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NEW BOUNDRIES FOR THE INTERNET IN FRANCE?

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A decision just rendered by the Tribunal de Grande Instance de Paris (roughly equivalent to the United States District Court) threatens to have major implications for the Internet in France and -- if its logic is adopted elsewhere -- throughout Europe and in other corners of the world.

The case was filed by two not-for-profit associations -- the French Union of Jewish Students and the League Against Racism and Anti-Semitism -- against YAHOO! Inc. and YAHOO France. They complained that YAHOO's American site (which can be accessed from France) offered Nazi "objects" for auction. It was also alleged that Geocities.com, owned by and accessed through YAHOO, contains pages offering excerpts of Mein Kampf and The Protocols of Zion, and that YAHOO France provided a link for French users to YAHOO's American service. The complaint charged that by making these services and information available over the Web, both YAHOO and its French affiliate violated articles of the French Penal Code which outlaw the sale of Nazi paraphernalia as well as the dissemination of racist statements. Plaintiffs requested money damages and a broad injunction directing defendants to block all access to the Web sites to anyone in France.

In its defense, YAHOO! Inc. argued that the French court lacked jurisdiction, since the allegedly wrongful acts were committed in the U.S. (where they were protected by the First Amendment), not France, and it was technically impossible to block the site to French visitors. YAHOO France added that it did not even host the offending Web site -- it merely provided a link to the YAHOO American service.

Significantly, the French government intervened in the dispute through the Procureur de la République (akin to the U.S. Solicitor General's office), who argued that the auctions should be stopped, and that defendants should be held responsible because they could block the Web sites and did not.

The French court agreed. In a decision issued on May 22, 2000, the judge granted a preliminary injunction, finding that the offer to sell the Nazi objects constituted "an offense to the collective memory of the country", and that by "permitting the site to be seen in France, YAHOO has committed a wrongful act on French territory, even if it was unintentional". The judge observed -- without explanation -- that YAHOO! Inc. surely had the technical means to block access to the sites by a French visitor, and ordered YAHOO to formulate technical proposals for doing so within the next two months. And while recognizing that YAHOO France did not itself host the challenged sites, it did nevertheless offer a link to YAHOO in the U.S. "without any particular precautions"; it, too, must therefore block the site or share liability with YAHOO! Inc.

The defendants have stated that they are considering an appeal.

A few things should be noted about this ground-breaking decision, which has drawn enormous press comment both in France and the U.S.

First, it was issued in the context of an emergency référé proceeding, resembling an application for a temporary restraining order in the U.S. It was

therefore decided by a single judge, rather than the customary panel of three judges which normally decides cases. As an "emergency" decision, it is not viewed as a ruling "on the merits" and has no precedential value in France.

Second, the action to be enjoined was the alleged violation of a French penal statute, not a provision of French civil law. If only a tort were involved, one could conjecture that the result might have been different.

Third, just two days after the Paris decision, a court in Nanterre (a Paris suburb), in another suit brought by the French Union of Jewish Students, issued a judgment on the merits dismissing a complaint against a French Internet portal, Multimania, for having "hosted" a neo-Nazi Web site. The tribunal found that Multimania simply permits "Internauts" to create their own Web pages and provides access to those sites. The court ruled that in these circumstances, the "host" had no legal obligation to investigate the identity of the author of the site, and there was no proof that Multimania had acted either in bad faith or with negligence -- particularly since it promptly shut down the site when alerted about its contents.

Finally, this judicial debate is taking place against the backdrop of legislation currently making its way through French parliament which would require anyone "publishing" on the internet to register with French authorities by completing an electronic form, with the aim of imposing liability for the contents of a Web site on the individual who created it rather than the hosting company (such as YAHOO! Inc.). The legislation has been widely criticized as vague, unworkable and administratively burdensome on Web hosts such as YAHOO France.

Whatever qualifiers can be attached to the YAHOO decision, it should be disquieting news to Internet providers, issuing in a new era of uncertainty as to what is permitted in France. Can such companies, if they provide access to, say, booksellers offering their wares over the Internet, be held liable in France if books on their list are held by a French court to violate French law against inciting racial hatred? The same question can be posed with reference to news articles, opinion or "fan" web sites containing information or images which may be regarded as invading the protected sphere of "private life", also a possible violation of French penal law. These and other questions must be regarded as being open in France, at least for the foreseeable future. Internet providers must guide their conduct accordingly.

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This memorandum provides only a general overview of recent French jurisprudence concerning the Internet. It is not intended to provide legal advice, and no legal or business decision should be based on its contents.

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