First Amendment v. International Law on Internet Speech

Yahoo!'s Challenge to French Court Judgment in the U.S.*

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John Perry Barlow, founder of the Electronic Frontier Foundation (EFF), proclaimed in his 1996 "Declaration of the Independence of Cyberspace":

> Governments of the Industrial World.... On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.... I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders.[1]

Barlow's vision of the Internet as separate from the "real" world appears increasingly off base. Indeed, his then daring declaration of cyberspace independence seems to be somewhat foolhardy now. Some Internet law commentators have called it a "mythology,"[2] and the *Economist* described Barlow's statement on cyberspace freedom as a "glorious illusion."[3]

A good illustration of the real world taking over cyberspace slowly but inexorably is that a growing number of governments have taken legal actions against Internet access-providers and publishers, "using old-fashioned laws, in old-fashioned courts."[4] The notion of the borderless or "a-geographical" Internet, to the dismay of many cyber-libertarians, is more often tested these days. And application of local laws to the Internet world within several countries substantiates the unmistakable resilience of old-style geographical boundaries in the era of the Internet.[5]

In late January 2004, for example, a Canadian judge rejected the *Washington Post*'s motion that a former U.N. official's libel lawsuit against the American newspaper be dismissed because it had nothing to do with Canada. Judge Romain Pitt of the Ontario Superior Court held: "Those who publish via the Internet are aware of the global reach of their publications, and must consider the legal consequences in the jurisdiction of the subjects of their articles."[6] Most significantly, the High Court of Australia stated in December 2002 that when a defamatory statement is accessible to and read by ISP subscribers in an Australian state, a court of that state has jurisdiction to hear an action for defamation relating to the statement.[7]

In this light, the ongoing *Yahoo!* case, which involved a French court's order of 2000 to the U.S.-based Internet portal to ban display of Nazi insignia on its sites,[8] is the latest example with far-reaching implications for the evolving cyberlaw.[9] The *Yahoo!* decision of the French court was challenged in the U.S. District Court for the Northern District of California.

In its December 21, 2000, complaint for declaratory relief, Yahoo! argued that the French court's order directing the Internet company to

install technological means to prevent French residents from accessing Nazi memorabilia should not be recognized and enforced in the United States.[10] In its motion to dismiss Yahoo!'s complaint, however, La Ligue Contre le Racisme et l'Antisemitisme (LICRA) (League Against Racism and Anti-Semitism) contended that the federal district court lacked jurisdiction over LICRA because LICRA did not engage in business in California or the United States.[11] In June 2001, Judge Jeremy Fogel of the U.S. District Court in San Jose, California, disagreed, denying the LICRA's motion to dismiss Yahoo!'s lawsuit against the French anti-hate group.[12] And in November 2001, Judge Fogel held that the French court order violated the First Amendment and was unenforceable in the United States.[13]

In its history-making context of the interaction between U.S. and French (and other nations') "old" laws in the Internet world, the *Yahoo!* decision, which is now on appeal to the Ninth U.S. Circuit Court of Appeals,[14] is bound to carry enormous consequences for freedom of speech and the press in the United States and beyond.[15] As law professor Mathias Reimann of the University of Michigan noted, the *Yahoo!* case is quickly emerging as "a classic of early twenty-first century international conflicts law."[16]

This Article examines the key issue underlying *Yahoo!* and related cases involving multi-national parties: Should U.S. courts recognize and enforce foreign cyberlaw judgments under the principles of comity[17] without violating the First Amendment freedom of expression guarantees, and, if so, to what extent? In addressing this overarching issue, three questions provide the main focus of the Article: (1) How have American courts in transnational cases protected the constitutional rights of the U.S. media against enforcement of foreign court judgments?; (2) How will the U.S. Court of Appeals for the Ninth Circuit likely rule on Judge Fogel's decision in favor of Yahoo! in challenging the French court judgment under American law?; and (3) What are the likely repercussions of the *Yahoo!* case for freedom of expression in cyberworld?

I. U.S. Courts Refuse to Enforce Foreign Court Judgments

The growing need for an understanding of foreign law has become more acute in recent years because "broadcasts and publications transcend the boundaries of one state, or even one country, causing complicated problems for potential libel plaintiffs."[18] As a leading English libel lawyer, David Hooper, observed:

> As information becomes increasingly transnational and widely available in cyberspace, it is usually possible to find a handful of copies of most leading foreign publications in the UK, if only for the purpose of being circulated among the overseas businesses based there or among foreign nationals in England. This has been accentuated by the Internet, where downloading a foreign publication in England is itself an act of publication within the jurisdiction of the English courts. Indeed, foreign publications are likely to be downloaded as a matter of routine during due diligence research in commercial transactions.[19]

Judging from the expanding case law of the United States on enforcement of foreign judgments since the early 1990s, the principles of comity are likely to be of little help to those wishing to bring their foreign judgments to America for enforcement. Two cases of the 1990s are illustrative.

A. New York Court in *Bachchan* Rejects an English Judgment

In *Bachchan v. India Abroad Publications, Inc.*,[20] a 1992 libel case, the plaintiff, an Indian national living in London, asked a New York State trial court to enforce an English libel verdict. *Bachchan* resulted from a British High Court of Justice libel judgment against India Abroad Publications, Inc. The case against the New York-based publications company concerned a defamatory story about the plaintiff. The defendant

transmitted the story to an Indian news agency, pursuant to an agreement between them, for distribution to Indian newspapers. The wire service story appeared in the *India Abroad*, the defendant's English-language weekly, which was reprinted and distributed in England by the defendant's English subsidiary, India Abroad UK.[21]

Bachchan sued India Abroad Publications in February 1990 as a result of the wire service story. He amended his libel claim to include an action against India Abroad UK for its distribution of the *India Abroad* article. At the English jury trial, Justice Philip Otton of the High Court of Justice in London applied the "strict liability" standard[22] of the English common law of libel. The jury awarded Bachchan damages and attorney's fees of £40,000 (U.S.$70,000).[23]

Since the judgment could not be enforced in England because there were no assets available in England,[24] the plaintiff asked the New York court to enforce the British libel ruling against the defendant. India Abroad argued against enforcement of the British judgment on the ground that the ruling was "fundamentally at odds with the core constitutional protections" of the First Amendment.[25] Characterizing the judgment as "plainly repugnant" to the public policy of New York, the defendant maintained that the English judgment would fall within an exception to the recognition of foreign judgments.[26]

Judge Fingerhood of the New York court held that if the foreign judgment is repugnant to policy embodied in both the federal and state constitutions, "the refusal to recognize the judgment should be, and it is deemed to be, 'constitutionally mandatory.'"[27] Comparing English with American libel law, Judge Fingerhood mentioned the strict liability rule still adhered to by British courts but rejected by American courts.[28] She also noted that the burden of proof standards employed by the English and U.S. courts were significantly different.[29]

Applying the U.S. Supreme Court's rejection in *Gertz v. Robert Welch, Inc.*[30] of the strict liability standard[31] and *Philadelphia Newspapers, Inc.*

v. Hepps[32] on the burden of proof,[33] the New York court expressed strong reservations about the British law, which places the burden of proving truth upon media defendants in libel litigation.[34] The court observed: "The 'chilling' effect is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants."[35] Thus, the court found Bachchan's judgment unenforceable in New York.

The New York court's refusal to recognize the British judgment also was based on the difference between the liability standards of English and New York law. Under English law, plaintiff Bachchan was not required to prove any degree of fault on the part of India Abroad. Noting that, under New York libel law, a private plaintiff must meet a "gross irresponsibility" standard in media libel actions for publications of public concern,[36] the court doubted whether Bachchan could have proved that the defendant's actions in disseminating the news story constituted gross negligence.

The *Bachchan* decision has established a legal precedent that foreign libel judgments will not be recognized and enforced by American courts if they contravene First Amendment guarantees. It has sent a clear signal to actual and potential plaintiffs in extraterritorial litigation against American media: "If you want to use the American judicial process, be prepared to meet the requirements of the First Amendment." Five years after, *Bachchan* was explicitly invoked by the Maryland Court of Appeals in another libel case pitting an English plaintiff against an American defendant.

B. Maryland's Highest Court Applies *Bachchan* in *Telnikoff*

In November 1997, Maryland's highest court rejected the recognition of an English court's libel ruling. The Maryland Court of Appeals in *Telnikoff v. Matusevitch*[37] reasoned that the English libel standards which were applied to the English libel judgment were so "repugnant" to the

public policy of Maryland that the judgment should not be recognized for enforcement.[38] *Telnikoff,* the first *appellate* court ruling in the United States on foreign libel judgments, resulted from an English libel decision of 1992 against Vladimir Matusevitch, a U.S. citizen then living in England, for libel.[39] The English libel ruling related to Matusevitch's letter to the editor that had appeared in the London *Daily Telegraph.* The letter was Matusevitch's response to Vladimir Telnikoff's op-ed article in the *Daily Telegraph.*

In his letter to the editor, Matusevitch, a Soviet Jewish emigre to the United States, argued that as a "racialist (anti-Semitic)," Telnikoff demanded a change in the recruitment policy of the BBC Russian Service "from *professional testing* to a *blood* test."[40] Telnikoff sued Matusevitch for libel, alleging that he had been "gravely injured" in his reputation as a result of Matusevitch's letter.

In granting Matusevitch's motion for summary judgment, the High Court of Justice in London ruled that no jury would find that the letter was "unfair comment" or that Matusevitch was malicious in writing the letter.[41] The trial court, pointing out that Telnikoff, in writing an article of public interest, invited comment from the public, stated that Matusevitch "is entitled in this country to express extreme views on a matter of public interest, provided he does not overstep the boundary of what is permitted, and expresses the views honestly and without ulterior motives."[42]

The Court of Appeal affirmed the High Court of Justice's ruling. The Court of Appeal agreed with the High Court that Matusevitch's letter, read together with Telnikoff's opinion article, was comment, not a statement of fact, and that no reasonable jury could have held that Matusevitch's primary motive had been to injure Telnikoff, and that there was no evidence of malice on the part of Matusevitch in publishing his letter.[43]

Telnikoff appealed again and the House of Lords, the highest court in England, affirmed in part, reversed in part, and remanded. The Law Lords agreed unanimously that Telnikoff had failed to establish malice on

Matusevitch's part and thus could not defeat the fair comment defense if the letter was comment as distinguished from fact.[44] The majority, however, rejected the contextual reading of defamatory comment like Matusevitch's letter, which was accepted by the Court of Appeal and the High Court of Justice. According to the House of Lords, "the letter must be considered on its own. The readers of the letter must have included a substantial number of persons who had not read the article or who, if they had read it, did not have its terms fully in mind."[45]

Following a jury trial on remand, the jury returned a verdict for Telnikoff in the amount of £40,000, or U.S.$416,000.[46] Matusevitch was strictly liable for his letter regardless of his state of mind. Judgment was entered on March 16, 1992.[47]

When the English libel judgment could not be enforced in England, Telnikoff in December 1993 asked the Circuit Court for Montgomery County, Maryland, to enforce the libel ruling against Matusevitch.[48] Matusevitch, a U.S. citizen, moved as a journalist for Radio Free Europe/ Radio Liberty from London to the corporation's headquarters in Washington. He was living in Maryland.[49]

Matusevitch countersued by filing a civil rights action against Telnikoff in the U.S. District Court for the District of Maryland. He argued that the recognition and enforcement of the British judgment would deprive him of his free speech rights under the U.S. Constitution and the state Constitution of Maryland because the judgment was repugnant to the Constitutions.[50] The case was moved to the U.S. District Court for the District of Columbia in May 1994.[51]

U.S. District Judge Ricardo M. Urbina ruled that a foreign libel judgment cannot be enforced in the United States if it is based on the libel standards that are contrary to U.S. law.[52] He found that Telnikoff's English judgment was "repugnant" and not enforceable. He concluded that enforcement of the judgment would deprive Matusevitch of his constitutional right to free speech and free press as a U.S. citizen.[53]

Telnikoff appealed Judge Urbina's decision to the District of Columbia Circuit. After hearing oral argument, the U.S. Court of Appeals for the District of Columbia Circuit certified to the Maryland Court of Appeals a question whether recognition of Telnikoff's foreign judgment would be repugnant to the public policy of Maryland.[54]

The Maryland Court of Appeals answered the certified question in the affirmative. In refusing to recognize Telnikoff's libel judgment, Maryland's highest court relied extensively on the American and Maryland constitutional history relative to the public policy, which favored "a much broader and more protective freedom of the press than ever provided for under English law."[55]

The Maryland court elaborated: "[P]rior to *New York Times Co. v. Sullivan*[56] ... and its progeny, numerous English common law principles governing libel and slander actions were routinely applied in Maryland defamation cases without any consideration or mention of the constitutional free press clauses or the strong public policy favoring freedom of the press."[57] Nevertheless, the Maryland Court of Appeals argued that the court "substantially" changed the Maryland common law on libel actions "even in areas where the changes were not mandated" by the First Amendment and the Maryland Declaration of Rights.[58]

First, in Maryland the *Gertz* principle on fault in libel actions[59] applies "regardless of whether the allegedly defamatory statement involved a statement of public concern and regardless of whether the action was against a media defendant or a non-media defendant."[60] Second, in all defamation actions in Maryland, neither presumed nor punitive damages may be recovered unless the plaintiff establishes liability under the "actual malice"[61] standard of *Sullivan*.[62] And finally, Maryland law does not allow recovery unless "actual malice" is established in defamation cases where the defamatory statement enjoys a conditional privilege.[63]

In its comparison of English libel standards with those of Maryland, the Maryland Court of Appeals took special note of the "unchanged"

principles governing English defamation actions from the earlier common law era.[64] The court called attention to the English courts' adherence to the strict liability standard, the presumptive falsity of defamatory statements, the defeat of qualified privilege with no proof of "actual malice," and no distinction between private and public figures and between statements of public and private concern.[65] The court concluded: "[P]resent Maryland defamation law is totally different from English defamation law in virtually every significant respect."[66]

As an illustration of the sharp contrast between English and Maryland law, the Maryland Court of Appeals took issue with the English court's reasoning underlying its judgment in favor of Telnikoff. Telnikoff would have been considered a public figure and thus required to prove "actual malice" for recovery under Maryland law. But the English courts allowed him to recover damages notwithstanding the absence of "actual malice."[67] Telnikoff was not required to prove the falsity of Matusevitch's letter. Rather, falsity was presumed under English law, which was contrary to Maryland law.[68] The Maryland court also questioned the way Matusevitch's letter was examined. The court pointed out that the letter was examined not in context but in isolation, which was incompatible with the present libel law of the United States.[69]

The Court characterized the libel law principles which applied to Telnikoff's suit in England as "so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland, that Telnikoff's judgment should be denied recognition under principles of comity." [70] The Maryland court's rejection of the *Telnikoff* judgment was also based on the court's concern that "recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country."[71]

The impact of *Telnikoff*, of course, will not be limited to the traditional mass media. The case would provide a judicial road map on cyberspace defamation in that "[c]omputer networks simply offer unparalleled

opportunities for injuring individual reputations anywhere in the world. In light of this potential for international defamation and forum shopping, more U.S. residents may soon select from a number of favorable forums, such as England, and choose to file defamation suits abroad."[72]

II. The *Yahoo!* Case in France and the United States: A Political, Legal, and Cultural Conflict?[73]

The *Yahoo!* case was arguably the most famous lawsuit that challenges the notion that cyberspace is in "the pleasant anarchy of the Internet."[74] The case capsulized how far a sovereign nation is willing to go in regulating Internet content by punishing the originating source of the content. From the perspective of international jurisdiction, the French judgment "represents a direct attempt by a foreign national to apply its law extraterritorially to restrict the freedom of expression of U.S.-based online speakers who are protected by the First Amendment."[75] And the case served as the hypothetical of the 2001-2002 Jessup Moot Court Competition and was the topic of the Conflicts Section at the 2003 annual convention of the Association of American Law Schools.[76]

The raging debate over the *Yahoo!* decision of the French court goes beyond the protective boundary of the U.S. Constitution for Internet users, individual and business as well, within the United States. It concerns not only the clash between France and the United States in their socio-cultural and political values but also the fast-developing Internet technology's role in helping governments to assert a greater role in control of the "government-free" Internet. The continuing court battle of Yahoo! Inc. - first in France and now in the United States - is a closely watched reality check on the complexity of cyberlaw and regulation as a global issue.

A. French Court Orders Yahoo! to Block Its Nazi Auction Site from Access

The *Yahoo!* case began in April 2000, when two French anti-hate groups, La Ligue Contre le Racisme et l'Antisemitisme (League Against Racism and Anti-Semitism) (LICRA) and L'Union des Etudiants Juifs de France (French Union of Jewish Students) (UEJF), demanded that Yahoo! "cease presenting Nazi objects for sale" on its U.S. auction site and stop "hosting" on its Webpage service Nazi-related writings such as an English-language translation of *Mein Kampf*.[77]

The French censorship advocacy groups then filed civil lawsuits against Yahoo! Inc. and Yahoo! France in the Tribunal de Grande Instance de Paris, claiming that Yahoo! violated a French criminal statute, the Nazi Symbols Act, which prohibits the public display in France of Nazi-related "uniforms, insignia or emblems."[78] The French groups asked the trial court in Paris to order Yahoo! Inc. and Yahoo! France to "institute the necessary measures to prevent the display and sale on its site Yahoo.com of Nazi objects" in France.[79]

Yahoo! argued that the French court did not have jurisdiction over Yahoo.com because it operates from servers in the United States and that the LICRA and UEJF's petitions should be dismissed on American constitutional law and also technological grounds:

> [T]he alleged wrong was committed in the territory of the United States .... [T]he obligations of vigilance and prior censure for which the plaintiffs are seeking to make it [Yahoo! Inc.] responsible are impossible obligations, firstly in regard to the law and constitution of the USA, in particular the first amendment of that constitution which enshrines freedom of speech, and in regard to the technical impossibility of identifying Internet surfers visiting the auctions service.....[80]

But the French court rejected Yahoo!'s arguments. Characterizing the exhibition of Nazi objects on its site for sale a violation of the French criminal code, Judge Jean-Jacques Gomez held that it constituted "more an affront to the collective memory of a country profoundly traumatised by the atrocities committed by Nazis against its citizens." He found that through its actions, Yahoo! committed "a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage ... to LICRA and UEJF." He discounted the fact that the activity complained of in the case is "insignificant" in relation to the overall business of the auction sales service offered on the Yahoo.com site.[81]

On May 22, 2000, the French court issued an interim order directing Yahoo! to "take all necessary measures" to "dissuade and render impossible" any access to the Yahoo! Internet auction service displaying Nazi artifacts and to any other site or service "that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."[82] The court also gave Yahoo! two months to come up with technical proposals to implement its order.

Two months later, July 24, 2000, Yahoo! told Judge Gomez that it would be "technically impossible" for the company to comply with his May 22 order. To determine the validity of Yahoo!'s alleged impossibility of implementing technical measures under his order, Judge Gomez convened a panel of three technology experts. The experts reported in November 2000 that "some 70% of the IP [Internet Protocol] 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."[83] Further, the panel added that if Yahoo! asked its users whose IP address is ambiguous to "provide a *declaration of nationality*," it could achieve "a filtering success rate approaching 90%."[84]

In "reaffirm[ing]" its order of May 22, 2000, the French court directed Yahoo!, among others, to (1) re-engineer its content servers in the United

States and elsewhere to enable them to recognize French IP addresses and block access to Nazi material by end-users assigned such IP addresses; (2) require end-users with "ambiguous" IP addresses to declare their nationalities when they arrive at Yahoo!'s home page or when they initiate any search using the word "Nazi"; and (3) comply with the court order within three months or face penalty of 100,000 Francs (approximately U.S.$ 13,300) for each day of non-compliance.[85] The court denied the anti-hate groups' request to enforce its order or impose any penalties directed at Yahoo! Inc. against Yahoo! France.[86]

The French court judgment was hailed as a moral and cultural victory for those who supported the advocacy groups who stated that "French have a right to be shielded from the commercialization of Nazi objects."[87] And the Movement Against Racism and for Friendship Among Peoples in France considers the ruling a warning against the Internet's becoming "an extra-legal zone" governed by the "permissive" nature of the First Amendment to the U.S. Constitution.[88]

To those who see the unlimited value of the Internet as a "unique new medium of communication" in expanding freedom of expression, Judge Gomez's order against Yahoo! is "a predictable consequence of the global character of the Internet and the conflicts that will inevitably arise concerning speech protected by the U.S. Constitution but forbidden by repressive laws elsewhere."[89] Nonetheless, it has set a major legal precedent establishing that Internet companies, no matter where they're located, must pay extra attention to local laws in any countries from which their Web sites are accessible.[90] While disavowing its intent to fully comply with the French ruling, Yahoo! has removed Nazi merchandise from its French-based site and inserted warnings on links to its auction site in the United States. On the other hand, Yahoo! has filed suit in U.S. federal district seeking a declaratory judgment that the French court decision cannot be enforced in the United States.

B. Yahoo! Challenges French Court's Ban on Its Nazi Material in America

In filing suit in a federal district court in California against the French anti-hate advocacy groups, who won a civil suit judgment against Yahoo! in France in 2000, Yahoo! Inc. sought a ruling that it did not have to obey the French court ruling. Yahoo! claimed that compliance with the French court order was "impossible." Further, Yahoo!'s compliance would result in "significant and permanent harm" to the company's operations, customer bases and goodwill, and it would force Yahoo! to collaborate in "an unconstitutional prior restraint" on freedom of expression owing to the French court's ruling with no jurisdiction.[91]

Yahoo!'s complaint centered on the unconstitutionality of the French court orders of May and November 2000. According to Yahoo!, the orders should not be enforced because they violate the U.S. and California "public policy" of protecting freedom of speech.[92] Yahoo! asserted:

> The Orders exercise an unreasonable, extraterritorial jurisdiction over the operations and content of a U.S.-based webservice belonging to a U.S. citizen. The Paris Court has extraterritorially imposed on a U.S. corporation the drastic remedy of a prior restraint and penalties that are impermissible under U.S. law, instead of simply enforcing the French Penal Code against French citizens who break French law by accessing information hosted outside their country that the French Penal Code deems illegal.[93]

Besides its violation of the First Amendment and the California Constitution, Yahoo! argued, the French court decision was incompatible with the Communications Decency Act,[94] which immunizes Internet service providers like Yahoo! from liability for content posted by third parties. "If permitted to stand," Yahoo! continued, "the French judgment would give foreign nationals a cause of action against U.S.-based ISPs that U.S.

citizens do not have."[95]

Yahoo! went to great lengths in invoking treaties and international law in claiming that the French court's ruling ran afoul of the freedom of expression guarantees under the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights. Yahoo! took special note of France as a signatory to all of the three international treaties.[96]

Why is a declaratory judgment necessary in the case? Yahoo! stated that it needed the judgment to "immediately" resolve the question whether the French court orders could be enforced in the United States. With no such declaratory judgment, Yahoo! must, without delay, start "significantly reengineering" of its services in the United States in compliance with the orders at significant expense or face fines of about $13,300 per day. Also, Yahoo!'s attempt to comply with the French court orders could cause "immediate and permanent harm" to its business because it could slow delivery of Yahoo!'s services, block access by non-French users, and otherwise disrupt Yahoo!'s business. Finally, Yahoo! maintained that it needed declaratory relief "to prevent significant chilling effect on the freedom of expression for users of Yahoo! and other U.S.-based ISPs," because the French court orders may force U.S. Internet companies to remove constitutionally protected speech to "avoid protracted court battles or legal liability."[97]

LICRA responded by arguing that Yahoo!'s complaint should be dismissed because the U.S. district court had no personal jurisdiction. LICRA asserted that it did not do business in California or the United States and its sole contact with the United States involved sending one "cease and desist' letter in April 2000 to Yahoo! and causing the service of legal process on the company in connection with its lawsuit in the French court.[98]

In their amici curiae brief on behalf of Yahoo!, 20 Internet advocacy

groups and civil liberties and public interest organizations asked the U.S. district court to consider the "practical and legal ramifications" that granting recognition to the French court's judgment would create. The amici curiae brief stated:

> It [recognition of the French court judgment] would establish a legal framework wherein *all* web sites on the global Internet are subject to the laws of *all* other nations, regardless of the extent to which such a legal requirement conflicts with the law of the place where the speakers are located. Any finding that the November 20 Order may be enforced in the United States would establish an international regime in which any nation would be able to enforce its legal and cultural "local community standards" on speakers in all other nations. In such a regime, Internet Service Providers and content providers would have no real choice but to restrict their speech to the lowest common denominator in order to avoid potentially crushing liability.[99]

As Yahoo! did in its complaint, the amici curiae questioned whether the French order could survive the strict constitutional requirements of the United States, which presumptively invalidates the kind of viewpoint discrimination and prior restraint that underlie the order. Citing *Bachchan* and *Telinikoff*,[100] they noted that no U.S. court has enforced the libel judgments based on foreign law which is at odds with the "public policy" of the First Amendment and state constitutions on free speech.[101] The amici curiae brief echoed Yahoo!'s argument[102] that the Communications Decency Act of 1996 prohibits the enforcement of the French court judgment.

Six business interest organizations, including the Chamber of Commerce of the United States, have filed their own amici curiae brief in support of Yahoo!. Drawing from the Fifth Amendment to the U.S. Constitution, they argued that the French court had no "personal jurisdiction" over Yahoo!. nor "prescriptive jurisdiction" over the conduct

of Yahoo! at issue.

The personal jurisdiction test could not be met in the French court proceedings, the amici curiae claimed, because Yahoo! did nothing more than merely "posting a website on the Internet."[103] They pointed out that Yahoo!'s website targeted a U.S. audience and its sites were in English and carried the domain suffix ".com," which indicated a U.S. company. Yahoo! also did not take advantage of the privilege of conducting business in France, for Yahoo! has incorporated a separate subsidiary to do business in France. The French subsidiary established its own French website in French and complies with French law.[104]

The Internet commerce groups termed France's exercise of prescriptive jurisdiction in the *Yahoo!* case "unreasonable." They reasoned that the United States maintained a "paramount" interest in the company's activity, which occurred within the U.S. boundaries and was lawful and protected by the First Amendment.[105]

C. U.S. District Court in California Refuses to Dismiss the Yahoo! Lawsuit

On June 7, 2001, U.S. District Judge Jeremy Fogel denied LICRA's motion to dismiss Yahoo!'s lawsuit against enforcement of the French court order directing the U.S.-based Internet portal to ban users in France from seeing online auctions of Nazi memorabilia. In refusing to dismiss the action, Judge Fogel noted that the case raised "novel legal issues arising from the global nature of the Internet."[106]

LICRA's challenge to the jurisdiction of the federal district court over the case was rejected because Yahoo! met the three-part test of the Ninth Circuit on whether a court may exercise "specific" jurisdiction.[107] Under the specific jurisdiction test, the nonresident defendant must have "purposefully"availed itself of the forum in conducting activities or consummating some transaction within the forum, thereby invoking the

benefits and protection of its laws; the claim at issue must have resulted from the defendant's forum-related activities; and the exercise of jurisdiction over the defendant must be reasonable.[108]

Judge Fogel found that LICRA's conduct satisfied the "purposeful availment" requirement of the jurisdiction test by having knowingly engaged in actions intentionally aimed at Yahoo! in Santa Clara, California. Among the forum-related actions of LICRA were LICRA's "cease and desist" letter to Yahoo!'s Santa Clara headquarters, its request to the French court to order Yahoo! to perform specific physical acts in Santa Clara, and its use of U.S. Marshals to effect service of process on Yahoo! in California.[109] Judge Fogel wrote: "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 Untied States if its primary purposes or intended effect is to deprive a United States resident of its constitutional rights."[110]

Yahoo! "easily" met the second prong of the specific jurisdiction analysis--whether the plaintiff's claims arise out of the nonresident defendant's forum-related conduct, Judge Fogel concluded. If LICRA had not filed and prosecuted the French lawsuit, "which in turn was obtained by Defendants' [LICRA] use of formal process in California," he stated, "Yahoo! would have no need for a declaration that the French Order is unenforceable in the United States."[111]

The final "reasonableness" element for specific jurisdiction must comport with the traditional notions of "fair play and substantial justice."[112] Judge Fogel has particularized seven factors to be considered in determining the reasonableness of the exercise of jurisdiction over the nonresident defendant: (1) the degree of the defendant's purposeful interjection in the forum state; (2) the burden on the defendant; (3) the possible 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 value of the forum to the plaintiff's

interest in convenient and effective relief; and (7) the existence of an alternative forum.[113]

In applying the "Gestalt factors" to the facts in the case, Judge Fogel held that five factors weighed in favor of his court's exercise of personal jurisdiction. In assessing the extent of LICRA's purposeful interjection into California, he noted LICRA's acts of targeting Yahoo! in California, of accessing Yahoo!'s U.S.-based website, of mailing a demand letter to Yahoo! in Santa Clara, of using U.S. Marshals to serve Yahoo!, and of obtaining a court order requiring Yahoo! to re-engineer its U.S.-based servers, including those located in California.[114]

Is LICRA's burden in litigating in California constitutionally unreasonable? Judge Fogel answered No. Given that "modern advances in communications and transportation have significantly reduced the burden on litigating in another country,"[115] he ruled that LICRA might communicate by telephone, fax, and e-mail, and "may even make telephone court appearances."[116] Judge Fogel projected that the present case would not entail "extensive fact discovery" in California because the case will focus on issues of law. He stated that LICRA failed to establish that burden of litigating the case at bar would be "so great as to constitute a deprivation of due process."[117]

In allowing the suit to proceed, Judge Fogel addressed the sovereignty concerns involved in the case:

> 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 to France's sovereign interest in enforcing the order 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.... For purposes of its jurisdictional analysis, this Court concludes that the sovereignty factor weights in favor of this Court's

exercise of personal jurisdiction.[118]

The federal district court rejected LICRA's argument that Yahoo! has suffered "no actual injury" because the French court order has never been sought for enforcement in the United States and it may never be enforced. The court pointed to the inevitable chilling effect of LICRA's proposed "wait and see" approach toward enforcement of the French order under uncertain circumstances of the kind facing Yahoo!. Judge Fogel explained:

> 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. 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.[119]

The "efficient resolution" factor of the jurisdictional dispute in the case was found "moot" because the evidence and potential witnesses involved in the action was limited. Nonetheless, Judge Fogel ruled that the U.S. district court would be "the more efficient and effective forum in which to resolve the narrow legal issue ... whether the French Order is enforceable in the United States in light of the Constitution and laws of the United States."[120] In this light, he held "moot" the question whether the French court could be an alternative forum for deciding whether the French order is enforceable in the United States. He noted that a United States forum is superior in handling the legal question at issue in the case.[121]

The U.S. district court's ruling in June 2001 did not address the core issue of whether the French court has authority over the content carried

on Yahoo!'s servers. Rather, it was only a finding on whether the U.S. district court in California had jurisdiction in the case. Regardless, the significance of the Yahoo!'s jurisdictional victory against LICRA was considerable, if not decisive, in presaging the eventual ruling of the U.S. district court on whether the French court judgment is enforceable in the United States. Yahoo! spokesman Scott Morris called the jurisdictional issue "a very small bump in the road for a long road ahead."[122]

Clearly evident in Judge Fogel's ruling on the jurisdictional question was his strong reservations about discovery in the case. He stated that "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."[123] Also, his opinion strongly indicated that the U.S. public policy against content-based regulations and prior restraint would lead him to reject restrictive foreign court judgments such as the French court order. In a telling footnote, he stated: "[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 Untied States but are viewed as offensive or inappropriate elsewhere."[124]

D. U.S. District Court Holds the French Court Judgment Unenforceable

On November 7, 2001, Judge Fogel answered the underlying issue in *Yahoo!* of whether the French court's order was enforceable under the First Amendment. He wrote: "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 U.S. Constitution by chilling protected speech that occurs simultaneously within our borders."[125] The comity principle was narrowly applied for a "sound" reason that freedom of speech and the press in the United States would be "seriously jeopardized" by enforcement of foreign court judgments considered

"antithetical to the protections afforded the press by the U.S. Constitution."[126]

In his ruling, Judge Fogel stated that the case had presented "novel and important issues" resulting from the global reach of the Internet. He added that the issues could affect "policy, politics, and culture that are beyond the purview of one nation's judiciary."[127] In this connection, he made it clear that the case was not about the "moral acceptability of promoting the symbols or propaganda of Nazism." Nor was the case about France's right to determine its own laws and social policies. Recognizing the "territoriality principle" in transnational law, Judge Fogel wrote:

> 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.[128]

However, the *Yahoo!* case revolved around the crucial issue of "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."[129] He pointed out that "ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless."[130]

Calling the modern world "home to widely varied cultures with radically divergent value systems," Judge Fogel said Internet users in the United States routinely engage in expressive activities that violate other countries' laws but are legitimate in American law.[131] He wondered what principles to use in addressing the legal issues arising from a foreign government's or a foreign party's attempt to enforce their laws against U.S.-based Internet service providers like Yahoo!

Relying on the free speech principle under the Constitution of the

United States, Judge Fogel stressed the "fundamental judgment" embedded 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."[132]

The French court's order was not content-neutral but banned viewpoints. "A United States court constitutionally could not make such an order," Judge Fogel wrote. "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."[133]

Also unconstitutionally vague and overbroad to Judge Fogel was 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."[134] He reasoned that it was "far too general and imprecise to survive the strict scrutiny required by the First Amendment" and not "a sufficiently definite warning as to what is proscribed."[135] As a result, the French order would "impermissibly chill" Yahoo! into censoring protected speech in the United States.[136] Judge Fogel declared: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[137]

Concerning the factual issue of whether Yahoo! is technologically capable of complying with the French court's order, Judge Fogel dismissed it as "immaterial" because enforcement of the French order in the United States would be inconsistent with the First Amendment.[138]

Finally, Judge Fogel noted the lack of international agreements which might guide him and others on enforcement of speech-restrictive foreign court judgments in the United States. "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," he stated, "the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."[139]

III. French Groups Challenge the U.S. District Court's Decision

LICRA and UEJF are presently appealing U.S. District Judge Fogel's decision in *Yahoo!* to the U.S. Court of Appeals for the Ninth Circuit. The French defendants argued that the federal district court's ruling was improper because it was only "an advisory opinion." They pointed out that no actual case or controversy existed since the French defendants had never sought to enforce the French order in the United States.[140] They asserted that Judge Fogel had given little consideration to the sovereign interest of France:

> France has a decided interest in creating, interpreting, and enforcing its law in France. In the absence of any efforts by the Defendants to enforce the French order in the United States, the district court's final conclusion that the French order was invalid and unenforceable unnecessarily infringed upon the sovereignty of the French government.[141]

The French advocacy groups wondered about Yahoo!'s motives behind challenging the French order in the United States. Instead of using the opportunity to appeal the French court's judgment in France, Yahoo! waived its right while filing an action in the U.S. district court. "Such forum-shopping does not demonstrate the absence of an alternative forum, only a tactical litigation decision," the groups stated.[142] In response, Yahoo! said it did not appeal Judge Gomez's November 20, 2000, decision in France because it "was enforceable pending appeal and stays are difficult"

in France. Further, because Yahoo! had no asset in France or any other European Union country,[143] the French court order could be enforced only in the United States.[144]

LICRA and UEJF questioned Judge Fogel's conclusion that Yahoo! faced a "real" threat due to the French order, which had "the immediate effect" of inducing Yahoo! to restrict its auction site. No evidence had been presented which suggested that Yahoo! changed its policy because of the French court judgment or out of fear that it "faces the actual threat of inexorably increasing fines," according to the French anti-hate organizations.[145] They emphasized:

> Yahoo!'s decision to discontinue profiting from the sale of some hate group items on its auction sites reflects nothing more than a public relations decision similar to its recent flip-flop policy relating to the sale and distribution of pornography on its web site, *not* the chilling fear of an interim order obtained by two non-profit organizations in France who are in no position to enforce it.[146]

To LICRA and UEJF, Yahoo!'s action for a declaratory judgment in the U.S. district court was "an end-run" around the French court proceeding because Yahoo!'s hope was that a favorable ruling would preempt further proceedings in France or it would be used as an advisory opinion in any future litigation.[147]

Nonetheless, Yahoo! called attention to the "harmful effects" of the French judgment on its activities: "Yahoo!'s speech was being chilled□ itself a First Amendment injury □as Yahoo! had to choose daily between censoring the constitutionally protected content on its U.S.-based Internet services or risking having to pay significant fines *still* accruing daily."[148]

Yahoo! warned that, if Judge Fogel's ruling is reversed, anyone outside the United States could deprive U.S. residents of their First Amendment rights "as long as the conduct causing harm in the U.S. is privileged

abroad."[149] Regarding the sovereignty issue in the case, Yahoo! argued that France has no legitimate interest in enforcing its *penal* statute in the United States. It continued that this was especially true when France enlisted U.S. courts to impose prior restraint on U.S. citizens. For France's "justification for the prior restraint is contrary to our nation's long-standing policy prohibiting content-based discrimination of speech."[150]

In addition, the public policy interests of the United States in protecting the free speech rights of American citizens and ISPs require American courts to reject the principles of international comity. Citing *Bachchan*[151] and *Telnikoff*,[152] Yahoo! noted that French sovereignty cannot be exercised if it contravenes the governing U.S. law on freedom of speech.[153]

A total of 18 public interest organizations, including the American Civil Liberties Union (ACLU) and the Society of Professional Journalists (SPJ), filed an amici curiae brief in support of Yahoo! They characterized the French judgment as "a direct attempt by a foreign nation" to apply its law to restrict free expression of Internet speakers in the United States, who are protected by the First Amendment.[154] The French court's order, according to the U.S. organizations, exemplifies the kind of judgment that American courts can expect with increasing frequency as Internet use continues to expand throughout the world.

Keenly aware of the Internet's role in complicating a government's ability to control undesirable behavior, ACLU and other amici argued against U.S. courts' recognition of French and other foreign courts' judgments on Internet communication. They stated:

> It is one thing ... for a foreign nation to use its authority to silence or regulate speakers within its borders. It is quite another for an American court to become complicit in such censorship. To open the door to foreign restrictions on U.S. speakers even the slightest crack would allow numerous restrictions on speech that would never be permitted if initiated in this country and would

undermine First Amendment protections for Internet speech. This door must be kept closed, and closed tightly, both by refusing to enforce such judgments and by affirming declaratory rulings ... to preclude their *in terrorem* effects.[155]

The U.S. public interest organizations also highlighted a key distinction between the United States and other countries on freedom of expression on the Internet. While American courts have "overwhelmingly" rejected Internet censorship, they wrote, nearly 60 countries impose controls on the Internet.[156] The amici curiae brief has examined seven countries, including Australia, China, Saudi Arabia, and Singapore, in limiting Internet speech.[157]

Recognition of the French court's judgment would carry "practical and legal ramifications" far beyond the U.S.-France confrontation in defining their different cultural, political, and legal attitudes to Internet speech. It would "establish an international regime in which any nation would be able to enforce its legal and cultural 'local community standards' on speakers in all other nations," according to the American groups.[158] "Under such a regime, U.S. courts would become vehicles for enforcing foreign speech restrictions on U.S. speakers. Such a rule is fundamentally inconsistent with the First Amendment and with U.S. public policy."[159]

Yahoo! was also supported by six American business organizations, including the Chamber of Commerce of the United States, Computer & Communications Industry Association, and Online Publishers Association, which submitted an amici curiae brief before the Ninth U.S. Court of Appeals.[160] In their brief, the U.S. business groups took special note of the Internet's transformative role in changing the way "we as a nation do business and access information for personal use."[161] If the French court's decision is recognized in the United States, however, the Internet will suffer from a crippling impact in its operating costs:

Under the French court's theory ... every individual or company with a

> presence on the Internet would have to constantly monitor the laws of every country in the world, search out content that might be prohibited by one or more of those countries, and implement some sort of blocking software that would screen different categories of material from users in each particular country. This would be too burdensome for even large companies like Yahoo!, and would be death knell for the Internet presence of smaller companies, non-profit organizations, and individuals.[162]

The U.S. business groups looked beyond the value of the Internet as a vehicle of commerce. They focused on the Internet as a medium of communication among individuals, community groups, political groups, and non-profit organizations. "If every entity with a web presence was subjected to the laws of each and every jurisdiction in which an Internet site could be viewed," they warned, "pro-democracy speech would be governed by the most totalitarian of nations, artistic expression would be governed by the most stringent of cultures, and commercial advertising and sales would be governed by the most protective of markets."[163]

They agreed with Yahoo! that it would not be economically feasible for U.S. companies to identify a user's location on behalf of governments worldwide. They stated that the technology itself will be expensive. In addition, they envisioned further expenditures, for "content providers would have to couple the technology with a database that contains the content restrictions (and other restrictions) of each and every country in the world." The user's geographic location would then have to be correlated to the relevant restrictions at issue. Further, the Internet content accessible to each user would have to be tailored to the restrictions of the relevant country.[164]

On December 2, 2002, a three-judge panel of the Ninth Circuit heard oral argument in the *Yahoo!* case. Richard Jones, who represented the French civil rights groups, focused his argument on the fact that the French groups' exercise of their legal rights in France was proper and thus should not be punished by American courts. He said: "When the defendants did

not misuse the judicial processes that they invoked in their home country, they did not use them for improper purposes. Where there's been no attempt made to enforce the resulting order in this country that was beyond the borders of France. And where the order has absolutely no legal effect in this country and has caused no injury."[165]

The French court's decision was "unenforceable" in the United States because it was premature, according to Jones. As "an interim order," it was issued by a French court "that had a purpose, an effect, in France, that was independent of anything that might happen in the United States... Yes; we can say it has a potential effect, if it were ever to be enforced in the United States."[166] Jones reiterated emphatically that there was no wrongful conduct or injury in the United States since enforcement of the French judgment was still "a theoretical threat" in that LICRA and UEJF had yet to obtain permission from the French court.[167]

But Senior Judge Melvin Brunetti challenged Jones to consider the unique nature of the Web as the underlying issue of the case. He contended: What matters was that French users accessed the Internet server in the United States, not necessarily what Yahoo! did. Jones responded that at stake in the case was a due process, i.e., whether the French court's "cease and desist letter" can properly ask Yahoo! to comply with French law insofar as its activities were occurring in France.[168]

In reply to Senior Judge Brunetti's assertion that the original penalties of the French court were accumulating against Yahoo!, Jones distinguished the requirement for declaratory relief from that for personal jurisdiction. He said "actual injury" is required for jurisdiction, while a "risk to rights" may be sufficient for a declaratory judgment action. Declaratory relief cannot be sought until after jurisdiction over the defendant is established.[169] Jones criticized U.S. District Judge Fogel for having found jurisdiction in the case, although Yahoo!'s claim derived from the "theoretical threat of future chilling of its right" that might result from the "imminent potential enforcement" of the French court's decision.[170]

Judge Warren Ferguson was leaning toward the French groups' position: "All the French court's saying is, 'Whatever you do, don't impact France.'" He questioned why Yahoo! abandoned its appeal in France: "You abandoned the appeal. For whatever reasons you did, you voluntarily abandoned the appeal. And if you abandoned the appeal, you consented it. And now you're coming to America, and you say, 'We don't like it, help me.' What kind of equity is that?"[171]

Yahoo!'s lawyer Robert Vanderet countered that Yahoo! abandoned its appeal in France because seeking a stay of the French order would be a cumbersome process. But Jones, the French groups' lawyer, accused Yahoo! of engaging in an international forum shopping to find a "more sympathetic" location for its case.[172]

Judge A. Wallace Tashima disagreed with Yahoo! that the location of the servers was an important consideration in addressing the issue before the court. "It's entirely fortuitous where Yahoo!'s servers are, they could have the servers in the Bahamas ... if they wanted to."[173] Nonetheless, Judge Brunetti was more sympathetic to Yahoo!, when he remarked: "What we're talking about is a United States company with a server in the United States; other country citizens are trying to stop what we're doing in the United States. We're not sending people over there, we just got a website. You want to look at it? Look at it. If you don't, don't."[174]

The judges of the federal appeals court were no doubt "clearly uncomfortable" with various issues directly emanating from Yahoo!'s challenge to the French court's decision in the United States.[175] Senior Judge Brunetti was looking for a treaty between the United States and France in addressing the Internet law issue of the kind involved in the case. "If you don't want to access the site, you don't," he stated. "If they go to France, we nail them with their fines. If you try to come here, you can't go on it, and why should this be a treaty issue then?"[176]

IV. The Ninth Circuit's Possible Application of "Real World" Case Law to *Yahoo!*

Given that there is no appellate court case on point relating to Internet regulation across the borders, the Ninth Circuit's upcoming ruling[177] on Judge Fogel's opinion will have precedential effect beyond the immediate case, no matter how the federal appeals court decides.

Nonetheless, the heightened urgency and wariness among U.S. Internet activists surrounding the debate over who will control content on the global Internet may be due in part to the perceived "novelty" or rarity of relevant case law relating to the *Yahoo!* case. Insofar as one searches the Internet law for a directional point to resolve the Yahoo! dispute, there is little out in the virtual world. But the "real" world experience of American courts with similar issues of the transnational "old" media can be used as a frame of reference. With regard to the conditions under which the First Amendment applies to extraterritorial publications, the U.S. District Court in *Desai v. Hersh*[178] held:

> [F]irst amendment protections are only abandoned with respect to the law of the nation in which there is intentional and direct publication in a manner consistent with the intent to abandon those protections. If, for example, defendant had intentionally and directly published the Book [defendant author Seymour Hersh's *The Price of Power: Kissinger in the Nixon White House*] in Mexico, in a manner consistent with his intention to abandon first amendment protections, those protections would be abandoned only with respect to a suit brought here under Mexican law. However, defendant's first amendment protections would still apply to a suit seeking to apply Indian law, where defendant's publication of the Book in India was either unintentional, indirect or unsubstantial.[179]

The *Desai* rule can be modified to apply to the First Amendment

protections (or lack thereof) of U.S. Internet companies when they are sued in foreign courts and they challenge foreign court judgments in the United States. In this connection, Internet lawyer Kurt A. Wimmer's four-factor risk management for Internet companies with transnational transactions is instructive. To begin with, he asks whether the site is hosted and produced entirely in a country that protects its content. If the site resides "physically" on servers in the United States and is produced by U.S. employees, the First Amendment will "fully" protects the site's activities.[180]

Second, does the Internet company have employees and assets in countries other than the United States? If so, there's a slim chance that the company will benefit from the First Amendment protections because it will probably be subject to the laws of the foreign countries.[181] Third, to determine the Internet company's intention *not* to abandon First Amendment protections under the *Desai* formula, Wimmer proposes inquiring "whether the site is published ... in another country's language."[182] If it is entirely published in another country's language, it is more likely than not to assume that the site has taken a calculated risk of giving up its First Amendment protections when it faces situations like that of Yahoo!. And finally, Wimmer recommends a close look at the site's "active" or passive solicitation of foreign business.[183] If the site actively seeks to do business with foreign nationals, it will tilt the scale toward application of foreign national laws to the Internet company.

The *Desai* principle and Wimmer's proposed test on the extraterritorial application of the First Amendment has a close nexus with the personal jurisdiction issue in the *Yahoo!* case. They certainly will reinforce the constitutional obstacles Judge Fogel has considered in ruling on enforceability of the French court judgment. Thus, there is a reasonable possibility that the U.S. Court of Appeals for the Ninth Circuit will uphold Judge Fogel's refusal to enforce the French judgment on two grounds: (1) The French court's ruling is so restrictive as to be fundamentally repugnant to the free speech public policy of the United States; and (2) Yahoo! had

no intention to abandon its First Amendment protections when it opened its Nazi auction sites.

On the other hand, if the Ninth Circuit accepts the French defendants' argument that Judge Fogel was improperly overreaching in addressing the jurisdictional issue, the federal appellate court will likely overturn the U.S. district court's decision. The Ninth Circuit's possible reversal of Judge Fogel's decision can be related to the views of the federal appeals judges, especially those of Judges Ferguson and Tashima, and their tone of questioning during oral argument in the case. Judges Ferguson and Tashima were critical of what they perceived to be Yahoo!'s preemptive tactic by suing the French groups in the United States while bypassing the appeal process in France.

Indeed, a probability that the Ninth Circuit has reservations about Yahoo!'s First Amendment argument may be conceptually supported by a U.S. district court's decision in *Dow Jones & Co. v. Harrods, Ltd.*[184] The federal district court found in 2002 that absent "extraordinary circumstances," it is not appropriate for a U.S. court to enjoin the plaintiff in a foreign libel action from pursuing its claims against a U.S. newspaper publisher. Rejecting the U.S. publisher's argument that the court use its power under the Declaratory Judgments Act (DJA) to expand First Amendment protections for Web publishers who become exposed to liability abroad, the court held that the burden of litigating the pending defamation action in the London High Court did not create an actual controversy within the meaning of the DJA and that there was no evidence that the filing of the action demonstrated "unconscionable bad faith or harassment."[185]

The *Harrods* court concluded that the issuance of an injunction would exceed the limits of federal judicial power and violate the principles of inter-judicial comity made more complex by the Internet. The federal district court said, however, that *Harrods* could be distinguished from *Yahoo!* in that the French court's order was limited to activity within the

United States, whereas in *Harrods*, the activity was limited to England.[186]

More directly relevant to the legal and public policy questions undergirding the *Yahoo!* case is U.S. District Judge Victor Marrero's thoughtful discussion of what courts, whether American or foreign, should or should not do in resolving legal disputes that raise international implications. On the premise that courts are required to "render judgments that are consistent with fostering broader cooperation and good will, and ... encourage mutual sovereign respect and the international rule of law among states,"[187] Judge Marrero wrote:

> Absent extraordinary circumstances, it would not comport with considerations of "practicality and wise administration of justice" for the courts of one nation as a matter of course to sit in judgment of the adequacy of due process and the quality of justice rendered in the courts of other sovereigns, and to decree injunctive relief at any time the forum courts conclude that the laws of the foreign jurisdiction under scrutiny do not measure up to whatever the scope of rights and safeguards the domestic jurisprudence recognizes and enforces to effectuate its own concept of justice. On this larger scale, there can be no room for arrogance or presumption, or for extravagant rules or practices that may encourage insularity or chauvinism rather than respect for comity.[188]

The *Harrods* court's refreshingly nuanced approach to the rules of comity in international law deserves careful attention in examining the interface between U.S. and foreign law. This is true particularly when the judicial comment on comity is understood in connection with the U.S. Supreme Court's increasingly global outlook on foreign law.[189] Judge Marrero is prescient in recognizing that "the United States□historically an innovator in constitutional adjudication□now has much to learn from the rapidly developing constitutional traditions of other democracies."[190]

V. Discussion and Analysis

The U.S. public interest organizations noted in their amici curiae brief in support of Yahoo!: "This is a pivotal time in the development of the Internet. Not only is the technology evolving before our eyes, but the law surrounding this new medium is developing as well."[191] Nonetheless, the *Yahoo!* case epitomizes the sustained utility of geography-based law, bolstered by technological progress, to undermine regulation skepticism which has seemingly pervaded cyberlaw in recent years.

To those who expect new rules separated from law tied to territorial jurisdictions to emerge to govern cyberspace,[192] it should offer a sobering picture of reality that they "underestimate the potential of traditional legal tools and technology to resolve the multi-jurisdictional regulatory problems implicated by cyberspace."[193] More importantly, the *Yahoo!* litigation will lead many of those cyberlaw skeptics to wonder whether they have overstated the differences between cyberspace and real-world transactions, while at the same time overlooking their similarities amidst their rush toward embracing cyberspace as a brand-new world to explore *and* conquer.

It is transparently clear that nearly all the arguments of Yahoo! and the French anti-hate groups throughout the court proceedings in France and the United States have been based on the "old" law and doctrines of the United States or France, not on uniquely cyberspace-centric law. Thus, the *Yahoo!* case demonstrates that the Internet world is not in any special way immune from real-space regulations and it is not as anarchic as some cyber libertarians have claimed.

Nonetheless, the driving forces behind the push of real-world law and regulations as an order- or norm-setting mechanism are the same kind of sociopolitical, cultural, and economic value systems, in combination with technologies, that have guided different body politics around the world. As Judge Fogel of the United States and Judge Gomez of France

articulated in their respective opinions in *Yahoo!*, each nation can limit as well as expand freedom of speech and the press in cyberspace within the context of its cultural, political, or legal standards.

Cyberspace is a place of relative freedom, which few dispute if they have experience with "moving" around. But the freedom is far from unrestrained. Legally and technologically, it is becoming more vulnerable to various "codes." The French court's attempt in *Yahoo!* to stretch its authority over the U.S. company in the United States showcases the willingness of some jurists or courts to expand their extraterritorial control because of what they perceive to be the harmful impact of "unconstrained" freedom of cyberspace.

In sharp contrast with the French court's ruling in *Yahoo!*, however, it is refreshingly heartening that an Australian court has been self-restrained in exercising its jurisdiction in a libel case involving material posted on the Internet by a person in the United States. Aware of the worldwide accessibility of the Internet material, the Australian court held that to issue an extraterritorial order interfering with a right to publish defamatory material in another forum would exceed the "proper limits of the use of the injunctive power" of the court.[194]

If *Yahoo!* is used as an experiential lesson in Internet law, jurisdictional and choice of law questions will likely dominate in setting the boundaries of extraterritorial control of communication in cyberworld. And they, of course, should not be dismissed only as procedural matters. They are as important as the merits of the disputes at issue, if not more, because they are closely intermingled with the substantive questions involved.

As the "geolocation" technologies continue to be upgraded and their filtering capability becomes sufficiently reliable from a judicial perspective, the traditional (read: territory-bound) law will be the rule, not the exception, in regulating Internet communication. After all, the future of the Internet as a "new frontier" for free expression will hinge on the enduring

validity of court rulings like French Judge Gomez's and on the success of filtering software. Thus far, however, American courts seem to be willing to neutralize the staying power of foreign court judgments, regardless of whether geolocation technology is a noteworthy factor they should consider in ruling on the Yahoo! and similar challenges to foreign judgments.

Most notably, the *Yahoo!* case highlights an actual or perceived need for a concerted global effort to develop "uniform jurisdictional principles." This is especially so when American courts in free speech jurisprudence recognize that "the comity principle, far from imposing a duty upon a state to enforce a foreign judgment, can actually lead a state to *refuse* enforcement."[195] On the other hand, from a practical perspective on American law, foreign judgments will have little direct impact on U.S.-based Internet content providers like Yahoo!, which do not have local presence or substantial assets in foreign countries. As case law serves as a direction for transnational Internet communicators within the United States, U.S. courts' distinction between "prescriptive and enforcement jurisdiction"[196] will likely lead those seeking to enforce foreign judgments in America to ask more seriously whether they can convince enforcement-skeptical U.S. judges that their foreign judgments are compatible with the First Amendment's free speech principle.

Reference Notes

*This Article is a revised version of a research paper presented by the Author in his special lecture on U.S. cyberlaw on September 2, 2003, at the Seoul National University Department of Communication.

[1] John Perry Barlow, "A Declaration of the Independence of Cyberspace," Feb. 9, 1996, available at: http:/www.eff.org/Publications/John_Perry_Barlow/barlow_0296. declaration (last visited Feb. 26, 2004).

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[3] "The Internet's New Borders," *Economist*, Aug. 11, 2001, at 9.

[4] *Id.*

[5] Lisa Guernsey, "Welcome to the Web. Passport, Please?," *New York Times*, March 15, 2001, at D1.

[6] *Bangoura v. Washington Post*, No. 03-CV-247461CM1, 2004 CarswellOnt 340, ¶9 (Ontario Sup. Ct. Jan. 27, 2004) (citation omitted).

[7] *Dow Jones & Co. v. Gutnick*, 194 A.L.R. 433 (2002). For a discussion of *Gutnick*, see Matt Collins, "Defamation and the Internet After Dow Jones & Company, Inc. v. Gutnick," 8 *Media & Arts Law Review* 165 (September 2003); Constance K. Davis, "Web Publishing International Jurisdiction in Defamation Cases: Implications of *Dow Jones v. Gutnick*" (paper presented on June 30, 2003, at the convention of the Association for Education in Journalism and Mass Communication, Kansas City, Kan.).

[8] *League Against Racism and Anti-Semitism v. Yahoo! Inc.*, No. NRG: 00/05308, Interim Court Order of the County Court of Paris (Nov. 20, 2000) (Gomez, J.) (translated copy of Nov. 20, 2000, order). In the companion case, a trial court in Paris in February 2003 asserted jurisdiction over former Yahoo! president Timothy Koogle, announcing it would try him for illegally selling Nazi memorabilia over the Internet. But Koogle was acquitted because of lack of evidence for the crimes with which he was charged. In March 2004, however, the Paris court of appeal ruled that it is competent to hear the case against him. *See* Appeal Court to Try Former Yahoo! Boss in Nazi Memorabilia Case, *Yahoo! New*, March 17, 2004, available at http://uk.news.yahoo.com/040317/323/eotuk.html (last visited March 18, 2004). If he is convicted, Koogle faces a maximum sentence of five years and a $40,000 fine. *See* Jeffrey P. Cunard & Jennifer B. Coplan, Internet and E-Commerce: A Summary of Legal Developments, in *Patents, Copyrights, Trademarks, and Literary Property* 387 (2002).

[9] For an excellent compendium of analyses of the *Yahoo!* case and related topics, see the "Special Feature: Cyberage Conflicts Law" issue of the *Michigan Journal of International Law* (spring 2003).

[10] Complaint for Declaratory Relief at 12, Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, No. C00-21275 PVT ADR (N.D. Cal. filed Dec. 21, 2000) [hereinafter Yahoo!'s Complaint].

[11] Points and Authorities in Support of Motion to Dismiss Pursuant to Rule 12(b) at 2, Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, No. C00-21275 JF

(N.D. Cal. filed Feb. 7, 2001).

[12] *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

[13] *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

[14] *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme,* 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *appeal docketed*, No. 01-17424 (9th Cir. Dec. 4, 2001). The three-judge panel of the U.S. Court of Appeals for the Ninth Circuit heard oral argument in *Yahoo!* on December 2, 2002, and has yet to announce its decision. For a discussion of the Ninth Circuit's oral argument in *Yahoo!,* see *infra* notes 165-76 and accompanying text.

[15] *Yahoo!* has been cited by American and foreign courts. *See* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002); Internet Billions Domain v. Venetian Casino Resort, No. 01CV5417, 2002 WL 1610032 (E.D. Pa. May 31, 2002); Pickrell v. Verio Pacific, Inc., No. B1443272002, WL 220650 (Cal. Ct. App. Feb. 11, 2002); Dow Jones & Co., Inc. v. Gutnick, 194 A.L.R. 433 (2002).

[16] Mathias Reimann, "Introduction: The *Yahoo!* Case and Conflict of Laws in the Cyberage," 24 *Michigan Journal of International Law* 663, 668 (2003).

[17] The U.S. Supreme Court noted the principle of comity in international law thus:

> Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

[18] Kyu Ho Youm, "Libel: The Plaintiff's Case, " in *Communication and the Law* 112 (W. Wat Hopkins ed., 2004 ed.).

[19] David Hooper, *Reputations Under Fire* 429 (2000).

[20] 585 N.Y.S.2d 661 (1992). For a detailed discussion of *Bachchan v. India Abroad Publications, Inc.*, see Kyu Ho Youm, "Suing American Media in Foreign Courts: Doing an End-run Around U.S. Libel Law?," 16 *Hastings Communications and Entertainment Law Journal* 235 (1994).

[21] *Id.* at 661.

[22] "Strict liability," also known as "liability without fault," means "liability that does not depend upon actual negligence or intent to harm." Bryan A. Garner, *A Dictionary*

of Modern Legal Usage 836 (2d ed. 1995). The "strict liability" standard in libel law was articulated by Justice Wendell Holmes Jr. of the U.S. Supreme Court as follows: "If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.'" *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909) (Holmes, J.) (citing the King v. Westfall, Lofft, 776, 781, 98 Eng. Rep. 914, 916 (1774)).

[23] *Bachchan,* 585 N.Y.S.2d at 662.

[24] Robin Pogrebin, "A N.Y. Court Refuses to Enforce Decision in U.K. Libel Case," *New York Observer,* May 4, 1992, at 1.

[25] Memorandum of Law in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment at 11, *Bachchan,* 585 N.Y.S.2d 661.

[26] *Id.* at 17-18. "A foreign country judgment need not be recognized if ... the cause of action on which the judgment is based is repugnant to the public policy of this state." N.Y. Civ. Prac. L. & R. 5304 (McKinney 2000).

[27] *Bachchan,* 585 N.Y.S.2d at 662.

[28] *Id.* at 663. For a recent discussion of U.S. libel law, see William K. Jones, *Insult to Injury: Libel, Slander, and Invasions of Privacy* (2003).

[29] *Id.*

[30] 418 U.S. 323 (1974).

[31] The *Gertz* Court held that the plaintiff in libel litigation must prove that the defendant was at least negligent in publishing a damaging falsehood. *Id.* at 348.

[32] 475 U.S. 767 (1986).

[33] The *Hepps* Court held that the Constitution places the burden of proving falsity on a plaintiff in a media libel case when the allegedly defamatory statement relates to a matter of public concern. *Id.* at 777.

[34] *Bachchan,* 585 N.Y.S.2d at 664.

[35] *Id.*

[37] *Id.* For the "gross irresponsibility" liability standard for private figure libel actions in New York, see Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 197 (1975), which held:

> [W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

According to Judge Robert D. Sack of the Second U.S. Court of Appeals, the "gross irresponsibility" standard is "highly protective of defendants; it is almost as difficult as 'actual malice' for plaintiffs to meet in most cases, and more difficult in some." Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* §6.4, at 6-14 (2003) (citations omitted).

[37] 702 A.2d 230, 249 (Md. 1997). For a detailed discussion of *Telnikoff v. Matusevitch*, see Kyu Ho Youm, "The Interaction Between American and Foreign Libel Law: U.S. Courts Refuse to Enforce English Libel Judgments." 45 *International and Comparative Law Quarterly* 131 (2000).

[38] *Id.*

[39] Brief for Appellee at 3, 6, 11, Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995) (No. 95-7138) [hereinafter Brief for Appellee].

[40] *Id.* at Pocket B: Defendant's Letter to the Daily Telegraph.

[41] *Telnikoff v. Matusevitch*, Judgment of May 25, 1989 (No. MR/0365), High Court of Justice, slip op., at 65.

[42] *Id.* at 66.

[43] *Telnikoff v. Matusevitch,* 3 All E.R. 865 (C.A. 1990).

[44] *Telnikoff v. Matusevitch*, 4 All E.R. 817, 825 (1991) (per Lord Keith).

[45] *Id.* at 822.

[46] Joint Appendix to Appellate Brief at 517, Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995) (No. 95-7138) [hereinafter Joint Appendix].

[47] *Id.* at 518.

[48] *Id*, at 77-79.

[49] Brief for Appellee, *supra* note 39, at 3-4.

[50] Complaint for Declaratory Relief (Federal and State Civil Rights) at 12, Matusevitch v. Telnikoff (D.D. Md. 1994) (No. 94-1037) .

[51] Joint Appendix, *supra* note 46, at 177.

[52] *Matusevitch v. Telnikoff,* 877 F. Supp. 1, 4 (D.D.C. 1995).

[53] *Id.*

[54] *Telnikoff,* 702 A.2d 230, 236 (Md. 1997).

[55] *Id.* at 240.

[56] 376 U.S. 254 (1964).

[57] *Telnikoff,* 702 A.2d at 244-45.

[58] *Id.* at 246 (citation omitted).

[59] For a discussion of the *Gertz* case on the fault requirement in libel litigation, see *supra* note 31.

[60] *Id.* (citing Jacron Sales Co. v. Sindorf, 276 Md. 580, 592, 350 A.2d 688, 695 (1976)).

[61] The "actual malice" standard of U.S. libel law, which the U.S. Supreme Court

promulgated in *Sullivan* in 1964, is "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80.

[62] *Telnikoff*, 702 A.2d at 246 (citing *Jacron*, 276 Md. at 601, 350 A.2d at 700).

[63] *Id.* at 246-47 (citing *Jacron*, 276 Md. at 599-601, 350 A.2d at 699-700).

[64] *Id.* at 247 (citing Bruce W. Sanford, *Libel and Privacy* §2.2.2 (2d ed. 1996 Supp.); Rodney A. Smolla, *Law of Defamation* §1.03[3] (1996); Blackshaw v. Lord, 1 Q.B. 1 (1984),2 All E.R. 311 (1983), 2 W.L.R. 283 (1983)).

[65] *Id.* at 247-48

[66] *Id.* at 248.

[67] *Id.* at 249.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 250.

[72] Eric J. McCarthy, "Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping," 16 *University of Pennsylvania Journal of International Business* 527, 551 (1995).

[73] This section is drawn from the Author's *Communications Law* commentary on the *Yahoo!* case. *See* Kyu Ho Youm, "U.S. Court Refuses to Recognize French Judgment in *Yahoo!* on Grounds that It Violates the Free Speech Clause of the First Amendment to the U.S. Constitution," 7 *Communications Law* 15 (2002).

[74] "Yahoo! Ordered to Block Access," *Arizona Republic*, Nov. 21, 2000, at A1 (quoting Harvard Law Professor Jonathan Zittrain on the Nov. 20, 2000, order of French Judge Jean-Jacques Gomez against Yahoo!).

[75] Brief Amici Curiae in Support of Plaintiff's Motion for Summary Judgment at 1, Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, No. C00-21275 JF (N.D. Cal. filed April 6, 2001) [hereinafter Amici Curiae Brief].

[76] Reimann, *supra* note 16, at 668, 669. The case notes and comments on *Yahoo!* are legion. *See, e.g.,* Christine Duh, "Yahoo! Inc v. LICRA," 17 *Berkeley Technology Law Journal* 359 (2002); Benoit Frydman & Isabelle Rorive "Fighting Nazi and Anti-Semitic Material on the Internet: The *Yahoo!* Case and Its Global Implications" (paper presented on Feb. 11, 2002, at the conference "Hate and Terrorist Speech on The Internet: The Global Implications of the *Yahoo!* Ruling in France," New York, N.Y.); Mark S. Kende, "Yahoo!: National Borders in Cyberspace and Their Impact on International Lawyers," 32 *New Mexico Law Review* 1 (2002); Stephanie K.

Hines, "Recent Developments: An Analysis of *UEJF Et LICRA v. Yahoo!,"* 5 *Journal of Small and Emerging Business Law* 445 (2001); Mark F. Kightlinger, "A Solution to the *Yahoo!* Problem?: The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law," 24 *Michigan Journal of International Law* 719 (2003); Daniel Arthur Lapres, "Of Yahoos and Dilemmas," 3 *Chicago Journal of International Law* 409 (2002); Michelle Love, "International Jurisdiction Over the Internet: A Case Analysis of *Yahoo!, Inc. v La Ligue Contre le Racisme et L'Antisemitisme*," 17 *Temple International and Comparative Law Journal* 261 (2003); Sakura Mizuno, "When Free Speech and the Internet Collide: Yahoo!-Nazi-Paraphernalia Case," 10 *Currents: International Trade Law Journal* 56 (winter 2001); Elissa A. Okoniewski, "*Yahoo! Inc. v. LICRA*: The French Challenge to Free Expression on the Internet," 18 *American University International Law Review* 295 (2002); Mahasti Razavi & Thaima Samman, "*Yahoo!* and Limitations of the Global Village," *Communicaitons Lawyer*, spring 2001, at 27; Joel R. Reidenberg, "Yahoo and Democracy on the Internet," 42 *Jurimetrics* 261 (2002); Evan Scheffel, "*Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*: Court Refuses to Enforce French Order Attempting to Regulate Speech Occurring Simultaneously in the U.S. and in France," 19 *Santa Clara Computer and High Technology Law Journal* 549 (2003); Pamela G. Smith, Comments, "Free Speech on the World Wide Web: A Comparison Between French and United States Policy with a Focus on *UEJF v. Yahoo! Inc.,*" 21 *Penn State International Law Review* (2003); Horatia Muir Watt, "*Yahoo!* Cyber-Collision of Cultures: Who Regulates?," 24 *Michigan Journal of International Law* 673 (2003). *See also* Madeleine Schachter, *Law of Internet Speech* 163-66 (2d ed. 2002).

[77] Yahoo!'s Complaint, *supra* note 10.

[78] *Yahoo!*, 145 F. Supp. 2d at 1172.

[79] French Union of Jewish Students v. Yahoo! Inc., No. N□RG: 00/05308, 00/05309, Interim Court Order of the County Court of Paris (May 22, 2000) (Gomez, J.) (translated copy of May 22, 2000, order).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] League Against Racism and Anti-Semitism v. Yahoo! Inc., No. N□RG: 00/05308, Interim Court Order of the County Court of Paris (Nov. 20, 2000) (Gomez, J.) (translated copy of Nov. 20, 2000, order).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Pierre-Antoine Souchard, "French Judge Sets New Cyberspace Parameter Rules Against Yahoo in Auction Case," *Record*, Nov. 21, 2000, at A1.

[88] Carl Honori, "Should Nazi Items Be Off-Limits on Net?," *Chicago Sun-Times*, Aug. 10, 2000, at 55.

[89] Amici Curiae Brief, *supra* note 75, at 1-2.

[90] David Pringle, "Some Worry French Ruling on Yahoo! Will Work to Deter Investments in Europe," *Wall Street Journal*, Jan. 20, 2000, at B2.

[91] Yahoo!'s Complaint, *supra* note 10, at 8-9.

[92] *Id.* at 10.

[93] *Id.* at 11.

[94] 47 U.S.C. §230 (2001).

[95] Yahoo!'s Complaint, *supra* note 10, at 10.

[96] *Id.* at 10-11.

[97] *Id.* at 12.

[98] Points and Authorities in Support of Motion to Dismiss Pursuant to Rule 12(b), Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, No. C00-2175 JF (N.D. Cal. filed Feb. 7, 2001).

[99] Amici Curiae Brief, *supra* note 75, at 10-11.

[100] For a discussion of *Bachchan* and *Telnikoff*, see *supra* notes 20-72 and accompanying text.

[101] Amicus Curiae Brief, *supra* note 75, at 16-17.

[102] For a discussion of Yahoo!'s CDA argument, see *supra* notes 94-95 and accompanying text.

[103] Brief of Amici Curiae Chamber of Commerce of the Untied States, Commercial Internet eXChange Association, Information Technology Association of America, US Internet Industry Association, Online Publishers Association, and United States Council for International Business in Support of Plaintiff Yahoo! Inc. at 16, Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, No. C00-21275 JF (N.D. Cal. filed Aug. 7, 2001). Under the personal jurisdiction test, "an entity must do 'something more' than merely 'posting a website on the Internet' to subject it to jurisdiction in any forum where someone might happen to access the site." *Id.*

[104] *Id.* at 16.

[105] *Id.* at 37.

[106] *Yahoo! Inc.*, 145 F. Supp. 2d at 1171 (footnote omitted).

[107] "Specific" jurisdiction is distinguished from "general" jurisdiction when personal jurisdiction is at issue in connection with a nonresident defendant of the forum state. The *Yahoo!* court stated:

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. 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.

Id. at 1173 (citation omitted).

[108] *Id.* (citations omitted).

[109] *Id.* at 1174.

[110] *Id.* at 1175.

[111] *Id.* at 1176.

[112] *Id.* at 1177 (citations omitted).

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1178 (quoting Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988)).

[116] *Id.* at 1177.

[117] *Id.* at 1178.

[118] *Id.* (citing Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 665 (1992); Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995)).

[119] *Id.* at 1179 (footnote omitted).

[120] *Id.*

[121] *Id.* at 1179-80.

[122] Brian Krebs, "Yahoo Lawsuit Over French Auction to Proceed--Judge," *Newsbytes*, June 8, 2001, LEXIS Nexis Library, Legal News File (quoting Yahoo! spokesman Scott Morris).

[123] *Yahoo! Inc.*, 145 F. Supp. 2d at 1177-78.

[124] *Id.* at 1179 n.7.

[125] *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d at 1192 (N.D. Cal. 2001) (citing Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992); Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994)).

[126] *Id.* at 1193 (citing *Bachchan*, 585 N.Y.S.2d at 665).

[127] *Id.* at 1186.

[128] *Id.* Judge Fogel stated in an accompanying footnote: "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." *Id.* at 1186 n.6.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1187.

[133] *Id.* at 1189 (citations omitted).

[134] *Id.*

[135] *Id.* (citation omitted).

[136] *Id.* (citations omitted).

[137] *Id.* at 1190 (citations omitted).

[138] *Id.* at 1194.

[139] *Id.* at 1193. Judge Fogel expressed no opinion with regard to the eventual constitutionality of any such treaty and legislation. *Id.* at 1193 n.12.

[140] Opening Brief of Appellants at 9, Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme, No. 01-17424 (9th Cir. Filed March 22, 2002).

[141] *Id.* at 28-29.

[142] *Id.* at 31.

[143] One legal commentator is skeptical about the veracity of Yahoo!'s claim that it had no asset in France and therefore the French judgment and fines could be enforced only in the United States. He argued in 2002 that Yahoo! had failed in its American complaint "to inform the U.S. court that its 70% stock ownership interest in Yahoo-France and its royalty interests arising from the licensing agreement between the U.S. parent and French subsidiary could be seized in France to satisfy any fines." Reidenberg, *supra* note 76, at 269.

[144] Appellee's Answering Brief at 13, Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme, No. 01-17424 (9th Cir. Filed April 29, 2002).

[145] *Id.* at 33.

[146] *Id.* at 34.

[147] *Id.* at 38.

[148] *Id.* at 29-30.

[149] *Id.* at 31-32.

[150] *Id.* at 40 (citation omitted).

[151] For a discussion of *Bachchan,* see *supra* notes 20-36 and accompanying text.

[152] For a discussion of *Telnikoff,* see *supra* notes 37-72 and accompanying text.

[153] *Id.* at 40-41 (citing *Bachchan v. India Abroad Publications,* 585 N.Y.S.2d 661 (1992); *Matusevitch v. Telnikoff,* 877 F. Supp. 1 (D.D.C. 1995), *aff'd,* 159 F.3d 636 (D.C. Cir. 1998)).

[154] Brief of Amici Curiae Center for Democracy and Technology, American Civil

Liberties Union et al., in Support of Appellee Yahoo! Inc., at 7, Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme, No. 01-17424 (9th Cir. Filed May 6, 2002) [hereinafter Appellate Amici Curiae Brief].

[155] *Id.* at 8-10.

[156] *Id.* at 12 (citing Reporters Sans Frontieres, *Enemies of the Internet* 5 (2001); Douglas Sussman, *Censor Dot Gov: The Internet and Press Freedom* 2 (2000) http://www.Freedomhouse.org/pfs2000/sussman.html).

[157] *Id.* at 13-19.

[158] *Id.* at 19-20.

[159] *Id.* at 22.

[160] Brief of Amici Curiae of Chamber of Commerce of the United States, Computer & Communications Industry Association, Computing Technology Industry Association, Information Technology Association of America, Netcoalition and Online Publishers Association, in Support of Appellee and Affirmance of the District Court, Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme, No. 01-17424 (9th Cir. Filed May 6, 2002).

[161] *Id.* at 4.

[162] *Id.* at 6.

[163] *Id.* at 10-11.

[164] *Id.* at 14.

[165] *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme,* No. 01-17424, at 1-2 (9th Cir. Dec. 4, 2001) (unofficial transcript) (on file with author) [hereinafter Oral Argument].

[166] *Id.* at 5.

[167] *Id.* at 6.

[168] *Id.* at 6-7.

[169] *Id.* at 7.

[170] *Id.*

[171] *Id.* at 20.

[172] *Id.* at 8.

[173] *Id.* at 16-17.

[174] *Id.* at 17.

[175] Jason Hoppin, "French Order Is Greek to Ninth Circuit," *Recorder*, Dec. 3, 2002, *available at* LEXIS-NEXIS, News Library.

[176] Oral Argument, *supra* note 165, at 22.

[177] The Ninth U.S. Circuit has yet to release its decision in *Yahoo!*. It is not clear when the federal appeals court will render its opinion. At present, the *Yahoo!* case "continues to be under advisement" at the U.S. Court of Appeals. Telephone

Interview with Deputy Clerk Donna Gilmour of the Ninth Circuit (Feb. 24, 2004).

[178] 719 F. Supp. 670 (N.D. Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir.), *cert. denied*, 506 U.S. 865 (1992).

[179] *Id.* at 681-82 (supplemental opinion).

[180] Kurt A. Wimmer, "Internet Jurisdiction," *National Law Journal*, March 26, 2001, at A12.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

[185] *Id.* at 420.

[186] *Id.* at 413-14.

[187] *Id.* at 428.

[188] *Id.* at 428-29 (citations omitted).

[189] *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (abolishing state prohibitions on private, consensual homosexual conduct and citing the opinions of the European Court of Human Rights).

[190] Charles Lane, "Thinking Outside the U.S.," *Washington Post*, Aug. 4, 2003, at A13.

[191] Appellate Amici Curiae Brief, *supra* note 154, at 33.

[192] *See generally* David R. Johnson & David Post, "Law and Borders--The Rise of Law in Cyberspace," 48 *Stanford Law Review* 1367 (1996).

[193] Jack L. Goldsmith, "Against Cyberanarchy," 65 *University of Chicago Law Review* 1199, 1200-01 (1998).

[194] *Macquarie Bank, Ltd. v. Berg* [1999] NSWSC 625 ¶4 (New South Wales Supreme Court, June 2, 1999).

[196] Sanjay S. Mody, "National Cyberspace Regulation: Unbundling the Concept of Jurisdiction," 37 *Stanford Journal of International Law* 365, 386 (2001).