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## Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet

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# **YAHOO!, INC. v. LICRA: THE FRENCH CHALLENGE TO FREE EXPRESSION ON THE INTERNET**

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\* J.D. Candidate, May 2003, American University Washington College of Law; B.S. Psychology, 2000, The Pennsylvania State University. I would like to extend special thanks to my parents, George and Elizabeth Okoniewski, for their constant encouragement and belief in my abilities. I would also like to thank the *American University International Law Review* staff for their diligent efforts in preparing this Comment for publication. Finally, I would like to dedicate this Comment to my grandmother, Kazimiera Wojcik. Her survival of World War II and her courageous immigration to the United States, in search of the very freedom that is the subject of this Comment, have always inspired me to achieve my goals.

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## INTRODUCTION

The recent litigation between the Internet service provider Yahoo!, Inc. and two French student organizations<sup>1</sup> addresses novel and important issues resulting from the global reach of the Internet.<sup>2</sup> The setting for this dispute is the modern world of computers, where ideas and information transcend borders through the Internet, while space and time between people disappear.<sup>3</sup> The modern capabilities of the Internet, coupled with varying freedom of speech laws from nation to nation, have led to international disputes about which country's laws should regulate speech over the Internet.<sup>4</sup>

In France, freedom of speech laws are not as broad as in the United States, and expression is more easily restricted by the government.<sup>5</sup> For instance, French Penal Code R. 645-1 restricts free expression by making it a crime to display, exchange, or sell Nazi

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1. See Margaret Khayat Bratt & Norbert F. Kugele, *Who's In Charge?*, 80 MICH. B. J. 42, 44 (2001) (establishing that LICRA is the International League Against Racism and Anti-Semitism, and UEJF is the Union of French Jewish Students).

2. See *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001) (noting that the global reach of the Internet makes this case novel and important).

3. See *id.* (stating that in the modern world, information can be passed quickly across the globe rendering meaningless the vast distances through which it travels).

4. See *id.* at 1192 (explaining that the issues in the case come about because the practice of law-abiding freedom of speech in one country may command an audience in another country where the speaker's words are not legal).

5. See *infra* notes 39-59 and accompanying text (explaining the limitations placed on freedom of speech in France).

paraphernalia or Third Reich memorabilia.<sup>6</sup> This restriction was the subject of *L'Union Des Etudiants Juifs De France Et La Ligue Contre Le Racisme Et L'Antisemitisme v. Yahoo! And Yahoo! France* ("Yahoo! Case"), in which a French court ruled that Yahoo! violated R. 645-1 by making available, on its auction website, various Nazi-related items to Internet users in France.<sup>7</sup> Yahoo! sought relief in the United States from the strict penalties imposed by the French court.<sup>8</sup> A U.S. district court subsequently ruled that the French order was unenforceable, basing its decision on the guarantee of freedom of speech in the First Amendment of the United States Constitution.<sup>9</sup>

This issue is significant because people will continue to break foreign laws with speech over the Internet, and disputes will inevitably continue to arise over these activities.<sup>10</sup> The Internet is a growing and changing part of our society and will continue to affect our lives in the future as new related technologies become available.<sup>11</sup> The *Yahoo! Case* is only one example of how the Internet and conflicting speech laws can cause international disputes.<sup>12</sup>

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6. See C. PÉN. ART. R. 645-1 (2001) [hereinafter French Penal Code R. 645-1] (providing that the display or sale of Nazi-related materials is prohibited in France).

7. See UEJF & LICRA v. Yahoo!, Inc. & Yahoo! France, T.G.I. Paris, May 22, 2000 [hereinafter May Tribunal Decision] (condemning Yahoo! for its violation of French Penal Code R. 645-1), available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Oct. 12, 2002); see also CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 52-53 (1993) (explaining the structure of the civil courts in France). The *Tribunal de Grande Instance*, where French judges heard the *Yahoo! Case*, was created in 1958 as a court of general jurisdiction. *Id.* Three judges usually sit *en audience publique* or in an open court in the *Tribunal de Grande Instance*. *Id.*

8. See May Tribunal Decision, *supra* note 7 (ordering Yahoo!, Inc. to pay LICRA 10,000 Francs, and ordering Yahoo!, Inc. and Yahoo France to pay UEJF 10,000 Francs). The court also ordered Yahoo!, *inter alia*, to make it impossible for French Internet users to view Nazi items on Yahoo!'s auction site. *Id.*

9. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1194 (holding that the First Amendment prohibits enforcement of the French order).

10. See *infra* notes 157-61 and accompanying text (explaining predictions for the future impact of the Internet).

11. See *id.* (noting various Internet technologies that will affect our lives in the future).

12. See *infra* notes 154-55 and accompanying text (stating that foreign citizens have been forced to appear in German and Italian courts for breaches of those

Various similar disputes have occurred involving citizens of other nations, demonstrating that this is a widespread global problem.<sup>13</sup> Because this issue exists on such a large scale, a consensus must be reached on how nations will settle future disputes, not only between France and the United States, but between all nations.<sup>14</sup> For purposes of this Comment however, the primary focus will be the dispute between France and the United States in the *Yahoo! Case*, which will serve as a clear example of the larger, global problem.

Section I of this Comment discusses the history of freedom of speech laws in both the United States and France and delineates the differences between the two. This section also provides background on the Internet, its creation, and how it has impacted society. Section II explains how *L'Union Des Etudiants Juifs De France* ("UEJF") and *La Ligue Contre Le Racisme Et L'Antisemitisme* ("LICRA") initiated the *Yahoo! Case* and discusses the decisions of the French Tribunal de Grande Instance de Paris and the U.S. District Court for the Northern District of California. This section also provides a detailed analysis of the two courts' decisions, and examines the drastic differences between freedom of speech rights in the United States and France. This section concludes that, in order to avoid similar future disputes, the international inconsistency of freedom of speech laws calls for a solution, not only between France and the United States, but worldwide. Section III recommends several ways to settle future conflicts between the United States and France involving speech over the Internet. This section first recommends courses of action that France may take on its own, and then recommends collective actions that France and the United States may take together. These collective recommendations are also applicable on a global scale.

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countries' speech laws in instances similar to the one involved in the *Yahoo! Case*).

13. *Id.*

14. See *infra* notes 178-236 and accompanying text (providing several recommended solutions to the international problem caused by inconsistencies in freedom of speech laws).

## I. BACKGROUND

### A. THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

The First Amendment to the Constitution of the United States provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .”<sup>15</sup> In the United States, the First Amendment is highly valued under the view that free expression is necessary to preserve a free society.<sup>16</sup> Freedom of speech is a fundamental cornerstone in American democracy,<sup>17</sup> where individuals self-govern and the government itself has little authority to impose restrictions on that right.<sup>18</sup> Indeed, the search for

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15. U.S. CONST. amend. I.

16. See JAMES E. LEAHY, *THE FIRST AMENDMENT, 1791-1991 TWO HUNDRED YEARS OF FREEDOM* 108 (1991) (commenting on language from *Stromberg v. California*, 283 U.S. 359, 369 (1931)). “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Id.* See also DANIEL A. FARBER, *THE FIRST AMENDMENT* 6 (1998) (supporting toleration of free speech by arguing that tolerance works better than repression in maintaining democratic order). Suppression drives dissidents into hiding, provides them with martyrs, and gives their ideas the attractiveness of that which is taboo. *Id.*

17. See DONNA DEMAC, *STATE OF THE FIRST AMENDMENT* 1 (1997) (stating that “[t]he right to speak one’s mind, whether privately or publicly, without fear of government restriction, is one of the cornerstones of American democracy”); see also LEAHY, *supra* note 16, at 108 (distinguishing *Stromberg v. California* as the first Supreme Court case to acknowledge the right to speak freely). This decision came 140 years after the adoption of the Bill of Rights. *Id.* See also *Stromberg*, 283 U.S. at 369 (upholding the right to freedom of speech by reversing a conviction for the display of a red flag).

18. See Julien Mailland, *Freedom of Speech, The Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. INT’L L. & POL. 1179, 1183-84 (2001) (stating that there is an ideal in American democracy that individuals are intelligent enough to self-govern and that the government is limited in restricting freedom of speech); see also FARBER, *supra* note 16, at 3 (stating that the government cannot even restrict false or hateful expression).

freedom of speech was one of the main desires that brought the first settlers to America.<sup>19</sup>

Limitations on the right to speak in the United States are minimal.<sup>20</sup> The First Amendment generally prevents the government from prohibiting speech or expressive conduct merely because the government disagrees or disapproves of the content.<sup>21</sup> Exceptions to this general rule include speech and expression that constitute defamation<sup>22</sup> or “fighting words,”<sup>23</sup> or is obscene.<sup>24</sup> While not totally prohibited, these types of speech can be regulated, consistent with the Constitution.<sup>25</sup> In addition, the Supreme Court has upheld reasonable time, place, and manner restrictions on speech, but only

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19. See DEMAC, *supra* note 17, at 1 (“The quest for freedom of speech was one of the main desires, along with religious liberty, that brought European refugees from tyranny to the New World in the first place.”).

20. See LEAHY, *supra* note 16, at 196 (discussing the evolution of the meaning of freedom of speech and giving as an example of regulated speech words that create a clear and present danger that will bring about evils that the government has a right to protect); see also FARBER, *supra* note 16, at 1 (stating that the Supreme Court has limited governmental regulation of free speech). “The list of unprotected speech included incitements to violence, libel, obscenity, fighting words, and commercial advertising . . . It is a gross oversimplification, however, to say that any of these categories is currently unprotected by the First Amendment.” *Id.* at 14.

21. See *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 377, 382 (1992) (explaining that content based regulations on speech are presumptively invalid).

22. See *generally* *Beauharnais v. Illinois*, 343 U.S. 250, 251-305 (1952) (involving a law that criminalized defamation of racial and religious groups in public places).

23. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining “fighting” words as words which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace).

24. See *Roth v. United States*, 354 U.S. 476, 496 (1957) (upholding the constitutionality of an obscenity statute that made the keeping of indecent or obscene material for sale or advertising punishable).

25. See *R.A.V.* 505 U.S. at 383 (explaining that obscene or defamatory speech or fighting words can be regulated because of their “constitutionally proscribable” content, and not because these areas of speech are “entirely invisible to the Constitution”).

when they are “justified without reference to the content of the regulated speech.”<sup>26</sup>

Although the First Amendment only mentions Congress, free expression is also protected against state government infringement pursuant to the Fourteenth Amendment.<sup>27</sup> Further, even though the First Amendment speaks only of speech and the press, other forms of communication are also protected.<sup>28</sup> These forms of communication include electronic media as well as symbolic speech, such as flag burning or cross burning.<sup>29</sup> It is also important to note that the First Amendment sometimes extends to protect commercial speech by corporations in the United States.<sup>30</sup>

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26. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that the main inquiry in speech cases is whether the government has adopted a regulation because of its disapproval with the message it conveys).

27. See FARBER, *supra* note 16, at 1 (explaining that the First Amendment protects Americans from limitations by Congress, the President, and the federal courts). “[T]he application of the First Amendment to the states is now beyond dispute.” *Id.* at 12.

28. See *id.* at 1 (explaining that some interpret the First Amendment’s text to apply to much more than simply oral and written words).

29. See *id.* at 2 (indicating that many people were shocked in 1989 with the California district court’s decision to allow burning of the American flag); see also *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the burning of an American flag is expressive conduct protected under the First Amendment); *R.A.V.*, 505 U.S. at 381 (striking as unconstitutional under the First Amendment, a city ordinance prohibiting cross burning, because the ordinance prohibited otherwise permitted speech only on the basis of the subjects addressed in the speech). The ordinance also would have outlawed public or private placement of Nazi swastikas. *Id.* at 380. The Court noted that a law outlawing outdoor fires could have made flag burning or cross burning punishable, but that an ordinance outlawing flag burning for dishonoring the flag could not. *Id.* at 385. See also DEMAC, *supra* note 17, at 14 (stating that the Supreme Court has a tendency to come down in favor of free speech and has even ruled that racist sentiments such as cross burning are worthy of First Amendment protection).

30. See LEAHY, *supra* note 16, at 180 (explaining that corporations are persons under the Fourteenth Amendment). Corporations have protection under the Due Process and Equal Protection clauses. *Id.* See also *First Nat’l Bank of Boston v. Att’y Gen.*, 359 N.E.2d 1262, 1270 (1977) (holding that when a general political issue materially affects a corporation’s business, property or assets, that corporation may claim First Amendment protection for its speech).

Although the U.S. Constitution is not unique in protecting speech, nowhere else in the world is the protection so expansive.<sup>31</sup> The First Amendment protects not only political speech, but also offensive and disagreeable speech.<sup>32</sup> Freedom of speech even goes so far as to protect expressions of racial hatred.<sup>33</sup> The U.S. Supreme Court has made it clear that freedom of speech is a value so important to American society that it outweighs almost any other interest.<sup>34</sup> In fact, it even outweighs an interest in protecting our youth from sexually explicit material on the Internet.<sup>35</sup> Justice Stevens, speaking for the majority in *Reno v. A.C.L.U.*,<sup>36</sup> stated that speech through the Internet is entitled to the highest protection from governmental restriction.<sup>37</sup> In *Reno*, the Court ruled that statutory provisions enacted to protect minors from “indecent” and “patently offensive”

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31. See FARBER, *supra* note 16, at 1 (stating that all democracies provide free speech in some form, but none to the extent of the United States).

32. See Adam Clayton Powell III, *Children, the Internet and Free Speech*, in 14 MEDIA STUDIES JOURNAL, THE FIRST AMENDMENT 36, 37 (Lisa DeLisle, et al. eds., 2000) (stating that even if people do not want to see it, read it, or hear it, bad taste is protected by the First Amendment).

33. See FARBER, *supra* note 16, at 2 (highlighting the Court's decision in *Texas v. Johnson* and stating that expression may not be regulated simply because it is offensive); see also *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978) *cert. denied*, 439 U.S. 916 (1978) (ruling that a prohibition on handing out materials promoting racial or religious hatred was unconstitutionally vague). But see FARBER, *supra* note 16, at 103 (noting that many scholars argue for drastic changes in freedom of speech in order to rid society of racist hate speech). This is currently one of the most significant controversies concerning the First Amendment. *Id.*

34. See *Smith v. Collin*, 439 U.S. 916, 916 (denying certiorari, thereby allowing to stand the lower court's decision that a prohibition on handing out materials promoting racial or religious hatred was unconstitutionally vague); see also Mailland, *supra* note 18, at 1183 (opining that in *Smith v. Collin*, the Supreme Court made it clear that freedom of speech would withstand any legal balancing test).

35. See *Reno v. A.C.L.U.*, 521 U.S. 844, 849 (1997) (striking a statute designed to protect minors from viewing pornography and other offensive material on the Internet because the restriction was unconstitutional under the First Amendment); see also DEMAC, *supra* note 17, at 6 (explaining that the “crusade against indecency” launched what was probably the most serious threat to freedom of expression in the 1990s).

36. 521 U.S. 844 (1997).

37. See *Reno*, 521 U.S. at 863.

communications on the Internet abridged the freedom of speech protected by the First Amendment.<sup>38</sup>

#### B. ARTICLE ELEVEN OF FRANCE'S DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN

Unlike the expansive freedom that the First Amendment affords U.S. citizens, French citizens exercise a more restricted freedom of speech.<sup>39</sup> Article Eleven of the Declaration of the Rights of Man and of the Citizen of 1789 states, “[t]he free communication of thoughts and opinions is one of the most precious rights of man. Every citizen may, accordingly, speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”<sup>40</sup> Although Article Eleven seems to provide French citizens with expansive freedom of speech, it is qualified by the last clause, which grants to the French government an active role in creating laws that restrict that freedom.<sup>41</sup> This active role in restricting speech is vastly different than the negative command to the U.S. government in the First Amendment—“Congress shall make no law . . .”<sup>42</sup>

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38. See *id.* at 849 (ruling that despite the importance of congressional goals to protect children from harmful material on the Internet, restrictions on freedom of speech violate the First Amendment); see also Powell III, *supra* note 32, at 41 (stating that in Sweden, rather than parents using filtering software or the government imposing restrictions on freedom of expression, Swedish children are taught to filter material through ethical training).

39. See WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 115 (1995) (explaining that freedom of speech in France is restricted by public authorities).

40. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (Fr. 1789), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited Oct. 12, 2002); see also RAYMOND YOUNGS, ENGLISH, FRENCH & GERMAN COMPARATIVE LAW 180 (1998) (explaining the status and workings of freedom of speech in France); CAIRNS & MCKEON, *supra* note 39, at 114 (explaining that the adoption of the Universal Declaration of the Rights of Man in 1789 guaranteed fundamental freedoms, which France is now proud to confer upon its citizens); GEORGE A. BERMAN ET AL., FRENCH LAW, CONSTITUTION AND SELECTIVE LEGISLATION 2-3 (1998) (quoting Article Eleven of the Declaration).

41. Compare Mailland, *supra* note 18, at 1184 (stating that the positive role of the French government is “striking”), with U.S. CONST. amend. I (connoting a vastly different explanation of how free speech laws should be promulgated).

42. See *supra* note 41 and accompanying text (explaining the differences between French and American freedom of speech laws).

Lawmakers in France have assumed their active role and have exercised power under Article Eleven, restricting freedom of speech in many ways.<sup>43</sup>

Article Five of the Declaration of the Rights of Man and of the Citizen gives French public authorities the right to limit free speech by outlawing certain actions in the public interest, in order to avoid injury to society.<sup>44</sup> Additionally, Article Thirty-Four of the French Constitution grants the legislature authority to determine the conditions under which freedom of speech may be exercised.<sup>45</sup> For example, the Minister of the Interior may prohibit the distribution of published material about the French President, whether created in France or abroad.<sup>46</sup> Publications which are “aimed at the young” can be seized and destroyed.<sup>47</sup> The government also has the right to suppress “unnecessarily provocative” advertising campaigns.<sup>48</sup>

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43. See *supra* notes 39-42, *infra* notes 44-59, and accompanying texts (explaining various examples of how the French government has limited the freedom of speech provided to its citizens).

44. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 5 (Fr. 1789), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited Oct. 12, 2002); see also Mailland, *supra* note 18, at 1184 (explaining Article Five of the Declaration of the Rights of Man and of the Citizen); CAIRNS & MCKEON, *supra* note 39, at 115 (stating that public authorities can restrict the rights of man in order to prevent their abuse); BERMANN, *supra* note 40, at 2-3 (quoting Article Five of the Declaration).

45. FR. CONST. art. 34; see also Mailland, *supra* note 18, at 1226 (explaining Article Thirty-Four of the French Constitution); BERMANN, *supra* note 40, at 2-17 (quoting Article Thirty-Four of the French Constitution that states, “[a]ll laws (*la loi*) shall be passed by Parliament. Laws shall establish the rules (*règles*) concerning: -civil rights and the fundamental guarantees accorded citizens for the exercise of their public liberties. . . .”).

46. See YOUNGS, *supra* note 40, at 182 (explaining how political control limits freedom of speech in France). The author further notes a decision of the *Tribunal de Grande Instance*, which held that distribution of *The Great Secret*, a French work by President Mitterrand’s former doctor contravening the right to respect for private life, could be limited by French public authorities. *Id.* at 182 n.659.

47. See *id.* at 182 (explaining that publicity of attacks on morality can be forbidden by the French Criminal Code). The author also cites a French court decision, which indicates that it is not necessary to show the publication is “primarily” aimed at the young in order for it to be confiscated. *Id.* at 182 n.662.

48. See *id.* at 182 (explaining how governmental beliefs of morality, decency, and religion can restrict freedom of speech in France). Additionally, the author

French freedom of speech does not include the right to criticize the religious beliefs of others, or to express racial or religious hatred.<sup>49</sup> Consequently, the publication of racist, anti-Semitic, xenophobic, or revisionist remarks is criminal.<sup>50</sup>

The French government further exercises its active role in restricting freedom of speech through the Law of July 29, 1881, which regulates the press by imposing restrictions on hate speech.<sup>51</sup> This law makes the expression of racist thoughts, including hate speech, a crime.<sup>52</sup> The French government enacted this law with the belief that it has a duty to protect its citizens from the harmful effects of such speech.<sup>53</sup>

The specific provision of French law at issue in the *Yahoo! Case* is a perfect example of the limitations placed on free speech in France.<sup>54</sup> The provision makes it a crime in France to display or sell paraphernalia that is related to the Third Reich or is of an anti-

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cites a decision of the *Tribunal de Grande Instance*, which suppressed an advertising campaign by the clothing company Benetton. *Id.* at 182 n.660.

49. See YOUNGS, *supra* note 40, at 182 (indicating that attacking or showing hatred of religion or race is not included in freedom of speech in France).

50. See *id.* (indicating that it is a crime in France to publish racist or similar comments).

51. See Law No. 637 of July 29, 1881, J.O., July 30, 1881, 125 [hereinafter The Law of July 29, 1881] (criminalizing racist statements); see also Mailland, *supra* note 18, at 1184-85 (illustrating the active role the French government takes in protecting its citizens from hate speech).

52. See The Law of July 29, 1881, *supra* note 51 (prohibiting hate speech).

53. See Mailland, *supra* note 18, at 1185 (explaining the French government's belief that it should protect its people from the harm that hate speech could cause). In addition, the French Public Health Code criminalizes favorable presentation of drug use, including research about the medical use of marijuana. *Id.* at 1185-86. France has also prosecuted people whose dissents against the government's policy were deemed "too vigorous." *Id.* at 1186. But see Sophie Boyron, *Constitutional Law*, in PRINCIPLES OF FRENCH LAW 139, 158 (1998) (stating that French Constitutional texts have consistently protected freedom of opinion, including decisions of the Conseil Constitutionnel, a group appointed to act as a pseudo-constitutional court); CAIRNS & MCKEON, *supra* note 39, at 117 (stating that the individual is free to think any thoughts on any topic, so long as he or she does not infringe upon the public order).

54. See French Penal Code R. 645-1 (outlawing the display or sale of Nazi-related materials).

Semitic nature.<sup>55</sup> It outlaws such items as Nazi-related photographs, coins, stamps, and texts.<sup>56</sup> France enacted the law in the wake of World War II while all of Europe struggled to recover from the atrocities brought on by the Nazis.<sup>57</sup> The intent of the law is to protect French citizens, especially those of Jewish faith, from the memories of suffering endured by their nation and their people at the hands of Nazi criminals.<sup>58</sup> By protecting the interests of some French

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55. See *id.* (criminalizing the display or distribution of Third Reich or anti-Semitic material); see also Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. LEGAL F. 35, 65 n.103 (2001) (providing an unofficial translation of French Penal Code R. 645-1). R. 645-1 states:

It shall be punished by the fine provided for violations of the fifth class, except for the needs of a film, show, or exhibit including an historical evocation, to wear or to display in public a uniform, insignia, or emblem evoking the uniforms, insignia, or emblems worn or displayed either by the members of an organization declared to be criminal pursuant to Article 9 of the statute of the international military tribunal annexed to the London agreement of August 8, 1945, or by a person found guilty by a French or international court of one or several crimes against humanity provided by Articles 211-1 to 212-3 or provided in law number 64-1326 of December 26, 1964.

*Id.* This Article is a regulation, which is the gravest of five classifications of misdemeanors, and is punishable by fines only. *Id.*

56. See Shannon Lafferty, *Yahoo's French Connection: Portal Takes Aim at Foreign Attempt to Restrict Site Contents*, THE RECORDER, Sept. 24, 2001 (explaining that Yahoo! was subject to suit for making these very items available on its auction site, allegedly in violation of French Penal Code R. 645-1), available at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1015973979949&live=true&cst=1&pc=0&pa=0> (last visited Oct. 12, 2002).

57. See *id.* (stating that French Penal Code R. 645-1, enacted after World War II, even outlaws the ownership of Adolf Hitler's *Mein Kampf*).

58. See May Tribunal Decision, *supra* note 7 (stating that the display and sale of Nazi objects not only violates French criminal law, but also offends its citizens, especially Jewish citizens, by reminding them of the atrocities committed by the Nazis during World War II); see also Calvin Peeler, *The Politics of Memory: Reconstructing Vichy and the Past the French Chose to Forget*, 19 WHITTIER L. REV. 353, 353 (1997) (explaining that the French government enacted a policy encouraging its citizens to forget the past abuse and deportation of Jews during World War II). The French government is reluctant to acknowledge any responsibility of the French state in deportation of Jews, but was so opposed to neo-Nazi revisionists that it enacted a law preventing the denial of the existence of the Holocaust. *Id.* at 353.

citizens, however, the law has also managed to cause harm by infringing upon their freedom of expression.<sup>59</sup>

### C. The Internet

International differences in freedom of speech laws intersect during expression on the Internet, warranting a discussion of this communication medium. The original design of the Internet was intended to be a decentralized and self-sufficient system, capable of transmitting information without human control.<sup>60</sup> It grew at an explosive rate due to the creation of the World Wide Web, which designers intended to be a universal mechanism that could function on any computer.<sup>61</sup> Once the World Wide Web became publicly available at no cost, Internet use greatly expanded.<sup>62</sup> As the demand for Internet services increases exponentially around the world,

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59. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1189 (explaining that France's enforcement of R. 645-1 would chill Yahoo!'s First Amendment right of free speech); see also Peeler, *supra* note 58, at 353 (declaring that French citizens launched an inquiry to learn more about their government's actions during World War II). The French government attempted to cleanse France of all reminders of the war, but there is now a desire and need for historical truth because "[w]hen it comes to human atrocities, nothing is erased with time." *Id.* at 357.

60. See *Reno v. A.C.L.U.*, 521 U.S. 844, 849-50 (1997) (explaining that the Internet began as a military program involving defense contractors and universities); see also Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 445, 448-49 (2001) (describing the origins and global reach of the Internet); William Crane, *The World-wide Jurisdiction: An Analysis of Over-inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 267, 267-68 (2001) (noting that the initial purpose of the Internet was to allow important research to continue even if part of the network was damaged).

61. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1183 n.1 (explaining that the "Internet" and the "World Wide Web" are separate entities, although the Court refers to them collectively as the "Internet"). The Internet, as a decentralized networking system, links computers and computer networks around the world, while the World Wide Web, as a publishing forum, contains millions of websites with varying content. *Id.* See also Eko, *supra* note 60, at 448-49 (explaining that the *Centre Européen de Recherche* ("CERN") in Switzerland designed the World Wide Web, which then grew at an explosive rate).

62. See Eko, *supra* note 60, at 449 (explaining that the greatest impetus for the growth of the Internet was the decision by CERN to make the World Wide Web available to everyone).

regional Internet providers struggle to keep up with the rapid growth.<sup>63</sup>

The Internet provides users with vast amounts of information, supplied by others all over the world.<sup>64</sup> Although the use of Internet information is most widespread in the United States, it has grown quickly in other countries as well.<sup>65</sup> While the Internet offers unique opportunities never available before, it also presents new problems.<sup>66</sup>

Unlike other media, the distinction between speaker and listener is unclear during Internet communication.<sup>67</sup> This requires modification

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63. See Bratt & Kugele, *supra* note 1, at 43 (explaining that worldwide access to and use of the Internet has "grown at an extraordinary pace in recent years"). In 1992, approximately 1.3 million computers accessed the Internet. *Id.* By 2000, approximately 260 million people worldwide had access to the Internet. *Id.* Estimates indicate that by 2005, over 765 million people will be using the Internet. *Id.* See also Ari Kaplan, *Code and Other Laws of Cyberspace*, 48 FED. LAW. 59, 59 (2001) (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)) (commenting that the Internet is breaking down barriers across the globe and significantly affecting our lives); Eko, *supra* note 60, at 449 (noting that the inventors of the Internet have realized their dream, as the "Internet works in all corners of the globe on all kinds of computers"). The high demand for Internet services creates a situation where regional registries and providers "are bursting at the seams." *Id.*

64. See Greg Wrenn, *Representing the New Media Company*, 631 PLI/PAT 1373, 1380 (2000) (explaining that before content is available on the Internet, the provider of the information must store it on a computer server that is part of a domain or network and is connected to the Internet).

65. See Bratt & Kugele, *supra* note 1, at 43 (describing Internet use in various places). In 1999, approximately 110 million people in the United States were using the Internet. *Id.* In 2000, estimates indicate that 99 million people in Europe, 72 million in the Asian Pacific and 19.6 million in South and Central America were Internet users. *Id.* But see Ben Goodger, *Globalization - A European Perspective*, 661 PLI/PAT 395, 401 (2001) (stating that between July 2000 and July 2001, there has been a great down turn in Internet use). This down turn may be no more than a necessary market correction. *Id.*

66. See Bratt & Kugele, *supra* note 1, at 43 (suggesting that the Internet offers "unprecedented opportunities" in international communication and commerce). The controversy over jurisdiction threatens to hinder the growth of e-commerce, and suggests creation of new laws to address this issue are necessary. *Id.* But see Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1160 (2000) (suggesting that premature codification of legal doctrine in response to a new technology can constrain an as yet unknown future).

67. See Elaine M. Spiliopoulos, *The Communications Decency Act of 1996*, 7 DEPAUL-LCA J. ART & ENT. L. & POL'Y 336, 359 (1997) (insisting that the

of traditional notions of constitutionally protected speech as they apply to this new medium.<sup>68</sup> There is no clear answer as to which country's laws apply to material posted on the Internet.<sup>69</sup> It seems unreasonable, however, to expect every website to comply with the speech laws of each country of the world.<sup>70</sup> In the United States at least, speech over the Internet is entitled to the highest protection from governmental restriction.<sup>71</sup>

The Internet also creates unique problems in applying current standards of jurisdiction.<sup>72</sup> Within the United States, jurisdiction is based on "minimum contacts," where websites are subject to jurisdiction in a particular state if they interact with residents of that state.<sup>73</sup> Many courts follow a sliding-scale method of determining jurisdiction: a company clearly doing business over the Internet falls

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problems of defining speaker and listener over the Internet mandate a "re-work[ing]" of the new "inter-active" medium).

68. See *id.* (explaining that lawmakers must reconsider the traditional notions of constitutionally protected speech in order to apply them to new technology).

69. See Bratt & Kugele, *supra* note 1, at 43-44 (posing the question of whose laws should apply to the posting of material on the Internet and indicating that there is not yet an answer); see also Crane, *supra* note 60, at 267 (explaining that although the Internet has grown at a fast pace, there is no single entity to regulate the great amount of information transmitted through it).

70. See Bratt & Kugele, *supra* note 1, at 43-44 (stating that it would be unreasonable to expect a business to comply with consumer protection, securities, criminal, intellectual property, sales, and other substantive laws from all over the world).

71. See *A.C.L.U.*, 521 U.S. at 863 (stating that the Internet, as "the most participatory form of mass speech yet developed," is entitled to "the highest protection from governmental intrusion"); see also Jeffrey P. Cunard & Jennifer B. Coplan, *Developments in Internet and E-Commerce Law: 2001*, 678 PLI/PAT 935, 999 (2001) (explaining how *Reno v. A.C.L.U.* affected the Internet).

72. See Goodger, *supra* note 65, at 417 (suggesting that "jurisdictional tensions and the conflict of laws are some of the most complex issues facing an Internet lawyer"); see also Spiliopoulos, *supra* note 67, at 359 (suggesting that the Internet also presents unique problems in applying obscenity and indecency standards). But see Sommer, *supra* note 66, at 1158 (arguing that jurisdictional problems existed before the advent of the Internet, as did privacy, intellectual property, and free speech problems). Several centuries of legal experience reveal these problems are not recent. *Id.*

73. See Cunard & Coplan, *supra* note 71, at 1090 (recognizing that jurisdiction over a website is more likely to exist if there is a history of residents from the forum states interacting with the website).

at one end, where jurisdiction is proper; a purely passive website falls on the opposite end, where jurisdiction is improper; and a more ambiguous category rests in the middle.<sup>74</sup> The rapidly developing and constantly changing nature of the Internet also makes it difficult for lawmakers to grasp the concepts with which they work.<sup>75</sup>

Internationally, the issues concerning the Internet become even more complex because of a conflict of laws problem.<sup>76</sup> Because anyone can view information on the Internet, every nation has an interest in regulating it.<sup>77</sup> This could result in the exercise of jurisdiction over a website without intentional contacts in another nation.<sup>78</sup> Determining which nation has jurisdiction over a particular

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74. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (1997) (describing the sliding scale). At one end of the spectrum are companies clearly doing business over the Internet, such as entering into contracts with residents of another jurisdiction that involve knowing and repeated transmission of computer files over the Internet. *Id.* Personal jurisdiction is proper at this end of the spectrum. *Id.* Passive websites at the other end simply post information on a website that is accessible in another jurisdiction, and jurisdiction over them is not proper. *Id.* The middle ground contains interactive websites where users can exchange information, and jurisdiction is based on the level of interactivity and commercial nature of the exchange of information. *Id.* See also *Cunard & Coplan*, *supra* note 71, at 1090 (explaining that the company clearly doing business over the Internet is likely subject to jurisdiction, while the passive website is less likely to fall under the jurisdiction of the state). For those companies falling into the middle category, jurisdiction is based on "level of interaction by and commercial nature of the exchange of information." *Id.*

75. See Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 115 (1996) (warning that the Internet changes daily and questioning how a court could render judgment on a law that affects something which is in a constant state of flux). "Today's fictions may turn out to be tomorrow's facts." *Id.*

76. See e.g., *Yahoo!, Inc.*, 169 F. Supp. 2d at 1186-87 (providing an example where jurisdiction over language and images on the Internet were at issue); see also *supra* notes 15-59 and accompanying text (explaining the conflict in freedom of speech laws between the United States and France).

77. See *infra* notes 154-55 and accompanying text (giving, as examples, instances where German and Italian courts forced foreign citizens to appear before their courts for breaches of those countries' speech laws).

78. See *Crane*, *supra* note 60, at 271 (stating that, because contacts over the Internet are foreseeable worldwide, a nation interested in regulating a website may have jurisdiction, regardless of whether the author intended contacts in that nation, as long as minimum contacts exist within that nation).

issue can have a significant impact on the outcome.<sup>79</sup> For instance, nations do not agree on one proper level of free speech; therefore what the United States protects may be subject to criminal penalties elsewhere.<sup>80</sup> Companies doing business over the Internet can never be certain of limiting their exposure to legal risk by simply complying with local laws.<sup>81</sup> If absolute freedom of speech existed everywhere in the world, problems in regulating speech over the Internet would not exist.<sup>82</sup> However, this is not the case.

## II. ANALYSIS

### A. THE YAHOO! CASE BEGINS

The defendant in the *Yahoo! Case* was Yahoo!, Inc., an Internet service provider incorporated under the laws of Delaware and operated principally in Santa Clara, California.<sup>83</sup> Yahoo! operates various Internet websites and services accessible by any computer user who has Internet access.<sup>84</sup> Some of Yahoo!'s services operate

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79. See U.S. CONST. amend. I (providing vast freedom of speech); see also *supra* notes 15-59 and accompanying text (explaining the conflict in freedom of speech laws between the United States and France, which could alter the outcome of a case).

80. See *supra* notes 15-59 and accompanying text (explaining the vast differences in freedom of speech afforded in the United States as compared to France).

81. See Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1347 (2001) (warning that it is a very real possibility for a court in a foreign country to summon a website author or owner into court for violating local laws).

82. See Richard J. Zecchino, *Could the Framers Ever Have Imagined? A Discussion on the First Amendment and the Internet*, 1999 L. REV. MICH. ST. U. DET. C. L. 981, 987 (1999) (discussing the problems of applying traditional American notions of free speech to the Internet, and recognizing that this problem would not exist were it not for varying rights to free expression based on the medium of the speech).

83. See YAHOO! TERMS OF SERVICE (explaining that California law and courts will settle any disputes with Yahoo!), at <http://docs.yahoo.com/info/terms/> (last visited Sept. 18, 2002).

84. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1183 (indicating how Yahoo! runs its operations). Yahoo!'s websites and services are available to Internet users at the Uniform Resource Locator ("URL") <http://www.yahoo.com>. *Id.*

under the laws of the United States, use the English language, target U.S. residents, and utilize servers in the United States.<sup>85</sup> Yahoo!, Inc. distinguishes these services from Yahoo!'s subsidiary corporations, which operate regional sites and services in twenty other nations.<sup>86</sup> Each of the regional sites operates in the local region's primary language, targets local citizens, and complies with local laws.<sup>87</sup> People from all over the world can communicate and interact through Yahoo!'s various services, including its auction site.<sup>88</sup>

Yahoo!'s auction site manages bids placed by people all around the world, after individual computer users post items for sale.<sup>89</sup> While Yahoo! itself is not a party to these transactions, it performs limited regulation of the auction site by prohibiting the sale of particular items.<sup>90</sup> The Yahoo! auction site informs users that they

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85. See *id.* (describing how Yahoo! operates). The services Yahoo! offers in the United States end in the suffix ".com." *Id.* See also *LICRA & UEJF v. Yahoo!, Inc. & Yahoo France*, T.G.I. Paris, Nov. 20, 2000 [hereinafter November Tribunal Decision] (stating that Yahoo! directs its auction site primarily at surfers in the United States, but noting that the same cannot be said of the auction of Nazi objects, which may be of interest to any person), available at <http://www.juriscor.net/txt/jurisfr/cti/tgiparis20001120.htm#texte> (last visited Oct. 12, 2002).

86. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1183 (noting that Yahoo! operates in other countries through subsidiary corporations, such as Yahoo! France, Yahoo! India, and Yahoo! Spain).

87. See *id.* (describing how Yahoo!'s subsidiary corporations operate). These regional sites each include the host nation's two-letter code, and individuals can access the sites at URLs such as <http://www.yahoo.fr>, for Yahoo! France and <http://www.yahoo.kr> for Yahoo! Korea. *Id.*

88. See May Tribunal Decision, *supra* note 7 (noting specifically that web surfers in France can see the pages, services, and sites of Yahoo.com, and in particular, the auction services); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1183-84 (stating that Yahoo!'s services, accessible to users from all over the world, include a search engine, e-mail, an auction site, personal web pages, shopping services, chat rooms, and clubs).

89. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (describing the auction services offered on Yahoo.com). After a user posts an item to auction, and the appropriate time period lapses, Yahoo! sends a confirmation e-mail to the seller and the highest bidder, with contact information. *Id.*

90. See November Tribunal Decision, *supra* note 85 (noting that Yahoo! refuses to accept sale of human organs, drugs, pedophilia-related works, live animals, and cigarettes); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (explaining that Yahoo! monitors the auction site, but is not a party to the transaction, and that

must comply with its rules and may not offer items for sale to buyers in countries where such transactions are illegal.<sup>91</sup>

The Yahoo! dispute began with a complaint from the plaintiffs, LICRA and UEJF, two French non-profit organizations dedicated to eliminating anti-Semitism.<sup>92</sup> LICRA and UEJF based their complaint on the fact that Yahoo!'s auction site allows the posting of items illegal in France, including Nazi paraphernalia and Third Reich memorabilia.<sup>93</sup> In April 2000, LICRA sent a cease and desist letter to Yahoo!'s Santa Clara headquarters,<sup>94</sup> explaining that the sale of Nazi and Third Reich paraphernalia through Yahoo!'s auction site violated French law.<sup>95</sup> LICRA gave Yahoo! eight days to take steps to prevent these sales, and then took legal action by filing a complaint against

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the buyer and seller are responsible for arranging payment and delivery). Yahoo! prohibits certain items from sale, such as: stolen goods, body parts, prescription and illegal drugs, weapons, goods in violation of U.S. copyright laws, and goods in violation of the Iranian and Cuban embargoes. *Id.* Yahoo! also provides a rating system for the benefit of future users that allows buyers and sellers to evaluate each other's behavior. *Id.*

91. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (recognizing that Yahoo! does not actively monitor each posting, but informs auction sellers that they must comply with Yahoo!'s policies and refrain from offering products to individuals in jurisdictions where the sale of such items is illegal).

92. See May Tribunal Decision, *supra* note 7 (stating that LICRA and UEJF both have a right to pursue in France the elimination of Nazism); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1183 (providing information on LICRA and its purpose of eliminating anti-Semitism); Bratt & Kugele, *supra* note 1, at 44 (informing readers that LICRA is the International League Against Racism and Anti-Semitism, and UEJF is the Union of French Jewish Students).

93. See May Tribunal Decision, *supra* note 7 (noting that Yahoo! permits French citizens to view and purchase Nazi objects, which is a source of damage to LICRA and UEJF); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (stating that individuals can and have posted Nazi and other offensive materials for auction on Yahoo!).

94. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (providing that the cease and desist order was sent on or about April 5, 2000).

95. See The Law of July 29, 1881 art. 24 (outlawing racist and hate speech); French Penal Code R. 645-1 (outlawing the display, sale or exchange of Nazi or Third Reich memorabilia, such as uniforms, insignia, and emblems reminiscent of those worn or exhibited by the Nazis).

Yahoo! in the *Tribunal de Grande Instance de Paris* ("the Tribunal" or "the French court").<sup>96</sup>

#### B. THE FRENCH TRIBUNAL DECISION

The Tribunal found that French citizens have access to Nazi and Third Reich related materials on Yahoo.com.<sup>97</sup> Therefore, the French court concluded that the auction site violated R. 645-1 of the French Criminal Code, which outlaws the sale, exchange or display of Nazi related materials or Third Reich memorabilia.<sup>98</sup>

In May of 2000, the French court ordered Yahoo! to: (1) eliminate French citizens' access to any Nazi objects, relics, insignia, emblems, and flags on the Yahoo.com auction site; (2) eliminate French citizens' access to web pages on Yahoo.com that display text, extracts, or quotations from *Mein Kampf*, Hitler's autobiography, or *Protocol of the Elders of Zion*, a collection of writings about the secret police of Czarist Russia; (3) post a warning on Yahoo! France stating that searches on Yahoo.com could lead to sites containing material prohibited by R. 645-1 of the French Criminal Code,<sup>99</sup> and that viewing of such material could result in legal action against the Internet user; and (4) remove from browser directories accessible in

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96. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (describing the order of events and explaining that LICRA filed a civil suit in the High Court of Paris).

97. See May Tribunal Decision, *supra* note 7 (noting that web surfers in France can view and purchase Nazi objects through the Yahoo.com auction site); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (stating that such materials are available to the French directly on Yahoo.com or through a link on Yahoo.fr). The French court found that Yahoo.com's auction site provided access to approximately 1,000 Nazi and Third Reich related objects. *Id.* The items available included: Adolf Hitler's *Mein Kampf*; *The Protocol of the Elders of Zion*, a Russian Czarist secret police report of an anti-Semitic nature; and purported "evidence" of the nonexistence of the Holocaust gas chambers. *Id.*

98. See May Tribunal Decision, *supra* note 7 (ruling that the display and sale of Nazi objects constitutes a violation of French Penal Code R. 645-1, which outlaws the exhibition of objects reminiscent of the Nazis); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 n.2 (stating that Yahoo!'s auction violates another French law, which prohibits the purchase or possession of such items in France).

99. See French Penal Code R. 645-1 (prohibiting the display of Nazi memorabilia).

the French Republic index headings entitled “negationists”<sup>100</sup> and from all hypertext links the term “negationists” under the heading “Holocaust.”<sup>101</sup>

The French court further ordered Yahoo! to dissuade French citizens from accessing the site and to take all necessary measures to make it impossible to access the Nazi artifact auction and any other site or service that may constitute an apology for Nazism or a contesting of Nazi crimes.<sup>102</sup> In addition, the French court ordered Yahoo! to pay a penalty of 10,000 Francs to LICRA.<sup>103</sup>

Yahoo! asked the French court to reconsider the terms of the order.<sup>104</sup> It claimed that compliance with the entire order was technologically impossible.<sup>105</sup> In response, the French court gathered

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100. See Barbara Guidice, *Controversy Over Holocaust Denial Sparks Furor at 2 French Universities*, CHRON. OF HIGHER EDUC., Aug. 13, 1999 (explaining that the term “negationist” is used in France to refer to “theories and writings that question the Holocaust or aspects of it.”), available at <http://www.ferris.edu/isar/arcade/holodenial/france.htm> (last visited Oct. 12, 2002); see also Matthew Herrington, *An Expert Witness Report on the Holocaust, and its Deniers*, FINDLAW’S BOOK REVIEWS (Mar. 8, 2002) (reviewing ROBERT JAN VAN PELT, *THE CASE FOR AUSCHWITZ: EVIDENCE FROM THE IRVING TRIAL* (2002) (stating that the negationist view denies that hundreds of thousands of human beings were put to death by gas by the Nazis in Auschwitz), at [http://writ.news.findlaw.com/books/reviews/20020308\\_herrington.html](http://writ.news.findlaw.com/books/reviews/20020308_herrington.html) (last visited Apr. 15, 2002).

101. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184-85 (listing the four orders that the French court placed against Yahoo!); see also May Tribunal Decision, *supra* note 7 (stating the court’s order more generally).

102. See May Tribunal Decision, *supra* note 7 (ordering Yahoo! to interrupt a connection when a French citizen views material constituting an apology for Nazism); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (further explaining the French court’s order).

103. See May Tribunal Decision, *supra* note 7 (ordering Yahoo!, Inc. to pay LICRA 10,000 Francs, and Yahoo!, Inc. along with Yahoo France to pay UEJF 10,000 Francs). The French Tribunal set July 24, 2000, as the date for Yahoo! to demonstrate the measures it would take to comply with the order. *Id.*

104. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (stating that Yahoo! asked the French court to reconsider the terms of the order). See generally, November Tribunal Decision, *supra* note 85 (giving the court’s decision after reconsideration and consultation of experts).

105. See November Tribunal Decision, *supra* note 85 (listing Yahoo!’s arguments, which include a claim that there is no technical means capable of satisfying the terms of the May 22 order); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (explaining Yahoo!’s argument that full compliance with the order was

expert opinions concerning the feasibility of eliminating French citizens' access to certain Yahoo! services.<sup>106</sup> In November of 2000, the French court reaffirmed its previous order and gave Yahoo! three months to comply, after which a penalty of 100,000 Francs per day would be enforced for noncompliance.<sup>107</sup>

Yahoo! subsequently posted the required warning, prohibited the auction of items in violation of French Penal Code R. 645-1, and amended its auction policy to prohibit the sale of items that promote hate or violence.<sup>108</sup> However, Yahoo! still has available some items that may violate the French order, and still has links to other sites that may violate the order.<sup>109</sup>

### C. THE U.S. DISTRICT COURT DECISION

Following the French decisions, Yahoo! filed a complaint in the U.S. District Court for the Northern District of California seeking a declaratory judgment that the French court's orders were neither recognizable nor enforceable under the laws of the United States.<sup>110</sup>

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technologically impossible). Yahoo! admits it could easily comply with part three of the order by posting a warning on Yahoo.fr, but that screening out French users was not possible. *Id.*

106. See November Tribunal Decision, *supra* note 85 (identifying the experts as Vinton Cerf, Ben Laurie, and Francois Wallon); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (indicating that the French court sought expert opinions on the matter).

107. See November Tribunal Decision (stating that the French court reaffirmed its May 22, 2000 order, requiring Yahoo! to comply within three months or face a penalty of 100,000 francs for each day of noncompliance); see also *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (explaining that 100,000 Francs is equal to about U.S. \$13,300). The French court also noted that potential penalties against Yahoo! could not be collected from Yahoo! France. *Id.*

108. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (explaining the subsequent actions taken by Yahoo!); see also YAHOO! AUCTION GUIDELINES (warning users that certain items may not be posted for auction, such as "[a]ny item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts"), at <http://user.auctions.Yahoo.com/html/guidelines.html> (last visited Sept. 18, 2002).

109. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (explaining that the Yahoo! auction site still sells stamps, coins, copies of *Mein Kampf*, and permits users to access other sites that contest the existence of Nazi crimes).

110. See Complaint for Declaratory Relief, *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. C 00-21275) (arguing that the French order is

Yahoo! argued that it lacks the technology to block French citizens from accessing the Yahoo.com auction site or other sites on Yahoo.com that may violate the French order.<sup>111</sup> Yahoo! contended that it could not comply with the order without completely banning Nazi-related items from the site, and argued that such a ban would impermissibly infringe upon its First Amendment rights.<sup>112</sup>

The issue in the case was whether another nation can regulate speech within the United States without violating the Constitution, on the basis that the speech can be accessed through the Internet in that nation.<sup>113</sup> The Court answered this question in the negative and stated that it must decide the case in accordance with the Constitution and laws of the United States.<sup>114</sup> The Court explained that Yahoo! could benefit from the declaratory judgment it was

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neither recognizable nor enforceable because of the First Amendment guarantee of freedom of speech), available at <http://tomwbell.com/NetLaw/Ch03/YahooComplaint.html> (last visited Oct. 12, 2002).

111. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185-86 (stating Yahoo!'s reasons concerning why it should not have to comply with the French court's order).

112. See *id.* at 1186 (explaining Yahoo!'s arguments). Subsequently, defendants moved to dismiss the action, claiming that the District Court lacked jurisdiction, but the motion was denied. *Id.* Yahoo! then moved for summary judgment, which was opposed by defendants. *Id.*

113. See *id.* at 1186 (stating the issue of the case). Speech over the Internet probably often violates many foreign nations' laws. *Id.* For example, speech over the Internet may violate China's laws against religious expression, the U.K. restrictions on freedom of the press, or the laws of various nations against advocacy of gender equality or homosexuality. *Id.*

114. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1187 (indicating that there is no clear answer as to what principles should guide a decision, if and when a foreign nation seeks enforcement of their laws against Internet service providers such as Yahoo!). The court also explained that a motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. *FED. R. CIV. P.* 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

seeking, because it would protect Yahoo! from the French order.<sup>115</sup> The Court found that Yahoo! was facing a present threat,<sup>116</sup> that there was an actual controversy, and that the French penalties if not declared unenforceable could be applied retroactively.<sup>117</sup>

Further, the Court explained that a U.S. court could not constitutionally issue an order like the one handed down by the French Tribunal because the First Amendment forbids viewpoint-based regulation of speech by the government.<sup>118</sup> The Court asserted that the French order was “too general and imprecise” to survive the strict scrutiny of the First Amendment because it did not provide a specific explanation of what Yahoo! is required to do.<sup>119</sup> In addition,

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115. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1187 (explaining that declaratory judgment protects potential defendants from multiple actions by providing a means by which a court declares in one action the rights and obligations of the litigants). The Declaratory Judgment Act was created to relieve potential defendants from the threat of impending litigation, while an adversary might never initiate the suit. See *Japan Gas Lighter Ass'n. v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966), cited in *Yahoo!, Inc.*, 169 F. Supp. 2d at 1189. The Act allows such parties to avoid potential damages by asking for a declaratory judgment, once the adverse positions are crystallized and the conflict of interests is real and immediate. *Yahoo!, Inc.*, 169 F. Supp. 2d at 1189. The court also explained the actual controversy requirement. *Id.* at 1187. Additionally, the court explained that defendants' arguments suggest ways to avoid deciding the issues of the case, but are not supported by the facts in the record. *Id.* at 1188.

116. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1188 (stating that the fact that a penalty is provisional does not mean that Yahoo! does not face a present and ongoing threat from the existing French order). The court also points out that the defendants have not expressed a willingness to withdraw the order or absolve Yahoo! from any penalty, despite their apparent satisfaction with Yahoo!'s efforts to comply. *Id.*

117. See *id.* at 1189 (declaring that Yahoo! cannot rely on defendants' assessment of compliance). Yahoo! continues to offer some items that appear to violate the order, such as Third Reich memorabilia and *Mein Kampf*, and still offers access to web pages containing Nazi and anti-Semitic content. *Id.* The fact that Yahoo! does not know whether it has complied with the order, because of the vagueness of it, is the type of harm against which the Declaratory Judgment Act was designed to protect. *Id.* There is no question that under French law the French order is valid and a penalty could go back to the date of the order. *Id.* at 1190.

118. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1189 (explaining that the Constitution does not allow restrictions on speech unless there is a compelling government interest, for example avoiding a clear and present danger of imminent violence).

119. See *id.* (stating that the language, “take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction

the Court noted that the order required Yahoo! to take actions that would impermissibly chill or censor protected speech, thus “unquestionably [causing] irreparable injury.”<sup>120</sup>

Although the U.S. Constitution requires full faith and credit to be given to judgments of sister states, territories and possessions of the United States, the extent to which a state honors the judicial decisions of a foreign nation is a matter of choice, under “comity of nations.”<sup>121</sup> U.S. courts usually recognize foreign judgments, but not if enforcement would violate the fundamental interests or public policy of the United States.<sup>122</sup>

The French order’s attempt to restrict speech through content and viewpoint-based regulation is inconsistent with the First

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service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes” does not specifically describe what is proscribed for Yahoo!).

120. *See id.* at 1189-90 (explaining that the French order violates, or “chills” Yahoo!’s First Amendment rights). The defendants went on to unsuccessfully argue that at the present time, there was no real or immediate threat, since the French order could not be enforced until the French court fixes a penalty. *Id.* The court notes that the defendants did not bother arguing that the French order could be enforced within the United States, but instead argued that there was no immediate threat to Yahoo!’s First Amendment rights. *Id.*

121. U.S. CONST. art. IV, sec. 1, cl. 1; *see Yahoo!, Inc.*, 169 F. Supp. 2d at 1192 (stating that 28 U.S.C. § 1738 indicates that no legal judgment has effect of its own force beyond the limits of the sovereignty from which its authority is derived); *Hilton v. Guyot*, 159 U.S. 113, 163 (stating that comity is “neither a matter of absolute obligation . . . nor of mere courtesy and good will”).

122. *See Yahoo!, Inc.*, 169 F. Supp. 2d at 1192 (stating that U.S. courts will not uphold foreign judgments if they are against public policy); *see also Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) *cert. denied*, 405 U.S. 1017 (1972) (explaining that U.S. courts generally recognize foreign judgments unless they are prejudicial or contrary to the country’s interests); Michael Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, 635 PLI/COMM 129, 169 (1992) (describing instances where the United States has recognized and respected laws of another nation, under comity of nations). Such instances include contracts executed in foreign countries, where U.S. courts will base decisions on the contract law of the appropriate country. *Id.* *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987) (stating that judgments granting injunctions are not generally entitled to enforcement, under comity of nations); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. G (1971) (stating that enforcement of foreign judgments is generally limited to actions to enforce monetary judgments).

Amendment.<sup>123</sup> Although France can regulate speech that occurs within its borders, the United States cannot enforce an order that violates the Constitution's First Amendment protection of freedom of speech when that speech occurs simultaneously inside the United States.<sup>124</sup> The Court reasoned that limited comity in the area of freedom of speech was sound because the protections afforded to Americans by the First Amendment would be destroyed if other nations were allowed to enter judgments based on the laws appropriate in foreign lands.<sup>125</sup> The Court granted Yahoo!'s request for a declaration that the First Amendment precludes enforcement within the United States of the French order because it would regulate the content of Yahoo!'s speech over the Internet.<sup>126</sup>

#### D. ANALYSIS OF THE COURTS' DECISIONS

##### *1. The French Decisions*

In looking at the laws of France<sup>127</sup> and the French version of freedom of speech already discussed,<sup>128</sup> it appears that the Tribunal

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123. *See Yahoo!, Inc.*, 169 F. Supp. 2d at 1192 (concluding that the French order's content and viewpoint-based regulation of the web pages and auction site were inconsistent with the First Amendment).

124. *See id.* (declaring that the United States may not enforce a foreign court order that chills First Amendment speech).

125. *See id.* at 1193 (determining that although restrictions on freedom of speech may be appropriate for foreign countries, they are antithetical to the protections of the Constitution). The defendant moved for further discovery, asserting that it may lead to the development of triable issues of fact and preclude summary judgment on First Amendment grounds. *Id.* However, the court stated that whether Yahoo! has the technological capabilities to comply with the order is not material, and that speech spoken in the United States cannot be regulated by a foreign nation just because it could later be heard there. *Id.* at 1194.

126. *See id.* (granting Yahoo!'s motion for declaratory judgment).

127. *See* DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 5 (Fr. 1789) (granting authority to public officials to outlaw certain actions to prevent the abuse of freedom of speech), *available at* <http://www.hrcr.org/docs/frenchdec.html> (last visited Oct. 12, 2002); FR. CONST. art. 4 (granting Parliament the power to pass laws concerning civil rights and fundamental guarantees such as freedom of speech); *see, e.g.*, French Penal Code R. 645-1 (prohibiting the display of Nazi memorabilia).

ruled correctly in both its May and November decisions.<sup>129</sup> The laws of France clearly state that freedom of speech is protected and valued, but state that it may be limited by any number of laws in order to avoid an abuse of that freedom.<sup>130</sup> Article Eleven of France's Declaration of the Rights of Man and of the Citizen is restricted by various laws, including French Penal Code R. 645-1.<sup>131</sup>

The Declaration, however, is not the only source of freedom of speech for the French, and the Tribunal may have ruled incorrectly.<sup>132</sup> France is a Member State of the Council of Europe and is also bound by the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>133</sup> This Convention, which entered into force in 1953, is modeled after the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations.<sup>134</sup> The Convention aims at securing the universal and effective recognition and observance of the rights declared in the Universal Declaration.<sup>135</sup>

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128. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (Fr. 1789) (providing freedom of speech, but allowing for its limitation as determined by the law), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited Oct. 12, 2002).

129. See *supra* notes 39-59 and accompanying text (explaining all of the limitations placed on freedom of speech in France).

130. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (Fr. 1789) (establishing that freedom of communication is an essential right of man), available at <http://www.hrcr.org/docs/frenchdec.html> (last visited Oct. 12, 2002).

131. See *id.* (indicating that citizens may be responsible for the abuse of freedom of communication); see also French Penal Code R. 645-1 (restricting certain forms of communication).

132. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10 [hereinafter European Convention] (stating the freedoms of expression that the treaty provides), available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Oct. 12, 2002). As a member of this Convention, France is bound to provide freedom of speech to its citizens. *Id.* art. 59.

133. See *id.* Chart of Signatures and Ratifications (listing France as a Member State of the Council of Europe and as a signed member of this Convention on the Chart of Signatures and Ratifications of the Treaty).

134. See European Convention, *supra* note 132 (explaining in the introductory comments that the Convention considered the aim of the Universal Declaration of Human Rights and intended to further the goals of the Universal Declaration).

135. See *id.* (discussing the goals of the Convention).

Article Ten of the European Convention guarantees Freedom of Expression and the French judiciary has not ignored this guarantee.<sup>136</sup> In 1998, less than two years before the *Yahoo! Case*, the French criminal court relied on the European Convention on Human Rights in dismissing charges against five newspaper directors for violating laws that restrict freedom of speech in France.<sup>137</sup> The French government accused these five people of violating a French law prohibiting the publication of political polls during the week before an election.<sup>138</sup> In that case, the court dismissed the charges, holding that the law in question was incompatible with the guarantees of freedom of speech contained in Article Ten of the European Convention.<sup>139</sup> The court determined that because the French public could see the polling data on foreign websites, the prosecutor's

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136. See *id.* art. 10 (providing freedom of speech). Article Ten states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

*Id.* See also CAIRNS & MCKEON, *supra* note 39, at 114 (stating that the European Convention on Human Rights has been fully incorporated into French law); Mahasti Ravazi & Thaima Samman, *Yahoo! and Limitations of the Global Village*, 19 COMM. LAW. 27, 27 (2001) (referring to a case in which a French court relied on the European Convention on Human Rights to protect French citizens' freedom of speech).

137. See Ravazi & Samman, *supra* note 136, at 27 (explaining that the charges against five people were dropped because the complexity of the Internet made it nearly impossible to enforce a law against publishing political polls during the week before an election).

138. See *id.* (although it was illegal to publish political polls during the week before an election, foreign newspapers had posted them on the Internet, so that French citizens could access them anyway).

139. See *id.* (explaining that the court refused to apply clear and enforceable criminal laws because they were in conflict with the European Convention's guarantee of freedom of speech).

efforts to enforce the law against publication were inconsequential.<sup>140</sup> There is no reasoning within the French Yahoo! decisions that explains why the outcome was different in that case.<sup>141</sup>

Additionally, it seems that the French Yahoo! decisions violate the part of Article Ten of the Convention that guarantees freedom “to receive and impart information and ideas.”<sup>142</sup> French citizens desiring to educate themselves about the history of France have had a difficult time learning the truth about the World War II period, since France has outlawed not only war paraphernalia, but also some books discussing the war or major characters in it.<sup>143</sup> Many people in France have recently become curious about what really happened during that era in their country, but the French government’s insistence on forgetting and hiding the tragedies of the war have hampered their efforts at learning more.<sup>144</sup> All of these issues bring to light an internal inconsistency between French law and the Tribunal’s decision.

## 2. *The U.S. Decision*

The decision of the U.S. district court clearly conforms to American notions of freedom of speech as well as U.S. case law.<sup>145</sup> Freedom of speech is highly valued among the American people;

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140. See *id.* (stating that the evolution of the Internet made enforcement of the criminal law no longer possible).

141. See May Tribunal Decision, *supra* note 7 (lacking a discussion of this seemingly significant French case); November Tribunal Decision, *supra* note 85 (deciding the *Yahoo! Case* without mentioning this seemingly on point case).

142. See European Convention, *supra* note 132, art. 10 (“This right [Freedom of Expression] shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

143. See Peeler, *supra* note 58, at 354 (explaining that the recent prosecution of former French government officials for war crimes during World War II has motivated French citizens’ curiosity about the truth of what happened in France during that time). Their search for the truth is hampered by France’s insistence to forget and hide the tragedies of the war. *Id.* at 357.

144. See *id.* (noting French citizens’ interest in World War II and the Holocaust).

145. See *supra* notes 15-38 and accompanying text (explaining the status of the First Amendment within the United States and related case law).

accordingly, the First Amendment is subject to minimal restriction.<sup>146</sup> Following precedent, the U.S. court had a duty to protect Yahoo!'s freedom of speech by preventing France from chilling that freedom.<sup>147</sup>

The Yahoo! decision was fairly simple and straightforward for the U.S. court because it involved a clear violation of Yahoo!'s First Amendment rights to free speech.<sup>148</sup> Some forms of expression are not afforded such strong protection under the First Amendment, as in the case of obscenity.<sup>149</sup> Cases that fall into this gray area make the international inconsistency in speech laws even more complex.<sup>150</sup> If Yahoo! had been selling online views of obscene images, rather than World War II collectors' items, the Court may not have arrived at the same decision.<sup>151</sup>

### 3. *International Inconsistency Calls for a Solution*

Not only is there internal inconsistency between French law and the Tribunal's decision, but there is also a more important international inconsistency between freedom of speech laws in the

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146. See *supra* notes 20-26 and accompanying text (explaining the very few restrictions placed on freedom of speech in the United States).

147. See *Stromberg*, 283 U.S. at 369 (stating that freedom of speech is fundamental to American society); *R.A.V.*, 505 U.S. at 382 (explaining that content based regulations on speech are "presumptively invalid"); *First Nat'l Bank of Boston*, 359 N.E.2d at 1269-70 (granting freedom of speech to corporations); *Johnson*, 491 U.S. at 414 (stating that speech cannot be prohibited simply because it is offensive); *Collin*, 447 F. Supp. at 676 (ruling that a prohibition on handing out materials promoting racial or religious hatred was unconstitutionally vague); *Reno*, 521 U.S. at 849 (striking a statute designed to protect minors from viewing pornography and other offensive material on the Internet because the restriction was unconstitutional under the First Amendment).

148. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1194 (granting a declaration to Yahoo! that the First Amendment clearly prohibits enforcement of the French order).

149. See FARBER, *supra* note 16, at 14 (stating that some forms of speech are not as strongly protected under the First Amendment, such as obscenity, incitements to violence, libel, fighting words, and commercial advertising).

150. *Id.*

151. See *Roth*, 354 U.S. at 479 (upholding the constitutionality of an obscenity statute).

United States and France.<sup>152</sup> The *Yahoo! Case* was not about the law applicable to the Internet, but instead it was about the confrontation of the essential values of two countries, and the fact that those differences come into play with speech over the Internet.<sup>153</sup> The *Yahoo! Case* is not an isolated incident, and similar problems occur globally.<sup>154</sup> For instance, German and Italian courts have also recently held foreign citizens accountable for breaches of domestic speech laws allegedly committed over the Internet.<sup>155</sup>

This inconsistency in speech laws creates a problem that will continue into the future, especially as the Internet grows and changes.<sup>156</sup> The Internet is rapidly evolving and will continue to affect us internationally, as we begin to realize its full potential.<sup>157</sup> As

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152. Compare U.S. CONST. amend. I (providing vast freedom of speech), with Article Eleven of France's Declaration of the Rights of Man and of the Citizen (providing for more limited freedom of speech laws). See generally *supra* note 40 and accompanying text (explaining the background and interpretation of Article Eleven).

153. See Ravazi & Samman, *supra* note 136, at 29 (explaining the underlying importance of the *Yahoo! Case*).

154. See *id.* at 28 (indicating that other European courts have made similar decisions to the French decision in the *Yahoo! Case*). In December 2000, Germany's highest court, the *Bundesgerichtshof*, held that a website based in Australia could be subject to Germany's laws against pro-Nazi speech and denial of the Holocaust. *Id.* Also, an Italian court ruled that Italian libel law could be applied to any online information that could be read in Italy. *Id.* Under these theories, the law of any country could be applied to any information available on the Internet, regardless of its place of origin or its intended audience. *Id.*

155. See *id.*

156. See Bratt & Kugele, *supra* note 1, at 42 (setting forth estimates that by 2005, over 765 million people will be accessing the Internet). The authors consider the question of which countries' laws should apply to the posting of material on the Internet, but indicate that there is not yet an answer. *Id.* at 42-43. See also Kaplan, *supra* note 63, at 59 (commenting that the Internet is breaking down barriers across the globe and significantly affecting our lives); Denis T. Rice, 2001: *A Cyberspace Odyssey Through U.S. and E.U. Internet Jurisdiction Over E-Commerce*, 661 PLI/PAT 421, 446 (2001) (indicating that the Internet of today is but a glimmer of what lies ahead in digital communications).

157. See Ian C. Ballon, *The Law of the Internet: Developing a Framework for Making New Law*, in GLASSER LEGAL WORKS – THE TECHNOLOGY ANSWER SHOW CONFERENCE AND EXHIBITION 63, 67 (1998) (explaining that the Internet is evolving quickly and exciting technologies are merely in their infancy); see also Charles R. Topping, *The Surf is Up, But Who Owns the Beach?—Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y

the Internet becomes a more widely used and mainstream media, online anonymity is likely to decrease, making it easier to identify people speaking on the Internet.<sup>158</sup> Technology such as Internet telephony, real-time video, and webcasting are in their infancy, and businesses have barely tapped the commercial potential of the World Wide Web.<sup>159</sup> In the future, the Internet may be the primary way municipalities transact business with citizens.<sup>160</sup> Internet use has increased dramatically, and the increase is likely to continue as more companies integrate the Internet into their daily business practices.<sup>161</sup>

If nothing is done about the international inconsistency of freedom of speech over the Internet, the problem will only grow.<sup>162</sup> One major effect that non-action will have is an eventual barrier to the future growth of e-commerce.<sup>163</sup> Businesses uncertain of the laws of other nations—whether they can be dragged into court in those nations or what the outcome of a foreign lawsuit would be<sup>164</sup>—will be less

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179, 192 (1999) (stating that we are not only “befuddled” by the difficulties of the Internet, but that its full potential has yet to be realized).

158. See Ballon, *supra* note 157, at 65 (explaining that once the Internet becomes more of a mainstream media source, foreign countries are likely to see a common interest in cooperating to identify the sources of anonymous Internet conduct).

159. See *id.* at 67-68 (explaining that the potentials of the Internet are just beginning to be recognized, and that new technology can replace what is new today in less than a year’s time).

160. See Steven Masur, *Cyber Symposium—Legal Issues of Broadcasting on the Internet*, 14 TOURO L. REV. 7, 7 n.2 (1997) (explaining that the Internet will be “the primary way cities, counties and states transact business with citizens” (quoting Stephen P. Gallagher and Joseph D. Bermingham, *Technology and the Legal Profession: Conflict and Opportunity*, 68 N.Y. ST.B.J. 24, 26 (1996))).

161. See Ballon, *supra* note 157, at 67 (stating that Internet use is going to increase as more and more businesses teach their employees to use it in conjunction with their companies).

162. See *infra* notes 164-66 and accompanying text (explaining why this problem is not going to correct itself).

163. See Robert M. Kossick, *The Internet In Latin America: New Opportunities, Developments & Challenges*, 13 FLA. J. INT’L L. 263, 265 (2001) (explaining the analogous situation in Latin America where the uncertainty of liability related to Internet transactions may eventually cause a decline in e-commerce due to the fear of foreign lawsuits).

164. See Rice, *supra* note 156, at 496-97 (stating that since web advertisers are subject to different and possibly conflicting laws, advertising could become a

likely to utilize Internet transactions.<sup>165</sup> As for those already involved in e-commerce, it may be financially sound to eliminate Internet transactions altogether rather than risk the possibility of a foreign lawsuit.<sup>166</sup>

If every court in the world is able to assert jurisdiction over a business merely because its website is accessible in that jurisdiction, future Internet development will be stifled.<sup>167</sup> Potential Internet users would need to weigh the advantages of the Internet with the potential of being subject to every legal jurisdiction in the world.<sup>168</sup> This uncertainty would strip businesses of the predictability that is crucial to the growth of e-commerce and the Internet.<sup>169</sup> Therefore, a decision must be made about how to handle similar future disputes concerning speech over the Internet, such as the dispute involved in the *Yahoo! Case*.<sup>170</sup>

### III. RECOMMENDATIONS

The discrepancy between the French Tribunal decision and the U.S. decision in the *Yahoo! Case* is alarming not only to the parties involved, but to companies in every nation doing business over the

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dangerous game of chance). The Internet's inherently global reach justifies special efforts to reduce uncertainty with respect to choice of law. *Id.* at 520-21.

165. See Kossick, *supra* note 163, at 265 (stating that parties interested in conducting electronic transactions are uncertain of possible lawsuits and outcomes, and therefore may choose not to deal with the Internet at all).

166. See *id.* (stating that the prospect of non-compliance inhibits online commerce).

167. See *infra* notes 164-166, *supra* notes 168-69, and accompanying texts (explaining that uncertainty about liability for speech and advertising over the Internet may cause a downturn in Internet use by businesses).

168. See Geist, *supra* note 81, at 578 (explaining that if people and businesses are forced to weigh the advantages of Internet use with the fear of being hauled into a foreign court, they will likely favor non-use of the Internet).

169. See Rice, *supra* note 156, at 430-31 (warning that differences between the laws of nations will hamper the sound operation and growth of e-commerce).

170. See Stephanie K. Hines, *An Analysis of UEJF et LICRA v. Yahoo!*, 5 J. SMALL & EMERGING BUS. L. 445, 449 (2001) (noting that the California district court did not discuss whether France properly exercised jurisdiction over Yahoo!, and warning that the principle of comity may prevail in other judgments where the Constitution is not offended).

Internet.<sup>171</sup> The discrepancy demonstrates the drastic differences in the protection afforded to free speech by France and that afforded by the United States.<sup>172</sup> Differences in free speech protection exist all over the world, not only between France and the United States.<sup>173</sup> This international inconsistency must be remedied in the near future in order to avoid similar disputes from arising.<sup>174</sup>

There are a limited number of ways the problem between France and the United States can be addressed. On one hand, France can act alone by choosing one of several options.<sup>175</sup> On the other hand, France and the United States can take action collectively.<sup>176</sup> The international community can apply these collective actions on a global scale, and utilize them as a guidepost for the prosecution of many other Internet crimes.<sup>177</sup>

## A. RECOMMENDATIONS FOR FRANCE

### *1. France Should Prosecute its Own Citizens for Intentionally Accessing Forbidden Material*

France can remedy this international inconsistency in free speech rights by changing the focus of its enforcement of Penal Code R. 645-1.<sup>178</sup> Instead of focusing on prosecuting foreigners who post the

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171. *See id.* at 446 (stating that the French Yahoo! decisions alarmed businesses because of the inherent uncertainty of conflicting laws).

172. *See supra* notes 15-59 and accompanying text (explaining the freedom of speech afforded to U.S. citizens, and then explaining the lower level of freedom of speech afforded to French citizens).

173. *See supra* notes 154-55 and accompanying text (stating that German and Italian courts have required foreign citizens to defend speech law cases).

174. *See supra* notes 152-70 and accompanying text (explaining why it is so important to remedy this problem in the near future).

175. *See infra* notes 178-206 and accompanying text (offering three unilateral options that France can choose from in order to avoid this problem in the future).

176. *See infra* notes 207-36 and accompanying text (offering two solutions that would require France and the United States to work together, and would also be applicable on a more global scale).

177. *Id.*

178. *See supra* note 6 and accompanying text (explaining that this provision criminalizes, among other things, the selling of Nazi paraphernalia); *see also*

material that is considered illegal under R. 645-1, the French government should focus on prosecuting its own citizens who intentionally access such material.<sup>179</sup>

Since France enacted the code to protect its people, those citizens should have an active role in protecting themselves.<sup>180</sup> France should require citizens to filter material on the Internet on their own.<sup>181</sup> If a French citizen intentionally accesses Nazi-related material on the Internet, he or she should be prosecuted; the person who posted the material in the English language, on a server in the United States, intending access by domestic computer users only, should not be punished.<sup>182</sup> If France were to change the focus of its enforcement of R. 645-1, foreign companies' speech rights would maintain the protection they are afforded in the United States.<sup>183</sup> Foreign companies would enjoy a greater degree of confidence in supplying information on the Internet if French law focused on punishing

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*Yahoo!, Inc.*, 169 F. Supp. 1181 (exemplifying how France focuses its enforcement of R. 645-1 on foreign citizens who post material on the Internet, rather than focusing on its own citizens who access that forbidden material).

179. See May Tribunal Decision, *supra* note 7 (ordering Yahoo! to post a warning on Yahoo! France stating that searches on Yahoo.com could lead to sites containing material prohibited under French law); see also *supra* notes 97-101 and accompanying text (explaining the nature of the decision).

180. See Mailland, *supra* note 18, at 1184-85 (explaining the French government's belief that it should protect its people from the harm that viewing Nazi-related materials could cause).

181. See Powell III, *supra* note 32, at 41 (stating that in Sweden children are taught to filter material through ethical training, rather than parents using filtering software or Sweden imposing restrictions on freedom of expression).

182. See May Tribunal Decision, *supra* note 7 (ordering Yahoo! to post a warning on Yahoo! France stating that searches by French citizens on Yahoo.com could lead to sites containing material prohibited under French law); see also Ravazi & Samman, *supra* note 136, at 27 (explaining that charges against five newspaper directors were dropped because the accessibility of foreign Internet sites made it nearly impossible to enforce a law against publishing political polls during the week before an election). The article does not contain any indication that French law enforcement ever tried to prosecute the foreign citizen who posted the illegal poll information on the Internet. *Id.*

183. See *supra* notes 15-38 and accompanying text (explaining the vast freedom of speech rights afforded to citizens in the United States).

French citizens for viewing restricted materials on the Internet, rather than punishing those companies that make information available.<sup>184</sup>

Although France's approach may seem more efficient than seeking out its own citizens who access offensive material on the Internet, that assumption is not true.<sup>185</sup> The *Yahoo! Case*, for instance, did not follow an efficient path to the final U.S. district court decision.<sup>186</sup> The entire case took over a year and a half and the French organizations presumably spent a large sum of money fighting for their position, only to be defeated in the end.<sup>187</sup> Additionally, Yahoo! still has available some materials considered offensive under R. 645-1 and never had to pay the fines imposed by the Tribunal.<sup>188</sup>

## 2. France Should Repeal Penal Code R. 645-1

More than fifty years after World War II ended, French citizens are now curious about the truth of what really happened during that time period.<sup>189</sup> However, the search for historical truth is impeded by Penal Code R. 645-1, a law created by the French government to rid the nation of all symbols of the war.<sup>190</sup> The French public has

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184. See *supra* notes 163-66 and accompanying text (explaining how important predictability is to the Internet business community).

185. See *infra* notes 186-88 and accompanying text (describing why France's approach is not as efficient as it seems).

186. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184 (providing that the *Yahoo! Case* began when a cease and desist letter was sent by LICRA to Yahoo! on or about April 5, 2000, and that a decision was reached on November 7, 2001); Ravazi & Samman, *supra* note 136, at 27 (explaining that, after months of litigation and testimony, Yahoo! finally agreed to monitor its own site).

187. See *id.* at 1194 (noting that the U.S. decision was in favor of Yahoo!, Inc.).

188. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185 (explaining that, as of the Federal court's decision in November 2001, the Yahoo.com auction site still offered stamps, coins, a copy of *Mein Kampf*, and access to other sites which could reasonably have been "construed as constituting an apology for Nazism or a contesting of Nazi crimes").

189. See Peeler, *supra* note 58, at 359 (explaining that the need to know what really happened during the Occupation has been necessitated by the fact that the "postwar purge," a period of convicting war criminals, was "incomplete and insincere").

190. See French Penal Code R. 645-1 (outlawing the viewing or display of Nazi-related materials); see also Peeler, *supra* note 58, at 357 (explaining that after World War II the French government tried to remove all symbols of the war from

launched a debate surrounding this issue as citizens become more and more interested in the government's attempt to alter their memory of World War II.<sup>191</sup> The recent prosecution of former French government officials for war crimes motivated this interest.<sup>192</sup> After World War II, France chose to place all the blame on the Axis Powers in an attempt to avoid dealing with the involvement and culpability of its own government.<sup>193</sup> As a result, French history, as it is written today, is full of inaccuracies and half-truths.<sup>194</sup>

If R. 645-1 is repealed, French citizens can more easily learn the truth about World War II, without having to worry about being punished for discovering Nazi information.<sup>195</sup> A recent study showed that forty-five percent of French citizens believe the anti-Semitism of the French World War II government has not been sufficiently analyzed.<sup>196</sup> In a desire for freedom of information, France should grant its citizens the right to search for the truth by repealing R. 645-1.<sup>197</sup>

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the country in an attempt to hide the French government's involvement in deporting French Jews to concentration camps).

191. See Peeler, *supra* note 58, at 353-54 (stating that a political debate has been launched concerning the acts of France's government during World War II, and the "politics of memory," as the government tried to alter the citizens' historical views).

192. See *id.* at 354 (explaining that the impetus for French curiosity was the recent prosecution of former French government officials for war crimes committed during World War II).

193. See *id.* (explaining that the French previously chose to forget the government's involvement in the atrocities of World War II, and instead placed all the blame on the Axis Powers).

194. See *id.* at 358 (explaining that part of the historical inaccuracy is a myth that ignores the reality of France's war time divisions and represents to the people that all of France had been united in a common goal to fight and defeat Nazi Germany).

195. See *id.* at 359 (stating that the public's appetite for information about the Holocaust has increased since the twenty-fifth anniversary of the war prompted an examination).

196. See Peeler, *supra* note 58, at 369 (indicating that the recent study also showed forty-two percent of the people believed the French public does not thoroughly discuss the character of the French wartime government, also referred to as the Vichy).

197. See *supra* notes 189-96 and accompanying text (describing the reasons why France should repeal R. 645-1).

### 3. *France Should Follow the European Convention on Human Rights*

As a party to the European Convention on Human Rights, France has a duty to uphold that treaty's principles.<sup>198</sup> The Convention is modeled after the Universal Declaration of Human Rights and aims to secure the universal and effective recognition and observance of fundamental rights.<sup>199</sup> Article Ten of the Convention guarantees the citizens of all signed parties a right to Freedom of Expression, including the right "to hold opinions and to receive and impart information and ideas without interference" from governmental authorities.<sup>200</sup>

In accepting this Convention in the past, French courts have upheld citizens' rights of expression.<sup>201</sup> In 1998, the French criminal court relied on the European Convention on Human Rights in dismissing charges against five newspaper directors for violating laws that restrict freedom of speech in France.<sup>202</sup> In that case, the court also noted that since the illegal material could be viewed on

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198. See European Convention, *supra* note 132 (listing France as a Member State of the Council of Europe and as a signed member of this Convention). Article One of the Convention states that the parties to the treaty shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I, which includes Article Ten's guarantee of freedom of speech. *Id.* art. 1.

199. See *supra* notes 132-35 and accompanying text (explaining that France is a member of the European Council and that the aim of the Convention is to secure human rights for all citizens of signed States).

200. See European Convention, *supra* note 132, art. 10 (granting everyone the right to freedom of expression).

201. See Ravazi & Samman, *supra* note 136, at 27 (explaining a case where the French criminal court dismissed charges against five newspaper directors for violating a law that restricts freedom of speech by outlawing the publication of political polls during the week before an election). The charges were dismissed on the grounds that the law itself conflicted with the ideals of the European Convention on Human Rights. *Id.*

202. See *supra* notes 136-41 and accompanying text (explaining how French courts have acknowledged the protections afforded in the Convention in the past, and that there was no explanation in the *Yahoo!* decision as to why the outcome was different this time).

foreign websites, the prosecutor's efforts to enforce the law against publication were inconsequential.<sup>203</sup>

If France were serious about its obligations under the Convention on Human Rights, it would grant more liberal freedom of speech to its citizens and would do so more consistently.<sup>204</sup> Following the provisions of the Convention would involve the repeal or non-enforcement of R. 645-1.<sup>205</sup> R. 645-1 is inconsistent with the Convention because it restricts French citizens and others around the world from posting, viewing, or reading on the Internet, materials or opinions related to the history of World War II, specifically those relating to the impact of the Nazis on Europeans of Jewish faith.<sup>206</sup>

## B. RECOMMENDATIONS INVOLVING COLLECTIVE ACTION

### 1. The "Country of Origin" Principle

Another feasible method of dealing with the problem would be for France and the United States to act collectively by agreeing that speech and other expression over the Internet will be regulated by authorities in its place of origin.<sup>207</sup> This "Country of Origin"

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203. See *id.* (noting that the law forbids publishing of political polls during the week before an election, but that a foreign citizen posted the polls on a foreign website, accessible in France).

204. See *id.* (noting the inconsistency between the decision involving the newspaper directors and the *Yahoo!* decision).

205. See *supra* notes 189-97 and accompanying text (reasoning why the French Penal Code R. 645-1 should be repealed).

206. See *supra* notes 142-44 and accompanying text (explaining that French citizens want to learn the real history of what happened in their country during World War II, and that their efforts are hampered by laws such as R. 645-1).

207. See Council Directive 2000/31, paras. 1-5, 2000 O.J. (L 178) [hereinafter E-Commerce Directive] (discussing certain legal aspects of information society services, in particular electronic commerce, in the internal market of the European Community), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_178/l\\_17820000717en00010016.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf) (last visited Oct. 12, 2002). The directive suggests implementation of the "Country of Origin" principle. *Id.* paras. 5, 22. See also Goodger, *supra* note 65, at 419 (explaining the suggestions of the E-Commerce Directive, one of which is the "Country of Origin" principle). The principle means, in broad terms, that a website operator would have a duty to follow only the domestic laws of the location where his website is established. *Id.*

principle would provide website operators more assurance, knowing they need only comply with the laws of the nation where their website is established.<sup>208</sup>

If France and the United States agreed to apply the "Country of Origin" principle, businesses in the United States would be required to follow only the regulations placed on speech and the Internet by the laws of the United States.<sup>209</sup> These businesses, including both small start-ups and large companies such as Yahoo!, could avoid being concerned about researching and following the details of French speech and Internet laws.<sup>210</sup>

In considering the effects of this recommendation, it would appear that one nation could not object if aspects of foreign websites varied from domestic laws.<sup>211</sup> For example, the existence of child pornography has grown due to the advantages of the Internet.<sup>212</sup> The United States has laws that more strictly limit the creation, possession, and distribution of child pornography than many other nations.<sup>213</sup> In keeping with the "Country of Origin" principle, citizens

208. See Goodger, *supra* note 65, at 419 (explaining that the principle is to be applied within the European community and will help solve some Internet related problems).

209. See *supra* notes 154-55 and accompanying text (indicating the importance of predictability for companies doing business over the Internet).

210. *Id.*

211. See E-Commerce Directive, *supra* note 207, arts. 16-20 (explaining how the "Country of Origin" principle would be applied).

212. See William R. Graham, Jr., *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding and Avenues Facilitating Law Enforcement's Access to 'Wonderland'*, 2000 L. REV. MICH. ST. U. DET. C.L. 457, 465 (2000) (discussing child pornography rings on the Internet). The three advantages of the Internet for child pornography rings are: (1) the rapid transfer of files and images; (2) relatively high security; and (3) almost complete anonymity. *Id.* See also Mehagen Doyle, *Bad Apples in Cyberspace: The Sexual Exploitation and Abuse of Children Over the Internet*, 21 WHITTIER L. REV. 119 (1999) (explaining that law enforcement is complicated when it comes to child pornography over the Internet).

213. See Doyle, *supra* note 212, at 137 (stating that the United States is one of the most aggressive countries in dealing with child pornography); see also Jennifer Stewart, *If This is the Global Community, We Must be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205, 225 (1997) (opining that "the United States has been the bellwether for other nations regarding child pornography legislation").

of another nation could post offensive child pornography images on the Internet and the United States would be unable to object.<sup>214</sup>

The problems associated with the implementation of this recommendation, however, are not as inevitable as they may seem.<sup>215</sup> First, since almost every nation in the world has laws that restrict child pornography, each has an interest in prosecuting its own citizens.<sup>216</sup> Therefore, the United States would still be able to object to child pornography on the Internet by informing authorities in the offender's nation, who would then likely agree to prosecute.<sup>217</sup> In some instances, the United States has worked collectively with other nations to bring down international child pornography rings.<sup>218</sup>

Second, the United States also has extradition agreements<sup>219</sup> with nations such as Russia and Korea, for the purpose of prosecuting child pornographers.<sup>220</sup> Third, child pornography is viewed globally

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214. See Goodger, *supra* note 65, at 419 (explaining the "Country of Origin" principle). The principle means in broad terms that a website operator would have a duty to follow only the domestic laws of the jurisdiction in which the website is established. *Id.*

215. See *infra* notes 216-23 and accompanying text (discussing why the "Country of Origin" principle will not have the negative effect on the United States that may first be apparent).

216. See, e.g., Doyle, *supra* note 212, at 133-37 (listing as examples of those countries with laws regarding child pornography: the Netherlands, Germany, France, Taiwan, Singapore, Australia, Canada, and the United States).

217. See Graham, Jr., *supra* note 212, at 471 (discussing which nations have launched aggressive counter offenses to the proliferation of child pornography on the Internet).

218. See *Global Raids Target Child Porn*, CNN.com (Nov. 28, 2001) (reporting that police in nineteen countries, including the United States, worked together to execute search and arrest warrants, in a global sweep against Internet child pornography), *at* <http://www.cnn.com/2001/WORLD/europe/11/28/world.arrests/index.html> (last visited Oct. 12, 2002); *Interpol Targets Child-sex Ring*, CNN.com (Mar. 20, 2002) (reporting the success of a major international police investigation, including authorities from the United States and nine other countries, into a pedophile ring operating on the Internet, that resulted in twelve arrests), *at* <http://www.cnn.com/2002/WORLD/europe/03/20/interpol.paedophiles/index.html> (last visited Oct. 12, 2002).

219. See Graham, Jr., *supra* note 212, at 470-71 (noting that the United States currently has such treaties with Hong Kong, Russia, and Korea).

220. Such prosecution agreements and extradition agreements would not be feasible in the *Yahoo! Case*. I do not suggest that the United States would agree to

as a universal crime.<sup>221</sup> Thus, international efforts have been undertaken, such as the United Nations Convention on the Rights of the Child,<sup>222</sup> ratified by 198 countries, to prevent exploitative use of children in pornographic materials.<sup>223</sup> Since many other nations are also involved in fighting child pornography, the effects of the "Country of Origin" principle on the United States are not nearly as negative as they first appear.

Not only can the "Country of Origin" principle be applied to resolve problems between France and the United States, but it can also be applied globally.<sup>224</sup> If various nations were to organize an international conference concerning the Internet, they could create an agreement that all information posted on or transferred through the Internet be regulated by authorities of the country in which it originated.<sup>225</sup> If nations had an interest in resolving specific issues with other particular nations, these reservations could be appended to the agreement.<sup>226</sup>

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either prosecute its own citizens for violation of French speech laws, or to extradite its own citizens to France for prosecution.

221. See Graham, Jr., *supra* note 212, at 478-79 (explaining that child pornography is reasonably considered a universal crime).

222. See Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/44/49 (1989), 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

223. See Doyle, *supra* note 212, at 120 (discussing the use of the term "child" as articulated in the Convention on the Rights of the Child ("CRC") that was supported by 198 countries as one possible avenue to preventing child pornography on the Internet). The vast majority of the world is concerned about fighting child pornography. *Id.* at 131. The 1993 Vienna World Conference on Human Rights also sought to make the sexual exploitation of children an international criminal offense, with international criminal jurisdiction. *Id.* at 142. See also World Conference on Human Rights, Jun. 14-25, 1993 (explaining that the Conference took historic new steps to promote and protect the rights of children, by calling for the universal ratification of the CRC), available at <http://www.unhchr.ch/html/menu5/wchr.htm> (last visited Oct. 12, 2002).

224. See *supra* notes 198-200 and accompanying text (explaining how the original suggestion for such a solution was to be applied to all member states of the European Council).

225. *Id.*

226. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (1987) (stating that a state may enter a reservation to a multilateral international agreement, except in specified instances).

## 2. An International Court for Internet Issues

Another way to resolve similar future disputes between nations involving speech over the Internet, is to create an International Court for Internet issues.<sup>227</sup> Such an International Court could adequately address the inherent jurisdictional problems of Internet crimes, such as the one at issue in the *Yahoo! Case*.<sup>228</sup> In addition, an International Court for Internet crimes could provide significant benefits for law enforcement officials worldwide.<sup>229</sup> Some advantages would include the “establishment of a neutral forum, the consolidation of the case in one location rather than subjecting the parties to multiple locations, and the free flow of evidence between countries.”<sup>230</sup> This type of forum “may best serve everyone’s interests.”<sup>231</sup>

However, there are problems inherent in the creation of an International Court on the Internet.<sup>232</sup> First, there may not be broad acceptance of the authority of such a court.<sup>233</sup> Second, lacking any sort of precedent, parties would be uncertain as to potential outcomes

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227. See Neil D. Schwartz, *Wall Street? Where We’re Going We Don’t Need Wall Street: Do Securities Regulators Stand a Chance in Cyberspace?*, 8 J. TRANSNAT’L L. & POL’Y 79, 103 (1998) (recognizing that scholars have called for the creation of an international criminal court for cyber-based crimes).

228. See Howard L. Steele, Jr., *The Web that Binds Us All: The Future Legal Environment of the Internet*, 19 HOUS. J. INT’L L. 495, 512 (1997) (explaining that an international court for the Internet could adequately address the inherent jurisdictional problems in Internet crimes, but that this would inevitably change the way international crimes are prosecuted). An international court would also provide assistance to law enforcement officials working to stop child pornography on the Internet. *Id.* at 513.

229. See Schwartz, *supra* note 227, at 103-04 (explaining the benefits of an International Internet Court for securities regulation, a concept that can also be applied to the regulation of speech over the Internet).

230. *Id.* (noting these benefits and acknowledging some problems as well).

231. *Id.* at 103 (explaining that the advantages of an International Court for international securities transactions could serve everyone’s needs).

232. See *id.* (discussing various problems that could arise if an International Court on the Internet were created).

233. See *id.* (acknowledging problems with an International Court on Internet Crime to include: lack of acceptance, politization, and lack of confidence in its ability to punish criminals).

in cases brought before the court.<sup>234</sup> For instance, in the *Yahoo! Case*, neither party could know ahead of time which values the International Court would prefer—protection of freedom of speech, or the protection of citizens by limiting what could be posted on a website.<sup>235</sup> Such an International Court could have some benefits in resolving Internet-related disputes, but the problems may currently outweigh the advantages.<sup>236</sup>

## CONCLUSION

Freedom of speech is given drastically different levels of protection in the United States and France.<sup>237</sup> In the United States, freedom of speech has great importance and is highly protected.<sup>238</sup> However, in France, the government can restrict speech in various ways and has limited citizens' rights to speak through the enactment of laws such as Penal Code R. 645-1.<sup>239</sup>

This international inconsistency of freedom of speech laws, coupled with the explosive growth of the Internet, has caused a problem of great magnitude concerning speech over the Internet.<sup>240</sup> The problem has affected not only France and the United States, but also many other countries of the world.<sup>241</sup> The Internet is here to stay

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234. See *supra* notes 154-55 and accompanying text (explaining the importance for businesses of being certain about outcomes of potential litigation).

235. *Id.*

236. See *supra* notes 227-36 and accompanying text (discussing the advantages and problems that would arise if an International Court for Internet Issues were created).

237. See *supra* notes 15-59 and accompanying text (explaining the rights to freedom of speech afforded to citizens of the United States as opposed to those afforded the citizens of France).

238. See *supra* notes 15-38 and accompanying text (explaining the expansive protection of freedom of speech in the United States).

239. See *supra* notes 39-59 and accompanying text (explaining the limits on freedom of speech that the French government has put in place).

240. See *supra* notes 67-71 and accompanying text (discussing the problems that have arisen because of the international inconsistency of freedom of speech laws).

241. See *supra* notes 154-55 and accompanying text (describing instances in Germany and Italy where foreign citizens were brought to court for violations of national speech laws).

and will affect our lives into the future as it grows and changes.<sup>242</sup> Therefore, a solution must be reached in order to avoid future disputes such as that involved in the *Yahoo! Case*.<sup>243</sup> France has several unilateral options to choose from, or it can work in conjunction with the United States, so future disputes over speech on the Internet can be easily resolved.<sup>244</sup> Other nations could also apply any collective action between France and the United States, to resolve this problem on a larger scale.<sup>245</sup>

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242. See *supra* notes 156-61 and accompanying text (explaining the future of the Internet and its impact on our lives and society as a whole).

243. See *supra* notes 152-70 and accompanying text (describing why a solution should be reached soon).

244. See *supra* notes 171-236 and accompanying text (describing several different steps that France can take in order to avoid another *Yahoo! Case*, and also suggesting two ways that collective action can be taken between France and the United States or between any countries of the world).

245. See *supra* notes 207-36 and accompanying text (describing two ways that an number of nations can use to settle future disputes concerning speech over the Internet).