Case No. 01-17424

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YAHOO!, INC., a Delaware Corporation,

Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RECISME ET L'ANTISEMITISME, a French association, and L'UNION DES ESTUDIANTS JUIFS DE FRANCE, a French association,

Defendants-Appellants.

On Appeal From The United States District Court for the Northern District of California, San Jose Division
Case No. C00-21275-JF-RS
The Honorable Jeremy Fogel

BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, NETCOALITION AND ONLINE PUBLISHERS ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT

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INTEREST OF *AMICI CURIAE* AND STATEMENT OF AUTHORITY FOR FILING

At issue in this case is whether a foreign country can control the content that American individuals, entrepreneurs, businesses, community organizations, libraries and churches can place on the "exponentially growing, worldwide medium that is the Internet." *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). *Amici* represent a broad cross-section of American businesses, including both Internet and online service providers (entities that provide access to the virtually limitless range of commercial and non-commercial material found on the Internet) and content providers (including the individuals, small businesses and organizations that provide a wide variety of the content found on the Internet). They submit this brief *amici curiae* to stress the devastating impact such a result could have on the Internet.[1]

The Chamber of Commerce of the United States (the Chamber) is the world's largest federation of business organizations and individuals, representing an underlying membership of more than three million businesses and organizations of every size and in every sector of the economy and geographic

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[1] The Chamber of Commerce of the United States, along with other *amici*, submitted a brief *amicus curiae* before the District Court. The District Court ruled both that it had jurisdiction to issue a declaratory judgment in this matter and that the order of a French court, ordering Yahoo! to render certain content on its web site unavailable to French users, was unenforceable in U.S. courts. LICRA and UEJF appealed, arguing that the District Court did not have jurisdiction. They do not appear to contest the lower court's ruling on the merits.

region of the country. Chamber members transact business in all of the United States as well as a large number of countries around the world. A principal function of the Chamber is to represent the interests of its members in important matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases which involve issues of vital concern to the nation's business community.

The Computer & Communications Industry Association ("CCIA") is an association of computer, communications, Internet and technology companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and online services, resellers, systems integrators, and third-party vendors. Its member companies employ nearly one million persons and generate annual revenues exceeding $300 billion. CCIA's mission is to further the interests of its members, their customers, and the industry at large by serving as the leading industry advocate in promoting open, barrier-free competition in the offering of computer and communications products and services worldwide.

The Computing Technology Industry Association (CompTIA) is the largest trade association in the information technology and telecommunications sector,

representing 10,000 companies, from every segment of the IT and telecommunications industry, in 63 countries (including approximately 9,000 companies headquartered in the United States). CompTIA helps its members stay competitive and profitable by providing vendor-neutral standards in certification, e-commerce, customer service, and workforce development to meet these industry-wide challenges.

The Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world. A respected resource, NetCoalition provides creative and effective solutions to the critical legal and technological issues facing the Internet. By enabling industry leaders, policymakers, and the public to engage directly, NetCoalition has helped ensure the integrity, usefulness, and continued expansion of this dynamic new medium.

The Online Publishers Association (OPA) is an industry trade organization founded in June 2001, whose mission is to advance the interests of high-quality

online publishers before the advertising community, the press, the government and the public. OPA membership consists of twenty of the Internet's leading content brands who maintain the highest standards in Internet publishing with respect to editorial quality and integrity, credibility and accountability.[2]

ARGUMENT

As courts have recognized, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *ACLU*, 929 F. Supp. at 842. This vibrant medium has already transformed the way we as a nation do business and access information for personal use. The decision of the French court that underlies this case represents one of the greatest threats to the promise of the Internet to date. The French court concluded that because French citizens sought out material on an American company's web site that is offensive to French law, courts in France can assert jurisdiction over the American company and mandate that it restrict French citizens' access to that material.[3] But "the Internet

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[2] *Amici* file this brief pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure. Yahoo! has consented to this filing. Counsel for LICRA and UEJF declined to consent unless *amici* agreed to limit this brief to a discussion of jurisdictional issues (as opposed to the effect adoption of LICRA and UEJF's arguments would have on American individuals, organizations and businesses). Accordingly, *amici* have filed a motion seeking leave to file in lieu of the Appellants' consent.

[3] In particular, two French student unions – La Ligue Contre Le Recisme Et L'Antisemitsme (LICRA) and L'Union Des Etudiants Jurifs de France (UEJF), brought suit against Yahoo!, Inc. ("Yahoo!"), an American company providing Internet services in English,

has an 'international, geographically-borderless nature,'" and "with the proper software every Web site is accessible to all other Internet users worldwide." *ACLU v. Reno*, 217 F.3d 162, 169 (3d Cir. 2000) (*citations omitted*), *cert. granted*, 532 U.S. 1037 (2001). Accordingly, if the French court's decision is recognized in this country, every piece of information posted on the Internet will have to conform to the laws of every country in which that material might be accessed, even where (as is the case here) the American company posting that information was targeting U.S. citizens, and operating in a manner fully consistent with U.S. law. Plainly put, such a result would cripple the Internet.

This devastating effect would occur even if it were technologically feasible (which it is currently not) for a web site to recognize the country of origin of visitors and block those visitors whose home countries ban some of the content on the website. As courts have recognized, the incredible diversity of information on

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targeted at American citizens, from host computers located in the United States, alleging that Yahoo!, Inc. violated French law by placing on its U.S. web site material that is indisputably lawful in the U.S. but banned in France. Although Yahoo! explained, and the French court recognized, that Yahoo!, Inc. maintains an entirely separate corporate subsidiary – Yahoo! France – that offers an Internet service that *is* targeted at French customers, operates in the French language, and is maintained in full compliance with French law, the French court concluded that it had jurisdiction over Yahoo!, Inc. because, due to the seamless nature of the Internet, French citizens are able to access Yahoo!'s U.S.-based web site. The French court thus ordered Yahoo! to censor content on its U.S.-based Internet services that is illegal in France but protected by the First Amendment to the U.S. Constitution. The French court imposed a penalty fine for each day that Yahoo! failed to comply.

the Internet "is possible because the Internet provides an *easy and inexpensive* way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines." *ACLU*, 929 F. Supp. at 843. Under the French court's theory, however, every individual or company with a presence on the Internet would have to constantly monitor the laws of every country in the world, search out content that might be prohibited by one or more of those countries, and implement some sort of blocking software that would screen different categories of material from users in each particular country. This would be too burdensome for even large companies like Yahoo!, and would be a death knell for the Internet presence of smaller companies, non-profit organizations, and individuals. *Cf. Reno v. ACLU*, 521 U.S. 844, 881 (1997) (noting that "it is not economically feasible for most noncommercial speakers" with web sites to screen out underage users by requiring them to submit credit card information).

As the district court below properly concluded, the French court's decision is unenforceable in this country because it requires a U.S. company to censor material that is constitutionally protected. The appellants have never made any serious effort to dispute this. Instead, they have studiously attempted to prevent

U.S. courts from addressing the issue at all – making the remarkable assertion that French courts are free to assert jurisdiction over, and enter judgment against, U.S. corporations based on the mere fact that the corporation has a web site, but that U.S. courts nonetheless lack jurisdiction to determine whether such a judgment is enforceable. The district court properly rejected this argument, and *amici* urge this Court to affirm the decision of the court below.

I. THE RULE OF LAW PROPOSED BY LICRA WOULD CRIPPLE COMMERCE AND EXPRESSION ONLINE.

The issue at stake in this case is not merely whether a French court can issue an enforceable order regulating the web site of a California-based corporation. The issue presented is whether American entities that post content on the worldwide web will be subject to the regulation of the most stringent jurisdiction worldwide and, equally importantly, whether U.S. companies can have that question answered by United States courts. Because adoption of LICRA's extreme view of jurisdiction would have the practical effect of holding American corporations hostage to foreign judgments which could not be obtained in this country, *amici* urge this Court to uphold the district court's decision.

LICRA's argument necessarily begins with the premise that a web publisher is subject to jurisdiction in the courts of any country in which the content might be

viewed. As explained below, this position is wrong as a matter of law. It is also a startling proposition which, if accepted, would fundamentally change the nature of the Internet.

The Internet is now accessible from almost every country across the globe, with nearly 500 million people having Internet access in their homes. *See* Nielsen//NetRatings, *An Expanding Marketplace: Internet Access Growth Rates Accelerated in the 4th Quarter of 2001*, at www.nielsen-netratings.com/newsletter/newdesign/global/global.htm. If, as LICRA and UEJF contended in the French court, the ability of a single person to access a site creates jurisdiction over the publisher of the site wherever in the world the web user happens to be, the simple act of creating a web site would be turned into an act with global legal consequences. The web publisher, whether a lone undergraduate, an aspiring entrepreneur, or an established corporation, would face civil – or, as this case demonstrates, even criminal – penalties for violating the laws of any one jurisdiction in the world.[4]

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[4] On February 26, 2002, a French criminal court ruled that a *criminal* lawsuit filed against Yahoo! and its former CEO, Timothy Koogle, based on the same conduct at issue in the present lawsuit, would go forward to a trial on the merits. Thus, the former CEO of a major U.S. corporation faces the possibility of time in a foreign jail for running a U.S. company that had a web site aimed at a U.S. audience on which content that is protected by the U.S. Constitution was posted.

Such a result would destroy the viability of the Internet as a vehicle for commerce. Commercial use of the Internet has burgeoned; last year alone e-commerce sales rose nearly 20% from their 2000 levels, reaching $32.6 billion. Economics and Statistics Administration, Census Bureau, Department of Commerce, *Retail E-Commerce Sales in Fourth Quarter 2001* (Feb. 20, 2002), at www.census.gov/mrts/www/current.html. And the rate of e-commerce is increasing. Indeed, estimates of the amount of transactions U.S. businesses are expected to engage in electronically during the next year alone range from $634 billion to $2.8 trillion. Economics and Statistics Administration, Census Bureau, Department of Commerce, *Digital Economy 2000*, at www.esa.doc.gov/de2k2.htm. And, this increasing use of the Internet as an tool of commerce has not only provided increased choice to consumers – it has helped spur the U.S. economy. As a recent Department of Commerce report noted, six major economic studies have concluded that the production and use of information technologies contributed "half or more of the acceleration in U.S. productivity growth in the second half of the 1990s." *Id.*

These gains in productivity have been particularly useful to small businesses, which are increasingly using the Internet as a means of reaching more consumers at lower cost. The Small Business Administration recently estimated

that 85% of such entities will conduct business via the web by this year. Small Business Administration Office of Advocacy, *Small Business Expansions in Electronic Commerce*, at i (June 2000), available at www.sba.gov/advo/stats/e_comm2.pdf. And not only are small brick and mortar businesses making their way onto the web, the Internet itself is providing new opportunities for entrepreneurs; of the more than 7,100 Internet service providers in the U.S., over half have fewer than 12 employees. *Id.*

And, of course, the Internet is not merely a vehicle of commerce. Thousands of individuals, community groups, political groups and non-profit organizations use the Internet to communicate ideas and information to their respective target audiences. As commentators have noted, for example, in the1990s the medium was marked by a "pioneering and cooperative spirit of alternative politics." Pippa Norris, *Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide* 201-02 (2001).

If every entity with a web presence – ranging from the largest of corporations to the smallest of public interest groups – was subjected to the laws of each and every jurisdiction in which an Internet site could be viewed, the Internet as it exists today would cease to exist. Pro-democracy speech would be governed by the most totalitarian of nations, artistic expression would be governed

by the most stringent of cultures, and commercial advertising and sales would be governed by the most protective of markets. Pursuant to the theory on which the French court relied, the People's Republic of China could purport to exercise jurisdiction over Yahoo! based on news reporting about the pro-democracy movement in that country accessible through Yahoo!'s site. America Online could be haled into court in Saudi Arabia because content posted on the personal websites of its subscribers offends Islamic law. Barnes & Noble's online division might be held liable in Iran for offering for sale to U.S. consumers Salman Rushdie's "The Satanic Verses." A radio station in Los Angeles offering live audio feed on its website might be prosecuted anywhere in the world where sexually explicit lyrics are considered unlawful.

Faced with the fear of such prosecution, companies and individuals would inevitably feel pressured to remove material that might be unlawful in any jurisdiction, thus giving the most restrictive jurisdictions in the world a *de facto* veto over the content available worldwide. The impact would be enormous. The vast majority of countries impose some restrictions on content. According to one recent study of press freedom, 63% of countries restrict print and electronic media, and 80% percent of the world's people live in nations with less than a free press. *See* Leonard R. Sussman, *Censor Dot Gov: The Internet and Press Freedom 2000*

(Freedom House 2000), available at www.freedomhouse.org/pfs2000/sussman.html. Even the United Kingdom does not offer the same protections to speech as does the First Amendment. *See, e.g.*, *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997) (declining to enforce British libel judgment because it conflict with the First Amendment); *accord Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (1992). Thus, the amount of material U.S. web publishers would have to suppress would be enormous.

This would be fundamentally inconsistent with this country's constitution; it would also be remarkably bad public policy. It is nonsensical to force one nation (or one nation's companies or courts) to enforce another nation's laws regarding the passive display of content. Even beyond the obvious sovereignty issues implicated in such a rule, placing the burden of enforcement on all web entities – rather than on the restrictive jurisdiction itself – is devastatingly inefficient. The cost of filtering content for particular viewers can be borne much more efficiently by the countries that require such filtering, by requiring, for example, all Internet users to go through government servers. Several countries, such as China and Saudi Arabia, impose such limits. *See* Sussman, *Censor Dot Gov*, *supra*.[5]

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[5] *Amici* find censorship of any sort repugnant, and do not mean to suggest that they encourage or condone censorship of the Internet. Instead, *amici* merely note that countries that do engage in censorship do not have to regulate extraterritorially to do so.

In any event, even if it were sensible policy to require U.S. companies to censor on behalf of governments worldwide – and it is not – it is currently technologically impossible for such companies to do so. First, technology cannot currently identify with certainty the geographic location of an Internet user. There is thus no effective way to determine the country from which a web user is accessing a given site. And while technology is being developed that may be able, in certain circumstances, to determine a user's location, it will never be foolproof. Attempts to determine the location of a web user by analyzing the user Internet Protocol ("IP") address will at best be unreliable,[6] and other more reliable technology, once it exists, will be able to circumvented. The Internet was never designed to pay heed to national boundaries, and the fiat of a court in France does not change this fundamental design.

Moreover, even if such technology was available – and it is not – and even if it were good policy to mandate U.S. companies to deploy it on behalf of

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[6] An IP address can be roughly correlated to a location only some of the time. For example, about 20% of French Internet users subscribe to AOL France. The IP addresses of these users indicate that the users are coming from the U.S. state of Virginia, the headquarters of AOL worldwide. French users may also appear to originate from somewhere other than France if they (a) access the Internet via an employer's international computer network, (b) use readily available online services such as "anonymizer.com," which masks the user's actual IP address, (c) access the Internet using an ISP located outside of France, or (d) falsify their IP addresses (a practice known as "IP spoofing"). Thus, even a web publisher who *tried* to comply with the laws of foreign jurisdictions could be hauled into court.

governments around the world – and it is not – it will not be economically feasible for the vast majority of web publishers to deploy. The technology itself will likely be expensive, and further expenditures would be required; content providers would have to couple the technology with a database that contains the content restrictions (and other restrictions) of each and every country in the world. The user's geographic location would then have to be correlated to the relevant restrictions, and the content available to each user would then have to be tailored to the restrictions currently in place in the relevant country.

Thus, even supposing that such an enormous and costly system could be devised (and it bears emphasizing that no such system currently exists), and even supposing that it were desirable to have U.S. entities with a web presence serve as foreign jurisdictions' content police, it would still be prohibitively expensive for all or virtually all entities with a web presence. This is especially true for the smallest web entities, who would face the same burdens that Yahoo! faced. Moreover, because the technology will never be foolproof, publishers who might try to use this non-existent technology would risk prosecution in foreign countries, because determined web users such as LICRA and UEJF will inevitably continue to seek out and access such content.

Thus, as a practical matter, if LICRA's position were adopted, regardless of advances in technology, all or virtually all entities would have little choice but to comply with the most restrictive laws worldwide. The Internet would thus be transformed from a robust forum of free expression and the most efficient of marketplaces, to an anemic offering of only what is acceptable to every jurisdiction worldwide. Much of the speech of mainstream America would be driven from the web. *See Reno*, 521 U.S. at 871-72 (recognizing that a statute's "chilling effect on free speech" on the Internet "raises special First Amendment concerns"). Protected expression and lawful commercial speech on the Internet would be chilled. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (discussing chill and recognizing "that the First Amendment needs breathing space"). And these effects would be felt not only by corporations and publishers, but by consumers who are denied the opportunity to read and purchase lawful materials, by the "small, not-for-profit groups, such as Stop Prisoner Rape and Critical Path AIDS Project" who benefit most from the Internet's lowered costs of communication, *ACLU*, 929 F. Supp. at 843, and by individuals who seek to speak out on issues of global public concern.

Presumably recognizing that such a draconian restriction on protected speech would not withstand scrutiny by U.S. courts, appellants urge this Court to

decline to reach the merits of the dispute. Specifically, appellants assert that because they have not yet attempted to enforce the French court's judgment, this case is not ripe. But there is no dispute that, pursuant to the French court's order, the fines assessed on Yahoo! increase daily. Thus, appellants ask this Court to leave Yahoo! in virtual limbo – without a legal judgment that the French court's order cannot be enforced, and without any indication when, or whether, appellants will seek to enforce the judgment they have obtained.

U.S. law, however, provides a mechanism to protect against just such devastating uncertainty. The Declaratory Judgment Act, 28 U.S.C. § 2201, allows persons and companies to have their rights declared by a court when the lack of legal clarity imposes a cognizable harm. Here, of course, as the fines the French court's order purports to impose accrue daily, "the hardship to the parties of withholding court consideration" of the enforceability of that order is severe. And because the order is in place and only awaits enforcement, "the fitness of the issues for judicial decision" is without question. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). This is precisely the case for which declaratory judgments exist.

A contrary result would be untenable. If businesses and individuals cannot obtain a declaratory judgment such as that obtained by Yahoo! below, the only

practical alternative will be to comply with every foreign order entered against a U.S. company, no matter how unenforceable companies believe that order to be. Thus, in essence, appellants ask this Court to grant them carte blanche to do indirectly what they cannot do directly: require a U.S. entity to censor content that is legal in the United States simply because that U.S. entity has presence on the Internet.

Yahoo!, in contrast, seeks something much simpler: the ability to determine whether an issued court order is enforceable so that it can tailor its behavior accordingly. Because it is entitled to such an order as a matter of law, and because failure to provide it with legal certainty would have far-reaching, negative consequences, *amici* respectfully urge this Court to uphold the decision of the court below.

II. LICRA'S JURISDICTIONAL ANALYSIS IS WRONG.

As noted above, LICRA does not assert that enforcement of the French judgment would be consistent with the First Amendment – nor could it do so. Instead, LICRA argues primarily that the district court erred in reaching the merits at all. LICRA's analysis is wrong as a matter of law, and a decision in its favor would contravene established doctrine on the enforceability of foreign judgments when the foreign court lacked jurisdiction. Equally important, however, the

arguments it currently advances are in irreconcilable conflict with those it made when convincing the French court to assert jurisdiction over Yahoo! in the first instance.

A. The French Court Improperly Asserted Jurisdiction Over Yahoo!, Inc.

In response to Yahoo!'s request for a declaratory judgment, the court below properly concluded that the French court's order is unenforceable in U.S. courts. Foreign judgments are recognized here only as "comity" requires. *See Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997). In this case, the French court's judgment cannot be recognized, because it requires the censorship of material that is protected by the First Amendment. Moreover, as *amici* explained in the District Court, the French court's judgment is unenforceable for a second, independent reason – the French court's expansive assertion of jurisdiction is inconsistent with due process requirements. *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (a foreign judgment may not be enforced if the foreign court lacked personal jurisdiction over the U.S. defendant); *accord Restatement (Third) of Foreign Relations Law of the United States* § 482(1)(a) (1987).

The test for determining whether the French court's exercise of personal jurisdiction comports with due process has two distinct components. First, the

court must ask whether the defendant "purposefully established minimum contacts within the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Next, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 316). If a court concludes either that the requirement of minimum contacts has not been met, or that assertion of jurisdiction would be essentially unfair, it must conclude that personal jurisdiction way lacking in the foreign court.[7]

The French court's exercise of jurisdiction over Yahoo! satisfies neither jurisdictional requirement. As noted above, Yahoo!, Inc. is a U.S. company. It provides Internet services in English, targeted at American citizens, from host

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[7] Personal jurisdiction is sometimes classified as either "general" or "specific" jurisdiction. When a defendant's contacts with the forum are "continuous and systematic," general jurisdiction attaches and the defendant may be sued in the forum whether or not the cause of action is related to the defendant's activities in the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). When a defendant's contacts with the forum are less substantial, it may still be subject to specific jurisdiction if the cause of action arises out of its contacts with the forum and if those contacts are sufficient to make the exercise of jurisdiction comport with due process. This case could only be viewed as involving specific jurisdiction because Yahoo!, Inc. does not engage in continuous and systematic conduct in France.

computers located in the United States. Yahoo! has a separate corporate subsidiary – Yahoo! France – that offers an Internet service that is targeted at French customers, and operates in the French language. That service is maintained in full compliance with French law. The French court recognized this, but nonetheless concluded that web site content is targeted at any individual who would find it of interest, and because offensive material was viewed in France, its effects were felt in France.

That conclusion is inconsistent with U.S. law. As this court has held, the maintenance of a passive web site does not, as a matter of law, demonstrate that the corporation has "*purposefully* (albeit electronically) directed his activity in a *substantial* way to the forum state." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (emphasis added). Instead, an entity must do "'something more'" than merely "posting a website on the Internet" to demonstrate a purposeful activity in any forum where someone might happen to access the site. *Panavision International, LP v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (quoting *Cybersell*, 130 F.3d at 418); *see also, e.g.*, *GTE New Media Services Inc.*

v. BellSouth Corp., 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (refusing to base personal jurisdiction on forum state's residents' ability to access web sites).[8]

Nor does the existence of Yahoo!'s U.S. site creates substantial effects in France that would, in turn, allow a French court to exercise jurisdiction over the U.S. company. The substantial effects inquiry focuses on the entity's activities *within* the territory. *Atlantic Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 193 (2d Cir. 1998); *see also Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (declining to extend U.S. jurisdiction over a foreign entity whose contacts with the U.S. were limited to use of the telecommunications system). Because Yahoo!, Inc. does not conduct *any* activities in France, instead leaving all such activities to its separate French subsidiary, there is no basis for jurisdiction.

Moreover, as LICRA itself asserts in its brief to this court, the effects test requires "more than a foreign act having an effect on a local resident." Appellants' Brief at 13; *see also id.* at 19 (arguing that "non-forum conduct that has the potential of offending local sensibilities" is insufficient to create

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[8] This is especially true when the party has chosen a domain suffix that indicates a U.S. company, as Yahoo!'s does. *Cf. Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F. Supp. 2d 1105, 1111-12 (N.D. Cal. 1999) (asserting jurisdiction over New Zealand defendant who sought a ".com" domain name, to tap the "lucrative American market," rather than the ".nz" domain of New Zealand). The Yahoo! France site, which *is* targeted at France, uses the "yahoo.fr" domain name.

"worldwide jurisdiction"). But that is the sole basis on which LICRA and UEJF urged the French court to assert jurisdiction over Yahoo!; LICRA and UEJF asserted only that Yahoo's acts in the United States had some effect on French residents. Appellants thus tacitly acknowledge that the French Court's exercise of jurisdiction was impermissible.

Moreover, any minimal effects felt in France were felt *only* because LICRA and UEJF intentionally sought out the content so that it could bring a case in France in an attempt to force Yahoo! to censor the material at issue.[9] As courts have recognized, "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." *ACLU*, 929 F. Supp. at 844. Instead, individuals must affirmatively seek out the material at issue. That was precisely what happened here: the French student unions themselves intentionally caused even the minimal effects they alleged. Such "unilateral activity" by foreign actors cannot, however, form the basis for the courts of a foreign country to exercise jurisdiction over U.S. corporations. *See Burger King*, 471 U.S. at 474-75. For these reasons, the French court lacked

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[9] The French Court itself noted that any "harm" caused by the "displaying" of material that is unlawful in France was "unintentional [in] character." Interim Court Order, No. RG: 00/05308 and 00/05309 (The County Court of Paris, rel. May 22, 2000).

jurisdiction over Yahoo! and its judgment cannot be recognized in American courts.[10]

B. LICRA's Attempt to Turn the Jurisdictional Arguments on Their Heads Must be Rejected.

Having convinced the French court to adopt a stunningly broad view of the jurisdiction *French* courts may exercise, LICRA now urges upon this Court – and attempts to hide behind – an astonishingly narrow view of the jurisdiction of *American* courts. As explained below, LICRA's position is hopelessly internally inconsistent. If adopted, it would also lead to disastrous consequences. If LICRA's lopsided jurisdictional view were to prevail, overseas entities would be able to obtain orders that purport to affect U.S. nationals' interests, but U.S.

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[10] The French court's order is unenforceable not only because it lacked personal jurisdiction over Yahoo!, as the District Court correctly held, but also because it lacked prescriptive jurisdiction and violated the fundamental principle that extraterritorial regulation infringes on other nations' sovereignty. As this Court has stated, states are limited to asserting jurisdiction over foreigners for extraterritorial acts "that may impinge on the territorial integrity, security, or political independence" of the state. *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994); *see also Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch.) 116, 136 (1812) (Marshall, C.J.) (arguing that a nation's jurisdiction over its own territory is exclusive and "is susceptible of no limitation not imposed by itself"). Exercising extraterritorial jurisdiction also infringes upon the fundamental rights of the infringed-upon nation's citizens, who have in no way consented to be governed by French law. These dangers are heightened in the Internet context, where material posted anywhere in the world is available substantially everywhere else in the world, and companies and individuals have no reasonable way to limit the availability of material they post on the web. *See, e.g.*, *ACLU*, 217 F.3d at 175 ("[O]f extreme significance is the fact . . . that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.").

nationals would be unable to determine through a declaratory judgment action whether the foreign order is enforceable. Indeed, pursuant to LICRA's reasoning, every court in the world would have jurisdiction over Yahoo!'s activities in the Northern District of California – *except* the U.S. District Court for the Northern District of California.

The one-way jurisdictional street that LICRA urges would paralyze the operations of even the most legally responsible businesses. Indeed, this case provides a particularly compelling example. If Yahoo! could not obtain a declaratory judgment in U.S. courts, it would be forced to either censor constitutionally protected material, or to operate under the constant threat of continuously mounting fines.[11] The law does not require such a draconian result. Instead, as the District Court correctly found, LICRA's and UEJF's actions in California were sufficient to create the "minimum contacts" necessary for personal jurisdiction in that forum and the District Court was thus able to resolve this very live dispute. *See International Shoe Co.*, 326 U.S. at 316.

As the court below concluded, its exercise of jurisdiction over appellants was consistent with due process requirements. A defendant purposefully avails

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[11] Moreover, as noted above, in addition to civil penalties, criminal charges are currently pending against Yahoo! and its former CEO in a French court.

itself of a forum state's law when it "(1) commit[s] an intentional act, which [is] (2) expressly aimed at the forum state, and (3) cause[s] harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). The facts of this case easily satisfy that test.

In *Bancroft*, the defendant sent a cease and desist letter to the plaintiff in the forum state. This Court found the letter sufficient to support jurisdiction over a declaratory judgment action, reasoning that by sending the letter the out-of-state defendant intentionally and "individually targeted the plaintiff" in California. *Id.* at 1084. Similarly, in the process of bringing suit in French court, LICRA and UEJF availed themselves of California's laws. Indeed, by utilizing the United States Marshals to serve process, appellants actually invoked California's legal processes. LICRA's and UEJF's other acts, ranging from sending the cease and desist letter to Yahoo!'s Santa Clara offices, to asking the French court to require Yahoo! to re-engineer its Santa Clara-based servers, further targeted Yahoo! in California. And given that Yahoo!'s only assets are in the U.S., LICRA and UEJF surely had reason to expect that the fine it sought in French court would sooner or later lead it to U.S. courts.

Thus, the District Court's decision was fully consistent with governing law. It is also the only ruling that is reasonable in the circumstances. According to LICRA, although Yahoo! is currently subject to a French court's fine that increases approximately $13,300 for each day of noncompliance, Yahoo! is powerless to obtain a declaratory judgment regarding the enforceability of the French court order until LICRA or UEJF decide to enforce it.

If that were the case, U.S. companies would be effectively bound by orders like that at issue here. Faced with the Hobson's choice of operating under the cloud of a judgment that purports to impose ever-mounting financial penalties or complying with an unlawful order, only the most daring business would continue to operate as if the foreign order did not exist. Instead, nearly all will feel constrained to comply with the unlawful order. In the present case, the unlawful order would require the repression of constitutionally protected speech. And for many companies, complying with an unlawful order could easily require a cessation of Internet operations altogether. Because a company has no practical ability to absolutely prohibit some or all content from some or all foreign users, it would have to remove potentially offensive content altogether.

One recent controversy is instructive. Online bookseller Amazon.com offered a book called "A Piece of Blue Sky" that criticizes the scientology religion

founded by L. Ron Hubbard. *See* K. Wimmer & J. Berman, *United States Jurisdiction to Enforce Foreign Internet Libel Judgments*, *in* Pike & Fischer's Internet Law & Regulation, available at http://internetlaw.pf.com. A British court found that the book defamed Hubbard, and the court enjoined the book's distribution. When Amazon learned of the injunction in 1999, it removed the book from its catalog, making it unavailable not only to customers in the United Kingdom, but to customers in the United States as well. Amazon's decision provoked a storm of controversy, with many asserting that "Amazon's actions had the effect of importing the British injunction into foreign jurisdictions in which it had no proper legal effect." *Id.* Although Amazon eventually changed course, this sort of self-censorship is plainly a danger in the absence of clear rules on the enforceability of foreign judgments in this context. *See id.* Indeed, *amici* note that Yahoo! itself removed much of the material at issue from its auction sites in the wake of the French court's judgment, even though there is no dispute that such material is constitutionally protected in this country.

Adopting LICRA's position would thus force a race to the regulatory bottom, in which U.S. entities are unable to seek protection from their own courts, and thus can publish and sell only what is allowed in the most restrictive nation. *See ACLU*, 217 F.3d at 175 (noting danger that regulation of the Internet could

"essentially require every Web communication to abide by the most restrictive community's standards"). This is the precise effect sought by LICRA and others, who want to dictate from abroad what U.S. individuals and companies can place on their web sites. Understanding that the U.S. Constitution prohibits them from enforcing such judgments directly, appellants seek to insulate the French judgment from review by U.S. courts, by maintaining, in perpetuity, the threat of eventual enforcement of the judgment. The law cannot be read to countenance, much less require, such a patently indefensible result, and appellant's contrary argument should be firmly rejected.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully Submitted,

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