

# Freedom of Expression, Internet Responsibility, and Business Ethics: The Yahoo! Saga and Its Implications

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**Abstract** In the late 1990s, the Internet seemed a perfect medium for business: a facilitator of unlimited economical propositions to people without any regulatory limitations. Cases such as that of Yahoo! mark the beginning of the end of that illusion. They demonstrate that Internet service providers (ISPs) have to respect domestic state legislation in order to avoid legal risks. Yahoo! was wrong to ignore French national laws and the plea to remove Nazi memorabilia from its auction site. Its legal struggle proved futile and may have harmed its business. This essay argues for the adoption of standards of corporate social responsibility (CSR). CSR considerations may trump some forms of antisocial, highly offensive expression.

**Keywords** Internet · Yahoo! · Nazi memorabilia · Corporate social responsibility (CSR) · Business ethics

## Introduction

In his cyber law scholarship, Lessig (1999, pp. 43–44) distinguishes between two claims. One is that, given its architecture, it is difficult for governments to *regulate behavior* on the Internet. The other is that it is difficult for governments to *regulate the architecture of the Internet*. The first claim is true; the second is not. It is not hard for governments to take steps to alter Internet architecture and, in so doing, facilitate regulation of Internet behavior.

In the late 1990s, the Internet seemed a perfect medium for business: supranational, diffusive, with wide distribution and little regulation, offering enormous opportunities to investors. In his famous “declaration of the independence of cyberspace,” the Internet theorist John Perry Barlow wrote,

Governments of the Industrial World, you weary giants of flesh and steel.... You have no sovereignty where we gather. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. Cyberspace does not lie within your borders.<sup>1</sup>

Cases such as that of Yahoo! mark the beginning of the end of the no-sovereignty illusion. They demonstrate that Internet service providers (ISPs) have to respect domestic state legislation in order to avoid legal risks. An ISP is a company or other organization that provides a gateway to the Internet, enabling users to establish contact with the public network. Many ISPs also provide e-mail service, storage capacity, proprietary chat rooms, and information regarding news, weather, finance, social and political events, travel, and vacations. Some offer games to their subscribers and provide opportunities for shopping. Yahoo! is one of the most popular search engines and websites in the world. The company also provides multiple other web services, including a directory (Yahoo! Directory), email, news, maps, advertising, an auction site, and video sharing (Yahoo! Video).<sup>2</sup>

The Yahoo! controversy juxtaposes two contrasting views: Yahoo!’s Internet-separatist view that it can engage in commerce as it chooses notwithstanding national laws

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<sup>1</sup> “The Internet’s new borders” (2001); Shea (2006, p. K4).

<sup>2</sup> <http://everything.yahoo.com/>; <http://uk.yahoo.com/?p=us>.

and morals, versus the view that countries have the right and ability to assert their sovereignty on the Internet. This essay argues for the adoption of standards of corporate social responsibility (CSR), under which limits are placed upon free expression in the interest of furthering goals of social responsibility. CSR on the Internet, especially when it concerns ISPs, may require limiting some information deemed by sovereigns to be antisocial and offensive (for further discussion, see Levmore and Nussbaum 2010).

In his seminal work, Bowen (1953, p. 6) defined CSR as the obligations of business people to make decisions, to pursue policies, or “to follow those lines of action which are desirable in terms of the objectives and values of our society.” The Internet is international in character, but it is susceptible to the constraints of national laws. There is not one law for the Internet and another for all other forms of communication.

This essay comprises four parts: First (I), the Yahoo! saga as it unfolded in France and the USA is described in detail. Next (II), a comparative legal dimension is provided, explaining how different countries address the challenge of hate and racist speech. Part III considers the business dimension of the Yahoo! affair. Finally, part IV discusses responsible terms of service that Internet companies can employ that prohibit antisocial, violent content on their servers.

## The Yahoo! Saga

Sales of Nazi merchandise are against the law in France, which strictly prohibits the selling or displaying of anything that incites racism. The French Criminal Code prohibits the display of Nazi symbols.<sup>3</sup> The Yahoo! saga started in February 2000 when Marc Knobel, director of the International League against Racism and Anti-Semitism (Ligue Internationale Contre le Racisme et l'Antisémitisme, LICRA) and a member of the Observatory of Anti-Semitism, went to the Yahoo! auction site and saw pages of Nazi-related paraphernalia. The site featured swastika armbands, SS daggers, concentration camp photos, striped uniforms once worn by Nazi camp prisoners, and replicas of Zyklon B gas canisters (Crumm and Capeloto 2000, p. A1; Reuters 2002, p. C4). Sales of Nazi merchandise are against French law. Knobel acknowledged that the auctions might be legal in the USA, but believed them to be absolutely illegal within the borders of France.<sup>4</sup>

In April 2000, LICRA together with two other organizations, Union des Etudiants Juifs de France (UEJF) and

Mouvement contre le Racisme, l'Antisémitisme et pour la Paix (MRAP), asked Yahoo! to either remove the Nazi memorabilia from its American websites or make all such auctions inaccessible to web surfers in France and its territories such as Martinique and French Guyana in accordance with its own terms of service agreement, which prohibited netusers from posting content that was “hateful, or racially, ethnically or otherwise objectionable.”<sup>5</sup> If it did not, the organizations asked that the California-based company be fined US \$96,000 for each day of noncompliance. Ronald Katz, a lawyer representing the French groups, asserted: “There is this naïve idea that the Internet changes everything. It doesn't change everything. It doesn't change the laws in France.”<sup>6</sup>

Yahoo! did not respond to the demands, and legal action commenced. At the first hearing in the Tribunal de Grande Instance de Paris on May 15, 2000 defending counsel Christophe Pecard noted that Yahoo! maintained a French-language website (Yahoo!.fr) that complied with French law. He argued that “Internet users who go to Yahoo.com undertake a virtual voyage to the US.,” so no offense could be said to take place in France (Le Menestrel et al. 2002, pp. 135–144). In any case, he said, it would be technically impossible for Yahoo! to block all access to its sites from France. Yahoo! claimed that it had no power to identify the national origins of its customers and thus no control over where in the world its digital products went. Were Yahoo! forced to comply with French law, it would need to remove the Nazi items from all its servers, thereby depriving Yahoo! users everywhere from buying them, and making French law the effective rule for the world (Goldsmith and Wu 2006, p. 5). In response, the plaintiffs' lawyer, Stéphane Lilti, asserted that France had the sovereign right to prohibit the sale of Nazi merchandise within its borders, and argued that Yahoo! should not be exempt from French law (Le Menestrel et al. 2002).

## The Court Orders

On May 22, 2000 Judge Jean-Jacques Gomez ruled that Yahoo!'s sales were “an offense to the collective memory of a nation profoundly wounded by the atrocities committed in the name of the Nazi criminal enterprise.”<sup>7</sup> He rejected all of Yahoo! Inc.'s jurisdiction-related arguments, holding that, though the Yahoo!.com site was located on a server in California, and perhaps intended for an American

<sup>5</sup> <http://uk.docs.yahoo.com/info/terms.html/>.

<sup>6</sup> Guernsey (2001), <http://query.nytimes.com/gst/fullpage.html?res=9B01E7D71F3AF936A25750C0A9679C8B63>.

<sup>7</sup> *LICRA v. Yahoo! Inc. and Yahoo! France* (Tribunal de Grande Instance de Paris, 2000), affirmed in *LICRA and UEJF v. Yahoo! Inc. and Yahoo! France* (Tribunal de Grande Instance de Paris, 2000), [www.foruminternet.org/actualities/lire.phtml?id=273](http://www.foruminternet.org/actualities/lire.phtml?id=273).

<sup>3</sup> Section R645-1 of French Criminal Code.

<sup>4</sup> “Yahoo! sued for Nazi-item auctions,” <http://www.usatoday.com/life/cyber/tech/cth715.htm>.

audience, harm was suffered in French territory, and Yahoo! auctions were not protected in France by the USA's First Amendment. Judge Gomez ordered Yahoo! Inc. "to take all measures such as would dissuade and render impossible all consultations on yahoo.com of the service of auctioning of Nazi objects as well as any other site or service which constitute an apology of nazism or which contest the nazi crimes."<sup>8</sup> In other words, the French Court said that there can be no apology for Nazi crime, and that it is impossible to contest or downplay the horrific magnitude of evil-doing that had happened. Nazi crimes should be condemned without any reservation. Yahoo! Inc. was ordered to prevent access from French territory to the Nazi objects and hate speech sites in question, or face a penalty of 100,000 francs per day for noncompliance (Kohl 2007, pp. 201–202).

In reaction to this court judgment, Heather Killen, a Yahoo! vice president, commented: "It's very difficult to do business if you have to wake up every day and say 'OK, whose laws do I follow?'... We have many countries and many laws and just one Internet."<sup>9</sup> Yahoo! argued that, even if French officials identified and blocked the offending offshore website, the same information could be posted on mirror sites outside France (Goldsmith and Wu 2006, p. 2), and to keep out the Nazi pages, France would need to shut down every single Internet access point within its borders. Furthermore, even this would not be completely effective because determined users in France could access the Internet by a telephone call to an Internet access provider in another country (Goldsmith and Wu 2006, p. 3). Yahoo! cofounder Jerry Yang did not believe that one country's laws should regulate the Internet in other parts of the world, and asserted that asking Yahoo! to filter access to its sites according to the nationality of web surfers was "very naive" (Love 2000, p. C6). Later it became clear that it was Yang who was naive. France instantiated new legal standards for the Internet which came into conflict with Yahoo!'s business practices.

Marc Levy, who represented the International League against Racism and Anti-Semitism, observed that "freedom of expression is not unlimited... The law does not permit racism in writing, on television or on the radio,

and I see no reason to have an exception for the Internet."<sup>10</sup> Yahoo!, he said, should not be exempt from laws in the countries where it does business. Levy expressed "great satisfaction" with the ruling, saying the judge had "rendered a service to the Internet," which otherwise ran the risk of becoming a "no-law zone."<sup>11</sup>

Judge Gomez gave Yahoo! 2 months to figure out how to block French surfers from the disputed auction sites. During this interval, Cyril Houri, the founder of a fledgling American firm called Infosplit, contacted the plaintiff's lawyer, Stéphane Lilti, and told him that he had developed a new technology that could identify and screen Internet content on the basis of its geographical source.<sup>12</sup> Using this technology he learned that the Yahoo! servers accessed by netusers in France, which the firm had claimed were protected by the US First Amendment to the US Constitution, were actually located on a website in Stockholm, Sweden. Yahoo! placed constantly updated "mirror" copies of its US site on servers in Sweden to make access to it in Europe faster.<sup>13</sup>

When the trial resumed on July 24, 2000, Yahoo! lawyers again asserted that it was technically impossible to identify and filter out French visitors to the firm's US-based websites. "It's technically not in Yahoo!'s power to do this," said Armando Fox, a computer science professor at Stanford University. He added: "All Yahoo! sees is an IP address, and anyone can set up a tunneling proxy to change an IP address. There's no way to reliably map an incoming connection" (Yahoo! Ruling Exposes Risks of Being Global 2000). Attorneys for the company said they had pulled Third Reich paraphernalia from their France-based site, Yahoo.fr. and added warnings to pages with sensitive material, alerting French netusers that they risked breaking French law by viewing them.<sup>14</sup>

However, this solution was not acceptable to the plaintiffs because it was still possible to buy the illegal items via the US server. In addition, Lilti raised Houri's geolocation technology with the court, alleging that Yahoo! auctions in France were not in fact coming from American servers, and that the assumption that every web page was equally accessible to every netuser everywhere in the world was

<sup>8</sup> *La Ligue Contre le Racisme et l'Antisémitisme (L.I.C.R.A.) and L'Union des Etudiants Juifs de France (U.E.J.F.) v. Yahoo! Inc. and Yahoo! France*, Interim Court Order, The County Court of Paris 6 (2000). The Superior Court of Paris reiterated this in its 20 November 2000 order. The original and English translation are provided in the Appendix to the Complaint for Declaratory Relief in *Yahoo! Inc. v. L.I.C.R.A. and U.E.J.F.*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. 00-21275).

<sup>9</sup> "Online Auction of Nazi items sparks debate issue: National laws on global Web" (2000).

<sup>10</sup> Dembart (2000), <http://www.iht.com/articles/2000/05/29/tfrance.2.t.php>.

<sup>11</sup> "French court says Yahoo broke racial law" (2000), <http://query.nytimes.com/gst/fullpage.html?res=9E00E2D61E3AF930A15756C0A9669C8B63&n=Top/Reference/Times%20Topics/Subjects/A/Auctions>.

<sup>12</sup> [http://www.implu.com/patent\\_application/20080275978](http://www.implu.com/patent_application/20080275978).

<sup>13</sup> Cyril Houri to Jack Goldsmith, personal communication (September 7, 2004). Quoted in Goldsmith and Wu (2006, p. 7).

<sup>14</sup> Associated Press (2000a, p. A5). However, while Yahoo! removed the items from the commercial auction site it still continued to allow them to be sold in chat rooms accessible worldwide. See Egelko (2005, p. C3).

simply wrong. If Yahoo! could target French users from Swedish servers, Lilti argued, it could potentially identify netusers by geographic location and screen them out (Goldsmith and Wu 2006, p. 7).

In August 2000, Judge Gomez appointed three Internet experts—Vinton Cerf, considered to be the “father” of the Internet, Ben Laurie, a British Internet expert, and Francois Wallon, a French technologist—to assess the extent to which Yahoo! could block transmissions into France. The experts concluded that it was possible to locate 70% of netusers, a figure that could be increased by 20% if Yahoo! asked the users who requested the illegal content to declare their nationality.<sup>15</sup> The three experts also suggested that netusers could be forced to declare their geographical location and to answer certain questions if they used key words such as “Nazi” in their searches. While Vinton Cerf expressed some philosophical reservations about the proposals, he admitted they were technically feasible (Cue 2001, p. 1).

In November 2000, Judge Gomez reaffirmed his May 22 order and ruled that Yahoo! was avoiding a moral and ethical exigency that all democratic societies share.<sup>16</sup> In his final ruling on November 20, Gomez said Yahoo! had already prohibited the sale of human organs, cigarettes, live animals, drugs, and used underwear. He observed that it would cost the company very little to extend the list of banned goods to include Nazi symbols, and that doing so “would have the merit of satisfying an ethical and moral standard shared by all democratic societies” (Cue 2001, p. 1). He noted that Yahoo! welcomed French visitors to its US website with French-language advertisements, which showed that Yahoo! was tailoring content for France, and that it could, at least to some extent, identify and screen netusers by geography.<sup>17</sup> Marc Knobel said in reaction: “The French justice system has heard us... It is no longer OK for online retailers to say they are not affected by existing laws.” He maintained that, if global Internet companies were not willing to put “ethics and morals” first themselves, they would be forced to do so.<sup>18</sup>

Yahoo! Inc. was again directed to satisfy the terms of Judge Gomez’s previous order within 3 months, or pay a fine of FF 100,000 (about US \$13,600) per day thereafter if they failed to comply with its legal obligations.<sup>19</sup> Yahoo! representatives responded by challenging the legitimacy of the proceedings and verdict (Associated Press 2000b, p. 3D; Vick 2005, pp. 41–42).

Yahoo! knew it was violating French law. Its managers knew that Nazi paraphernalia was highly offensive to the French people, especially the Jews after the Holocaust. Yet Yahoo! preferred to behave as if American legal norms applied globally.

#### American Salvation?

After realizing that Yahoo! could not win in France, the company directors decided to seek help on its home soil, thinking that an American court would decline to enforce the French judgment against the company and would grant Yahoo! permission to continue its unfettered business practices on the global Internet. Yahoo! filed suit against LICRA and UEJF in federal district court, seeking a declaratory judgment that the interim orders of the French court were not enforceable in the USA.<sup>20</sup> In January 2001, after both interim orders had been entered by the French court, and after Yahoo! had filed suit in federal district court, Yahoo! adopted a new policy prohibiting use of auctions or classified advertisements on Yahoo.com to offer or trade in items associated with groups principally known for hateful and violent positions directed at others, based on race or similar factors. Yahoo! pulled all Nazi, Ku Klux Klan, and similar items associated with hatred and violence from its auction sites, announcing that it “will no

<sup>15</sup> Union des Etudiants Juifs de France, TGI Paris (Feb 1, 2001), Nov. 20, 2000, Ord. ref., J.C.P. 2000, Actu., 2219; Piazza (2001, p. 38).

<sup>16</sup> Conclusions pour la Société Yahoo! Inc., “A Monsieur le Président du Tribunal de Grande Instance de Paris,” Audience de référé du 15 mai 2000: 18.

<sup>17</sup> *La Ligue Contre le Racisme et l'Antisémitisme (L.I.C.R.A.) and L'Union des Etudiants Juifs de France (U.E.J.F.) v. Yahoo! Inc. and Yahoo! France*, Interim Court Order, The County Court of Paris 6 (2000). <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm>; <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm>. For critical discussion, see Corn-Revere (2003).

<sup>18</sup> *LICRA et UEJF v Yahoo! Inc.*, Ordonnance Référé, TGI Paris (2000), Ord. ref., J.C.P. 2000, Actu., 2219, at [www.lapres.net/yahen11.html](http://www.lapres.net/yahen11.html); see also Essick (2000), [http://www.pcworld.com/article/35419/judge\\_to\\_yahoo\\_block\\_nazi\\_goods\\_from\\_french.html](http://www.pcworld.com/article/35419/judge_to_yahoo_block_nazi_goods_from_french.html).

<sup>19</sup> Two days after Judge Gomez decided the Yahoo! case, another judge rendered his verdict on similar facts and issues against UEJF. In this case, Multimania hosted a website entitled “nsdap” (an acronym for the Nazi party) whose content related to Adolf Hitler, the Nazi ideology, Nazi texts, and symbols. Once on notice, Multimania removed access to the website. Multimania had also supervised the websites it hosted by use of a search engine and keywords relating to usual illegal content found on the Internet. However, Multimania had not used the acronym “nsdap” for its search. The court found that Multimania acted reasonably and promptly given its competence and the technical means available to detect illegal content. Unlike Yahoo!, Multimania acted in good faith, and the court held that it was not liable. See *Ass’n Union des Etudiants Juifs de France v. SA Multimania Prod.*, Tribunal de grande instance de Nanterre (2000), [http://translate.google.co.uk/translate?hl=en&sl=fr&u=http://www.juriscom.net/txt/jurisfr/cti/tginanterre20000524.htm&sa=X&oi=translate&resnum=2&ct=result&prev=/search%3Fq%3DMultimania%2Bnsdap%26hl%3Den%26rlz%3D1T4SKPB\\_enGB304GB304](http://translate.google.co.uk/translate?hl=en&sl=fr&u=http://www.juriscom.net/txt/jurisfr/cti/tginanterre20000524.htm&sa=X&oi=translate&resnum=2&ct=result&prev=/search%3Fq%3DMultimania%2Bnsdap%26hl%3Den%26rlz%3D1T4SKPB_enGB304GB304); see also Amadei (2001/2002, p. 189). In *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831 (2000), a Canadian website was enjoined from transmitting copyrighted programming material into the USA.

<sup>20</sup> Reidenberg (2005, p. 1959) argues that Yahoo! introduced a misleading translation of the French decision at the district court.



longer allow items that are associated with groups which promoted or glorify hatred and violence, to be listed on any of Yahoo!'s commerce properties.”<sup>21</sup> Yahoo! also said it would start a new policy that included having trained representatives monitoring the site regularly. In addition, Yahoo! would use software to identify potentially objectionable items.<sup>22</sup> Because of these actions that brought Yahoo! into substantial compliance with French law, the fines were not imposed.

In November 2001, the US District Court for the Northern District of California considered the important differences between the French legal norms and the American First Amendment and ruled that the Yahoo! order could not be enforced in the USA. Judge Jeremy Fogel concluded that the French ruling was inconsistent with the First Amendment, and held that, while France could regulate speech in its territory, “this court” would not enforce a foreign order that violated the protections granted under the US Constitution. Yahoo! showed that the threat to its constitutional rights was real and immediate.<sup>23</sup>

The litigation culminated in January 2006 with a lengthy and fractured opinion by an en banc panel of the US Court of Appeals for the Ninth Circuit.<sup>24</sup> Eight of the 11 judges concluded that the District Court had personal jurisdiction over the French organizations but, notwithstanding its view of the jurisdictional issue, 3 of the 8 judges also concluded that Yahoo!'s claim was not “ripe for adjudication” and should be dismissed on those grounds. Because LICRA and UEJF had not sought enforcement of the French court's orders in the USA, the French court may not impose a fine even if they do ask for one, and it is unlikely a US court would enforce such a fine even if a French court imposed one. Enforcement is unlikely “not because of the First Amendment, but rather because of the general principle of comity under which American courts do not enforce monetary fines or penalties awarded by foreign courts.”<sup>25</sup> Though 5 of those 8 judges did think Yahoo!'s case was “ripe,” 3 of the court's 11 judges concluded that the District Court did not have personal jurisdiction over the French organizations. Since a majority of judges (6 of the 11) voted to dismiss the case for one reason or another, dismissed it was. Yahoo! did not receive the judicial support it was hoping for.

## Comparative Legal Dimension

As an American company, Yahoo! relied in its business model upon a First Amendment view of freedom of expression. The First Amendment is enshrined in the American legal and political culture. It explicitly instructs: “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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>26</sup> This is a sharp and uncompromising statement, leading American scholars and judges to argue that no law means no law (Dennis et al. 1978; Konvitz 1963, pp. 393–506; Shapiro 1966, p. 87; Martin 1961, p. 109; Brown 2011, <http://www.firstamendmentcoalition.org/2011/03/opinion-no-law-means-no-law-when-it-comes-to-protecting-npr-and-the-first-amendment/>). One of the preeminent American justices of the Supreme Court, Black (1960, p. 879), asserted in a classic article his belief that the Constitution “with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere.” The First Amendment was designed to guarantee the freest interchange of ideas about all public matters. If the Constitution withdraws from Government all power over subject matter in areas such as speech, press, assembly, and petition, wrote Black (1960), “there is nothing over which authority may be exerted.”<sup>27</sup>

Another iconic legal authority, Meiklejohn (1965, p. 107), asserted that the First Amendment declares that, with respect to belief, political discussion, political advocacy, and political planning, the citizens are the sovereign, and the Congress is their subordinate agent. Meiklejohn (1965, p. 124), coined the saying that “to be afraid of any idea is to be unfit for self-government.” According to this view, the public responsibilities of citizenship in the free world are in a vital sense beyond the reach of any legislative control. Consequently, freedom of expression in the American tradition occupies an especially protected normative position. Generally speaking, expression is perceived as doing less injury to other social goals than action. It has less immediate consequences, and is less irremediable in its impact (Emerson 1970, pp. 9, 292).<sup>28</sup> Only when expression might immediately translate to

<sup>21</sup> Editorial (2001, p. 22); Wolverton and Pelline (2001), <http://news.com.com/2100-1017-250452.html?legacy=cnet>.

<sup>22</sup> Ibid.

<sup>23</sup> *Yahoo! Inc. v. La Ligue Contre le Racisme Yahoo! Inc.*, 169 F. Supp. 2d 1181; 2001 US Dist. Lexis 18378 (2001).

<sup>24</sup> *Yahoo! Inc. v. LICRA and UEJF*, 433 F.3d 1199 (9th Cir. 2006). See also *Yahoo! Inc. v. LICRA and UEJF*, 379 F.3d 1120 (9th Cir. 2004).

<sup>25</sup> <http://ftp.resource.org/courts.gov/c/F3/433/433.F3d.1199.01-17424.html>.

<sup>26</sup> <http://caselaw.lp.findlaw.com/data/constitution/amendment01/>.

<sup>27</sup> <http://www.criminology.fsu.edu/faculty/gertz/hugoblack.htm>.

<sup>28</sup> See also Black (1960, p. 879), Meiklejohn (1966, pp. 19–26), Emerson (1970), Baker (1992), BeVier (1978, pp. 299–358), Schauer (1982), Dworkin (1985), Bollinger (1986), Smolla (1993), Gates Jr. et al. (1995), Fiss (2000, pp. 70–78), and Newman (2010, pp. 119–123). For views that balance freedom of expression with other values such as privacy and the dignity of a person, see Matsuda et al. (1993), Tsesis (2002a), Delgado and Stefancic (2004), and Cohen-Almagor (1994, 2005, 2006, 2007).

harmful action, when one is able to prove a clear link between the harmful speech and the resulting harmful action, is it possible to justify restrictions on freedom of expression. This approach sets a very high threshold to satisfy. Only in clear and exceptional cases are there grounds to limit expression. Hate speech, in its varied general manifestations, is protected speech in the USA (Waldron 2010, pp. 1596–1657; Heyman 2008, esp. pp. 164–183; Lawrence 2006, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921923); Cohen-Almagor 1993, pp. 453–470). Only hate crimes are criminalized.

Other democracies in the Western world are more willing to regulate hate speech. Most European countries, especially those that were under Nazi occupation or fought against Nazi Germany, are very cognizant of the harms of hate speech because the horrors of WWII are well remembered, and the power of hate propaganda is well appreciated. Hate speech led not only to the destruction of European Jewry but also to mass murders of horrific scale of all “inferior races” and “undesired elements.”<sup>29</sup> In consequence, many European nations have laws prohibiting hate speech. Spain passed legislation authorizing judges to shut down Spanish sites and block access to US web pages that do not comply with its national laws to address threats to its national defense and public order (Scheeres 2002; Ramasastry 2003). In The Netherlands, Section 137 of the Criminal Code makes it a criminal offence to “deliberately give public expression to views insulting to a group of persons on account of their race, religion or conviction or sexual preference.”<sup>30</sup> In Sweden, the Freedom of the Press Act (Chap. 7, Art. 4) prohibits the expression of contempt for any population group “with allusion to its race, skin colour, national or ethnic origin, or religious faith” (Sadurski 1999, p. 179).

Britain has recognized dangers associated with the fascist uses of hate speech. Its earliest attempt to curb such speech was Article 5 of the Public Order Act (1936).<sup>31</sup> This

legislation was intended to counter the verbal attacks on the Jewish community made by Oswald Mosley and his fellow members in the British Union of Fascists, which led to outbreaks of violence in Britain. The law was bolstered in 1965 with Section 6 of the British Race Relations Act, making it an offense to stir up hatred against a racial group.<sup>32</sup> Section 17 of the Public Order Act of 1986 defines “racial hatred” as hatred against a group of persons by reference to color, race, nationality (including citizenship) or ethnic or national origins.<sup>33</sup> Other European countries that have enacted laws penalizing the distribution of hate propaganda include Austria, Belgium, Cyprus, Hungary, Italy, and Switzerland (Jones 1998, pp. 189–224, 259–313; Tsesis 2002b, p. 5; 2009, esp. pp. 499–501; Cohen-Almagor 2010, pp. 125–132).<sup>34</sup>

The implications of the Yahoo! saga are particularly relevant for Germany, where many racist and hate groups post messages on American sites that are illegal in Germany. German radicals access the Internet for those purposes from Germany, in clear violation of German law. Children are targeted in an attempt to lure them to racist, radical ideologies. According to a recent study, the number of right-wing extremist contributions from Germany to Internet platforms aimed at school children or music fans—Facebook, YouTube, Twitter, and other social networking tools—rose from 750 in 2007 to about 6,000 in 2010 (Internet extremism growing in Germany 2010). In July 2009, the then Justice Minister Brigitte Zypries said her office would appeal to foreign Internet providers to use their own terms of service as grounds for eliminating content promoting fascism. She called for ISPs in the USA and elsewhere to remove neo-Nazi images, text, and other content that can be viewed inside the country in violation of laws forbidding any Nazi symbols (McGroarty 2009). It is doubtful, however, that US companies have rushed to

<sup>29</sup> On the horrors of WWII, their root causes and justifications, see Hilberg (1985), Mosse (1997), Klee et al. (1996), Sereny (1983), Burleigh and Wippermann (1993), Fings et al. (1997), Fings (1999), Aly et al. (2003), Lusane (2002), Brustein (2003), Johnson and Reuband (2006), Ehrenreich (2007), Browning (2007), Goldhagen (2009), Kershaw (2009); Nazi racism, <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007679>; Racism: An Overview, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005184>; Wistrich (2010).

<sup>30</sup> Sadurski (1999, p. 179), [http://books.google.co.uk/books?id=4Ldb0cIbS7kC&pg=PA179&lpg=PA179&dq=Netherlands,+Section+137+of+the+Criminal+Code&source=bl&ots=veYMMuQcXf&sig=m\\_ua2h6o5FBoyBcWgP44tLkOo1c&hl=en&ei=uyIBTPfG5v80wS3n533Ag&sa=X&oi=book\\_result&ct=result&resnum=10&ved=0CDsQ6AEwCQ#v=onepage&q=Netherlands%2C%20Section%20137%20of%20the%20Criminal%20Code&f=false](http://books.google.co.uk/books?id=4Ldb0cIbS7kC&pg=PA179&lpg=PA179&dq=Netherlands,+Section+137+of+the+Criminal+Code&source=bl&ots=veYMMuQcXf&sig=m_ua2h6o5FBoyBcWgP44tLkOo1c&hl=en&ei=uyIBTPfG5v80wS3n533Ag&sa=X&oi=book_result&ct=result&resnum=10&ved=0CDsQ6AEwCQ#v=onepage&q=Netherlands%2C%20Section%20137%20of%20the%20Criminal%20Code&f=false).

<sup>31</sup> Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 5, (U.K.), <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2236942>.

<sup>32</sup> Barendt (2007), Supperstone (1981, p. 15); Home Office, *Racial Discrimination*, White Paper (1975), Comm. 6234; Commission for Racial Equality, *Reviews of the Race Relations Act (1985/1992)*; Her Majesty's Stationery Office, *Race Relations Act 1976* (1976); Her Majesty's Stationery Office, *Race Relations (Amendment) Act 2000*. See also: Commission for Racial Equality, *Fairness for All, Reviews of the Race Relations Act* <http://www.jrank.org/cultures/pages/179/Commission-Racial-Equality.html#ixzz1AVMgqg47>.

<sup>33</sup> [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1986/cukpga\\_19860064\\_en\\_4](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1986/cukpga_19860064_en_4).

<sup>34</sup> I asked the eminent historian, Saul Friedlander, how to explain the American attitude to hate speech as compared with the European. He answered (on July 22, 2011) that the striking difference is especially “between the situation in most of continental Europe, on the one hand, and in Great Britain, Sweden and Switzerland, on the other (who were not under German occupation). In the US, in my opinion, the first amendment is crucial.”

remove material that is protected under the First Amendment.<sup>35</sup>

### Business Dimension

The business dimension of the Yahoo! saga was implicitly acknowledged in November 2000, when Yahoo!'s management decided that auctions would henceforth be a paying service, and Yahoo! would decide what was proper for sale. Yahoo! realized that it had assets in France including a French subsidiary that might be at risk of seizure if the company failed to comply with the French court's ruling. Shares of Yahoo! Inc. fell nearly 15% on New York's NASDAQ stock market after the Gomez verdict. This was their lowest level in 2 years (Reuters 2000a, p. B1). Yahoo! was sensitive to the wishes of its foreign customers, because 40% of its traffic at that time was outside the USA. Analysts noted that legal issues facing the company were not likely the main cause of the stock's weakness, but feared that any additional successful suits could hurt international revenues (Reuters 2000b, p. B5).

Sometimes there is tension between freedom of information, on the one hand, and moral and social responsibility, on the other, which can have significant business implications not only for the company at hand but for other information and communication companies in the future. In business, responsibility is defined in terms of obligations accepted by employers in relation to their employees and suppliers to customers and clients. There is often a basis in law, but many responsibilities are customary, subject to negotiation according to the interests and balance of power of the parties involved, and dictated by competitive necessities. The acceptance and fulfillment of responsibilities by business actors is mainly determined by considerations of long-term self-interest and maintaining good customer relations, although ethical principles may also

play a part (McQuail 2003, p. 191).<sup>36</sup> CSR scholar Davis (1973, p. 313) asserts that it is a firm's obligation to consider the effects of its decisions on society in a manner that will accomplish social benefits as well as traditional economic benefits. This means that "social responsibility begins where the law ends. A firm is not being socially responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do."<sup>37</sup> Yahoo! focused on the legal aspects of its auction site by merely complying with the American requirements of the law which champions freedom of expression.

The main principles of CSR dictate integrated, sustainable decision-making which takes into consideration the positive and negative potential consequences of decisions; obligations on the part of corporations not only to consider different stakeholders and interests but also to incorporate them into the decision-making processes; transparency that is vital for ensuring accountability to stakeholders; liability for decisions and enactment of remedial measures to redress harm inflicted as a result of conduct (Goodpaster 2010, pp. 126–157; Kerr et al. 2009; Werther and Chandler 2010). Carroll (1979, pp. 497–505; 1981) articulated in his seminal work that, beyond the obvious economic and legal obligations that a firm has, the social responsibility of businesses also encompasses ethical and discretionary responsibilities. Business is expected, by definition, to make a profit. Society expects business to obey the law. In addition, ethical responsibilities include adherence to ethical norms. By "ethical norms" Carroll means adherence to fairness, justice, and due process. And finally, by discretionary responsibilities Carroll refers to philanthropic contributions and nonprofit social welfare activities.<sup>38</sup> Carroll's pyramid of CSR depicted the economic category at the base and then built upward through legal, ethical, and philanthropic categories. In his view, a company with good CSR practices should strive to make a profit while obeying the law and should behave ethically as a good corporate citizen (Carroll 1999, pp. 268–295; Carroll and Buchholtz 2011, esp. Chaps. 2, 6).

According to Carroll's formulation, Yahoo! did not behave responsibly because its conduct lacked ethical perspective. Instead, the Yahoo! officials exhibited amoral management. "Amoral managers," Carroll explains (1991, pp. 39–48), "are neither immoral nor moral but are not sensitive to the fact that their everyday business decisions may have deleterious effects on others." In my assessment, the Yahoo! managers ignored the ethical dimension of their business because they were unresponsive to local laws and

<sup>35</sup> In August 2000, the Dusseldorf District Authority President, Jurgen Bussow, wrote to four American ISPs, requesting that they prevent access to four websites containing racist, neo-Nazi material. This action was unsuccessful. See Akdeniz (2008, p. 236). On February 8, 2002, Bussow ordered all ISPs in the German State of Nordrhein-Westfalen (North Rhine-Westphalia) to block user access to two specific US-based hate sites, Stormfront and Nazi-Lauck (Press Release, Bezirksregierung Düsseldorf erlässt Sperrungsverfügungen wegen rechtsextremischer Angebote im Internet, 42/2002 Feb. 8, 2002). More than 30 of the 76 ISPs in Nordrhein-Westfalen lost various court battles which may be found in Oberverwaltungsgericht Münster, 2003 Multimedia und Recht (MMR) 348; Verwaltungsgericht Düsseldorf 2003 MMR 305; Verwaltungsgericht Arnberg 2003 Zeitschrift für Urheber- und Medienrecht Rechtsprechungsreport 222. However, this blocking directive is local and does not compel the other German landers (states), and it relates to only two hate sites. See Eberwine (2004).

<sup>36</sup> For further discussion, see Horrigan (2010).

<sup>37</sup> See also Kotler and Lee (2005).

<sup>38</sup> See also Crane (2009).

were inattentive to the implications of their conduct on stakeholders.

CSR carries a special meaning in the context of information and communication technologies (ICT). ICTs make humanity increasingly accountable, morally speaking, for the way information is transferred (Floridi and Sanders 2001, pp. 55–66). Members of these professions are trained to practice a core skill, requiring autonomous judgment as well as expertise. ICT professionals have an inviolable duty to abide by the terms of service and see that their clients are satisfied. Their work is based on knowledge and skill. Certain standards and qualifications are expected to be maintained.<sup>39</sup>

CSR on the Internet may prompt ICT professionals to adopt different modes of operation: The first is to follow the law of the land. The second is to do more than following the laws. I believe my analysis implies that multinational companies must do more than follow the laws in the home country of the head office; they need to integrate the laws of the host country into the decision-making process, for instance, banning hate speech even where this is not required, as is the case in the USA. And the third is to ignore the laws of the host country where the laws are manifestly unethical. This is the case, for instance, when the law is aimed to censor political speech or certain groups because of their race, culture or religion.

Radin (2001, p. F3), the President of Radio Network, asserts that removing Nazi memorabilia from auction sites is the right business decision. First, removing the objectionable materials will probably not harm the company's sales dramatically, but will have a goodwill effect throughout the world, possibly attracting more users. Second, from a business standpoint, it is easier to implement restrictions worldwide than to create business and technical processes that treat citizens of different countries differently in order to universally stay on the right side of the law. Third, Radin rightly notes, it is the morally responsible thing to do.<sup>40</sup>

Although hate speech is legally tolerated in the USA, Yahoo! Inc.'s commercial image would not have gained much by condoning the sale of Nazi memorabilia via its websites. Even in the absence of enforceability, factors such as market forces, moral beliefs, or a combination of them may by themselves or in combination with legal measures compel legal compliance (Kohl 2007, p. 207).

Adopting norms of social responsibility could be beneficial for ISPs and web hosting services. This ethical practice could contribute to each firm's reputation and marketing. Indeed, there is a significant positive

relationship between CSR activities and consumers' purchasing decisions (Lee and Shin 2010, pp. 193–195). Lewis (2003, pp. 356–394) argues that CSR, referring to practices that improve the workplace and benefit society beyond what companies are legally mandated to do, is established as a fundamental addition to stakeholders' criteria for judging companies, and calls for a reappraisal of companies' brand and reputation management. Upholding norms of CSR benefits both the firm and the societies in which it operates.

### Responsible Terms of Service

Online intermediaries encompass conduits such as ISPs, platforms such as video sharing sites, social networking sites that allow netusers to access online content and interact with each other, and web hosting companies that provide space on servers they own for use by their clients as well as Internet connectivity. Some ISPs offer guidelines regarding prohibited Internet content and usage, terms of service cancellation, and even user responsibilities. ISPs may prohibit posting of legally seditious or offensive content. For example,

Yahoo!'s rules state that it is prohibited to	Upload, post, transmit or otherwise make available any Content that is unlawful, harmful, threatening, abusive, harassing, tortuous, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, adult-oriented, or racially, ethnically or otherwise objectionable. <sup>a</sup>
Basic ISP rules state that it is prohibited to	Post or transmit any unlawful, threatening, abusive, libelous, defamatory, obscene, pornographic, profane, or otherwise objectionable information of any kind, including without limitation any transmissions constituting or encouraging conduct that would constitute a criminal offense, give rise to civil liability, or otherwise violate any local, state, national or international law... <sup>b</sup>
Jivas Internet's rules state that it is prohibited to	Post or transmit any unlawful, threatening, abusive, libelous, defamatory, obscene, pornographic, profane, or otherwise objectionable information of any kind, including without limitation any transmissions constituting or encouraging conduct that would constitute a criminal offense, give rise to civil liability, or otherwise violate any local, state, national or international law, including without limitation the U.S. export control laws and regulations. <sup>c</sup>

<sup>39</sup> Compare with the responsibilities of the press; see McQuail (2003, p. 191) and Cohen-Almagor (2005, pp. 87–123).

<sup>40</sup> See also Fannon (2003, pp. 93–103).



DataPipe rules state that it is prohibited to	Transmit, distribute or store material (a) in violation of any applicable law, (b) in a manner that will infringe the copyright, trademark, trade secret or other intellectual property rights of others or the privacy, publicity or other personal rights of others, or (c) that is obscene, threatening, abusive or hateful, including the advocating of terrorism and/or the killing of any individual or group. <sup>d</sup>
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<sup>a</sup> <http://docs.yahoo.com/info/terms/lfws/>

<sup>b</sup> <http://www.basicisp.net/TOS/DSLTON.aspx>

<sup>c</sup> <http://www.isp01.net/tos.htm>

<sup>d</sup> [http://www.datapipe.com/Acceptable\\_Use\\_Policy.aspx](http://www.datapipe.com/Acceptable_Use_Policy.aspx)

DataPipe's rules have a social responsibility section in which it names its favorite charities and its commitment to preserve the environment.<sup>41</sup> Several ISP associations have developed different codes concerning, among other things, the protection of minors.<sup>42</sup>

ISPs may choose to prescreen and refuse any content that is available via their service. Yahoo! declares that it may or may not prescreen and that it has "the right (but not the obligation) in their sole discretion to pre-screen, refuse, or remove any Content that is available via the Yahoo! Services. Without limiting the foregoing, Yahoo! and its designees shall have the right to remove any Content that violates the TOS or is otherwise objectionable."<sup>43</sup> Some ISPs assert the right to terminate service under any circumstances and without prior notice, especially if content violates the terms of service agreement or if law enforcement or other government agencies request the removal. Some ISPs reserve the right to remove information that does not meet the standards they set.<sup>44</sup> However, if such content is not removed by the ISP, neither it nor its partners assume any liability. In this context, let me mention that the American Congress passed the "Good Samaritan provision," included in the 1996 Communication Decency Act (Section 230-c-2) which protects ISPs that voluntarily take action to restrict access to problematic material: "No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material

that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."<sup>45</sup>

Whatever responsible steps that corporations take, it is imperative that these steps should be transparent, and communicated to the public. In 2002, Google, the world's most popular search engine, quietly deleted more than 100 controversial sites from some search result listings. It did so secretly, without public discussion or explanation and, as a result, was subjected to intense criticism. Most of the sites that were removed from Google.fr (France) and Google.de (Germany) were anti-Semitic, pro-Nazi or related to White supremacy (McCullagh 2002). However, the removed sites continue to appear in listings on the main Google.com site.

In 2005, Google spokesman Steve Langdon announced that Google News does not allow hate content. "If we are made aware of articles that contain hate content, we will remove them," he said (Kuchinskis 2005). Among the removed news was *National Vanguard*, a publication of the National Alliance, an organization for "people of European descent" aiming at achieving a new consciousness, a new order, and a new people. The *National Vanguard* describes itself as "fearless—uncompromising—brilliant—witty—educational. National Vanguard provides the information and the insights that White America's future leaders will need to guide our nation through the dangerous, revolutionary times ahead."<sup>46</sup> Indeed, news organizations have editorial discretion over what they run and do not run. Google made a conscious decision not to help in the spread of racism and bigotry. In this case, Google proactively adopted ethical norms of CSR.<sup>47</sup>

Economically speaking, some may raise the concern that enforcing liability on Internet intermediaries will significantly raise the costs of business. One way to offset the incurred costs might be higher subscription fees. As a result, some subscribers who will not be able to afford the service would leave the market. There are several ways to address this concern. One is to suggest more advertising, or the same amount of advertising charging more money, accompanied with an explanation for the reason why the price has risen. Another is governmental tax incentives to Internet intermediaries based on the number of subscribers. A third way is to impose financial penalties against those who systematically violate their own terms and conditions of service, penalizing people who abuse the service for their misconduct.

<sup>41</sup> [http://www.datapipe.com/Social\\_Responsibility.aspx](http://www.datapipe.com/Social_Responsibility.aspx).

<sup>42</sup> For further discussion, see Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy, *Working Party on the Information Economy* (2006), [http://www.biac.org/members/iccp/mtg/2008-06-seoul-min/DSTI-ICCP-IE\(2005\)3-FINAL.pdf](http://www.biac.org/members/iccp/mtg/2008-06-seoul-min/DSTI-ICCP-IE(2005)3-FINAL.pdf); see also Price and Verhulst (2000).

<sup>43</sup> <http://docs.yahoo.com/info/terms>.

<sup>44</sup> <http://legal.web.aol.com/aol/aolpol/comguide.html>.

<sup>45</sup> CDA 47 U.S.C. at <http://www4.law.cornell.edu/uscode/47/230.html>.

<sup>46</sup> <http://www.natvan.com/national-vanguard/>.

<sup>47</sup> For critic of Google for its lax attitude on human rights in China, see Dann and Haddow (2008, pp. 219–234).

To be sure, Internet intermediaries need to be careful in restricting speech. Adopting an extremely overzealous monitoring policy increases the likelihood of subscribers' being informed about such a policy, and thus might create a negative reputation for an ISP, which in turn would encourage its users to experiment with other service providers (Hamdani 2002, pp. 929–930). What Internet intermediaries could certainly do is to provide a uniform channel for user complaints. Such a channel (which could be as simple as a link to the CyberTipline) could easily be placed on the complaints or customer service page of the service provider (Thornburgh and Lin 2002, p. 380).

## Conclusions

The Internet has been perceived as an unfettered highway, and the way to combat problematic speech is said to be by more speech. Organizations and associations were set up to protect and promote freedom of expression, freedom of information, and privacy on the Internet.<sup>48</sup> The Internet's design and *raison d'être* are open architecture, freedom of expression, and neutral network of networks. In the prevailing Western liberal tradition, freedom of expression is perceived as a fundamental human right and censorship should not be allowed to inhibit the free flow of information. This is especially true for the Internet.

The aim of this article is to show that (1) ethically speaking, Yahoo! should not entertain Nazi material on its servers; (2) ethics and business go hand in hand, as the decision not to entertain such material serves the company's best interests, and (3) international companies such as Yahoo! should strive to respect the laws of the countries in which they operate. Although international in character, the medium of the Internet is not above the law.

France has pushed forward new legal standards for the Internet. The Yahoo! saga opened a renewed discussion about the national boundaries of the Internet. The case urges us to reconsider the international aspects of the Internet as a global phenomenon, with an enhanced awareness of national sovereignty and national laws. International companies need to be cognizant of different state laws and are required to identify the appropriate approach when these laws come into conflict with their home-country laws.

When corporations violate national laws, nations can assert their regulatory authority. The threat of multiple regulatory exposures will not destroy the Internet. What is needed is a formal strategic planning effort which is positively linked to CSR (Galbreath 2010, pp. 511–525). Firms may be required to filter content geographically to comply with national laws but only for a small fraction of their communications. This will impose extra costs on multinational intermediaries, but in light of the constantly innovative Internet, this cost will be trivial in the long run (Goldsmith and Wu 2006, pp. 160–161). We can and should expect business to adhere to some norms of social and corporate responsibility, and corporations should strive to respect and abide by domestic laws.

Lasting social change needs a combination of solid governmental support and committed corporate action. A comprehensive look at the movement for CSR shows that market forces often jump-start responsibility. Consumer demand for responsibility may push companies to produce certain products and abandon others; actual (or threatened) consumer boycotts influence decision-making processes; "naming and shaming" practices by nongovernmental organizations, pressure from socially responsible investors, and values held by employees and management are all influential. However, there is no guarantee that a company will sustain its efforts past a marketing campaign if practices and standards are not enshrined in law, and corporations will only participate for the long term in CSR if it is good for their bottom line. While profitability may not be the only reason corporations will or should behave virtuously, it has become the most influential. CSR is sustainable only if virtue pays off (Vogel 2005; Campbell and Miller 2004; Painter-Morland 2011). Thus, what is needed to address the threat of hateful messages is to take legal action as France did, inspired by a strong tradition of sovereign state regulation and with confidence that its values were of universal validity.

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<sup>48</sup> Among them are The Center for Democracy and Technology (CDT), <http://cdt.org/>; The Electronic Frontier Foundation (EFF), <http://www.eff.org/>; The Electronic Privacy Information Center (EPIC), <http://epic.org/>; The Global Internet Liberty Campaign (GILC), <http://gilc.org/>; The Internet Society, <http://www.isoc.org/>; The Association for Progressive Communication, <http://www.apc.org/>; Save the Internet, <http://savetheinternet.com/>.

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