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I. Abstract

This comment discusses the regulation of content on the World Wide Web, while focusing on the recent international conflict between the United States and France in UEJF v. Yahoo! Inc.¹ The author's goal in this comment is to provide a better understanding of the differences in opinion held by the two nations by comparing the development of their Internet use and respective Internet policies. The comment discusses, in

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some detail, the *Yahoo!* proceedings that have occurred so far in France and the United States. This author concludes that the conflict can be best resolved by placing the burden of complying with their nation's laws and regulations upon the users of the Internet.

II. Introduction

On May 22, 2000, the Tribunal de Grande Instance de Paris, the Superior Court in France (hereinafter, the "French Court"), decided *UEJF v. Yahoo! Inc.* in which it ordered *Yahoo!* to "dissuade and render it impossible" for French users to access sites and services which contain content harmful to the "internal public order." The order was aimed at *Yahoo!'s* United States auction web site, which had displayed various Nazi-related items for sale.

After *Yahoo!'s* challenge to the May 22nd order failed, the company filed a complaint in the United States District Court for the Northern District of California. In its complaint, *Yahoo!* requested the court to declare that the French Court's order was neither recognizable nor enforceable against it. Following a denial of a motion to dismiss on jurisdictional grounds brought by the French defendants, the United States District Court issued an order and opinion on November 7, 2001. The court ruled that enforcing the French order would violate the First Amendment of the United States Constitution.

The decisions by the courts in France and the United States are yet another attempt to draw borders where borders have been difficult, if not...
impossible, to define. This comment does not provide a detailed discussion of the jurisdictional aspect of this problem, but rather focuses on the issue of content regulation and the Internet. To that end, this comment discusses regulation of the Internet in the United States and France, with a focus on the Yahoo! litigation. Part III of this comment provides background information on the development of the Internet and the World Wide Web in the United States and France. Part IV of this comment discusses relevant Internet policy in the United States and France. Part V discusses the United States' policy concerning the enforcement of foreign judgments as a lead-in to Part VI, which discusses the Yahoo! litigation, both in France and the United States. Part VII provides a discussion of the current state of content regulation on the Internet in France and the United States. Finally, this comment concludes by proposing that the burden of compliance with the nation's laws be placed on the users in each nation.

III. Development of the Internet and World Wide Web

A. The Internet

The Internet has been defined as "an international network of interconnected computers." It was created in the United States in 1969, as part of the Advanced Research Project Agency (ARPA), to link computers and networks owned and operated by the military and other defense-related operations. This interconnected network was dubbed ARPANET. One of the primary purposes of ARPANET was to "allow vital research and communications to continue even if portions of the network were damaged, [for example,] in a war." At the same time that ARPANET was evolving, similar networks were being developed to link universities, research facilities, businesses, and individuals. These networks then became interconnected and evolved into what is now known as the Internet. It is nearly impossible to determine, at any given moment, the size of the Internet. In addition, no single entity administers the Internet, nor would it be feasible for a single entity to

16. Id.
17. ARPANET later was referred to as DARPA Internet which then became known as the Internet. Id.
18. Id.
19. Id. at 832.
20. ACLU, 929 F. Supp. at 832.
21. Id. at 831.
22. Id. at 832.
do so.\textsuperscript{23} Users may access the Internet generally in two ways – through a direct connection to a computer network or by using their personal computer to connect via a modem attached to their telephone line.\textsuperscript{24} Users may generally access the Internet via a network at schools, at work, or at a library.\textsuperscript{25} Users may also access the Internet by utilizing one of the many commercial or non-commercial Internet Service Providers (ISPs) that are currently available.\textsuperscript{26}

The uniqueness of the Internet makes it a very attractive means of communication. The Internet is a cost-effective means of communicating information to a large audience.\textsuperscript{27} Commercial entities use the Internet to disseminate information to their consumers.\textsuperscript{28} The Internet is also attractive to non-profit entities and public interest groups who are seeking to disseminate information as cost-effectively as possible.\textsuperscript{29} In addition, the ease and cost-effectiveness of communicating information on the Internet is attractive to the general public.\textsuperscript{30}

B. The World Wide Web

Once connected to the Internet, there are various ways in which users may communicate with each other and in which they may access information.\textsuperscript{31} This comment focuses primarily on one means of communication via the Internet - the World Wide Web.\textsuperscript{32}

The World Wide Web, “the Web”, was created by CERN, the European Particle Physics Laboratory, and was initially used as a means of sharing information internationally with teams of researchers and engineers.\textsuperscript{33} The Web was “created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world.”\textsuperscript{34} The Web consists of a series of documents stored in computers all over the

\begin{itemize}
\item 23. Id.
\item 24. Id. at 832.
\item 25. ACLU, 929 F. Supp. at 832-33.
\item 26. Id.
\item 27. Id. at 843.
\item 28. Id.
\item 29. Id.
\item 30. ACLU, 929 F. Supp. at 843
\item 31. Means of communication via the Internet include the use of e-mail, chat rooms, USENET newsgroups and ftp, among others. Id. at 834.
\item 32. The terms Internet and World Wide Web are often used interchangeably, even though in actuality the World Wide Web is only one facet of the Internet.
\item 33. Id. at 836.
\item 34. Id.
\end{itemize}
Navigation of the Web is fairly simple because each document is identified by an address. The user, using a web browser, may either type in the address of a web page or perform a keyword search using a search engine to locate sites of interest. Once connected to a web site, the user may then navigate to other pages through the use of hypertext links. Access to information on most web pages is free, while others require the user to pay a fee for access.

From the user's point of view, the Web is comparable to both an enormous library and a large shopping mall, with access to millions of publications and thousands of goods and services. From the publisher's point of view, the Web "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers." No single entity controls access to the Web and there is no centralized device in place for blocking content on the Web.

C. France: Minitel versus the Internet

France has been slower than the United States in developing its use of the Internet and the World Wide Web. "By 1998, only a fifth of French households had a computer . . . and only 2% of households were connected to the Internet." The slow growth of the Internet in France has been attributed in part to the dominance of the English language on the Internet and in part to the emergence of Minitel, France's internal version of the Internet. In 2001, Minitel was "estimated to have 16 million regular users in France, compared to about 8 million for the Internet."

The Minitel was an initiative of the French government developed

35. Id.
36. ACLU I, 521 U.S. at 852.
37. Id.
38. ACLU, 929 F.Supp. at 836.
39. ACLU I, 521 U.S. at 852.
40. Id. at 853
41. Id. at 852.
42. Id.
43. Id.
44. ACLU I, 521 U.S. at 852.
46. Id.
47. Id.; see also discussion infra Part IVB.
48. Id.
in the early 1980s. While the Internet was developed in the United States for military purposes, the Minitel was developed in France for the advancement of social policy. France Telecom, a government owned telephone service, and Alcatel, an electronic equipment manufacturer, produced the Minitel. The first Minitels were small plastic terminals that were attached to the telephone line. The Minitel was distributed for free as part of the French telephone service, and was initially marketed for its online telephone directory. Today, the Minitel is used for a variety of services, including e-mail, purchasing train tickets, checking stocks, chat rooms, and for research. While the graphics do not compare to those of the Internet, the Minitel remains popular in France, mainly for its reputation as being a secure method of performing financial transactions.

IV. Internet Policy in the United States and France

A. United States

1. Self-Regulation

With respect to content, "the United States government supports the broadest possible free flow of information across international borders." This philosophy has been expressed in the application of the theory of self-regulation to the Internet. "When applied to the Internet, [the policy of self-regulation] refers to the role of the Internet community... in determining the standards, protocols, codes of ethics and direction of the Internet, with minimal government participation, input, and control." The underlying premise behind the policy is that if the industry regulated itself, there would be no need for government

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51. See discussion infra Part IIIA.
52. Kessler, supra note 50.
53. Id.
54. Id.
55. Id.
56. Id.
57. McGrath, supra note 49.
58. Id.
regulation.\textsuperscript{61}

An example of self-regulation policy applied to the Internet is 47 U.S.C. § 230, which provides for protection of ISPs from liability for the activities of their users in tort actions.\textsuperscript{62} Implementation of § 230 was in furtherance of the United States' policy "to promote the continued development of the Internet and other interactive computer services and other interactive media."\textsuperscript{63}

2. First Amendment

The First Amendment of the United States Constitution, in pertinent part, states, "Congress shall make no law ... abridging the freedom of speech."\textsuperscript{64} There are two ways in which a governmental entity may attempt to restrict speech: (1) by implementing content specific regulations which attempt to regulate a certain type of content,\textsuperscript{65} or (2) by implementing content neutral regulations which seek to regulate the time, manner, or place of the speech as opposed to the substantive content of the speech.\textsuperscript{66} However, not every type of speech is protected under the First Amendment.\textsuperscript{67}

A regulation that attempts to restrict specific content is presumptively invalid.\textsuperscript{68} American courts review content-based restrictions under a strict scrutiny analysis.\textsuperscript{69} Under the strict scrutiny analysis, the regulation must address a compelling state interest\textsuperscript{70} and it must be narrowly tailored to accomplish that interest.\textsuperscript{71} In addition, the benefit to be gained by the restriction on content must outweigh the loss of the protection on speech.\textsuperscript{72} If the statute or regulation is overbroad or too vague, the court will hold that the regulation is unconstitutional.\textsuperscript{73} Overbreadth refers to an attempt to cover more speech than is necessary.\textsuperscript{74} An analysis of vagueness examines whether the government has given proper notice through the language of the statute as to what

\textsuperscript{61} Id. at 452.
\textsuperscript{62} 47 U.S.C. § 230(c)(1).
\textsuperscript{63} 47 U.S.C. § 230(b)(1).
\textsuperscript{64} U.S. CONST. amend. 1.
\textsuperscript{65} ACLU I, 521 U.S. at 867-68.
\textsuperscript{66} Id.
\textsuperscript{67} For example, obscenity is not protected under the First Amendment. See Miller v. California, 413 U.S. 15, 24 (1973).
\textsuperscript{68} The Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999).
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} See ACLU, 929 F. Supp. at 854 (overbreadth); Free Speech, 198 F.3d at 1095 (vagueness).
\textsuperscript{74} ACLU, 929 F.Supp. at 854.
one may or may not do under the regulation.75 The standard to be considered under the vagueness analysis is whether the statute "gives sufficient guidance to a person of reasonable intelligence as to what it prohibits."76

Finally, when conducting an analysis under the First Amendment, it is important to remember that the protections afforded under the First Amendment are only applicable to governmental restrictions on content.77 In cases where a private actor is imposing the restriction on content, the courts have applied a three-part test to determine if the First Amendment is being violated.78 This test considers whether (1) the private actor has acted in an arena that was traditionally exclusive to the government,79 (2) whether the actor acted with the help of or in concert with government officials80 and (3), whether the actions of the government are such that it may be considered a joint participant in the conduct of the private actor.81

Application of the First Amendment to the Internet is still under development in the United States. This comment discusses two of the lead cases in this area: Reno v. American Civil Liberties Union (ACLU I)82 and American Civil Liberties Union v. Reno (ACLU II).83

One of the leading cases in the United States dealing with the content regulation of the Internet is ACLU I,84 which was decided by the United States Supreme Court in 1997. At issue in ACLU I were Sections 223(a)85 and 223(d)86 of the Communications Decency Act (CDA),

75. Free Speech, 198 F.3d at 1095.
76. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. ACLU I, 521 U.S. 844.
83. American Civil Liberties Union v. Reno, 217 F.3d 162 (3d Cir. 2000) [hereinafter ACLU II].
84. ACLU I, 521 U.S. at 844.
85. 47 U.S.C. § 223(a) at the time ACLU I was decided provided in relevant part:
   (a) Whoever-
   (1) in interstate or foreign communications-. . . .
   (B) by means of a telecommunications device knowingly-
   (i) makes, creates or solicits, and
   (ii) initiates transmission of,
   any comment, request, suggestion, proposal, image, or other communication
   which is obscene or indecent, knowing that the recipient of the communication
   is under 18 years of age, regardless of whether the maker of such
   communication placed the call or initiated the communication;
   (2) knowingly permits any telecommunications facility under his control
   to be used for any activity prohibited by paragraph (1) with the intent that
which dealt with the transmission of obscene or indecent material by telephone or over the internet, to recipients under eighteen years of age.\textsuperscript{87} The Supreme Court held that Sections 223(a) and 223(d) violated the First Amendment.\textsuperscript{88} While the court agreed that protecting children from exposure to sexually explicit material is a compelling state interest,\textsuperscript{89} it determined that Sections 223(a) and 223(d) were not narrowly tailored to address that interest.\textsuperscript{90} Specifically, the court found that the terms "indecent" and "patently offensive" were overbroad and vague because they could be interpreted as including "large amounts of nonpornographic materials with serious educational or other value."\textsuperscript{91}

Another example of application of the First Amendment to the Internet is \textit{ACLU II},\textsuperscript{92} recently reviewed by the United States Supreme Court.\textsuperscript{93} The case was a challenge to the Child Online Protection Act (COPA).\textsuperscript{94} COPA was enacted by Congress in an attempt to correct the

\begin{itemize}
  \item it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both. \textit{Id.}
  \item pleaded under Section 223(d) provides in relevant part:
  \begin{itemize}
    \item (d) Whoever-
      \begin{itemize}
        \item (1) in interstate or foreign communications knowingly-
          \begin{itemize}
            \item (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
            \item (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communications that, in context, depicts or describes, in terms patently offensive as measured by community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
          \end{itemize}
        \item (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both. \textit{Id.}
      \end{itemize}
  \end{itemize}
\item\textit{ACLU I}, 521 U.S. at 849.
\item Id. at 875.
\item Id.
\item Id. at 877.
\item \textit{ACLU v. Reno}, 217 F. 3d at 162 (3d 2000).
\item \textit{ACLU II}, 217 F.3d at 165; 47 U.S.C. § 231 (COPA) provides, in pertinent part:
  \begin{itemize}
    \item (a) Requirement to restrict access.
      \begin{itemize}
        \item (1)Prohibited conduct. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $ 50,000, imprisoned not more than 6 months, or both.
        \item (e) Definitions. For purposes of this subsection, the following definitions shall apply:
      \end{itemize}
  \end{itemize}
\end{itemize}
defects found in the CDA. In its opinion, the court found fault with the three-part test supplied by Congress for defining the term “harmful to minors.” As part of the test, the question of whether material is “harmful to minors” is to be determined based on “contemporary community standards.” The court found that the “contemporary community standards” test is overbroad because of the lack of geographical boundaries on the Internet. The court determined that the “community standards test would essentially require every Web communication to abide by the most restrictive community’s standards.”

The United States Supreme Court, in a divided opinion, determined that reliance upon a community standards test does not by itself, render the statute unconstitutional. The Court expressed no opinion as to whether the statute is unconstitutional for other reasons but remanded the case for further proceedings.

The Court noted first that “community standards need not be defined by reference to a precise geographical area.” In addition, the Court felt that the “community standards” test was sufficiently narrowed in COPA by the inclusion of a “serious value” prong and a “prurient”

(6) Material that is harmful to minors. The term “material that is harmful to minors” means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. Id.

95. *ACLU II*, 217 F.3d at 167.
96. Id. at 166.
97. Id. at 167-68.
98. Id.
99. *ACLU II*, 217 F.3d at 173.
100. Id. at 175.
101. Parts I, II, III-B and IV of the Court’s opinion were joined by three other justices. Parts III-A, III-C and III-D were joined by only two justices. In addition, concurring opinions were written by Justices O’Connor, Breyer and Kennedy, and a dissenting opinion was written by Justice Stevens. *Ashcroft*, 122 S. Ct. at 1700.
102. Id. at 1713.
103. Id.
104. Id. at 1708.
interest prong – something that the CDA had lacked.  

The Court also noted that “if a publisher chooses to send its material into a particular community, this Court’s jurisprudence teaches that it is the publisher’s responsibility to abide by that community’s standards.”

While this language taken alone might indicate a different result in the Yahoo! litigation, it is important to note that throughout the Supreme Court’s opinion, the Court dealt with the “community standards” issue in a national context when rendering its decision.

B. France

France’s delay in developing the Internet has been attributed, in part, to the American dominance of the Internet. As one commentator has stated: “[i]n the early 1990s, when the Internet began to change from an esoteric network for computer scientists and researchers to a global communication and commercial platform, the French intelligentsia dismissed it as an American cultural tool which was incompatible with French Cartesian logic, political culture and tradition.”

Historically, the French have viewed the Internet as an “Anglo-American threat to French language, culture and values.” However, by 1997, the French government began to realize that France was falling behind the rest of the world in terms of its presence on the Internet. Thus, in August 1997, French Prime Minister Lionel Jospin announced a framework for the creation of an “integrated information society.”

This comment focuses on two of the six areas of development that were presented in the framework: cultural policy and regulation.

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106. Ashcroft, 122 S. Ct. at 1712.
107. See, e.g., 122 S. Ct. at 1712 (referring to the publisher’s choice in “distribut[ing] material to every community in the Nation”, and the publisher’s choice in utilizing a medium that “transmits speech from coast to coast”).
108. Le Cyber Challenge, supra note 45; see also discussion supra Part IIIC.
110. Id.
112. Id.
1. Culture

The framework recognizes that the Internet has often been viewed in France as a "possible threat to cultural identity." Thus, one area of development under the framework is the application of French cultural policy to the Internet. One of the purposes behind this policy is to promote the access to French heritage and language to as large an audience as possible. Underlying this purpose is the notion that access to this material on the Internet should be available in order to "promote France's cultural influence" and to "reinforce the international presence of France and the French language."

One way in which the framework promotes this policy is by encouraging the application of French-language terms to the Internet. Another way in which this policy has been applied to the Internet is the requirement that web pages in France contain "a certain amount of French language content."

2. Self-Regulation with Regulation

France is still in the infancy stages of developing its policy concerning regulation of the Internet. Prime Minister Lionel Jospin has recognized that "freedom of communication is the foundation of the Internet, and the development of the Internet, in turn, benefits freedom of communication." The government of France has also recognized that the nature of the Internet "does not lend itself to regulation." However, the government nevertheless has sought to find a balance between regulation and self-regulation. As part of this balance, France sought to develop and apply a "code of ethics" to the Internet. To further this goal, the French framework for the development of the Internet provides "netiquette" as a beginning for establishing rules on

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114. Id. at 20.
115. Id. at 14.
116. Id. at 17.
117. Id. at 14.
118. PROGRAMME, supra note 113, at 14.
119. For example, the framework suggests promoting the French term "navigateur" over the American term "browser." Id. at 21.
120. Eko, supra note 60, at 470.
122. Id.
123. Id.
124. Id.
V. Enforcement of Judgments in the United States

The United States is currently not a party to any treaty or international agreement concerning the enforcement of judgments obtained in foreign jurisdictions. Instead, the enforcement of foreign judgments has been predicated on the notion of international comity. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Thus, a foreign judgment may not be enforced if it is repugnant to public policy. The Supreme Court has held that non-recognition of a foreign judgment is mandatory under the Constitution if the public policy at issue is the First Amendment.

The United States has not addressed the precise issue posed in the Yahoo! case, that is, violation of another country's laws targeted at hate speech. However, the United States has addressed the issue of defamation and libel in the context of British judgments. British law places upon the defendant the burden of proving that the alleged defamatory statements were true; in addition, British law does not look to intent or malice as an element of defamation. In the United States, on the contrary, the burden is on the plaintiff to prove the falsity of the alleged statements; in addition, the plaintiff must prove malice on the part of the defendant. These differences between United States law and British law have been enough justification for United States courts to decline recognition of British defamation judgments on First Amendment grounds.

126. PROGRAMME, supra note 113, at 58.
128. Hilton, 159 U.S. at 164.
129. Id.; Matusевич, 877 F. Supp. at 3.
130. Bachchan, 585 N.Y.S.2d at 662.
131. See Matusевич, 877 F. Supp. 1; Bachchan, 585 N.Y.S.2d 661.
133. Id.
134. Id.
135. Id.
136. See Bachchan, 585 N.Y.S.2d at 664. ("The protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution.")
VI. The Yahoo! Litigation

A. The Parties

Yahoo! Inc. is an Internet Service Provider (ISP) incorporated under the laws of the United States. Yahoo!'s services ending in the "com" suffix are operated in the United States, use the English language, and are targeted at American users. Yahoo! operates subsidiary corporations in other nations; the services provided by Yahoo!'s subsidiaries are identifiable by the foreign nation's code as the suffix. Yahoo!'s regional sites are posted in that region's language, target that region's citizens, and operate under that particular region's laws.

Yahoo!'s auction website allows any user to post an item for sale and to solicit a bid from any other user around the world. However, Yahoo! is never a party to the actual transaction. Yahoo! merely records the posting and notifies the seller and the highest bidder when the time period for selling the item has expired. Yahoo! does not formally regulate the content posted on the site, but Yahoo! does have policies that prohibit certain items, such as body parts, from being posted. In addition, Yahoo! informs users that they may not sell items to individuals in jurisdictions that prohibit the sale of such items.

The French parties, La Ligue Contre le Racisme et l'Antisemitisme (LICRA) and L’Union des Etudiants Juifs de France (UEJF) are French non-profit organizations dedicated to eliminating Anti-Semitism. LICRA instituted the legal proceedings in France after sending Yahoo! a cease and desist letter which informed Yahoo! that the sale of Nazi-related items on its auction web site violated Article R645-1 of the Penal Code.
French Penal Code.  

Pursuant to Article 46 of the French Code of Civil Procedure, the court had jurisdiction over Yahoo! because the alleged harm had occurred in France. In addition, because Yahoo! operates a subsidiary in France, it was an easier target for jurisdiction. The French Court also found that LICRA and UEJF, on the basis of their organizational goals of eliminating anti-Semitism had suffered harm and thus had standing to sue Yahoo!.

B. The French Proceedings

Article R654-1 of the French Penal Code provides for sanctions in the case of a legal person who exhibits or displays nazi-related items for sale. The order issued by the French Court on May 22, 2000 requires Yahoo! to “dissuade and render impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects, as well as to render impossible any other site or service which makes apologies of Nazism or that contests Nazi crimes.”

Yahoo! contested the May 22nd order on the grounds that it did not have the technology necessary to implement the order. Yahoo! argued in the alternative, that implementation of such technology, if it existed, would result in high costs, possibly jeopardizing the existence of the company.

After consulting with a panel of experts, the court determined that

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150. Yahoo!, 169 F. Supp.2d at 1184.

151. Yahoo!, http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (last visited Sept. 29, 2002); see also N.C.P.C. Article 46.

152. See N.C.P.C. Article 46.


154. C. PEN. R645-1, supra note 150.


156. Yahoo!, 6 PIKE & FISCHER INTERNET LAW & REG. at 435.

157. Id.
Yahoo! has the technical means\textsuperscript{158} to identify and prevent French users from accessing material that is objectionable under French law.\textsuperscript{159}

The French court consulted with a panel of experts to determine if technology or other means existed by which Yahoo! could effectively comply with the May 22nd order.\textsuperscript{160} Several Internet providers informed the court that the technical means existed for Yahoo! to fulfill the requirements imposed upon it under the May 22nd order.\textsuperscript{161} According to the experts, Yahoo! could utilize technology that would enable it to identify the IP addresses of users accessing its databases in order to determine the locale and nationality of the users.\textsuperscript{162} However, this would only work with certainty in the case of approximately seventy percent (70\%) of the IP addresses assigned to French users.\textsuperscript{163}

Because no filtering method would allow Yahoo! to identify and prevent all French users from accessing Nazi-related items,\textsuperscript{164} the experts concluded that Yahoo! could also implement a declaration of nationality.\textsuperscript{165} The declaration of nationality would require the user, whose IP address could not be identified, to identify his or geographic location before proceeding to view information that violates French law.\textsuperscript{166}

After concluding that Yahoo! has the technical means to comply with the May 22nd order,\textsuperscript{167} the court ordered that Yahoo! comply with the terms of the May 22nd order within three months.\textsuperscript{168} In the event that Yahoo! did not comply, the French court imposed sanctions in the amount of 100,000 Francs per day for failure to comply with the order after the expiration of the three month period.\textsuperscript{169}

\textbf{C. The United States Proceedings}

Subsequent to the French order, Yahoo! filed a complaint in the United States District Court for the Northern District of California.\textsuperscript{170} In

\begin{itemize}
\item \textsuperscript{158} The court noted that Yahoo! was already using technology to identify French users for purposes of French advertising. \textit{Id.} at 441.
\item \textsuperscript{159} \textit{Id.} at 435.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Yahoo!, 6 Pike & Fischer Internet Law & Reg.} at 437.
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 438.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Yahoo!, 6 Pike & Fischer Internet Law & Reg.} at 440.
\item \textsuperscript{167} \textit{Id.} at 443.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 443.
\item \textsuperscript{170} \textit{Yahoo!, 7 Pike & Fischer Internet Law & Reg.} at 2206.
\end{itemize}
On June 7, 2001, the United States District Court for the Northern District of California denied a motion to dismiss for lack of jurisdiction brought by LICRA. The court determined that it had jurisdiction over LICRA pursuant to the effects test, which gives the court jurisdiction over a defendant who has "engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."  

On November 7, 2001, the United States District Court granted summary judgment in favor of Yahoo! finding that the French court's orders were unenforceable in the United States. 

The District Court began its analysis by stating "this case is not about the moral acceptability of promoting the symbols or propaganda of Nazism." The court also stated that it was "deeply respectful" of the French Republic's decision to enact R645-1. France, as a sovereign state, has the authority within its own borders to define acceptable and unacceptable forms of speech. However, the issue required the court to apply United States law.  

Thus, the issue, as defined by the court, was "whether it is consistent with the Constitution and the laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation." This issue is of importance because Internet users in the United States often post content that adheres to United States law but violates the laws of other nations.  

LICRA posed three arguments to the court. First, LICRA argued

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171. A request for a declaratory judgment asks the court to declare "the rights and obligations of the litigants." Yahoo!, 169 F. Supp. 2d at 1187.
172. Yahoo!, 7 PIKE & FISCHER INTERNET LAW & REG. at 2211.
175. Yahoo!, 145 F. Supp. 2d at 1171.
176. Id. at 1174.
177. Yahoo!, 169 F. Supp. 2d at 1194.
178. Id.
179. Id. at 1186.
180. Id.
182. Id. at 1186.
183. Id. at 1186-87.
that there was no actual case or controversy for the court to decide.\textsuperscript{184} Second, LICRA argued that Yahoo! had not suffered any harm because the French court has not yet enforced the sanctions against Yahoo!.\textsuperscript{185} Finally, LICRA argued that the case should refrain from making a decision on the basis of abstention.\textsuperscript{186}

1. Case or Controversy

LICRA argued that there was no case or controversy because further proceedings were required in France before the French Court's orders could be enforced there.\textsuperscript{187} LICRA also argued that there was no case or controversy because Yahoo! had "substantially complied" with the French Court's orders by altering its auction policies and by removing certain Nazi-related items from the site.\textsuperscript{188} However, the District Court noted that Yahoo! still faces a current threat from the French Court orders because the sanctions imposed upon it by that court are retroactive.\textsuperscript{189} Furthermore, there has been no finding by the French Court that Yahoo! has substantially complied with the terms of the order.\textsuperscript{190} Lastly, LICRA has not made any attempt, under French law, to seek withdrawal of the order nor has it sought a statement from the court that Yahoo! has effectively complied with the order.\textsuperscript{191}

2. The First Amendment

The court determined that the language of the French Court's order was "far too general and imprecise to survive the strict scrutiny analysis"\textsuperscript{192} required for content-based restrictions on speech under the First Amendment.\textsuperscript{193} Under the laws of the United States, no American Court could have made the determination that the French Court did.\textsuperscript{194} The court found that not only does the language of the French Court order "impermissibly chill" protected speech,\textsuperscript{195} it also fails to adequately provide Yahoo! with notice as to what is sufficient for compliance with

\textsuperscript{184} \textit{Id.} at 1188-9; see also discussion infra Part VIB1.
\textsuperscript{185} \textit{Yahoo!}, 169 F. Supp. 2d at 1190; see also discussion infra Part VIB2.
\textsuperscript{186} The court rejected this argument finding that the purpose of the action was not to relitigate or challenge the application of French law in a French court; rather the purpose was "to determine whether a United States court may enforce the French order without running afoul of the First Amendment." \textit{Id.} at 1191-92.
\textsuperscript{187} \textit{Id.} at 1188.
\textsuperscript{188} \textit{id.}
\textsuperscript{189} \textit{Yahoo!}, 169 F. Supp. 2d at 1188-89.
\textsuperscript{190} \textit{Id.} at 1189.
\textsuperscript{191} \textit{Id.} at 1190.
\textsuperscript{192} \textit{Id.} at 1189.
\textsuperscript{193} See discussion supra Part IVA2.
\textsuperscript{194} \textit{Yahoo!}, 169 F. Supp. 2d at 1189.
\textsuperscript{195} \textit{Id.} at 1190.
the order.196

3. Abstention

LICRA next argued that Yahoo!'s action in the United States court was an attempt at forum-shopping and that the court should therefore abstain from deciding the case.197 However, the court rejected this argument finding that the purpose of the action was not to relitigate or challenge the application of French law in a French court,198 but rather the purpose was "to determine whether a United States court may enforce the French order without running afoul of the First Amendment."199

4. International Comity

Without a treaty or legislation dealing with enforcement of foreign judgments affecting speech in the United States,200 the court must rely upon the principle of comity.201 "France has the sovereign right to regulate what speech is permissible in France."202 However, the District Court "may not enforce a foreign order that violates the protections of the United States Constitution"203 even when that speech "occurs simultaneously" in France and the United States.204

VII. The Future of Content Regulation on the Internet

A. Proposed Legislation in the United States

On January 3, 2001, House Representative David Dreier introduced House Resolution 12,205 "opposing the imposition of criminal liability on Internet service providers based on the actions of their users."206 The resolution is a direct response to the Yahoo! litigation.207 The resolution

196. Id.
197. Id. at 1191.
199. Id. at 1191-92.
200. The court refused to speculate as to how such a treaty or legislation would affect its decision. Id. at 1193, n.12.
202. Id. at 1192.
203. Id.
204. Id.
205. At the time of this writing, the resolution had been referred to the Committee on the Judiciary and the Committee on International Relations, but no further action had been taken. H.R. 12, 107th Cong. (2001).
206. Id.
207. Id. (noting that "a number of European and Asian countries have held [ISPs] based in the United States liable for content that it is illegal under the laws of those countries, but protected by the First Amendment.")
seeks to implement legislation that will protect ISPs from judgments obtained against them in foreign countries. The resolution reflects past United States policy with regards to the promotion of the growth of the Internet. It also provides for the protection of ISPs from liability for the actions of their users in furtherance of that goal.

B. The Internet Rights Forum in France

In addition to the ongoing governmental framework for the development of the Internet in France, French Prime Minister Lionel Jospin decided to begin the Internet Rights Forum in December 2000. The Internet Rights Forum is a non-profit organization, although the government supported the creation of the Forum, for the sake of impartiality, it is not a member of the organization. The Forum, much like previous Internet policy in France, "aims at finding a balance between self-regulation and legal regulation through open and pragmatic discussions." The Forum sets up a series of debates (forums) to which anyone may join, including individuals from other nations. Each "forum" is dedicated to a specific topic and moderated by a member of the Forum. Messages posted to the "forum" must be in accord with "the standards of open and constructive debating." The moderator may reject any messages that violate the user's charter. Rejected

208. Id.
209. Id.
211. See discussion supra Part IVB.
220. Examples of messages that violate the user's charter are those that are "irrelevant to the topic, of an advertising or promotional nature, racist or slanderous, rude or insulting, disrespectful of copyrights and similar rights, database rights, image rights or privacy rights, break any other law or rule in force." Id.
messages may nevertheless be posted if they do not violate the law; however, rejected messages cannot be "answered to or supported" by other users.

C. Internationally

1. Convention on Cybercrime

The Convention on Cybercrime was opened up for signatories on November 23, 2001. The Convention provides for "a common criminal policy aimed at the protection of society against cybercrime." The Convention also seeks a balance between fundamental human rights and the need for law enforcement. With respect to the Yahoo! case, there was debate regarding the inclusion of hate speech within the section concerning content-related offenses. However, the Committee could not reach a consensus on the issue, and the matter was referred to the European Committee on Crime Problems to consider an additional Protocol for the distribution of racist propaganda as a crime under content-related offenses.

VIII. Conclusion

With an appeal of the United States order in the Yahoo! case already underway, it is not likely that the debate over regulation of content on the Internet will end anytime in the near future. France clearly is entitled to make its own judgments as to what it deems fit in terms of regulating the Internet. Enforcement of the French order in the United States however, would be a clear violation of the First Amendment of the Constitution under the strict scrutiny analysis employed by the United States courts when deciding First Amendment issues. While a treaty or legislation may seem like a simple solution, any treaty or legislation that attempts to impose the type of restriction at issue in the Yahoo! case is a violation of the First Amendment and would be contradictory to the principles embedded in that Amendment. Thus, the

221. Id.
222. Id.
224. Id. (Preamble).
225. Id. (Preamble).
227. Id.
228. Id.
best policy to adopt with regard to conflicts over content regulation seems to be the establishment of geographical borders.

In the situation of Yahoo! then, the French court order should only be enforceable against its French subsidiary, which clearly is targeting French users. This would mean that the French court order would not be enforceable against Yahoo!’s operations in the United States. A disclaimer\textsuperscript{230} could be placed on the page regarding the possibility of users accessing material that is illegal in their jurisdiction. This, of course, is not a perfect solution as it still does not prevent French users from accessing illegal material. Perhaps the burden is best placed upon the users, who can make their own determination as to whether they will abide by the laws of their respective nations.

\textsuperscript{230} In fact, Yahoo! does have such a disclaimer on its U.S. website. See Yahoo! Auctions Guidelines, \textit{at} http://www.acutions.yahoo.com/html/guidelines.html (last visited Sept. 29, 2002).