

FRENCH YAHOO! JUDGMENT (ENGLISH TRANSLATION)

Union des Etudiants Juifs de France
Ligue contre le Racisme et l'Antisémitisme

v.

Yahoo! Inc. and Yahoo France

TRIBUNAL DE GRANDE INSTANCE OF PARIS (November, 2000)

Court's Opinion.

.....I, the President of the Court,

[1] Considering the terms of my ordinance [injunction against Yahoo!] of May 22, 2000, to which it is appropriate to refer expressly, whereby I ordered:

.....1 / Yahoo Inc: to take all appropriate measures in order to deter and prevent any [Internet] visit to the service of auction sales of Nazi items on Yahoo.com and to any other site or service which constitutes an apology for nazism or a contention about nazi crimes;

.....2 / Yahoo France: to give any internaut [user], before he opens the link enabling him to proceed with searches on Yahoo.com, a notice informing him about the risks he takes by going on visiting such sites;

.....3 / the pursuance of the case to allow Yahoo Inc to debate contradictorily the measures it intends to take in order that disorder and suffered damage are ended and that any further disorder is prevented;

[2] Considering the conclusions developed by Yahoo France as well as by Yahoo Inc. for their defense and aiming to fulfill the purposes mentioned in my previous ordinance;

[3] On the claims directed against Yahoo Inc.

[4] Whereas Yahoo Inc argues that:

- this Court has no jurisdiction to decide upon the case;
- there does not exist any technical means to satisfy the terms of the this court's original order of May 22, 2000;
- assuming that such means might exist, their implementation would generate an over cost for Yahoo Inc., which would even put at risk the existence of the Internet network

[5] Whereas to support its exception concerning non-jurisdiction, reiterated for the third time, Yahoo Inc. argues that:

- its services are rendered essentially to internauts located in the United States of America;
- its servers are installed in this same territory;
- a coercive measure against the company could not be enforced in the United States because such a measure would be contrary to the First Amendment of the Constitution of the United States, which guarantees to any citizen the right of freedom of thought and expression;

[6] Whereas, if it is true that the site "Yahoo Auctions" is in general addressed mainly to internauts based in the United States, having regard among other things to the nature of items for

sale, methods of payment, delivery terms, language and currency used, that is not true concerning items representing symbols of the nazi ideology, which can be of interest and are accessible to any person who wishes to bid, including the French;

[7] Besides, as that has already been judged, merely sighting such objects in France is a violation of article R.645-1 of the penal code and is therefore against the country's public policy;

[8] Moreover, looking at such objects causes obviously a wrong in France to the plaintiffs, who have grounds to claim that it be ended and they be indemnified;

[9] Whereas at last Yahoo is aware that it addresses to French internauts, since in reply to a connection to its auction site opened from a computer located in France, there are in response advertising banners written in French language;

[10] A tying link of the present case with France is consequently sufficiently characterized, which gives this Court full jurisdiction to hear the claims from the plaintiffs;

[11] The possible difficulties of enforcing the Court's decision in the territory of the United States, invoked by Yahoo Inc. do not by themselves justify a claim of lack of jurisdiction;

[12] That such exception [by Yahoo! to jurisdiction] will therefore be rejected;

[13] Whereas, regarding the argument by Yahoo and derived from the impossibility to implement technical means such as to satisfy the ordinance of May 22, 2000, it is at first necessary to quote the conclusions of the group of consultants appearing on pages 62 through 76 of their report:

Opinion of the consultants

The companies Yahoo! France and Yahoo! Inc. have been condemned [ordered] on May 22, 2000 by the Court of Great Instance of Paris in the following terms:

[14] "Order Company Yahoo! Inc. to take all appropriate measures to deter and prevent any visit to the auction sales service of nazi items on Yahoo.com and to any other site or service which constitutes an apology for nazism or a contention about nazi crimes; "Order Company Yahoo! France to give to any internaut, before he opens the link enabling him to proceed with his searches on Yahoo.com, a notice informing him that, if the result of his search, coming either from a tree structure or from key words, leads him to point to sites, pages or forums, the title and/or contents of which constitute a violation of the French law, which is the case in consulting sites which contain an apology of nazism and/or exhibiting uniforms, badges, emblems reminding those which were carried or exhibited by nazis, or offering for sale objects and works the sale of which it strictly prohibited in France, then he must stop the consultation of the site concerned, lest he incurs the penalties provided for by the French law or has to defend against legal actions which might be initiated against him."

[15] Yahoo! France says that it has complied with the decision. Yahoo! Inc makes the point that there was no technical solution enabling it to fully comply with the Court's decision.

[16] A group of consultants was appointed to enlighten the Court about the technical solutions which could be implemented by Yahoo! Inc. in order to comply with the decision of May 22 .

Internet

[17] Internet is a combination of several hundreds of millions of digital networks and associated sites which are interconnected in the world. The routers are computers dedicated to the interconnection of these networks.

[18] A set of procedures was defined from 1973 through 1980, under the control of the research laboratories of the American army (DARPA). These procedures, known under the name of TCP/IP [Internet Protocol], are the heart of several hundreds of protocols used on Internet.

[19] In the end of the nineteen-eighties, CERN conceived the Web (www) which uses additional procedures, protocols http and html language, to set up a global system for sharing information.

[20] The most usual applications include electronic mail (email), forums (news group), dialogue services (chat), services for auction sales, telephone, video and audio on line and many others.

[21] A widespread error consists in saying that all Internet services are performed by the Web. Actually, the Web is only one of the facets of Internet.

[22] Internet, which started like an experimental project, has become a worldwide business. The Internet services providers (ISP) have built and exploit networks opened to the public. The private networks of universities, companies, and even home computers, are interconnected by the internet services providers in a global network.

[23] This structure is not very convenient and a system has been set up to allow association of a name to an address. The names are called domain names. The conversion of a domain name into a numerical IP address is made through a group of data bases spread on Internet (DNS). The DNS servers proceed along a tree structure and are specialized according to the kind of services offered (com, org, edu, gov, etc.) and according to countries (fr, uk, sf, etc).

[24] But, it must be well understood that there are no rules of correspondence between the countries appearing in the domain name and the numerical IP address. For instance www.yahoo.fr does not correspond to an IP address of a French network.

[25] Consequently, the extension of the domain name does not make it possible to determine which is the network to which belongs the numerical IP address.

[26] On the other hand, the allocation of IP addresses granted to suppliers of Internet services

(ISP) follows a tree structure going for example from the main network, to the sub-network, to the access provider and then to the local user.

[27] One can go up from a certain IP address to the access provider, the sub-network and the main network.

[28] Consequently, some organizations and providers maintain data bases enabling them to find out the co-ordinates of a network, a sub-network, a router or a site, starting from its IP address.

[29] The DNS system offers to access providers, to sites, etc... the possibility of recording with their co-ordinates their geographical localization in the form of latitude and longitude. It is not an obligation.

[30] The exploitation of the geographical localizations of the holders of an IP address is however of a great interest. Several services providers have the technology and data bases enabling them to locate geographically such address, fixed or even dynamically allocated. Several of them made revelations to the consultants stating they had the technical means to allow Yahoo! to satisfy the obligations ordered by the Court.

Problems

[31] To satisfy the terms of the condemnation decision [requiring Yahoo! to bloc French user access to the Nazi memorabilia website] and to forbid the access to auction sales of nazis items, Yahoo! must:

.....1) have knowledge of the geographical origin and the nationality of the internautes desiring to have access to the site of auction sale

.....2) prevent the French internautes or those connected in the French territory from learning the description of the nazis objects put for auction sale and a fortiori from bidding.

On the geographical origin and nationality

[32] The interrogation of a Web site by the public consists in connecting the user working equipment (microcomputer or other) to a targeted site.

[33] This process takes place with the intervention of different categories of intermediaries: the access provider, the routers, one or more addressee sites.

[34] It is necessary at this stage to keep in mind that the user's computer, the access provider, the routers and the addressee site are identified on the network by an address conforming with the Internet protocol(IP).

[35] One may add that for phone cost reasons, the French internautes use mainly the services of

access providers present in their own country.

[36] One can therefore estimate that nearly 70% of IP addresses allocated to French internautes can be linked with certainty to a French domiciliation of access providers and can be filtered.

[37] Besides, it is this reality which enables Yahoo Inc to post Franco-French advertising banners on its auction sales site.

Use of nationality by Yahoo Inc.

[38] Here is the second problem. What is to be done once the nationality or the place of localization of the computer is known? The measures to be taken depend upon every particular case. They cannot be generalized to concern all internet sites and services.

[39] In the present case, the site to be considered is "pages.auctions.yahoo.com". It is hosted by GeoCities IP address 216.115.104.70, localization 37°.352 of northern latitude, 121°.958 of western longitude, GeoCities network registered by Yahoo, 3400 Central Expressway, Suite 201, Santa Clara, CA 95051.

[40] The site is a site of auction sales of miscellaneous things, not [eclusively] dedicated to nazi objects. The characteristic of this type of site is to make it possible for internautes to easily find the objects which they look for.

[41] It appears that in order to abide with the terms of the decision of May 22, 2000, Yahoo must not allow internautes of French nationality or internautes connecting from the French territory to access to these objects.

[42] If, at the end of a search made from a query launched by a French internaute, one or more nazi objects described as nazi by their owner have been selected by the search engine, they must be hidden and excluded from the result of search.

[43] But, obviously, it is not possible for Yahoo to exclude . . . objects which would not have been described by their owner as being of nazi origin or from the nazi time, or whose characteristics would not have been made known to Yahoo.

[44] Verifications made collectively by the consultants confirmed that many nazi objects are presented as such by their owners. A more radical solution is also possible. It would be enough that the search engine would not fulfill the queries, transmitted in the URL, with the inclusion of the word "nazi" and coming from internautes identified as French or declaring to be such.

Claim directed against Yahoo Inc

"To describe the information conveyed through the net allowing to determine the geographical origin of the calls."

[45] According to "Association Française des Fournisseurs d'Accès" (AFA), one can consider that 80% of the addresses allocated dynamically to members of the Association are identified as from French nationals. ... 20% are not French. Among the information conveyed through the net, exclusively the IP addresses of the senders make it possible to determine the geographical origin of the calls. 80% of the addresses allocated dynamically by access providers which are members of AFA can be identified as from French nationals.

[46] But, it is appropriate to specify that the geographical origin discussed here is that of the site of the access provider used by the internaut. Nothing prevents a user in France from calling by phone an access provider whose telephone number is foreign. In this case, an address IP allocated dynamically will be most likely identified as a foreign one. A foreigner may also call an access provider located in France and be looked in that way as being allocated a French IP address.

[47] However, one can estimate, as things now stand, that more than 70% of IP addresses of internauts residing in the French territory can be identified as being French.

[48] The consultants stress that it is not possible to say that things will remain same in the future. Encapsulation is being developed, services suppliers and access providers are getting international and internauts seek more and more to protect their privacy.

[49] "To describe the filtering procedures which can be implemented by company Yahoo to prevent internauts operating from the French territory from accessing to items which could be considered as illegal by the French judicial authorities."
..... "In the event that no technical solution could guarantee a 100% filtering, to provide any and all technical and factual information permitting to appreciate the filtering efficiency of every one of the filtering procedures described by the consultants."
....."More generally, to provide all technical and factual information permitting the Court to enforce the access restrictions ordered to Yahoo Inc."

[50] The consultants consider that to be efficient a technical solution must be adapted to the particular case. Companies [like] Yahoo! run many services through the Net, ranging from personal pages ("GeoCities") to astrology ("Yahoo astrology") with in between finance, etc... Most of the sites do not seem to be of concern to the present lawsuit.

[51] Only the auction sales site is precisely described by the decisions of the Court and the claims. No claim against other sites and services of Yahoo! is formulated with sufficient precision to enable the consultants to propose adapted and operational technical solutions.

[52] As the matter now stands, the consultants will limit consequently their answers to the case of the auction sales site ("Yahoo auctions") [whereon one may purchase nazi memorabilia]. . . .

Answer of the consultants Laurie and Wallon

[53] These consultants point out that, in the current state of development of the Internet:

.....1) The figures provided for by AFA, crossed with their personal experience, make it possible for the consultants to estimate at nearly 70% the IP addresses of French nationals or residents in the French territory which may be correctly identified by specialized services suppliers like InfoS-plit, GeoNet or others, on the basis of specialized data bases.

.....2) Yahoo! posts advertising banners targeted to internautes who are regarded as French by Yahoo! who has therefore technical means to spot them.

.....3) Approximately 30 % of IP addresses allocated to French nationals cannot be identified correctly with the above mentioned techniques.

.....4) Many sites, most of the time which are related to the field of national defence (cryptography) authorize the access to some pages of the site or the down-loading of software, only after having requested from the internaute a declaration of nationality.

.....5) "Cookies" are of current practice and make it possible to prevent that certain information should be given again by the internaute every time that he consults a site. [Anyone] [w]ho wants to destroy one's cookies or prevent them from being memorized knows perfectly well that consultations with the sites they came from [time to reaccess] will be longer [without the Internet cookies].

.....6) The nazi objects are generally described as such by the sellers with a mention "nazi", said description appears to them as a reason for the buyer to purchase. Consequently, the consultants consider that in addition to the geographical identification already used by Yahoo to target its publicity, it would be appropriate to ask the internautes, when their IP address is ambiguous, that they subscribe a declaration of nationality.

[54] The declaration upon honor, would concern only the internautes whose IP address cannot be identified as being related to a French ISP (i.e. multinationals ISP like AOL address originating from an anonymous site or encapsulation of an address allocated by an intranet server). The declaration could, as Yahoo! would think it fit, be subscribed either on the index page of its auction sales site, or only, in the case of a query for nazi objects, if the word nazi is mentioned in the user's query, just before it is processed by the search engine.

[55] The consultants consider it cannot reasonably be supported that that would have negative effects on the performances and response time of the server hosting the auction sales site of Yahoo! The combination of the two procedures, geographical identification of IP addresses and declaration of nationality, would probably make it possible to reach a filtering ratio close to 90%.

Answer of consultant Vinton Cerf

[56] Whereas it results from said conclusions that physical localization of an internaute is possible on the basis of one's IP address; Whereas YAHOO Inc. attempts to make these conclusions totally unoperative by opposing to them a note prepared by one of the consultants Mr Vinton Cerf; but whereas Mr Vinton Cerf admitted the feasibility of a geographical localization in accordance with the terms and conditions of the report and with the proposals appearing in said report, the contents of which he approved;

[57] Whereas, then, his separate note of November 5, 2000, that Yahoo Inc. mentions, does not contradict the conclusions of the report: the note merely states on one hand that it would be "incorrect, in any case likely to induce in error", to affirm that it would be possible to determine with a high rate of reliability the physical localization of an address IP, the term "high rate of reliability " meaning obviously a rate of reliability much higher than the one mentioned in the report, which is about 70%, and on the other hand, which the consultants collectively admitted entirely, that the answer which was given about this point could only concern the auction sales site of nazi objects and could not be extrapolated to services site under Yahoo's control;

[58] Whereas it is, besides, appropriate to mention that Yahoo Inc. already practices geographical identification of French internauts or internauts connecting from the French territory, since Yahoo Inc. systematically posts advertising banners in French language aimed to these internauts, whom Yahoo Inc. has therefore the means to spot; Yahoo Inc could not validly argue that the technology in question in the present case would be a "rough technology" with no reliability, unless one would have to consider that Yahoo Inc. has made the decision to waste its money or cheat the advertisers about the quality of the services and advantages which it is engaged to offer to them, which does not appear to be the case in this instance;

[59] Whereas, in addition to geographical identification, which is already practiced by Yahoo Inc., the consultants' report suggests that the internauts, whose IP address is ambiguous (going through an anonymiser [site guaranteeing anonymity] - or allocation of IP addresses by AOL COMPUSERVE not taking into account the country of origin from the subscriber) may subscribe a declaration concerning the geographical origin of the internaut, that Yahoo Inc. could require either when its home page is opened, or in the case of a search for nazi objects, if the word "nazi" appears in the query from the user, just before the query is processed by the search engine;

[60] Whereas the consultants, who challenge the allegations of Yahoo Inc. relating to the negative effects of such control over the performance and the response time of the server hosting the auction sales site, figure that the combination of both procedures, geographical identification and declaration of nationality, would make it possible to reach a filtering rate close to 90%;

[61] Whereas, in addition to the measures suggested by the consultants, it is necessary to add control by Yahoo on delivery location for the objects purchased in the auction sales;

[62] Whereas, as a matter-of-fact, the visit of the auction sales site of nazi objects is not exclusively consultative; its purpose is often the purchase of objects; consequently, if Yahoo did not have the possibility to identify with certainty the geographical origin of the internaut, French in the present case, Yahoo will have, because the place of delivery is known, the ability to prevent the delivery when it is scheduled to take place in France;

[63] Whereas, at last, on the basis of the language version of the navigator, Yahoo Inc, could have additional information on the nationality of the internaut;

[64] Whereas Yahoo Inc. argues that to use that information it would be necessary to modify the software to manage its sites and a significant increase in the associated hardware resources;

[65] Whereas Yahoo Inc. adds that filtering all information at the level of the web server could be envisaged only if it was possible to make sure that prohibition would apply only to French internautes, unless other internautes throughout the world are deprived from information published on its sites, which cannot be envisaged;

[66] Whereas, furthermore, Yahoo Inc. does not demonstrate, with a convincing forecast, that the technical changes which would be necessary to control access to the auction sales site of nazi objects would entail a significant increase in the associated hardware resources;

[67] Whereas in any event, company Yahoo! Inc. has proposed to cooperate with the plaintiffs; in effect Yahoo! Inc. requests that it be acknowledged that it is prepared to set up a watch system with the assistance of the plaintiffs, the fight of whose it has always respected, in order, when an offending site is brought to its attention by the plaintiffs and on condition that it is obviously aimed to French users, to stop hosting it;

[68] To prove its good faith, Yahoo Inc. indicates to have stopped hosting the Protocole des Sages de Sion (Protocol of the Wise Men of Sion), considering sufficient the link of this document to France because of the language of the work;

[69] Whereas with a bit of good will, Yahoo! Inc. will be able to convince itself that it is useful to extend that link to pictures and descriptions of objects representing symbols of nazism;

[70] Whereas, Yahoo refuses as of now its service for the auction sales of human organs, drugs, works or objects related to pedophilia, cigarettes, or animals alive, all sales which it excludes automatically and rightly from the benefit of the First Amendment of the American Constitution which guarantees freedom of thought and expression;

[71] Whereas most certainly it would cost Yahoo! Inc. very little to extend the above prohibitions to symbols of nazism and such an initiative would have the merits of satisfying the requirements of ethics and morality shared by every and all democratic societies; Whereas the technical means that Yahoo! Inc. has give consequently to Yahoo! Inc the possibility to comply with the injunctions contained in the ordinance of 22 May, 2000 concerning filtering access to the auction sales service of nazi objects and to the service related to the work "Mein Kampf" which was included in the formulation of the aforesaid ordinance under the mention "and of any other site or service which constitutes an apology of nazism ";

[72] Whereas nevertheless a three months period will be granted to Yahoo! Inc. to comply with this ordinance [from November 20,2000] ;

[73] Whereas after the expiration of that period Yahoo! Inc. will have to pay a daily fine for non compliance in the amount of French Francs 100,000.00 [approximately US \$ 13,000.00 as of

November 2000] till perfect performance.

About claim against Yahoo France

[74] The ordinance of May 22, 2000 provides in this respect:

"Order company Yahoo France to warn any internaut consulting yahoo.fr, and this even before he uses a link enabling him to go on with his search on yahoo.com, that if the result of his search, either starting from a tree structure, or starting from key words, leads him to point to sites, pages or forums the title and/or the contents of which constitute a violation of the French law, which is the case of a consultation of sites making an apology of nazism and/or exhibiting uniforms, insignia, emblems recalling those which were worn or exhibited by nazis, or offering for sale objects or works the sale of which is strictly prohibited in France, then he must stop consulting the site concerned, lest he is liable to penalties provided for by French laws or he has to defend against lawsuits initiated against him."

[75] To conform with the terms of the ordinance, Yahoo! France has:

.....1) changed and supplemented its terms of use which are accessed to by clicking on the link "tout savoir sur Yahoo!" appearing at the bottom of every page of the site. The following paragraph has been added:

....."At last, if within the framework of a search undertaken on www.yahoo.fr starting from a tree structure, of key words, the result of which would lead you to point to sites, pages or forums the title and/or contents of which constitute a violation of the French law, taking into account in particular the fact that Yahoo! France cannot check the contents of these sites and external sources (including the contents referred to on other sites and services of Yahoo! throughout the world), you must stop your consultation of the site concerned, lest you would be liable to penalties provided for by French laws or would have to defend against lawsuits initiated against you."

.....2) installed, in the case of a search through a tree structure (categories) a warning drafted as follows: "Warning: by going on with your search on Yahoo! US you may be led to consult revisionist sites, the contents of which constitute a violation of the French law and the consultation of which, if you persevere, would make you subject to penalties.

....."It has been found that the terms of use of Yahoo ! were not systematically posted at the time of the first connection to the site and besides that the link "tout savoir sur Yahoo!" did not refer necessarily to the access for general terms of use.

[76] It is technically possible for Yahoo! France to force the posting of its terms of use at the time of the first connection of a user to its site.

[77] Yahoo! could also, in addition to, or in place of, the previous measure, cause systematically the posting of the notice mentioned in 2) [para. 75] as soon as the link to Yahoo.com is opened.

[78] But on this last point, Yahoo! sustains that such were not the terms of the ordinance. Contrary to what Yahoo! sustains, "to warn any internaut consulting yahoo.fr and this as soon as he uses the link..." can mean that the notice must be posted every time the link is opened.

[79] Whereas Yahoo France sustains that it has complied with the ordinance of May 22, 2000 by amending the link targeted at by plaintiffs , by installing on several links the notice mentioned in the ordinance, by recalling to internautes the terms of use of the service which may be accessed to by users as soon as they connect with Yahoo.fr and which may be consulted on all the pages of yahoo.fr since November 3, 2000, and by modifying the general terms of use of service;

[80] Whereas the initiatives taken by Yahoo! France are technically such that they may to a large extent satisfy the terms of our ordinance of May 22 2000, reserve being made however that the warning must be mentioned "even before the internaute put the link in use";

About other claims filed against Yahoo! France

[81] Whereas there is no urgency concerning the claims from LICRA, UEJF, and MRAP that Yahoo! France be ordered to suppress any link from its site to sites owned directly or indirectly by Yahoo! Inc. till Yahoo! Inc has fulfilled its obligations, having regard to a dispute raised by Yahoo! France about claims which are outside our jurisdiction;

[82] For these reasons

.....Order Yahoo! Inc to satisfy, within 3 months as of notification of this ordinance [dated Nov. 20, 2000], the injunctions contained in the ordinance of May 22, 2000, subject to penalty for non-performance in the amount of French Francs 100,000.00 per day [approximately US \$ 13,300.00] of delay from the 1st day which will follow the expiration of the 3 months period;

.....Appoint Mr. Wallon, at the expense to be paid by Yahoo Inc., with the duties to report about the ways the terms of this ordinance are fulfilled;

.....Acknowledge Yahoo Inc. has made the decision to stop hosting the Protocol of the Wise Men of Sion (Le Protocole des Sages de Sion);

.....Acknowledge that Yahoo! France has to a large extent satisfied the spirit and the letter of the ordinance of May 22, 2000 containing injunction against it;

.....Order however that the warning to internautes must be posted before they put to use the link to Yahoo.com, and this within 2 months after the present decision is notified;

.....Condemn Yahoo Inc to pay to each of the plaintiffs the sum of French Francs 10,000.

Made in Paris, on November 2000