

Appeals Court Agrees to Reconsider Ruling About French Censorship of U.S. Speech

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(1) Appeals Court Agrees to Reconsider Ruling About French Censorship of U.S. Speech

Last week the U.S. Ninth Circuit Court of Appeals agreed to reconsider an earlier decision that restricted Yahoo's efforts to protect its lawful U.S. publications from censorship under French law. The ruling is a small but welcome development in a case with broad implications for free speech by Internet speakers around the world.

A large panel of judges from the Appeals Court will now hear oral arguments in the case next month in California. A complete set of resources about the case, *Yahoo! Inc. v. LICRA*, is available at <http://www.cdt.org/jurisdiction/> [1]

The case in California stems from a late-2000 French court decision ordering Yahoo in the U.S. to block French users from accessing a broad array of World War II and Nazi memorabilia published on Yahoo's U.S. web sites. The French decision, requiring Yahoo to censor its U.S.-based content or face massive fines, has broad implications for free speech and commerce online. A rule of law holding any Web publisher, blogger, or Internet speaker liable as in this case--simply because his or her content can be viewed somewhere in the world where it might be unlawful--would have a disastrous chilling effect on speech around the globe.

After the French decision, Yahoo brought suit in U.S. District Court in San Francisco. That court agreed with Yahoo, and declared that under the First Amendment, the French court order could not be enforced in the United States. On appeal by the French parties, a three-judge panel ruled on a narrow technical ground and held that the lower court did not have jurisdiction over the French parties. Under the ruling, Yahoo cannot raise its First Amendment claims until the French parties tried to enforce the French order in a U.S. court.

As CDT and a broad group of public interest organizations, Internet industry associations, and publishing industry representatives explained in a "friend-of-the-court" brief, the ruling that Yahoo must wait puts Yahoo and similar speakers in an untenable situation. The fines imposed by the

French court are mounting on a daily basis, putting great pressure on Yahoo to give up its First Amendment rights to reduce the risk that it might have to pay an enormous fine. In support of Yahoo's motion for "reconsideration," CDT and others argued that the case was of such importance that the full court of appeals should revisit the issues. The court has now agreed to do just that.

(2) Case Tests Global Reach Of National Courts

The French court's order against Yahoo is but one example of the sort of judgment that may arise with increasing frequency as Internet use expands globally. Given the borderless character of the Internet, speech that is perfectly legal in one country may be forbidden by laws somewhere else. A critical question is whether foreign courts will be able to pressure speakers located in the United States into removing web site content that is clearly lawful in the U.S. and protected by the First Amendment. The same question applies around the world: can Internet publishers in Country A be forced by Country B to remove lawful material, simply because the material can be accessed from Country B.

In the U.S., a fundamental tenet of the Constitution is that diverse and sometimes controversial speech should be protected. Given that commitment to free expression, there will be an increasing number of instances where a U.S. speaker runs afoul of more restrictive foreign laws. For example, some countries have laws against speech that questions the government, or is critical of a state religion. If foreign courts can block such speech in the U.S. and other countries where it is perfectly legal, open debate and discussion in the United States and around the world will suffer.

More globally the rule of law put forward by the French courts is untenable in a democratic international communications medium. How is a blogger or small website publisher in Japan, France, or any other country supposed to screen their content to obey the rules of every country and town where their publication might be viewed? And, for example, would the U.K. or France, themselves enforce an order from a Chinese or Iranian court against a dissident publishing allegedly seditious speech online? The human rights implications of these possible restrictions are magnified if a country can issue criminal judgments against the speech of human rights advocates who live and speak in a different country (where their speech is lawful).

Importantly, finding the French court ruling unenforceable in the US still leaves the French people with ways to enforce their values within France. As CDT has argued in this case, the kind of speech that the French ruling seeks to restrict in the US could still be illegal in France. The French government could still seek to prosecute those in France who produce it or access it. Alternatively, the French government could provide French citizens with filtering technology that allows the citizens to block access to the content. The French government could even force ISPs to attempt to block access to the content (as China, Saudia Arabia, and other repressive regimes do) - a troubling approach from a free expression perspective, but one that is far better than forcing publishers everywhere to remove content that might be offensive anywhere in the world.

(3) Background: Chronology Of The Yahoo Case

The French Yahoo case has had a long and somewhat complicated trip through the courts. Here is a short chronology:

- Nov 2000 - A French court ruled that Yahoo, by allowing its US-based Web site to be accessed

from France, violated France's law criminalizing the exhibition or sale of racist materials. The French court ordered Yahoo to re-engineer its servers to identify French IP addresses and block their access to Nazi material. It also required Yahoo to ask users with "ambiguous" IP addresses to declare their nationality when they arrive at Yahoo's home page or when they initiate a search using the word "Nazi."

- Dec 2000 - Yahoo filed a lawsuit in the US federal court in its home district in California asking for a declaratory judgment that the foreign verdict was unenforceable in the US. Yahoo argued that the US courts should refuse to enforce the French judgment because it contravened fundamental US policy, namely, the strong protection of free speech offered by the First Amendment.
- June 2001 - The federal court in California denied a motion by the French defendants to dismiss the case.
- Oct 2001 - Back in France, criminal charges were brought against Yahoo and its former CEO, Tim Koogle, alleging that they engaged in "crimes against humanity" because Nazi material was available on the U.S.-based Yahoo service.
- Nov 2001 - In a victory for Yahoo, the U.S. district court ruled that the French court's decision is unenforceable in this country because it requires a US company to censor material that is constitutionally protected.
- Dec 2001 - The private French groups that had initiated the case in France appealed to the Ninth Circuit Court of Appeals, claiming that the US district court lacked jurisdiction to determine whether the French court judgment is enforceable. In other words, after asserting broad jurisdiction of French courts over a US company operating in the US, the complainants asserted that US courts had no jurisdiction to determine whether the foreign order is enforceable in the US.
- May 2002 - CDT, ACLU and others file a brief in the Ninth Circuit Court of Appeals supporting Yahoo right to promptly vindicate its rights in U.S. courts. The U.S. Chamber of Commerce and other leading Internet industry groups file a similar brief opposing the French court's ruling.
- Feb 2003 - A court in Paris dismissed criminal charges against Yahoo and its former CEO, Tim Koogle, in a criminal prosecution involving the auction of Nazi memorabilia on Yahoo's auction site. The French criminal court dismissed all charges, holding that Yahoo never tried to "justify war crimes [or] crimes against humanity."
- Aug 2004 - A three-judge panel of the Ninth Circuit Court of Appeals decided that the lower court (which had ruled in favor of Yahoo) should not have considered Yahoo's First Amendment claims because the court did not have sufficient jurisdiction over the French parties. Essentially, the appeals panel concluded that the French parties would not be subject to U.S. law unless and until they affirmatively ask the U.S. courts to enforce the French judgment.
- Sep 2004 - CDT and a broad range of business and public interest organizations file a brief with the Ninth Circuit in support of Yahoo's request that the full court reconsider and review the decision of the three-judge panel. The brief argued that the three-judge panel's decision leaves free speech in the United States at the mercy of foreign courts, with no ability for U.S. speakers to obtain a prompt determination of their rights under the U.S. constitution.
- Feb 2005 - The Ninth Circuit agreed to reconsider its earlier decision.

(4) Next Steps

The Ninth Circuit Court of Appeals has instructed the parties in the case to present "oral argument" to a large panel of judges on March 24, 2004. Following that argument, the court would then issue a new decision addressing the issues raised. No time is set for that decision; it could take anywhere from a few months to more than a year. After that, it is possible that the case would be appealed to the U.S. Supreme Court.

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