

No. 05-

IN THE
Supreme Court of the United States

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

Petitioners,

v.

YAHOO!, INC., a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this closely watched case concerning the Internet, Due Process and the First Amendment, Petitioners were sued for declaratory relief in California after they successfully obtained injunctive relief against Yahoo! in France, preventing the sale of Nazi memorabilia in that country. In a splintered *en banc* ruling, the Ninth Circuit held that jurisdiction could be asserted over the Petitioners, who did absolutely nothing wrongful or illegal, but rather merely successfully asserted their legitimate rights in their domestic courts. By venturing into uncharted territory, the Ninth Circuit has placed itself at odds with every other circuit court and this Court, none of which have ever asserted personal jurisdiction in a non-contract case over a foreign defendant without finding that the defendant's conduct was tortious or wrongful. The holding of the *en banc* circuit court below extends the bounds of personal jurisdiction beyond anything previously sanctioned under the Due Process Clause. In the words of the dissenting judges, the circuit court's majority opinion is "a radical extension of personal jurisdiction" that "cannot be reconciled with the 'constitutional touchstone' of foreseeability." Appendix 67a, 74a. The decision is "dubious," "reckless," "unprecedented," "novel," "radical" and "perverse." Appendix 69a-70a, 74a-75a. The decision below, therefore, raises the following questions:

1. By litigating a bona fide claim in a foreign court and receiving a favorable judgment, does a foreign party automatically assent to being haled into court in the other litigant's home forum?

2. Under the "effects" test set forth in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), must the underlying action in a non-contract case be tortious or otherwise wrongful to justify the exercise of personal jurisdiction, or is "express aiming" of any action, regardless of culpability, sufficient?

LIST OF PARTIES

Petitioners are two French associations named La Ligue Contre Le Racisme Et L'Antisemitisme ("LICRA" or The League Against Racism and Antisemitism) and L'Union Des Etudiants Juifs de France ("UEJF" or The Union of Jewish Students of France).

Respondent Yahoo!, Inc., is a Delaware corporation.

Further, Chamber of Commerce of the United States, The Computer Communications Industry Association, The Computing Technology Industry Association, The Information Technology Association of America, NetCoalition, The Online Publishers Association, American Booksellers Foundation for Free Expression, Center for Democracy and Technology, American Civil Liberties Union, Computer Professionals for Social Responsibility, Digital Freedom Network, The DKT Liberty Project, The Electronic Frontier Foundation, Feminists for Free Expression, The First Amendment Project, The Freedom to Read Foundation, Human Rights in China, Human Rights Watch, The Media Institute, National Coalition Against Censorship, People for the American Way, The Reporters Committee for Freedom of the Press, The Society of Professional Journalists, and VIP Reference ("Dacankao") appeared as *amicus curiae* in support of respondent Yahoo! in the appeal below.

CORPORATE DISCLOSURE STATEMENT

La Ligue Contre Le Racisme Et L'Antisemitisme and L'Union Des Etudiants Juifs De France are two non-profit associations organized and located in France.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	xv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION AND STANDING	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION ...	10
I. The Conflict with the Court and other Circuit Courts	10
II. The Importance of the Issues Involved	13

Contents

	<i>Page</i>
III. The Erroneousness of the Decision Below . . .	19
CONCLUSION	23

TABLE OF CITED AUTHORITIES

Page

Cases:

<i>Akro Corp. v. Luker</i> , 45 F.3d 1541 (Fed. Cir. 1995)	12
<i>Asahi Metal Industry Co., Ltd. v. Superior Court</i> , 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)	13, 19
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)	20
<i>Burnham v. Superior Court</i> , 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)	18-19
<i>Calder v. Jones</i> , 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)	<i>passim</i>
<i>Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.</i> , 334 F.3d 390 (4th Cir. 2003)	12
<i>Cent. Freight Lines, Inc. v. Transp. Corp.</i> , 322 F.3d 376 (5th Cir. 2003)	12
<i>F. Hoffmann-La Roche Ltd. v. Empagran S.A.</i> , 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)	13
<i>Far West Capital, Inc. v. Towne</i> , 46 F.3d 1071 (10th Cir. 1995)	12

Cited Authorities

	<i>Page</i>
<i>Fielding v. Hubert Burda Media, Inc.</i> , 415 F.3d 419 (5th Cir. 2005)	12
<i>Forney v. Apfel</i> , 524 U.S. 266, 118 S. Ct. 1984, 141 L. Ed. 2d 269 (1998)	4
<i>Helicopteros Nacionales de Columbia, S.A. v. Hall</i> , 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)	20
<i>Helmer v. Doletskaya</i> , 364 U.S. App. D.C. 178 (D.C. Cir. 2004)	12
<i>Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.</i> , 205 F.3d 1244 (10th Cir. 2000)	12
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)	20
<i>Janmark, Inc. v. James T. Reidy & Dreamkeeper, Inc.</i> , 132 F.3d 1200 (7th Cir. 1997)	12
<i>Libutti v. United States</i> , 178 F.3d 114 (2nd Cir. 1999)	12
<i>Noonan v. Winston Co.</i> , 135 F.3d 85 (1st Cir. 1998)	12
<i>Omni Capital Int’l v. Rudolf Wolff & Co.</i> , 484 U.S. 97, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)	19

Cited Authorities

	<i>Page</i>
<i>Oriental Trading Co. v. Firetti</i> , 236 F.3d 938 (8th Cir. 2001)	12
<i>Retail Software Servs., Inc. v. Lashlee</i> , 854 F.2d 18 (2nd Cir. 1988)	12
<i>Reynolds v. Int’l Amateur Athletic Fed’n</i> , 23 F.3d 1110 (6th Cir. 1994)	12
<i>Ruhrgas AG v. Marathon Oil Co.</i> , 526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)	3
<i>Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.</i> , 207 F.3d 1351 (11th Cir. 2000)	12
<i>Schwarzenegger v. Fred Martin Motor Co.</i> , 374 F.3d 797 (9th Cir. 2004)	20
<i>Shaffer v. Heitner</i> , 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)	20
<i>Toys “R” Us, Inc. v. Step Two, S.A.</i> , 318 F.3d 446 (3d Cir. 2003)	12
<i>U.S. Sec. & Exch. Comm’n v. Carillo</i> , 115 F.3d 1540 (11th Cir. 1997)	12
<i>United States v. Ferrara</i> , 54 F.3d 825 (D.C. Cir. 1995)	12

Cited Authorities

	<i>Page</i>
<i>United States v. Swiss Amer. Bank, Ltd.</i> , 274 F.3d 610 (1st Cir. 2001)	12
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme</i> , 145 F. Supp. 2d 1168 (N.D. Cal. 2001)	1
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme</i> , 169 F. Supp. 2d 1181 (N.D. Cal. 2001)	1-2
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme</i> , 379 F.3d 1120 (9th Cir. 2004)	2
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme</i> , 399 F.3d 1010 (9th Cir. 2005)	2
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme</i> , 433 F.3d 1199 (9th Cir. 2006)	<i>passim</i>
 Statutes:	
28 U.S.C. § 1254(1)	3
Cal. Civ. P. Code § 410.10	4, 19

*Cited Authorities**Page***Other Authorities:**

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Ayelet Ben-Ezer & Ariel L. Bendor, <i>Conceptualizing</i> <i>Yahoo! v. L.C.R.A.: Private Law Constitutional</i> <i>Review, and International Conflict of Laws</i> , 25 Cardozo L. Rev. 2089 (2004)	16
Paul Schiff Berman, <i>From International Law to Law</i> <i>and Globalization</i> , 43 Colum. J. Transnat'l L. 485 (2005)	16
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	<i>Page</i>
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Cited Authorities

	<i>Page</i>
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Andrew F. Halaby, <i>You Won't Be Back: Making Sense of "Express Aiming" After Schwarzenegger v. Fred Martin Motor Co.</i> , 37 Ariz. St. L.J. 625 (2005)	17
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Cited Authorities

	<i>Page</i>
Aaron Judson Lodge, <i>Globalization: Panacea for the World or Conquistador of International Law and Statehood?</i> , 7 Or. Rev. Int'l L. 224 (2005)	17
Markus Mullern, <i>Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet</i> , 15 Fordham Intell. Prop. Media & Ent. L.J. 709 (2005)	17
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Cited Authorities

	<i>Page</i>
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	<i>Page</i>
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Christopher D. Van Blarcum, <i>Internet Hate Speech: The European Framework and the Emerging American Haven</i> , 62 Wash & Lee L. Rev. 781 (2005)	18
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Rules:

Fed. R. Civ. P. 4(k)(1)(A).	19
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Constitutional Provisions:

United States Constitution, Fifth Amendment	19
United States Constitution, Fourteenth Amendment	4, 19

TABLE OF APPENDICES

	<i>Page</i>
Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed January 12, 2006	1a
Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed February 10, 2005	121a
Appendix C — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed August 23, 2004	122a
Appendix D — Order Granting Motion For Summary Judgment Of The United States District Court For The Northern District Of California, San Jose Division Filed November 7, 2001	162a
Appendix E — Order Of The United States District Court For The Northern District Of California, San Jose Division Denying Motion To Dismiss Filed June 7, 2001	188a
Appendix F — Interim Court Order Made On November 20, 2000	209a
Appendix G — Interim Court Order Made On May 22, 2000	246a

OPINIONS BELOW

Petitioners LICRA and UEJF initially brought an action against Respondent Yahoo! in Paris, France seeking an injunction compelling Yahoo! to “take all measures¹ of the type that dissuade and block any access from French territory on Yahoo.com to the auction service for Nazis objects and to any other site or service that may be construed as constituting an apology for Nazism or dispute over the reality of Nazi crimes.” Appendix 257a. The French court issued an interim order on May 22, 2000 (Appendix G) and, after further hearings, a second interim order on November 20, 2000 (Appendix F) granting the requested injunctive relief and directing Yahoo! to comply within three months, “subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.” Appendix 243a.

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in federal district court in California, seeking a declaratory judgment that the interim orders of the French court were not recognizable or enforceable in the United States. On June 7, 2001, the district court denied Petitioners’ motion to dismiss, concluding that the court had personal jurisdiction over Petitioners. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (Appendix E). On November 7, 2001, the district court granted summary judgment in favor of Yahoo!. *Yahoo!*

1. The parties dispute the proper translation of the French phrase “toutes les mesures.” See Appendix 6a n.1; Joel R. Reidenberg, Symposium, *Current Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951, 1959 (2005).

Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (Appendix D).

In a split opinion filed August 23, 2004, the United States Court of Appeals for the Ninth Circuit reversed, with the two-judge majority finding that the district court could not properly assert personal jurisdiction over the French defendants. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004) (Appendix C).

On February 10, 2005, the Ninth Circuit vacated its earlier ruling and granted a rehearing *en banc*. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 399 F.3d 1010 (9th Cir. 2005) (Appendix B).

In a fractured *en banc* decision issued January 12, 2006, the United States Court of Appeals for the Ninth Circuit issued a *per curiam* ruling dismissing the case. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (Appendix A). No majority controlled the opinion of the court. The court determined that it could assert personal jurisdiction over the defendants. However, three of the eight judges finding in favor of jurisdiction also held that the case was not ripe for adjudication. Therefore, those three judges joined the three judges finding no basis for jurisdiction to make a majority of six judges voting for dismissal. The remaining five judges would have affirmed the district court's judgment. As a result, only the jurisdictional decision against Petitioners represented a majority of the *en banc* circuit court.

STATEMENT OF JURISDICTION AND STANDING

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's opinion *en banc* was rendered on January 12, 2006.

Although the Ninth Circuit ultimately dismissed the case in their favor, Petitioners did not prevail on the threshold jurisdictional issue, which was the only issue decided by a majority of the *en banc* circuit court. Petitioners have standing pursuant to 28 U.S.C. § 1254(1), which permits "any party" to file a petition for certiorari. Because the case was dismissed (narrowly) on ripeness grounds by the three judges writing the controlling opinion for the court,² there is a distinct possibility that Yahoo! may re-file its case again if circumstances change with regard to the French Court's orders. In that event, Petitioners would most likely be precluded from relitigating the prior jurisdictional ruling, on which 8 of 11 judges agreed. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) (personal jurisdiction determination may preclude the parties from relitigating the same issue in future litigation). Therefore, this Petition may be the only opportunity that Petitioners have to challenge the Ninth Circuit's jurisdictional ruling, which may be used against them in subsequent litigation if further action is taken in France and the matter becomes ripe. Although Petitioners recognize that it is unusual for a successful party to petition for a writ of certiorari, such a petition is permitted under 28 U.S.C. § 1254(1), and warranted under these extraordinary

2. Of the eleven circuit judges, only three found the case was not ripe. Five judges dissented and three others expressed no opinion on the ripeness question.

circumstances. *See, e.g., Forney v. Apfel*, 524 U.S. 266, 271, 118 S. Ct. 1984, 141 L. Ed. 2d 269 (1998) (party is “aggrieved” and may appeal order remanding but not reversing administrative decision).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fourteenth Amendment, U.S. Constitution.

Cal. Civ. P. Code § 410.10 (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).

STATEMENT OF THE CASE

Respondent Yahoo! Inc. (“Yahoo!”), a California-based Internet Service Provider (ISP), operates an English-language website under the domain name “yahoo.com” offering, *inter alia*, auction sites, message boards and chat rooms. In 2000, on the “geocities” websites hosted by Yahoo!, excerpts from the anti-Semitic works *Mein Kampf* and *Protocole des Sages de Sion* appeared and Nazi memorabilia, such as SS-daggers and canisters of Zyklon-B, were offered for sale on Yahoo!’s auction site. Yahoo! France, the French subsidiary of Yahoo!, maintained the French language website under the domain name “yahoo.fr,” which contained links and directed visitor traffic to yahoo.com, where the offending material could be found.

La Ligue Contre Le Racisme Et L’Antisemitisme (“LICRA”) is an association combating racism and anti-Semitism; L’Union Des Etudiants Juifs De France (“UEJF”)

is the union of Jewish students of France. In April 2000, the two associations discovered that they could access the anti-Semitic material in question in France. After LICRA had sent a brief cease-and-desist letter to Yahoo! in California, it filed a complaint, alleging violations of Article R 645-1 of the French Penal Code, in which UEJF joined. In an order dated May 22, 2000, the Tribunal de Grande Instance (“TGI”) in Paris asserted jurisdiction under Article 46 of the New Code of Civil Procedure, reasoning that the accessibility of the websites in question (via both the yahoo.com website directly and the yahoo.fr website through a hyperlink) caused harm in France. The TGI ordered Yahoo! to take all measures of the type that dissuades and blocks any access by French Internet users on yahoo.com to auctions of Nazi memorabilia and all other websites condoning Nazism or disputing the reality of Nazi crimes. Yahoo! France was ordered to warn all users of the fact that pursuing their searches on yahoo.com might put them in violation of French law.

Yahoo! sought to have the TGI reconsider its order, arguing that its services under the yahoo.com domain were addressed to U.S. Internet users and that the technical means to fulfill its obligations under the May 22 order, *i.e.* the means to block viewers in France, did not exist. On November 20, 2000, after having received expert reports on the feasibility of compliance with the first interim order, the TGI confirmed its order. The Court took note of Yahoo!’s arguments that its services, including its auction site, targeted mainly U.S. Internet users, particularly given the nature of the objects sold, the language and currency used, and the payment options offered. The TGI also noted that Yahoo!’s servers were installed in the United States, where Yahoo! argued it had a First Amendment right to display and offer the offending materials. Nonetheless, the TGI was not convinced

by these arguments. It reasoned that Nazi memorabilia would be of interest to French users and the mere visualization of such objects on the Internet in France was in violation of the Penal Code. Significantly, the Court pointed out that Yahoo! knew it was addressing French Internet users with its offerings on the yahoo.com website, as the website displayed French-language commercials if accessed by visitors from France. The TGI also rejected Yahoo!'s argument that compliance with the order was impossible. This conclusion relied heavily on the expert report, which stated that 70% of the internet protocol (IP) addresses allocated to French Internet users could definitely be associated with a French access provider and thus be filtered (a technology used by Yahoo! to target the commercials to French users). For users with an unclear status, a prompt for a declaration of their locality could be required. Given that Yahoo! already used the relevant technology to target commercials to French users, the TGI concluded that no extravagant financial burden was required for compliance with the order. The technology, according to the experts, does not have too great an impact on the performances of the servers. Finally, Yahoo!'s argument that the technology was not trustworthy was also discounted by the TGI; after all, that would have meant that Yahoo! was deceiving its advertising clients who presumed that they were being accurately served by the technology permitting Yahoo! to target its French advertising to French visitors.

Yahoo! largely complied with the French order. It undertook the relevant changes to the yahoo.fr and yahoo.com websites and amended its auction policy to prohibit items promoting, glorifying, or directly associated with groups such as the Nazis or those that violated Yahoo!'s hate-speech policy. However, some items, such as hyperlinks to sites offering the text or copies of *Mein Kampf*, were still available.

Yahoo! did not pursue an appeal against the order in France. Instead, it filed a complaint in the Northern District of California seeking a declaratory judgment that the French court orders were not enforceable in the United States. LICRA and UEJF felt that Yahoo! had substantially complied with the TGI's interim orders and had not asked the French court to assess any penalties against Yahoo! for non-compliance. Consequently, they also had not asked a U.S. court to enforce the French orders. LICRA and UEJF responded to Yahoo!'s complaint by filing a motion to dismiss for lack of personal jurisdiction. The district court rejected the motion, reasoning that the defendants had purposefully availed themselves of the benefits of California by sending a cease-and-desist letter to Yahoo!, using the U.S. Marshals Service to serve process, and by requesting a French court to order that Yahoo! perform acts in California. The district court subsequently granted Yahoo!'s motion for summary judgment, holding that enforcement of the French orders in the United States would violate the First Amendment.

LICRA and UEJF filed an appeal focusing on personal jurisdiction and ripeness defenses. The appeal was decided by the Court of Appeals for the Ninth Circuit in August 2004. With one judge dissenting, the court reversed the district court. The court held that personal jurisdiction could be obtained only if the defendants were to ask a United States district court to enforce the French orders. To this point, the court noted, the defendants had not done so. The only possible basis for jurisdiction, the court concluded, would be that the defendants had purposefully availed themselves of the jurisdiction of California by pursuing their action before the TGI in France. But to do so, LICRA's and UEJF's efforts must qualify as wrongful conduct targeted at Yahoo!. The court concluded that enforcing their legal rights under French

law cannot constitute such conduct. Judge Brunetti, dissenting, argued that it would have been proper to exercise jurisdiction, as LICRA and UEJF deliberately sought action from Yahoo! in California, regardless of whether such action may be considered wrongful or not.

The case continued, with an *en banc* rehearing in the Ninth Circuit. On January 12, 2006, the circuit court panel of 11 judges handed down its judgment. By six votes to five, it dismissed Yahoo!’s suit, *i.e.* it reversed and remanded the case to the district court. However, of the six judges in favor of dismissing the suit, only three held so on the basis of lack of jurisdiction. The other three judges considered the suit not ripe. Notwithstanding the dismissal, an eight-judge majority of the eleven-judge *en banc* panel held that the district court had properly exercised jurisdiction. They reasoned that, in contrast to the original panel’s holding, all intentional acts aimed at the forum state causing a “jurisdictionally sufficient amount” of harm that the defendant knows is likely to be suffered in the forum state are relevant for the evaluation of jurisdiction - not just wrongful conduct. The same eight-judge majority then considered the three contacts of LICRA and UEJF with California. The cease-and-desist letter sent to Yahoo! before the lawsuit in France alone does not suffice as a basis for jurisdiction, as an opposite holding would discourage cease-and-desist letters and encourage filing lawsuits without first attempting to find an amicable solution. Nor does service of process, namely to commence the French lawsuit, and service of the French court’s orders suffice as a basis for jurisdiction, or else U.S. citizens sued abroad could without further ado bring suit in the United States. However, considered in conjunction with the first two contacts, the fact that LICRA and UEJF had obtained two orders from the French court

directing Yahoo! to take actions in California on threat of a substantial penalty was held to suffice for a finding of jurisdiction, even if only narrowly so. In the majority's opinion, this last act could potentially involve a penalty or at least cast some cloud on the legality of Yahoo!'s actions.

The minority of three judges who concurred in the judgment considered the exercise of personal jurisdiction over LICRA and UEJF as improper. They held that the defendants' actions were not expressly aimed at California since they sought French court orders directing Yahoo! to perform acts in France. Even though they knew that Yahoo! was based in California, their express aim was local and not directed towards California. Furthermore, much like the original panel, they considered only wrongful conduct to give rise to jurisdiction in a non-commercial and non-contract case. The minority went beyond that and rightly pointed to a contradiction in the majority's assessment: The majority, despite its claim to the contrary, would expose a foreigner litigating a bona fide claim in a foreign court and receiving a favorable judgment to U.S. jurisdiction, as any foreign judgment arguably has an effect on the defendant at home.

REASONS FOR GRANTING THE PETITION

By venturing into uncharted territory, the Ninth Circuit has placed itself at odds with every other circuit court and this Court, none of which have ever asserted personal jurisdiction in a non-contract case over a foreign defendant who did absolutely nothing wrongful or illegal, but rather merely successfully asserted its legitimate rights in its domestic courts. The holding of the *en banc* circuit court below extends the bounds of personal jurisdiction beyond anything previously sanctioned by this Court. In the words of the concurring and dissenting judges, the circuit court's majority opinion is "a radical extension of personal jurisdiction" that "cannot be reconciled with the 'constitutional touchstone' of foreseeability." Appendix 67a, 74a. The decision is "dubious," "reckless," "unprecedented," "novel," "radical" and "perverse." Appendix 69a-70a, 74a-75a.

I

The Conflict with the Court and other Circuit Courts

In *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), the Court unanimously held that intentional, wrongful conduct calculated to cause injury in the forum state was sufficient to support the exercise of jurisdiction over the defendant in an action arising from that conduct. Until the circuit court holding below, no court had ever applied the *Calder* effects test in a case where the defendant's conduct was not wrongful.

In *Calder*, the Court held that the defendants should reasonably have expected that, by circulating a libelous story

in California about a California celebrity, they would be haled into court in California to answer for their tortious behavior. However, under the circuit court's reading of *Calder*, acts giving rise to personal jurisdiction in a non-contract case need not be wrongful. Appendix 17a-18a (“[W]e do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts.”). The circuit court's holding was unprecedented, and extends the reach of the court's jurisdiction beyond all previously known limits.

Calder itself was a case in which the acts giving rise to jurisdiction were tortious. *Calder*, 465 U.S. at 1485. The Court held that “in this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction is proper on that basis.” *Id.*, at 1487. As Judge O’Scanlain stated in dissent below,

[t]he wrongfulness of the defendants’ acts was, therefore, a key element in the jurisdictional calculus, possibly because a person who has committed a wrongful act should expect to be haled into court by his victim in the victim’s home State. Although the Court might have reached the same result if the act in question had not been wrongful – as the majority apparently presumes it would – it is reckless of us to proceed on the basis of such speculation beyond what is currently the farthest reach of personal jurisdiction approved by the Court.

Appendix 69a. Indeed, the circuit court could not cite one other instance of this Court or any court asserting jurisdiction

in a non-contract case where the acts supporting jurisdiction were not wrongful or tortious. Appendix 17a.

Therefore, in extending *Calder* to conduct that was neither wrongful nor tortious, the circuit court brought itself into conflict with *Calder* itself, and with every other circuit court that has applied the *Calder* effects test. See *United States v. Swiss Amer. Bank, Ltd.*, 274 F.3d 610 (1st Cir. 2001); *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998); *Libutti v. United States*, 178 F.3d 114 (2nd Cir. 1999); *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18 (2nd Cir. 1988); *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005); *Cent. Freight Lines, Inc. v. Transp. Corp.*, 322 F.3d 376 (5th Cir. 2003); *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994); *Janmark, Inc. v. James T. Reidy & Dreamkeeper, Inc.*, 132 F.3d 1200 (7th Cir. 1997); *Oriental Trading Co. v. Firetti*, 236 F.3d 938 (8th Cir. 2001); *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000); *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995); *Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351 (11th Cir. 2000); *U.S. Sec. & Exch. Comm’n v. Carillo*, 115 F.3d 1540 (11th Cir. 1997); *Helmer v. Doletskaya*, 364 U.S. App. D.C. 178 (D.C. Cir. 2004); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995); *Akro Corp. v. Luker*, 45 F.3d 1541 (Fed. Cir. 1995).

II

The Importance of the Issues Involved

Petitioners are not citizens of the United States. As the Court has previously noted, “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). Indeed, notions of comity warn against the type of “legal imperialism” that would require foreign citizens to subject themselves to American courts and laws merely as a result of asserting their legal rights within their own states. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004).

The decision of the circuit court below is of immense importance to the delicate balance of our country’s relations with foreign states and their citizens. Respondent Yahoo! is one of the world’s largest and most highly-valued multinational corporations with operations in various countries across the globe, including France, where it operates a subsidiary corporation and a French-language website (yahoo.fr) designed to direct visitors to its main website (yahoo.com). Petitioners are human rights organizations in France who discovered that Yahoo! was violating French law in France, and who obtained two interim orders from a French court aimed at stopping those violations and protecting French citizens. If such actions are sufficient to give rise to the exercise of personal jurisdiction and to be required to retain counsel and defend oneself in an American court, then

no litigant suing an American-based firm is safe from the long arm of United States jurisdiction.

In effect, the circuit court has told all foreign citizens who might wish to sue an American multi-national corporation to think twice before taking action in their home state, lest they be haled into an American court. And it is not difficult to see how the shoe could be placed on the other foot. What American citizen suing a foreign company operating in the United States would think that by asserting his rights before a U.S. Court that he would be subjecting himself to a lawsuit in the home country of the foreign defendant? Were a foreign court to assert jurisdiction in the same manner as the circuit court has done below, we would be rightly outraged. The implications of the circuit court's opinion are staggering.

The jurisdictional decision by the circuit court is likely to cause considerable mischief. It is not hard to imagine how the circuit court's decision might lead to a proliferation of tit-for-tat actions, even within the United States. As one example, imagine a woman in State A who is being harassed with phone calls and letters by an ex-husband in State B. If the woman brings suit in State A to obtain an injunction against her harasser, she would now necessarily be subject to a counter-suit in State B. After all, she would have done only what the Petitioners here did, namely, assert her legitimate rights to an injunction against someone violating the law in her home state. Nevertheless, by obtaining an injunction directed at her husband in State B, the woman would be considered to have directed her activities toward the other state in a way that the circuit court would find sufficient for the exercise of jurisdiction over her in the other state.

Similarly, any person seeking injunctive relief against a foreign company doing business in the state would subject himself to jurisdiction in the foreign state if he obtained an order that affected the foreign company's activities in its home state. So, for example, if a foreign company was selling products that were banned in the plaintiff's state, an injunction compelling the foreign company to change its formula, if it wished to continue its business in the state, would be sufficient to support the exercise of jurisdiction over the plaintiff in an action in the foreign company's home state.

As in other jurisdictional cases reviewed by the Court, the order below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of the Court's supervisory power," pursuant to Rule 10(a) of the Rules of the Supreme Court. The Ninth Circuit's *en banc* jurisdictional ruling necessarily will affect countless other lawsuits that are brought within the large circuit. The opinion is not particularly limited to the facts of the case, but rather boldly answers a broad legal question by stating that *wrongful* conduct directed toward the forum is not a prerequisite to the exercise of personal jurisdiction in a non-contract case. The decision therefore holds importance far beyond the interests of the litigants.

In this case, the interest is heightened because of the First Amendment issues raised by Yahoo!'s complaint and the worldwide interest in Internet free speech cases. The case has already attracted a great deal of scholarly attention aimed at both the jurisdictional and free speech aspects of the case.³

3. Among the numerous scholarly articles discussing the case are Article, 2005 Syracuse Sci. & Tech. L. Rep. 2 (2005); Ryan Bates, (Cont'd)

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Comment, *Communication Breakdown: * The Recording Industry's Pursuit of the Individual Music User, a Comparison of U.S. and E.U. Copyright Protections for Internet Music File Sharing*, 25 NW. J. Int'l L. & Bus. 229 (2004); Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law Constitutional Review, and International Conflict of Laws*, 25 Cardozo L. Rev. 2089 (2004); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Colum. J. Transnat'l L. 485 (2005); Paul Schiff Berman, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: Judges as Cosmopolitan Transnational Actors*, 12 Tulsa J. Comp. & Int'l L. 109 (2004); Paul Schiff Berman, Symposium, *Current Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. Pa. L. Rev. 1819 (2005); Shawn A. Bone, *The Washington and Lee Law Alumni Association Student Notes Colloquium: Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co. +*, 62 Wash & Lee L. Rev. 279 (2005); Rochelle Dreyfuss, Symposium, *Intellectual Property Online: The Challenge of Multi-territorial Disputes Co-sponsored with the Brooklyn Law School Center for the Study of International Business Law: Panel 1: Resolution Through Conflict of Laws: The Ali Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?* 30 Brooklyn J. Int'l L. 819 (2005); Eric T. Eberwine, Note & Comment, *Sound and Fury Signifying Nothing? Jurgen Bussow's Battle Against Hate-Speech On The Internet*, 49 N.Y.L. Sch. L. Rev. 353 (2004); Kevin Fayle, Note, *Sealand Ho! Music Pirates, Data Havens, and the Future of International Copyright Law*, 28 Hastings Int'l & Comp. L. Rev. 247 (2005); Flora J. Garcia, *Bodil Lindqvist: A Swedish Churchgoer's Violation of the European Union's Data Protection Directive Should Be a Warning to U.S. Legislators*, 15 Fordham Intell. Prop. Media & Ent. L.J. 1205 (2005); Michael A. Geist, Doris Estelle Long, Leslie Ann Reis, David E. Sorkin & Fred Von Lohmann, *Copyright & Privacy: Collision Or*

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Coexistence? Conference Brochure: Copyright & Privacy — Through The Technology Lens *, 4 J. Marshall Rev. Intell. Prop. L. 242 (2005); Tim Gerlach, Note & Comment, *Using Internet Content Filters to Create E-Borders to Aid in International Choice of Law and Jurisdiction*, 26 Whittier L. Rev. 899 (2005); Andrew F. Halaby, *You Won't Be Back: Making Sense of "Express Aiming" After Schwarzenegger v. Fred Martin Motor Co.*, 37 Ariz. St. L.J. 625 (2005); Holger P. Hestermeyer, LL.M., *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 NW. J. Int'l L. & Bus. 267 (2006); Daniel P. Homiller, *From Deepsouth to the Great White North: The Extraterritorial Reach of United States Patent Law after Research in Motion*, 2005 Duke L. & Tech. Rev. 17 (2005); Alison Kelly, Case Summary, *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'AntiSemitisme*, 379 F.3d 1120 (9th Cir. 2004), 15 DePaul-LCA J. Art & Ent. L. 257 (2004); Aaron Judson Lodge, *Globalization: Panacea for the World or Conquistador of International Law and Statehood?*, 7 Or. Rev. Int'l L. 224 (2005); Markus Mullern, *Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet*, 15 Fordham Intell. Prop. Media & Ent. L.J. 709 (2005); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115 (2005); Taiwo A. Oriola, *Regulating Unsolicited Commercial Electronic Mail in the United States and the European Union: Challenges and Prospects*, 7 Tul. J. Tech. & Intell. Prop. 113 (2005); Katherine Raynolds, Note, *One Verizon, Two Verizon, Three Verizon, More?—A Comment: RIAA v. Verizon and How the DMCA Subpoena Power Became Powerless*, 23 Cardozo Arts & Ent L.J. 343 (2005); Robert T. Razzano, Comment & Casenote, *Error 404 Jurisdiction Not Found: The Ninth Circuit Frustrates the Efforts of Yahoo! Inc. to Declare a Speech-Restrictive Foreign Judgment Unenforceable*, 73 U. Cin. L. Rev. 1743 (2005); Recent Case, *Civil Procedure - Personal Jurisdiction - Ninth Circuit Requires Intentional, Wrongful Conduct To Satisfy the Calder Effects Test. - Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004), 118 Harv. L. Rev. 1363 (2005); Joel R. Reidenberg, Symposium, *Current*

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Indeed, in this respect, the case is much like *Calder*, which also addressed a personal jurisdiction question in the context of the First Amendment. Clearly, the case is an important case by itself, and it raises important legal questions of broad interest to litigants and others throughout the world.

The case also presents an important opportunity for the Court to revisit perhaps the difficult question of personal jurisdiction that the Court has previously been unable to resolve. In the last two major personal jurisdiction cases addressed by the Court, both arising out of California, the Court was extremely divided in its approach. *See Burnham*

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Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Technology and Internet Jurisdiction, 153 U. Pa. L. Rev. 1951 (2005); Michael L. Rustad & Thomas H. Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. High Tech. L. 13 (2005); Allan R. Stein, Symposium, *Current Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Parochialism and Pluralism in Cyberspace Regulation*, 153 U. Pa. L. Rev. 2003 (2005); Peter P. Swire, Symposium, *Current Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. Pa. L. Rev. 1975 (2005); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 Roger Williams U. L. Rev. 1 (2004); Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 Wash & Lee L. Rev. 781 (2005); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (2005); Christopher Wolf, *The Washington and Lee Law Alumni Association Student Notes Colloquium: A Comment on Private Harms in the Cyber-World*, 62 Wash & Lee L. Rev. 355 (2005).

v. Superior Court, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) (no majority opinion issued); *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (limited majority opinion). The present case would perhaps provide a proper vehicle to revisit some of the analytical questions that divided the Court at that time, and if those issues could be resolved, the case would naturally be of even greater importance.

III

The Erroneousness of the Decision Below

In a case brought under the federal court's diversity jurisdiction, such as this one, the federal court is required to apply the long-arm statute of the state in which it sits. Fed. R. Civ. P. 4(k)(1)(A). California's long-arm statute is coextensive with federal due process requirements. Cal. Civ. P. Code § 410.10. Indeed, the limit of any court's jurisdiction over an individual is the Due Process Clause.⁴ *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987). For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least "minimum contacts" with the relevant forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice."

4. While a state court's exercise of jurisdiction and a federal court's exercise of jurisdiction in a diversity case, are limited by the Due Process Clause of the Fourteenth Amendment, all federal courts are also limited by the Due Process Clause of the Fifth Amendment. In this case, there is no reason to address the Fifth Amendment Due Process Clause unless the Court would find that for some reason it is more restrictive than the Fourteenth Amendment Due Process Clause.

International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The “minimum contacts” test applies to all assertions of personal jurisdiction. See *Shaffer v. Heitner*, 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (applying test to assertion of jurisdiction over defendants in *in rem* and *quasi in rem* jurisdiction cases).

Defendants may be subject to general jurisdiction or specific jurisdiction. General jurisdiction arises when the defendant’s contacts with the forum are “continuous and systematic.” *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Plaintiff does not assert general jurisdiction over the defendants in this case.

Alternatively, specific jurisdiction arises when (1) the non-resident defendant purposefully directs his activities toward the forum or purposefully avails himself of the privilege of conducting activities in the forum; (2) the claim arises out of or relates to the defendant’s forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

In general, with regard to the first prong, the “purposeful availment” standard ordinarily applies in contract cases, while the “purposeful direction” standard applies in tort cases. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (“availment and direction are, in fact, two distinct concepts”). Under *Calder*, a tort case, the “purposeful direction” or “effects” test is satisfied if the defendant committed an intentional act expressly aimed at the forum state causing harm that the defendant knows is

likely to be suffered in the forum state. *Calder*, 465 U.S. 783.⁵

Petitioners had only three contacts with California. These contacts were a cease and desist letter, the service of process to commence the French action, and the subsequent service of two interim orders on Yahoo!. Service was made in accordance with the requirements of the Hague Convention on the service abroad of judicial documents. As the circuit court majority correctly acknowledged, these limited contacts are an insufficient basis for the exercise of personal jurisdiction over Petitioners. Appendix 18a-20a.

Nevertheless, the circuit court concluded that these contacts, combined with the acts of Petitioners in France of obtaining the two interim orders from the French court, satisfied the *Calder* test for assertion of jurisdiction over the Petitioners. Appendix 24a (“All of the contacts with the forum state in this case are either the interim orders themselves or contacts directly related to those orders.”). Quite unbelievably, the court found that by filing suit in France — and succeeding — the Petitioners had committed an intentional act expressly aimed at California. Appendix 21a. Unable to answer whether Yahoo! had been harmed or not (Appendix 23a-25a), the Court still concluded that in a “close question” it believed Petitioners were subject to personal jurisdiction in this suit. Appendix 25a.

The principle dispute between the majority and dissenting judges was whether the intentional act must be

5. The present case seeking declaratory relief, sounding neither in contract nor tort, does not lend itself easily to either method of analysis.

wrongful. As set forth above, no court has previously held that conduct that was not wrongful provided a basis for the assertion of jurisdiction over the defendant in a non-contract case. The original circuit court panel and the dissenting *en banc* judges make a strong case that only wrongful conduct should be considered. Appendix 68a-72a, 126a-134a.

But the larger error may be in that the majority failed to engage in any analysis whatsoever of the crucial third prong of the jurisdictional analysis, namely, whether the exercise of jurisdiction would comport with “fair play and substantial justice.” The principle mistake of the court was in failing to recognize that the *only purpose* of the French action was to regulate Yahoo!’s activities in France. It was erroneous to conclude that the French action was “expressly aimed” at California, when it aimed solely at preventing violations of the law in France. Any effect outside France was only incidental, and the result of the fact that the defendant Yahoo!, which was doing business in France and directing its activities toward French customers, was a corporation based in California. Seen in this light, the majority should never have concluded that the exercise of jurisdiction over the French defendants would comport with “fair play and substantial justice.” No party taking lawful action in its home forum against a corporation doing business in that forum to regulate activities in the forum would anticipate being haled into court in the corporation’s home forum, merely because the order obtained in the action affected the corporation’s business model. The circuit court below simply ignored the Constitutional requirement that the exercise of jurisdiction comport with traditional standards of fair play and justice. Those standards do not permit the exercise of jurisdiction over foreign parties who merely assert their legal rights in their own countries to protect themselves from American corporations who are violating local laws.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this important matter.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED JANUARY 12, 2006**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 01-17424

YAHOO! INC., a Delaware corporation,

Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RACISME ET
L'ANTISEMITISME, a French association; L'UNION
DES ETUDIANTS JUIFS DE FRANCE,
a French association,

Defendants-Appellants.

March 24, 2005, Argued and Submitted,
San Francisco, California
January 12, 2006, Filed

JUDGES: Before: Mary M. Schroeder, Chief Judge, and
Warren J. Ferguson, Diarmuid F. O'Scannlain, Michael Daly
Hawkins, A. Wallace Tashima, William A. Fletcher, Raymond
C. Fisher, Ronald M. Gould, Richard A. Paez, Richard R.
Clifton, and Carlos T. Bea, Circuit Judges. Opinion by Judge

Appendix A

William A. Fletcher; Concurrence by Judge Ferguson; Concurrence by Judge O’Scannlain; Concurrence by Judge Tashima; Partial Concurrence and Partial Dissent by Judge Fisher. W. FLETCHER, Circuit Judge, with whom SCHROEDER, Chief Circuit Judge, and GOULD, Circuit Judge, join as to the entire opinion, and with whom HAWKINS, FISHER, PAEZ, CLIFTON and BEA, Circuit Judges, join as to Parts I and II. FERGUSON, Circuit Judge, with whom O’SCANNLAIN and TASHIMA, Circuit Judges, join with respect to Part I, concurring in the judgment. O’SCANNLAIN, Circuit Judge, with whom FERGUSON and TASHIMA, Circuit Judges, join, concurring only in the judgment. TASHIMA, Circuit Judge, with whom FERGUSON and O’SCANNLAIN, Circuit Judges, join, concurring in the judgment. FISHER, Circuit Judge, with whom HAWKINS, PAEZ, CLIFTON and BEA, Circuit Judges, join, concurring in part and dissenting in part.

OPINION BY: William A. Fletcher

OPINION: PER CURIAM:

A majority of the en banc court (Judge W.A. Fletcher, joined by Chief Judge Schroeder and Judges Hawkins, Fisher, Gould, Paez, Clifton, and Bea) concludes that the district court had personal jurisdiction over the defendants. Of that majority, three judges (Chief Judge Schroeder, and Judges W.A. Fletcher and Gould) conclude that the action should be dismissed for lack of ripeness. Five judges (Judge Fisher, joined by Judges Hawkins, Paez, Clifton, and Bea) conclude that the case is ripe for adjudication. The three remaining judges (Judges Ferguson, O’Scannlain, and Tashima)

Appendix A

conclude that the action should be dismissed because the district court lacked personal jurisdiction over the defendants.

A majority of the en banc court having voted therefor, the judgment of the district court is **REVERSED** and the case **REMANDED** with directions to dismiss the action without prejudice.

W. FLETCHER, Circuit Judge, with whom SCHROEDER, Chief Circuit Judge, and GOULD, Circuit Judge, join as to the entire opinion, and with whom HAWKINS, FISHER, PAEZ, CLIFTON and BEA, Circuit Judges, join as to Parts I and II:

Yahoo!, an American Internet service provider, brought suit in federal district court in diversity against La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and L'Union des Etudiants Juifs de France ("UEJF") seeking a declaratory judgment that two interim orders by a French court are unrecognizable and unenforceable. The district court held that the exercise of personal jurisdiction over LICRA and UEJF was proper, that the dispute was ripe, that abstention was unnecessary, and that the French orders are not enforceable in the United States because such enforcement would violate the First Amendment. The district court did not reach the question whether the orders are recognizable. LICRA and UEJF appeal only the personal jurisdiction, ripeness, and abstention holdings. A majority of the en banc panel holds, as explained in Part II of this opinion, that the district court properly exercised personal jurisdiction over LICRA and UEJF. A plurality of the panel concludes, as explained in Part III of this opinion, that the

Appendix A

case is not ripe under the criteria of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). We do not reach the abstention question.

I. Background

Yahoo! is a Delaware corporation with its principal place of business in California. Through its United States-based website yahoo.com, Yahoo! makes available a variety of Internet services, including a search engine, e-mail, web page hosting, instant messaging, auctions, and chat rooms. While some of these services rely on content created by Yahoo!, others are forums and platforms for user-generated content. Yahoo! users can, for example, design their own web pages, share opinions on social and political message boards, play fantasy baseball games, and post items to be auctioned for sale. Yahoo! does not monitor such user-created content before it is posted on the web through Yahoo! sites.

Yahoo!'s United States website is written in English. It targets users in the United States and relies on servers located in California. Yahoo!'s foreign subsidiaries, such as Yahoo! France, Yahoo! U.K., and Yahoo! India, have comparable websites for their respective countries. The Internet addresses of these foreign-based websites contain their two-letter country designations, such as fr.yahoo.com, uk.yahoo.com, and in.yahoo.com. Yahoo!'s foreign subsidiaries' sites provide content in the local language, target local citizens, and adopt policies that comply with local law and customs. In actual practice, however, national boundaries are highly permeable. For example, any user in the United States can type www.fr.yahoo.com into his or her web

Appendix A

browser and thereby reach Yahoo! France's website. Conversely, any user in France can type www.yahoo.com into his or her browser, or click the link to Yahoo.com on the Yahoo! France home page, and thereby reach yahoo.com.

Sometime in early April 2000, LICRA's chairman sent by mail and fax a cease and desist letter, dated April 5, 2000, to Yahoo!'s headquarters in Santa Clara, California. The letter, written in English, stated in part:

We are particularly choked [sic] to see that your Company keeps on presenting every day hundreds of nazi symbols or objects for sale on the Web.

This practice is illegal according to French legislation and it is incumbent upon you to stop it, at least on the French Territory.

Unless you cease presenting nazi objects for sale within 8 days, we shall size [sic] the competent jurisdiction to force your company to abide by the law.

On April 10, five (rather than eight) days after the date on the letter, LICRA filed suit against Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris. On April 20, UEJF joined LICRA's suit in the French court. LICRA and UEJF used United States Marshals to serve process on Yahoo! in California.

After a hearing on May 15, 2000, the French court issued an "interim" order on May 22 requiring Yahoo! to "take *all*

Appendix A

necessary measures to dissuade and render impossible any access [from French territory] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes” (emphasis added).¹ Among other things, the French court required Yahoo! to take particular specified actions “by way of interim precautionary measures.” Yahoo! was required “to cease all hosting and availability in the territory of [France] from the ‘Yahoo.com’ site . . . of messages, images and text relating to Nazi objects, relics, insignia, emblems and flags, or which evoke Nazism,” and of “Web pages displaying text, extracts, or quotes from ‘Mein Kampf’ and the ‘[Protocols of the Elders of Zion]’” at two specified Internet addresses. Yahoo! was further required to remove from “all browser directories accessible in the territory of the French Republic” the “index heading entitled ‘negationists’” and any link “bringing together, equating, or presenting directly or indirectly as equivalent” sites about the Holocaust and sites by Holocaust deniers.

The May 22 interim order required Yahoo! France (as distinct from Yahoo!) to remove the “negationists” index heading and the link to negationist sites, described above,

1. The French court’s orders are written in French. We quote from the English translation provided in the record. Counsel for LICRA and UEJF contended at oral argument that the words “all necessary measures” (underlined and italicized above) are a mistranslation of the French text. The original French for the entire phrase (italicized above) is “prendre toutes les mesures de nature a dissuader et a rendre impossible.” Counsel contended that the words “toutes les mesures de nature a” are more accurately translated as “all reasonable (or available) measures.”

Appendix A

from fr.yahoo.com. The order further required Yahoo! France to post a warning on fr.yahoo.com stating to any user of that website that, in the event the user accessed prohibited material through a search on Yahoo.com, he or she must “desist from viewing the site concerned[,] subject to imposition of the penalties provided in French legislation or the bringing of legal action against him.”

The order stated that both Yahoo! and Yahoo! France were subject to a penalty of 100,000 Euros per day of delay or per confirmed violation, and stated that the “possibility of liquidation of the penalties thus pronounced” was “reserved.” The order also awarded 1 Franc in “provisional damages,” payable by Yahoo! and Yahoo! France to UEJF, and awarded an additional 1 Franc against Yahoo! and Yahoo! France for expenses under Article 700 of the New Code of Civil Procedure. The French court also awarded 10,000 Francs against Yahoo! for expenses under Article 700, payable to LICRA, and 10,000 Francs each against Yahoo! and Yahoo! France under Article 700 (a total of 20,000 Francs), payable to UEJF.

Yahoo! objected to the May 22 order. It contended, among other things, that “there was no technical solution which would enable it *to comply fully* with the terms of the court order.” (Emphasis added.) In response, the French court obtained a written report from three experts. The report concluded that under current conditions approximately 70% of Yahoo! users operating from computer sites in France could be identified. The report specifically noted that Yahoo! already used such identification of French users to display advertising banners in French. The 70% number applied

Appendix A

irrespective of whether a Yahoo! user sought access to an auction site, or to a site denying the existence of the Holocaust or constituting an apology for Nazism.

With respect to auction sites, the report concluded that it would be possible to identify additional users. Two out of the three experts concluded that approximately an additional 20% of users seeking access to auction sites offering Nazi-related items for sale could be identified through an honor system in which the user would be asked to state his or her nationality. In all, the two experts estimated that almost 90% of such auction site users in France could be identified: “The combination of the two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%.” The third expert expressed doubts about the number of additional users of the auction site who would respond truthfully under the honor system. He did not, however, specify an alternative number of users — say, 15% or 10% — who would respond truthfully.

With respect to sites denying the existence of the Holocaust or constituting an apology for Nazism, the report was not able to “propose suitable and effective technical solutions” because no “grievance” against those sites had been made with “sufficient precision.” In consequence, as to these non-auction sites, the report did not estimate how many Yahoo! users above the base 70% number could be identified by an honor system.

In a second interim order, issued on November 20, 2000, the French court reaffirmed its May 22 order and directed

Appendix A

Yahoo! to comply within three months, “subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.” (The May 22 order had specified a penalty of 100,000 Euros rather than 100,000 Francs.) The court “reserved the possible liquidation of the penalty” against Yahoo!. The French court’s November 20 order required Yahoo! France (as distinct from Yahoo!) to display “a warning to surfers even before they have made use of the link to Yahoo.com, to be brought into effect within 2 months following notification of the present order.” However, the French court found “that YAHOO FRANCE has complied *in large measure* with the spirit and letter of the order of 22nd May 2000[.]” (Emphasis added.)

The November 20 order required Yahoo! to pay 10,000 Francs for a report, to be prepared in the future by one of the experts previously appointed by the court, to determine whether Yahoo! was in compliance with the court’s orders. It also awarded a total of 20,000 Francs against Yahoo! for expenses under Article 700, payable to LICRA and UEJF, and an unspecified amount of costs against Yahoo!, payable to LICRA and UEJF. The court specifically stated that it was not awarding any expenses or costs against Yahoo! France (which it had found to have complied “in large measure” with its order). LICRA and UEJF used United States Marshals to serve both orders on Yahoo! in Santa Clara, California.

Yahoo! did not pursue appeals of either interim order.

The French court has not imposed any penalty on Yahoo! for violations of the May 22 or November 20 orders. Nor has either LICRA or UEJF returned to the French court to

Appendix A

seek the imposition of a penalty. Both organizations affirmatively represent to us that they have no intention of doing so if Yahoo! maintains its current level of compliance. Yet neither organization is willing to ask the French court to vacate its orders. As LICRA and UEJF's counsel made clear at oral argument, "My clients will not give up the right to go to France and enforce the French judgment against Yahoo! in France if they revert to their old ways and violate French law."

The record reveals that the French "public prosecutor" participated in the proceedings against Yahoo! and Yahoo! France in the French court, but it does not reveal whether he has the authority to seek a penalty against Yahoo! under the interim orders, either on his own or pursuant to a request by LICRA and/or UEJF. The public prosecutor was not made a party to the suit in the district court, and has made no appearance in the district court or on appeal to this court. If LICRA, UEJF, or the public prosecutor were to seek the imposition of a penalty by the French court pursuant to the interim orders, that court would have to determine the extent of Yahoo!'s violation, if any, of the orders, as well as the amount of any penalty, before an award of a penalty could be entered.

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in federal district court, seeking a declaratory judgment that the interim orders of the French court are not recognizable or enforceable in the United States. Subject matter jurisdiction is based solely on diversity of citizenship. 28 U.S.C. § 1332(a)(2). In a thoughtful opinion, the district court concluded that it had personal jurisdiction over LICRA

Appendix A

and UEJF. et l'Yahoo! Inc. v. La Ligue Contre le Racisme Yahoo! Inc., 145 F. Supp. 2d 1168, 1180 (N.D. Cal. 2001). Several months later, in another thoughtful opinion, the district court concluded that the suit was ripe, that abstention was not warranted, and that "the First Amendment precludes enforcement within the United States." *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

In early 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 that are associated with or could be used to promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors." Yahoo! has represented, in this court and elsewhere, that its new policy has not been adopted in response to the French court's orders, but rather for independent reasons. Yahoo's new policy eliminates much of the conduct prohibited by the French orders. However, after conducting its own Internet research on yahoo.com, the district court found that even after this policy change, Yahoo! "appear[s]" not to have fully complied with the orders with respect to its auction site. 169 F. Supp. 2d at 1185. For example, the district court found that Yahoo! continued to allow the sale of items such as a copy of *Mein Kampf* and stamps and coins from the Nazi period on which the swastika is depicted. *Id.* The district court also found that access was available through yahoo.com to various sites in response to searches such as "Holocaust/5 did not happen." *Id.*

Appendix A

LICRA and UEJF timely appealed the district court's rulings on personal jurisdiction, ripeness, and abstention.

II. Personal Jurisdiction

The only bases for personal jurisdiction over LICRA and UEJF in the district court are the actions they have taken in connection with their French suit against Yahoo!. Those actions are sending a cease and desist letter to Yahoo! at its headquarters in Santa Clara, California; serving process on Yahoo! in Santa Clara to commence the French suit; obtaining two interim orders from the French court; and serving the two orders on Yahoo! in Santa Clara.

Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same. *Id.* at 1320 (citing Cal. Civ. Proc. Code § 410.10).

In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the Supreme Court held that a court may exercise personal jurisdiction over a defendant consistent with due process only if he or she has "certain minimum contacts" with the relevant forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339,

Appendix A

85 L. Ed. 278 (1940)). Unless a defendant's contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be "present" in that forum for all purposes, a forum may exercise only "specific" jurisdiction — that is, jurisdiction based on the relationship between the defendant's forum contacts and the plaintiff's claim. The parties agree that only specific jurisdiction is at issue in this case.

In this circuit, we analyze specific jurisdiction according to a three-prong test:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). The first prong is determinative in this case. We have sometimes referred to it, in shorthand fashion, as the

Appendix A

“purposeful availment” prong. *Schwarzenegger*, 374 F.3d at 802. Despite its label, this prong includes both purposeful availment and purposeful direction. It may be satisfied by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.

We have typically treated “purposeful availment” somewhat differently in tort and contract cases. In tort cases, we typically inquire whether a defendant “purposefully direct[s] his activities” at the forum state, applying an “effects” test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum. *See Schwarzenegger*, 374 F.3d at 803 (citing *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). By contrast, in contract cases, we typically inquire whether a defendant “purposefully avails itself of the privilege of conducting activities” or “consummate[s] [a] transaction” in the forum, focusing on activities such as delivering goods or executing a contract. *See Schwarzenegger*, 374 F.3d at 802. However, this case is neither a tort nor a contract case. Rather, it is a case in which Yahoo! argues, based on the First Amendment, that the French court’s interim orders are unenforceable by an American court.

LICRA and UEJF contend that we must base our analysis on the so-called “effects” test of *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), which is normally employed in purposeful direction cases. *See, e.g., CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1111 (9th Cir. 2004); *Schwarzenegger*, 374 F.3d at 803; *Dole Food*

Appendix A

Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002). In *Calder*, a California-based entertainer sued the *National Enquirer* and various individual defendants for an allegedly defamatory article published in the *Enquirer*. The article had been written and edited in Florida, and the defendants had few contacts with California. The Court nonetheless upheld the exercise of personal jurisdiction in California because the defendants knew that the article would have an effect in that state. In the words of the Court, the defendants had not engaged in “mere untargeted negligence”; rather, their “intentional, and allegedly tortious, actions were expressly aimed at California.” 465 U.S. at 789.

In this circuit, we construe *Calder* to impose three requirements: “the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Schwarzenegger*, 374 F.3d at 803 (quoting *Dole Food*, 303 F.3d at 1111). In some of our cases, we have employed a slightly different formulation of the third requirement, specifying that the act must have “caused 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 Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (emphasis added). The “brunt” of the harm formulation originated in the principal opinion in *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482 (9th Cir. 1993). That opinion required that the “brunt” of the harm be suffered in the forum state; based on that requirement, it concluded that there was no purposeful availment by the defendant. *Id.* at 1486. A dissenting judge would have found purposeful availment. Relying on the Supreme Court’s

Appendix A

opinion in *Keeton v. Hustler Magazine*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), he specifically disavowed the “brunt” of the harm formulation. *Core-Vent*, 11 F.3d at 1492 (Wallace, C.J., dissenting) (“The Supreme Court has already rejected the proposition that the brunt of the harm must be suffered in the forum.”). Without discussing the disputed “brunt” of the harm formulation, a concurring judge agreed with the dissenter that purposeful availment could be found. *Id.* at 1491 (Fernandez, J., concurring) (“I agree with Chief Judge Wallace that purposeful availment can be found in this case.”). Later opinions picked up the “brunt” of the harm formulation of the principal opinion in *Core-Vent* without noting that at least one, and possibly two, of the judges on the panel disagreed with it. *See, e.g., Bancroft & Masters*, 223 F.3d at 1087; *Panavision*, 141 F.3d at 1321; *Caruth v. Int’l Psychoanalytical Ass’n*, 59 F.3d 126, 128 (9th Cir. 1995).

We take this opportunity to clarify our law and to state that the “brunt” of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state. In so stating we are following *Keeton*, decided the same day as *Calder*, in which the Court sustained the exercise of personal jurisdiction in New Hampshire even though “it is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire.” 465 U.S. at 780.

LICRA and UEJF contend that the *Calder* effects test is not satisfied because, in their view, *Calder* requires that the actions expressly aimed at and causing harm in California

Appendix A

be tortious or otherwise wrongful. LICRA and UEJF contend that they have done no more than vindicate their rights under French law, and that their behavior has therefore not been wrongful. They conclude that their behavior therefore does not confer personal jurisdiction in California. We agree with LICRA and UEJF that the *Calder* effects test is appropriately applied to the interim orders of the French court. But we disagree with them about the meaning and application of *Calder*.

In any personal jurisdiction case we must evaluate all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 308, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (upholding jurisdiction to enforce state tax on out-of-state corporation that sent catalogs and goods to forum); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (upholding personal jurisdiction based on a course of dealing related to a franchise agreement). Many cases in which the *Calder* effects test is used will indeed involve wrongful conduct by the defendant. *See, e.g., Calder*, 465 U.S. at 790, (allegedly defamatory publication purposefully directed at *California*); *Bancroft & Masters*, 223 F.3d at 1088 (wrongful interference with California corporation's use of domain name); *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1192 (9th Cir. 1988) (unauthorized use of celebrity's name and likeness to promote Swiss clinic); *Lake*, 817 F.2d at 1422-23 (provision of legal services to secure allegedly improper custody order). But we do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful

Appendix A

acts. We do not see how we could do so, for if an allegedly wrongful act were the basis for jurisdiction, a holding on the merits that the act was not wrongful would deprive the court of jurisdiction.

We therefore analyze all of LICRA and UEJF's contacts with California relating to its dispute with Yahoo!, irrespective of whether they involve wrongful actions by LICRA and UEJF. There are three such contacts. The first two contacts, taken by themselves, do not provide a sufficient basis for jurisdiction. However, the third contact, considered in conjunction with the first two, does provide such a basis.

The first contact is the cease and desist letter that LICRA sent to Yahoo!, demanding that Yahoo! alter its behavior in California to conform to what LICRA contended were the commands of French law. A cease and desist letter is not in and of itself sufficient to establish personal jurisdiction over the sender of the letter. *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998) ("A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement."). There are strong policy reasons to encourage cease and desist letters. They are normally used to warn an alleged rights infringer that its conduct, if continued, will be challenged in a legal proceeding, and to facilitate resolution of a dispute without resort to litigation. If the price of sending a cease and desist letter is that the sender thereby subjects itself to jurisdiction in the forum of the alleged rights infringer, the rights holder will be strongly encouraged to file suit in its home forum without attempting first to resolve the dispute informally by

Appendix A

means of a letter. *See Red Wing Shoe*, 148 F.3d at 1360-1361; *Cascade Corp. v. Hiab-Foco AB*, 619 F.2d 36, 38 (9th Cir. 1980); *Douglas Furniture Co. of Cal., Inc. v. Wood Dimensions, Inc.*, 963 F. Supp. 899, 903 (C.D. Cal. 1997) (“If any attempt by an intellectual property holder to put an alleged wrongdoer on notice forced the property holder to submit to the jurisdiction of the alleged wrongdoer’s forum, an intellectual property owner would be forced to file an action in his own jurisdiction in order to avoid the threat of being haled before a court in another, possibly distant state.”).

This is not to say that a cease and desist letter can never be the basis for personal jurisdiction. For example, in *Bancroft & Masters*, we upheld jurisdiction based on two letters sent by Augusta National Inc. (“ANI”), based in Georgia, contending that Bancroft & Masters, Inc. (“B & M”) was improperly using its domain name. One letter was sent to Network Solutions, Inc. (“NSI”) in Virginia. NSI was then the sole registrar of domain names. The other, a cease and desist letter, was sent to B & M at its corporate offices in California. B & M sued ANI in federal district court in California seeking a declaratory judgment that it had the right to the disputed domain name. On the assumption that B & M’s factual allegation was true, we held that the letters were intended to trigger NSI’s dispute resolution procedures, to interfere wrongfully with B & M’s use of its domain name, and to misappropriate that name for ANI’s own use. 223 F.3d at 1087. We therefore upheld jurisdiction under *Calder* based on the letters.

LICRA’s letter was not used to facilitate settlement. Although it stated that LICRA would file suit in eight days

Appendix A

if Yahoo! had not complied with LICRA's demands, LICRA filed suit five days after the date of the letter. Nonetheless, LICRA's letter to Yahoo! was more like a normal cease and desist letter than the letters at issue in *Bancroft & Masters*, for it was not abusive, tortious or otherwise wrongful. Rather, it simply alerted Yahoo! to its view of French law and stated its intent to file suit in France to enforce that law against Yahoo!. Under these circumstances, we do not believe that LICRA's letter is a contact that would, if considered alone, justify the exercise of personal jurisdiction.

LICRA and UEJF's second contact (or, more precisely, set of contacts) with California was service of process on Yahoo! in California. LICRA first effected service of process to commence the French suit. LICRA and UEJF later effected service of the French court's two interim orders. We do not regard the service of documents in connection with a suit brought in a foreign court as contacts that by themselves justify the exercise of personal jurisdiction over a foreign litigant in a United States court. If we were to hold that such service were a sufficient basis for jurisdiction, we would be providing a forum-choice tool by which any United States resident sued in a foreign country and served in the United States could bring suit in the United States, regardless of any other basis for jurisdiction. We are unaware of any case so holding, and Yahoo! has cited none.

Third, and most important, LICRA and UEJF have obtained two interim orders from the French court directing Yahoo! to take actions in California, on threat of a substantial penalty. We agree with LICRA and UEJF that the French court's orders are appropriately analyzed under the *Calder* effects test.

Appendix A

The first two requirements are that LICRA and UEJF “have ‘(1) committed an intentional act, [which was] (2) expressly aimed at the forum state[.]’” *Schwarzenegger*, 374 F.3d at 805 (quoting *Dole Food*, 303 F.3d at 1111). It is obvious that both requirements are satisfied. LICRA intentionally filed suit in the French court. Indeed, it had previously signaled its intent to file suit in its April 5 letter to Yahoo!. UEJF intentionally joined LICRA’s suit ten days later. Further, LICRA and UEJF’s suit was expressly aimed at California. The suit sought, and the French court granted, orders directing Yahoo! to perform significant acts in California. It is of course true that the effect desired by the French court would be felt in France, but that does not change the fact that significant acts were to be performed in California. The servers that support yahoo.com are located in California, and compliance with the French court’s orders necessarily would require Yahoo! to make some changes to those servers. Further, to the extent that any financial penalty might be imposed pursuant to the French court’s orders, the impact of that penalty would be felt by Yahoo! at its corporate headquarters in California. *See Dole Food*, 303 F.3d at 1113-14.

The third requirement is that LICRA and UEJF’s acts “‘cause harm that the defendant knows is likely to be suffered in the forum state.’” *Id.* This requirement is somewhat problematic, for Yahoo! has not shown or even alleged any specific way in which it has altered its behavior in response to the French court’s interim orders. Yahoo! changed its policy with respect to Yahoo.com after the French court’s orders were entered, but Yahoo! has consistently maintained that the change was unrelated to the orders. Therefore, even

Appendix A

if we were persuaded that Yahoo!'s change of policy harmed it in some way, Yahoo! itself has represented that such harm was not caused by any action of LICRA or UEJF. Nor is it clear that, absent the interim orders, Yahoo! would change its policy in the future. Indeed, Yahoo! represented to us during oral argument that there is nothing that it would like to do, but is now refraining from doing, because of the interim orders.

Yahoo!, however, points to the possibility that a substantial penalty will be assessed under the French court's November 20 interim order. It points in particular to the provision in that order specifying that the potential amount of the penalty increases by 100,000 Francs for every day that Yahoo! is in violation of the court's orders. Yahoo! represents to us that even now, after its change of policy, it is acting in plain violation of the orders. It contends that a declaratory judgment determining the enforceability by an American court of the French court's orders will allow it to determine an appropriate course of conduct with respect to the activities in which it continues to engage. The district court found that, notwithstanding its new policy,

the Yahoo.com auction site still offers certain items for sale (such as stamps, coins, and a copy of *Mein Kampf*) which *appear* to violate the French Order. While Yahoo! has removed the *Protocol of the Elders of Zion* from its auction site, it has not prevented access to numerous other sites which reasonably "may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."

169 F. Supp. 2d at 1185 (emphasis added).

Appendix A

In both this court and the district court, LICRA and UEJF have represented that, in their view, Yahoo! is in what they call “substantial compliance” with the French court’s orders. They have further represented that they will not seek enforcement of the penalty provision if Yahoo! continues its present level of compliance with the orders. However, LICRA and UEJF have stopped short of making a binding contractual commitment that they will not enforce the orders, and they have taken no action to have the orders withdrawn. As their counsel made clear at oral argument, LICRA and UEJF want to be able to return to the French court for enforcement if Yahoo! returns to its “old ways.” For its part, while Yahoo! does not independently wish to take steps to comply more fully with the French court’s orders, it states that it fears that it may be subject to a substantial (and increasing) fine if it does not. Yahoo! maintains that in these circumstances it has a legally cognizable interest in knowing whether the French court’s orders are enforceable in this country.

In a specific jurisdiction inquiry, we consider the extent of the defendant’s contacts with the forum and the degree to which the plaintiff’s suit is related to those contacts. A strong showing on one axis will permit a lesser showing on the other. A single forum state contact can support jurisdiction if “the cause of action . . . arise[s] out of that particular purposeful contact of the defendant with the forum state.” *See Lake*, 817 F.2d at 1421. The case before us is the classic polar case for specific jurisdiction described in *International Shoe*, in which there are very few contacts but in which those few contacts are directly related to the suit. *See* 326 U.S. at 318 (“Some single or occasional acts of the corporate agent in a state . . . because of their nature and quality and the

Appendix A

circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.”). All of the contacts with the forum state in this case are either the interim orders themselves or contacts directly related to those orders.

LICRA and UEJF have not sought enforcement of the French court’s orders in this country, and they have stated that they will not seek enforcement or penalties so long as Yahoo! continues its current course of conduct. However, LICRA and UEJF have not sought to vacate the French court’s orders, and it is at least possible that they might later seek enforcement based on a continuation of Yahoo!’s current conduct. Or more likely, they might seek enforcement if Yahoo! changes its conduct in the future. But even if LICRA and UEJF seek enforcement at some time in the future, and even if the French court finds a violation that warrants the imposition of a penalty, enforcement of that penalty is extremely unlikely in the United States. 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.

Finally, Yahoo! contends that it has a legally protected interest, based on the First Amendment, in continuing its current policy with respect to Nazi memorabilia and Holocaust-related anti-semitic materials. Until that contention is endorsed by the judgment of an American court, it is only a contention. But even if the French court’s orders are not enforced against Yahoo!, the very existence of those orders may be thought to cast a shadow on the legality of Yahoo!’s current policy.

Appendix A

It is a close question whether LICRA and UEJF are subject to personal jurisdiction in California in this suit. But considering the direct relationship between LICRA and UEJF's contacts with the forum and the substance of the suit brought by Yahoo!, as well as the impact and potential impact of the French court's orders on Yahoo!, we hold that there is personal jurisdiction.

III. Ripeness

Because we conclude that the exercise of personal jurisdiction over LICRA and UEJF is proper, we turn to the question of ripeness. Ripeness doctrine is “‘drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.’” *Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)). Even where jurisdiction is present in the Article III sense, courts are obliged to dismiss a case when considerations of prudential ripeness are not satisfied. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972) (“Problems of prematurity and abstractness may well present ‘insuperable obstacles’ to the exercise of the Court’s jurisdiction, even though that jurisdiction is technically present.”) (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 574, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947)).

The existence of Article III subject matter jurisdiction is, like personal jurisdiction, a close question, but we agree with the district court that the effect of the French court’s

Appendix A

orders on Yahoo! is sufficient to create a case or controversy within the meaning of Article III. *See* 169 F. Supp. 2d at 1187-91. However, we disagree with the district court's conclusion that there is prudential ripeness. In its current form, this case presents the sort of "problems of prematurity and abstractness" that counsel against reaching the First Amendment question that Yahoo! insists is presented by this case. *See Socialist Labor Party*, 406 U.S. at 588.

In determining whether a case satisfies prudential requirements for ripeness, we consider two factors: "the fitness of the issues for judicial decision," and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (quoting *Abbott Labs.*). We address these two factors in turn.

A. Fitness of the Issue for Judicial Decision

1. The Substantive Legal Question at Issue

Whether a dispute is sufficiently ripe to be fit for judicial decision depends not only on the state of the factual record. It depends also on the substantive legal question to be decided. If the legal question is straightforward, relatively little factual development may be necessary. As we wrote in *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996), "Pure legal questions that require little factual development are more likely to be ripe." By contrast, if the legal question depends on numerous factors for its resolution, extensive factual development may be necessary.

Appendix A

A noted example is *Adler v. Bd. of Educ.*, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952), in which Justice Frankfurter disagreed with the other justices about the precise legal question presented, and, as a consequence, disagreed about ripeness. Because the legal question, as Justice Frankfurter understood it, required fine-grained and subtle judgments based on extensive factual development, he concluded that the suit was not ripe. *Id.* at 506-07 (Frankfurter, J., dissenting). In the view of the other justices, however, the legal question was different. In their view, this different legal question was relatively simple, requiring little factual development. For them (and for this different legal question), the suit was ripe. *Id.* at 492-93 (maj. op.); 508-09 (Douglas, J., dissenting). See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 532 (1966). See also *United Public Workers v. Mitchell*, 330 U.S. 75, 90-91, 67 S. Ct. 556, 91 L. Ed. 754 (1947) (dismissing suit as unripe); *id.* at 109 (Black, J., dissenting); *id.* at 116-17 (Douglas, J., dissenting).

It is thus important to a ripeness analysis that we specify the precise legal question to be answered. Depending on the legal question, the case may be ripe or unripe. If we ask the wrong legal question, we risk getting the wrong answer to the ripeness question. The legal question presented by this case is whether the two interim orders of the French court are enforceable in this country. These orders, by their explicit terms, require only that Yahoo! restrict access by Internet users located in France. The orders say nothing whatsoever about restricting access by Internet users in the United States. We are asked to decide whether enforcement of these interim orders would be “repugnant” to California public policy.

Appendix A

There is currently no federal statute governing recognition of foreign judgments in the federal courts. *See* American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (April 11, 2005) (proposed final draft). The federal full faith and credit statute, 28 U.S.C. § 1738, governs only judgments rendered by courts of states within the United States. In diversity cases, enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought. *Bank of Montreal v. Kough*, 612 F.2d 467, 469-70 (9th Cir. 1980); *see also Southwest Livestock & Trucking Co. v. Ramon*, 169 F.3d 317, 320 (5th Cir. 1999); *Choi v. Kim*, 50 F.3d 244, 248 (3d Cir. 1995); *S.A. Andes v. Versant Corp.*, 878 F.2d 147, 150 (4th Cir. 1989); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 686 (7th Cir. 1987); *Branca v. Security Benefit Life Ins. Co.*, 773 F.2d 1158, 1161 (11th Cir. 1985). This is a diversity suit, brought by Yahoo! in federal district court in California.

In a typical enforcement case, the party in whose favor the foreign judgment was granted comes to an American court affirmatively seeking enforcement. The standard rule in such a case is that the federal court sitting in diversity applies the law of the state in which it sits. However, this is not the typical case, for the successful plaintiffs in the French court do not seek enforcement. Rather, Yahoo!, the unsuccessful defendant in France, seeks a declaratory judgment that the French court's interim orders are unenforceable anywhere in this country.

Insofar as the issue is whether the French court's orders are enforceable in California, it is clear that California law

Appendix A

governs. However, it is less clear whose law governs when enforceability in other states is at issue. This is a potentially difficult choice-of-law question, but we do not need to answer it in order to decide ripeness. First, the central issue is enforceability in California. Therefore, if the suit is unripe under California law, we should not decide the case, irrespective of whether it might be ripe under the law of some other state. To do otherwise would be to allow the tail to wag the dog. Second, in any event, the law of virtually all other states appears to be similar, or even identical, to California law. We may thus safely proceed with our ripeness analysis based on the California law of enforceability.

California, along with many other states, has adopted the Uniform Foreign Money-Judgments Recognition Act (“Uniform Act” or “Act”). Cal. Civ. Proc. Code §§ 1713-1713.8. The relevant standard for enforceability under the Act is whether “the cause of action or defense on which the judgment is based is *repugnant to the public policy* of this state.” *Id.* § 1713.4(b)(3) (emphasis added). However, the Act is not directly applicable to this case, for it does not authorize enforcement of injunctions. *See id.* § 1713.1(2) (“‘Foreign judgment’ means any judgment of a foreign state granting or denying recovery of a sum of money, other than . . . a fine or other penalty[.]”) But neither does the Uniform Act prevent enforcement of injunctions, for its savings clause specifies that the Act does not foreclose enforcement of foreign judgments “in situations not covered by [the Act].” *Id.* § 1713.7.

Because the Uniform Act does not cover injunctions, we look to general principles of comity followed by the

Appendix A

California courts. We may appropriately consult the Restatement (Third) of the Foreign Relations Law of the United States (“Third Restatement” or “Restatement”), given that California courts frequently cite the Restatement, as well as earlier Restatements, as sources of law. *See, e.g., Renoir v. Redstar Corp.*, 123 Cal. App. 4th 1145, 1150, 20 Cal. Rptr. 3d 603 (2004) (Third Restatement); *American Home Assurance Co. v. Societe Commerciale Toutelectric*, 104 Cal. App. 4th 406, 424, 128 Cal. Rptr. 2d 430 (2003) (same); *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 10, 115 Cal. Rptr. 2d 455 (2002) (same); *Pecaflor Construction, Inc. v. Landes*, 198 Cal. App. 3d 342, 349, 243 Cal. Rptr. 605 (1988) (Second Restatement). The general principle of enforceability under the Third Restatement is the same as under California’s Uniform Act. That is, an American court will not enforce a judgment if “the cause of action on which the judgment was based, or the judgment itself, is *repugnant to the public policy* of the United States or of the State where recognition is sought[.]” Restatement § 482(2)(d) (emphasis added); *see also* Restatement (Second) of the Conflict of Laws § 117 cmt. c (1971) (“Enforcement will usually be accorded [a] judgment [of a foreign court] except in situations where the original claim is *repugnant to fundamental notions of what is decent and just* in the State where enforcement is sought.”) (emphasis added).

There is very little case law in California dealing with enforceability of foreign country injunctions under general principles of comity, but that law is consistent with the repugnancy standard of the Restatement. We have found only one case in which a California court has ruled on the enforceability of an injunction granted in another country.

Appendix A

In *In re Stephanie M.*, 7 Cal. 4th 295, 27 Cal. Rptr. 2d 595, 867 P.2d 706 (1994), a Mexican court had entered a guardianship decree purporting to authorize the named guardian to take immediate custody of a child and to return her to Mexico. The California Supreme Court recognized that an injunction could be enforced by the California courts as a matter of comity, but it declined to order enforcement in this particular case because the Mexican decree conflicted with California public policy. *Id.* at 314.

California courts have also relied on public policy in the analogous context of injunctions entered by other American courts. In *Smith v. Superior Court*, 41 Cal. App. 4th 1014, 49 Cal. Rptr. 2d 20 (1996), plaintiff Smith had been badly injured, and her husband and two children killed, when their General Motors (“GM”) vehicle burst into flames after a collision. Smith brought a product liability suit in California against GM. Elwell had been an engineer for GM for many years and had extensive knowledge about the design of GM vehicles. An earlier wrongful termination suit between Elwell and GM in Michigan had been dismissed after the parties stipulated to a permanent injunction forbidding Elwell from testifying in any suit about GM vehicles. Smith sought to call Elwell as an expert witness in her California suit. The California Court of Appeal declined to enforce the Michigan injunction on the ground that it “blatantly and irreconcilably conflicts with our fundamental public policy against the suppression of evidence.” *Id.* at 1025; *see also Baker v. General Motors Corp.*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (Missouri state court not required by 28 U.S.C. § 1738 to enforce the same Michigan injunction against Elwell when such enforcement would violate Missouri public policy).

Appendix A

The repugnancy standard is also generally followed in states other than California. *See, e.g., Hilkmann v. Hilkmann*, 579 Pa. 563, 575, 858 A.2d 58 (2004) (observing that the Restatement’s repugnancy standard has been incorporated into Pennsylvania common law); *Alberta Sec. Comm’n v. Ryckman*, 200 Ariz. 540, 549, 30 P.3d 121 (2001) (stating that foreign judgments are not enforceable under Arizona common law if they are repugnant to public policy); *Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, 796 P.2d 276, 283 (Okla. 1990) (declaring that a judgment must not be enforced if repugnant to public policy); *Greschler v. Greschler*, 51 N.Y. 2d 368, 377, 414 N.E.2d 694, 434 N.Y.S.2d 194 (1980) (“The public policy exception to the doctrine of comity is usually invoked . . . when the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”) (internal quotation omitted). Further, federal courts sometimes cite general principles of comity without reference to particular state laws. *See, e.g., Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 593 (4th Cir. 2002) (declaring that a judgment will not be enforced if repugnant to public policy); *In re Schimmelpenninck*, 183 F.3d 347, 365 (5th Cir. 1999) (to be enforceable, “foreign laws need not be identical to . . . the laws of the United States; they merely must not be repugnant to our laws and policies”); *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994) (“General comity concerns include . . . whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just.”); *see also Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (discussing principles of comity governing enforcement of foreign judgments).

Appendix A

Under the repugnancy standard, American courts sometimes enforce judgments that conflict with American public policy or are based on foreign law that differs substantially from American state or federal law. *See, e.g., In re Hashim*, 213 F.3d 1169, 1172 (9th Cir. 2000) (reversing bankruptcy court's refusal to enforce English court's award of \$ 10 million in costs against debtors whose assets had been frozen by Saddam Hussein); *Milhoux v. Linder*, 902 P.2d 856, 861-62 (Colo. Ct. App. 1995) (affirming recognition of Belgian judgment as a matter of comity, even though it was based on a 30-year Belgian statute of limitations). Inconsistency with American law is not necessarily enough to prevent recognition and enforcement of a foreign judgment in the United States. The foreign judgment must be, in addition, repugnant to public policy.

2. Fitness of the Question for Judicial Decision

With the suit in its current state, it is difficult to know whether enforcement of the French court's interim orders would be repugnant to California public policy. The first difficulty is evident. As indicated by the label "interim," the French court contemplated that it might enter later orders. We cannot know whether it might modify these "interim" orders before any attempt is made to enforce them in the United States.

A second, more important, difficulty is that we do not know whether the French court would hold that Yahoo! is now violating its two interim orders. After the French court entered the orders, Yahoo! voluntarily changed its policy to comply with them, at least to some extent. There is some

Appendix A

reason to believe that the French court will not insist on full and literal compliance with its interim orders, and that Yahoo!'s changed policy may amount to sufficient compliance.

In its interim second order, entered on November 20, the French court found that Yahoo! France had “complied *in large measure* with the spirit and letter” of its May 22 order. (Emphasis added.) Based on that level of compliance, the French court was satisfied. It declined to enter any further orders against Yahoo! France. It also declined to award any expenses or costs against Yahoo! France, even though in that same order it awarded expenses and costs against Yahoo!. We thus know from this second order that compliance “in large measure” by Yahoo! is very likely to be satisfactory to the French court, just as compliance “in large measure” by Yahoo! France was satisfactory.

LICRA and UEJF insist that Yahoo! has now, in their words, “substantially complied” with the French court’s orders. We take this to be a statement that, in their view, Yahoo! has complied “in large measure” with the orders. For its part, however, Yahoo! insists that it continues to be in serious violation of the orders. The district court did not hold that Yahoo! is in violation, substantial or otherwise, of the French court’s orders. It wrote only that Yahoo! does not “appear” to be in full compliance with the French court’s order with respect to its auction site, and that various anti-semitic sites continue to be accessible through yahoo. com. 169 F. Supp. 2d at 1185. There is only one court that can authoritatively tell us whether Yahoo! has now complied “in large measure” with the French court’s interim orders. That is, of course, the French court.

Appendix A

To the extent that we are uncertain about whether Yahoo! has complied “in large measure” with the French court’s orders, the responsibility for that uncertainty can be laid at Yahoo!’s door. In its November 20 interim order, the French court ordered the appointment of one of the experts who had previously reported on the technical feasibility of restricting access by French users to Yahoo.com. Under the November 20 order, Yahoo! was required to pay the expert, who would be charged “to undertake an assignment to prepare a consultancy report on the conditions of fulfilment of the terms of the aforementioned order.” Yahoo! has placed nothing in the record to tell us whether Yahoo! has paid the expert; whether the expert has prepared a report for the French court; and, if a report has been prepared, what it says. There is also nothing in the record to indicate what other steps, if any, Yahoo! has taken to obtain an indication from the French court whether it believes that Yahoo! is in compliance, “in large measure” or otherwise, with the terms of its interim orders. All we know for certain is that Yahoo! abandoned its appeal of the May 22 interim order and declined to appeal the November 20 interim order, and that on December 21, a month and a day after entry of the second interim order, it came home to file suit in the Northern District of California.

A third difficulty is related to the second. Because we do not know whether Yahoo! has complied “in large measure” with the French court’s orders, we cannot know what effect, if any, compliance with the French court’s orders would have on Yahoo!’s protected speech-related activities. We emphasize that the French court’s orders require, by their terms, only a limitation on access to anti-semitic materials *by users located in France*. The orders do not by their terms

Appendix A

limit access by users outside France in any way. Yahoo! contended in the French court that it was technically too difficult to distinguish between users inside and outside France. As described above, the French court commissioned a report by three experts to determine if Yahoo!'s contention were true. The experts disagreed with Yahoo!, concluding that Yahoo! is readily able to distinguish between most users inside and outside France.

With respect to users seeking access to forbidden auction sites, two out of the three experts concluded that Yahoo! could identify almost 90% of its users located in France. The third expert did not dispute that 70% of such auction site users could be identified, but expressed doubt about how many additional such users could be identified. With respect to users seeking access to sites of Holocaust deniers and Nazi apologists, the experts declined to propose any solution by which a greater number than 70% of users located in France could be identified.

In its briefing to this court, Yahoo! contends that restricting access by French Internet users in a manner sufficient to satisfy the French court would in some unspecified fashion require Yahoo! simultaneously to restrict access by Internet users in the United States. This may or may not be true. It is almost certainly not true if Yahoo! is now complying "in large measure" with the French court's orders, for in that event the French court will almost certainly hold that no further compliance is necessary. Even if the measures Yahoo! has already taken restrict access by American Internet users to anti-semitic materials, this has no bearing on Yahoo!'s First Amendment argument. By its

Appendix A

own admission, Yahoo! has taken these measures entirely of its own volition, for reasons entirely independent of the French court's orders.

However, it is possible, as Yahoo! contends, that it has not complied "in large measure" with the French court orders, and that the French court would require further compliance. It is also possible, as Yahoo! contends, that further compliance might have the necessary consequence of requiring Yahoo! to restrict access by American Internet users. But Yahoo! has been vague in telling us in what ways, and for what reasons, it believes further compliance might have that consequence. One possible reason for Yahoo!'s vagueness might be that its contention is ill-founded, and that a detailed explanation would reveal that fact. We are not now in a position to judge this. Another, more important, reason — not merely a possible reason — for its vagueness is that Yahoo! has no way of knowing what further compliance might be required by the French court. Until it knows what further compliance (if any) the French court will require, Yahoo! simply cannot know what effect (if any) further compliance might have on access by American users.

The possible — but at this point highly speculative — impact of further compliance with the French court's orders on access by American users would be highly relevant to the question whether enforcement of the orders would be repugnant to California public policy. But we cannot get to that question without knowing whether the French court would find that Yahoo! has already complied "in large measure," for only on a finding of current noncompliance would the issue of further compliance, and possible impact on American users, arise.

Appendix A

Without a finding that further compliance with the French court's orders would necessarily result in restrictions on access by users in the United States, the only question in this case is whether California public policy and the First Amendment require unrestricted access by Internet users in France. In other words, the only question would involve a determination whether the First Amendment has extraterritorial application. The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue. *Compare, e.g., Desai v. Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989) ("For purposes of suits brought in the United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution."), and *Laker Airways Ltd. v. Pan American Airways, Inc.*, 604 F. Supp. 280, 287 (D.D.C. 1984) ("It is less clear, however, whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad[.]"), with *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492, 502 (C. D. Cal. 1986) ("There can be no question that, in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders."), *aff'd*, 847 F.2d 502 (9th Cir. 1988). We are thus uncertain about whether, or in what form, a First Amendment question might be presented to us. If the French court were to hold that Yahoo!'s voluntary change of policy has already brought it into compliance with its interim orders "in large measure," no First Amendment question would be presented at all. Further, if the French court were to require additional compliance with respect to users in France, but that additional

Appendix A

compliance would not require any restriction on access by users in the United States, Yahoo! would only be asserting a right to extraterritorial application of the First Amendment. Finally, if the French court were to require additional compliance with respect to users in France, and that additional compliance would have the necessary consequence of restricting access by users in the United States, Yahoo! would have both a domestic and an extraterritorial First Amendment argument. The legal analysis of these different questions is different, and the answers are likely to be different as well.

B. Hardship to the Parties

We next consider “the hardship to the parties of withholding court consideration.” *Abbott Labs.*, 387 U.S. at 149. As discussed above, we believe that Yahoo! has suffered sufficient harm to justify (though not by a wide margin) the exercise of personal jurisdiction over LICRA and UEJF. The threshold requirement for hardship for purposes of personal jurisdiction, however, is not necessarily the same as the threshold for purposes of prudential ripeness. Particularly where, as here, there are substantial uncertainties bearing on the legal analysis to be performed, there is a high threshold requirement for hardship.

Yahoo! contends that it will suffer real hardship if we do not decide its suit at this time. Yahoo! makes essentially two arguments. First, it argues that the potential monetary penalty under the French court’s orders is mounting every day, and that the enforcement of a penalty against it here could be extremely onerous. Second, it argues that the French

Appendix A

court's orders substantially limit speech that is protected by the First Amendment. We take these arguments in turn.

1. Enforceability of the Monetary Penalty

Yahoo! contends that the threat of a monetary penalty hangs like the sword of Damocles. However, it is exceedingly unlikely that the sword will ever fall. We may say with some confidence that, for reasons entirely independent of the First Amendment, the French court's orders are not likely to result in the enforcement of a monetary penalty in the United States. The French court's orders threaten monetary sanctions against Yahoo!, which that court explicitly labels "penalties." In order to obtain an award of a penalty from the French court, LICRA and UEJF would have to return to the French court, to explain to the French court why they believe Yahoo! has violated its interim orders, and to persuade the French court that Yahoo!'s violation merits the imposition of a penalty. In the nearly five years since the entry of the French court's second interim order and Yahoo!'s change of policy, LICRA and UEJF have taken none of these steps. Further, LICRA and UEJF have represented that they have no intention of seeking a monetary penalty by the French court so long as Yahoo! does not revert to its "old ways."

More important, even if the French court were to impose a monetary penalty against Yahoo!, it is exceedingly unlikely that any court in California — or indeed elsewhere in the United States — would enforce it. California's Uniform Act does not authorize enforcement of "fines or other penalties." Cal. Civ. Proc. Code § 1713.1(2). The Act includes a savings clause, *see* Cal. Civ. Proc. Code § 1713.7, but the fine is

Appendix A

equally unenforceable under California common law doctrine.

California courts follow the generally-observed rule that, ““unless required to do so by treaty, no state [*i.e.*, country] enforces the penal judgments of other states [*i.e.*, countries].”” *In re Manuel P.*, 215 Cal. App. 3d 48, 81, 263 Cal. Rptr. 447 (1989) (Wiener, J., dissenting) (quoting Restatement § 483 cmt. 3); *see also In re Marriage of Gray*, 204 Cal. App. 3d 1239, 1253, 251 Cal. Rptr. 846 (1988). This is consistent with the Restatement’s declaration that “courts in the United States are not required . . . to enforce judgments [from foreign countries] for the collection of . . . fines[] or other penalties.” Restatement § 483; *see also* 30 Am. Jur. 2d Execution and Enforcement of Judgments § 846 (2004) (“Courts in the United States will not recognize or enforce a penal judgment rendered in another nation.”). A number of states have adopted an identical version of California’s Uniform Act, *see* Enforcing Foreign Judgments in the United States and United States Judgments Abroad 28-32 (Ronald A. Brand ed., 1992), and the common law rule against the enforcement of penal judgments is venerable and widely-recognized. *See Huntington v. Attrill*, 146 U.S. 657, 673-74, 13 S. Ct. 224, 36 L. Ed. 1123 (1892); *see also* 18 James Wm. Moore et al., Moore’s Federal Practice § 130.05 (2002).

Penal judgments are those intended ““to punish an offense against the public justice of the [foreign] state[.]”” *Chavarria v. Superior Court*, 40 Cal. App. 3d 1073, 1077,

Appendix A

115 Cal. Rptr. 549 (1974) (quoting *Huntington*, 146 U.S. at 673-74). The test to determine a judgment's nature

is not by what name the statute [on which the judgment is based] is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.

Huntington, 146 U.S. at 682.

There are a number of indications that the French judgments are penal in nature. First, the word used by the French court (“astreinte”) is consistently translated as “penalty” in the record in this case. For example, the May 22 order provides that Yahoo! and Yahoo! France are “subject to a penalty of 100,000 Euros per day of delay and per confirmed violation[.]” The November 20 order provides that Yahoo! is “subject to a penalty of 100,000 Francs per day of delay[.]”

Second, the French court held that Yahoo! was violating Section R645-1 of the French Penal Code, which declares it a “crime” to exhibit or display Nazi emblems, and which prescribes a set of “criminal penalties,” including fines. Fr. C. Pen. § R645-1, *translation available at* <http://www.lex2k.org/yahoo/art645.pdf>. The monetary penalties against Yahoo! do not lose their character as “penalties” simply because they were obtained in a civil action.

Appendix A

See Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299, 8 S. Ct. 1370, 32 L. Ed. 239 (1888). Nor do they lose their character because private litigants initiated the action. A civil remedy is penal, as the term is understood in private international law, if it awards a penalty “to a member of the public, suing in the interest of the whole community to redress a public wrong.” *Weiss v. Glempe*, 792 F. Supp. 215, 227 (S.D.N.Y. 1992); *see also Loucks v. Standard Oil Co.*, 224 N.Y. 99, 101, 120 N.E. 198 (1918) (Cardozo, J.). In short, the label “civil” does not strip a remedy of its penal nature. Thus, for example, an American court is not required to enforce an order of contempt or an award of punitive damages in a civil action. *Cf. Frank v. Reese*, 594 S.W.2d 119, 121 (Tex. Civ. App. 1979) (“Other jurisdictions are reluctant to give full faith and credit to an order for contempt due to its punitive nature[.]”); *Republic of Philippines v. Westinghouse Elec. Corp.*, 821 F. Supp. 292, 295 (D.N.J. 1992) (refusing to enforce Philippine law providing for punitive damages); *see also* Third Restatement § 483 cmt. b (“Some states consider judgments penal for purposes of non-recognition if multiple, punitive, or exemplary damages are awarded, even when no governmental agency is a party.”).

Third, the penalties the French court imposed on Yahoo! are primarily designed to deter Yahoo! from creating, in the words of the November 20 order, “a threat to internal public order.” The penalties are payable to the government and not designed to compensate the French student groups for losses suffered. *See Farmers & Merchants Trust Co. v. Madeira*, 261 Cal. App. 2d 503, 510, 68 Cal. Rptr. 184 (1968) (suggesting that a judgment is penal if it is designed to punish a defendant “for an offense committed against the public

Appendix A

justice” of the jurisdiction). Judgments designed to deter conduct that constitutes a threat to the public order are typically penal in nature. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

The French court awarded nominal damages of one Franc to LICRA and UEJF in its first (but not its second) order. Balanced against the far more substantial penalties payable to the government (up to 100,000 Francs per day under the second order), this award of one Franc cannot render the orders primarily remedial rather than punitive in nature. *See Ducharme v. Hunnewell*, 411 Mass. 711, 714, 585 N.E.2d 321 (1992) (determining that whether a judgment requires enforcement “depends on whether its purpose is remedial in nature, affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice”). Even the “restitution” the court ordered — the printing of its judgment in publications of UEJF’s and LICRA’s choosing — benefits the general public and does not specifically compensate the two student groups for a particular injury.

2. First Amendment

Yahoo! argues that any restriction on speech and speech-related activities resulting from the French court’s orders is a substantial harm under the First Amendment. We are acutely aware that this case implicates the First Amendment, and we are particularly sensitive to the harm that may result from chilling effects on protected speech or expressive conduct. In this case, however, the harm to First Amendment interests — if such harm exists at all — may be nowhere near as great

Appendix A

as Yahoo! would have us believe. Yahoo! has taken pains to tell us that its adoption of a new hate speech policy after the entry of the French court's interim orders was motivated by considerations independent of those orders. Further, Yahoo! refuses to point to anything that it is now not doing but would do if permitted by the orders. In other words, Yahoo! itself has told us that there is no First Amendment violation with respect either to its previous (but now abandoned) speech-related activities, or to its future (but not currently engaged in) speech-related activities. Any restraint on such activities is entirely voluntary and self-imposed.

The only potential First Amendment violation comes from the restriction imposed by the interim orders — if indeed they impose any restrictions — on the speech-related activities in which Yahoo! is now engaged, and which might be restricted if further compliance with the French court's orders is required. For example, Yahoo! continues to allow auctions of copies of *Mein Kampf*, and it maintains that the French court's orders prohibit it from doing so. The French court might find that Yahoo! has not yet complied “in large measure” with its orders, and that Yahoo! is prohibited by its orders from allowing auctions of copies of *Mein Kampf*.

Even if the French court took this step, Yahoo!'s claim to First Amendment protection would be limited. We emphasize that the French court's interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States. They only require it to restrict access by users located in France. That is, with respect to the *Mein Kampf* example, the French court's orders — even if further compliance is required — would by their terms

Appendix A

only prohibit Yahoo! from allowing auctions of copies of *Mein Kampf* to users in France.

The core of Yahoo!’s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France. Yet under French criminal law, Internet service providers are forbidden to permit French users to have access to the materials specified in the French court’s orders. French users, for their part, are criminally forbidden to obtain such access. In other words, as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. As we indicated above, the extent — indeed the very existence — of such an extraterritorial right under the First Amendment is uncertain.

3. Summary

In sum, it is extremely unlikely that any penalty, if assessed, could ever be enforced against Yahoo! in the United States. Further, First Amendment harm may not exist at all, given the possibility that Yahoo! has now “in large measure” complied with the French court’s orders through its voluntary actions, unrelated to the orders. Alternatively, if Yahoo! has not “in large measure” complied with the orders, its violation lies in the fact that it has insufficiently restricted access to anti-semitic materials by Internet users located in France. There is some possibility that in further restricting access to these French users, Yahoo! might have to restrict access by American users. But this possibility is, at this point, highly speculative. This level of harm is not sufficient to overcome the factual uncertainty bearing on the legal question presented and thereby to render this suit ripe.

Appendix A

C. The Dissent Addressed to Ripeness

The dissent addressed to the question of ripeness makes two principal contentions. First, it contends that the French court's interim orders are unconstitutional on their face, and that further factual development is therefore not needed. Second, it contends that if any further factual development is necessary, we should remand to the district court for that purpose. We take these contentions in turn.

1. Unconstitutionality of the French Court's Orders

The dissent repeatedly states that the French court's interim orders are facially unconstitutional. It writes, "The French orders on their face . . . violate the First Amendment and are plainly contrary to one of America's, and by extension California's, most cherished public policies." (Dissent at 481.) It later refers to the French court's orders as "foreign court orders that so obviously violate the First Amendment." (*Id.* at 15.) It writes further, "The absence of a discernible line between the permitted and the unpermitted . . . makes the orders facially unconstitutional." (*Id.* at 490.)

The dissent is able to conclude that the French court's interim orders are facially unconstitutional only by ignoring what they say. The dissent appears to assume that the orders, on their face, require Yahoo! to block access by United States users. It writes, "The question we face in this federal lawsuit is whether our own country's fundamental constitutional guarantee of freedom of speech protects Yahoo! (and, derivatively, at least its users in the United States) against

Appendix A

some or all of the restraints the French defendants have deliberately imposed upon it *within the United States*.” (*Id.* at 473-74) (emphasis in original). Further, “Yahoo! confront[s] the dilemma of whether or not to stand by its United States constitutional rights or constrain its speech and that of its user[.]” (*Id.* at 480.) “Legions of cases permit First Amendment challenges to governmental actions or decrees that on their face are vague, overbroad and threaten to chill protected speech. Indeed, the sweeping injunction here presents just such a paradigmatic case.” (*Id.* at 480.) Still further, “Under the principles articulated today, a foreign party can use a foreign court decree to censor free speech here in the United States[.]” (*Id.* at 483.)

If it were true that the French court’s orders by their terms require Yahoo! to block access by users in the United States, this would be a different and much easier case. In that event, we would be inclined to agree with the dissent. *See, e.g., Sarl Louis Feraud Int’l v. Viewfinder Inc.*, No. 04 Civ. 9760, 2005 U.S. Dist. LEXIS 22242 (S.D.N.Y. Sept. 29, 2005) (holding unenforceable as contrary to the First Amendment a French damage judgment based on photographs posted on the Internet freely accessible to American viewers). But this is not the case. The French court’s orders, by their terms, require only that Yahoo! restrict access by users in France. The boundary line between what is permitted and not permitted is somewhat uncertain for users in France. But there is no uncertainty about whether the orders apply to access by users in the United States. They do not. They say nothing whatsoever about restricting access by users in the United States.

Appendix A

The dissent's conclusion that the French court's orders are unconstitutional may be based in part on an assumption that a necessary consequence of compliance with the French court's orders will be restricted access by users in the United States. But if this is the basis for the dissent's conclusion, it could hardly say that the orders are unconstitutional "on their face." Whether restricted access by users in the United States is a necessary consequence of the French court's orders is a factual question that we cannot answer on the current record.

If the only consequence of compliance with the French court's orders is to restrict access by Internet users in France, Yahoo!'s only argument is that the First Amendment has extraterritorial effect. The dissent fails to acknowledge that this is inescapably a central part of Yahoo!'s argument, let alone acknowledge that it may be Yahoo!'s *only* argument.

2. Remand to the District Court

As a fallback position, the dissent contends that we should remand to the district court for a determination whether a necessary consequence of compliance with the French court's orders would be restriction on access by users in the United States. This fallback contention is, of course, in tension with the dissent's conclusion that the French court's orders are unconstitutional on their face.

If a necessary consequence of compliance with the French court's orders were a restriction on access by American users, this would be a different and much easier case. The dissent argues that we should remand to the district court to determine whether this is a necessary consequence.

Appendix A

But we cannot obtain this determination merely by remanding to the district court. Before the district court can engage in useful factfinding, it must know whether (or to what extent) Yahoo! has already sufficiently complied with the French court's interim orders. There are two alternative scenarios.

First, if the French court were to conclude, as LICRA and UEJF contend, that Yahoo! has already complied "in large measure" with the French court's orders, Yahoo! simply has no First Amendment argument. Yahoo! has explicitly stated that its change of policy after the entry of the second interim order was undertaken for reasons entirely independent of the French court's orders. Under this scenario, the question of compliance would disappear, and the district court would have no factfinding role.

Second, if the French court were to determine, contrary to LICRA and UEJF's contention, that Yahoo! has not complied "in large measure," the question of the necessary consequences for American users would then arise. If and when the French court determines what further compliance is necessary, there might be some appropriate factfinding role for the district court on that question. But even under this scenario, we first need to get a determination from the French court as to what further compliance is necessary, for the district court's factfinding role is dependent on there having been such a prior determination by the French court.

Under either scenario, the essential initial step is to find out from the French court whether Yahoo! has complied "in large measure" with its orders, and, if not, what further compliance is required. Until we know that, the district court

Appendix A

cannot perform any useful factfinding on the question of whether a necessary consequence of compliance with the French court's orders will be to restrict access by Internet users in the United States.

Conclusion

First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power.

Yahoo! wants a decision providing broad First Amendment protection for speech and speech-related activities on the Internet that might violate the laws or offend the sensibilities of other countries. As currently framed, however, Yahoo!'s suit comes perilously close to a request for a forbidden advisory opinion. There was a live dispute when Yahoo! first filed suit in federal district court, but Yahoo! soon thereafter voluntarily changed its policy to comply, at least in part, with the commands of the French court's interim orders. This change in policy may or may not have mooted Yahoo!'s federal suit, but it has at least come close. Unless and until Yahoo! changes its policy again, and thereby more clearly violates the French court's orders, it is unclear how much is now actually in dispute.

Appendix A

It is possible that because of Yahoo!’s voluntary change of policy it has now complied “in large measure” with the French court’s orders. It is also possible that Yahoo! has not yet complied “in large measure.” If further compliance is required, Yahoo! will have to impose further restrictions on access by French users. The necessary consequence of such further restrictions on French users may or may not be that Yahoo! will have to impose restrictions on access by American users. Until we know whether further restrictions on access by French, and possibly American, users are required, we cannot decide whether or to what degree the First Amendment might be violated by enforcement of the French court’s orders, and whether such enforcement would be repugnant to California public policy. We do not know whether further restrictions are required, and what they might be, because Yahoo! has chosen not to ask the French court. Instead, it has chosen to come home to ask for a declaratory judgment that the French court’s orders — whatever they may or may not require, and whatever First Amendment questions they may or may not present — are unenforceable in the United States.

An eight-judge majority of the en banc panel holds, as explained in Part II of this opinion, that the district court properly exercised specific personal jurisdiction over defendants LICRA and UEJF under the criteria of *Calder*. A three-judge plurality of the panel concludes, as explained in Part III of this opinion, that the suit is unripe for decision under the criteria of *Abbott Laboratories*. When the votes of

Appendix A

the three judges who conclude that the suit is unripe are combined with the votes of the three dissenting judges who conclude that there is no personal jurisdiction over LICRA and UEJF, there are six votes to dismiss Yahoo!'s suit.

We therefore REVERSE and REMAND to the district court with instructions to dismiss without prejudice.

Appendix A

CONCUR BY: Warren J. Ferguson, Diarmuid F. O’Sconnlain, A. Wallace Tashima, Raymond C. Fisher (In Part)

CONCUR: FERGUSON, Circuit Judge, with whom O’Sconnlain and TASHIMA, Circuit Judges, join with respect to Part I, concurring in the judgment:

I concur that the District Court judgment in favor of Yahoo! should be reversed and the case dismissed, but I do so based on reasons other than those set forth by the majority. I do not believe that lack of ripeness is the proper ground to dismiss Yahoo!’s suit. Instead, I believe that the District Court did not properly exercise personal jurisdiction over the defendants and also should have abstained from deciding Yahoo!’s claims. Yahoo!’s suit should be dismissed, therefore, either under Rule 12(b)(2) or Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

The District Court did not properly exercise personal jurisdiction over La Ligue Contre Le Racisme et L’Antisemitisme (“LICRA”) and L’Union des Etudiants Juifs de France (“UEJF”). LICRA and UEJF’s suit was not “expressly aimed” at California under the “effects” test of *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), which, I agree with Judge Fletcher, governs this case and may be appropriately applied to the French court orders.

Appendix A

An intentional act aimed exclusively at a location other than the forum state, which results in harm to a plaintiff in the forum state, does not satisfy the “express aiming” requirement under *Calder*. In *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 799 (9th Cir. 2004), an Ohio car dealer ran an advertisement in the *Akron Beacon Journal* that featured Arnold Schwarzenegger as “the terminator” without first seeking Schwarzenegger’s permission. We held that the advertisement, though it wrongfully depicted Schwarzenegger, a California resident, “was expressly aimed at Ohio rather than California.” *Id.* at 807. Because the dealer’s “express aim was local,” the district court lacked jurisdiction to hear Schwarzenegger’s complaint. *Id.* Cf. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1112 (9th Cir. 2002) (finding that European defendants “expressly aimed” at California, the forum state, since they “communicated directly with Dole’s California managers to [fraudulently] induce them . . . to enter into significant and detrimental contractual arrangements”); *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (deciding that defendant’s “letter was expressly aimed at California[,]” the forum state, “because it individually targeted [Bancroft & Masters], a California corporation doing business almost exclusively in California”).

The majority provides a one-sentence explanation for why LICRA and UEJF’s suit was expressly aimed at California: “The suit sought, and the French court granted, orders directing Yahoo! to perform significant acts in California.” Maj. op. at 425.

Appendix A

That is not true. LICRA and UEJF's suit sought French court orders directing Yahoo! to perform significant acts locally *in France*, not in California. The May 22, 2000 interim order declares: "By permitting [anti-Semitic] objects to be viewed *in France* and allowing surfers located *in France* to participate in such a display of items for sale, the Company Yahoo! Inc. is therefore committing a wrong *in the territory of France*, a wrong whose unintentional character is averred but which has caused damage to be suffered by LICRA and UEJF, both of whom are dedicated to combating all forms of promotion of Nazism *in France*." (emphases added).

To comply with French law, Yahoo! would need "to prevent surfers calling *from France* from viewing these [anti-Semitic] services on their computer screen"; "to identify the geographical origin of a visiting site from the caller's IP address, which should enable it to prevent surfers calling *from France* . . . from accessing services and sites which[,] when displayed on a screen installed *in France*[,] . . . is liable to be deemed an offence *in France* and/or to constitute a manifestly unlawful trouble [under French law]"; and "to take all measures to dissuade and make impossible any access by a surfer calling *from France* to disputed sites and services of which the title and/or content constitutes a threat to *internal* public order." (emphases added).

There is no evidence whatsoever that LICRA and UEJF had any intention to expressly aim their suit at California. The majority believes that because the effect of the French court orders was for Yahoo! to perform significant acts in California, express aiming on the part of LICRA and UEJF was "obvious." Maj. op. at 425. But the majority fails to

Appendix A

recognize what *Schwarzenegger* makes clear: express aiming requires intentional conduct by a party directed at the forum state. LICRA and UEJF are two anti-racist French civil liberties organizations. Yahoo! is a global Internet service. At the time LICRA and UEJF brought their suit, they could not precisely have known of Yahoo!’s server locations, security capabilities, or technical procedures or, more important, how they relate to Yahoo!’s California-based operations. LICRA and UEJF had one aim and one aim only: to prevent French citizens from using “Yahoo.fr” and “Yahoo.com” to access illegal anti-Semitic hate merchandise in France. They were plainly concerned with Yahoo!’s actions *within France*, regardless of where those actions emanated from.

“It may be true that [LICRA and UEJF]’s intentional [suit] eventually caused harm to [Yahoo!] in California, and [LICRA and UEJF] may have known that [Yahoo!] [was based] in California. But this does not confer jurisdiction, for [LICRA and UEJF]’s express aim was local.” *Schwarzenegger*, 374 F.3d at 807.

II.

The District Court should have also abstained from deciding Yahoo!’s claims.

The common law act of state doctrine specifies:

Every foreign state is bound to respect the independence of every other sovereign state, and the court of one country will not sit in judgment

Appendix A

on the acts of government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). “Judicial . . . engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). The act of state doctrine therefore “mandates [judicial] abstention.” *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989); *see also West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 827 (9th Cir. 1987) (“The act of state doctrine is a combination justiciability and abstention rule . . .”).

While a foreign court judgment arising out of private litigation is generally not an act of state, it can be when it gives effect to the public interest of the foreign government. *See Philippine Nat’l Bank v. U.S. Dist. Ct. of Hawaii*, 397 F.3d 768, 773 (9th Cir. 2005); *Liu*, 892 F.2d at 1433-34 & n.2 (citing Restatement (Second) of Foreign Relations of the United States § 41 cmt. d (1965) (“A judgement of a court may be an act of state”)).

In *Philippine Nat’l Bank*, a dispute arose between a class of plaintiffs and the Republic of Philippines over the right to the assets of Philippine President Ferdinand Marcos’s estate. *Id.* at 770. The class obtained a large judgment in a federal district court in Hawaii against the Marcos estate for

Appendix A

human rights violations by the Marcos regime. At the same time, the Republic of Philippines brought suit in the Philippines seeking forfeiture of the Marcos estate's assets on the ground that they were stolen by Marcos from the Philippine government and its people. *Id.* at 771. The Philippine Supreme Court agreed with the Republic of Philippines and ordered the assets to be forfeited to the Philippine Government. *Id.* A federal district court in Hawaii, however, ruled that the Philippine Supreme Court judgment violated the due process rights of the class of plaintiffs and was entitled to no judicial deference. *Id.* at 772.

We disagreed and held that the Philippine Supreme Court judgment was an act of state because it effectuated the “statutory mandate [of the Philippine government] to recover property allegedly stolen from the treasury.” *Id.* at 773 (quoting *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 546 (9th Cir. 1996)). Significantly, we held that the “collection efforts of the Republic [of Philippines],” even though they extended beyond Philippine’s borders into Singapore, were “governmental,” and the Philippine Supreme Court decision upholding those efforts was therefore an act of state. *Philippine Nat’l Bank*, 397 F.3d at 773 (“The Republic’s ‘interest in the enforcement of its law does not end at its borders’ . . .”) (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1121-25 (5th Cir. 1985)).

Like the Philippine forfeiture judgment, both French court orders at issue in this case constitute acts of state. Three factors lead to this conclusion. First, while LICRA and UEJF were private French litigants, they were acting as non-governmental, anti-racist associations and institutional

Appendix A

partners with the French government in fighting anti-Semitism.¹ Their injunctive actions against Yahoo! clearly followed the French government's mandate to enforce Le Nouveau Code Penal Art. R. 645-2 ("Nazi Symbols Act"), a criminal provision. The record makes clear, for example, that LICRA and UEJF litigated with the assistance of Mr. Pierre Dillange, First Deputy Prosecutor representing the office of the Public Prosecutor to the County Court of Paris. Dillange, in fact, "demanded" to the French court "that the reality of the damages suffered by [LICRA and UEJF] be recognised." Prior to the issuance of the French court orders, Dillange publicly condemned the sale of Nazi memorabilia on Yahoo.fr and Yahoo.com calling for "constraints and an injunction" against Yahoo!.² LICRA and UEJF litigated their claims in accordance with the demands of the French public prosecutor.

Second, French justice Jean-Jacques Gomez expressly recognized in his court orders the compelling interest of France to rid its country of anti-Semitic merchandise and

1. The French anti-racism Pleven law ("Loi Pleven"), passed in July 1972, expressly permits French anti-racist associations to file legal actions to combat racism. The law confers upon French anti-racist associations official "civil party" status in such matters. The French text of the law is referenced at: <http://www.culture.gouv.fr/culture/infos-pratiques/droit-culture/cinema/pdf/l-290781.pdf>; see also Eric Bleich, RACE POLITICS IN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960s 135-39 (2003).

2. Reuters, "Paris Prosecutor Condemns Nazi Auctions on Yahoo," May 15, 2000, available at <http://www.icare.to/archivemay2000.html>.

Appendix A

speech within its borders. In his May 22, 2000 interim order, for example, he called Yahoo.com “the largest vehicle in existence for the promotion [of] Nazism” and described the commercial sale of Nazi objects as “an affront to the collective memory of a country profoundly traumatized by the atrocities committed by and in the name of the criminal Nazi regime against its citizens.” Access to Nazi memorabilia on Yahoo!’s auction sites “constituted a threat to internal public order” and a “wrong in the territory of France.” Like the Philippine Supreme Court, the French court here gave clear effect to the collective efforts of French civil liberties organizations, the French government, and French law enforcement to enforce French criminal provisions against anti-Semitism. Justice Gomez’s opinion sets forth the moral judgment of France itself.

Third, the French court orders reflected judicial enforcement of a robust French state policy against racism, xenophobia, and anti-Semitism. France has acceded to the International Convention on the Elimination of all Forms of Racial Discrimination (ICEFRD) (1965) and the International Covenant on Civil and Political Rights (ICCPR) (1966), both of which include provisions against racist speech. *See* ICCPR, Art. 20-2; ICEFRD, Art. 4(a). Since World War II, France has introduced sweeping legislation to combat anti-Semitism. In July 1972 it passed “Loi Pleven,” which criminalized a range of racist behavior from racial defamation and provocation to racial hatred and violence, and in July 1990 it passed “Loi Fabius-Gayssot,” which criminalized speech that denied the existence of the Holocaust or that celebrated Nazism. The Nazi Symbols Act, which Yahoo! was found guilty of violating, encompassed France’s earlier dramatic efforts to criminalize racist speech within its borders.

Appendix A

It is apparent then that the French court orders were not merely private judgments but, in fact, reflected the sentiments of two French civil liberties organizations, the French public prosecutor, and, indeed, France itself. They were acts of state.³ The District Judge sitting in San Jose, California did not have the authority to second guess these orders and should have abstained from invalidating them. He should have deferred to the Executive and Congress to assess the foreign consequences of France's broad policy against anti-Semitic hate speech. *See Sideman de Blake v. Republic of Argentina*, 965 F.2d 699, 707 (9th Cir. 1992) ("The [act of state] doctrine reflects the prudential concern that the courts, if they question the validity of foreign acts taken by sovereign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.") (footnote and citations omitted). Our current government, in fact, is already "fully committed to monitoring and combating anti-Semitism throughout the world."⁴

3. It is also worth noting that the French court orders were final criminal judgments that Yahoo! elected not to appeal through the French court system. Instead, Yahoo! brought the present declaratory relief action for a U.S. district court to invalidate the French court orders based on a violation of Yahoo!'s First Amendment right. In so doing, Yahoo! here is essentially no different than a party losing in state court who seeks to vindicate his or her federal rights by challenging the adverse state court judgment in federal district court. The Supreme Court has barred such opportunistic attempts at relitigation under the *Rooker-Feldman* doctrine. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 161 L. Ed. 2d 454, 125 S. Ct. 1517, 1521-22 (2005).

4. Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, REPORT ON GLOBAL ANTI-SEMITISM, 5-6, 13-15

Appendix A

The criminal statutes of most nations do not comport with the U.S. Constitution. That does not give judges in this country the unfettered authority to pass critical judgment on their validity, especially where, as here, the criminal statute embodies the determined will of a foreign sovereign to protect its borders from what it deems as morally reprehensible speech of the worst order.

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(January 2005) (discussing France's efforts to combat anti-Semitism). On October 16, 2004, President George W. Bush signed into law the Global Anti-Semitism Review Act, Pub. L. No. 108-332, which authorized the 2005 report, the first of its kind.

Appendix A

O'SCANNLAIN, Circuit Judge, with whom FERGUSON and TASHIMA, Circuit Judges, join, concurring only in the judgment:

Our requirement that a defendant have “purposefully availed” himself of the protections and benefits of the forum state, or have “purposefully directed” his activities into the forum state, must be read in light of the Supreme Court’s admonition in *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940), that the exercise of personal jurisdiction must comport with “traditional notions of fair play and substantial justice.” *Id.* at 463. Because I cannot agree that California’s exercise of personal jurisdiction over La Ligue Contre Le Racisme et L’Antisemitisme (“LICRA”) and L’Union des Etudiants Juifs de France (“UEJF”) comports with those basic principles, I respectfully dissent from the majority’s opinion while concurring in its conclusion that Yahoo!’s suit must be dismissed. For similar reasons, I concur in Judge Tashima’s concurrence and in Part I of Judge Ferguson’s concurrence.

I

A State’s jurisdiction is defined not by force or influence but by physical territory and its judicial power traditionally extended over only those persons and property within its borders. *See Pennoyer v. Neff*, 95 U.S. 714, 720-22, 24 L. Ed. 565 (1878). The idea of “minimum contacts” developed as a surrogate for actual presence in a State but did not alter the essentially territorial nature of jurisdiction. The question in every personal jurisdiction case, then, is whether an individual’s contacts with the forum State are so

Appendix A

substantial that they render the extension of sovereign power just, notwithstanding his lack of physical presence there.

A

The personal jurisdiction requirement is not merely a rule of civil procedure; it is a constitutional constraint on the powers of a State, as exercised by its courts, in favor of the due process rights of the individual. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987) (“The requirement that a court have personal jurisdiction flows not from [Article] III, but from the Due Process Clause. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”). Grounded in the Fourteenth Amendment’s protection of the processes necessary to ensure basic fairness in the application of the law, the requirement that an individual have “certain minimum contacts” with the relevant forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’” *International Shoe*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken*, 311 U.S. at 463), protects him from the unpredictable and burdensome exercise of authority by foreign courts. It follows from this that the rights and interests of Yahoo! and the interests of the State of California, if not irrelevant to the inquiry, are clearly subordinate to the rights of LICRA and UEJF, the parties against whom jurisdiction is asserted and whose rights are protected by the Due Process Clause.

Appendix A

The Supreme Court has advised that

the constitutional touchstone remains whether the defendant purposefully established “minimum contacts” in the forum State. Although it has been argued that *foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require*, the Court has consistently held that this kind of foreseeability is not a “sufficient benchmark” for exercising personal jurisdiction. Instead, the foreseeability that is critical to due process analysis is that the defendant’s conduct *and connection with the forum State are such that he should reasonably anticipate being haled into court there*.

Burger King v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528, 542 (1985) (emphases added). By requiring that individuals have “fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,” *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

Appendix A

B

The Supreme Court has never approved such a radical extension of personal jurisdiction as would sanction the majority's holding that, by litigating a bona fide claim in a foreign court and receiving a favorable judgment, a foreign party automatically assents to being haled into court in the other litigant's home forum. Such a result cannot be reconciled with the "constitutional touchstone" of foreseeability: that the defendant "should reasonably anticipate being haled into court" in the forum. *Burger King*, 471 U.S. at 474.

In *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), the defendants should reasonably have expected that, by circulating a libelous story in California about a California celebrity, they would be haled into court in California to answer for their tortious behavior. And in *Burger King*, because the defendants' business ties with the State of Florida were "shielded by the 'benefits and protections'" of Florida's laws, it was "presumptively not unreasonable to require [them] to submit to the burdens of litigation [there] as well." 471 U.S. at 476. These cases stake out the limits of personal jurisdiction as approved by the Supreme Court.

LICRA's and UEJF's actions lie beyond that limit. Neither party has ever carried on business or any other activity through which they have availed themselves of the benefits and protections of California's laws,¹ nor should

1. I agree with the majority that the mailing in good faith of cease and desist letters and the use of the United States Marshal's
(Cont'd)

Appendix A

either party have reasonably anticipated that it would be haled into court in California to answer for the legitimate exercise of its rights in France.

II

This case was reheard en banc primarily for the purpose of answering the question of whether the underlying action in a non-contract case must be tortious or otherwise wrongful to justify the exercise of personal jurisdiction, or whether the “express aiming” of any action, regardless of culpability, will suffice.² Although the resolution of that question does not affect my conclusion that California cannot exercise personal jurisdiction over LICRA or UEJF, I respectfully disagree with the majority’s interpretation of *Calder* on this point.

(Cont’d)

Office to effect service of process of documents related to the French legal proceedings are not sufficient bases for jurisdiction. Maj. op. at 423-25.

2. Although the fact is ignored by the majority, this question was settled law in our circuit prior this appeal being reheard en banc. In *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), the panel made it clear that its decision relied on the assumption that the defendant had engaged in *tortious* conduct. Judge Sneed, writing for a majority of the panel, further held that “jurisdiction in California would be ripe for challenge if following the development of trial it should appear that ANI acted reasonably and in good faith to protect its trademark against an infringer.” *Id.* at 1089 (Sneed, J., concurring).

Appendix A

A

Under the majority’s reading of *Calder*, acts giving rise to personal jurisdiction in a non-contract case need not be wrongful. Maj. op. at 423 (“We do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts.”). That conclusion is undermined by the language of *Calder* itself and requires the majority to divorce that case’s holding from its fact—always a dubious exercise. In *Calder*, the Supreme Court affirmed a decision that had “concluded that a valid basis for jurisdiction existed *on the theory that petitioners intended to, and did, cause tortious injury* to respondent in California.” *Calder*, 465 S. Ct. at 1485 (emphasis added). The Court itself held that “in this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction is proper *on that basis*.” *Id.* at 1487 (emphasis added). The wrongfulness of the defendants’ acts was, therefore, a key element in the jurisdictional calculus, possibly because a person who has committed a wrongful act should expect to be haled into court by his victim in the victim’s home State. Although the Court might have reached the same result if the act in question had not been wrongful—as the majority apparently presumes it would—it is reckless of us to proceed on the basis of such speculation beyond what is currently the farthest reach of personal jurisdiction approved by the Court.

Appendix A

B

The majority's jurisdictional legerdemain is nimble but, like any trick, does not stand up to close scrutiny. It begins innocuously enough by noting that the traditional analysis of minimum contacts depends on whether the disputed act sounds in tort or in contract. In tort cases, "we typically inquire whether a defendant 'purposefully direct[s] his activities' at the forum state," maj. op. at 420. And in commercial and contract cases, "we typically inquire whether a defendant 'purposefully avails itself [sic] of the privilege of conducting activities' or 'consummate[s] [a] transaction' in the forum." *Id.* and do not require that the defendants actions be wrongful. However, that traditional distinction is abruptly jettisoned when the majority next asserts that "in *any personal jurisdiction case* we must evaluate all of a defendant's contacts with the forum state, *whether or not those contacts involve wrongful activity* by the defendant." *Id.* at 422 (emphases added).

The majority's statement is, quite literally, unprecedented. With a stroke of its pen, the majority extends the analysis previously applied only to commercial and contract cases to all assertions of personal jurisdiction. Tellingly, the only cases that the majority musters in support of its novel assertion are commercial or contract-related "purposeful availment" cases. In *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), the Supreme Court held that when an out-of-state mail order company "purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical

Appendix A

presence in the State.” 504 U.S. at 302. And, in *Burger King*, the Court held that jurisdiction was proper on the grounds that defendants’ business ties with the State of Florida were “shielded by the ‘benefits and protections’” of Florida’s laws. 471 U.S. at 476. In sharp contrast, every “purposeful direction” case that the majority cites in its opinion involved tortious or otherwise wrongful acts by the defendants.

Given our long line of precedent applying the “purposeful availment” test only in contract and commercial cases, and the majority’s concession that this case should be analyzed under *Calder*’s “purposeful direction” test, *see* maj. op. at 423, the majority’s conflation of the elements of these two tests is an unseemly act of judicial slight of hand. LICRA and UEJF are, indisputably, non-commercial actors who have never purposefully availed themselves of the benefits or protections of California’s laws. Therefore, neither *Calder* nor any other Supreme Court precedent justifies California’s assertion of personal jurisdiction over them.

III

LICRA’s and UEJF’s actions and contacts with the State of California were, at most, incidental to the legitimate exercise of their rights under French law. They should not have reasonably anticipated being haled into court in California to answer for their prosecution of a lawsuit in France. Because California’s exercise of personal jurisdiction over them on that basis would violate traditional notions of fair play and substantial justice and, therefore, the procedural guarantees of the Due Process Clause, I would remand the case with instructions to dismiss for want of personal jurisdiction and not reach the issue of ripeness.

Appendix A

Thus, while I must dissent from its rationale, I concur in the majority's conclusion that the district court's opinion must be reversed.

Appendix A

TASHIMA, Circuit Judge, with whom FERGUSON and O'SCANNLAIN, Circuit Judges, join, concurring in the judgment:

I concur in the judgment reversing and remanding with instructions to dismiss this action, but I dissent from the majority's conclusion that personal jurisdiction exists over La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and L'Union des Etudiants Juifs de France ("UEJF"). I therefore concur in Part I of Judge Ferguson's concurring opinion — that a district court located in California cannot exercise personal jurisdiction over LICRA and UEJF.

Because I believe that the district court lacked in personam jurisdiction, I would not reach the issues discussed in Part III of the majority opinion¹ — ripeness — and Part II of Judge Ferguson's concurring opinion — whether, even if it had jurisdiction over the defendants, the district court should have abstained from deciding this case. I do believe, however, that Judge Ferguson's eloquent discussion in Part II of the reasons why he would hold that abstention is proper further supports why personal jurisdiction is lacking in this case.

LICRA and UEJF ("defendants") had only three contacts with California. These contacts were a cease and desist letter, the service of process to commence the French action, and the subsequent service of two interim orders on Yahoo!.

1. I refer to the opinion authored by Judge W.A. Fletcher as the "majority opinion," because it commands a majority of the en banc court on the issue of personal jurisdiction, although that is not the majority that controls the disposition of the case.

Appendix A

Service was made in accordance with the requirements of the Hague Convention on the service abroad of judicial documents. As the majority rightly acknowledges, these contacts are an insufficient basis for the exercise of personal jurisdiction over defendants. Maj. op. at 422-25.

The majority goes on, however, to find a sufficient basis for the exercise of personal jurisdiction over defendants in two interim orders issued by the French court because those orders “directed Yahoo! to take actions in California, on threat of a substantial penalty.” *Id.* at 425. The majority’s conclusion is not based on any contact with California, but on acts which it contends were “expressly aimed at the forum state.” *Id.* (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 805 (9th Cir. 2004)). But neither *Schwarzenegger* nor any other case relied on by the majority based a finding of specific jurisdiction on conduct expressly aimed at the forum state which conduct was not also a contact with the forum state. Here, for the first time, the majority completely divorces the expressly-aimed conduct from the requirement that that conduct also be a contact with the forum state. Thus, I submit that the finding of personal jurisdiction on the basis of *Calder*’s² “effects” test in the circumstances of this case is a radical extension of that doctrine.

It is self-evident that the orders are the orders of the French court, not acts of defendants. Thus, more precisely, the majority’s finding of personal jurisdiction is, in fact, based on LICRA and UEJF *petitioning* the French court for relief

2. *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

Appendix A

under French law. But should the petitioning by a citizen of the courts of his or her own country to uphold the laws of that country form the *sole* basis of personal jurisdiction over that citizen by the courts of a foreign country? The majority's answer is yes. That answer, seems to me, to be perverse. First, the bringing and prosecuting of an action in a French court are all acts done wholly in France. None of these acts constitutes a "contact" with California. Second, no citizen of any country can safely sue a foreign defendant under the majority's theory of specific jurisdiction because the sought judgment, including an ordinary money judgment for injury or damages, will have an adverse "effect" on the defendant's purse or treasury in that defendant's home country. In this sense, every lawsuit naming a foreign defendant can be said to be expressly aimed at that defendant's home state (or nation). Thus, unless it is anchored to a contact with the forum, express aiming becomes a meaningless test in terms of due process.

Moreover, courts, even when acting at the behest of a private petitioner, have an independent interest and obligation to uphold their nations' domestic laws, particularly when, as here, those laws are designed to carry out an important and strongly-held national policy. Thus, as Judge Ferguson reminds us, it is the manner in which the French courts have determined to vindicate French national policy — that "state action" — that has the adverse "effect" in California that Yahoo! is complaining about, not the acts of defendants in petitioning for French anti-Semitism laws to be upheld. It was not defendants who determined the terms and scope of injunctive relief, nor was it defendants who determined that continuing non-compliance should be "subject to a

Appendix A

penalty,” or the amount of such a penalty. Needless to say, defendants will not be the ones who decide whether such penalties ultimately will have to be paid or waived.³

Whatever other conduct *Calder*’s “effects” test was intended to encompass, it surely was not intended to include attribution of the effects of an intervening court’s order when a citizen does no more than petition a court in his own country for relief under domestic law, particularly in a case, such as this, in which defendants have had no contact that would “provide a sufficient basis for jurisdiction.”⁴ Maj. op. at 423. For these additional reasons, I concur in Part I of Judge Ferguson’s concurring opinion.

3. Indeed, if any penalties are ever paid, they will not redound to the benefit of defendants, but “are payable to the government.” Maj. op at 444.

4. What the majority opinion calls a “third contact,” maj. op. at 423 (“However, the third contact, considered in conjunction with the first two, does provide such a [sufficient] basis [for personal jurisdiction].”), is not a “contact” with California at all. The majority classifies as the “third, and most important [contact], LICRA and UEJF have obtained two interim orders from the French court directing Yahoo! to take actions in California, on threat of a substantial penalty.” *Id.* at 425. It cites no authority for the proposition that conduct by LICRA and UEJF which takes place entirely in France can be classified as a “contact” with California.

Appendix A

DISSENT BY: Raymond C. Fisher (In Part)

DISSENT: FISHER, Circuit Judge, with whom HAWKINS, PAEZ, CLIFTON and BEA, Circuit Judges, join, concurring in part and dissenting in part:¹

I.

Overview Stated simply, the issue before us is whether a United States Internet service provider, whose published content has been restricted by a foreign court injunction, may look to the United States federal courts to determine the enforceability of those restrictions under the United States Constitution’s First Amendment. The French injunctive orders — backed by substantial, retroactive monetary penalties for noncompliance — require Yahoo! to block access from French territory to Nazi-related material on its <yahoo.com> website.² Some prohibited content is readily

1. Like Judge Tashima, we refer to Judge Fletcher’s opinion as the “majority” or the “majority opinion” because an eight-judge majority of the en banc court joins Part II of the opinion on the issue of personal jurisdiction. As the per curiam and Judge Fletcher’s opinions explain, however, Judge Fletcher’s articulated rationale on ripeness in Part III of his opinion represents a three-judge plurality and does not command a majority of the en banc court. Nevertheless, we refer to Judge Fletcher’s opinion as the “majority” throughout our dissent for ease of reference.

2. As the majority recognizes, any Internet user in France or a French territory — whether or not a French citizen or resident — can gain access to Yahoo!’s U.S.-based server by typing <yahoo.com> into her browser or linking through <fr.yahoo.com>. (Op. at 412.)

Appendix A

identifiable, such as Nazi artifacts or copies of *Mein Kampf*. Much, however, is not. The orders impose the following sweeping mandate:

We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible *any access* via Yahoo.com to the Nazi artifact auction service and *to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes*.

(Emphasis added.) In traditional First Amendment terms, this injunctive mandate is a prior restraint on what Yahoo! may post (or control access to) on its U.S.-located server — imposed under principles of French law and in such facially vague and overbroad terms that even the majority does not know “whether further restrictions on access by French, and possibly American, users are required” to comply with the French orders. (Op. at 451.) Yahoo! can either hope to comply with what the French court (and the defendants here) deems to be inappropriate content by attempting to block access to material Yahoo! *thinks* the orders cover or by simply removing any questionable content altogether. Or Yahoo! can ignore the French court’s mandate in whole or in part and accept the risk of substantial accruing fines. The majority, however, is unmoved. For it, Yahoo!’s proper recourse is to take its case back to France. We cannot agree.

As the district court readily concluded in its thoughtful opinion, “[a] United States court constitutionally could not make such an order.” *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1189

Appendix A

(N.D. Cal. 2001) (hereinafter “*Yahoo II*”). It specifically found that the orders are “far too general and imprecise to survive the strict scrutiny required by the First Amendment,” and that “phrases such as ‘all necessary measures’ and ‘render impossible’ instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech.” *Yahoo II*, 169 F. Supp. 2d at 1189-90 (citing *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987); and *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)). The district court emphasized that “‘the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Id.* at 1190 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971))).

The issue is not whether the French defendants who obtained the injunctive orders, or the French court that issued them, are justified in trying to suppress hateful speech. We of course recognize the horrors of the Holocaust and the scourge of anti-Semitism, and France’s understandable interest in protecting *its* citizens from those who would defend or glorify either. Nor is the issue one of extra-territorial application of the First Amendment; if anything, it is the extra-territorial application of French law to the United States. We do not question the validity of the French orders on French soil, and Yahoo! has complied with the orders as they relate to its <fr.yahoo.com> website. Rather the question we face in this federal lawsuit is whether our own country’s fundamental constitutional guarantee of freedom of speech protects Yahoo! (and, derivatively, at least

Appendix A

its users in the United States) against some or all of the restraints the French defendants have deliberately imposed upon it *within the United States*. “Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Tory v. Cochran*, 161 L. Ed. 2d 1042, 125 S. Ct. 2108, 2111 (2005) (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)).

The majority, after properly opening the door to the federal courthouse by upholding personal jurisdiction, nonetheless turns a blind eye to the constitutional free speech interests of Yahoo!, throwing it out of court because those interests are not “ripe” for adjudication. The majority’s thesis rests on the contention that the French “orders do not by their terms limit access by users outside France in any way.” (Op. at 438.) But as the majority recognizes elsewhere in its opinion (Op. at 438-441), the crux of this case is not in the words of the order alone, but in their application. And to assess the effects of the orders, one cannot simply disregard the “what” of the orders and focus only on their “who.”

As we shall explain later, we disagree with the majority’s conclusion that uncertainties about whether Yahoo! can technologically isolate the effects of the orders only to France-based users compel us to withdraw the case from the district court. Even assuming such uncertainties exist and are material, the district court is fully capable of exercising its fact-finding role to resolve them. But there is no uncertainty that the mandate imposed on Yahoo! is also content based, and the orders identify that content in terms that on their face are overbroad and vague. They require

Appendix A

Yahoo! to guess what has to be censored on its Internet services here in the United States, under threat of monetary sanction if it guesses wrong. In that respect, the orders are facially unconstitutional.

By their terms, the orders reach “any other site or service [in addition to the auction service] that *may be construed as* constituting an apology for Nazism or a contesting of Nazi crimes.” (Emphasis added.) As the district court rightly understood, this is the crux of Yahoo!’s facial overbreadth and vagueness concern:

Yahoo! seeks protection for its actions in the United States, specifically the ways in which it configures and operates its auction and Yahoo.com sites. Moreover, the French order requires Yahoo! not only to render it impossible for French citizens to access the proscribed content but also to interpret an *impermissibly overbroad and vague definition of the content* that is proscribed. . . . In light of the Court’s conclusion that enforcement of the French order by a United States court would be inconsistent with the First Amendment, *the factual question of whether Yahoo! possesses the technology to comply with the order is immaterial. Even assuming for purposes of the present motion that Yahoo! does possess such technology, compliance still would involve an impermissible restriction on speech.* . . .

Yahoo II, 169 F. Supp. 2d at 1193-94 (emphasis added).

Appendix A

Surely the majority is not suggesting that Yahoo! has no First Amendment protection from being sanctioned when it could not guess or it guessed wrong as to what it was supposed to censor on its domestic servers — even if limited to France-based users. (And if not so limited, so much the worse.) Yet the majority faults Yahoo! *because* — like Yahoo! itself — we do not know whether its current activities are permitted by the orders. (Op. at 437.) This is to apply First Amendment precedents exactly backwards. As the majority admits, “the boundary line between what is permitted and not permitted is somewhat uncertain for users in France.” (Op. at 448.) Under such circumstances, we blame the law, not the speaker.

Instead, the majority effectively imposes an exhaustion requirement on Yahoo! to litigate this issue in France, confirm that it is still is not in compliance with the orders (just as it was not on May 22 and November 20, 2000) and obtain a “final” adverse judgment before the majority will consider this case ripe. In doing so, the majority imposes a heightened standard on a U.S. plaintiff seeking to vindicate its First Amendment rights when that plaintiff is challenging a *foreign* prior restraint. Principles of ripeness (or comity) do not require this result. The extraordinary hurdles the majority creates are inconsistent with our established jurisprudence protecting this country’s tradition of free expression. *See, e.g., City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (holding that a plaintiff need not have applied and been denied a newspaper rack license before challenging a city ordinance as an unconstitutional prior restraint on speech). To say so is not to deny France’s interests in protecting its

Appendix A

own citizens from harmful speech, but only to recognize that federal courts have the duty to adjudicate and uphold the legitimate constitutional rights of litigants who have properly invoked our federal jurisdiction.

In correctly sustaining personal jurisdiction over the defendants and in finding an Article III case or controversy, the majority concedes the central dilemma Yahoo! faces as a result of the French injunction. “While Yahoo! does not independently wish to take steps to comply more fully with the French court’s orders, it states that it fears that it may be subject to a substantial (and increasing) fine if it does not.” (Op. at 427.) Acknowledging the obvious chilling effect of the injunction, the majority recognizes that “even if the French court’s orders are not enforced against Yahoo!, the very existence of those orders may be thought to cast a shadow on the legality of Yahoo!’s current policy.” (Op. at 428-29.)

But unfortunately the majority then stops short, concluding that the “level of harm [suffered by Yahoo!] is not sufficient to overcome the factual uncertainty bearing on the legal question presented and thereby to render this suit ripe.” (Op. at 447.) With respect, the majority creates its own factual dilemma — and bad First Amendment precedent — in its attempt to find daylight between its holdings on personal jurisdiction and ripeness. We agree that the *Calder* “effects” test, *see Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004) (citing *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)), need not be satisfied by the same degree of harm as ripeness (Op. at 441), but the majority’s rationale for finding the harm

Appendix A

sufficient in one instance and deficient in the other is seriously flawed.

By peremptorily terminating Yahoo!’s access to federal court, the majority establishes a new and burdensome standard for vindicating First Amendment rights in the Internet context, threatening the Internet’s vitality as a medium for robust, open debate. It also bypasses the factfinding role of the district court — failing to credit much of what the district court found on the record as litigated below, and removing the district court from the process of resolving the factual issues the majority now finds so vital to Yahoo!’s First Amendment claims. Accordingly, although we concur in that part of the majority’s opinion upholding personal and Article III jurisdiction, we respectfully dissent from its ultimate holding that this case is not ripe for adjudication.

II. Prudential Ripeness

The majority invokes prudential ripeness because it finds Yahoo!’s circumstances suffer from “prematurity and abstractness” that preclude our reaching Yahoo!’s claim that the French injunction on its face violates the First Amendment. (Op. at 429-30.) As did the district court, we conclude otherwise.

*Appendix A**A. Fitness of the issues for judicial resolution**1. A “purely legal” question*

The majority holds this case unfit for judicial resolution by suggesting that it does not involve a “purely legal” question, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), but instead requires us to sort through factual uncertainties, which ultimately make adjudication inappropriate. (Op. at 430.) Yet even if the majority were correct that Yahoo!’s case suffers from a lack of factual development, it does not follow that the suit is therefore rendered unripe. When a dispositive fact is missing from the district court record, we usually remand for further factfinding. We do not peremptorily throw litigants out of court and expect them to petition a foreign court for relief.

To begin with, this case fundamentally involves a straight-forward legal question: whether the French injunction as ordered against Yahoo! runs afoul of the First Amendment. The answer calls for a legal application of free speech doctrine to final orders that on their face are vague and overbroad. True, the defendants must take steps in the French court to initiate actual enforcement, but Yahoo! is subject to the orders and to a retrospective financial penalty for noncompliance. The majority’s argument that we should give weight to the label “interim” because it indicates that “the French court contemplated that it might enter later orders” is a make-weight. (Op. at 436.) A court may contemplate issuing subsequent orders whether or not a prior order on the subject is called “interim” or “final.” We need

Appendix A

not be distracted by the label “interim,” because, as the district court found, “there is no dispute that the French order is valid under French law and that the French Court may fix a penalty retroactive to the date of the order.” *Yahoo II*, 169 F. Supp. 2d at 1190.

Cases involving far less definitive or targeted mandates — not yet enforced against the complaining party — have been treated as final actions ripe for adjudication. In *Abbott Laboratories*, one of the majority’s lynchpin cases, drug manufacturers challenged the Food and Drug Commissioner’s regulation requiring that their products’ labels show both a drug’s generic and its brand name. The Supreme Court, addressing the “purely legal” issue presented, held that the regulation was a final agency action, even though it was a statement of general applicability and violations of the new rule could be enforced only by the Attorney General authorizing criminal and seizure actions. 387 U.S. at 151-52. The Court held the case ripe for pre-enforcement review because the Commissioner’s labeling order placed “petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.” *Id.* at 152. The Court cited the district court’s finding that petitioners either “‘must comply [with the label changeovers] . . . or they must follow their present course and risk prosecution’” and concluded that the latter “course would risk serious criminal and civil penalties for the unlawful distribution of ‘misbranded’ drugs.” *Id.* at 152-53. *See also Frozen Food Express v. United States*, 351 U.S. 40, 43-44, 76 S. Ct. 569, 100 L. Ed. 910 (1956) (holding justiciable a challenge to an Interstate Commerce Commission rule because violations could be punished by criminal sanctions and the rule itself

Appendix A

would cause companies to conform their behavior to the regulation); *cf. United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198, 76 S. Ct. 763, 100 L. Ed. 1081 (1956) (finding standing to challenge a Federal Communications Commission rule limiting radio licenses even though the broadcaster had not yet received an unfavorable decision).³

The final, targeted injunction before us presents the same kind of purely legal issue — with Yahoo! confronting the dilemma of whether or not to stand by its United States constitutional rights or constrain its speech and that of its

3. The majority's citation of *Adler v. Bd. of Educ.*, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952), as a "noted example" of a debate over ripeness in the context of speech is inapposite. (Op. at 430.) *Adler*, a case affirming limits on the speech of teachers in New York public schools during the post-World War II "Red Scare," not only concerns the constitutionally distinct situation of a state government regulating the speech of its employees (as opposed to a court being asked to enforce a speech-restrictive injunction against a corporation), but also predates important modern free speech precedents establishing the doctrine of facial invalidation. *See, e.g., Lakewood*, 486 U.S. at 755-56. Furthermore, Justice Frankfurter was the sole dissenter (and the sole Justice) to question the suit's ripeness; Justices Black and Douglas were convinced the suit was ripe and that New York's laws infringed upon public school teachers' First Amendment rights. *See Adler*, 342 U.S. at 496-511. Because *Adler* itself would certainly be reasoned, and likely decided, differently today given cases such as *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), which recognized a government employee's interest in commenting on matters of public concern, *Adler's* approach to ripeness is hardly illuminating even within the narrow confines of government employee speech.

Appendix A

users to avoid a French-imposed penalty. Legions of cases permit First Amendment challenges to governmental actions or decrees that on their face are vague, overbroad and threaten to chill protected speech. Indeed, the sweeping injunction here presents just such a paradigmatic case. *See, e.g., Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434-35 (9th Cir. 1996) (rejecting a ripeness defense to a facial attack on blanket travel restrictions to Cuba under the First and Fifth Amendments, even though the plaintiff group had never applied for a license, because the case presented purely legal questions); *see also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) (addressing a facial First Amendment challenge to a licensing scheme even though the plaintiff had never applied for a permit, citing numerous First Amendment cases involving facial claims); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (concluding that petitioner had established an actual controversy based on his threatened criminal trespass arrest by state police for distributing political handbills and holding that he did not need to “first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights”). Yahoo! seeks nothing more than for a United States court to resolve its legal claim that the French court injunction by its very nature — in whole or in part — threatens Yahoo!’s protected speech. *See NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1352, 1358 (9th Cir. 1984) (upholding standing to bring facial challenge to “substantially overbroad” city parade ordinance).

*Appendix A*2. *Comity and the repugnance of unconstitutional injunctions*

We do not agree with the majority's professed uncertainties as to whether a California court, under principles of comity, would be inclined to enforce a foreign court order that infringes upon a U.S. corporation's First Amendment rights. The "repugnancy" standard the majority invokes is easily satisfied here. California's case law and its federal underpinnings tell us to honor foreign court judgments unless they "prejudice the rights of United States citizens or violate domestic public policy." *In re Stephanie M.*, 7 Cal. 4th 295, 27 Cal. Rptr. 2d 595, 867 P.2d 706, 716 (Cal. 1994) (citing *Hilton v. Guyot*, 159 U.S. 113, 202-03, 16 S. Ct. 139, 40 L. Ed. 95 (1895); and *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987)). The French orders on their face — and by putting Yahoo! at risk of substantial penalties — violate the First Amendment and are plainly contrary to one of America's, and by extension California's, most cherished public policies.⁴ In short, they constitute a

4. As the majority correctly notes, it is California's public policy (rather than U.S. public policy) that is relevant to a comity analysis in a federal diversity case. (Op. at 431.) However, although Yahoo! focused its energies on alleging violations of the federal First Amendment rather than violations of the analogous provision of the California Constitution, *see* art. I, § 2(a), it is certainly not California's public policy to countenance violations of the United States Constitution. Indeed, the California Supreme Court has held California's free speech clause to be more expansive than the First Amendment. *See Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P. 3d 797, 801 (Cal. 2001) ("Unlike the United States Constitution, which couches

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Appendix A

foreign judgment that is “repugnant to public policy.” (Op. at 436.)

The district court considered the role of comity but ultimately found that it was outweighed by U.S. constitutional freedoms. “Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.” *Yahoo II*, 169 F. Supp. 2d at 1192. This finding does not mean that *every* foreign court judgment implicating speech in the United States would be deemed repugnant to American public policy and therefore unenforceable, but *this* particular judgment is so vague and overbroad that it fails the repugnancy analysis. Significantly, the defendants do not argue to us that the French injunction comports with the First Amendment. Indeed, they did not even appeal the district court’s ultimate finding that the orders are unconstitutional.

The majority goes to great lengths to avoid labeling a prior restraint on speech — overbroad and vague by its terms

(Cont’d)

the right to free speech as a limit on congressional power, the California Constitution gives ‘every person’ an affirmative right to free speech. Accordingly, we have held that our free speech clause is ‘more definitive and inclusive than the First Amendment.’”) (internal citations omitted). *See also Sarl Louis Feraud Int’l v. Viewfinder Inc.*, 2005 U.S. Dist. LEXIS 22242, at *19 (S.D.N.Y. 2005) (“American courts have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with our notions of what is fair and just, and conflict with the strong public policy of *our* State [New York].”) (emphasis in original).”

Appendix A

— as “repugnant to public policy” and is content to leave in place foreign court orders that so obviously violate the First Amendment. (Op. at 436.) In reaching this result, the majority has succumbed to an error of logic. It has conflated foreign orders that are somewhat inconsistent with U.S. law with those that violate U.S. law. It is one thing for U.S. courts to pass on foreign attorney’s fees larger than what domestic laws would award, *see In re Hashim*, 213 F.3d 1169, 1172 (9th Cir. 2000), or to recognize a judgment pursuant to a foreign statute of limitations longer than that of its domestic analogue, *see Milhoux v. Linder*, 902 P.2d 856, 861-62 (Colo. Ct. App. 1995). It is quite another to imply, as the majority does, that a violation of the U.S. Constitution is no different from any other “inconsistency with American law,” which the majority claims “is not necessarily enough to prevent recognition and enforcement of a foreign judgment in the United States.” (Op. at 435-36.)

Neither *In re Hashim* nor *Milhoux* implicated federal or state constitutional rights. Indeed, both cases held that the foreign judgments being challenged were not repugnant to the public policy of either Arizona or Colorado, respectively. Where a foreign judgment *was* held to be repugnant to California’s public policy, the repugnancy was based on the violation of California’s Uniform Child Custody Jurisdiction Act that would have resulted had the foreign order been enforced. *See In re Stephanie M.*, 867 P.2d at 716. The majority provides no explanation why the California courts would refuse to enforce a foreign judgment that violated a state statute, yet be willing to enforce a foreign judgment that violates the federal (and perhaps the state) Constitution.

Appendix A

The majority's dictum implying that foreign judgments that would be unconstitutional if entered by a U.S. court may nonetheless be enforceable is troubling. Under the principles articulated today, a foreign party can use a foreign court decree to censor free speech here in the United States on any range of subjects it finds objectionable — religion, democracy, gender equality — in the name of enforcing its own country's laws. The good intentions of even sympathetic foreign parties such as LICRA and UEJF in this case are not the standard. How could a California court honor the French defendants' good intentions in proscribing pro-Nazi speech when the City of St. Paul's good intentions did not cure its anti-hate speech code of viewpoint discrimination and constitutional infirmity even when directed at cross-burnings? *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *see also Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S. Ct. 291, 58 L. Ed. 2d 264 (1978) (striking down on First Amendment grounds several Skokie, Illinois ordinances prohibiting the National Socialist Party of America from marching through the town: "First Amendment rights are truly precious and fundamental to our national life. . . . It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.")

People in the United States and France should abhor anti-Semitism and the horrors perpetrated by the Nazi Party.

Appendix A

Nonetheless, our constitutional law differs from French jurisprudence in our approach to hate speech. Our law reflects deeply held political beliefs about freedom of expression in this country. Borrowing Justice Brandeis’s formulation, “the remedy to be applied [to expose falsehood and fallacies] is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring).

3. *The alleged lack of factual development*

Even accepting the majority’s assumption that this case does not turn on purely legal issues, the concerns the majority invokes as reasons to withhold judicial resolution are either unconvincing or at most reasons for remand. For instance, the majority seems to call into question whether the French court’s injunction is sufficiently final because the orders are labeled “interim,” notwithstanding their unconditional and mandatory language. (Op. at 436.) In considering whether the injunction survives U.S. laws, we must take the orders issued by the French court as final actions, reflecting that court’s view of Yahoo!’s conduct and current obligations under French law. There is no reason for us to assume that the French court intends something different from the words of its own mandatory orders — just as we would not assume that a U.S. federal or state court would not stand by an injunctive order it has issued.

Moreover, by insisting on withholding judicial resolution, the majority disregards the district court’s factual determinations, and its role in resolving factual disputes. First, with respect to the content at issue, the majority

Appendix A

minimizes the district court findings that Yahoo! hosts content violating the specific terms of the orders. As the district court found, Yahoo! “continues to offer at least some Third Reich memorabilia as well as *Mein Kampf* on its auction site and permits access to numerous web pages with Nazi-related and anti-Semitic content.” *Yahoo II*, 169 F. Supp. 2d at 1189. The district court took judicial notice from its own search of the site (in October 2001) that using the keyword “Nazi” called up 69 Nazi-related items posted for sale, such as stamps, coins and a copy of *Mein Kampf*. *Id.* at 1185 n.3. The district court also conducted keyword searches on Yahoo!’s general <yahoo.com> website, finding thousands of sites referring to “Jewish conspiracy,” promoting modern-day Nazism or suggesting the Holocaust did not happen. *Id.* at n.4.⁵

Clouding the majority’s view of the facts are the defendants’ assertions before us and in the district court that they “have no present intention of taking legal action against Yahoo! in the United States” because they consider Yahoo! to be in “substantial compliance with the French order.” *Yahoo II*, 169 F. Supp. 2d at 1188. But the French court has never made such a determination of Yahoo!’s alleged compliance. Instead, the majority speculates that because

5. The French defendants initially objected to a far broader array of content than the limited category of items Yahoo! now excludes under its revised auction site policy. UEJF’s plea for relief asked the French court to mandate that Yahoo! remove from *all* browser directories the index heading entitled “negationists” and *any* link “bringing together, equating or presenting directly or indirectly as equivalent sites categorised under the heading ‘Holocaust’ and those indexed as negationist.”

Appendix A

Yahoo! France has “complied [in France] in large measure with the spirit and letter” of the May 22 French order, “compliance ‘in large measure’ by Yahoo! is very likely to be satisfactory to the French court.” (Op. at 436-37.) But *Yahoo!* is not *Yahoo! France*, and the French court did not explain the factual basis for its finding of compliance.

Nor have the defendants ever taken any steps to stipulate in a legal forum that Yahoo! is in compliance with the injunction. Thus the district court properly gave no weight to the defendants’ professions of Yahoo!’s substantial compliance. The court pointedly observed that the defendants “have not taken steps available to them under French law to seek withdrawal of the orders or to petition the French court to absolve Yahoo! from any penalty,” *Yahoo II*, 169 F. Supp. 2d at 1188, and they gave no indication they would pursue such measures when pressed on the subject. *Id.* at 1189 n.7.

During oral argument before us, defense counsel conceded that the defendants did not want to foreclose their options by agreeing to such a stipulation. As the majority recognizes (Op. at 416), should Yahoo! alter its content in a way that the defendants disapprove of, they want the judicial authority to seek relief and mandate Yahoo!’s compliance. (Oral Arg. 1:02.) The majority in large part hinges its analysis on the defendants’ litigation position of saying that they have no problem now with Yahoo!’s conduct but declining to take any steps to eliminate the speech injunction or accruing financial penalties. *See Abbott Laboratories*, 387 U.S. at 154 (concluding that the “subsequent representation of the Department of Justice” that it was likely to impose only civil sanctions for violations, thus mitigating the harm to the

Appendix A

plaintiff, “should not suffice to defeat” the claim); *see also Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617-18 (9th Cir. 1999) (disregarding attorney general’s claim that she lacked authority to carry out specific threat of prosecution in holding that a real controversy existed for purposes of Article III).

The majority claims that “we do not know whether the French court would hold that Yahoo! is now violating its two interim orders.” (Op at 436.) Ironically, the majority thereby highlights the very threat Yahoo! faces. Uncertainty about whether the sword of Damocles might fall is *precisely* the reason Yahoo! seeks a determination of its First Amendment rights in federal court. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n. 13, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991); *Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003) (recognizing that this court does not require “Damocles’s sword to fall” before it will adjudicate a case).

In sum, the uncertainties Yahoo! faces are not reasons to delay adjudication. Rather, they provide a compelling basis for a federal court to hear Yahoo!’s First Amendment challenge at this time, as the district court did.

The fact that Yahoo! does not know whether its efforts to date have met the French Court’s mandate is the *precise harm* against which the Declaratory Judgment Act is designed to protect. The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing

Appendix A

adversary might brandish, while initiating suit at his leisure or never.

Yahoo II, 169 F. Supp. 2d at 1189 (emphasis added).⁶ Instead,

6. Yahoo!’s circumstances are readily distinguishable from those found not ripe in *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972). There, the principal First Amendment claims the party leveled against Ohio’s election code were mooted by legislative amendments, leaving only a subsidiary challenge to a loyalty oath. The Court found this claim “singularly sparse in its factual allegations,” with no suggestion that the Party had ever refused or would refuse in the future to sign the oath, or that it had suffered or would suffer any injury from the existence of the oath requirement. *Id.* at 586. Similarly, in *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501 (9th Cir. 1992), members of the Popular Front for the Liberation of Palestine (PFLP) contended that anti-Communist provisions of the McCarran-Walter Act unconstitutionally put them at risk of deportation for engaging in protected First Amendment activities without the opportunity for a fair and impartial hearing before the INS. We held that the plaintiffs were sufficiently at risk of government prosecution to give them standing; but we found their claims not ripe because there was “a sketchy record . . . with many unknown facts,” such as whether the plaintiffs were actually members of the PFLP or what acts the government alleged they had committed, and we emphasized that the INS had not yet interpreted or applied the challenged provisions. *Id.* at 510-11.

In marked contrast to these cases, here the French injunction remains extant and as broadly worded as ever; the defendants have refused to stipulate to Yahoo!’s compliance; and the district court has found actual non-compliance with specific terms as well as an overall risk of noncompliance with fatally undefined terms — thereby subjecting Yahoo! to the risk of substantial monetary fines and the chilling effect of the vague and overbroad injunction. Additionally, there is no court or agency — other than this federal court — that can address Yahoo!’s United States constitutional claim.

Appendix A

the majority turns Yahoo!’s uncertainties against it — relegating it to the French courts for clarification and absolution.

B. *Substantial hardship of withholding judicial consideration*

Even more perplexing is the majority’s conclusion that Yahoo! does not face “substantial hardship” because of our unwillingness to adjudicate its First Amendment claim. The majority attempts to avoid the obvious chilling effect of an overbroad and vague injunction in two creative and troubling ways. First, the majority opines “with some confidence” that Yahoo! need not fear the enforcement of a fine because “it is exceedingly unlikely that the sword [of Damocles] will ever fall” (Op. at 441) — another speculative assessment, we submit. It also faults Yahoo! for failing to proffer examples of “anything that it is now not doing but would do if permitted by the orders” (Op. at 445) and thereby imposes a new, higher burden on a First Amendment plaintiff to establish a chilling effect.

1. *The French orders chill speech*

First, the majority overlooks Yahoo!’s claim that it faces actual abridgment of its current speech — not just a chilling effect on its ever-changing Web content. As the majority does acknowledge, Yahoo! hosts content on its auction site, including the sale of *Mein Kampf*, that is specifically prohibited by the terms of the injunction. The district court’s findings of impermissible material still present on the auction site demonstrate that Yahoo! is currently engaged in speech

Appendix A

that the French orders — by their terms — *compel* it to foreclose to some users or forgo entirely. Yahoo! opts not to accede to the injunction, thereby incurring daily accumulating fines should its current or future behavior displease LICRA or UEJF. Certainly Yahoo! should not have to abstain from conduct it believes is constitutionally protected solely for us to find its claim ripe. *Cf. City of Auburn*, 260 F.3d at 1173 (9th Cir. 2001) (noting that finding case unripe would require party to comply with “costly and cumbersome” franchise requirements, only for the party to then raise “exactly the same argument that it makes here”).

More importantly, the majority largely ignores the broad and diffuse scope of the French injunction — which extends well beyond Yahoo!’s auction site and clearly raises the question whether it is substantively possible for Yahoo! to comply. Apart from entirely obvious cases, how can one determine with any certainty whether something “may be construed as constituting an apology for Nazism or a contesting of Nazi crimes”? The majority makes the rather startling assertion that “before the district court can engage in useful factfinding, it must know whether (or to what extent) Yahoo! has already sufficiently complied with the French court’s interim orders.” (Op. at 449.) Of course, this is precisely the crux of Yahoo!’s predicament — and highlights the vagueness and overbreadth of the orders. We know the actions Yahoo! has taken and not taken with respect to Nazi paraphernalia appearing on its site. The only reason we cannot determine “whether (or to what extent) Yahoo! has already sufficiently complied” with the French orders is because we

Appendix A

cannot assess the scope of the orders themselves.⁷ It is this very kind of uncertainty that epitomizes a purely legal question of facial infringement of First Amendment rights and the harms routinely associated with such an infringement.

In plain terms, if no one but the French court can decipher the meaning of its injunction aimed at Yahoo!’s speech, how can Yahoo! comply? Yahoo! has to know what content it has to screen from France-based users. The French orders contain no meaningful instructions for Yahoo! to winnow permitted speech from unpermitted speech. It is the absence of a discernible line between the permitted and the unpermitted that makes the orders facially unconstitutional. As the district court concluded, and as discussed previously, “compliance would still involve an impermissible restriction on speech” because it would require Yahoo! to interpret the vague and overbroad injunction as to what content is prohibited and which users should be denied access, on pain of substantial penalty should it guess wrong. *See Yahoo II*, 169 F. Supp. 2d at 1193-94.

Ultimately, the majority’s parsimonious treatment of the free speech issues here culminates with its reducing Yahoo!’s argument to an interest in merely “allowing access by users

7. It is telling that even the Internet experts relied upon by the French court were unable to recommend a “suitable and effective technical solution” for Yahoo! to screen out France-based users from any of its sites or services, other than the auction site, that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes because “no grievance against any . . . Yahoo! sites or services [other than the auction site] is formulated with sufficient precision.”

Appendix A

in France” to Nazi materials. (Op. at 446.) Yahoo! is allegedly seeking “a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others.”⁸ (Op. at 446.) Notably, even the defendants have not construed Yahoo!’s First Amendment argument in such crabbed terms.

But suppose Yahoo! really were concerned only with not having to act *in the United States* as an enforcer of France’s restrictions on Internet access by France-based users. That would not make the constitutional implications of the effects on Yahoo!’s United States operations go away. Yahoo! cannot merely act in France to restrict access by users located in France; the French orders require Yahoo! to make changes to its servers and protocols in the United States. That Yahoo! seeks First Amendment protection from having to compromise its domestic operations to comply with a foreign injunction does not translate into its seeking the right simply

8. According to the majority, “the French court’s interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States.” (Op. at 446.) This is not Yahoo!’s position. The company has asserted that complying with the French orders would compel it to remove prohibited material from its United States-based Internet services and reengineer its servers, also located in the United States, to identify both France-based users and prohibited material that may be posted in the future; therefore, it may not be possible to comply with the French orders without rendering certain content inaccessible to *all* users, including those in the United States and not just those in France. Nor does Yahoo! appear to be interested in asserting its constitutional rights solely for the sake of violating French law. To comply with the orders as they affect the company’s French services, Yahoo! now removes any posted material it becomes aware of on its <fr.yahoo.com> site that would violate French law.

Appendix A

to violate French law. This case is not about the extra-territorial application of the First Amendment; it is about the extra-territorial application of France's anti-Holocaust denial speech codes and the extent to which compliance may infringe Yahoo!'s rights of free speech here in the United States.

The majority, however, views the French orders as concerning "speech accessible solely by those outside the United States." (Op. at 440.) Additionally, it accepts that Yahoo! can screen out access to any prohibited materials by "most" — estimated to be 70-90% — of France-based users. (Op. at 438.) This reasoning is flawed in several respects.

First, Yahoo! does not target specific users by initiating content directed solely at them. Rather, anyone who logs on to #yahoo.com>, including users in France, gains access to material on Yahoo!'s message boards, search engines, auction sites and other services. It is the *accessing* of vaguely and overbroadly described content — by anyone in French territory — that the orders prohibit and hold Yahoo! responsible for preventing. Thus, even if one could readily and reliably limit the universe of Internet users whose access must be censored — an assumption the record before us does not justify — Yahoo! would still be at a loss to define the universe of content it must censor.

Second, the factual question of whether it *is* technologically feasible for Yahoo! to monitor the postings and filter the millions of users accessing the <yahoo.com> website — assuming such technology actually bears on Yahoo!'s First Amendment claims — is an *unresolved* issue

Appendix A

that should be returned to the district court. The parties have not addressed the specifics of technical feasibility issue on this appeal, nor the validity of the experts' report. Thus the 70% and 90% figures the majority adopts from that report depend solely on the majority's reading of a translated technical and ambiguous document, the scientific merits of which have not been addressed even in the district court. LICRA and UEJF did raise the issue of feasibility below, but the district court denied them discovery regarding technological feasibility of screening France-based users because it deemed the issue immaterial to the court's First Amendment ruling. *See Yahoo II*, 169 F. Supp. 2d at 1194. The defendants *have not appealed* either the district court's First Amendment decision or its discovery ruling. To the extent that the technological feasibility issue has been argued at all on appeal, Yahoo! has said that it "could not monitor the content of these millions of postings and listings to its U.S.-based Internet services" and that it essentially faces a binary choice between self-censorship and paying the French fines.

On the record before us — lacking expert testimony and cross-examination, much less district court findings of fact — we do not believe we as appellate judges can or should accept as a given that Yahoo! can readily and reliably identify 70% of the users it must censor, "irrespective of whether a Yahoo! user sought access to an auction site, or to a site denying the existence of the Holocaust or constituting an apology for Nazism." (Op. at 414-15.)

This is particularly true given that the experts' report is replete with hearsay, technological assumptions and

Appendix A

disclaimers. Most importantly, the experts explicitly limited their analysis to how an Internet “surfer” in France could be prevented from accessing prohibited content *only* on Yahoo!’s *auction* site, not all such content that might find its way onto <yahoo.com> generally. As the experts emphasized — echoing Yahoo!’s own concern about the imprecision of the orders:

The decisions of the [French] court and the demands made are precisely directed against the auctions site. *No grievance against any other Yahoo! sites or services is formulated with sufficient precision to enable the consultants to propose suitable and effective technical solutions.* In these circumstances, the consultants will therefore confine their answers to the matter of the auctions site. . . .⁹

(Emphasis added.) The experts also emphasized, “the measures to be taken depend upon the particular case in point. They cannot be generalised to all sites and services on the Internet. In this case, the site in question is *pages.auctions.yahoo.com*.” (Emphasis added.)

9. Even as to screening content on the auction site, the experts acknowledged that it was not possible for Yahoo! to “exclude *a priori* items which have not been described by their owner as being of Nazi origin or belonging to the Nazi era.” How then would Yahoo! keep the prohibited material from being accessed? The report suggested that a more “radical solution” might be warranted, essentially prohibiting any search containing the word “Nazi” by an identified French user. How such Nazi paraphernalia which has not been described by its owners with the label “Nazi” could be screened remains a mystery.

Appendix A

Of course, the French orders do not solely prohibit content on Yahoo!'s auction site but, by their terms, encompass content on *all* of Yahoo!'s services. Yahoo!'s services extend far beyond its auction site and include its search engine, e-mail, classified listings, personal Web pages, shopping, message boards, chat rooms and news stories.

The majority — like the French court itself — seems to credit two of the three experts who estimated as many as 90% of France-based users of Yahoo's auction site could be identified and screened. The methodology underlying this estimate, however, further illustrates the uncertainty of predicting Internet identification and screening, compounded by the vague and overbroad mandate of the court orders. Assuming that "70% of the IP addresses assigned to French surfers can be matched with certainty to a service provider located in France, and can be filtered," all three experts agreed that "no filtering method is capable of identifying all French surfers or surfers connecting from French territory."¹⁰ To reach 90%, two experts relied on a voluntary "sworn declaration of nationality" by a French surfer that "could be made when a first connection is made to *a disputed site*, in this case the *Yahoo auctions site . . .*" (Emphasis added.)¹¹

10. Significantly, the experts were at pains to caution that even the 70 figure based on IP addresses has a short shelf life: "the consultants stress that there is no evidence to suggest that the same will apply in the future. Encapsulation is becoming more widespread, service and access providers are becoming more international, and surfers are increasingly intent on protecting their rights to privacy."

11. Notably, the French orders compel Yahoo! to prohibit access by *any* users in *French territory*, not just French citizens. Thus a declaration of "nationality" does not seem adequate in any event.

Appendix A

They suggested asking for the declaration of nationality at “the home page of the auctions site” or “in the context of a search for Nazi objects if the word ‘Nazi’ is included in the user’s request” In short, the experts’ 90% figure depends on the ability to link users to a *specific* Yahoo! site and to specific content *on* that site.

The third expert, Vinton Cerf, a 1997 recipient of the United States National Medal of Technology for co-designing the architecture of the Internet,¹² disavowed relying on users’ self-identification at all, concluding that “it does not appear to be very feasible to rely on discovering the geographic locations of users for purposes of imposing filtering of the kind described in the [French] Court Order.”

Given the orders’ broad language, none of the experts could devise a system for screening out France-based users that went beyond the auction site. Therefore, even if were true that Yahoo! can identify up to 70% of all of its France-based users, irrespective of the site or service they are accessing, the evidence is clear that geographical identification alone would not enable Yahoo! to prohibit such users from accessing 100% of the *content* proscribed by the French orders — indeed, Yahoo! could not even come close on that side of the compliance equation.

There are other serious questions about the experts’ report that should be part of an evidentiary hearing in the

12. See Technology Administration, Department of Commerce, *The National Medal of Technology Recipients*, at <http://www.technology.gov/Medal/Recipients.htm>.

Appendix A

district court. For example, the 70% IP-address screening figure was derived in part from information provided by a French Internet association regarding how many of its access providers can identify whether their users are located in France. Such anecdotal data do not demonstrate conclusively that Yahoo! itself has the capability to identify the location of its users. Indeed, the method the experts proposed for Yahoo! to identify users is imprecise. The experts noted that for a number of reasons the “real world” location of a user may not be readily identifiable. For instance, a French citizen who uses AOL for Internet service may be shown as having an IP address from Virginia, where AOL’s network is located. In other instances, users may choose to mask the geographical origin of their Internet address.

Thus we cannot assume, as does the majority, that this case is about Yahoo! restricting access only by French users, 70-90% of whom are readily identifiable regardless of what content they may seek out on <yahoo.com>. The validity of these percentage assumptions not only drives the majority’s definition of whose access is restricted, but also its apparent willingness to assume that even if Yahoo! can identify only 70% of the prohibited universe of users, that would be good enough. If technical feasibility is to be the lynchpin on which Yahoo!’s day in federal court depends, then let the parties return to the district court for proper factfinding. Instead, the majority preempts the district court’s factfinding function, interpreting the French experts’ report as conclusive evidence in order to deny Yahoo! access to the court altogether.

Lastly, there is the issue of cost of compliance. There can be no dispute that the very nature of the French orders

Appendix A

puts Yahoo! to the choice of incurring the costs to develop and implement mechanisms to filter out individual users based on location or removing content from its service altogether. This type of immediate financial burden clearly suffices to make a case ripe for adjudication, even if we accept the majority's proposition that the threat of enforcement is remote. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 197-98, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (holding ripe for review a preemption challenge to a regulation imposing a moratorium on new nuclear plants because petitioners would face substantial financial hardship if they built plants while hoping the law would be struck down); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1173 (9th Cir. 2001) (noting that finding case unripe would require party to comply with "costly and cumbersome" franchise requirements).¹³

13. The mere possibility of future fines can have very real financial consequences for a publicly held corporation like Yahoo!. To the extent it is material to a corporation's financial condition, such companies are required to disclose contingent liabilities in Form 10-Q and 10-K statements filed with the Securities and Exchange Commission. *See* Securities Exchange Act of 1934, § § 10(b), 15(d), 15 U.S.C. §§ 78j(b), 78o(d); 17 C.F.R. § § 240.10b-5, 240.12b-20; *see also* Financial Accounting Standards Board Statement of Financial Standards No. 5, *available at* <http://www.fasb.org/pdf/fas5.pdf>. Such filings may adversely affect the credit ratings and hence the valuation of shares of such companies. In another context, we have held that financial impacts on a business resulting from legal uncertainty support a finding that a case is ripe. *See Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2003).

*Appendix A**2. The enforceability of foreign penal judgments*

Recognizing that the risk of a large monetary penalty must inevitably weigh heavily in Yahoo!’s assessment of its options, the majority tries to neutralize the risk — creating a protective shield by invoking the doctrine that United States courts will not enforce the penal judgments of other countries. It thus assures Yahoo! that “even if the French court were to impose a monetary penalty against Yahoo!, it is exceedingly unlikely that any court in California — or indeed elsewhere in the United States — would enforce it” because it is a penal judgment. (Op. at 442.)

It is true as Justice Marshall observed that “the courts of no country execute the penal laws of another,” *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L. Ed. 268 (1825). But that begs the question whether the French injunction itself or the accruing fines are truly penal. Although we respect the majority’s scholarship, this issue has not been the focus of the parties’ briefs or arguments, and thus we cannot share the majority’s level of confidence that its dictum is sufficiently accurate — or binding — that we should remove the risk of a substantial, retroactive monetary penalty from the First Amendment or ripeness analysis. As with the French defendants’ assurances that they consider Yahoo! currently in substantial compliance, absent a binding court order actually freeing Yahoo! from the enforcement of the French orders, Yahoo! remains at serious risk if it fails to conform its web content to the dictates of those orders.

“The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong

Appendix A

to the public, or a wrong to the individual” *Huntington v. Attrill*, 146 U.S. 657, 668, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). The Court warned against the “danger of being misled by the different shades of meaning allowed to the word ‘penal’ in our language.” *Id.* at 666.¹⁴ Determining whether a sanction is penal or civil in nature is not always a simple task. *Cf. F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137-38 (9th Cir. 2001) (establishing procedural protections due a party based on whether sanctions were criminal or civil in nature).

Although LICRA and UEJF’s substantive claims against Yahoo! in French court depended in part upon Yahoo!’s violations of French criminal law,¹⁵ the record suggests that the French lawsuits were civil rather than criminal and, more

14. The Supreme Court’s warning in *Huntington* has even greater salience when we are attempting to determine “the different shades of meaning allowed to the word ‘penal’” in a language *other* than our own. (*Op.* at 443.)

15. LICRA and UEJF’s claims are based in part on a French law that criminalizes the public wearing or display of the uniforms, insignias and emblems of any organization declared criminal by the post-World War II International (Nuremberg) Military Tribunal (e.g., the Nazi Party). *See* C. Pen. R645-1. One of the most serious penalties for violation of this provision of the penal code is a fine. *See id.* Their claims also appear to rely on the French Law of July 29, 1881 (Law on Freedom of the Press) (2004), which, among other things, criminalizes Holocaust denial, *see* art. 24 bis, and the incitement of discrimination, hatred or violence on the basis of belonging to a particular ethnic, national, racial group, *see* art. 24, P6. Both crimes carry a penalty of one year imprisonment or a fine of 45,000 Euros or both. *See id.*

Appendix A

importantly, that the French orders primarily sought to redress a wrong to LICRA and UEJF rather than a wrong to the French public. Of course, we agree with the majority that “the label ‘civil’ does not strip a remedy of its penal nature.” (Op. at 444.) However, that still begs the question whether or not the French accruing fines were penal. On this point, the majority asserts that there is some language in the November 20 order that supports the characterization of the fines as penal and that in any event the fines are potentially much larger than the nominal damages awarded to UEJF and therefore the “award of one Franc [to UEJF] cannot render the orders primarily remedial rather than punitive in nature.” (Op. at 445.) The majority cites no authority for the novel arithmetic balancing test it proposes to distinguish penal from non-penal orders, and although we admit there is some language in the orders that supports holding the French orders punitive, there is also significant language that supports the conclusion that the orders sought to redress a wrong done to LICRA and UEJF. The proper test for determining whether the French orders are penal is a purposive one, *see Huntington*, 146 U.S. at 668, and based on the record before us, we do not share the majority’s certainty that the orders are undoubtedly penal in nature.

French law gives standing to public interest, non-governmental organizations dedicated to defending the interests of members of certain victimized groups, including victims of the Holocaust (deportes), to initiate enumerated types of civil actions (but not criminal prosecutions) on behalf of such victims. *See, e.g.*, C. Pr. Pen. arts. 2-4 & 2-5; Law of July 29, 1881 (Law on Freedom of the Press) (2004), art. 48-2. Yahoo!’s challenge to UEJF’s standing under Article

Appendix A

48-2 of the French Law on Freedom of the Press and the French court's subsequent finding that LICRA and UEJF "are dedicated to combating all forms of promotion of Nazism in France" suggest that the French trial was a civil proceeding under one of the specialized French standing statutes. This conclusion is further supported by the French court's reliance on Article 809 of the New Code of *Civil* Procedure for its authority to issue orders.

Furthermore, the award of damages to UEJF and other relief "by way of restitution" strongly suggests that the French court orders were predominantly civil and remedial rather than penal.¹⁶ The court based its award of damages and other restitution in its May 22 decision on a finding that the exhibition for sale of Nazi objects "has caused damage to be suffered by LICRA and UEJF." The French court reiterated this finding of direct harm in its November 20 decision: "this display [of Nazi objects] clearly causes damage in France to the plaintiff associations who are justified in demanding the cessation and reparation thereof." In this context, the additional relief afforded to the French plaintiffs — an injunction ordering Yahoo! to cease its harmful activity in France — appears to be merely an additional remedy in a civil suit.

16. The French court ordered payment by Yahoo! (jointly and severally with Yahoo! France) of provisional damages of 1 Franc to UEJF. As a means of effecting restitution for the harm suffered, the French court also ordered Yahoo! to pay for the publication of one of the French decisions in "five daily or weekly publications at the choice of [UEJF]."

Appendix A

As with the French injunction, the accruing fines are similarly more likely civil than penal in nature. The most natural reading of the French court's rationale for imposing the accruing fines is that such fines were meant to coerce Yahoo! into compliance with the substance of the French injunction. Rather than assessing the fines retroactively as a court would do when redressing the public wrong Yahoo! had allegedly *already* committed, the French court made the fines entirely conditional on Yahoo!'s future behavior beginning three months after the date of the second French order.

The U.S. analogue for such a regime of per diem fines is civil contempt. *See Sarl Louis Feraud Int'l v. Viewfinder Inc.*, 2005 U.S. Dist. LEXIS 22242, at *2, *7 (S.D.N.Y. 2005) (characterizing a French court's judgments and a "fine ('*astreinte*') of 50,000 francs per day for each day that View-finder failed to comply with each judgment" as "an injunction backed by coercive penalties analogous to a civil contempt fine under American law"). "In contrast [to criminal contempt], civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience." *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994). *See also* 17 C.J.S. Contempt § 64 (2005) ("Contempt proceedings brought to vindicate the dignity and authority of the court may be characterized as criminal in nature, whereas those brought to preserve and enforce the rights of private parties are remedial and civil in character."). Courts have the power to order either imprisonment or the payment of fines when holding a party in civil contempt: "A close

Appendix A

analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure.” *Bagwell*, 512 U.S. at 829. *See also People v. Gonzalez*, 12 Cal. 4th 804, 50 Cal. Rptr. 2d 74, 910 P.2d 1366, 1373 (Cal. 1996).¹⁷ Yahoo! was afforded a three-month safe harbor to allow it to implement the French court’s orders, and only then would any fines be assessed. As with a U.S. civil contempt order, the fines were entirely “avoidable through obedience.” Because the French coercive fines’ aim is enforcement of an underlying injunction that is civil (preventing the continuation of harm the French court found LICRA and UEJF had already suffered) rather

17. Admittedly, the characterization of the fines as coercive yet non-penal may depend on whether Yahoo! “is afforded an opportunity to purge” its liability to pay the fines. *Bagwell*, 512 U.S. at 829. Alternatively, the fines may be compensatory and therefore non-penal if they are payable to LICRA and UEJF “for losses sustained” rather than to the French government. *See id.* The majority claims that the “penalties are payable to the government and not designed to compensate the French student groups for losses suffered.” (Op. at 444.) However, nothing in the record indicates to whom the fines are payable. Furthermore, the majority fails to acknowledge the possibility, indeed the probability, that the fines were not designed to punish Yahoo! for its past behavior, but rather to prevent future harm to LICRA and UEJF. Coercive per diem fines need not be “designed to compensate [plaintiffs] for losses suffered” (Op. at 444), in order to be non-penal, so long as their purpose is to “preserve and enforce the rights of private parties,” 17 C.J.S. Contempt § 64 (2005). In any event, such uncertainty concerning the nature of the fines merely reinforces the conclusion that further factfinding by the district court is necessary before we can jump to the conclusion that the French fines are penal and unenforceable.

Appendix A

than penal (benefitting French public justice or vindicating the French court's dignity and authority), the California rule of comity announced in *In re Stephanie M.* might well apply, were it not for the orders' substantive unconstitutionality.¹⁸ See 867 P.2d at 716.

For these reasons, unlike the majority we cannot take the monetary penalty out of the ripeness analysis and assume that Yahoo! is not harmed by the very threat of the French orders' possible enforcement. Once again, at the least this is another issue that could and should be remanded to the district court for appropriate briefing and factfinding.

3. *A new, higher burden for proving chilling effect*

Finally, the majority dismisses the chilling effect of the orders by placing the burden on Yahoo! to identify *other* speech it wants to engage in but which is foreclosed by the French orders. What more should Yahoo! have to specify

18. Even if the exact accruing fines as calculated by the French orders were not directly enforceable under California law, Yahoo! could face the possibility that a California court would enforce a foreign injunction with its own state contempt proceedings under comity doctrine (again, assuming no substantive constitutional defect). *Cf. Biewend v. Biewend*, 17 Cal. 2d 108, 109 P.2d 701, 704 (Cal. 1941) ("Upon the basis of comity, however, as distinguished from the requirements of full faith and credit, the California courts have in numerous cases ordered that a foreign decree for future payments of alimony be established as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply."), *overruled on other grounds by Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19, 22-23 (Cal. 1955).

Appendix A

about the exact manner in which the objectionable content would appear on its site? Millions of postings and other material flow through Yahoo!’s networks each day.¹⁹ Yahoo! cannot possibly predict when and how specific content prohibited by the French orders will make its way onto its service. For example, a user could decide at any time to post a message or a link to a website containing impermissible content. Because it acts as a platform for other speakers, Yahoo! cannot, as the majority demands, identify the specific speech it wishes to engage in that is prohibited by the injunction.

Nor should it have to. To place such a requirement on an Internet provider — essentially forcing it to speculate as to the particular speech activity its millions of users “might” engage in as senders or recipients — is to afford it no First Amendment protection at all. As the Supreme Court has recognized, “the Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 566, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (quoting 47 U.S.C. § 230(a)(3) (1994 ed., Supp. V)); see *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (emphasizing that Congress, in insulating Internet service

19. The record indicates that as of July 2000, Yahoo! and its subsidiaries had 146 million users worldwide. Each month Yahoo! users added or edited more than 15 million Geocities web pages and posted more than 6 million classified advertisements. There were more than 2.5 million active auction items viewable on Yahoo! each day and 200,000 Yahoo! clubs were accessed each day by members who posted messages, uploaded photos or added Internet links.

Appendix A

providers from liability for certain content published on their sites, recognized the importance of protecting the “unfettered and unregulated development of free speech on the Internet”).²⁰

The majority would impose on Yahoo! far greater burdens and litigation risks than those alleging First Amendment violations by domestic parties would have to bear. Yahoo! is expected to try to persuade the French court to narrow or eliminate the very injunction Yahoo! has unsuccessfully fought against in France from the beginning. Unconstrained by our First Amendment, the French court might well take the opportunity to sanction Yahoo! for noncompliance — and do nothing to alleviate the sweeping restraint on the content of the <yahoo.com> website. If the defendants want to narrow the injunction such that it might warrant comity, that burden should fall on them, not Yahoo!.

But even if Yahoo! went to the French court and obtained a ruling that its current auction site policy and Internet services content comply with the orders, that would not resolve Yahoo!’s First Amendment problem unless the sweeping injunction itself were permanently withdrawn or narrowed. All Yahoo! would obtain would be clearance for its *current* operations; it would remain exposed to the risk of violating the orders and incurring penalties should it deviate from those current practices or should the defendants decide that Yahoo!’s content has become objectionable.

20. *Batzel* analyzed the rationale for the provisions protecting Internet providers under 47 U.S.C. § 230, which Yahoo! invoked before the district court as a statutory basis for preventing enforcement of the French court orders here.

Appendix A

The very nature of Yahoo!’s business is inherently mutable — that is the essence of the Internet, because of the sheer number and constantly changing identity of its users and of the content those users may seek or themselves post on <yahoo.com>. Only a United States court can provide Yahoo! with a legal resolution of its claim that the injunctive order, as written, cannot be enforced in the United States without infringing the company’s First Amendment rights, thereby relieving it of the coercive threat hanging over its website and the operation of its business. By denying adjudication, the majority abdicates our proper role in protecting Yahoo!’s constitutional rights.

In so doing, it leaves in place a foreign country’s vague and overbroad judgment mandating a U.S. company to bar access to prohibited content by Internet users from that country. This astonishing result is itself the strongest argument for finding Yahoo!’s claims ripe for adjudication. Are we to assume that U.S.-based Internet service providers are now the policing agencies for whatever content another country wants to keep from those within its territorial borders — such as, for example, controversial views on democracy, religion or the status of women? If the majority’s application of the First Amendment in the global Internet context in this case is to become the standard — whether as a matter of constitutional law or comity — then it should be adopted (or not) after full consideration of the constitutional merits, not as a justification for avoiding the issue altogether as not ripe for adjudication.

Appendix A

III. Conclusion

Without doubt, the hateful speech the defendants in this case seek to suppress is to be condemned. But censoring speech we find repugnant does not comport with our cherished First Amendment. It is well-settled that a hate speech code which “prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses” is “facially unconstitutional.” *R.A. V.*, 505 U.S. at 381. Under the majority’s reasoning, a party targeted for enforcement of a foreign judgment restricting its speech in the United States will have no recourse but to appeal to the foreign court, which does not recognize the First Amendment, to try to escape the strictures of the decree — or to demonstrate compliance, either through voluntary action or by submitting to its terms. Only after enduring the decree’s chilling effects while this process plays out, and then faced with whatever sanction the foreign court may impose for noncompliance, may the doors of the United States District Court be opened.

We should not allow a foreign court order to be used as leverage to quash constitutionally protected speech by denying the United States-based target an adjudication of its constitutional rights in federal court. By invoking the doctrine of prudential ripeness — notwithstanding having found both personal jurisdiction over the two foreign defendants and a constitutional case or controversy — the majority does just that, denying Yahoo! the only forum in which it can free itself of a facially *unconstitutional* injunction. Moreover, in doing so the majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted

120a

Appendix A

with foreign court orders that require them to police the content accessible to Internet users from another country. We therefore respectfully dissent from the majority's ripeness decision.

**APPENDIX B — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT FILED FEBRUARY 10, 2005**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 01-17424

YAHOO! INC., a Delaware corporation,

Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RACISME ET
L'ANTISEMITISME, a French association; L'UNION
DES ETUDIANTS JUIFS DE FRANCE,
a French association,

Defendants-Appellants.

February 10, 2005, Filed

JUDGES: Before: SCHROEDER, Chief Judge.

OPINION:

ORDER

Before: SCHROEDER, Chief Judge:

Upon the vote of a majority of nonrecused regular active judges of this court¹, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

1. Judges Pregerson and Wardlaw are recused.

**APPENDIX C — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT FILED AUGUST 23, 2004**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 01-17424

YAHOO! INC., a Delaware corporation,

Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RACISME ET
L' ANTISEMITISME, a French association; L' UNION
DES ETUDIANTS JUIFS DE FRANCE,
a French association,

Defendants-Appellants.

JUDGES: Before: Warren J. Ferguson, Melvin Brunetti, and
A. Wallace Tashima, Circuit Judges. Opinion by Judge
Ferguson; Dissent by Judge Brunetti.

OPINION BY: WARREN J. FERGUSON

OPINION: FERGUSON, Circuit Judge:

Appellants La Ligue Contre Le Racisme Et
L' Antisemitisme ("LICRA") and L' Union Des Etudiants Juifs
De France ("UEJF") appeal the District Court's grant of
summary judgment in favor of Appellee Yahoo! Inc.

Appendix C

(“Yahoo!”). Appellants contend that the District Court lacked jurisdiction, that the case was not ripe, and that the District Court should have abstained from hearing the case. We hold that there was no personal jurisdiction over Appellants and reverse the District Court.

BACKGROUND

Yahoo! is an Internet service provider which has its principal place of business in Santa Clara, California. Its American website, www.yahoo.com, targets U.S. users and provides many services, including auction sites, message boards, and chat rooms, for which Yahoo! users supply much of the content. Nazi discussions have occurred in Yahoo!’s chat rooms and Nazi-related paraphernalia have appeared for sale on its auction website.

Section R645-2 of the French Criminal Code bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing such material. Although a Yahoo! subsidiary, Yahoo! France, operates www.yahoo.fr in France and removes all Nazi material from its site to comport with French law, French users can still access the American Yahoo! website that carries the Nazi-related discussions and auction items.

In April 2000, LICRA and UEJF discovered that they could access www.yahoo.com in France and view Nazi materials. On April 5, 2000, LICRA sent a cease-and-desist letter to Yahoo! in Santa Clara, California, demanding that Yahoo! prohibit the display of the Nazi materials because the practice was illegal in France. On approximately April

Appendix C

10, LICRA filed a complaint against Yahoo! in a French court, alleging violations of the Nazi Symbols Act. On April 20, UEJF filed a second complaint against Yahoo!, alleging further violations of French law because of the Nazi-related postings. Appellants served Yahoo! with the complaint by using the United States Marshals Service pursuant to the service-abroad requirements of the Hague Convention. Yahoo! challenged the French court's jurisdiction, but the court found jurisdiction was proper under Section 46 of France's New Code of Civil Procedure. Both LICRA and UEJF litigated the cases in France.

On May 22, 2000, the French court, at the request of LICRA and UEJF, issued an order requiring Yahoo!—subject to a fine of 100,000 Francs (approximately \$ 13,300) per day—to destroy all Nazi-related messages, images, and text stored on its server, particularly any Nazi relics, objects, insignia, emblems, and flags on its auction site, and to remove any excerpts from *Mein Kampf* and *Protocole des Sages de Sion*, books promoting Nazism. The order also required Yahoo! to remove from its browser directories, which are accessible in France, the headings “negationists” and any equivalent category under the heading “Holocaust.” The French court further ordered Yahoo! to take all necessary measures to prohibit access to the Nazi artifacts on its site and to warn that viewing such material violates French law. On November 20, the French court reaffirmed its May 22 order, giving Yahoo! three months to comply with the first order and reiterating that fines would accrue daily if Yahoo! did not comply with the order. Appellants used the United States Marshals Service to serve the order on Yahoo! in Santa Clara, California. The imposition of penalties is provisional

Appendix C

in France and cannot be imposed without further court proceedings. Yahoo! chose not to pursue its appeal in France, and its right to appeal expired on February 7, 2001.

Yahoo! has not fully complied with the French orders. Some items, such as copies of *Mein Kampf*, coins, and stamps, are still available through www.yahoo.com. Yahoo! has, however, modified its hate-speech policy to preclude use of its services to promote groups that are known for taking violent positions against others because of race or similar factors. Yahoo! also removed *Protocole des Sages de Sion* from its site.

On December 21, 2000, Yahoo! filed a complaint in the Northern District of California requesting a declaration that the French court's orders of May 22 and November 20 were not recognizable or enforceable in the United States. LICRA and UEJF filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) claiming that the District Court lacked in personam jurisdiction over them. Yahoo! thereafter filed a motion for summary judgment claiming that the French orders were in violation of the First Amendment and asserting that a summary declaratory judgment was appropriate because fines were accruing for each day that Yahoo! failed to comply with the French orders. Yahoo! contended that the French judgment and fines would only be collectable in the United States since the French court had prohibited collection from Yahoo!'s French subsidiary and Yahoo! has no other assets in France.

The District Court concluded that it could properly exercise specific jurisdiction over LICRA and UEJF and,

Appendix C

accordingly, denied their motion to dismiss. The District Court then granted Yahoo!'s motion for summary judgment, holding that there was an actual controversy causing a real and immediate threat to Yahoo! and that enforcement of the French orders in the United States would violate the First Amendment. The following day, the District Court filed an amended judgment, declaring that both the May 22 and November 20, 2000, French court orders were unenforceable in the United States.

LICRA and UEJF filed timely notice of appeal challenging the District Court's exercise of personal jurisdiction over them, the ripeness of the case, and the Court's failure to abstain.

DISCUSSION

The French court's determination that Yahoo! was in violation of French law may not be reviewed by any U.S. court. Yahoo!, however, contends that enforcement of the French court's judgment in the United States would violate Yahoo!'s First Amendment rights. This constitutional claim would presumably be reviewable by any U.S. court able to assert jurisdiction over LICRA and UEJF.

Jurisdiction may be obtained, and the First Amendment claim heard, once LICRA and UEJF ask a U.S. district court to enforce the French judgment. As of yet, the organizations have declined to do so. Rather than wait for the French parties to take action, Yahoo! requested the District Court below to issue a declaratory judgment that enforcement of the French order by U.S. officials would be unconstitutional.

Appendix C

The District Court held that it did have personal jurisdiction over LICRA and UEJF. We review this exercise of personal jurisdiction de novo. *Panavision Int'l., L.P. v. Toeppen*, 141 F.3d 1316, 1319-20 (9th Cir. 1998).

As Yahoo! acknowledges, no basis for general jurisdiction exists because LICRA and UEJF do not have the kind of continuous and systematic contacts with the forum state sufficient to support a finding of general personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). We hold that LICRA and UEJF are also not subject to personal jurisdiction under the specific jurisdiction doctrine, which permits jurisdiction over a defendant in a law-suit “arising out of or related to the defendant’s contacts with the forum.” *Id.* at n.8.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945), the Supreme Court held that “due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

Exercise of jurisdiction is consistent with these requirements of “minimum contacts” and “fair play and substantial justice” where (1) the non-resident defendant has purposefully directed his activities or consummated some transaction with the forum or a resident thereof, or performed some act by which he purposefully availed himself of the

Appendix C

privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction is reasonable. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

The first requirement, purposeful availment of the benefits of the forum, "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (internal quotation marks and citations omitted). A defendant must, by his own actions, create a "substantial connection" to the forum state. *Id.*

In the present case, the District Court found that LICRA and UEJF had purposely availed themselves of the benefits of California. The District Court based this holding on three contacts with the forum: (1) the cease-and-desist letter LICRA sent to Yahoo!; (2) the use of the United States Marshals Service to serve process; and (3) LICRA and UEJF's request to the French court that Yahoo! perform certain acts on its server and remove certain Nazi items from its website in California. The District Court held that these contacts constituted "ex-press aiming," in the sense contemplated by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), and by this Court in *Bancroft & Masters*, sufficient to confer personal jurisdiction because Yahoo! alleged that LICRA's and UEJF's intent was to compel Yahoo! to censor constitutionally protected content in California. We disagree.

Appendix C

In *Calder*, the Supreme Court elaborated on the “purposeful availment” standard in the tort context. The plaintiff, whose acting career was centered in California, brought a libel suit in California against a reporter and editor of a Florida tabloid. *Id.* at 784, 788. The defendants asserted that their employer alone was responsible for the circulation of the article in California and that they should therefore not be subject to jurisdiction in California courts. *Id.* at 789. They likened themselves to a welder employed in Florida whose defective product causes injury in California and contended that principles holding the manufacturer subject to jurisdiction in distant states should not be applied to a welder who derives no direct benefit from his employer’s interstate sales. *Id.*

The Court rejected this analogy, stating that the writer and editor were not charged with “untargeted negligence” but rather “intentional, and allegedly tortious, actions . . . expressly aimed” at California. *Id.* at 789. The defendants knew that the article would have a possibly devastating impact on the plaintiff and that the brunt of any harm would be felt in California. *Id.* at 789-90. Under those circumstances, the Court said, the defendants “must ‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article.” *Id.* at 790.

In *Bancroft & Masters*, 223 F.3d at 1087, this Court noted that cases since *Calder* had “struggled somewhat with *Calder*’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific

Appendix C

jurisdiction.” We stated that there must be “something more,” and concluded that “something more” was what the *Calder* Court described as express aiming at the forum state. *Bancroft & Masters*, 223 F.3d at 1087; *see also Calder*, 465 U.S. at 789 (“Their intentional, and allegedly tortious, actions were expressly aimed at California.”). We then held that the express aiming requirement of *Calder* was “satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters*, 223 F.3d at 1087.

In *Bancroft & Masters*, the defendant, Augusta National Inc. (ANI), held several federally registered trademarks for “Masters.” *Id.* at 1084. The plaintiff, California-domiciled Bancroft & Masters (“B&M”), registered the domain name “masters.com” for use as its business homepage. *Id.* When ANI learned of B&M’s use of the domain name, ANI sent a letter to B&M’s California offices demanding that B&M cease and desist its use of masters.com. *Id.* at 1085.

More importantly, ANI also sent a letter to Network Solutions, Inc. (“NSI”), the organization charged at the time with regulating domain names. *Id.* at 1085. That letter triggered NSI’s dispute-resolution process, which gave B&M three options: (1) voluntarily transfer the domain name to ANI; (2) allow the domain name to be placed “on hold” such that neither party could use it; or (3) obtain a declaratory judgment establishing B&M’s right to use the domain name. *Id.* B&M chose the third option and filed suit in California; ANI challenged jurisdiction. *Id.*

B&M contended that ANI’s letters constituted purposeful availment under *Calder*, since ANI triggered

Appendix C

NSI's dispute-resolution process in part to wrongfully effect the conversion of B&M's masters.com domain name. *Id.* at 1087. Although ANI responded that its letters were purely defensive, aimed only at protecting its mark, we adopted B&M's interpretation because prima facie jurisdictional analysis requires us to accept the plaintiff's allegations as true. *Id.*

Interpreting *Calder*, we determined that the express aiming "requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters*, 223 F.3d at 1087. We concluded that ANI's letters wrongfully initiated the NSI process and that this act was targeted at B&M; thus, it was not presumptively unreasonable to hale ANI into a California court to answer for its allegedly wrongful actions. *Id.* at 1089.¹

Consequently, for LICRA's and UEJF's litigation efforts against Yahoo! to amount to "express aiming," those efforts must qualify as wrongful conduct targeted at Yahoo!.² We hold that they do not.

1. Two of the three members of the *Bancroft & Masters* panel concurred separately to specify that their decision rested solely on the assumption that the defendant had engaged in tortious conduct, saying, "Jurisdiction in California would be ripe for challenge if following the development of trial it should appear that ANI acted reasonably and in good faith to protect its trademark against an infringer." 223 F.3d at 1089 (Sneed, J., concurring).

2. Our dissenting colleague contends that, so long as the Appellants intended to accomplish a particular result in California,
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Appendix C

France is within its rights as a sovereign nation to enact hate speech laws against the distribution of Nazi propaganda in response to its terrible experience with Nazi forces during World War II. Similarly, LICRA and UEJF are within their rights to bring suit in France against Yahoo! for violation of French speech law.³ The only adverse consequence

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it does not matter whether their acts may be considered wrongful or not. This position is not supported by our case law. In addition to our explicit holding in *Bancroft & Masters*, 223 F.3d at 1087, that the express aiming requirement “is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff . . . ,” our cases finding purposeful availment based on *Calder* have uniformly involved an allegation of a wrongful act. *See, e.g., Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1112 (9th Cir. 2002) (fraudulent communications intended to induce California managers into detrimental contract arrangement); *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007 (9th Cir. 2002) (trademark infringement); *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990) (attempt to defraud a California resident); *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989) (defamatory statement); *see also Calder*, 465 U.S. at 785 (libel, intentional infliction of emotional distress, and invasion of privacy).

3. The dissent asserts that certain acts undertaken in bringing this suit, namely sending a cease-and-desist letter and using the U.S. Marshals Service to serve process on Yahoo!, should have lead LICRA and UEJF reasonably to anticipate being haled into court in California. We fail to see why this is so. Both acts demonstrate that the French parties were aware that Yahoo! was based in California when they took legal action against it, but deliberately initiating legal action against a California party in a foreign court is no reason to anticipate being compelled to appear in California. If that were true, any foreign litigant taking action against parties located in California

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Appendix C

experienced by Yahoo! as a result of the acts with which we are concerned is that Yahoo! must wait for LICRA and UEJF to come to the United States to enforce the French judgment before it is able to raise its First Amendment claim. However, it was not wrongful for the French organizations to place Yahoo! in this position.

In *Bancroft & Masters*, 223 F.3d at 1087, because the plaintiff had so alleged, we were required to assume that ANI had initiated the NSI process to effect the wrongful conversion of the masters.com domain name and not merely to protect its own rights. According to this assumption, it was wrongful for ANI to place B&M in the position of having to choose between the three options available to it under the NSI procedures (voluntarily transferring the domain name to ANI, allowing the domain name to be placed “on hold” such that neither party could use it, or obtaining a declaratory judgment establishing B&M’s right to use the domain name).

Here, however, the French court has already upheld LICRA and UEJF’s position with respect to French law. We know that LICRA and UEJF were acting to uphold their legitimate rights under French law. This places the parties in this case in a very different posture than the parties in *Bancroft & Masters*. As a result, we cannot say here that the parties did anything wrongful, sufficient for a finding of “express aiming,” in bringing this suit against Yahoo!.

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would be subject to jurisdiction there, even if the act giving rise to the litigation took place in a foreign jurisdiction and even if the foreign party had no other connection to California. No foreign party would ever be able to initiate legal action unless they had the resources to appear in the opposing party’s home jurisdiction.

Appendix C

Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs—one of which is that, if Yahoo! violates the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the judgment before its First Amendment claim may be heard by a U.S. court.

LICRA and UEJF took action to enforce their legal rights under French law. Yahoo! makes no allegation that could lead a court to conclude that there was anything wrongful in the organizations' conduct. As a result, the District Court did not properly exercise personal jurisdiction over LICRA and UEJF. Because the District Court had no personal jurisdiction over the French parties, we do not review whether Yahoo!'s action for declaratory relief was ripe for adjudication or whether the District Court properly refused to abstain from hearing this case.

REVERSED.

*Appendix C***DISSENT BY: MELVIN BRUNETTI****DISSENT: BRUNETTI, Circuit Judge, dissenting:**

Appellants La Ligue Contre Le Racisme Et L'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France ("UEJF") appeal the district court's grant of summary judgment related to a French judgment against Appellee Yahoo! Inc. ("Yahoo!"). Appellants claim that the district court lacked jurisdiction over them, that the case was not ripe, and that the district court should have abstained from hearing the case.

The majority holds that, "for LICRA's and UEJF's litigation efforts against Yahoo! to amount to 'express aiming,' those efforts must qualify as wrongful conduct targeted at Yahoo!." The majority, in turn, finds no wrongful conduct on LICRA's and UEJF's part based on the fact that LICRA and UEJF have not come to the United States to enforce the French court judgment.

I dissent from such position for two reasons. First, as detailed below, the case law in our circuit makes clear that, although wrongful conduct will satisfy the Supreme Court's constitutional standard for the exercise of in personam jurisdiction, it is not necessarily required in all cases; indeed, I believe that the Supreme Court's "express aiming" test may be met by a defendant's intentional targeting of his actions at the plaintiff in the forum state. Second, I dissent because the record provides ample indication that LICRA and UEJF targeted Yahoo! in California by successfully moving the French court to issue an order requiring Yahoo!'s American

Appendix C

website to comply with French law, serving Yahoo! with such order in the United States, and thereby subjecting Yahoo! to significant and daily accruing fines if Yahoo! refuses to so comply; it is immaterial to the analysis that LICRA and UEJF have yet to enforce the monetary implications of Yahoo!’s refusal to acquiesce in the French court order. Therefore, because I believe that LICRA and UEJF directed their actions toward Yahoo! in California sufficiently to confer in personam jurisdiction, I respectfully dissent.

BACKGROUND

Although I generally agree with the majority’s recitation of the background of this case, I will emphasize and elaborate on certain facts throughout the opinion to highlight where our analyses diverge.

DISCUSSION

Appellants raise three issues on appeal. First, they assert that the case lacked ripeness for declaratory relief from the district court. Second, they argue that the district court improperly exercised personal jurisdiction over them. Finally, they claim that the district court erred when it refused to abstain from hearing the case.

A.

A court may, in an “actual controversy,” declare the rights and obligations of the parties. 28 U.S.C. § 2201 (2003). The Declaratory Judgment Act’s “actual controversy” requirement is analyzed just as in constitutional cases

Appendix C

involving questions of “actual controversy.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 81 L. Ed. 617, 57 S. Ct. 461 (1937). The controversy must be definite and concrete, not merely hypothetical or abstract. *Id.* at 240. The dispute must be subject to specific, conclusive relief, not advisory in nature. *Id.* at 241.

LICRA and UEJF have followed their lawsuit to completion in the French court. Judgment has been rendered against Yahoo! and fines continue to accrue daily. LICRA and UEJF have simply refrained from enforcing the judgment against Yahoo!. A declaration regarding enforcement of a judgment that has already been ordered by a court, even though not yet sought by the adversarial party, is distinguishable from a declaration sought when a lawsuit has never been instigated. *See id.* at 240 (The controversy “must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”); *cf. San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (holding that to have standing to challenge a statute the plaintiff must show a genuine threat of imminent prosecution under the statute); *Int’l. Society for Krishna Consciousness v. City of Los Angeles*, 611 F. Supp. 315 (C.D. Cal. 1984) (case not sufficiently concrete for adjudication because group exercising speech rights at airport had not been harassed by airport officials). As the district court noted, LICRA and UEJF have not requested withdrawal of the French order so that the penalties accruing against Yahoo! would cease. Yahoo! could feasibly be responsible for all retroactive penalties that accrue until Yahoo! is in compliance

Appendix C

with the French order. The threat to Yahoo! is concrete and growing daily. Therefore, I believe that the case is sufficiently ripe to be heard in American courts.

B.

The district court and Yahoo! acknowledge that no basis for general jurisdiction exists. Even if a nonresident party's contacts with the forum state are insufficient for general personal jurisdiction, however, the party may be amenable to jurisdiction under the specific jurisdiction doctrine if the claim is related to the party's activities in or contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).

In the seminal case on personal jurisdiction, *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), the Supreme Court held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (emphasis added). The "minimum contacts" prong of the due process inquiry focuses on whether the defendant "has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). The "fair play and substantial justice" prong gives the defendant an opportunity to "present a compelling

Appendix C

case that the presence of some other considerations would render jurisdiction unreasonable.” *Id.* at 477.

This Circuit has summarized the Supreme Court’s jurisprudence by setting forth a three-factor test to determine whether asserting jurisdiction over an out-of-state defendant comports with due process. Jurisdiction may be exercised when the following requirements are met:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The first two factors correspond with the “minimum contacts” prong of the *International Shoe* analysis, and the third factor corresponds with the “fair play and substantial justice” prong of the analysis.

Appendix C

1.

The “purposeful availment” requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.” *Burger King*, 471 U.S. at 475 (internal quotations and citations omitted). Indeed, to satisfy the first factor, there must be “some act” by which defendants “purposefully avail[]” themselves of the “privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.* The contacts made by a defendant therefore must, by his own actions, create a “substantial connection” to the forum state. *Id.*

Where the defendant “deliberately” has engaged in significant activities within a State . . . or has created “continuing obligations” between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by “the benefits and protections” of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76 (internal citations and quotations omitted); *see also Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (citing *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988) (“‘Purposeful availment’ requires that the defendant ‘have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.’”)).

Appendix C

In *Burger King*, the defendants contracted with Burger King's Florida headquarters to open a franchise restaurant in Michigan. *Burger King*, 471 U.S. at 467. Throughout the preliminary negotiations, the defendants often communicated with Burger King's regional Michigan office; however, because the defendants eventually realized that the regional office lacked authority to alter the terms of the franchise agreement, the defendants ultimately resorted to communicating directly with the Florida headquarters. *Id.* at 467 & n.7. After the contract was signed, one of the defendants traveled to Florida briefly to attend a training session for franchisees. *Id.* at 479.

The *Burger King* Court emphasized that jurisdictional analysis must be based on a "realistic approach" rather than on "'mechanical' tests." *Id.* The Court noted that while an individual's contract with an out-of-state party *alone* would not automatically establish sufficient contacts to justify the exercise of jurisdiction, a more realistic approach would recognize that a contract is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.* (internal quotations and citation omitted). The Court concluded that the defendants knowingly entered into a long-term relationship that "envisioned continuing and wide-reaching contacts with Burger King in Florida." *Id.* at 480. Because the Court found that "the quality and nature of [this] relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated,'" it held that the defendants had sufficiently availed themselves of the Florida forum to support specific jurisdiction. *Id.*

Appendix C

The Supreme Court elaborated on the “purposeful availment” standard in the tort context in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984). In *Calder*, a California-resident professional entertainer brought a libel suit in California against a reporter and editor of a Florida-domiciled tabloid. *Id.* at 785. The offending story impugned the plaintiff’s professionalism whose acting career was centered in California. *Id.* at 789. The tabloid sold numerous copies of its publication in California. *Id.* at 785. The Florida-resident reporter, however, conducted most of the research for the article in Florida, relying on phone calls to sources in California for the information contained in the article. *Id.* And although the Florida-resident editor “[oversaw] just about every function of the [tabloid],” he had been to California only twice, once on pleasure and again to testify in an unrelated trial. *Id.* at 786.

The defendants asserted that they were not responsible for the circulation of the article in California, but rather that their Florida-domiciled employer circulated the article, and therefore they should not be haled into California’s courts. *Id.* at 789. They likened themselves to a welder employed in Florida whose defectively made product causes injury in California; the cases holding the manufacturer subject to jurisdiction in distant states should not be applied to the welder who derives no direct benefit from his employer’s sales in such states. *Id.* at 789-90. The Court rejected this analogy, stating that the writer and editor were not charged with “untargeted negligence,” but rather “intentional, and allegedly tortious, actions,” which were “expressly aimed” at California. *Id.* at 790. The defendants knew that the article would have a potentially devastating impact on the plaintiff

Appendix C

and that the brunt of that harm would be felt in California. *Id.* Under these circumstances, the Court said, the defendants “must ‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article.” *Id.* Accordingly, the Court held that a foreign act that is both “aimed at” and “has effect in” the forum state satisfies the constitutional requirements for jurisdiction. *Id.*

According to our Circuit’s jurisprudence, a defendant can meet the *Calder* “effects” test, by (1) committing an intentional act, which was (2) expressly aimed at the forum state, and (3) causing harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state. *See Bancroft & Masters*, 223 F.3d at 1087. In *Bancroft & Masters*, the defendant, Georgia-domiciled Augusta National Inc. (ANI), which operated a golf club in Georgia and sponsored the annual “Masters Tournament,” held several federally registered trademarks for the mark “masters.” *Id.* at 1084. The plaintiff, California domiciled Bancroft & Masters (“B & M”), registered the domain name “masters.com” for use as its business homepage. *Id.* When ANI learned of B & M’s use of the domain name, ANI sent a letter to Network Solutions, Inc. (NSI)—the Virginia-based organization charged with regulating domain-names—challenging B & M’s use of masters.com. *Id.* at 1085. ANI also sent a letter to B & M’s California offices demanding that B & M cease and desist its use of masters. com and immediately transfer the domain name to ANI. *Id.* ANI’s letter triggered NSI’s dispute-resolution process, which gave B & M three options: (1) voluntarily transfer the domain name to ANI; (2) allow the domain name to be placed “on hold,” which meant that neither party could use it; or

Appendix C

(3) obtain a declaratory judgment establishing B & M's right to use the domain name. *Id.* B & M chose the third option and filed suit in California seeking, *inter alia*, a declaration of non-dilution and non-infringement. *Id.*

ANI challenged jurisdiction in California; it asserted that its minimal contacts with California were insufficient to justify general or specific jurisdiction. *Id.* The court agreed that ANI's contacts did not permit the exercise of general jurisdiction. *Id.* The court emphasized that ANI was not registered or licensed to do business in California, paid no taxes in California, maintained no bank accounts in California, and "targeted" no print, television, or radio advertising toward California. *Id.* at 1086. Moreover, the defendant's website was "passive," i.e., consumers could not use it to make purchases, and they made only occasional, unsolicited sales of tickets and merchandise to California residents. *Id.* The court concluded therefore that because ANI's contacts constituted doing business *with* California, but not doing business *in* California, they could not be subject to the restrictive reach of general jurisdiction. *Id.* (citing *Helicopteros*, 466 U.S. at 418).

Thus, having found insufficient contacts to support general jurisdiction, the court was left to analyze the applicability of specific jurisdiction. Because ANI had few other contacts with California, and B & M's claim stemmed directly from ANI's letter, the court necessarily assessed whether ANI's letter to B & M was sufficient to establish its "purposeful availment" of California. B & M argued that ANI's letter constituted purposeful availment under the *Calder* "effects test," as ANI deliberately triggered NSI's

Appendix C

process not only to defend its trademark but to wrongfully effect the conversion of B & M's masters.com domain name. *Id.* at 1087. ANI retorted that its letter was purely defensive, aimed only to protect its mark. *Id.* Because the prima facie jurisdictional analysis requires a court to accept the plaintiff's allegations as true, the court adopted B & M's interpretation. *Id.*

This court noted that myriad cases since *Calder* have “struggled with *Calder*’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.” *Id.* We emphasized that this Circuit has required that there be “something more,” and concluded that “something more” is what the *Calder* Court described as “express aiming” at the forum state. *Id.*; *see also Calder*, 465 U.S. at 789. Applying *Calder*, we determined that “the requirement [express aiming] is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters*, 223 F.3d at 1087. The court concluded that ANI’s letter targeted B & M and wrongfully instigated the NSI process; thus, it was not presumptively unreasonable to hale ANI into the California courts to answer for its actions. *Id.* at 1089.

Two members of the *Bancroft & Masters* panel concurred separately specifically to emphasize that their decision to exercise specific jurisdiction rested solely on the assumption that the defendant had engaged in tortious conduct; indeed, they said, “Jurisdiction in California would be ripe for challenge if following the development of trial it should

Appendix C

appear that ANI acted reasonably and in good faith to protect its trademark against an infringer.” *Id.* at 1089 (Sneed, J., concurring).

Tortious conduct, however, is only one element to be considered as satisfaction of the *Calder* “express aiming” requirement. This Circuit’s jurisprudence precludes basing the exercise of personal jurisdiction upon only the defendant’s act of sending a cease-and-desist letter; indeed, either the letter itself must evince some sort of “targeting,” “express aiming,” or “wrongfulness,” *see id.*, or the defendant must have some additional contacts with the forum for the exercise of personal jurisdiction to comport with due process. Indeed, although an intentional tortious act clearly satisfies the *Calder* “effects test,” *see, e.g., Calder*, 465 U.S. at 789-90; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 2004 WL 1462444 at *9 (9th Cir. June 29, 2004) (holding that, in the tort context, “the ‘express aiming’ analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue”), so too can other conduct “targeted” or “expressly aimed” at residents of the forum state. *Compare Cascade Corp. v. Hiab-Foco AB*, 619 F.2d 36 (9th Cir. 1980), with *Inamed Corp. v. Kuzmak*, 249 F.3d 1356 (Fed. Cir. 2001).

In *Cascade Corp.*, the Oregon-based plaintiff manufactured hydraulic equipment and material handling equipment. *Cascade Corp.*, 619 F.2d at 36. The defendant was a Swedish corporation which manufactured cranes and other equipment in Sweden. *Id.* The defendant maintained no offices or personnel in Oregon or in the United States, owned no property in Oregon, and marketed its products in

Appendix C

the United States through a wholly-owned subsidiary, which was incorporated in Delaware. *Id.* The defendant advertised its products in national publications, which were available in Oregon, and, on two occasions, the defendant's representatives visited Oregon to explore distributorship possibilities and to evaluate the use of cranes in the lumber industry. *Id.* at 37.

Upon the belief that the plaintiff was infringing the defendant's patent, the defendant sent an infringement letter to the plaintiff in Oregon. *Id.* at 36. The parties exchanged a series of letters, but were unable to resolve their dispute. *Id.* The plaintiff ultimately brought a declaratory judgment action in Oregon district court, seeking clarification of the parties' rights vis-a-vis the disputed patents. *Id.*

The district court concluded that the defendant had not purposely availed itself of Oregon to justify the exercise of specific jurisdiction there. *Id.* On appeal, this court first acknowledged that the Oregon long-arm statute was limited to certain causes of action enumerated in the act, such as the conduct of business in the state; the commission of a tort in the state; the ownership, use or possession of real estate in the state; among others. *Id.* The court then explained that when a "defendant's activities are not so pervasive as to subject him to general jurisdiction, the issue whether jurisdiction will lie turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action." *Id.* at 37 (citing *Varsic v. U.S. Dist. Ct. For Cent. Dist., Etc.*, 607 F.2d 245 (9th Cir. 1979) (quoting *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977))).

Appendix C

In affirming the district court, this court rejected the plaintiff's assertion that cease-and-desist letters with few additional contacts could justify the exercise of jurisdiction. *Id.* at 38. Indeed, we concluded that allowing specific jurisdiction over parties, whose contacts with the forum consisted only of sending cease-and-desist letters into the forum, advertising in magazines available in the forum, and selling its products nationwide through independent distributors, would offend "traditional notions of fair play and substantial justice." *Id.* (quoting *International Shoe Co.*, 326 U.S. at 316).

In comparison, the Federal Circuit recently held that a defendant's good-faith infringement letter coupled with his other contacts in the forum justified the exercise of personal jurisdiction. *Inamed Corp.*, 249 F.3d at 1360. *Inamed* was a patent-infringement case occurring in California. *Id.* at 1358. There, the New Jersey-resident doctor-defendant, Kuzmak, entered into a series of license agreements with a California-domiciled manufacturing company, Inamed; the agreements granted Inamed an exclusive license to practice all four of Kuzmak's patents related to obesity treatment in exchange for royalty fees based on Inamed's commercial exploitation of the patents. *Id.* at 1359. Except for one "get acquainted" meeting that took place in California, Kuzmak negotiated and consummated these contracts with Inamed entirely by phone and mail from New Jersey. *Id.* The contracts remained in effect for approximately six years, during which time Inamed paid royalties to Kuzmak of more than \$ 1.3 million. *Id.* Ultimately, the contracts fell apart, and Kuzmak sent a letter to Inamed protesting Inamed's willful infringement of his patents. *Id.* Several months after receiving the letter,

Appendix C

Inamed commenced a declaratory judgment action against Kuzmak in California, seeking, *inter alia*, the invalidation and unenforceability of the patents. *Id.*

In analyzing the propriety of the exercise of specific jurisdiction over Kuzmak in California, the court began with the infringement letter, which it called, “the first and most important contact.” *Id.* at 1360. Although the court determined that the letter was “directed at” California-resident Inamed, it concluded that a good-faith infringement letter alone was insufficient to establish purposeful availment. *Id.* at 1361 (collecting Federal Circuit cases).

However, the court went on to consider “other activities” in the state to determine whether Kuzmak had made such minimum contacts with California to justify the exercise of jurisdiction. The court noted that the 1989 meet-and-greet session in California as well as Kuzmak’s telephone and mail contacts with California surrounding the making of the licensing agreements should be considered when deciding whether a defendant purposely availed himself of the forum. *Id.* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 308, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992) (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”) (emphasis omitted))).

Accordingly, the court concluded that the combination of the infringement letter and Kuzmak’s negotiations and license agreements satisfied the first prong of the minimum contacts analysis. *Id.*

Appendix C

In the present case, the district court found that LICRA and UEJF had purposely availed themselves of the benefits of California so that the effects of their actions would be felt there. The district court cited the cease-and-desist letter LICRA sent to Yahoo!, use of the United States Marshals Service to serve process, and LICRA and UEJF's request to the French court for Yahoo! to perform certain acts on its server and to remove certain Nazi items from its website in California to support its conclusion that Appellants met the purposeful availment requirement. Focusing its conclusion on "express aiming" rather than tortious conduct, the district court determined that LICRA and UEJF's contacts with California satisfied the *Calder* "effects test." The court stated that LICRA and UEJF were on notice that they could be haled into court in California because they specifically targeted Yahoo! at its California headquarters. I agree.

LICRA and UEJF's conduct toward California is sufficient to establish their purposeful availment of the forum. Before bringing suit against Yahoo!, LICRA sent Yahoo! a letter stating, in part,

We are particularly choked [sic] to see that your Company keeps on presenting every day hundreds of nazi symbols or objects for sale on the Web. [P] This practise is illegal according to french legislation and it is incumbent upon you to stop it., at least on French Territory. [P] Unless you cease presenting nazi objects for sale within 8 days, we shall size [sic] the competent jurisdiction to force your Company to abide by the law.

Appendix C

Although our case law maintains that a cease-and-desist letter *alone* is not enough to assert specific jurisdiction, such a letter in combination with Appellants' other conduct supports the conclusion that LICRA and UEJF expressly aimed their conduct at California-resident Yahoo!. Several days after sending the letter, LICRA filed suit against Yahoo! in France seeking to compel Yahoo! to prevent users of its U.S.-based auction site from posting Nazi-related material or to re-engineer its U.S. servers so that such items would be blocked to French users. Soon thereafter, UEJF filed a similar lawsuit in France, which, in addition to the relief sought by LICRA, sought to compel Yahoo! to "cease all hosting" of user-posted writings on Nazism or other Nazi-related materials or to block all access to these items to French users. Under the Hague Convention procedures, in order to instigate their lawful suit in France, LICRA and UEJF were required to utilize the Marshals Service to serve process in the United States. However, the simple fact that they followed the required procedure does not insulate LICRA and UEJF from jurisdiction; rather, it supports the conclusion that they could reasonably anticipate being haled into California's court for so doing. Indeed, as in *Calder*, LICRA and UEJF knew that their lawsuits' demands would have a powerful and potentially devastating impact on Yahoo! and that the brunt of that effect would be felt in California. *See Calder*, 465 U.S. at 790.

Moreover, after the French court decided the two lawsuits in LICRA and UEJF's favor, LICRA and UEJF moved the French court to order Yahoo! to perform certain acts on Yahoo!'s California server to comply with the French court judgment. The French order, again served by the United States

Appendix C

Marshals Service on Yahoo! in California, demanded that Yahoo! remove from its California server any Nazi relics, objects, insignia, emblems and flags on its auction site, excerpts from *Mein Kampf* and *Protocole des Sages de Sion*, and its browser directories' headings "negationists" and any equivalent category under the heading "Holocaust." Although LICRA and UEJF note that they must take additional steps to enforce and collect the accrued penalties and fines against Yahoo!, I nonetheless would hold that LICRA and UEJF purposely availed themselves of the benefits of California through their successful requests to the French court for an order requiring Yahoo! to conform its California conduct to French law or suffer extensive monetary consequences. I do not dispute that LICRA and UEJF pursued their legal rights in France, but the resulting order from the French court and its service on Yahoo! in California constitute conduct expressly aimed at California. *Cf. Calder*, 465 U.S. at 789-90; *Cascade Corp.*, 619 F.2d at 38; *Inamed Corp.*, 249 F.3d at 1361.

Indeed, LICRA and UEJF expressly aimed the cease-and-desist letter, the service of process, and the service of the French order at Yahoo! in California intending to accomplish a particular result in California; they deliberately sought action from Yahoo!—removal of all Nazi-related material or, alternatively, a complete re-engineering of Yahoo!'s U.S. servers to prevent French users from being able to see such material—knowing that their request would likely create extensive technical and logistical problems for Yahoo! in California. Regardless of whether such acts may be considered wrongful or not, I believe they nonetheless satisfy *Calder*'s "express aiming" criteria for a finding of purposeful availment.

Appendix C

In sum, I would hold that LICRA and UEJF's actions toward California-based Yahoo! constitute such purposeful availment of California to justify the exercise of personal jurisdiction over them there. LICRA and UEJF's contacts cannot be deemed "a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person," *see Burger King*, 471 U.S. at 475; rather, these acts were deliberately and expressly aimed at Yahoo! in California for the very purpose of having their effects felt there. Therefore, I conclude that LICRA and UEJF's contacts with Yahoo! in California are sufficient to establish that LICRA and UEJF purposely availed themselves of the forum as to warrant the district court's exercise of specific jurisdiction.

2.

Given my conclusion that LICRA and UEJF sufficiently directed their activities toward Yahoo! in California, I next assess whether the claim arises out of or relates to the defendant's forum-related activities. This court relies on a "but for" test to determine whether a particular claim arises out of or is related to forum-related activities and thereby satisfies the second requirement for specific jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991)). Again, in *Inamed*, the court determined that the infringement letter itself satisfied the relatedness factor. Noting that "the central purpose of a declaratory action is often to 'clear the air of infringement charges,'" the court concluded that Inamed's claim for

Appendix C

declaratory judgment arose directly out of Dr. Kuzmak's act of sending an infringement letter. *Inamed*, 249 F.3d at 1362 (citation omitted). Indeed, Kuzmak's letter clearly asserted that Inamed "willfully infringed" at least two of Dr. Kuzmak's patents and alleged infringement of another. *Id.* at 1361-62. This language, the court noted, indicated that Kuzmak was aware—and perhaps intentionally communicating his awareness—of the treble damages and attorney fees to which he may be entitled in a successful infringement action against Inamed. *Id.* Inamed's action to preempt such suit therefore arose directly out of such letter. *Id.* at 1362.

The same holds true here. LICRA and UEJF deliberately attacked the validity and legality of Yahoo!'s website in the French court. As noted above, they sent the cease-and-desist letter, brought suit in France and prevailed, and moved the court to order Yahoo!'s compliance in California. All of these acts led to Yahoo!'s declaratory judgment action seeking clarity as to the constitutional implications of LICRA and UEJF's demands. The within suit stems directly from Appellants' actions vis-a-vis Yahoo!.. Thus, Yahoo!'s attempt for judicial clarity in the United States courts can be said to at least "relate to" if not "arise out of" LICRA and UEJF's actions. *See Inamed*, 249 F.3d at 1362 (noting that "Inamed's misuse cause of action at least 'relates to' if not outright 'arises out of' Dr. Kuzmak's prior negotiation efforts leading to the parties' license agreements").

Appendix C

3.

The final requirement needed to establish specific jurisdiction is reasonableness. To be reasonable, the exercise of jurisdiction “must ‘comport with fair play and substantial justice.’” *Panavision*, 141 F.3d at 1322 (quoting *Burger King*, 471 U.S. at 476). “Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Id.* (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487 (9th Cir. 1993) (citing *Burger King*, 471 U.S. at 476-77)).

This Circuit has determined that the court must balance seven factors to determine reasonableness: (1) the extent of the defendant’s purposeful availment; (2) the burden on the defendant to litigate in the forum; (3) the extent of conflict with the defendant’s sovereign state; (4) the forum’s interest in hearing the dispute; (5) the most efficient resolution of the controversy; (6) importance to the plaintiff for convenient forum and effective relief; and (7) the existence of an alternative forum. *Id.* at 1323.

Under the first factor, the extent of the defendant’s purposeful availment, or the “degree of interjection,” must be considered under the reasonableness standard. *Id.* “Even if there is sufficient ‘interjection’ into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the reasonableness prong.” *Id.* (citing *Core-Vent Corp.*, 11 F.3d at 1488). Here, the degree of interjection was not minimal.

Appendix C

LICRA and UEJF's acts were aimed at Yahoo! in California; indeed, they sent a letter threatening suit in France, brought such suit by serving Yahoo! with process in California, and most importantly, upon obtaining a favorable judgment in France, asked the French court to order Yahoo! to comply with such judgment by stripping Yahoo!'s website of any offending material or re-engineering its servers to block French users from seeing such material. Moreover, Appellants' assertion that they have not attempted to enforce the French law order in the United States is unavailing. The May 22, 2001, order served on Yahoo! indeed demanded that Yahoo! immediately comply with French law by removing Nazi materials or rendering them inaccessible to French users or face significant daily fines; it is unimportant that LICRA and UEJF have as yet refrained from taking the additional steps necessary to collect the extensive and accruing fines against Yahoo!. Because I believe that LICRA and UEJF expressly aimed their actions at Yahoo! in California seeking to cause a particular effect, I conclude that this factor weighs in Yahoo!'s favor.

Second, while the defendant's burden in litigating in the forum is considered, it will not be deemed unreasonable unless it constitutes a deprivation of due process. *Id.* Although LICRA and UEJF assert that they will endure continued hardships if forced to litigate this action in California, they have failed to allege facts that rise to a deprivation of due process; indeed, they readily complied with the Hague Convention's procedures for service of process in California in order to further the ends of their French lawsuit; thus, it would not be unreasonable for them to return to answer for the constitutional implications their

Appendix C

lawsuits may have in the United States. This factor too favors Yahoo!.

Third, the court must weigh the extent of interference with the alternate forum (here, France). *See id.* “The foreign-acts-with-forum-effects jurisdictional principle must be applied with caution, particularly in an international context.” *Core-Vent Corp.*, 11 F.3d at 1489 (citing *Pacific Atlantic Trading Co., Inc. v. M/V Main Exp.*, 758 F.2d 1325, 1330 (9th Cir. 1985)). “Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.” *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (citation omitted)). “Litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist.” *Sinatra*, 854 F.2d at 1199.

In the interest of comity, this factor may tip in favor of Appellants; however, United States courts are in a unique position to interpret their own constitution and render determinations regarding their citizens’ rights thereunder. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-48, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting) (“The interpretation of the text of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text—has always been the unique role of this Court.”). Thus, this factor neither weighs in favor of nor against Appellants.

Appendix C

Fourth, as LICRA and UEJF have purposely availed themselves of California, the state's interest in resolving the dispute is considerable. Yahoo! is based in California and the constitutionality of the French court judgment will have significant effects on Yahoo!'s ability to conduct business in the state. Thus, this factor favors Yahoo!.

Fifth, the efficient-resolution factor considers the availability of evidence and witnesses, *see Panavision*, 141 F.3d at 1323, and the forum which is more familiar with the facts and history of the case, *Ballard v. Savage*, 65 F.3d 1495, 1501-02 (9th Cir. 1995). Although LICRA and UEJF's suit was litigated in France and involves French law, Yahoo!'s declaratory judgment action seeks to clarify the constitutionality of the French court order under United States law; thus, as noted above, the United States courts seem to be in a better position to make such determination.

The sixth factor favors Yahoo!, as it certainly would be more effective and convenient for Yahoo! to conclude the French suit in its own state, rather than wait for LICRA and UEJF to take the final steps to enforce the penalties and fines assessed against Yahoo!. Moreover, given that First Amendment concerns are implicated, this factor again favors Yahoo! because a United States venue is uniquely qualified to interpret its own constitutional law.

Finally, Yahoo! bears the burden to demonstrate the unavailability of an alternative forum. *Panavision*, 141 F.3d at 1324. LICRA and UEJF assert that the French court was the proper avenue to question the validity of the French court judgment; indeed, Yahoo! opted not to appeal the French

Appendix C

court order and rather to bring suit in the United States. Moreover, because additional steps must be taken in the French court before LICRA and UEJF can collect the penalties under the judgment, the French court may be a more favorable forum. Again, however, the United States courts are better situated to analyze the validity of the French court judgment under United States law. This factor neither favors Yahoo! nor Appellants.

In balancing these factors, I conclude that, although some factors weigh in Appellants' favor, they failed to present a compelling case that the district court's exercise of jurisdiction in California was unreasonable. I therefore would hold that all of the requirements for the exercise of specific, personal jurisdiction are satisfied, and therefore the district court properly exercised personal jurisdiction over LICRA and UEJF. Given this conclusion, I now turn to the question of whether the district court abused its discretion in refusing to abstain from this controversy.

C.

Although federal courts have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress, in exceptional cases, a federal court should stay a suit and await the outcome of parallel proceedings as a matter of "wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation." *Finova Capital Corp. v. Ryan Helicopters*, 180 F.3d 896, 898 (7th Cir. 1999) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)).

Appendix C

(internal quotation and citation omitted)); *see also Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1149 (N.D. Cal. 2001) (citing Schwarzer et al., Federal Civil Procedure Before Trial, P 2:1326.4 (2000) (noting that international abstention is rooted in concerns of international comity, judicial efficiency, and fairness to litigants)). Typically, the doctrine allows a court to abstain from hearing an action if there is a first-filed foreign proceeding elsewhere. *Supermicro Computer, Inc.*, 145 F. Supp. 2d at 1149.

The court's first task is to determine whether the federal and foreign proceedings are in fact parallel. *Finova Capital Corp.*, 180 F.3d at 898. Here, the district court determined that the proceedings between LICRA and UEJF and Yahoo! in France turned on the question of whether Yahoo!'s postings violated French law; whereas, "the purpose of the present action is to determine whether a United States court may enforce the French order without running afoul of the First Amendment." Indeed, the court noted, "Nothing in Yahoo!'s suit for declaratory relief in this Court appears to be an attempt to relitigate or disturb the French court's application of French law or its orders with respect to Yahoo!'s conduct in France." Accordingly, the district court refused to abstain.

The district court acted within its discretion in refusing to abstain. The proceedings in France had concluded, Yahoo!'s ability to appeal had expired, and the French court order specifically instructed Yahoo! to remove or render inaccessible the offending postings or else be subject to ongoing fines. These fines continue to mount, and Yahoo! brought the within suit to challenge the constitutionality of

Appendix C

such judgment's enforcement. The district court correctly concluded that the actions involve distinct legal issues and that no basis for abstention had been established.

CONCLUSION

For the foregoing reasons, I would hold that Yahoo!'s action for declaratory relief was ripe for adjudication and that the district court properly exercised jurisdiction over LICRA and UEJF and acted within its discretion in refusing to abstain. I would therefore affirm the district court's decision.

**APPENDIX D — ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SAN JOSE DIVISION
FILED NOVEMBER 7, 2001**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Case Number C-00-21275 JF [Docket No. 17]

YAHOO!, INC., a Delaware corporation,

Plaintiff,

v.

LA LIGUE CONTRE LE RACISME ET
L'ANTISEMITISME, a French association, et al.,

Defendants.

November 7, 2001, Decided
November 7, 2001, Filed

JUDGES: JEREMY FOGEL, United States District Judge.

OPINION BY: JEREMY FOGEL

*Appendix D***OPINION:**

Plaintiff moves for summary judgment. Defendants oppose the motion. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on September 24, 2001. For the reasons set forth below, the motion will be granted.

I. PROCEDURAL HISTORY

Defendants La Ligue Contre Le Racisme Et l'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France, citizens of France, are non-profit organizations dedicated to eliminating anti-Semitism. Plaintiff Yahoo!, Inc. ("Yahoo!") is a corporation organized under the laws of Delaware with its principal place of business in Santa Clara, California. Yahoo! is an Internet¹ service provider that operates various Internet websites and services that any computer user can access at the Uniform Resource Locator ("URL") <http://www.yahoo.com>. Yahoo! services ending in the suffix, ".com," without an associated country code as a prefix or extension (collectively, "Yahoo!'s U.S. Services") use the English language and target users who are residents of, utilize servers based in and operate under the laws of the United States. Yahoo! subsidiary corporations operate

1. The "Internet" and "World Wide Web" are distinct entities, but for the sake of simplicity, the Court will refer to them collectively as the "Internet." Generally speaking, the Internet is a decentralized networking system that links computers and computer networks around the world. The World Wide Web is a publishing forum consisting of millions of individual websites that contain a wide variety of content.

Appendix D

regional Yahoo! sites and services in twenty other nations, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain. Each of these regional web sites contains the host nation's unique two-letter code as either a prefix or a suffix in its URL (e.g., Yahoo! France is found at <http://www.yahoo.fr> and Yahoo! Korea at <http://www.yahoo.kr>). Yahoo!'s regional sites use the local region's primary language, target the local citizenry, and operate under local laws.

Yahoo! provides a variety of means by which people from all over the world can communicate and interact with one another over the Internet. Examples include an Internet search engine, e-mail, an automated auction site, personal web page hostings, shopping services, chat rooms, and a listing of clubs that individuals can create or join. Any computer user with Internet access is able to post materials on many of these Yahoo! sites, which in turn are instantly accessible by anyone who logs on to Yahoo!'s Internet sites. As relevant here, Yahoo!'s auction site allows anyone to post an item for sale and solicit bids from any computer user from around the globe. Yahoo! records when a posting is made and after the requisite time period lapses sends an e-mail notification to the highest bidder and seller with their respective contact information. Yahoo! is never a party to a transaction, and the buyer and seller are responsible for arranging privately for payment and shipment of goods. Yahoo! monitors the transaction through limited regulation by prohibiting particular items from being sold (such as stolen goods, body parts, prescription and illegal drugs, weapons, and goods violating U.S. copyright laws or the Iranian and Cuban embargos) and by providing a rating system through which

Appendix D

buyers and sellers have their transactional behavior evaluated for the benefit of future consumers. Yahoo! informs auction sellers that they must comply with Yahoo!'s policies and may not offer items to buyers in jurisdictions in which the sale of such item violates the jurisdiction's applicable laws. Yahoo! does not actively regulate the content of each posting, and individuals are able to post, and have in fact posted, highly offensive matter, including Nazi-related propaganda and Third Reich memorabilia, on Yahoo!'s auction sites.

On or about April 5, 2000, LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters informing Yahoo! that the sale of Nazi and Third Reich related goods through its auction services violates French law. LICRA threatened to take legal action unless Yahoo! took steps to prevent such sales within eight days. Defendants subsequently utilized the United States Marshal's Office to serve Yahoo! with process in California and filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris (the "French Court").

The French Court found that approximately 1,000 Nazi and Third Reich related objects, including Adolf Hitler's *Mein Kampf*, *The Protocol of the Elders of Zion* (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900's), and purported "evidence" that the gas chambers of the Holocaust did not exist were being offered for sale on Yahoo.com's auction site. Because any French citizen is able to access these materials on Yahoo.com directly or through a link on Yahoo.fr, the French Court concluded that the Yahoo.com auction site violates Section R645-1 of the French Criminal Code, which prohibits exhibition of Nazi

Appendix D

propaganda and artifacts for sale.² On May 20, 2000, the French Court entered an order requiring Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the French Republic index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust." The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order. The order concludes:

We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.

High Court of Paris, May 22, 2000, Interim Court Order No. 00/05308, 00/05309 (translation attested accurate by Isabelle Camus, February 16, 2001). The French Court set a return date in July 2000 for Yahoo! to demonstrate its compliance with the order.

2. French law also prohibits purchase or possession of such matter within France.

Appendix D

Yahoo! asked the French Court to reconsider the terms of the order, claiming that although it easily could post the required warning on Yahoo.fr, compliance with the order's requirements with respect to Yahoo.com was technologically impossible. The French Court sought expert opinion on the matter and on November 20, 2000 "reaffirmed" its order of May 22. The French Court ordered Yahoo! to comply with the May 22 order within three (3) months or face a penalty of 100,000 Francs (approximately U.S. \$ 13,300) for each day of non-compliance. The French Court also provided that penalties assessed against Yahoo! Inc. may not be collected from Yahoo! France. Defendants again utilized the United States Marshal's Office to serve Yahoo! in California with the French Order.

Yahoo! subsequently posted the required warning and prohibited postings in violation of Section R645-1 of the French Criminal Code from appearing on Yahoo.fr. Yahoo! also amended the auction policy of Yahoo.com to prohibit individuals from auctioning:

Any item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan. Official government-issue stamps and coins are not prohibited under this policy. Expressive media, such as books and films, may be subject to more permissive standards as determined by Yahoo! in its sole discretion.

Yahoo Auction Guidelines (visited Oct. 23, 2001) <<http://user.auctions.Yahoo.com/html/guidelines.html>>.

Appendix D

Notwithstanding these actions, the Yahoo.com auction site still offers certain items for sale (such as stamps, coins, and a copy of *Mein Kampf*) which appear to violate the French Order.³ While Yahoo! has removed the *Protocol of the Elders of Zion* from its auction site, it has not prevented access to numerous other sites which reasonably “may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.”⁴

Yahoo! claims that because it lacks the technology to block French citizens from accessing the Yahoo. com auction site to view materials which violate the French Order or from accessing other Nazi-based content of websites on Yahoo.com, it cannot comply with the French order without banning Nazi-related material from Yahoo.com altogether. Yahoo! contends that such a ban would infringe impermissibly upon its rights under the First Amendment to the United States Constitution. Accordingly, Yahoo! filed a complaint in this Court seeking a declaratory judgment that the French Court’s orders are neither cognizable nor enforceable under the laws of the United States.

3. The Court takes judicial notice that on October 24, 2001, the key word “nazi” on the Yahoo.com auction site search engine called up sixty-nine Nazi-related items for sale, most of which were stamps and coins from the Third Reich. One copy of *Mein Kampf* was for sale.

4. The Court also takes judicial notice that on October 24, 2001, a search on Yahoo.com of “Jewish conspiracy” produced 3,070 sites, the search “Protocols/10 Zion produced 3,560 sites, and the search “Holocaust/5 ‘did not happen,’” produced 821 sites. The search “National Socialist Party” led to a website of an organization promoting modern day Nazism.

Appendix D

Defendants immediately moved to dismiss on the basis that this Court lacks personal jurisdiction over them. That motion was denied.⁵ Defendants' request that the Court certify its jurisdictional determination for interlocutory appeal was denied without prejudice pending the outcome of Yahoo!'s motion for summary judgment.

II. OVERVIEW

As this Court and others have observed, the instant case presents novel and important issues arising from the global reach of the Internet. Indeed, the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary. Thus it is critical that the Court define at the outset what is and is not at stake in the present proceeding.

This case is *not* about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

5. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D.Cal. 2001).

Appendix D

Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here.⁶

What *is* at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or

6. In particular, there is no doubt that France may and will continue to ban the purchase and possession within its borders of Nazi and Third Reich related matter and to seek criminal sanctions against those who violate the law.

Appendix D

another U.S.-based Internet service provider, what principles should guide the court's analysis?

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

III. LEGAL STANDARDS

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Appendix D

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

IV. LEGAL ISSUES**A. Actual Controversy**

The Declaratory Judgment Act protects potential defendants from multiple actions by providing a means by which a court declares in one action the rights and obligations of the litigants. 28 U.S.C. § 2201. A declaratory judgment will not expand a federal court's jurisdiction, but if jurisdiction exists, litigants have earlier access to federal courts to spare potential defendants from the threat of impending litigation. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950); *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996). Declaratory judgment actions are justiciable only if there is an "actual controversy." 28 U.S.C. § 2201(a). The "actual controversy" requirement is analyzed in the same manner as the "case or controversy" standard under Article III of the United States Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 81 L. Ed. 617, 57 S. Ct. 461 (1937).

Appendix D

The threshold question in any declaratory action thus is whether “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941); *National Basketball Ass’n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 565 (9th Cir. 1987). The “mere possibility, even probability, that a person may in the future be adversely affected by official acts not yet threatened does not create an ‘actual controversy’ which is a prerequisite created by the clear language of the [Declaratory Judgment Act]. . . .” *Garcia v. Brownell*, 236 F.2d 356, 358 (9th Cir. 1956) *cert. denied*, 362 U.S. 963, 4 L. Ed. 2d 878, 80 S. Ct. 880 (1960). The party invoking federal jurisdiction bears the burden of showing that it faces an immediate or actual injury. *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 5 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008, 42 L. Ed. 2d 283, 95 S. Ct. 328 (1974).

1. Status of the French Order

Defendants contend that the “actual controversy” requirement is not met in the instant case. They point out that Yahoo! appealed the French Court’s initial order of May 22, 2000, and that a successful appeal would nullify the order of November 20, 2000 that “reaffirmed” the May 22 order. They argue that even if the May 22 order is upheld on appeal, the French court may find that Yahoo! has substantially complied with the order. Alternatively, they assert that they themselves may elect not to initiate the complex process the French Court would use to fix an actual

Appendix D

penalty, and that until that process is completed, there is no order that could be enforced against Yahoo! in the United States. Finally, Defendants offer declarations to the effect that they view Yahoo!'s revised policies with respect to its auction site and removal of *Protocol of the Elders of Zion* from its host sites as substantial compliance with the French order and that accordingly they have no present intention of taking legal action against Yahoo! in the United States.

While these points are facially appealing and suggest a way for the Court to avoid deciding the sensitive and controversial issues presented herein, the facts in the record do not support Defendants' position. First, there are no relevant appellate proceedings presently pending in France. In its order of November 20, 2000, the French Court determined that Yahoo! is technologically and legally capable of complying with the May 22 order and that Yahoo! is subject to a fine of approximately \$13,000 for each day of non-compliance. That order was not appealed, and the record indicates that Yahoo! withdrew its appeal of the May 22 order on May 28, 2001 (Supp. Dec. of Mary Catherine Wirth, Exhibit A, Aug. 19, 2001).

Second, the fact that any penalty against Yahoo! is provisional and would require further legal proceedings in France prior to any enforcement action in the United States does not mean that Yahoo! does not face a present and ongoing threat from the existing French order. At oral argument, Defendants did not dispute that if the penalty enforcement process were initiated, the French Court could assess penalties retroactively for the entire period of Yahoo!'s non-compliance. Despite their declarations to the effect that

Appendix D

they are satisfied with Yahoo!'s efforts to comply with the French order, Defendants have not taken steps available to them under French law to seek withdrawal of the order or to petition the French court to absolve Yahoo! from any penalty.⁷ See *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 945 (9th Cir. 1981) (“It is not relevant that Hunter attempted to withdraw its ‘threat’ after the filing of this lawsuit. We do think it relevant, in the light of the circumstances, that Hunter has not indicated that it will not sue SCAL for infringement or in any other manner agree to a non-adversary position with respect to the patent.”).

Third, it is by no means clear that Yahoo! can rely upon the assessment in Defendants’ declarations that it is in “substantial compliance” with the French order. The French Court has not made such a finding, nor have Defendants requested or stipulated that such a finding be made. As set forth earlier, Yahoo.com continues to offer at least some Third Reich memorabilia as well as *Mein Kampf* on its auction site and permits access to numerous web pages with Nazi-related and anti-Semitic content. The fact that the Yahoo! does not know whether its efforts to date have met the French Court’s mandate is the precise harm against which the Declaratory Judgment Act is designed to protect.

The Declaratory Judgment Act was designed to
relieve potential defendants from the Damoclean

7. The Court inquired at oral argument whether Defendants would be willing to take such steps in order to avoid the necessity of the present adjudication but has received no indication to date that they would.

Appendix D

threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never. The Act permits parties so situated to forestall the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate.

Japan Gas Lighter Ass'n. v. Ronson Corp., 257 F. Supp. 219, 237 (D. N.J.1966).

2. Real and Immediate Threat

The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948). The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992); *Simon & Schuster, Inc. f. Members of New York State Crime Victims Board*, 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991); *Boos v. Barry*, 485 U.S. 312, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988); *Police Dept. v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512,

Appendix D

79 S. Ct. 1362 (1959). In addition, the French Court’s mandate that Yahoo! “take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes” is far too general and imprecise to survive the strict scrutiny required by the First Amendment. The phrase, “and any other site or service that *may be construed* as an apology for Nazism or a contesting of Nazi crimes” fails to provide Yahoo! with a sufficiently definite warning as to what is proscribed. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971). Phrases such as “all necessary measures” and “render impossible” instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech. See *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987); *Gooding v. Wilson*, 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) *citing New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971).

Rather than argue directly that the French order somehow could be enforced in the United States in a manner consistent with the First Amendment,⁸ Defendants argue instead that at present there is no real or immediate threat to Yahoo!’s First

8. As is discussed below, Defendants do argue unpersuasively that further discovery might affect the First Amendment analysis.

Appendix D

Amendment rights because the French order cannot be enforced at all until after the cumbersome process of petitioning the French court to fix a penalty has been completed. They analogize this case to *Int'l Soc. for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 611 F. Supp. 315, 319-20 (C.D. Cal. 1984), in which the City of Los Angeles sought a declaratory judgment that a resolution limiting speech activities adopted by its Board of Airport Examiners was constitutional. The district court concluded that the action was unripe because the resolution could not take effect without ratification by the City Council, which had not yet occurred. The cases, however, are distinguishable. While Defendants present evidence that further procedural steps in France are required before an actual penalty can be fixed, there is no dispute that the French order is valid under French law and that the French Court may fix a penalty retroactive to the date of the order. The essence of the holding in the Krishna Consciousness case is that the subject resolution had no legal effect at all.

Defendants also claim that there is no real or immediate threat to Yahoo! because they do not presently intend to seek enforcement of the French order in the United States. In *Salvation Army v. Department of Community Affairs of the State of New Jersey*, 919 F.2d 183 (3rd Cir. 1990), a religious group that operated a family center for disadvantaged persons claimed a state statute regulating boarding houses violated its right to the free exercise of religion. After the group brought suit, the state authorities agreed outside of the judicial proceedings to exempt the group from some of the provisions. The district court then granted summary judgment and dismissed the action. On appeal, the group claimed it

Appendix D

still faced uncertainty with respect to future enforcement of the statute because the exemptions were not legally binding and the regulations in their entirety impermissibly intruded upon its First Amendment rights. The Court of Appeals for the Third Circuit agreed with the trial court that there was no immediate threat to the group because the state had provided an express assurance that it would not enforce any of the waived provisions, no criminal penalties could be imposed under the statute unless additional steps were taken by the state, the state could not impose fines without giving notice and opportunity to comply, and there was no evidence that the group's First Amendment rights actually would be affected by the threat of future law suits.

Salvation Army is distinguishable from this case in several significant respects. First, the New Jersey statute's penalties were "enforceable by the defendants only prospectively . . ." *Salvation Army*, 919 F.2d at 192. The French order permits *retroactive* penalties. Second, while the exemptions granted to the Salvation Army allowed it to maintain the status quo, the French order had the immediate effect of inducing Yahoo! to implement new restrictive policies on its auction site. Third, while the perceived threat to the Salvation Army was the potential withdrawal of the exemptions in the future, the provisions of the French order that require Yahoo! to regulate the content of its websites on Yahoo.com never have been waived, suspended or stayed and apparently remain in full force and effect. Under these circumstances, Defendants' assurances that they do not intend to enforce the order at the present time do not remove the threat that they may yet seek sanctions against Yahoo!'s

Appendix D

present and ongoing conduct⁹. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 154, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1969) (“There is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner’s rule they are quite clearly exposed to the imposition of strong sanctions.”); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993) (construing *Abbott Laboratories* to mean that if “promulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation,” the controversy is ripe).

3. Abstention.

Defendants next argue that this Court should abstain from deciding the instant case because Yahoo! simply is unhappy with the outcome of the French litigation and is trying to obtain a more favorable result here. Indeed, abstention is an appropriate remedy for international forum-shopping. In *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001), a California manufacturer was sued by a corporate customer in France for selling a defective product. The California company sought a declaratory judgment in the United States that its products

9. Again, it would appear that legal means are available to Defendants both in France and in this Court to eliminate such a threat, but as yet Defendants have not availed themselves of these procedures.

Appendix D

were not defective, that the French customer's misuse of the product caused the product to fail, and that if the California company was at fault, only limited legal remedies were available. The court concluded that the purpose of the action for declaratory relief was to avoid an unfavorable result in the French courts. It noted that the action was not filed until a year after the French proceedings began, that the French proceedings were still ongoing, and that the French defendants had no intent to sue in the United States. It concluded that the declaratory relief action clearly was "litigation involving the same parties and the same disputed transaction." *Id.*, at 1152.

In the present case, the French court has determined that Yahoo!'s auction site and website hostings on Yahoo.com violate French law. Nothing in Yahoo!'s suit for declaratory relief in this Court appears to be an attempt to relitigate or disturb the French court's application of French law or its orders with respect to Yahoo!'s conduct in France.¹⁰ Rather, the purpose of the present action is to determine whether a United States court may enforce the French order without running afoul of the First Amendment. The actions involve distinct legal issues, and as this Court concluded in its jurisdictional order, a United States court is best situated to determine the application of the United States Constitution

10. Arguably, Yahoo! does seek to relitigate the French court's factual determination that Yahoo! does possess the technology to comply with the French order. For the reasons discussed herein, the Court concludes that Yahoo!'s ability to comply with the order is immaterial to the question of whether enforcement of the order in the United States would be constitutional.

Appendix D

to the facts presented.¹¹ No basis for abstention has been established.

4. Comity

No legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. 28 U.S.C. § 1738. However, the United States Constitution and implementing legislation require that full faith and credit be given to judgments of sister states, territories, and possessions of the United States. U.S. CONST. art. IV, §§ 1, cl. 1; 28 U.S.C. § 1738. The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by “the comity of nations.” *Hilton v. Guyot*, 159 U.S. 113, 163, 40 L. Ed. 95, 16 S. Ct. 139 (1895). Comity “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” *Hilton*, 159 U.S. at 163-64 (1895). United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country’s interests. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) *cert. denied*, 405 U.S. 1017, 31 L. Ed. 2d 479, 92 S. Ct. 1294 (1972); *Laker Airways v. Sabena Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 931 (D.C. Cir. 1984) (“[The court] is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.”); *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 864 (D.C.

11. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 145 F. Supp. 2d 1168, 1179 (N.D.Cal. 2001).

Appendix D

Cir. 1981) (“Requirements for enforcement of a foreign judgment expressed in *Hilton* are that . . . the original claim not violate American public policy . . . that it not be repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”).

As discussed previously, the French order’s content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders. See, e.g., *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (declining to enforce British libel judgment because British libel standards “deprive the plaintiff of his constitutional rights”); *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup.Ct. 1992) (declining to enforce a British libel judgment because of its “chilling effect” on the First Amendment); see also, *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing a libel claim brought under English law because “establishment of a claim for libel under the British law of defamation would be antithetical to the First Amendment protection accorded to the defendants.”). The reason for limiting comity in this area is sound. “The protection to free

Appendix D

speech and the press embodied in [the First] amendment would be seriously jeopardized by the entry of foreign [] judgments granted pursuant to standards deemed appropriate in [another country] but considered antithetical to the protections afforded the press by the U.S. Constitution.” *Bachchan*, 585 N.Y.S.2d at 665. Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court’s obligation to uphold the First Amendment.¹²

B. Rule 56(f)

FED. R. CIV. P. 56(f) permits a court either to postpone determination of a motion for summary judgment or to deny such motion pending further discovery. A court may take such action when “it appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition.” FED. R. CIV. P. 56(f). To justify a continuance, the Rule 56(f) motion must demonstrate 1) why the movant needs additional discovery and 2) how the additional discovery likely will create a genuine issue of material fact. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993).

Defendants assert that further discovery may lead to the development of triable issues of fact concerning the extent

12. The Court expresses no opinion as to whether any such treaty or legislation would or could be constitutional.

Appendix D

to which Yahoo!'s modifications to its auction site have affected its potential liability under the French order and as to Yahoo!'s technological ability to comply with the order. Defendants contend that these issues are material because the law is unsettled as to whether the First Amendment protects speech originating within the United States that is expressly targeted at a foreign market. In *Desai v. Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989) *aff'd*, 954 F.2d 1408 (7th Cir. 1992), an author published a book in the United States about former Secretary of State Henry Kissinger. A former Indian government official who was mentioned in the book brought a defamation action in the United States, seeking to apply Indian law. Although it held that the First Amendment applied extraterritorially to publication of the book and therefore refused to apply Indian defamation law, it also commented that "for purposes of suits brought in United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution." *Id.*, 719 F. Supp. at 676.

Relying upon this dictum, Defendants suggest that discovery may produce additional evidence that would preclude summary judgment on First Amendment grounds. However, unlike the defendant in *Desai*, who claimed protection under the First Amendment for his extraterritorial conduct, Yahoo! seeks protection for its actions *in the United States*, specifically the ways in which it configures and operates its auction and Yahoo.com sites. Moreover, the French order requires Yahoo! not only to render it impossible for French citizens to access the proscribed content but also to interpret an impermissibly overbroad and vague definition of the content that is proscribed. If a hypothetical party were

Appendix D

physically present in France engaging in expression that was illegal in France but legal in the United States, it is unlikely that a United States court would or could question the applicability of French law to that party's conduct. However, an entirely different case would be presented if the French court ordered the party not to engage in the same expression in the United States on the basis that French citizens (along with anyone else in the world with the means to do so) later could read, hear or see it. While the advent of the Internet effectively has removed the physical and temporal elements of this hypothetical, the legal analysis is the same.

In light of the Court's conclusion that enforcement of the French order by a United States court would be inconsistent with the First Amendment, the factual question of whether Yahoo! possesses the technology to comply with the order is immaterial. Even assuming for purposes of the present motion that Yahoo! does possess such technology,¹³ compliance still would involve an impermissible restriction on speech. Accordingly, Defendants' motion pursuant to Rule 56(f) motion will be denied.

V. CONCLUSION

Yahoo! seeks a declaration from this Court that the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet. Yahoo! has shown that the French order is valid under the laws of France, that it may be enforced with

13. As noted earlier, the French court expressly found against Yahoo! as to this point in its order of November 20, 2000.

Appendix D

retroactive penalties, and that the ongoing possibility of its enforcement in the United States chills Yahoo!'s First Amendment rights. Yahoo! also has shown that an actual controversy exists and that the threat to its constitutional rights is real and immediate. Defendants have failed to show the existence of a genuine issue of material fact or to identify any such issue the existence of which could be shown through further discovery. Accordingly, the motion for summary judgment will be granted. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 11-7-01

JEREMY FOGEL
United States District Judge

**APPENDIX E — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SAN JOSE DIVISION
DENYING MOTION TO DISMISS
FILED JUNE 7, 2001**

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION**

Case Number 00-21275 JF

YAHOO! INC., a Delaware corporation,

Plaintiff,

v.

LA LIGUE CONTRE LE RACISME ET,
L' ANTISEMITISME, a French association, et al.,

Defendants.

June 7, 2001, Decided

June 7, 2001, Filed

JUDGES: JEREMY FOGEL, United States District Judge.

OPINION BY: JEREMY FOGEL

OPINION:

Appendix E

[Docket Nos. 13-15, 24-26, 32]

This case presents novel legal issues arising from the global nature of the Internet.¹ *See Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997) (describing the Internet as a unique and wholly new medium of worldwide human communication) (*internal citation omitted*). Defendants La Ligue Contre Le Racisme Et L’Antisemitisme (“LICRA”) and L’Union Des Etudiants Juifs De France (“UEJF”) have obtained a court order in France which requires Plaintiff Yahoo!, Inc. (“Yahoo!”) to “render impossible” access by persons in France to certain content on servers based in the United States. Yahoo! now seeks a declaration by this Court that the order of the French court is unenforceable in the United States because it contravenes the Constitution and laws of the United States. Defendants move for dismissal of this action on the ground that this Court lacks personal jurisdiction over them. *See Fed. R.Civ.P.* 12(b)(2). The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on Monday, April 9, 2001. For the reasons set forth below, the motion will be denied.

1. The “Internet” and “World Wide Web” are distinct entities, but for the sake of simplicity the Court will refer to them collectively as the “Internet.” Generally, the Internet is a decentralized networking system which links computers and computer networks around the world. The World Wide Web is a publishing forum consisting of millions of individual web sites which contain various forms of content (i.e., text, images, animation, etc.).

*Appendix E***I. BACKGROUND**

LICRA and UEJF are citizens of France. Yahoo! is a corporation organized under the laws of Delaware with its principal place of business in Santa Clara, California. Yahoo! is an Internet service provider which operates various Internet web sites and services which end-users can access at the Uniform Resource Locator (“URL”) “<http://www.yahoo.com>.” According to Yahoo!’s complaint, Yahoo! services ending in the suffix, “.com”, without an associated country code as a prefix or extension (collectively, “Yahoo!’s U.S. Services”), use the English language and target users who are residents of, utilize servers based in and operate under the laws of the United States. Yahoo! subsidiary corporations operate regional Yahoo! sites and services in twenty (20) other countries, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain. These regional web sites contain the host country’s unique two-letter code as either a prefix or a suffix in their URL (*e.g.*, Yahoo! France is found at <http://www.yahoo.fr> and Yahoo! Korea at <http://www.yahoo.kr>). Yahoo! alleges that all of its regional sites use the local region’s primary language, target the local citizenry, and operate under local laws.

Certain services provided by Yahoo! allow end-users to post materials on Yahoo! servers which then can be accessed by end-users at Yahoo!’s Internet sites. As relevant here, Yahoo! end-users are able to post, and have in fact posted, highly offensive matter, including Nazi-related propaganda and memorabilia, the display and sale of which are illegal in France. While Yahoo! avers that its French subsidiary sites do not permit such postings, Yahoo!’s U.S.-based site ending

Appendix E

in “.com” does not impose such a restriction because to do so might infringe upon the First Amendment to the United States Constitution. End-users in France are able to access Yahoo!’s U.S. services via the web site located at www.yahoo.com.

On or about April 5, 2000, LICRA sent a “cease and desist” letter to Yahoo!’s headquarters in Santa Clara, California, stating that “unless you cease presenting Nazi objects for sale [on the U.S. Auction Site] within 8 days, we shall size [sic] the competent jurisdiction to force your company to abide by [French] law.” Defendants then employed the United States Marshal’s Office to serve process on Yahoo! in California and filed civil complaints against Yahoo! in the Tribunal de Grande Instance de Paris (the “French Court”) for alleged violation of a French criminal statute barring the public display in France of Nazi-related “uniforms, insignia or emblems” (the “Nazi Symbols Act”). *See* Le Nouveau Code Penal Art. R.645-2. On May 22, 2000 the French Court issued an order (the “French Order”) directing Yahoo! to “take all necessary measures” to “dissuade and render impossible” any access via “yahoo.com” by Internet users in France to the Yahoo! Internet auction service displaying Nazi artifacts. (*See* Complaint, Exhibit A: Translated Copy of May 22 Order.) On November 20, 2000, the French Court “reaffirmed” its Order of May 22 and directed Yahoo!, *inter alia*, to 1) re-engineer its content servers in the United States and elsewhere to enable them to recognize French Internet Protocol (“IP”) addresses and block access to Nazi material by end-users assigned such IP addresses; 2) require end-users with “ambiguous” IP addresses to provide Yahoo! with a

Appendix E

declaration of nationality when they arrive at Yahoo!’s home page or when they initiate any search using the word “Nazi”; and 3) comply with the Order within three (3) months or face a penalty of 100,000 Francs (approximately U.S. \$ 13,300) for each day of non-compliance. The Court denied Defendants’ request to enforce its Order or impose any penalties directed at Yahoo! Inc. against Yahoo! France. Thereafter, Defendants again utilized the United States Marshal’s Office to serve Yahoo! in Santa Clara with the French Order.²

II. LEGAL STANDARD

Where no applicable federal statute indicates otherwise, a district court has personal jurisdiction over a nonresident defendant to the extent that the law of the forum state

2. Before addressing the jurisdictional issue presented by Defendants’ motion, the Court must consider whether this case presents a “case or controversy” which is ripe for adjudication. U.S. Const., Art. III. Although Defendants have not yet sought to enforce the French Order in the United States, the Court concludes that, as is discussed in more detail below, Yahoo! nonetheless faces immediate and ongoing consequences because of its refusal to comply with that Order. Without an expeditious means for determining whether the French Order is enforceable in the United States, Yahoo! must either comply with the Order or face the daily accumulation of penalties against it, subject to an uncertain legal outcome if and when Defendants take steps to enforce the Order in the United States. The coercive effect of such a situation is self-evident; this would appear to be a classic example of a situation in which declaratory relief would clarify the present and ongoing rights and obligations of the parties. Accordingly, the Court concludes that this case is ripe for adjudication.

Appendix E

constitutionally provides. *See Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). California law permits courts to exercise jurisdiction to the full extent authorized by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See* Cal. Civ. Proc. Code § 410.10; *Data Disc*, 557 F.2d at 1286 n.3. The Due Process Clause, in turn, has been interpreted to authorize the exercise of personal jurisdiction over a nonresident defendant if that defendant has “minimum contacts” with the forum state such that maintenance of the suit “does not offend ‘traditional notions of fair play and substantial justice.’” *See International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (*citation omitted*); *see also Data Disc*, 557 F.2d at 1287.

Personal jurisdiction over a nonresident of the forum state can be either “general” or “specific.” If the nonresident defendant’s contacts with the forum state are “substantial” or “continuous and systematic,” the defendant is subject to “general jurisdiction” in the forum state even if the cause of action is unrelated to the defendant’s activities within the state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984); *Data Disc*, 557 F.2d at 1287. Where the defendant’s activities within the forum are not so pervasive as to subject it to general jurisdiction, the defendant still may be subject to specific jurisdiction depending upon the *nature* and *quality* of its contacts in relation to the cause of action. *See Data Disc*, 557 F.2d at 1287 (*emphasis added*). The Court of Appeals for the Ninth Circuit applies a three-part test to determine whether a court may exercise specific jurisdiction: 1) the nonresident defendant must do some act or

Appendix E

consummate some transaction within the forum or perform some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws; 2) the claim must be one which arises out of or results from the defendant's forum-related activities; and 3) the exercise of jurisdiction must be reasonable. *See Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997).

When a nonresident defendant raises a challenge to personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction is proper. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986). In the context of a motion to dismiss based upon pleadings and affidavits, the plaintiff may meet this burden by making a *prima facie* showing of personal jurisdiction. *See Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990); *Data Disc*, 557 F.2d at 1285. In determining whether the plaintiff has made a *prima facie* showing, any doubt is resolved in the plaintiff's favor. *See Metropolitan Life*, 912 F.2d at 1064 n.1.

III. DISCUSSION

Yahoo! appropriately does not argue that this Court has general jurisdiction over Defendants, as Defendants clearly do not have substantial, continuous or systematic contacts with California. The Court therefore turns to the question of whether it has specific jurisdiction over Defendants.

*Appendix E***A. Purposeful Availment**

The purposeful availment requirement is intended to give notice to a nonresident that it is subject to suit in the forum state, thereby protecting it from being haled into local courts solely as the result of “random, fortuitous or attenuated” contacts over which it had no control. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). Yahoo! asserts that Defendants’ conduct meets this requirement under the “effects test” articulated by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984) (establishing an “effects test” for intentional action aimed at the forum state). “Under *Calder* personal jurisdiction can be based upon: ‘(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.’” *Panavision*, 141 F.3d at 1321 (quoting, *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). The Court of Appeals for the Ninth Circuit recently elaborated on this “effects” standard, holding that in order to satisfy the effects test a plaintiff must allege that the nonresident defendant “engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” See *Bancroft & Masters*, 223 F.3d at 1087 (establishing “express aiming” requirement under effects test).

This Court concludes that Yahoo! has made a sufficient prima facie showing of purposeful availment under the effects

Appendix E

test. Yahoo! alleges that Defendants knowingly have engaged in actions intentionally targeted at its Santa Clara headquarters for the express purpose of causing the consequences of such actions to be felt in California, including 1) LICRA's "cease and desist" letter to Yahoo!'s Santa Clara headquarters; 2) Defendants' request of the French Court that Yahoo! be required to perform specific physical acts in Santa Clara (*e.g.*, re-engineering of its Santa Clara-based servers); and 3) Defendants' utilization of United States Marshals to effect service of process on Yahoo! in California. Yahoo! further alleges that the conscious intent of these actions was to compel it to censor "constitutionally protected content on its U.S.-based Internet services." *See, e.g., Bancroft & Masters*, 223 F.3d 1082; *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987) (California attorney misrepresented facts in obtaining ex parte child custody order from California court, which the attorney then caused to be enforced in Idaho; having "purposefully directed" the effect in Idaho, the California attorney was subject to suit there for abuse of process although he never entered state).

Defendants correctly point out that in every Ninth Circuit decision to date in which the effects test has been applied, the plaintiff's cause of action has been akin to a tort claim or the defendant's alleged conduct has been tortious in nature. *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1074 (9th Cir. 2001) (applying effects test where plaintiff filed action for alleged violation of the Fair Credit Reporting Act—but indicating that the particular theory therein was "akin to invasion of privacy cases under state law-cases . . ."); *Bancroft & Masters*, 223 F.3d at 1089 (applied effects test where plaintiff sought declaratory judgment of non-dilution

Appendix E

and non-infringement of mark; however, concurring opinion, joined by two out of three panel judges, clarified that they imposed jurisdiction only on the assumption that the nonresident defendant, through its letter to plaintiff, “engaged in tortious conduct, *i.e.*, that they intended to effect a conversion of . . . [plaintiff’s] domain name.”); *Panavision*, 141 F.3d at 1321 (noting that “in tort cases” jurisdiction can attach under the effects test and therefore applicable therein because plaintiff’s state and federal trademark dilution claims are “akin to a tort case.”); *Cybersell*, 130 F.3d at 419 (refusing to apply effects test and indicating that effects test was “with respect to intentional torts directed to plaintiff”); *Ziegler v. Indian River County*, 64 F.3d 470, 473-474 (9th Cir. 1995) (application of purposeful availment prong differs depending on whether the underlying claim is a tort or contract claim; § 1983 claim more akin to tort claim and thus apply effects test); *Caruth v. International Psychoanalytical Ass’n*, 59 F.3d 126, 128, n.1 (9th Cir. 1995) (apply effects test to discrimination claims because the “facts alleged in [plaintiff] Caruth’s complaint sound in tort[.]”); *Lake*, 817 F.2d 1416 (apply effects test where ex-husband brought tort action against ex-wife and her attorney based upon conduct involved in having child removed from ex-husband’s custody).³

3. Yahoo! appropriately points out that in several of the aforementioned cases, as in the instant action, the plaintiffs asserted claims for declaratory relief. However, even in such cases the court generally has concluded or assumed that the underlying allegations sounded in tort. *See, e.g., Bancroft & Masters*, 223 F.3d at 1089; *Panavision*, 141 F.3d at 1321 (concluding that dilution of trademark claim was akin to a tort case); *but see, Meade Instruments Corp. v. Reddwarf Starware LLC*, 1998 U.S. Dist. LEXIS 9041, 47 U.S.P.Q.2D (BNA) 1157 (C.D. Cal. 1998) (concluding that defendant’s act of sending cease in desist letters to plaintiff was sufficient contact with California without explicitly concluding that the underlying claim sounded in tort).

Appendix E

Defendants therefore argue that the Court may not apply the effects test in this case absent allegations of tortious conduct. *See Bancroft & Masters*, 223 F.3d at 1087 (noting that personal jurisdiction issue can be challenged again “if following the development of trial it should appear that Augusta National [who challenged personal jurisdiction] acted reasonably and in good faith to protect its trademark against an infringer.”) (*concurring opinion*); *Panavision*, 141 F.3d at 1321; *Ziegler*, 64 F.3d at 473.

This Court concludes, however, that the application of the effects test in the present case is fully consistent not only with the rationale of the test but also with traditional principles of personal jurisdiction and international law.⁴ While filing a lawsuit in a foreign jurisdiction may be entirely proper under the laws of that jurisdiction, such an act nonetheless may be “wrongful” from the standpoint of a court in the United States if its primary purpose or intended effect is to deprive a United States resident of its constitutional rights. Several of the cases discussing the purposeful

4. The Court could direct Yahoo! to amend its complaint so as to allege tort claims, *see Caruth*, 59 F.3d at 128 n.1 (applying effects test even though complaint only asserted discrimination claims because “alleged facts . . . could possibly give rise to several tort claims . . .”), but such an approach would be disingenuous. Even though Yahoo! does not allege *per se* that Defendants engaged in tortious conduct, the values which underlie both the effects test and due process clause in general support a finding of personal jurisdiction here. That the fact pattern in this case is novel is simply a reflection of the many new challenges faced by courts which must apply traditional principles to the realities of cyberspace. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (Summer 1996).

Appendix E

availment have focused less on the characterization of the plaintiff's cause of action than on whether the defendant's forum-related acts evidenced intentional, or at the very least knowing, targeting of a forum resident(s). *See, e.g., Burger King Corp.*, 471 U.S. at 472-477; *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 109-113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (*plurality opinion*); *Bancroft & Masters*, 223 F.3d at 1087. Proper application of the test thus appears to require consideration not only of the nature of the defendant's conduct (i.e., whether conduct is wrongful or tortious) but also of whether there is "express aiming" of the conduct, i.e., targeting of a forum resident. *See, e.g., Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1196 (9th Cir. 1988); *Panavision*, 141 F.3d at 1321-1322; *Bancroft & Masters*, 223 F.3d at 1087. The focus on evidence of "express aiming" reflects the basic rationale of the effects test in that it assures that a defendant is on notice that it may be subject to suit in the forum state with respect to its forum-related or targeted activities. *See Burger King Corp.*, 471 U.S. at 472. In the present case, Yahoo! has alleged with particularity that Defendants "purposefully targeted" its Santa Clara headquarters and thus reasonably could have expected to be haled into a California forum in order to defend the Order they obtained from the French Court.⁵

5. Obviously, Defendants also reasonably could have expected to have to appear in a United States court in order to *enforce* the French Order. In this instance, Yahoo!'s declaratory relief action merely reverses the position of the parties while addressing the same issues which would arise were Defendants to bring such an enforcement action.

Appendix E

The Court is especially mindful that “great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.” *Asahi Metal*, 480 U.S. at 115 (quoting *United States v. First National City Bank*, 379 U.S. 378, 404, 13 L. Ed. 2d 365, 85 S. Ct. 528 (1965) (*Harlan, J., dissenting*)). Accordingly, the Court looks to the Restatement (Third) of Foreign Relations Law § 101 et al. (1987) (“Restatement”), which articulates the limitations imposed by international law upon courts determining whether or not to exercise personal jurisdiction over a foreign defendant. Although the Restatement is not binding authority, it does provide valuable guidance. Adopting in essence a broad version of the effects test, the Restatement concludes that a court may exercise jurisdiction over a person “if at the time jurisdiction is asserted . . . the person, whether natural or judicial, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect to such activity.” Restatement (Third) of Foreign Relations Law § 421(2)(j); see also *id.*, §§ 402(c), 403(2)(a). See, *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340-1344 (2nd Cir. 1972) (applying effects test in international context); *Eskofot A/S v. E.I. Du Pont De Nemours & Company*, 872 F. Supp. 81, 87-88 (S.D. N.Y. 1995) (“personal jurisdiction may be asserted by courts where a foreign corporation, through an act performed elsewhere, causes an effect in the United States.”); *United States v. International Brotherhood of Teamsters, et al.*, 945 F. Supp. 609, 620 (S.D. N.Y. 1996) (noting that it “is an elementary principle of international law that a court may exercise jurisdiction over a person” under the effects test) (citing Restatement § 421(2)(j) and Restatement (Second) of

Appendix E

Conflict of Laws § 50 (1971)); *United States v. International Brotherhood of Teamsters*, 72 F. Supp. 2d 257, 262 (S.D. N.Y. 1999) (same); Teresa Schiller and Stephan Wilske, *International Jurisdiction in Cyberspace: Which States May Regulate The Internet?*, 50 Fed. Comm L.J. 117 (Dec. 1997) (noting that while controversies may arise where the conduct was lawful where carried out the effects test “as a basis for jurisdiction . . . is increasingly accepted.”).

B. Arising Out Of

The second element of a specific jurisdiction analysis is a determination as to whether the plaintiff’s claims arise out of the defendant’s forum-related conduct. As to this element, the Court of Appeals for the Ninth Circuit employs a “but for” test. *See Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). Accordingly, in the present case Yahoo! must demonstrate that it would have no need for a judicial declaration but for Defendants’ forum-related activities. *See Bancroft & Masters*, 223 F.3d at 1088. This requirement is easily met. But for Defendants’ filing and prosecution of the French lawsuit, which in turn was obtained by Defendants’ use of formal process in California, Yahoo! would have no need for a declaration that the French Order is unenforceable in the United States. *See, e.g., Lake*, 817 F.2d at 1423 (“the alleged injury to the [plaintiff] arose out of [the defendant-lawyer’s] acts in procuring the ex parte order”); *Panavision*, 141 F.3d at 1322 (defendant’s “registration of Panavision’s trademarks as his own domain names on the Internet had the effect of injuring Panavision in California . . . But for . . . [defendant’s] conduct, this injury would not have occurred.”); *Bancroft & Masters*, 223 F.3d

Appendix E

at 1088 (“But for the letter to NSI, which . . . forced [plaintiff] to choose between this suit and losing the use of its website, it is clear that [plaintiff] would have no need for a judicial declaration of its right to use masters.com”).

C. Reasonableness

The final requirement for specific jurisdiction is that the exercise of jurisdiction be reasonable. For the exercise of jurisdiction to be reasonable it must comport with fair play and substantial justice. *Burger King*, 471 U.S. at 476; *Bancroft & Masters*, 223 F.3d at 1088. When purposeful availment has been established, Defendants have the burden of demonstrating a “compelling case” of unreasonableness. *Bancroft & Masters*, 223 F.3d at 1088. “The reasonableness determination requires the consideration of several specific factors: (1) the extent of the defendant’s purposeful interjection into the forum state; (2) the burden on the defendant in defending in the forum; (3) the extent of the conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum.” *Id.* No one factor is dispositive as the Court must balance all seven. *Panavision*, 141 F.3d at 1322.

1. Purposeful Interjection

“Even if there is sufficient ‘interjection’ into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall

Appendix E

reasonableness of jurisdiction under the reasonableness prong.” *Panavision*, 141 F.3d at 1323 (citations omitted). Here, Defendants’ acts were aimed at Yahoo! in California. Defendants purposefully accessed Yahoo!’s U.S.-based web site, mailed a demand letter to Yahoo! in Santa Clara, used U.S. Marshals to serve Yahoo! in Santa Clara, and purposefully sought and obtained an order requiring Yahoo! to reconfigure its U.S.-based servers, specifically including servers located in California. The purposeful interjection factor thus weighs in favor of this Court’s exercise of personal jurisdiction.

2. Defendants’ Burden in Litigating

“A defendant’s burden in litigating in the forum is a factor in the assessment of reasonableness, but unless the inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.” *Id.* (citations omitted). The Court recognizes that the burden on Defendants as non-profit organizations organized in France of litigating in California is not trivial. However, it does not appear that requiring Defendants to litigate this particular case in California is constitutionally unreasonable. *See id.* (“in this era of fax machines an discount air travel requiring [defendant] . . . to litigate in California is not constitutionally unreasonable.”) (citations omitted). Defendants may confer with their counsel by telephone, fax, and e-mail, and under this Court’s Local Rules may even make telephonic court appearances. Further, it is likely that this case will be resolved largely if not entirely by dispositive motions addressing issues of law which do not require extensive fact discovery in this forum. Defendants

Appendix E

have made no factual showing as to the severity of their burden other than making a generalized reference to the financial expense of participating in litigation in a foreign country and noting correctly that the jurisdictional barrier is higher when the defendant is not a resident of the United States. *See Sinatra*, 854 F.2d at 1199 (“However, modern advances in communications and transportation have significantly reduced the burden on litigating in another country.”); *Walker & Zanger Ltd. v. Stone Design S.A.*, 4 F. Supp. 2d 931, 940 (C.D.Cal. 1997) (“defendants have not asserted any hardship beyond the expense of participating in litigation in a foreign country”). Defendants have not demonstrated that the burden of litigating the instant case will be so great as to constitute a deprivation of due process.

3. Conflict With Sovereignty of France

Generally, as just noted, a plaintiff seeking to hale a foreign defendant into court in the United States must meet a “higher jurisdictional threshold” than is required when a defendant is United States resident. *See Core-Vent Corp.*, 11 F.3d at 1484. However, since sovereignty concerns inevitably arise whenever a United States court exercises jurisdiction over a foreign national, this factor is “by no means controlling,” *Ballard*, 65 F.3d at 1501; otherwise “it would always prevent suit against a foreign national in a United States court.” *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984). The instant action involves only the limited question of whether this Court should recognize and enforce a French Order which requires Yahoo! to censor its U.S.-based services to conform to French penal law. While this Court must and does accord great respect and deference

Appendix E

to France's sovereign interest in enforcing the orders and judgments of its courts, this interest must be weighed against the United States' own sovereign interest in protecting the constitutional and statutory rights of its residents. *See, e.g., Bachchan v. India Abroad Publications Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661, 665 (1992) (English libel judgment unenforceable because it was "antithetical to the protections afforded the press by the U.S. Constitution"); *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (granting summary judgment in favor of plaintiff seeking declaration that English libel judgment was not enforceable in U.S. because the judgment "contrary to U.S. libel standards"); Cal.Civ.Proc. Code § 1713.4(b)(3) (court need not recognize foreign money judgment based on cause of action repugnant to public policy of state). For purposes of its jurisdictional analysis, this Court concludes that the sovereignty factor weighs in favor of this Court's exercise of personal jurisdiction.⁶

4. California's Interest in Adjudicating the Dispute

California has an interest in providing effective legal redress for its residents. *See Core-Vent*, 11 F.3d at 1489; *Sinatra*, 854 F.2d at 1200; *Gordy v. Daily News*, 95 F.3d 829, 836 (9th Cir. 1996). This interest appears to be particularly strong in this case in light of Yahoo!'s claim that its fundamental right to free expression has been and will be affected by Defendants' forum-related activities. *See, e.g., Cal.Civ.Proc.Code* § 425.16 (providing procedural

6. Because Yahoo! is seeking equitable relief, this determination is without prejudice to Defendants' right to raise issues related to sovereignty and international comity as an equitable factor in subsequent proceedings herein.

Appendix E

mechanism to dismiss at an early stage lawsuits that “chill the valid exercise the constitutional right[] of freedom of speech”). As noted earlier, Defendants argue that Yahoo! has suffered no actual injury because they have not sought to enforce the French Order in the U.S. and may never seek to do so. Defendants’ proposed “wait and see” approach, however, only highlights the importance of California’s policy interest in providing a means for obtaining declaratory relief under circumstances such as those presented here. Many nations, including France, limit freedom of expression on the Internet based upon their respective legal, cultural or political standards. Yet because of the global nature of the Internet, virtually any public web site can be accessed by end-users anywhere in the world, and in theory any provider of Internet content could be subject to legal action in countries which find certain content offensive.⁷ Defendants’ approach would force the provider to wait indefinitely for a determination of its legal rights, effectively causing many to accept potentially unconstitutional restrictions on their content rather than face prolonged legal uncertainty. California’s interest in adjudicating this dispute thus weighs strongly in favor of the exercise of personal jurisdiction.

7. Indeed, there can be little doubt that most people in the United States, including this Court, find the display and sale of Nazi propaganda and memorabilia profoundly offensive. However, while this fact may cause one to sympathize with Defendants’ efforts before the French Court, it is immaterial to this Court’s jurisdictional determination. As Yahoo! and others have pointed out, a content restriction imposed upon an Internet service provider by a foreign court just as easily could prohibit promotion of democracy, gender equality, a particular religion or other viewpoints which have strong support in the United States but are viewed as offensive or inappropriate elsewhere.

*Appendix E**5. Efficient Resolution*

This factor focuses on the location of the evidence and the witnesses. “It is no longer weighed heavily given the modern advances in communication and transportation.” *Panavision*, 141 F.3d at 1323. In any event, this factor appears to be neutral in light of the limited amount of evidence and small number of potential witnesses in the present action. *See id.*

6. Convenient and Effective Relief for Plaintiff

This factor focuses on the importance of the forum to the plaintiff’s interest in convenient and effective relief. Yahoo! contends that only a United States court has jurisdiction to adjudicate the question of whether the French Order is enforceable in the United States. Defendants contend that Yahoo! could have challenged the Order’s validity, scope and extraterritorial application in France. The Court concludes that even if it were to assume that Yahoo! could challenge the extraterritorial application of the French Order in either jurisdiction or in both, it would hold that this Court is the more efficient and effective forum in which to resolve the narrow legal issue in question: whether the French Order is enforceable in the United States in light of the Constitution and laws of the United States. *See, e.g., Gates*, 743 F.2d at 1334 (“district court in Arizona is more efficient forum to resolve . . . interpretations of Arizona law” than Philippines court). Accordingly, this factor weighs in favor of exercising jurisdiction.

*Appendix E**7. Alternative Forum*

The analysis of this factor is identical to that of the previous one. While the parties disagree as to whether the French Court offers an alternative forum for determining whether the French Order is enforceable in the United States, the point is moot in light of the superiority of a United States forum for addressing the limited legal question at issue here.

8. Balancing of Factors

It is clear from the foregoing discussion that the balance of factors weighs in favor of this Court's exercise of personal jurisdiction over Defendants. The Court concludes that Defendants have failed to make the "compelling case" necessary to rebut the presumption that jurisdiction is reasonable.

IV. DISPOSITION

Accordingly, and good cause therefore appearing, the motion to dismiss is denied. Defendants shall answer the complaint within twenty (20) days of the date this Order is filed.

IT IS SO ORDERED.

DATED: 6/7/01

JEREMY FOGEL
United States District Judge

209a

**APPENDIX F — INTERIM COURT ORDER
MADE ON NOVEMBER 20, 2000**

THE COUNTY COURT OF PARIS

**INTERIM COURT ORDER
made on 20th November 2000**

N° RG:
00/05308

N°: 1/k1

by Jean-Jacques GOMEZ, First Deputy Justice Presiding in the County Court of Paris, hearing a summary proceeding in public by delegation of the Chief Presiding Justice of the Court.

assisted by Nicole VOURIOT, Clerk to the Court.

PLAINTIFFS

The **LEAGUE AGAINST RACISM AND ANTISEMITISM**
- **LICRA**, represented by its President Mr. Patrick GAUBERT
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represented by counsel Marc LEVY, Member of the PARIS
Bar - P0119

The **FRENCH UNION OF JEWISH STUDENTS**, acting
through its President Mr. Ygal Le HARRAR
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210a

Appendix F

represented by counsel Stephane LILTI, member of the PARIS
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VOLUNTARY PARTICIPANT

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represented by counsel Didier SEBAN, member of the PARIS
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Appendix F

IN THE PRESENCE OF

The PUBLIC PROSECUTOR

Palais de Justice de Paris
4 Boulevard du Palais
75001 PARIS

represented by Mr. Pierre DILLANGE, First Deputy
Prosecutor.

We, the Presiding Justice,

Considering our order of 22nd May 2000, to which reference
shall expressly be made and wherein we ordered:

1/ YAHOO Inc.: to take all measures of the type that
dissuades and blocks any access on yahoo.com to the auction
service for Nazi merchandise as well as to any other site or
service that may be construed as an apology for Nazism or a
dispute over the reality of Nazi crimes;

2/ YAHOO France: to issue to all Internet surfers, even
before use is made of the link enabling them to proceed with
searches on yahoo.com, a warning informing them of the
risks involved in continuing to view such sites;

3/ continuance of the proceeding in order to allow YAHOO
Inc. to submit for hearing by all interested parties the
measures that it proposes to take that cease causing harm
and damage and to prevent any further harm;

Appendix F

Considering our order of 11th August 2000, to which reference shall be made insofar as it sets out the facts of the case as well as the arguments and claims of the parties.

Considering the submissions made by LICRA, UEJF and MRAP and reiterated at the hearing of 6th November 2000 in pursuit of their case as already set forth in our previous order;

Considering the submissions in defence presented both by Yahoo France and by Yahoo Inc. in pursuit of their case as set forth in our previous order:

Considering the report by the consultants WALLON - VINTON CERF - LAURIE;

Considering the memoranda submitted under private consideration, to which reference is expressly made;

Having heard the oral submissions made by the Public Prosecutor;

Considering the documents produced;

Having received the expert witness statement by Mr. Vinton CERF, who is not registered on the list of court-registered experts, and by Mr. NORER, who is a court-registered expert but acting in this instance in the capacity of English interpreter alongside Ms. KINDER, a court-registered expert in this speciality;

Appendix F

On the complaint against YAHOO Inc.

Whereas in the opinion of the company YAHOO Inc.:

- this court lacks jurisdiction to make a ruling in this dispute;
- there are no reasonable technical means capable of satisfying the terms of the order of 22nd May 2000;
- on the assumption that such means existed, their implementation would entail high costs for the company, might even place the company in jeopardy and would compromise to certain extent the existence of the Internet, as a space of liberty, and scarcely receptive to attempts to control and restrict access;

Whereas in support of its jurisdictional plea, reiterated for the third time, the company YAHOO points out that:

- its services are directed essentially at Internet users located in the United States of America;
- its servers are installed in the same territory [the US];
- a coercive measure instituted against it could have no application in the United States because it would violate the First Amendment of the United States Constitution, which guarantees freedom of opinion and expression to every citizen;

Appendix F

Whereas it is true that the “Yahoo Auctions” site is in general directed principally at Internet users based in the United States having regard specifically to the type of items offered for sale, the anticipated methods of payment, the terms of delivery, the language and the currency used, it is no different for auction objects representing symbols of Nazi ideology which may be of interest and are accessible to any person wishing to participate in such activities, including French people;

Whereas, furthermore, and as already ruled, the simple act of displaying such objects in France constitutes a violation of Article R645-1 of the Penal Code and therefore a harm to internal public order;

Whereas, in addition, this display clearly causes damage in France to the plaintiff associations who are justified in demanding the cessation and remedy thereof;

Whereas YAHOO is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in French;

Whereas a sufficient nexus with France is thus established in this case to provide this Court with jurisdiction to rule in this matter;

Whereas any possible difficulties in enforcing our decision in the United States, as argued by YAHOO Inc., cannot by themselves be a basis to deny this Court’s jurisdiction;

Whereas this plea will therefore be rejected;

Appendix F

Whereas, on the argument developed by YAHOO and based on the impossibility of implementing technical measures capable of satisfying the terms of the order of 22nd May 2000, it is necessary cite in the first instance the findings of the panel of consultants contained in pages 62 to 76 of their report:

“Opinion of the consultants*Preamble*

The undersigned consultants are at pains to point out that their brief is limited to answering the technical questions put by the Court. In no circumstances may their answers be construed as constituting a technical or moral backing of the decisions of the court or, on the contrary, a criticism of these decisions.

The context

An order was made on 22nd May 2000 against the companies YAHOO! France and YAHOO! Inc. by the County Court of Paris in the following terms:

We order the company YAHOO! Inc. to take all measures of the type that dissuade and block any access on Yahoo.com to the auction service for Nazi objects and to any other site or service that may be construed as constituting an apology for Nazism or dispute over the reality of Nazi crimes;

Appendix F

We order the company YAHOO FRANCE to warn any Internet user visiting Yahoo.fr, even before linking to searches on Yahoo.com, that if the result of any search, initiated either through categories or by means of keywords, causes the Internet user to reach sites, pages or forums of which the title and, or content constitutes a violation of French law, as is the viewing of sites making an apology for Nazism and/or displaying uniforms, insignia or emblems resembling those worn or displayed by the Nazis, or offering for sale objects or works whose sale is strictly prohibited in France, the Internet user must cease viewing the particular site or be subject to the penalties provided in French law or legal action.”

YAHOO! France declared that it had complied with this decision. YAHOO! Inc. pointed out that there was no technical solution which would enable it to comply fully with the terms of the court order.

A panel of experts was then designated to enlighten the Court on the various technical solutions that could be implemented by YAHOO! Inc. in order to comply with the order of 22nd May.

*Appendix F**Internet*

The Internet is a combination of several hundred million computer networks and associated sites which are interconnected throughout the world. The routers are computers dedicated to the interconnection of these networks. The number of computers using the Internet at any one time is estimated at one hundred million, and three times more if one includes portable computers, office computers, organisers, mobile telephones, etc. . .

A set of procedures was defined in the period between 1973 and 1980 under the control of the US defence research laboratories (DARPA). These procedures, referred to as TCP/IP, are the core of several hundred protocols used by the Internet.

In the late 80's, CERN developed the World Wide Web (WWW) which uses a set of complementary procedures - the HTTP protocols and HTML language - to set up this global information-sharing system.

The commonest applications include electronic mail (email), forums (newsgroups), dialogue services (chat), auction services, online telephony, video and audio, together with many other services.

It is a common misconception that all Internet services are provided via the World Wide Web. In reality, the Web is only one facet of the Internet.

Appendix F

The Internet, which started out as an experimental project used and developed by computer researchers, has become a global business enterprise within the space of ten years. Internet service providers (ISPs) have established and operate networks open to the general public. Private networks in universities, companies, and even home computers are now interconnected by internet services providers to form a truly global network. Some service providers specialised in providing access to users of the public switched telephone network. Other specialised in providing access to users of cable television, digital users (ISDN), users of ADSL services, local loop, etc. . . These providers are generally referred to as Internet Access Providers. They also offer various portal services, email, information services, etc. . .

Each unit connected to the Internet has to have an IP address. Initially, certain organisations obtained sets of addresses from MANA. These sets were divided into sub-sets for allocation to their customers. These addresses could be fixed for permanently connected units or temporary for dial-up users connecting via the switched telephone network or for mobile units (portable computers). These addresses are composed of 32 bits in a two-part structure: the network part and the individual part. The boundaries between these two parts are variable depending on the class of the addresses. WAP telephones do not each have an IP address. The WAP protocol uses a gateway to convert the WAP address into an IP address and vice versa.

IP addresses are represented by four series of bytes converted into decimal numbers in the range 0 to 255.

Appendix F

This representation is not very convenient to use and a system was devised to associate a name with an address. These names, each of which corresponds to an address, are referred to as domain names. Conversion of domain names into their numerical IT addresses is performed by an array of databases distributed across the Internet (DNS). These DNS servers operate on the basis of a tree structure and are specialised according to the nature of the services offered (.COM, .ORG, .EDU, .GOV, etc. . .) and according to country (FR, .UK, .SF, etc. . .).

However, it is necessary to understand that there is no hard and fast correspondence between the country appearing in the domain name and the numerical IP address. For example, *www.yahoo.fr* does not correspond to an IP address of a French network.

Therefore, the domain name extension cannot be used to determine which network a numerical IP address belongs to.

However, the IP address allocation originally made by MANA, and subsequently by ICANN, to Internet Service Providers (ISPs) follows a tree structure, for example, from the main network, to the sub-network, to the access provider, and finally to the local user.

It is possible to work backwards from a given IP address to the access provider, to the sub-network, to the main network.

This being so, certain organisations and certain providers maintain databases which are used to determine the identity of a network, sub-network, router or site from its IP address.

Appendix F

The DNS system gives access providers, sites, etc. . . the ability to associate their reference address with their geographical location in the form of latitude and longitude coordinates. This is not an obligatory requirement.

The ability to use information about the geographical location of IP address holders is extremely useful, however, not only for the purposes of targeted advertising but also in order to ensure harmonious development of the Web.

Several providers have technology and databases capable of identifying the geographical location of fixed addresses or even of dynamically allocated addresses. A number of these made submissions to the panel of experts to the effect that they had at their disposal the technical means to enable YAHOO! to fulfil the obligations placed upon it by the Court.

The problem

In order to satisfy the terms of the court order requiring it to prevent access to auction services for Nazi objects, YAHOO! has to:

- 1) know the geographical origin and nationality of surfers wishing to access its auctions site
- 2) prevent French surfers or surfers connecting from French territory from perusing the description of Nazi objects posted for auction, and even more importantly to prevent them from bidding.

*Appendix F**On geographical origin and nationality**General case*

In order for a website to be viewed by members of the public, it is necessary for a user workstation (PC or other) to be linked to a destination site.

This operation involves the participation of various categories of intermediaries: the access provider, routers, one more destination sites.

It may be useful to recall at this point that the user's workstation, access provider, routers and destination sites are all identified on the network by an address which conforms to the Internet Protocol (IP) standard.

Whereas the IP addresses of the sites operated by the access providers, routers and destination sites are fixed, in the sense that there is a permanent reciprocal link between the IP address and its holder, this does not apply to the address allocated to the user's workstation. This address is allocated dynamically, on a non-permanent basis, by the access provider at the time of connection.

However, access providers are only able to assign the IP addresses which have been allocated to them by the Internet authorities. These addresses follow a tree structure as mentioned above. A surfer's PC receives an IP address allocated to an access provider who belongs to a sub-network which belongs to a network.

Appendix F

The panel of experts consulted the AFA, the French association of access and internet service providers, to find out the proportion of internet connections made by access providers who do not assign IP addresses capable of being identified as French.

The answer was 20.57% at 30th September 2000.

The panel also asked the AFA to what extent were its members representative of access providers operating in French territory.

The answer, according to a Mediametrie survey carried out in March 2000, was that “87% of surfers connecting from their home use access providers who are AFA members”.

It may be added that, given the level of telephone charges involved, French surfers for the most part use the services of access providers present in their country.

It may therefore be estimated that 70% of the IP addresses assigned to French surfers can be matched with certainty to a service provider located in France, and can be filtered.

Further, it is this fact that enables YAHOO Inc. to display French advertising banners in French on its auctions site.

Appendix B to this report illustrates the connection pathway from a surfer to the destination site via the access provider Club-Internet (Grolier) using the PING and WHOIS functions of the Internet.

*Appendix F**The exceptions*

There are numerous exceptions.

A large number of these, in the order of 20%, stem from the multinational character of the access provider or from the fact that they use the services of an international ISP or a private communications network.

The case of AOL is significant in this regard. AOL uses the services of the UUNET network. The dynamic IP addresses assigned by AOL appear as being located in Virginia where UUNET has its headquarters.

In this situation, the workstations of users residing in French territory appear on the Web as if they are not located in French territory.

The same applies to a number of private networks operated by large corporations (intranets) in which the real addresses are encapsulated and transported in a manner such that the address seen by Internet sites is that appearing at the tunnel exit.

Other exceptions stem from the desire on the part of certain users to hide their real address on the net. Thus, so-called anonymizer sites have been developed whose purpose is to replace the user's real IP address by another address. It is not possible in this case to know the geographical location of the access provider's customer because the user's address can no longer be identified. The only location which can be known is that of the anonymizer site, but this is of no value in this case.

*Appendix F**Examination of solutions proposed by specialised providers*

All of the proposed solutions are based on using geographical information about sites which have one or more permanent addresses. These approaches rely partly on information obtained from DNS servers and partly on information provided by the access providers themselves.

Infosplit

The consultants found that Infosplit was incapable of identifying the geographical location of users of AOL France whose server is sited in the United States, for the reasons stated earlier.

NetGeo

This system, which is based on principles similar to those of Infosplit, is also unable to determine the location of surfers using a network in which the access provider assigns dynamic IP addresses that do not match the user's actual geographical location.

Cyber Locator

This approach relies on the use of geographical data obtained from a satellite positioning system (GPS).

This solution is wholly unsuited to the case in question given the limited number of surfers with a GPS peripheral connected to their terminal.

Appendix F

Declaration of nationality made by the surfer

Given that, in light of the aforementioned exceptions, no filtering method is capable of identifying all French surfers or surfers connecting from French territory, the panel of consultants looked at the feasibility of requiring the surfer to make a sworn declaration of nationality.

This declaration could be made when a first connection is made to a disputed site, in this case the Yahoo auctions site, by a surfer whose IP address falls within the exceptions regime described above.

A message (cookie) downloaded to the surfer's workstation would then dispense with the need for the surfer to make a fresh declaration at each subsequent connection.

Use of nationality information by YAHOO Inc.

This is the second aspect of the problem. How to proceed once the nationality or location of the user workstation is known?

The measures to be taken depend on the particular case in point. They cannot be generalised to all sites and services on the Internet.

In this case, the site in question is pages.auctions.yahoo.com. This site is hosted by GeoCities IP address 216.115.104.70, location 37°352 North by 121°958 West, GeoCities network registered by Yahoo, 3400 Central Expressway, Suite 201, Santa Clara, CA 95051.

Appendix F

This site is an auction site for miscellaneous items and is not dedicated to Nazi objects. A characteristic feature of this type of site is to enable the surfer to easily find the item he or she is looking for.

It appears that in order to satisfy the terms of the court order of 22nd May 2000, YAHOO must not allow surfers of French nationality or calling from French territory to access these items.

If, as the result of a search initiated by a request entered by a French surfer, one or more Nazi objects described as Nazi by their owner are picked up by the search engine, these items must be hidden from the surfer and excluded from the search result.

Clearly, however, it is not possible for YAHOO to exclude *a priori* items which have not been described by their owner as being of Nazi origin or belonging to the Nazi era, or the characteristics of which have not been brought to the attention of YAHOO.

Checks carried out by the panel of consultants confirmed that numerous Nazi objects were presented as such by their owner.

A more radical solution is also possible. This would simply require the search engine not to execute requests, transmitted in the URL, including the word “Nazi” and originating from surfers identified or declared as French.

*Appendix F***THE DEMANDS PLACED ON YAHOO INC.**

“Describe the information carried on the Internet enabling the geographical origin of calls to be determined.”

The Internet Protocol (IP) attaches the sender's IP address and the recipient's IP address to each datapacket transmitted. The recipient is thus able to determine the sender's IP address. There are three classes of IP address (A, B and C), as described in Appendix P.

The first part of this address is used to identify the network and subnetwork to which the sender's access provider belongs. These networks may be national or multinational.

According to the French association of access providers (AFA), it may be estimated that 80% of the addresses assigned dynamically by the members of that association are identified as French. On the other hand, 20% are not so identified.

Of the information carried on the Internet, only senders' IP addresses can be used to determine the geographical origin of calls. 80% of the addresses assigned dynamically by AFA member access providers can be identified as being French.

It should be noted, however, that the geographical origin referred to is that of the access provider's site called by the surfer. There is nothing to prevent a user from placing a call from France, by telephone, to an access provider with a foreign telephone number. In this case, there is every chance that the dynamically assigned IP address will be identified

Appendix F

as being foreign. It is equally feasible for a foreigner to call an access provider located in France and thus be assigned a French IP address.

However, it may be estimated in practice that over 70% of the IP addresses of surfers residing in French territory can be identified as being French.

The consultants stress that there is no evidence to suggest that the same will apply in the future. Encapsulation is becoming more widespread, service and access providers are becoming more international, and surfers are increasingly intent on protecting their rights to privacy.

* * * * *
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“Say whether other information, originating notably from telephone or cable operators, could be used either by access providers or destination site hosting services to determine the origin of calls and, if so, to describe this information.”

This refers to information carried by telecommunications and cable operators, but which is not transmitted over the Internet. In this situation, the destination sites cannot know this information.

French telecommunications operators routinely transmit the caller’s telephone number to the called party’s handset. This information is not used in real time by the access provider. It is held temporarily in a file to facilitate searches at a later

Appendix F

time. It is thus possible to know, *a posteriori*, after analysing the connection history, which caller number was assigned at a given time to a particular IP address, and vice versa.

Cable operators are also able, on request but *a posteriori*, to match an IP address assigned at a particular time to their customer's local site.

* * * * *
 * * *
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“Describe the filtering procedures that can be implemented by the company YAHOO to prevent surfers operating from French territory from accessing sites which may be deemed illegal by the French judicial authorities.

On the assumption that no technical solution can guarantee 100% filtering, provide all technical and factual information to facilitate an assessment of the effectiveness of filtering capable of being achieved by each of the filtering procedures described by the consultants.

More generally, provide all technical and factual information to enable the Court to assure itself that the restrictions on access ordered against YAHOO Inc. can be met.”

The consultants consider that, in order for a technical solution to be effective, it must be properly suited to the case in question. The YAHOO! companies operate numerous services (Appendix G) on the Internet, ranging from personal pages (GeoCities) to astrology (Yahoo astrology) and finance, etc. . . The majority of these sites do not appear to be concerned in the present dispute.

Appendix F

The decisions of the court and the demands made are precisely directed against the auctions site. No grievance against any other Yahoo! sites or services is formulated with sufficient precision to enable the consultants to propose suitable and effective technical solutions.

In these circumstances, the consultants will therefore confine their answers to the matter of the auctions site (Yahoo auctions).

They will also rule out an examination of other technical measures that could be imposed on third parties not party to the proceeding. Neither the matter of proxy servers nor the matter of browser settings at the surfer's computer fall within the remit as stipulated by the Court.

REPLIES OF THE CONSULTANTS LAURIE AND WALLON

These consultants report that in the current state of development of the Internet

1) The figures supplied by the AFA, combined with their personal experience, enable the consultants to estimate that some 70% of the IP addresses of French users or users residing in French territory are capable of being correctly identified by specialised providers such as InfoSplit, GeoNet or others, using specialised databases.

2) Yahoo! displays advertising banners targeted at surfers considered by that company to be French, and that it therefore has the technical means to identify them.

Appendix F

3) Around 30% of the IP addresses assigned to French users cannot be identified correctly by the aforementioned methods.

4) Numerous sites, most often relating to the area of national defence (cryptography), only allow access to certain pages on the site or allow software to be downloaded after requesting surfers to declare their identity.

5) The use of cookies is a common practice which avoids the necessity for surfers to re-enter information every time they visit a site. Individuals wishing to delete cookies or prevent them from being stored on their computer are perfectly well aware that it will take longer to access the sites which issued the cookies.

6) Nazi objects are generally described as such by the vendors by including the word “Nazi” in the description of the item, which in their eyes constitutes a selling point.

In these circumstances, the consultants consider that in addition to the geographical identification already practised by Yahoo to target its advertising, it would also be desirable to ask surfers whose IP address is ambiguous to make a declaration of nationality.

This declaration, given on honour, would only be required of surfers whose IP address cannot be identified as belonging to a French ISP (e.g. multinational ISPs like AOL, address transmitted from an anonymizer site, or encapsulation of an address assigned by an intranet server).

Appendix F

At the discretion of Yahoo, this declaration could be made on the home page of the auctions site, or only in the context of a search for Nazi objects if the word “Nazi” is included in the user’s request, immediately before the search engine processes the request.

In these circumstances, the consultants consider that it cannot be reasonably claimed that this would have a negative impact on the performance and response time of the server hosting the Yahoo! auctions service.

The combination of two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%.

REPLY OF THE CONSULTANT VINTON CERF

We reproduce here the divergent part of the opinion given by the consultant Vinton Cerf as expressed by him:

“.....

[Original text in English]

233a

Appendix F

[Original text in English - continued]

.....”

Thus written, checked and signed

Paris. 6th November 2000

Vinton Cerf

Ben Laurie

Fancois Walton

Free translation of the above: “It has been proposed that users identify where they are at the request of the web server, such as the one(s) serving yahoo.fr or yahoo.com. There are several potential problems with this approach. For one thing, users can choose to lie about their locations. For another, every user of the website would have to be asked to identify his or her geographic location since the web server would have no way to determine a priori whether the user is French or is using the Internet from a French location.

Some users consider such questions to be an invasion of privacy. While I am not completely acquainted with privacy provisions in the European Union, it might be considered a violation of the right of privacy of European users, including French users, to request this information. Of course, if this information is required solely because of the French Court Order, one might wonder on what grounds all other users all over the world are required to comply.

Another complaint about the idea of asking users for their location is that this might have to be done repeatedly by each web site that the user accesses. Yahoo cannot force every web site to make this request.

Appendix F

When a user first contacts the server(s) at yahoo.fr or yahoo.com, one might imagine that the question of geographic location might be asked and then a piece of data called a cookie might be stored on the user's computer disk. Repeated visits to Yahoo sites might then refer to this cookie for user location information. The problem with this idea is that cookies are considered by many to be an invasion of privacy. Also, as a result, many users configure browsers to reject storage of cookies on their disk drives or they clear them away after each session on the Internet - thus forcing the query about geographical location each time the user encounters a Yahoo-controlled web site. Again, Yahoo would have no way to force a web site not under its control to either ask the location question or to request a copy of the cookie containing the location. Indeed, it would open up a vulnerability for each user if arbitrary web sites were told how to retrieve the cookie placed there by the Yahoo sites.

For these and many other reasons, it does not appear to be very feasible to rely on discovering the geographic location of users for purposes of imposing filtering of the kind described in the Court Order".

Whereas it emerges from the said submissions that it is possible to determine the physical location of a surfer from the IP address;

Whereas YAHOO Inc. has sought to completely overturn these submissions on the basis of the contents of a separate note written by one of the consultants, Mr. Vinton CERF;

Appendix F

Whereas, however, at the hearing of submissions devoted inter alia to a presentation of the consultants' findings, Mr. Vinton CERF acknowledged the feasibility of identifying geographical location under the terms and conditions of the report and in the proportions mentioned in the report, of which he approved the content;

Whereas, furthermore, his separate note dated 5th November 2000 and submitted in evidence by YAHOO Inc. does not contradict the findings of the report; whereas the note confines itself to stating *on one hand* that it would be "incorrect or at any rate liable to be mistaken" to affirm that it is possible to determine with a high degree of reliability the physical location of an IP address, the phrase "high degree of reliability" evidently meaning a degree of reliability well above that stated in the report at some 70% and that, *on the other hand*, which the panel of consultants accepted in its entirety, that the reply give on this point could only relate to the auctions site for Nazi objects and that it could not be extrapolated against other YAHOO-controlled sites and services;

Whereas it should be borne in mind that YAHOO Inc. already carries out geographical identification of French surfers or surfers operating out of French territory and visiting its auctions site, insofar as it routinely displays advertising banners in the French language targeted at these surfers, in respect of whom it therefore has means of identification; whereas YAHOO Inc. cannot properly maintain that this practice amounts to "crude technology" of limited reliability, unless it were felt that YAHOO Inc. had decided to spend money with no hope of a return or that it was deliberately

Appendix F

misleading its advertisers about the quality of the services which it had undertaken to offer them, which does not appear to be so in this case;

Whereas in addition to the geographical identification as shown above to be already practised by YAHOO Inc., *the consultants' report suggests that a request be made to surfers whose IP address is ambiguous (access through an anonymizer site - or allocation of LP addresses by AOL COMPUSERVE which do not take account of the subscriber's country of origin) to provide a declaration of nationality*, which in effect amounts to a declaration of the surfer's geographical origin, which YAHOO could ask for when the home page is reached, or when a search is initiated for Nazi objects if the word "Nazi" appears in the user's search string, immediately before the request is processed by the search engine;

Whereas the consultants, who contest the arguments adduced by YAHOO Inc. as to the negative impact on such controls- on the performance and response time of the server hosting the auctions site, estimate that a combination of two procedures, namely geographical identification and declaration of nationality, would enable a filtering success rate approaching 90% to be achieved;

Whereas in regard to optimisation of the filtering process by the use of associated keywords, the consultants gave the opinion during the hearing of submissions that it would undoubtedly be necessary in order to optimise the filtering to select about ten words associated with the search operators for document searches or character string searches "AND",

Appendix F

Whereas, in addition to the measures suggested by the consultants, it is necessary to include checks by YAHOO on the place of delivery of items purchased by auction;

Whereas, in effect, the act of visiting the auctions site for Nazi objects is not exclusively for the purpose of viewing; that this purpose is often to purchase items; that in these circumstances even if YAHOO had been unable to identify with certainty the surfer's geographical origin, in this case France, it would know the place of delivery, and would be in a position to prevent the delivery from taking place if the delivery address was located in France;

Whereas, furthermore, YAHOO Inc. could obtain additional nationality information from the language version of the surfer's browser;

Whereas, however, it maintains that this information would require it to modify the management software of its sites and to substantially increase associated hardware resources;

Whereas it adds that filtering of all information at Web server level would only be feasible if it were possible to ensure that the prohibition would only apply to French surfers, otherwise surfers throughout the world would be denied access to information published on its sites, which cannot be envisaged;

Whereas, however, it has been shown above that it does have effective filtering methods available to it;

Whereas, furthermore, it fails to show by means of a convincing case study that the technical modifications

Appendix F

required to control access to auction services for Nazi objects would effectively entail a substantial increase in associated hardware resources;

Whereas, in any event, the company *YAHOO Inc.* has offered to cooperate with the plaintiffs; whereas it thus requests that note be taken of its willingness to put in place a monitoring system with the assistance of the plaintiffs, for whom it expresses the greatest respect for the cause to which they are committed, so that when an offending site is brought to its notice by the plaintiffs and subject to its being manifestly directed essentially at French users, it can take action to cease hosting the site;

Whereas, to demonstrate its good faith, it states that it has ceased hosting the “*Protocole des Sages de Sion*”, considering that a sufficient connecting link exists between this document and France by reason of the language of the work;

Whereas, with a modicum of will on its part, the company *YAHOO Inc.* could be persuaded of the usefulness of extending this connecting link to photographs and descriptions representing symbols of Nazism;

Whereas, according to the information given in the consultants’ report at the initiative of the plaintiffs and which has not been seriously challenged, the company *YAHOO* is currently refusing to accept through its auctions service the sale of human organs, drugs, works or objects connected with *paedophilia*, *cigarettes* or *live animals*, all such sales being automatically and justifiably excluded with the benefit

Appendix F

of the first amendment of the American constitution guaranteeing freedom of opinion and expression;

Whereas it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies;

Whereas the combination of these technical measures at its disposal and the initiatives which it is able to take in the name of simple public morality therefore afford it the opportunity of satisfying the injunctions contained in the order of 22nd May 2000 in respect of the filtering of access to the auctions service for Nazi objects and to the service relating to the work *Mein Kampf* which was included in the wording of the aforementioned order by the phrase “and any other site or service constituting an apology for Nazism”;

Whereas it is nonetheless granted a period of three months in which to comply with this order;

Whereas upon expiry of this period it shall be liable to a penalty of 100,000 Francs per day of delay until such time as it has complied in full;

240a

Appendix F

On the complaint against YAHOO FRANCE

Whereas the consultants' report states and suggests:

“Verify whether YAHOO France has effectively satisfied the terms of our injunction contained in the order of 22nd May 2000.”

The order of 22nd May 2000 stipulates in this regard:

We order the company YAHOO FRANCE to warn any Internet user visiting Yahoo.fr, even before linking to searches on Yahoo.com, that if the result of any search, initiated either through categories or by means of keywords, causes the Internet user to reach sites, pages or forums of which the title and or content constitutes a violation of French law, as is the viewing of sites making an apology for Nazism and/or displaying uniforms, insignia or emblems resembling those worn or displayed by the Nazis, or offering for sale objects or works whose sale is strictly prohibited in France, the Internet user must cease viewing the particular site or be subject to the penalties provided in French law or legal action.”

Appendix F

In order to satisfy the terms of this order, YAHOO! France has:

- 1) modified and expanded the terms of use that are available by clicking on the link “Find out about Yahoo!” (“*tout savoir sur Yahoo!*”) appearing at the bottom of each page on the site. The following paragraph has been added: “*Finally, if in the context of a search conducted on www.yahoo.fr from categories or keywords, the result of the search leads you to sites, pages or forums whose title and/or content violate French law, in light of the fact that Yahoo! France has no control over the content of these sites and external sources (including content referenced on other Yahoo! Sites and Services worldwide), you must cease viewing the site or you may be subject to the penalties provided in French law or legal action may be brought against you*”
- 2) put in place the following warning when a search by tree structure (categories) is requested: “*Warning: if you continue this search on Yahoo! US, you can view revisionist sites. The content of such sites contravenes French law and the viewing of such sites could lead to prosecution.*”

It was found that the Yahoo! terms of use were not systematically displayed when first logging on to this site, and further that the link “Find out about Yahoo!” did not necessarily convey the impression that it pointed to the general terms of use of the service.

Appendix F

However, the warning was systematically displayed in the context of a search by category (e.g. holocaust).

It is technically possible for Yahoo! France to arrange the obligatory display of its terms of use apart from the first connection of a user to its site.

Yahoo! could also, instead of or in addition to the preceding measure, arrange for the warning referred to in 2) to be systematically displayed whenever the link to Yahoo.com is displayed.

However, on this latter point, Yahoo! contended that this went beyond the terms of the court order. Under these circumstances, it is for the court to interpret its ruling. Contrary to the argument made by Yahoo!, the phrase “*warn any surfer visiting Yahoo.fr, even before use is made of the link . . .*” can mean that the warning must be displayed every time the link is displayed.

Whereas Yahoo France maintains that it has fully complied with the terms of our order of 22nd May 2000 by modifying the link referred to by the plaintiffs, by installing the warning mentioned in the order on several links, by advising surfers of the terms of use of the service which are accessible to users when they log on to Yahoo.fr and which can be viewed on all Yahoo.fr pages with effect from 3rd November 2000, and by amending the general terms of use of the service to include a message exceeding the requirements of the court order of 22nd May 2000 and worded in the terms of the new Article 6.2;

Appendix F

Whereas the initiatives undertaken by Yahoo! France are technically capable of satisfying in large measure the terms of our order of 22nd May 2000, with the proviso however that the warning is given every time the link is displayed “even before use is made of the link”.

On the other demands placed on YAHOO! France

Whereas there is no matter for summary consideration in respect of the demands of LICRA, UEJF and MRAP seeking to require YAHOO FRANCE, subject to the imposition of financial penalties, to eliminate all links connecting the site Yahoo.fr to sites belonging directly or indirectly to YAHOO Inc. until such time as YAHOO Inc. has fulfilled its obligations, having regard to the existence of a serious objection to the demands on the part of YAHOO FRANCE, which objections are exclusive of our competence;

ON THESE GROUNDS

Ruling in public hearing in the first instance by order following full hearing of all parties,

We reject the claim reiterated by YAHOO Inc. of a lack of jurisdiction;

We order YAHOO Inc. to comply within 3 months from notification of the present order with the injunctions contained in our order of 22nd May 2000 subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period;

Appendix F

We instruct YAHOO Inc. to pay the expenses in advance:

Mr. WALLON

19 rue Decamps 75016 PARIS

Telephone: 01.47.55.47.73

Fax: 01.47.55.48.08

to submit an expert report on the implementation of the terms of the aforementioned order;

We fix the sum of 10,000 Francs as the advance for the expert report to be paid by the YAHOO Inc. directly to the consultant within one month following the present order:

We state that a failure to pay the advance within this mandatory period, the matter shall be referred to us for summary ruling;

We take due note of the decision by YAHOO Inc. to cease hosting the “Protocole of the Elders of Zion”;

We find that YAHOO FRANCE has complied in large measure with the spirit and letter of the order of 22nd May 2000 containing an injunction against it;

We order it, however, within 2 months following notification of the present order to display a warning to Internet users even before they link to Yahoo.com;

245a

Appendix F

We order YAHOO Inc. to pay to each of the plaintiffs the sum of 10,000 Francs pursuant to Article 700 of the New Code of Civil Procedure;

We state that there is no ground to apply the aforementioned provisions against YAHOO FRANCE;

We reserve the possible liquidation of the penalty;

We state that there is no ground to order other measures or to issue a summary ruling with respect to other claims against YAHOO FRANCE;

We award costs at the expense of YAHOO Inc., with the exception of those arising from the petition brought against YAHOO FRANCE which shall provisionally remain to the charge of each of the parties.

Made at Paris on 20th November 2000

The Clerk to the Court

(signature)

Nicole VOURIOT

The Presiding Justice

(signature)

Jean-Jacques GOMEZ

246a

**APPENDIX G — INTERIM COURT ORDER
MADE ON MAY 22, 2000**

THE COUNTY COURT OF PARIS

**INTERIM COURT ORDER
made on 22nd May 2000**

N° RG:

00/05308

00/05309

N°: 1/k1

by **Jean-Jacques GOMEZ**, First Deputy Justice Presiding at the County Court of Paris, hearing a summary proceeding in public by delegation of the Chief Presiding Justice of the Court.

assisted by **Christiane BENSOAM**, Chief Clerk to the Court.

PLAINTIFFS

The **FRENCH UNION OF JEWISH STUDENTS**, acting through its President **Mr. Ygal LE HARRAR**

27 ter, avenue Löwendal

75015 PARIS

represented by Counsel **STEPHANE LILTI**, Member of the PARIS Bar - C1133

The **LEAGUE AGAINST RACISM AND ANTISEMITISM - LICRA**, represented by its President **Mr. Patrick GAUBERT**

42 rue du Louvre

75002 PARIS

247a

Appendix G

represented by Counsel MARC LEVY, Member of the PARIS
Bar - PO119

RESPONDENTS

The Company **YAHOO! Inc.**
3420 Central Expressway SANTA-CLARA
CALIFORNIA 95051
UNITED STATES OF AMERICA

represented by Counsel CHRISTOPHE PECNARD. Member
of the PARIS Bar - L0237

The Company **YAHOO FRANCE**
8 rue du Sentier
75002 PARIS

represented by Counsel ISABELLE CAMUS, Member of the
PARIS Bar - L0237

IN THE PRESENCE OF

The PUBLIC PROSECUTOR
attached to the County Court of Paris
4 Boulevard du Palais
75055 PARIS

represented by Mr. Pierre DILLANGE, First Deputy Prosecutor.

Appendix G

We, the Presiding Justice,

Having heard the parties here present or their respective counsel.

Having established, and having obtained confirmation from an officer of the court, that the Yahoo.com site, which is accessible to all Internet surfers calling from France, features an “AUCTIONS” page offering for sale some thousand Nazi objects, and maintaining that this display of objects offered for sale not only constitutes a violation of the provisions of Section R645-I of the Criminal Code (*Code Penal*), but also constitutes the largest vehicle in existence for the promotion in Nazism, the League Against Racism & Anti-Semitism (*LICRA*), whose purpose is notably to combat racism and anti-Semitism by all means . . . , and to defend the honour and the memory of deportees, *has petitioned this court* to make an enforcement order on the Company YAHOO! Inc., being the owner of Yahoo.com, *to institute the necessary measures to prevent the display and sale on its site Yahoo.com of Nazi objects throughout the territory of France* (procedure number 00/05308);

The French Union of Jewish Students (*UEJF*), which endorses the petition filed by LICRA and further takes issue with YAHOO! Inc. and YAHOO FRANCE for promoting the propagation of anti-Semitism in written form, the first named company hosting on its service Geocities.com two prominent examples of contemporary anti-Semitic literature, namely Adolf Hitler’s *Mein Kampf* and the *Protocole des Sages de Sion* (“*Protocol of the Elders of Zion*”) (a celebrated bogus document portraying Jews as corrupt and their plans

Appendix G

for government), and the second named company offering a link to Yahoo.com where the auctions service is offered, together with a “revisionist” category through which it is possible to view a site entitled “Air photo evidence” which purports to contain images proving that the gas chambers did not exist, *has petitioned this court* (procedure 00/05309):

To declare the French Union of Jewish Students justified in bringing their action,

Consequently, and pursuant to the provisions of Section 809 paragraphs 1 and 2 of the New Code of Civil Procedure,

- Interim precautionary measures:

1/ Order YAHOO! Inc., subject to a penalty of 100,000 Euros per day of delay and/or per kilobyte of file in violation of the prohibition so ordered, to destroy all computer data stored directly or indirectly on its server and, correlatively, *to cease all hosting and availability in the territory of the Republic* from the “Yahoo.com” site:

- of messages, images and text relating to Nazi objects, relics, insignia, emblems and flags, or which evoke Nazism, and which can currently be acquired through the “Auctions” service,
- of Web pages displaying text, extracts or quotes from “Mein Kampf” and the “Protocole des Sages de Sion” which can currently be viewed, reproduced or

Appendix G

downloaded from the Geocities hosting site of YAHOO! Inc. at the following addresses:

- “www.geocities.com/SouthBeach/Cabana/7748mk.html”
- “www.geocities.com/Athens/Thebes/6370/protocol1tot8.htm”

2/ Order YAHOO! Inc. and YAHOO FRANCE jointly and severally, subject to a penalty of 100,000 Euros per day of delay and per confirmed violation, *to remove from all browser directories accessible in the territory of the French Republic, from Yahoo.com and Yahoo.fr sites:*

- the index heading entitled “negationists”,
- any hypertext link bringing together, equating or presenting directly or indirectly as equivalent sites categorised under the heading “Holocaust” and those indexed as negationist.

Reserve the possibility of liquidation of the penalties thus pronounced;

- Restitution:

Order publication of the order in question by means of extracts placed in five daily or weekly publications at the choice of the French Union of Jewish Students, up to a limit of Fr 25,000 per publication, payable in advance by the respondents and drawable on the CARPA account of their legal counsel who shall effect release of payment upon presentation of the OSP estimates;

Appendix G

Urge each of the respondent companies to implement appropriate technical measures to display, in the form of a warning, an extract of the order in question on the home page of the sites Yahoo.fr and Yahoo.com for a period of 30 seconds on each occasion that the page is visited and for a period of 15 days;

Determine and rule that this publication will be made outside the context of any advertisement and with no additional wording of any kind other than that relating to a possible appeal in accordance with terms and conditions as may be laid down by the Presiding Justice.

Fix in the sum of Fr 50,000 per confirmed default the penalty intended to ensure proper execution of this publication in the forms and under the conditions defined by the Presiding Justice.

Reserve the possibility of liquidation of any penalty thus pronounced;

- Given the absence of serious objection:

Order YAHOO! Inc. and YAHOO FRANCE jointly and severally to pay to UEJF the sum of 1 Franc by way of provisional damages;

Order the above-named companies to pay the sum of 1 Franc pursuant to Section 700 of the New Code of Civil Procedure;

Award costs against the above-named companies;

Appendix G

Sound judicial practice dictates that the two proceedings number 00/05308 and 00/05309 be bound together.

YAHOO! Inc. submits that this court lacks jurisdiction to make a determination in the dispute on the grounds that the alleged wrong was committed in the territory of the United States; it submits further that the suit filed by LICRA for non-compliance with the provisions of Section 56 of the New Code of Civil Procedure is null and void; and further that the petition filed by the French Union of Jewish Students is inadmissible on the grounds that the latter has failed to show that it is eligible to act pursuant to Section 48-2 of the Law of 29th July 1881, it having failed to establish that it is an association for the defence of members of the resistance movement or deportees; that in any event the petitions should be dismissed on the grounds that the obligations of vigilance and prior censure for which the plaintiffs are seeking to make it responsible are impossible obligations, firstly in regard to the law and constitution of the USA, in particular the First Amendment of the Constitution which enshrines freedom of speech, and in regard to the technical impossibility of identifying Internet users visiting the auctions service, pointing out however that its charter contains a warning to Internet users against any use of the service for purposes liable to attract legal censure on any basis whatsoever (incitement to hatred, racial or ethnic discrimination . . .);

YAHOO FRANCE submits that the petition filed by UEJF is inadmissible on the grounds that the latter has failed to show that it is empowered to act pursuant to Section 48-2 of the Law of 29th July 1881, and on a subsidiary basis that all of its claims be rejected on the grounds that, firstly, the fact

Appendix G

of placing a link to Yahoo.com on its Yahoo.fr site is not intended to encourage revisionist thinking or to promote Nazism, and secondly that it is acting with all due diligence by making available online a charter setting forth the terms of use of Yahoo.fr, and lastly that it does not personally propose any access to the disputed sites and services;

Having heard the oral arguments made by the Public Prosecutor wherein he demanded that the reality of the harm suffered by the plaintiffs be recognised;

Further considering the written submissions of the parties and the documents produced in the course of our deliberations

Whereas it is not contested that an Internet user calling Yahoo.com from French territory, either directly or via the link proposed by Yahoo.fr, is able to view on his or her computer screen the pages, services and sites to which Yahoo.com allows access, in particular the auctions service hosted on Geocities.com, which is a hosting service run by YAHOO! Inc., and notably the category relating to Nazi objects:

Whereas the exhibition of Nazi objects for purposes of sale constitutes a violation of French law (Section R.645-2 of the Criminal Code), and even more an affront to the collective memory of a country profoundly traumatised by the atrocities committed by and in the name of the criminal Nazi regime against its citizens and above all against its citizens of the Jewish faith;

Appendix G

Whereas by permitting these objects to be viewed in France and allowing Internet users located in France to participate in such a display of items for sale, YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused harm to be suffered by LICRA and UEJF, both of whom are dedicated to combating all forms of promotion of Nazism in France, however insignificant the residual character of the disputed activity may be regarded in the context of the overall running of the auctions service offered on its Yahoo.com site;

Whereas, the harm being suffered in France, our court therefore has jurisdiction to rule on the present dispute under Section 46 of the New Code of Civil Procedure;

Whereas YAHOO! Inc. points out that it is technically impossible for it to control access to the auctions service or to other services, and hence for it to prevent Internet users calling from France from viewing these services on their computer screen;

Whereas however YAHOO! Inc. is at pains to point out that it warns all visitors against any use of these services for purposes “liable to attract legal censure on any basis whatsoever”, notably for purposes of racial or ethnic discrimination (see the company’s Utilization Charter);

Whereas however YAHOO! Inc. is able to identify the geographical origin of a visiting site from the caller’s IP address, which should enable it to prevent Internet users calling from France, by all appropriate means, from accessing services and sites which when displayed on a screen installed

Appendix G

in France, with possible subsequent downloading and reproduction of the content, or any other action justified by the nature of the site visited, is liable to be deemed an offence in France and/or to constitute a manifestly unlawful harm within the meaning of Sections 808 and 809 of the New Code of Civil Procedure, which manifestly applies to the exhibition of uniforms, insignia and emblems resembling those worn or displayed by the Nazis;

Whereas in regard to Internet users who gain access via sites guaranteeing them anonymity, YAHOO! Inc. has a reduced capability to exert control, save for example that of systematically denying access to such sites to any visitor who fails to reveal his or her geographical origin;

Whereas the real difficulties encountered by YAHOO do not constitute insurmountable obstacles;

That it should therefore be ordered to take all measures of the type that dissuade and block any access by an Internet user located in France to disputed sites and services of which the title and/or content constitutes a harm to internal public order, especially the site offering Nazi objects for sale;

Whereas an opportunity must be afforded to effectively debate the nature of these measures in the context of this proceeding;

That a period of two months will be granted to YAHOO to enable it to formulate any proposals in respect of technical measures capable of facilitating settlement of the present dispute;

Appendix G

Whereas, *in respect of YAHOO FRANCE*, it is stipulated that its site Yahoo.fr does not personally propose to Internet users located in France that they access sites and services whose title and/or content constitutes a violation of French law; whereas it does not therefore permit access to sites or auction services for Nazi objects;

Whereas however it offers the Internet user a link to Yahoo.com entitled “continue search on Yahoo.com” with no particular warning;

Whereas furthermore, knowing the content of the services offered by Yahoo.com, in this instance the auctions service offering Nazi objects for sale under one of its categories, *it has a duty to warn Internet users*, by means of a warning panel, before the user continues the search on Yahoo.com, that whenever the result of the search on Yahoo.com either via categories or keywords causes him or her to point to sites, pages or forums whose title and/or content constitutes a violation of French law, as is the case with sites directly or indirectly, deliberately or inadvertently, making an apology for Nazism, the user must not proceed to view the site concerned, subject to the penalties provided in French law or legal action”;

Whereas these measures would appear sufficient at the present time;

Whereas, however, there is a case for applying the provisions of Section 700 of the New Code of Civil Procedure in favour of the plaintiffs;

257a

Appendix G

ON THESE GROUNDS

Ruling in public hearing in the first instance by order following full hearing of all parties,

We bind together proceeding numbers 00/05308 and 00/05309;

We reject the pleas made in defence;

We order YAHOO! Inc. to take all necessary measures of the type that dissuade and block any access on Yahoo.com to the Nazi artifacts auction service for and to any other site or service that may be construed as constituting an apology for Nazism or dispute over the reality of Nazi crimes.

We order YAHOO FRANCE to warn any Internet user visiting Yahoo.fr, before linking to searches on Yahoo.com, that if the result of any search initiated either through categories or by means of keywords, causes the Internet user to reach sites, pages or forums of which the title and/or content constitutes a violation of French law, is the viewing of sites making an apology for Nazism and/or displaying uniforms, insignia or emblems resembling those worn or displayed by the Nazis, or offering for sale objects or works whose sale is strictly prohibited in France, the Internet user must cease viewing the particular site or be subject to the penalties provided in French law or legal action;

We order the continuance of these proceedings at a hearing before us on:

Appendix G

Monday 24th July 2000 at 14h00

(Chambers of First Deputy Presiding Justice GOMEZ)

during which YAHOO! Inc. will present the measures that it intends to take to put an end to the damage and harm suffered by the plaintiffs and to prevent any further harm;

We order YAHOO! Inc. to pay to LICRA the sum of Fr 10,000 pursuant to Section 700 of the New Code of Civil Procedure;

We order YAHOO! Inc. and YAHOO FRANCE to pay to UEJF the sum of Fr 10,000 pursuant to Section 700 of the New Code of Civil Procedure;

We say that there is no need to prescribe other measures at the present time;

We award the costs originating from the petition initiated by LICRA at the expense of YAHOO Inc., and those originating from the claim of UEJF at the expense of YAHOO Inc. and YAHOO FRANCE.

Made at Paris on 22 May 2000

The Clerk to the Court
s/ Christiane Bensoam
Christiane BENSOAM

The Presiding Justice
s/ Jean-Jacques Gomez
Jean-Jacques GOMEZ