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* ("Krishna") as analogous to the instant facts.⁵² In *Krishna*, the court concluded that a declaratory relief action seeking a determination of the constitutionality of a proposed resolution that arguably limited speech was unripe because the resolution had not been enacted at the time of the action.⁵³ The *Yahoo!* court stated that the *Krishna* decision was inapposite because it was distinguishable on its facts; in *Krishna*, the resolution at issue had no legal effect, while the French order at issue was indisputably valid and enforceable (albeit in France).⁵⁴

Second, LICRA argued that since it did not presently intend to seek enforcement of the French order in the United States, there was no real and immediate threat to Yahoo!'s First Amendment rights.⁵⁵ In support of this contention, LICRA cited the holding in *Salvation Army v. Department of Community Affairs of the State of New Jersey*.⁵⁶ In *Salvation Army*, a religious group claimed that, despite being informally granted exemptions by the state of New Jersey from a statute which purportedly interfered with the free exercise of religion, the exemptions were not legally binding and therefore subjected the group to future uncertainty in the enforcement of the statute, the effect of which would have infringed on the group's First Amendment rights.⁵⁷

The *Yahoo!* court concluded that *Salvation Army* was also inapposite for several reasons. First, the French order provides for retroactive penalties while the New Jersey statute only provides for prospective penalties.⁵⁸ Second, the exemptions created in *Salvation*

51. *Id.* at 1190.

52. *Id.* (citing *Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 611 F. Supp. 315, 319-20 (C.D. Cal. 1984)).

53. *Yahoo!*, 169 F. Supp. 2d at 1190.

54. *Id.*

55. *Id.*

56. *Id.* (citing *Salvation Army v. Dep't of Cmty. Affairs of the State of New Jersey*, 919 F.2d 183 (1990)).

57. *Id.*

58. *Id.*

Army allowed the group to maintain the status quo rather than to take affirmative steps to modify existing policies which arguably violated the First Amendment.⁵⁹ Third, the requirements set forth in the French order remained in full force and effect, while in *Salvation Army* the perceived threat was merely the possibility that New Jersey would withdraw the exemptions.⁶⁰ The court further reiterated that LICRA's commitment to refrain from seeking enforcement of the order in the United States did not diminish Yahoo!'s real and immediate threat since LICRA could, at any time, pursue sanctions against Yahoo! for its "present and ongoing" actions.⁶¹

Based on the particular mandates contained in the French order, the court found a real and immediate threat to Yahoo!'s First Amendment rights.⁶² The court concluded that the French order was tantamount to a content-based regulation, as it required Yahoo! to refrain from displaying or selling on its Web site any item relating to Nazism.⁶³ The court stated that the U.S. Constitution prohibits the regulation of speech based solely on its content, or viewpoint, absent a showing of a compelling interest, such as the need to avert imminent danger resulting from inciteful speech.⁶⁴

In further support of its conclusion, the court stated that, as written, the French order was impermissibly "general" and "imprecise," which, by itself, constituted a violation of the First Amendment.⁶⁵ The order required Yahoo! to "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."⁶⁶ The court stated that the phrase "and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes" did not pass strict scrutiny (as required by the First Amendment) because it did not describe the prohibited speech with sufficient particularity.⁶⁷ In addition, the court stated that the phrases "all necessary measures"

59. *Yahoo!*, 169 F. Supp. 2d at 1190-91.

60. *Id.* at 1191.

61. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (internal quotation omitted)).

62. *Id.*

63. *Id.* at 1189.

64. *Id.*

65. *Yahoo!*, 169 F. Supp. 2d at 1189.

66. *Id.*

67. *Id.* (citing *Coates v. City of Cincinnati*, 402 U.S. 611 (1971)).

and “render impossible” required Yahoo! to undertake efforts which would have “chilled,” and perhaps even censored, protected speech.⁶⁸

Having concluded that the French order violated Yahoo!’s First Amendment rights, the United States District Court of California stated that such violation—no matter how short in duration—constituted “irreparable injury.”⁶⁹ The court held that although the French order could regulate speech occurring in France on the basis of content or viewpoint, the French order could not be enforced against the same speech occurring simultaneously in the United States. Enforcement of such an order would impermissibly violate the First Amendment—even if such speech was considered highly offensive.⁷⁰ Accordingly, the court refused to enforce the French order prohibiting Yahoo! from displaying or selling Nazi propaganda and artifacts through the use of its Web site.⁷¹

IV. CONCLUSION

Given the global reach of the Internet, which provides an avenue for wildly divergent cultures and value systems to intersect, this case presents important and novel issues regarding free speech, constitutional rights and foreign state sovereignty. Since the facts of this case involve issues of policy, politics and culture that transcend the jurisdiction of the courts of the United States, this case may very well be cited as the progeny of a new breed of free speech cases.

68. *Id.* (citing *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987)).

69. *Id.* at 1189–90.

70. *Id.* at 1194.

71. *Yahoo!*, 169 F. Supp. 2d 1194.