

# FRANCE ASSERTS SOVEREIGNTY IN CYBERSPACE

The latest attempt to assert sovereignty over cyberspace came on November 20 when a French court ordered Yahoo! Inc. to block French users from accessing auctions of Nazi paraphernalia and other items that run afoul of France's hate crime laws. Judge Jean-Jacques Gomez of the Paris Tribunal de Grande Instance gave Yahoo! Inc. (Yahoo!), the California-based Internet portal, three months to comply with his order, or face heavy daily fines. (Materials related to the case, and an unofficial translation of the November 20 decision, can be accessed on the French site [www.jurisline.net](http://www.jurisline.net) and the US site [www.gigalaw.com](http://www.gigalaw.com), respectively.)

The case has drawn attention on both sides of the Atlantic because it raises one of the most complex legal issues in Internet law today: can foreign courts impose their countries' particular laws on Web sites based outside their boundaries, and if so, how can e-commerce companies, whose sites are accessible from different countries, adapt to an international patchwork of rules? While the Yahoo! case has many predicting the death of the "borderless Internet", it may serve merely as an important wake-up call to US companies about some of the hidden costs of operating in cyberspace.

The case was brought against Yahoo! by the International League Against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF). The groups objected to the Nazi memorabilia—including flags, stamps, military souvenirs and hate speeches—that were being auctioned on Yahoo!'s main US site in violation, the groups contended, of Article R. 645-2 of the French Penal Code, a World War II-era law criminalizing the exhibition or sale of racist materials. Yahoo! maintained a French-language subsidiary portal, Yahoo! France, that did not provide access to Nazi memorabilia auctions, but French Web surfers could access the



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main Yahoo! pages via links from the Yahoo! France site. More importantly, and more germane to the larger issues, any French citizen could always just type [www.yahoo.com](http://www.yahoo.com) into his or her browser and view the same pages that the rest of the world viewed.

In May, 2000, Judge Gomez ruled that the French court had jurisdiction over Yahoo! for violations occurring within France, and ordered the company to render it "impossible" for French Web users to access the Nazi

memorabilia auctions. Yahoo! was given several months to devise a strategy that would allow it to comply with the court order, but returned to the court with an answer that it would be technologically unable to accomplish that. After hearing the testimony of three court-appointed experts on the technical ability of Yahoo! to comply with his prior order, Judge Gomez issued his latest ruling, allowing Yahoo! three months to implement the necessary technology. Under the ruling, Yahoo! will be subject to a fine of 100,000 francs (\$13,000) for each day of non-compliance.

Yahoo! has not yet announced its next move. An appeal in the French courts is possible, or Yahoo! could seek intervention by a US court. (In the United States, Yahoo!'s listings would be protected not only by the *First Amendment*, but also possibly by laws shielding Internet Service Providers from liability for users' postings, such as the *Communications Decency Act*. See, e.g., *Stoner v. eBay, Inc.*, No. 305666 (Cal. Super. Ct. S.F. Cty. Nov. 7, 2000)).

To comply with the French court's order, Yahoo! would probably need to implement some sort of geographical filter, blocking access to the Nazi-related auctions by users who either identified themselves as French and then had "cookies" placed on their computers, or who could be traced to France using their ISP's address or some other tracer. Yahoo! could also block access to sites based on

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certain keywords used in users' searches. As the court-appointed experts in the case were quick to point out, many of the technical measures at Yahoo's disposal could easily be circumvented.

Even as Yahoo! decides on its next move in response to the French ruling, it has been reported that German authorities are investigating sales of Hitler's *Mein Kampf* on the site, in violation of a German law forbidding sales of that book in Germany. See Gold, *Germany Probes Yahoo Sale of 'Mein Kampf,' Newsbytes*, Nov. 28, 2000.

#### ADAPTING BUSINESSES TO FOREIGN LAWS

Many Internet companies in similar situations have already adapted their ways of doing business significantly in response to the laws of other jurisdictions. In response to pressure from German regulators, Amazon.com (and subsequently the other major online booksellers) stopped shipping copies of *Mein Kampf* to customers in Germany. But a restriction on sales is much easier to carry out than preventing German Web surfers from viewing a copy of a certain book for sale; in fact, Amazon.com has continued to offer the book for sale to customers outside of Germany, so any German browsing the main site could presumably read a description of *Mein Kampf*, customer reviews, etc.

eBay has restricted the Nazi-related memorabilia that is available through all their auctions, purportedly limiting such items to those of legitimate historic value. In the aftermath of the French court's ruling, an eBay spokesman stated the company's commitment to following the laws of the countries in which they do business.

The "respect" afforded to the laws of foreign jurisdictions will, of course, continue to be driven by economics. US computer company Hewlett-Packard was recently caught in the grips of a German law requiring companies to pay fees for selling devices that are capable of duplicating intellectual property. In a settlement, Hewlett-

Packard agreed to pay GEMA, a German music copyright group, several dollars for each CD "burner" that it sold in Germany since February, 1998, and several more dollars for each burner sold in the future. Rather than simply discontinuing its sales of burners in Germany, Hewlett-Packard reluctantly agreed to the fee scheme.

#### A DIFFERENT PERSPECTIVE

The whole issue of reining in e-commerce with a patchwork of "foreign" laws is not as "foreign" a concept as one might think. Earlier in the year, Jay Cohen was convicted and sentenced under the *Federal Wire Wager Act*, 18 U.S.C. § 1084, for running an Internet sports gambling operation out of Antigua that accepted bets from Americans. Sports gambling is legal in Antigua, as well as many other offshore locations. Perhaps there was a different reaction in Antigua, but few Americans voiced outrage at the Department of Justice's successful invocation of a US law to curtail commercial Internet activity that, at least arguably, originated and occurred outside the United States.

One can easily imagine other scenarios in which local authorities aggressively assert local laws in response to foreign Internet concerns. It was recently reported that a Swedish company called Leechnet had launched a peer-to-peer "Napster-style" file-sharing service to facilitate the exchange of pornographic images. Canadian prosecutors might well target such a company for violations of Canadian pornography laws if, say, pornographic images of children reached Canadians' computers via the service, and European authorities were hesitant to respond. ♣

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