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A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market

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A RETURN TO LILLIPUT: THE *LICRA v. YAHOO!* CASE AND THE REGULATION OF ONLINE CONTENT IN THE WORLD MARKET

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ABSTRACT

Over the past three years, a see saw battle has raged in Paris, France and in the heart of Silicon Valley in Santa Clara County, California, over the regulation of content on the Internet. The arena for this battle is the case of *LICRA v. Yahoo!*, which pits two non-profit human rights groups in France against giant Internet search engine and information portal Yahoo!, Inc. ("Yahoo"). The issues are (1) whether Yahoo may be prosecuted in France under French law for maintaining both auction sites that sell Nazi-related items and information sites promoting Nazi doctrine and (2) whether U.S. courts should enforce the resulting judgment.

The first section of this Article presents the laws governing Internet content providers and the jurisdictional regime that gave rise to this see saw battle. The second section examines a series of court proceedings. The first two proceedings in France in 2000 resulted in a French court order directing Yahoo to add geo-location filtering software to its servers in Santa Clara. The subsequent California district court litigation filed in 2001 resulted in summary judgment for Yahoo. This judgment is on appeal. The third and final section explores the global implications of the French and U.S. proceedings. The section concludes that the international community should restructure certain principles governing international jurisdiction in Internet cases and adopt shared guidelines on online content available to the world market. These changes would promote the principle of international comity while allowing the Internet to retain most of its unique, borderless nature. Without such changes we may, like the people of Lilliput and Blefuscu in Jonathan Swift's

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Gulliver's Travels, be locked in senseless conflict for years over which end of the egg we should break, instead of developing the tremendous potential of the Internet as a means for truly global communication.

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I. BACKGROUND AND INTRODUCTION

The battle began when the League Against Racism and Anti-Semitism (Ligue Contre La Racisme Et L'Antisémitisme, or "LICRA") filed a lawsuit against Yahoo in France. LICRA, based in Paris, sought enforcement of French laws making the offering of Nazi memorabilia a hate crime, claiming Yahoo violated French law by allowing Yahoo users

to offer Nazi-related items for sale. Yahoo contested the jurisdiction of the Paris court, but the court rejected this, finding jurisdiction on the theory that Yahoo's conduct caused harm in France, thereby justifying the exercise of jurisdiction.

After losing a preliminary decision on the merits in the French court, Yahoo responded by filing an action for declaratory relief in U.S. District Court in California.[1] Yahoo ultimately obtained a ruling that the Paris court's order directing Yahoo to install geo-location filtering software in its California-based servers violated Yahoo's First Amendment rights and was therefore unenforceable.[2]

The French and U.S. cases raise a number of significant issues. Jurisdictional issues raised include the extent to which the "effects test," typically applied to establish jurisdiction in tort cases, applies in web content cases. If courts use this test,[3] should they modify it to require evidence of targeting or other grounds (the so-called "effects-plus test") before finding jurisdiction? Finally, should the filing of a judgment obtained in one country by a plaintiff, without subsequent enforcement efforts, be a sufficient contact with the forum of the defendant's country to confer jurisdiction over that plaintiff in a declaratory relief action filed in the defendant's country?

Technological issues raised include the potential role of geo-location filtering. Is geo-location filtering a flawed technical measure offering no substantive assistance to countries seeking to enforce their laws over the "borderless" Internet, or can it afford a means for those countries to maintain their cultural values and mores without seeking to impose them on the rest of the world?

A broader question these cases pose is whether litigation in multiple fora all over the world is the best way to resolve the international disputes that are arising with increasing frequency over the clash between web content and local laws. This Article suggests that the litigation route is fruitless and endlessly draining of valuable resources, and proposes an alternative approach: provide notice to website hosts of the possible liability their content may expose them to under other countries' laws and develop international guidelines, or possibly treaties, addressing the regulation of online content.

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1. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001) [hereinafter *Yahoo! I*].

2. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001) [hereinafter *Yahoo! II*].

3. *See, e.g.*, *Yahoo! I*, 145 F. Supp. 2d at 1173-74 (utilizing the "effects test").

A. Yahoo and Its Auction Pages

Yahoo is a Santa Clara, California based Internet communications, commerce, and media company.[4] A leading search engine for the Internet, Yahoo reports reaching more than 232 million web surfers per month.[5] The company hosts more than twenty-five websites all over the world, with an extensive database of content ranging from stock information, to reproductions of political cartoons, to listings for local movie theaters. The French site ("Yahoo France") is located at the Universal Resource Locator ("URL") http://fr.Yahoo.com.

Yahoo's regional sites target local users, but users from other parts of the world can access these sites through links on other Yahoo pages or through the URL. Presented in the language of their host countries, the regional sites generally observe the laws of those countries for content under their control. Users of the U.S. sites and the regional sites can access any Yahoo site by clicking on a link on each site that allows them to view instantly the contents of the desired site. Each site contains ways for people to interact online, including chat rooms, auction pages, shopping pages, e-mail services, and clubs users can join.

The auction pages on each of Yahoo's twenty-one regional sites are accessible to all net surfers. Anyone over the age of eighteen may list an item for sale under a wide range of categories. Yahoo records the posting and sends an e-mail to the seller detailing the highest bid and the buyer's contact information. The parties then complete their transaction without further involvement by Yahoo.[6]

Although Yahoo does not regulate sales terms for transactions on its auction sites, Yahoo monitors the U.S. Yahoo auction sites for compliance with U.S. copyright laws[7] and warns auction sellers that they may not offer for sale goods or services that violate U.S. laws, such as the sale of stolen goods, body parts, prescription and illegal drugs, weapons, or goods

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4. Yahoo! Inc. was founded in 1994 by two Ph.D. candidates in electrical engineering at Stanford University as a way to keep track of their favorite websites on the Internet. Originally named "Jerry's Guide to the World Wide Web" after co-founder Jerry Yang, the founders shortly thereafter changed the name to Yahoo!. The Yahoo! name is an acronym for "Yet Another Hierarchical Officious Oracle," but the co-founders insist they chose the name because they liked its dictionary definition as meaning a person who is "rude, unsophisticated, uncouth." Yahoo! Media Relations, *The History of Yahoo—How It All Started*, *at* http://docs.yahoo.com/info/misc/history.html (last visited Oct. 14, 2002).

5. *Id.*

6. Yahoo! Shopping Auctions, *Shopping Auctions Guidelines*, *at* http://user.auctions.shopping.yahoo.com/html/guidelines.html (last visited Oct. 14, 2002).

7. *Id.*

that would violate the Iranian or Cuban embargoes.[8] Yahoo also advises sellers that they may not offer items to buyers in jurisdictions that prohibit the sale of those items.[9] Yahoo polices only for copyright law and places the burden of complying with other laws on users—specifically sellers.

Proprietary content sites such as AOL, Prodigy, and Yahoo have struggled with the issue of how much control to exercise over the content they provide to their members and subscribers. Prodigy, for instance, initially represented that it would police the appropriateness of content on its site to attract family use, in effect guaranteeing that the content would be safe for all ages to see. This policy earned Prodigy liability for damages in the much-publicized case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*[10] In the post-*Stratton* era, content-rich sites have steered away from attempting to control all material viewers see, opting instead for the safe-harbor protections afforded to them as passive Internet Service Providers ("ISPs") under the terms of the Digital Millennium Copyright Act.[11]

According to *Stratton*, Internet providers that offer services to subscribers and members de facto exercise some control over their activities, since they have the power to do so.[12] Yahoo exercises this control through the Terms of Service it imposes on its members.[13] These terms prohibit members from using the Yahoo service to "intentionally or unintentionally violate any applicable local, state, national or international law."[14] This provision shifts the burden of determining whether content

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8. *Id.*

9. *Id.*

10. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

11. 17 U.S.C. § 512 (2000).

12. *Stratton*, 1995 WL 323710, at *3.

13. *Yahoo! Terms of Service*, *at* http://docs.yahoo.com/info/terms (last visited Oct. 14, 2002). As noted previously, Yahoo offers membership free of charge. Members receive certain benefits, including personalized content on their home page. In exchange, Yahoo receives demographic information on its members, advertising revenues, and other benefits.

14. *Id.* ¶ 6. The use of the term "national law" may be confusing. Does this mean U.S. law, or the law of other nations? This paragraph also raises a central question in this entire dispute: to what extent has a member violated these rules by posting content lawful in the United States, but not lawful in another country? The Terms of Service are ambiguous on this point. The next term provides the following sentences, which neither shed much light on the issue, nor provide much guidance for the members: "Recognizing the global nature of the Internet, you agree to comply with all local rules regarding online conduct and acceptable Content. Specifically, you agree to comply with all applicable laws regarding the transmission of technical data exported from the United States or the country in which you reside." *Id.* ¶ 7. The first sentence's meaning is unclear, because the agreement neglects to define "local rules." The second sentence is unrelated to the first—

violates "any applicable local, state, national or international law" to the members who post it—a seemingly Herculean task, difficult even for Yahoo itself to comply with, as we shall see. Through its Terms of Service, Yahoo restricts what members can post or upload onto its service overall (not just the auction sites). Restrictions include prohibitions against defamatory statements and material that breaches fiduciary duties or violates intellectual property law.[15]

B. European Laws Making the Promotion of Nazism a Hate Crime

The ease with which information can be disseminated via the Internet inexpensively to a large audience has, in the view of some commentators, sparked a tremendous growth in hate group advocacy for racial supremacy, religious discrimination, and other fringe group views.[16] While in the United States the First Amendment protects a fairly broad spectrum of hate speech,[17] a different set of limits applies to certain kinds of speech in other countries, including France—and it is this difference that triggered the dispute in the *LICRA v. Yahoo!* cases.

France, Germany, the Netherlands, and other countries have laws that make it a crime to exhibit for sale objects relating to Nazism and the Third Reich.[18] Judge Jean-Jacques Gomez, the judge who presided over the *LICRA v. Yahoo!* case in Paris, France, explained the rationale behind the French statute:

> Whereas the exhibition of Nazi objects for purposes of sale constitutes a violation of French law (Section R.645-2 of the Criminal Code), and even more an affront to the collective memory of a country profoundly traumatised by the atrocities

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what does the global nature of the Internet have to do with the applicable laws relating to transmission of a specific kind (technical) of data?

15. *Id.* ¶ 7.

16. Lisa Guernsey, *Mainstream Sites Serve as Portals to Hate*, N.Y. TIMES, Nov. 30, 2000, *available at* http://www.nytimes.com/2000/11/30/technology/30HATE.html. According to the Simon Wiesenthal Center, there are more than 2000 groups with sites on the Internet promoting anti-Semitism or white supremacy. *Id.*

17. *See, e.g.*, Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

18. *See, e.g.*, CODE PENAL [C. PÉN.] art. R.645-1 (Fr.), *translation available at* http://www.lex2k.org/yahoo/art645.pdf (last visited Dec. 4, 2003); § 130(1)(3) STRAFGESETZBUCH [StGB] (F.R.G.). Section 130(3) of the Federal Criminal Code in Germany provides that "Imprisonment, not exceeding five years, or a fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes {the Holocaust} committed under National Socialism, in a manner which is liable to disturb the public peace." § 130(1)(3) StGB (F.R.G.).

> committed by and in the name of the criminal Nazi regime against its citizens and above all against its citizens of the Jewish faith . . . .[19]

There has been no challenge presented in any proceedings claiming that France, Germany, the Netherlands, or any other countries with similar hate crime laws lack either the political or moral right to enact those statutes. However, the unique nature of the Internet has given birth to a controversy unforeseen when these laws were enacted: what is the responsibility of national legal systems when online content is posted in one country where it is legal but can be viewed in another country where the same content is illegal?

C. Whose Content Prohibitions Govern? Which End of the Egg is the Right End to Break?

The pointless struggle of nations over their cultural differences, and the effort to impose their laws on each other in an effort to protect those differences rather than seeking means to preserve them without conflict, is an old and regrettably venerated tradition. Literature is replete with examples of the destructive nature of such endless fights.

In Jonathan Swift's brilliant eighteenth century satire *Gulliver's Travels*,[20] Captain Lemuel Gulliver is shipwrecked and washes ashore on the island of Lilliput. The people of Lilliput are physically tiny, and to them, Gulliver appears to be a giant. After assuaging the initial fears the Lilliputians have towards him, the King of Lilliput enlists Gulliver's help to resolve a bitter war that has raged for "six and thirty moons"[21] against the people of a neighboring island, Blefescu.

The conflict's source, the King explains, is that the two countries, once on friendly terms, became bitter enemies over a dispute regarding which end of an egg should be broken before it is consumed. The Lilliputian view is that the small end of the egg should be broken, and the Blefescu view is that the large end is the one to break. The conflict's consequences are summarized as follows:

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19. Pl.'s Compl. for Decl. Relief, ex. A, at 5, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d. 1181 (N.D. Cal. 2001) (No. 00-21275), *available at* http://www.cdt.org/speech/international/001221yahoocomplaint.pdf (last visited Dec. 2, 2003).

20. JONATHAN SWIFT, GULLIVER'S TRAVELS AND OTHER WRITINGS (Louis A. Landa ed., The Riverside Press 1960) (1726).

21. *Id.* at 39.

> It is computed, that eleven thousand persons have, at several times, suffered death, rather than submit to break their eggs at the smaller end. Many hundred large volumes have been published upon this controversy: but the books of the Big-Endians have been long forbidden, and the whole party rendered incapable by law of holding employments.[22]

Swift used satire to point out the absurdity and terrible consequences of the political, religious, and economic conflicts between Ireland and England, in terms of trade and agriculture, all of which he saw as being unfairly controlled by England. As a clergyman loyal both to his native home of Ireland and to the Church of England, he sought to reform and bring an end to this pointless and damaging conflict.[23] Swift hoped that by illustrating that the two peoples of Lilliput and Blefuscu were foolish to engage in a terrible and costly war over a matter of insignificance (which end of the egg to break) when their common goal was in fact the same (to eat the egg), that he could encourage the English and the Irish to put aside their differences and strive for the common good (enough eggs in famine-stricken Ireland to feed them all).

The goal of this Article, with apologies to Swift, is similarly to urge the combatants in the Internet content regulation disputes to refrain from endless litigation in disjunctive legal systems, which results in stalemates and unenforceable judgments, and instead to look to means by which to achieve the common goal: an Internet that allows for the free exchange of information in the global marketplace. The United States, France, and perhaps other countries have a common goal, which may extend to a more general interest in international comity. France and the United States share a long history of support for a free press and democratic principles in governance.[24] Both countries recognize that the Internet's capacity for the free flow of information and opinions represents a quantum leap forward in advancing the goal of an expanded range of exchange in contemporary society.[25] Both countries also recognize that free speech needs to be limited in some respects to preserve domestic and international peace, and to respect and preserve the cultural values of each country.[26] Where the

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22. *Id.*

23. *Id.* at xviii-xxvi.

24. *See* Julian Mailland, *Freedom of Speech, The Internet, and The Costs of Control: The French Example*, 33 N.Y.U. J. INT'L L. & POL. 1179, 1184 (2001).

25. *See* Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL. 445, 477-81 (2001).

26. *See generally id.* at 468-70; Mailland, *supra* note 24; Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263 (1997).

countries occasionally differ is the emphasis each places in that regulatory scheme—differences likely resulting from distinct sets of historical experiences and societal pressures. The challenge for countries like these is to find a way to allow the maximum amount of freedom in communication and exchange, while at the same time not permitting that exchange to violate those local cultural values and laws and to find that balance in a way that encourages the expansion of the doctrine of comity among nations.

D. The Legal Dilemma: Jurisdiction and Enforceability on the Worldwide Internet

One of the challenges of the Internet is determining whether we can solve a particular problem by applying existing legal principals to the digital realm, or whether only the creation of new legal doctrine will suffice. The interaction between the Internet and the traditional legal doctrines of jurisdiction, national and international, has been the subject of considerable debate, both in case law and in scholarly works. The *LICRA v. Yahoo!* cases show how far we have to go in resolving how jurisdictional principles do or should work on the international Internet and illustrate the importance of addressing these issues as a global community.

Traditional jurisdiction in the United States was articulated definitively in the seminal 1877 decision of *Pennoyer v. Neff*.[27] The U.S. Supreme Court ruled that for a court to assert personal jurisdiction over an individual, that person must be present physically in that court's state when served.[28] By the middle of the twentieth century, changes in technology mandated a less stringent standard. It had now become possible to do business by catalog sales, by telephone or telegraph, and commercial aviation and the development of the national highway system meant that interstate travel was no longer an onerous burden.

The Supreme Court recognized the changes wrought by increased interstate contact in *International Shoe v. Washington*.[29] Here, the Court extended states' jurisdictional reach with a two-part test to determine whether jurisdiction could be asserted against an out-of-state defendant: (1) whether the defendant had sufficient "minimum contacts" with the forum state to justify the exercise of jurisdiction,[30] and (2) whether allowing the defendant to be sued in the forum state would offend

27. 95 U.S. 714 (1877).
28. *Id.* at 722.
29. 326 U.S. 310, 316 (1945).
30. *Id.* at 319.

"traditional notions of fair play and substantial justice."[31] Both parts of the test must be satisfied before a case can proceed.

Typically, courts look to the long-arm statutes of a particular state to determine what the state views as sufficient "minimum contacts" to invoke jurisdiction. This inquiry has led to the development of the doctrine of "purposeful availment." In applying the doctrine, the court focuses on whether a defendant has initiated contacts and expects protection by a given forum's laws for the defendant's commercial or personal benefit.[32] If a showing of minimum contacts can be established, courts next look to the reasonableness of the exercise of jurisdiction against a nonresident defendant, considering the interests of the state in protecting the rights granted to its citizens, the burden on the plaintiff if denied the choice of venue, and the burden on the defendant in coming to a foreign jurisdiction to defend against the action.[33] Mere inconvenience or added expense will not be sufficient to overcome a court's decision to exercise jurisdiction; the inconvenience must be severe and the expense significant to warrant denial of jurisdiction on the fairness ground.[34]

The question then becomes what constitutes a reasonable exercise of jurisdiction over the global Internet. Professor Michael Geist has argued that a "foreseeability metric lies at the heart of the reasonableness standard," which he defines as meaning that "a party should only be haled into a foreign court where it was foreseeable that such an eventuality might occur."[35] He asserts that the "borderless Internet" and the worldwide availability of the Internet makes foreseeability very difficult, and creates instead an "all or nothing environment in which either every jurisdiction is foreseeable or none is foreseeable."[36]

Within the United States, online transactions via the Internet and websites established to provide information and/or goods have challenged the "purposeful availment" and "minimum contacts" tests of *International Shoe* and its progeny, since these transactions and sites do not actually "enter" into a specific jurisdiction. A California-based website advertising goods for sale across the nation would not, absent any other evidence of activity in a given state, meet the test of minimum contacts and purposeful availment, and jurisdiction would be denied. As cases dealing with these

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31. *Id.* at 320.

32. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985).

33. *Id.*

34. *Id.*

35. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1356 (2001).

36. *Id.* at 1356-57.

issues began to emerge, it became apparent that courts needed a different jurisdictional model for Internet-based activity.

The model evolved into a "passive versus active" test based on the nature of the website involved. If the site required a high degree of interaction between site host and visitor, the visitor who became a plaintiff would be able to assert jurisdiction against the host/defendant.[37] A purely passive, information-only site, by contrast, would generally be outside of the jurisdictional reach of the plaintiff's home state.[38]

Initially, courts applied the passive versus active test as a refinement of traditional jurisdiction that recognized the unique characteristics of Internet commerce. One of the earliest decisions applying the test was *Bensusan Restaurant Corp. v. King*.[39] Using the *Bensusan* case as a guide, a federal district court in Pennsylvania elaborated on the passive/active test in the decision in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[40] This case presented a claim of trademark infringement and dilution based on the use of a trademarked name on a website. The plaintiff, Zippo Manufacturing, based in Pennsylvania, manufactured the famous "Zippo" cigarette lighters. The defendant, Zippo Dot Com, was an Internet news service located in California that had registered the domain name "Zippo.com" for its service.[41] Through its online presence, Zippo.com attracted subscribers to its news service from all over the country. At least 3000 of those subscribers came from Pennsylvania, all of whom found

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37. *See* Bensusan Rest. Corp. v. King, 126 F.3d 25, 27-29 (2d Cir. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).

38. *Zippo*, 952 F. Supp. at 1121.

39. 126 F.3d. 25 (2d Cir. 1997). The Blue Note was a nightclub in Columbia, Missouri. Club owner Richard King promoted the musical performances at his club through a Web site which posted the club's calendar, and gave ticket purchasing information. To avoid confusion between his club and the historic New York club of the same name, the Missouri club's Web site contained the following disclaimer: "The Blue Note's CyberSpot should not be confused with one of the world's finest jazz club[s], [the] Blue Note, located in the heart of New York's Greenwich Village. If you should ever find yourself in the big apple [sic] give them a visit." *Id.* at 27. The proprietors of the Blue Note in New York, the Bensusan Restaurant Corporation, were not mollified by this disclaimer. As holders of a federal trademark registration in the Blue Note name, they brought a trademark infringement action in New York federal court. *Id.* The case presented the court with the dilemma of imposing jurisdiction of the federal court in New York over a Missouri club owner whose only presence in the New York district was a virtual one, only manifesting itself through the fact that a Web surfer in New York could access the Missouri club's site online. *Id.* at 29. The court noted that King's Web site was passive in nature and his business operations were "of a local character." *Id.* The court found that jurisdiction would not lie for this level of passivity. *Id.*

40. 952 F. Supp. 1119 (W.D. Pa. 1997).

41. *Id.* at 1121.

their way to the site despite the fact that Zippo.com had no physical presence in the state—no employees or agents, and no office.[42]

In analyzing the jurisdiction issue, the court opined that there are three different types of web presence, and found that the degree of interactivity on a given site would determine whether it was reasonable to impose jurisdiction. At one extreme was the situation in *CompuServe, Inc. v. Patterson*,[43] where the court found jurisdiction in a trademark infringement case brought by plaintiff CompuServe. The court found that defendant Patterson had availed himself of the benefits of the laws of the state of Ohio, where CompuServe was based, by entering into a shareware agreement with a party based in Ohio, by sending shareware electronically to CompuServe, and by advertising the availability of that shareware on CompuServe.[44] At the other extreme for the court was the pure information site, illustrated in *Bensusan* by a jazz nightclub's website that did not sell tickets or merchandise online, by phone, or by mail. The court in *Bensusan* declined to extend jurisdiction to the website's owner. The *Zippo* court followed this application of the test and reaffirmed that the mere fact that a website contained information about a business's activities would not confer jurisdiction.[45]

The court in *Zippo* then expanded the definition of these passive and active sites by noting that there was a third group to consider between the two ends of the spectrum: interactive websites in which, even though there is no solicitation from the host computer, there is interaction in the form of an exchange of information. Depending on the extent of the exchange and the commercial nature of the information exchanged, the court held that jurisdiction might or might not be imposed.[46] The court found that the extent of interaction between Zippo.com and its customers in Pennsylvania was closer in its conduct to the defendant in *CompuServe* than the defendant in *Bensusan*, and applying a similar analysis of the contacts, concluded similarly that jurisdiction was proper against Zippo.com.[47]

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42. *Id.*

43. 89 F.3d 1257 (6th Cir. 1996).

44. *Id.* at 1265-66.

45. *Zippo*, 952 F. Supp. at 1124 (citing Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997)).

46. *Id.*

47. *Id.* at 1125-27.

A number of decisions in U.S. courts have followed the passive/active approach over the past few years.[48] However, courts and scholars have begun to note some limitations of this approach.[49] One area of difficulty for courts trying to apply the *Zippo* test was for cases dealing with defamation on the web. A purely passive site published in California that, for example, defames former New York City Mayor Rudolph Guiliani would not, under the *Zippo* test, allow a New York court to impose jurisdiction. The fact that the site could be seen in New York, and could harm Guiliani's reputation in New York, would not be enough for the court to find jurisdiction if the host site had no business activity in New York, no offices, employees or agents, and did not solicit any contact with New York citizens. The worldwide availability of Internet access, coupled with the anonymity afforded to persons posting material online, seemed like an open invitation to spread lies and defamatory content with no fear of liability for damages.

To remedy this oversight, courts looked for guidance in earlier decisions, and found it in *Calder v. Jones*, a 1984 decision by the U.S. Supreme Court employing the so-called "effects test" to establish jurisdiction for a web-based tort claim.[50] In *Calder*, an entertainer resident in California brought a libel case against a publisher in Florida.[51] The case was filed in a California superior court, and the defendants objected to the jurisdiction of the court.[52] Instead of focusing on the defendants' contacts with the forum in order to apply the *International Shoe* criteria, the Court, however, concentrated on the effects of their actions.[53] The Court ruled that in such cases, the "effects doctrine" required the Court to find personal jurisdiction properly imposed when the following four elements are present: a) the defendant's tortious actions, b) expressly aimed at the forum state, c) cause harm to the plaintiff in the forum state, d) which the defendant knows is likely to be suffered.[54] Applying this test, the Court found that plaintiff Jones suffered injury to her professional reputation in California, that she lived in California, and that she suffered emotional

48. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743 (D.N.J. 1999); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).

49. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998); Bochan v. La Fontaine, 68 F. Supp. 2d 692, 701-02 (E.D. Va. 1999).

50. 465 U.S. 783 (1984).

51. *Id.* at 784, 785.

52. *Id.* at 784.

53. *Id.* at 789.

54. *Id.*

distress arising from the defamatory conduct in California.[55] Based on those reasons, the Court found that the defendant had intentionally targeted a California resident for harm and was therefore subject to the jurisdiction of the California courts.[56]

Courts have applied the effects test doctrine, focusing on where the harm occurs, in a number of Internet cases.[57] Not all of the cases have been based on tort claims; they have also encompassed other forms of business activity, usually in the context of unfair competition or trademark or copyright claims.[58] Notably, in all these cases the conduct at issue (i.e., tortious actions, trademark, or copyright infringement) was unlawful in both the plaintiff's and the defendant's home states or countries. It is not surprising, consequently, that the question of the validity of the doctrine was never raised in the context of attempting to apply it in a case where the law in one forum would allow the conduct at issue, whereas the law in another forum would make that same conduct illegal.

Internet interaction makes the jurisdictional question of whose law to apply pressing, as the conduct at issue may be simultaneously lawful and unlawful depending on where in the world the parties post to and/or access the web. Traditionally, the effects test made jurisdiction and hence the choice of law clear: usually some item containing the offending conduct physically made its way across a border where it caused harm according to local law—for instance, an obscene film. In this case, the effects test established jurisdiction at the item's physical location, leaving it to the local court to decide which law to apply. Material posted on the Internet, however, is simultaneously available all over the world, making it harder to prove intent to do harm in a particular jurisdiction, yet easier to show an effect in all jurisdictions around the world. Efforts to regulate content in this context spark claims, such as what Yahoo advanced in this instance, that the only means available to comply with all countries' laws is to remove the content entirely, a course that then gives rise to claims of

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55. *Id.* at 789-90.

56. *Id.* at 791.

57. *See generally* Geist, *supra* note 35, at 1360–80 (discussing the "effects test" on Internet-related cases).

58. *See, e.g.*, *id.* at 1373-76 (citing court decisions finding jurisdiction under the effects test in *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000), and *Euromarket Designs Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824 (N.D. Ill. 2000), and court cases finding insufficient evidence to support application of the test in *People Solutions, Inc. v. People Solutions, Inc.*, No. 3:99-CV-2339-L, 2000 WL 1030619 (N.D. Tex. Jul. 25, 2000), and *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000)).

censorship and that the defendant is being forced to accede to the lowest denominator in the regulation of information it distributes.

Like the United States, France has adopted a jurisdictional test similar in nature to the "effects test," allowing its courts to exercise jurisdiction over defendants who cause harm within the borders of France regardless of the defendant's place of residence.[59] The Internet makes this principle necessary to preclude defendants from locating outside a country's borders for the purpose of avoiding jurisdiction. United States courts have been fighting this battle on a number of fronts in recent years, in efforts to prevent offshore website owners from providing online gambling opportunities in violation of U.S. federal or state laws,[60] or from posting software systems that allow parties to circumvent copy-protection systems in violation of Section 1201 of the Digital Millennium Copyright Act.[61]

A significant issue not addressed in these jurisdictional battles is whether, after the dust settles on these conflicts, any lasting change is actually accomplished due to the remaining problem of enforceability. Little will be accomplished if the boundaries of jurisdiction are expanded without concurrently expanding the ability to enforce judgments obtained in those foreign courts.

II. CROSSING THE POND—THE LAWSUIT IN FRANCE, THE FRENCH COURT'S INTERIM ORDERS, AND THE ENSUING U.S. LITIGATION

The following history of the dispute between the French plaintiffs and Yahoo serves as a sad illustration of the inability of the litigation process, either in France or in the United States, to deal with the complex cultural and legal issues that arise when material posted lawfully on servers in one country violates the law when viewed by web surfers in another country. The courts in each country attempt to walk the fine line between preserving their sovereignty and preserving the principle of international comity. The results are less than satisfying on all sides. Perhaps the most disappointing element of this dispute is that after more than three years of litigation, the parties are no better off than when they started, and the

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59. *See* Pl.'s Compl. for Decl. Relief, ex. A, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d. 1181 (N.D. Cal. 2001) (No. 00-21275), *available at* http://www.cdt.org/speech/international/001221yahoocomplaint.pdf (last visited Dec. 2, 2003).

60. *See infra* note 177.

61. *See* United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. May 8, 2002); *see also* discussion *infra* note 264.

issues they attempted to address in the litigation are still unresolved. Like the endless battles in Lilliput, the combatants seem unable to recognize that the larger goals they both share are disserved by their unrelenting positions.

A. The Opening Salvo: *LICRA et UEJF v. Yahoo and Yahoo France*

The battle began with LICRA's contention that the ease with which French web surfers could access auction pages on the Yahoo U.S. website where they could find Nazi memorabilia for sale was a clear violation of French criminal law. LICRA's unsuccessful efforts to convince Yahoo to remove the offending materials led to the initiation of litigation in a Paris court, raising questions of first impression over jurisdiction, technical measures, and the impact of the U.S. Constitution's First Amendment on the dispute.[62] Finding jurisdiction, the French court ruled against Yahoo and issued orders for Yahoo to implement in France and California.[63] International flak soon followed.

1. The Source of Conflict: The Yahoo U.S. Auction Sites

In September 2000, visitors could find as many as 1500 Nazi and Third Reich related objects offered for sale on the Yahoo U.S. site.[64] These goods included Nazi uniforms, medals, and photographs, as well as literary works, such as Adolf Hitler's *Mein Kampf,* and *The Protocols of the Elders of Zion*, a notorious report produced by the Russian secret police in the early 1900's alleging a world wide Jewish conspiracy to foment corruption and sedition.

On April 5, 2000, LICRA sent a cease and desist letter to Yahoo in Santa Clara, California, advising the company that both the sale of the Nazi objects on the auction site and the promotion of pro-Nazi books and other written materials violated French law.[65] LICRA threatened to take

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62. *See* Pl.'s Compl. for Decl. Relief, ex. A, at 4, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d. 1181 (N.D. Cal. 2001) (No. 00-21275), *available at* http://www.cdt.org/speech/international/001221yahoocomplaint.pdf (last visited Dec. 2, 2003).

63. *See id.* exs. A, B.

64. Yahoo! Shopping Auctions, *at* http://search.auctions.yahoo.com/search/auc?p=mazo&alocale=1us&acc=us (last viewed Sept. 18, 2000) (on file with author). Downloaded U.S. auction pages showed 1589 items total. Descriptions of some of the items included the following: "Nazi 25 yrs Service Medal LOOK!!," "Nazi War Songs & Marches 6 Tapes NEW!," "Nazis in Front of a Beautiful House," "Nazi Officers with Sweetie," "Hitler 20 Mint NH Stamps Nazi Germany."

65. *Yahoo! II*, 169 F. Supp. 2d. 1181, 1184 (N.D. Cal. 2001); Pl.'s Compl. for Decl. Relief ¶ 14, *Yahoo! II* (No. 00-21275).

legal action if Yahoo failed to take steps to prevent the sales and remove pro-Nazi content within eight days.[66] On April 10th, LICRA filed a complaint in the Superior Court of Paris against Yahoo U.S. and Yahoo France.[67] On April 20th, LICRA was joined by the Union of Jewish Students of France (Union Des Etudiants Juif De France or "UEJF"), which filed a similar claim in the same action.[68] Yahoo U.S. was served with process by a United States Marshal and retained counsel to appear especially on its behalf in the French court.[69]

2. The May 22, 2000 Interim Decision of the French Court

On May 15, 2000, the Paris court heard arguments on an expedited emergency basis before a single judge, Judge Jean-Jacques Gomez, First Deputy Chief Justice of the Superior Court of Paris. All parties were represented by counsel. Yahoo objected to the expedited emergency review status of the proceeding and requested a trial before a full judicial panel.[70] The court rejected this objection and proceeded to take evidence in response to the request of the plaintiffs for a preliminary injunction.[71]

The French court received evidence from the parties and the Sheriff of Paris regarding the contents of the Yahoo U.S. auction site, and the ease with which French citizens could access the site by using the link on the Yahoo France site. While not disputing that the offer of these goods for sale violated French law, Yahoo argued that the French court had no jurisdiction because the goods were offered for sale within the United States, on the Yahoo site targeted for U.S. users, and further that any prohibition of the sales or barring of the posting of the written works (*Mein Kampf* and *The Protocols of the Elders of Zion*) would violate the First Amendment of the U.S. Constitution.[72] Yahoo France also argued that it had no liability because the Yahoo France regional site did not contain any offers to buy or sell Nazi or Third Reich items.[73] Finally, Yahoo argued that it was technologically impossible to prevent French web surfers from accessing the auction sites at issue.[74]

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66. *Yahoo! II*, 169 F. Supp. 2d at 1184; Pl.'s Compl. ¶ 17, *Yahoo! II* (No. 00-21275).

67. Pl.'s Compl. for Decl. Relief ¶ 17, *Yahoo! II* (No. 00-21275).

68. *Id.* ¶ 18.

69. *Yahoo! II*, 169 F. Supp. 2d at 1184.

70. Pl.'s Compl. for Decl. Relief ¶ 20, *Yahoo! II* (No. 00-21275).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

After considering this evidence Judge Gomez, on May 22, 2000, issued his first preliminary order ("May 22 Order"). The order addressed the various objections raised by Yahoo, and found that none of them precluded the court from issuing a preliminary injunction.[75] Because the reasoning Judge Gomez applied in this first order would come to frame the issues in the subsequent proceedings, both in France and in the United States, it therefore warrants close examination.

a) The French Court's Application of the "Effects Test" to the Jurisdiction Issue

The threshold issue for Judge Gomez to decide was whether the French court had jurisdiction over Yahoo. Applying French law, which embodies an approach similar to the "effects test" used in the United States, Judge Gomez produced a jurisdictional analysis virtually identical to that in the *Calder v. Jones* decision.[76] Noting that Yahoo had objected to the jurisdiction of the French court on the grounds that the alleged unlawful conduct was "committed on the territory of the United States,"[77] the court next considered the evidence of harmful effects in France. Judge Gomez asserted that there is no dispute that "surfers" (presumably web surfers) who link to Yahoo.com (the U.S. site) from French territory may see on their screens the pages that contain auction offerings of Nazi objects.[78] The court then reiterated the policy consideration behind the passage of French law Article R.645-2 of the Criminal Code by noting that the "exhibition of Nazi objects for purposes of sale," in addition to being a violation of the Code, was also "an affront to the collective memory of a country profoundly traumatised by the atrocities committed [by the Nazis] . . . ."[79]

Judge Gomez concluded that jurisdiction may be imposed based on the harm done in France, noting also his view that Yahoo's actions were probably unintentional:

> Whereas while permitting these objects to be viewed in France and allowing surferes located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage to be suffered by LICRA and UEJF, both of whom are

75. Pl.'s Compl. for Decl. Relief, ex. A, at 5-6, *Yahoo! II* (No. 00-21275).
76. *See supra* note 50 and accompanying text.
77. Pl.'s Compl. for Decl. Relief, ex. A, at 4, *Yahoo! II* (No. 00-21275).
78. *Id.* ex. A, at 5.
79. *Id.*

> dedicated to combating all forms of promotion of Nazism in France, however insignificant the residual character of the disputed activity may be regarded in the context of the overall running of the auctions service offered in its Yahoo.com site;
>
> Whereas, the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure . . . .[80]

Having determined that the court had jurisdiction and that the evidence established that Yahoo had violated Article R.645-2 of the Criminal Code, Judge Gomez turned to the issue of remedies. These included orders directed both to Yahoo's French website located in France and ultimately to the home site of Yahoo in Santa Clara County, California. [81]

b) The "Technical Measures" Ordered by the French Court

In the May 22 Order, the French court's solution to the problem of unfettered access to content prohibited in France was a technological one: use code to forbid access to pages containing Nazi goods for all French users. Judge Gomez noted that Yahoo asserted in its defense that it was impossible for it to determine the national identity of people visiting its auction sites, which meant that such an order would have the effect of forcing Yahoo to remove the offending material from its site entirely.[82] Asserting that Yahoo was in a position, in most cases, to verify the geographical origin of surfers visiting its auction pages based on the IP address of the Internet service provider,[83] the court acknowledged that for those surfers who accessed the web through portals that guaranteed their anonymity, Yahoo would have more difficulty in exercising control over what pages they could access, but also noted that control could still be exerted by limiting page access only to surfers who disclosed their geographical origin.[84] The court went on to assert that since Yahoo! Inc. was in a position, in most cases, to verify the geographical origin of surfers visiting its auction pages based on the IP address of the caller, it was in a position to prohibit surfers from France from viewing those pages

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80. *Id.*

81. *Id.* ex. A, at 6-7.

82. *Id.* ex. A, at 4.

83. *Id.* ex. A, at 5.

84. *Id.* ex. A, at 6. This part of the Order apparently reflects the understanding held by the Court at that point in the proceedings that changes in the programming code for the site would be an effective way to regulate what content a given group of surfers could see. As will be shown, the Court later heard from experts that the use of code alone would yield only limited success in regulating access. *See* note 116 and accompanying text.

that violated Criminal Code Article R.645-2 by offering Nazi items for sale.[85] Judge Gomez concluded from this analysis that "the real difficulties encountered by Yahoo do not constitute insurmountable obstacles."[86] He therefore ordered that Yahoo "[t]ake any and all measures of such kind as to dissuade and make impossible any consultations by surfers calling from France to its sites and services in dispute, . . . , especially the site selling Nazi objects."[87]

The court retained jurisdiction over these technical measures, gave Yahoo two months to "formulate any proposals in respect of technical measures capable of facilitating settlement of the present dipuate,"[88] and set a second hearing date for July 24, 2000 for Yahoo to return and advise the court of the measures it was prepared to adopt.[89]

At the second hearing, Yahoo advised the court that it "would be technically impossible for Yahoo! to comply with the May 22 Order,"[90] supporting this claim with a technical report prepared by its French Internet expert Jean-Denis Gorin, and also submitting a supplemental declaration from Yahoo engineer Geoff Ralston.[91] Judge Gomez took the matter under submission and on August 11, 2000, ordered the formation of an expert panel to study the feasibility of compliance with the "technical measures" portion of the May 22 Order.[92] He followed with another order on September 18, 2000, establishing the expert panel and requiring that the panel report back to the court with its findings by November 5, 2000.[93]

3. *The International Response to the May 22 Order*

Judge Gomez's May 22 Order stirred up a firestorm of controversy throughout the European Union and the United States, as commentators questioned the wisdom of such a solution, the French court's authority, and the future of the Internet.

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85. *Id.*

86. *Id.*

87. *Id.*, ex. A at 7. Judge Gomez also ordered Yahoo! France to post a warning on the French language site advising any surfers who used the site's link to the U.S. Yahoo site that if they encountered material on the U.S. site pages that violated French law, they were to cease their review of those pages on penalty of the sanctions French law authorized for such violations. *Id.*

88. *Id.*, ex. A at 6.

89. *Id.*, ex. A at 7.

90. *Id.* ¶ 22.

91. *Id.*

92. *Id.* ¶ 23.

93. *Id.* ¶ 24. Judge Gomez allowed each party to designate an expert and chose a third expert himself. The panel included Francois Wallon from France, Ben Laurie from the United Kingdom, and Vinton Cerf from the United States. *Id.*

Philippe Guillanton, director general of Yahoo France, warned that the decision was very dangerous:

> The whole question goes above Yahoo . . . . The point is whether we want to condemn the Internet to be closed in the same way that the media have traditionally been closed by frontiers . . . . This case could set a potentially dangerous precedent. . . . It is the first case where a judge in one country feels he is competent to decide over what actions he thinks an actor (in another country) should be taking.[94]

Marc Knobel, spokesman for the plaintiffs, retorted, "If Yahoo doesn't respect the court's ruling, we'll press criminal charges against individuals such as Jerry Yang and perhaps the president of Yahoo France."[95] Spokespeople for the auction site eBay and online bookseller Amazon.com offered the alternative view that content regulation of the Internet was best left up to the community of users, in other words, the marketplace, leading one reporter to conclude, "The lack of international consensus on how to deal with conflicting legal issues might for the moment mean that the market ultimately decides the fate of these Internet companies."[96]

Henry H. Perritt Jr.[97] offered the following summary of the problem in asserting that the French court was wrong to find jurisdiction:

> The Yahoo case points up a dilemma in the law of jurisdiction . . . . If a web site is accessible to all, and is subject to jurisdiction by every nation on earth, then the laws of the lowest common denominator nation [will govern the Internet]. On the other hand, if we say that the only important law is the one where the content provider resides, then local values of foreign nations will not be enforced. We also run the risk of creating havens for shyster practices.[98]

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94. Reuters, *Yahoo Says French Ruling May Set Precedent*, CNET NEWS.COM, *at* http://news.cnet.com/news/0-1007-200-1930850.html (last viewed May 23, 2000).

95. Jenny Oh, *French Court Gives Yahoo More Time*, THESTANDARD.COM, *at* http://www.codoh.com/newsdesk/2000/000724std.html (last viewed July 24, 2000).

96. *Id.*

97. Mr. Perritt is the Dean of the Chicago-Kent College of Law and an expert in Internet law.

98. Carl S. Kaplan, *French Nazi Memorabilia Case Presents Jurisdiction Dilemma*, N.Y. TIMES, Aug. 11, 2000, *available at* http://www.moglen.law.columbia.edu/CPC/archive/hatespeech/11law.html [hereinafter Kaplan, *French Nazi Memorabilia*].

Dean Perritt expressed his hope that an appellate court in France would overturn the May 22 Order based on a finding that Yahoo had not targeted French citizens. He cited the existence of Yahoo France and its exclusion of Nazi items from its site pages as evidence of the absence of such targeting and characterized Judge Gomez's decision as "an exorbitant exercise of jurisdiction that is inconsistent with emerging best practices."[99] The "emerging best practices" to which Dean Perritt is alluding are presumably the use of a "plus" element in addition to the effects test, in which a showing of harm in a forum is insufficient to confer jurisdiction; some additional factor must also be present, with evidence of targeting of the jurisdiction being the most favored "plus."

Professor Jack Goldsmith[100] proposed that it was proper for France to exercise jurisdiction over Yahoo because "Yahoo has something on its web site that is being accessed by French citizens that violates French law."[101] He noted that the United States could likewise enforce its own laws against content posted in France and concluded, "The harmful effects are running in both directions."[102] Professor Goldsmith felt that an answer to the dilemma may be found in the deployment of filtering technology that, although not necessarily perfect in its ability to identify and block all French surfers, would have a significant enough effect on the ability of those surfers to access illegal content.[103] Such a solution could potentially resolve many Internet-related jurisdictional disputes.[104]

The opinions of Professor Goldsmith and Dean Perritt focus, alternatively, on legal and technological solutions to the jurisdictional problems posed by *LICRA v. Yahoo!*. For reasons discussed below, the best solution to this problem will require a mixture of these elements, also referred to as "modalities," as well as a marketplace that appeals to our cultural values and mores. The effect of these elements/modalities on the regulation of the Internet is discussed in detail by Lawrence Lessig in his seminal work, *Code and Other Laws of Cyberspace*.[105] As Part III argues, it is only through the adoption of a restructured approach to international jurisdiction, and a set of guidelines or international standards

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99. *Id.*

100. Professor Goldsmith is an expert in Internet jurisdiction from the University of Chicago.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 88 (1999) [hereinafter LESSIG, CODE].

incorporating aspects of these four elements, that we are likely to reach a workable solution to this jurisdictional dilemma.[106]

4. *The French Court's Interim Order of November 20, 2000—The Verdict of the Experts*

On November 6, 2000, the French court conducted the hearing in Paris to receive the report of the expert panel on the technical measures, and to hear one last round of general arguments on jurisdiction and on the technical issues before finalizing its decision. The decision, rendered by the Court on November 20th ("November 20 Order"), although characterized as an Interim Court Order, was a final order on the application for relief by the plaintiffs, and as such was appealable under French law.[107]

The November 20 Order appeared to add a targeting test to the effects test the court first used in finding jurisdiction over Yahoo. Judge Gomez began with a reiteration of the jurisdictional rationales supporting his May 22 Order.[108] He then added an additional piece of evidence that Yahoo was targeting French citizens in its advertising: "Whereas YAHOO [sic] is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language . . . ."[109]

By adding the further ground for the imposition of jurisdiction, Judge Gomez had now employed two different approaches to justify his decision. The effects test previously examined remained the principal

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106. The merits of this approach were addressed by Thomas P. Vartanian, a Washington, D.C., attorney who at that time chaired a committee on cyberspace law for the American Bar Association and said that he expected to see similar cases in the coming years "unless the world can agree on what the standards for jurisdiction should be." Kaplan, *French Nazi Memorabilia*, *supra* note 98. Mr. Vartanian and an international group of lawyers had just completed a two-year study that called for the creation of an international body to develop uniform global principles of Internet jurisdiction. *Id.* The failure to act on this problem, Mr. Vartanian warned, could result in the smothering of the emerging e-commerce golden goose. *Id.*

107. Pl.'s Compl. for Decl. Relief, ex. B at 20, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d. 1181(N.D. Cal. 2001) (No. 00-21275), *available at* http://www.cdt.org/speech/international/001221yahoocomplaint.pdf (last visited Dec. 2, 2003).

108. *Id.* ex. B, at 3-4. Judge Gomez appeared irritated that counsel for Yahoo raised these jurisdictional arguments at this November hearing, writing, "Whereas in support of its incompetence plea, *reiterated for the third time*, the company Yahoo [sic] . . . ." *Id.* ex. B, at 3 (emphasis added).

109. *Id.* ex. B, at 4.

basis for jurisdiction. His second ground added a targeting analysis, which is the approach Professor Geist and other scholars are encouraging the United States to embrace as a more reasonable and less all-encompassing basis for jurisdiction.[110]

Judge Gomez also rejected Yahoo's argument that an order of the French court directing Yahoo to take actions in the United States would violate the First Amendment and would therefore be unenforceable. In his view, the enforceability of the order was irrelevant to the decision to impose jurisdiction:

> Whereas any possible difficulties in executing our decision in the territory of the United States, as argued by YAHOO [sic] Inc., cannot by themselves justify a plea of incompetence;
> Whereas this plea will therefore be rejected.[111]

Having dispatched the jurisdiction argument for the third time,[112] the court next reviewed the report of the expert panel on the issue of whether a technical solution existed that would allow Yahoo to comply with the May 22 Order.[113] The experts' report begins with a disclaimer:

> The undersigned consultants are at pains to point out that their brief is limited to answering the technical questions put by the Court. In no circumstances may their answers be construed as constituting a technical or moral backing of the decisions of the court or, on the contrary, a criticism of these decisions.[114]

The report went on to detail the various options available for blocking the Yahoo U.S. auction pages from access by French web surfers. They concluded that approximately 70% of French surfers could be identified by their IP addresses,[115] and that this group could be effectively blocked

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110. Michael Geist, *supra* note 35, at 1384–1404. Professor Geist suggests replacing the effects test with a new standard focusing on three factors: contracts, technology, and actual or implied knowledge. *Id.*

111. Pl.'s Compl. for Decl. Relief, ex. B at 4, *Yahoo! II* (No. 00-21275).

112. *See id.* Counsel for Yahoo! Inc., raised the jurisdiction argument at the May 22 hearing, the July 24 hearing, and again at the November 6th hearing.

113. The court included the report of the experts, entitled "Opinion of the Consultants," as part of the Interim Court Order. *See id.* ex. B, at 4–15.

114. *Id.* ex. B, at 4. As will be illustrated later, the experts were very uncomfortable with the directions they received from the French court, and in at least one case, an expert published an online apology for his contribution to the report. *See infra* note 141 and accompanying text.

115. *Id.* ex. B, at 8.

from accessing those pages via the use of geo-location filtering software, which could be loaded onto Yahoo's servers in California.[116]

The viability of geo-location filtering has been the subject of some debate.[117] Geo-location filtering software works through algorithms that can identify the geographical source of a web surfer by 1) cross-comparing the results of a tracer analysis of the route of the Internet transmission, following the transmission nodes the message went through and their physical locations, and 2) by mapping the Internet Protocol addresses in the surfer's header with IP address databases.[118]

Neither of these two tracking systems guarantees 100% accuracy in identifying all surfers' geographic origins. Cross-referencing the results of both tracking systems, however, generates results ranging from a low figure of 80% to a high figure of 99% accuracy.[119] Several companies are actively marketing geo-location filtering software to allow Internet providers to comply with local laws and engage in target marketing by routing surfers from particular locations to products tailored to their regional needs.[120] For several reasons, however, geo-location filtering is not always an optimal solution to online content regulation. The software is expensive, and as noted, not 100% accurate. It is, as the experts found, also circumscribable with relative ease.[121] A further objection to this kind of software involves concerns about the preservation of the privacy rights of surfers to be free of software that identifies them as they surf the net, and maintaining the end-to-end Internet without technological roadblocks.

The experts next considered whether the number of surfers who could be blocked would increase if all surfers were asked to verify their national origin before accessing the Yahoo site. They concluded that verification would increase the number of surfers blocked on the basis of national access point by about 20%.[122] In sum, their opinion was that the use of geo-location filtering software coupled with a requirement for a

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116. *Id.* ex. B, at 9-10.

117. For an overview of this debate, see Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 809-12 (2001).

118. *Id.* at 810-11.

119. *Id.*

120. Examples of this software include the NetLocator™ software developed by Infosplit, *available at* http://www.infosplit.com/prod/ip_address_country.htm (last visited Oct. 20, 2003), and the EdgeScape technology produced by Akamai, *at* http://www.akamai.com (Oct. 20, 2003). Infosplit was one of the advisors to the UEJF in the Yahoo! case. *See* Sayer & Deveaux, *Jurisdiction in Cyberspace,* IDG News Service, July 28, 2000, *at* http://www.pcworld.com/news/article/0,aid,17868,00.asp.

121. Pl.'s Compl. for Decl. Relief, ex. B at 12, *Yahoo! II* (No. 00-21275).

122. Pl.'s Compl. for Decl. Relief, ex. B at 8, *Yahoo! II* (No. 00-21275).

declaration of nationality would produce a filtering success rate approaching 90%.[123]

The experts' opinions were not unanimous. American based expert Vinton Cerf wrote a "minority report" criticizing the efficacy of the geo-location filtering solution on several grounds. He began by pointing out a common problem with all self-generated online authentication measures: the user can lie about her identity characteristics.[124] For example, how effective can a website identification page that requires a person to verify that she is over the age of eighteen really be in barring entry by underage surfers? Without any means for verifying the truth of the response, this kind of measure is of limited value.

Cerf went on to note that requiring users to provide national identity information might violate the laws of privacy of other countries, and that enforcing compliance with this term in those other countries might be difficult.[125] This would seem to be less of an obstacle than Cerf might think, since it would not be difficult for Yahoo to require a statement of national identity as a prerequisite to entry into any Yahoo site other than one based in the user's own country. What would be lost in such a system is the ease with which surfers all over the world can now reach the Yahoo U.S. website. Thus, this objection points to the crux of the distasteful dilemma that enforcing local content laws on the Internet presents to websites that seek to cultivate an international audience: either create sites in each country you wish to reach, tailored to that country's social and cultural values and laws, and protected with technological measures that threaten privacy and the free end-to-end Internet, or create a single "dumbed down" version of the site that attempts to cater to all of the limitations that are or will be imposed by each nation.

Neither of these choices is likely to appeal to web providers. One clear byproduct of the first choice is that less well-funded sites would be shut down because they are unable to create and maintain local versions of their sites. Creating a site that is palatable to all countries and reflects all the limits each nation would propose may prove equally daunting and would doubtless reduce Internet sites to a level of blandness that would eventually sap all interest in the Internet as an effective means of communication between nations. Cerf's criticism again highlights the need for a better alternative than these two choices—each of which is a way of

123. *Id.* ex. B, at 14.
124. *Id.* ex. B, at 15.
125. *Id.*

opening the egg that is likely to lead to many more years of international squabbling and uncertainty.

The court discounted Vinton Cerf's objections and noted that he did not disagree with the findings of the other consultants. Judge Gomez felt that Cerf's concerns were targeted to the degree of success geo-location filtering would achieve, rather than whether there was any merit to attempting it.[126] The judge went on to take the experts' estimate that 90% of French surfers could be blocked by the combination of geo-location filtering and national identity confirmation as sufficient to accomplish the remedy sought by the plaintiffs.[127] He rejected Yahoo's arguments that the technical means to achieve these results were not available or would be too burdensome, pointing out that Yahoo already refused to accept offers for the sale of human organs, drugs, works, or objects connected with pedophilia, cigarettes, or live animals on its auction pages, and noting that these limitations did not seem to be deemed a violation of the First Amendment.[128]

In making this argument, Judge Gomez kicked a hole in the fence erected by protectors of the First Amendment. He correctly noted that in the United State, the First Amendment is not an absolute bar to restrictions on speech; instead, it is a conditional bar that legislatures and courts have the power to restrict or expand depending on legal and cultural values. The significance of this argument in the context of online content regulation is that it moves the debate off the moral high ground of absolute protection for all speech to the murkier swamp where the question is who has the power to limit what speech—comparing, for example, the U.S. ban on child pornography with the French ban on Nazi propaganda.

To Judge Gomez, the answer is clear. He concludes this portion of his opinion by exhorting Yahoo to consider the value of banning Nazi-related items: "Whereas it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies . . . ."[129]

Concluding that Yahoo had the ability to install geo-location filtering software and to demand nationality verification from its users, the court ordered Yahoo to put these technical measures in place within 90 days of the date of the order, on penalty of 100,000 Francs (about $13,000 U.S.

126. Pl.'s Compl. for Decl. Relief, ex. B at 16, *Yahoo! II* (No. 00-21275).
127. *Id.* ex. B, at 14.
128. *Id.* ex. B, at 18.
129. *Id.*

dollars as of the date of the order) per day for each day thereafter that it remained out of compliance with the order.[130]

5. *The International Response to the November Hearing and Order*

Reaction to the French Court's November ruling was swift and vigorous. *The Economist* characterized the ruling as one that "threaten[ed] the freedom of the web," and criticized the filtering order:

> But such filtering would not be foolproof. Like most things on the Internet, attempts to control or censor content are soon circumvented. . . . The French ruling could result in many more such restrictions by governments. This is an alarming prospect for many of the Internet's pioneers, or anyone else who opposes government censorship.[131]

The New York Times characterized the decision as "a shot heard 'round the world,'"[132] summarizing the conflict in views arising from the ruling thusly:

> Some lawyers say the decision earlier this week, rooted in a French anti-Nazi statute, is an alarming example of a foreign court's willingness to impose its national law on the activities of a United States-based web site.
>
> Even worse, they say, is the ruling's implication. Under the Paris court's logic, any Web site [sic] with global reach could be subject to the jurisdiction of every nation on earth. Forced to comply with a patchwork of local laws, global e-commerce could grind to a halt.[133]

Yahoo counsel Michael Traynor viewed the decision as an alarming effort of a foreign court to dictate standards for the worldwide Internet: "One country is purporting to exercise and impose its standards on a worldwide conversation. It's fundamentally an interference with freedom

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130. *Id.* The Court also found that Yahoo! France had complied with the requirements imposed on it in the May 22 Order, except as to displaying a banner warning French surfers about the legal risks of connecting to the U.S. Yahoo! site, and so the Court reiterated this portion of the May 22 Order and directed immediate compliance with it. *Id.* ex. B, at 19-20.

131. *Yahoo!'s French Connection,* THE ECONOMIST, Nov. 20, 2000, *available at* http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=431328.

132. Carl S. Kaplan, *Ruling on Nazi Memorabilia Sparks Legal Debate*, N.Y. TIMES, Nov. 24, 2000, *available at* http://www.nytimes.com/2000/11/24/technology/24CYBERLAW.html [hereinafter Kaplan, *Ruling on Nazi Memorabilia*].

133. *Id.*

of speech and expression."[134] David J. Loundy[135] also worried about the long-term consequences of the decision:

> The next thing you know a court in the Middle East will order another U.S. Internet company to block Middle Eastern consumers from seeing soft-core pornography, which is legal here but illegal there. You can pick your country and pick your problem. Will every Internet company in the future have to put on 42 geographical filters to make everybody happy? Or 420 filters?
>
> There are other questions, Loundy said with a sigh: Does an Internet company have an affirmative duty to figure out the laws of every nation in the world and put on the appropriate geographical filters, or do they just have to put on filters following a court order? And as the technology gets better, does a company have a duty to slap on the newest filtering gizmo?[136]

Others interviewed by *The New York Times*, however, hailed the decision as correctly decided and disagreed with critics who predicted dire consequences for e-commerce:

> Rubbish—the sky is not falling, other lawyers say with equal fervor. The Paris court's decision was perfectly reasonable under the circumstances, they claim. Indeed it is a welcome harbinger of things to come.[137]

Goldsmith said it was "too simplistic" for some lawyers to complain that the ruling threatens global e-commerce.

> "IBM, McDonald's and other international companies sell stuff into every country in the world and they have to comply with local laws," he said. The fact that real-space companies have to obey a patchwork of laws "hasn't brought real-space commerce to a halt" . . . .
>
> . . . .
>
> "This decision is significant because it shows that geographical filters, though not perfect, are feasible and that nations can take reasonable steps to keep content out . . . . I have

134. *Id.*
135. David J. Loundy a Chicago-based specialist on Internet law.
136. Kaplan, *Ruling on Nazi Memorabilia*, *supra* note 132.
137. *Id.*

> no doubt that the Internet will become more geographically filtered. This ruling will enhance the trend."[138]

These sharply conflicting viewpoints illustrate why the ruling in the *LICRA v. Yahoo!* case has attracted so much attention. Professor Goldsmith is right to point out that companies doing business in other jurisdictions have always had to deal with adapting to local cultural values to be successful. But Michael Traynor and David Loundy are also right in noting that in the case of website hosts, the burden of having to try to determine and satisfy all of the different laws of every country may be too onerous for many businesses to handle.

At the core of this problem, as the Introduction noted, is the unique simultaneity and global reach that mark the Internet. Yes, companies doing business abroad have always had to deal with the burden of conforming to local country standards to do business—yet Yahoo tried to do just that by creating local websites such as Yahoo France that strictly complied with the law. The problem was that by nature of the Internet the site they hosted in the United States was viewable with equal ease as the local site. This suggests yet another solution to the problem: block all visitors from any site but local sites. In essence, this would reduce the Internet to the model of television. Each country would have the opportunity to strictly control everything that came into the country online, through a combination of technical measures, including filtering, geographic and age identifiers, regulation of ISP licensing, and other measures.[139] But following this course of ultimate national sovereignty would end all hope for the Internet to serve as a contemporary commons—a meeting place for the free exchange of ideas.[140] By deciding that each country has the absolute right to dictate which end of the egg must be broken, we would discard a singular opportunity to enhance worldwide communication, literacy, and awareness of our common and different ways of life.

In a dramatic development, critics of the French court's decision were joined by one of the experts on whose opinion the court relied. On November 21, 2000, European expert Ben Laurie wrote and posted online

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138. *Id.*

139. This is the outcome feared by Stanford Law School Professor Lawrence Lessig, which he outlines in detail in his two works on Internet regulation, *Code and Other Laws of Cyberspace* and *The Future of Ideas*. *See* LESSIG, CODE, *supra* note 105; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 17–100 (2001) [herinafter LESSIG, FUTURE OF IDEAS].

140. *See* LESSIG, FUTURE OF IDEAS, *supra* note 139, at 17-100.

an extraordinary document, entitled *An Expert's Apology*.[141] Critical of the press coverage of the decision, which he characterized as marked by a "remarkable lack of deep thought on this matter," Laurie felt compelled to explain his contribution to the report and his disagreement with its use.[142] Laurie pointed out that the panel of experts answered the first question put to them, whether it was technically possible for Yahoo to comply with the judgment against them, with a "no" answer—full compliance was not possible.[143] He then noted, "I was not allowed to leave it at that; remember that if it was not possible to comply completely, I was asked to say to what extent compliance is possible."[144] It was in response to this second question that he and the other experts noted that the seventy percent compliance could be achieved by filtering, and an additional amount by asking for geographic identity confirmation. Laurie characterized the percentage figures he and the rest of the panel agreed on as "a rather flaky guess."[145]

Laurie asserted that both the filtering technology and the requirement of geographical identification "can be trivially circumvented,"[146] and went on to tell readers exactly how to do it, giving a website URL for anonymizer software that can be loaded onto a user's computer for the purpose of masking their geographic identity, thereby precluding filtering programs from preventing access.[147] As to the confirmation request issue, he pointed out that this can be avoided "simply by lying."[148]

Despite his critiques, in answering the question "so what does it all mean?," Laurie agreed that the French court properly asserted jurisdiction and suggested that if Yahoo wanted to be beyond France's reach, it could withdraw its operations in France.[149] He characterized the November 20 Order as ineffective, but noted that this is a natural result of the legal process: "Yes, the solution is half-assed and trivially avoidable. We know that. But it is still the natural outcome of applying the law. Law-abiding citizens are aided in obeying the law, and law-breakers are able to do so, just as they can slash tires, or mug people in the street."[150]

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141. Ben Laurie, *An Expert's Apology*, Nov. 21, 2000, *at* http://www.apache-ssl.org/apology.html.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

Laurie concluded by asserting that the case simply reaffirms that governments will continue to try, and fail, to regulate the Internet.[151]

No one will argue with Laurie's assertion that governments will continue to try to regulate the Internet. However, there is little evidence to suggest that they will fail completely in those efforts. Both of Professor Lessig's books bear eloquent and often chilling testimony to the many successes achieved by government in regulating aspects of the Internet in the United States and abroad.[152] It would also be an error to conclude that the universal viewpoint in the United States supported the free speech position advocated by Yahoo in the French court.

Another article in *The New York Times* summarized the contrary views on this issue[153]—particularly those of Rabbi Abraham Cooper, an associate Dean at the Wiesenthal Center, which has launched an effort to convince online services to eradicate sites that promote anti-Semitism or white supremacy. The Wiesenthal Center became involved in this effort as it realized that such sites were proliferating, with the number reaching more than 2000 by the spring of 1999.[154]

Rabbi Cooper rejected the First Amendment defense and instead urged, as Judge Gomez did, a return to moral values.

> "It's good to try to wrap yourself around free speech . . . but in this case it doesn't wash. Television stations, newspapers and magazines refuse to accept some advertisements in an effort to marginalize viewpoints and products that the vast majority of Americans think are disrespectful or even potentially dangerous. Internet companies . . . should just do what American companies have been doing for half a century: reserve the right not to peddle bigotry."[155]

Rabbi Cooper's argument is the same voiced by Judge Gomez: First Amendment protection in the United States is not, and never has been, protection of an absolute standard. Instead, the standard has been subject to exceptions, particularly in the area of commercial speech, which are often driven by our social and cultural values. Cigarette ads were widespread on television during the 1950s and 1960s, but were later banned for health reasons. To the cigarette companies, this ban was an

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151. *Id.*

152. *See generally* LESSIG, CODE, *supra* note 105; LESSIG, FUTURE OF IDEAS, *supra* note 139.

153. Guernsey, *supra* note 16.

154. *Id.*

155. *Id.*

infringement of their right to freely speak out in promotion of their goods, yet the ban withstood challenge and remains in effect.[156]

Rabbi Cooper's argument proved effective with Yahoo. A month after meeting with him and other representatives of the Wiesenthal Center, Yahoo voluntarily announced that it would more actively enforce its terms of service agreement by pre-screening and eliminating hateful and racist material, such as Nazi memorabilia and Ku Klux Klan artifacts, from its auction sites. This new enforcement approach did not apply to non-commercial content on Yahoo's sites, appearing to be limited to commercial speech material.[157] Yahoo representatives claimed that the change in policy had nothing to do with Judge Gomez's ruling, but was instead part of a general housekeeping of their auction sites, and in response to their ongoing discussions with Jewish groups in the United States such as the Wiesenthal Center.[158]

Judge Gomez, for his part, remained confident that his decision properly followed French law. In an interview,[159] he expanded on his reasoning in applying the "effects test" as follows:

> For me, the issue was never whether this was an American site, whether Yahoo had a subsidiary in France, the only issue was whether the image was accessible in France. It is true that the Internet creates virtual images, but to the extent that the images are available in France, a French judge has jurisdiction for harm caused in France or violations of French law.
>
> But in the case of my decision, it was extremely simple: the Nazi collectibles were visible in France, this is a violation of French law, and therefore I had no choice but to decide on the

156. *See* Mark R. Ludwokowski, *Proposed Government Regulation of Tobacco Advertising Uses Teens To Disguise First Amendment Violations*, 4 COMM. LAW CONSPECTUS 105, 106 (1996).

157. Carl S. Kaplan, *Experts See Online Speech Case as Bellweather,* N.Y. TIMES, Jan. 5, 2001, *available at* http://www.nytimes.com/2001/01/05/technology/05CYBERLAW.html [hereinafter Kaplan, *Expets See Online Speech*].

158. *Id.*

159. Although much has been written about the decision of the French court in this case, none of the articles published to date solicited direct comment from Judge Gomez about the debate and controversy flowing from his Order. With the assistance of Marie Galanti, a highly capable bilingual (French/English) law student and research assistant, the author requested that Judge Gomez consent to an interview regarding the reasoning behind his Orders. Noting that this was the first time a source from the U.S. had sought to discuss the case with him directly, Judge Gomez agreed to the interview. Ms. Galanti met with the Judge on June 5, 2001, and posed questions written by the author. The result provides us with a rare glimpse into the judicial reasoning that led to the May 22 Order and the November 20 Order in this case.

> face of the issue. Whether the site is all in English or not makes no difference. The issue of visibility in a given country is the only relevant issue. Even if the image is virtual, if it is accessible on a computer monitor in France, a French judge has jurisdiction to intervene if the image violates French law. The issue is strictly a geographic one. Even an American in France violates French law by consulting a site prohibited by French law.[160]

As to Yahoo's decision to pull the Nazi objects off its auction pages, Judge Gomez reinforced the view expressed in his orders that free speech was not really at issue here. Rather it was simply a business decision for Yahoo to make: Should it add Nazi items to those it already regulated on its site? He noted that American judges, in his view, were also becoming skeptical of First Amendment defenses raised in purely commercial sales contexts:

> Yahoo's decision confirms the fact that it had the ability to control its auction site. We knew this because there were precedents showing us that it could exercise this control: for example, Yahoo chose not to sell cigarettes in certain countries where the sale was prohibited. Banner ads were specifically tailored for and directed to audiences in certain countries. Therefore, it was a business decision to put these items on its site and a business decision to remove them. Behind the philosophical discussion, there are basic technical questions and financial interests.
>
> Now Yahoo wants an American judge to say that a foreign judge may not interfere with its freedom of speech. But, even in the U.S., this freedom of speech is not an absolute right. Some of my American colleagues are having second thoughts about using the First Amendment to promote endeavors that are strictly financial, strictly business. For my part, I am thrilled that capitalistic enterprises are getting involved in this debate.[161]

In its earliest incarnations, the Internet was viewed as a newly-minted anarchic format—a frontier where all forms of communication were acceptable and which was not, and could not, be bound by any rules or regulation. As Ben Laurie said, "the Internet does not adapt well to the control of subject matter—people have been trying to do that [intervene

160. Interview by Marie Galanti with J. Jean-Jacques Gomez, First Deputy C.J. of the Super. Ct. of Paris, in Paris, Fr. at 2-3 (Marie Galanti trans., June 5, 2001) (on file with author) [hereinafter Interview, Gomez].

161. *Id.* at 3–4.

and censor content] since it started, and they've never got anywhere. This case is no exception."[162]

In Lawrence Lessig's *Code and Other Laws of Cyberspace*, he takes the view that whether the Internet will be regulated or free is a choice to be made—and the question is by whom.[163] In a dark view of that choice, he suggests that while an Internet largely free of regulation is a possibility, the forces of law and code and the inertia of society militate more in the direction of a highly regulated Internet.[164]

Indeed, many would agree that the vision that the Internet would be a place for the untrammeled exchange of ideas, in a purely anarchic form, was always just a vision and a dream. If you consider that the initial architecture of the Internet, before even getting to the point of software and applications and operating systems, is the telecommunications network, you come crashing back to reality with the recognition that someone has to pay to create that physical network, and has to continue to pay to maintain it. Initially, the U.S. Government paid the bill through the Department of Defense.[165] As commercial activity erupted online with the development of hypertext mark-up language ("HTML") and the web, the cost was assumed by the commercial sectors of many countries. In some countries, such as China, government still retains control of and pays for the infrastructure of telecommunications.[166] It is a sweet but naïve view to think that these commercial entities and/or governments would willingly pay for a system over which they could exercise no control. The Internet never was, and never will be, "free."

In the debates that followed his orders, Judge Gomez shared the view that a free Internet is not possible, but for a different reason. He explained:

> Philosophically, the issue of a totally free Internet is utopia. Clearly if we are dealing with what we call in France the "bon père de famille" or what you call in the United States the "reasonable person" standard, then a free Internet would be possible. If users did not attempt to use the Web for anything illegal, immoral or otherwise reprehensible, we could dispense

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162. Laurie, *supra* note 141.

163. LESSIG, CODE, *supra* note 105, at 213-30.

164. *Id.*

165. Vinct Cerf, *A Brief History of the Internet and Related Networks*, *at* http://www.isoc.org/internet/history/cerf.shtml (last visited Dec. 7, 2003).

166. *See, e.g.*, Hanna Beech, *Living It Up in the Illicit Internet Underground*, TIME, July 22, 2002, at 4 ("Although the Public Security Bureau has deployed a corps of Internet police to block surfers from offending websites, there's no way a few hundred officers can filter the whole Web and maintain blocks that stymie users for long.").

> with regulations. But, this is not always the case. Just look at the newspapers. Specialty publications give all kinds of tricks and tips to bypass regulations on the Net.[167]

The Internet, Judge Gomez has maintained, is simply a tool, a machine, and as such can no more be left unregulated than we would leave a car to drive itself, or a drill to run without a hand to guide it. When asked whether he considered the Internet and the web to be American creations, Judge Gomez commented:

> The origin is of little importance. I look at their creation as I would look upon the discovery of a vaccine for a disease. No matter where it comes from, it brings a contribution to humanity. The origin of the Internet was military and surely the U.S. was the first country to develop it. This does not disturb me. On the contrary, I am pleased that this development has taken place.
>
> The question of its origin is not the most important. The fact that it has become a tool is the issue. A tool cannot be left to its own devices, without guidance or human involvement.
>
> When people say that the Internet cannot or should not be controlled or regulated, I cannot agree. A machine has no sense of responsibility: man has a sense of responsibility. The machine cannot be left to control man. To say that the Internet has not been conceived to be regulated is a monumental mistake. Man's illegal acts cannot hide behind a machine. Whether we are dealing with the activities of pedophiles or with racist acts, we cannot allow men to hide behind the machine. We cannot forget that behind the Internet there are people and there must be some form of regulation. Responsibility cannot hide behind technical difficulties.[168]

Judge Gomez reiterates the argument made by Rabbi Cooper, that the ability to spread hate on the web with relative anonymity cannot be justified by reliance on laws that allow that message to be spread under the protection of freedom of expression, or because the architecture of the web makes regulating any kind of speech more difficult. Instead, both men argue that the third of Professor Lessig's modalities, the regulation by cultural and social norms, must enter the picture and become a guiding principal in the quest for standards for the regulation of the Internet.

The courtroom is not the best forum to debate the importance of using cultural norms in the regulation of online content, and as the *LICRA v.*

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167. Interview, Gomez, *supra* note 160, at 5.

168. *Id.* at 6-7.

Yahoo! case moved from France to the United States, this discussion took a back seat to issues better suited to the litigation process. The next phase of the case would concentrate on the extent to which the French court's orders were enforceable in the United States.

B. Yahoo v. Licra—The United States Litigation and the Question of Enforceability

As the case crossed the Atlantic, the focus of the litigation moved from the examination of the technical measures and the question of whether the U.S. Yahoo site violated French law, to the issue of the impact an American court's heightened scrutiny, from a First Amendment perspective, would have on the likelihood of a court enforcing Judge Gomez's order. An additional issue posed was whether there was a justiciable controversy as of the time when the litigation shifted to the United States.

When asked what he thought the likelihood of enforcement of his decision might be in the United States, Judge Gomez replied,

> [k]eep in mind that my decision was only the first step in the process. . . . Yahoo had many options. It had the option to appeal in France since my courtroom is only the first level. There was also the option to appeal in the US. To be enforceable, my decision required the "exequatur" or execution by an American court. An American court was free to grant this or not. If the court executed my judgment, then Yahoo was free to appeal that decision. Or the French associations are also free to appeal it had it been contrary to them. My decision left a host of legal options available to all parties. . . . My responsibility was not determining how the order might be enforced internationally. In fact, I denied the French associations' request to allow for attorneys' fees to defend in the United States.[169]

While Judge Gomez declined to speculate on the likelihood of enforcement, he instead emphasized that Yahoo had many options as well as a fair forum in the French courts.

1. Yahoo Fights Back—The U.S. District Court Action

On December 21, 2000, several weeks before it removed the Nazi memorabilia from its auction pages, Yahoo formally responded to the November Order of Judge Gomez by filing a complaint for Declaratory

169. *Id.* at 5-6.

Relief in the United States District Court for the Northern District of California, San Jose Division, naming LICRA and UEJF as defendants.[170]

As a threshold issue, Yahoo dealt with how to assert jurisdiction over the two defendants, who admittedly were citizens of France, with no offices, assets or agents in the United States. Yahoo, following Judge Gomez's analysis in the November hearing, began its jurisdiction claims in the complaint by using a "targeting" approach. Yahoo asserted that the defendants had committed acts targeted against Yahoo by 1) sending a cease and desist letter to Yahoo in Santa Clara demanding removal from the U.S. auction site of items constitutionally protected in the United States; 2) filing a complaint in France relating to the material they viewed on the U.S. site; 3) "repeatedly" using the U.S. Marshal's Office to serve complaints and orders in the Paris lawsuit on Yahoo in Santa Clara; and, 4) seeking an injunction forcing Yahoo to suppress and restrain constitutionally protected speech and to spend significant funds to modify and reengineer Yahoo's U.S. servers to suppress and restrain speech.[171]

Seeking to bolster its jurisdiction argument, Yahoo next asserted that LICRA, which had established an e-mail account with the U.S. site, had therefore agreed to Yahoo's Terms of Service, which included a jurisdiction clause requiring users to agree to the personal and exclusive jurisdiction of the courts of California.[172] Yahoo similarly asserted that UEJF agreed to its Terms of Service by viewing pages on the U.S. Auction site and directory listings on Yahoo's search engine.[173]

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170. Pl.'s Compl. for Decl. Relief, ¶¶ 1-3, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d. 1181(N.D. Cal. 2001) (No. 00-21275), *available at* http://www.cdt.org/speech/international/001221yahoocomplaint.pdf (last visited Dec. 2, 2003).

171. *Id.* ¶ 6. This jurisdiction argument adopts the approach recommended by Professor Michael Geist, *supra* note 35, at 1384–1406. This targeting approach provides greater certainty of result than the broader based effects doctrine. Both doctrines, however, carry the risk that a party who initiates an action in their home forum against a content provider whose content violates local laws, must be prepared to find themselves subject to the jurisdiction of the hosting party's home country courts as a result of obtaining a favorable judgment in their own country, and serving either notice, or attempting to enforce that judgment in the hosting party's country.

172. Pl.'s Compl. for Decl. Relief, ¶ 8, *Yahoo! II* (No. 00-21275).

173. *Id.* ¶ 9. This allegation creates an interesting dilemma. Suppose a party in Germany posts a listing on the Yahoo U.S. auction site, and a party in France purchases the goods. If a dispute arises in which one of the parties names Yahoo, the Terms of Service require all parties to come to Santa Clara County, rather than using more convenient forums such as the World Trade Organization or the World Intellectual Property Organization's dispute resolution systems. This functions as a disincentive to sue Yahoo. Additionally, this could provide a defense to the seller of the goods. The

In the balance of its complaint, Yahoo argued that its U.S. site targeted an audience of U.S. users and that the articles on the U.S. site displaying Nazi symbols were constitutionally protected speech in the United States. In addition to arguing that the French court's orders were technically impossible to implement, Yahoo also asserted that the orders constituted an unconstitutional prior restraint on freedom of expression guaranteed by the First Amendment.[174]

Finally, Yahoo argued the district court should not recognize the French court orders for several other reasons, including:

> U.S. law immunizes Internet Service Providers ("ISPs") such as Yahoo! from responsibility and liability for the content of postings by third parties, as provided by Section 230 of the Communications Decency Act, 47 U.S.C. Section 230(a). If permitted to stand, the French judgment would give foreign nationals a cause of action against U.S.-based ISPs that U.S. citizens do not have.[175]
>
> The orders violate sections of three international treaties to which France is a signatory: Article 19 of the International Covenant on Civil and Political Rights; Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedom; and Article 19 of the Universal Declaration of Human Rights.[176]
>
> The orders exercise an unreasonable, extraterritorial jurisdiction over the operations and content of a U.S.-based web service belonging to a U.S. citizen. The complaint alleges that the French court instead should have enforced the French Penal

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seller could assert that Yahoo was an indispensable party and that the action should not proceed without their participation, forcing the plaintiff to prosecute the action in the U.S. Courts or drop the action.

174. *Id.* ¶¶ 12, 15, 34.

175. *Id.* ¶ 42(a). Section 230 of the Communications Decency Act is often referred to as the "Safe Harbor" clause of the Act. 47 U.S.C. § 230 (2000). This characterization as a safe harbor is not quite accurate. Subpart (c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1). Congress intended this subpart to protect the ISP who serves as a mere conduit of information. *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995); *see supra* notes 10-12. However, since Yahoo, through its Terms of Service, exercises control over the material posted on its auction sites, arguably Section 230 (c)(1) would fail to provide Yahoo any shelter.

176. Pl.'s Compl. for Decl. Relief ¶ 42(b), *Yahoo! II* (No. 00-21275). The Complaint does not provide details as to the basis for the claim that the Orders violate these sections of the enumerated treaties.

> Code directly against French citizens who break French law by accessing the auction sites at issue.[177]
>
> The orders are contrary to California's public policy that discourages granting specific or preventive relief to enforce penal law and that discourages implying a private right of action from penal law.[178]
>
> France would not give reciprocal recognition to, or enforce a judgment of the State of California in the reverse situation.[179]

Based on these arguments, Yahoo alleged that a declaratory judgment was necessary to resolve whether the Paris court's orders were enforceable.[180]

LICRA and UEJF retained counsel and filed a Motion to Dismiss the complaint for lack of personal jurisdiction. The parties briefed the issue. On June 7, 2001, United States District Court Judge Jeremy Fogel denied the motion.[181] His reasoning remains controversial and on appeal.

2. *The Ruling Denying LICRA's Jurisdictional Motion to Dismiss*

Judge Fogel's ruling denying LICRA's Motion to Dismiss for lack of jurisdiction relied on questionable assumptions that may provide a basis for reversal. The Court of Appeal presently retains the case under submission, a year after the parties presented oral argument in November 2002. Whether the U.S. court had jurisdiction was ultimately irrelevant, however, since Yahoo clearly indicated in the French court that it had no intention of complying with Judge Gomez's order. Just like the residents of Lilliput, Yahoo, convinced of the validity of its position, was prepared

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177. *Id.* ¶ 42(c). Here again, the drafters of the Complaint tread on dangerous ground. The U.S. Government has shown little reluctance to assert extraterritorial jurisdiction over websites that host material that violates U.S. law. *See, e.g.*, Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1042-49 (1999) (detailing the view that the U.S. Government and State governments may exercise extraterritorial jurisdiction over offshore gambling sites because the resultant gambling activity is in violation of U.S. law). The argument that the French government should instead pursue the Web surfers is equally applicable in the gambling context. Those parties hosting those sites could just as easily argue that the U. S. Government should leave them alone, and limit their policing activities to pursuing the surfers who log on to those sites to gamble in violation of their local or federal law.

178. Pl.'s Compl. for Decl. Relief ¶ 42(d), *Yahoo! II* (No. 00-21275).

179. *Id.* ¶ 42(e). This section of the complaint further alleges, in subparagraphs (f) and (g), that the Paris court lacked personal jurisdiction over Yahoo, the Paris court denied Yahoo a full and fair opportunity to present its case, and the proceedings failed to comport with U.S. notions of due process. Yahoo also presented these arguments in the Paris proceedings, but Judge Gomez rejected them. *Id.* ¶ 42(f), (g).

180. *Id.* ¶ 44.

181. *Yahoo! I*, 145 F. Supp. 2d 1168, 1180 (N.D. Cal. 2001).

to fight on endlessly, rather than seek a less contentious resolution of the dispute.

To what extent countries will attempt to regulate online content depends on whether local courts will extend jurisdiction. In view of the importance of the jurisdictional argument, Judge Fogel's decision warrants careful examination. He first examines whether Yahoo inappropriately attempted to obtain an advisory opinion or whether Yahoo required a ruling to avoid the enforcement of a foreign court's impermissible orders.

a) Case or Controversy

A threshold issue in the dispute over whether the U.S. court had jurisdiction over the French defendants is whether the case presented a "case or controversy" that was ripe for adjudication.[182] Judge Fogel acknowledged that neither LICRA nor UEJF had taken steps to enforce the judgment of the French court.[183] However, he asserted that this failure to enforce the judgment created a chilling effect on Yahoo's constitutional rights, because the penalties imposed by the French Court order would continue to mount.[184] Judge Fogel also voiced concern that declining to rule on the matter until the French defendants sought to enforce the judgment could set a precedent encouraging parties to create legal uncertainty as a means to coerce website owners to engage in self-censorship. He stated, that

> [d]efendants' approach would force the provider to wait indefinitely for a determination of its legal rights, effectively causing many to accept potentially unconstitutional restrictions on their content rather than face prolonged legal uncertainty. California's interest in adjudicating this dispute thus weighs strongly in favor of the exercise of personal jurisdiction.[185]

LICRA and UEJF, in their Opening Brief on appeal, argued that what Judge Fogel was asserting in this section of his decision is that the expectation of future harm in an enforcement proceeding gives the court a basis for issuing an advisory opinion, in essence reassuring Yahoo that even if a subsequent order by a French court authorized collection of damages, that order would be unenforceable in the United States.[186] The

182. *Id.* at 1172 n.2 (citing U.S. CONST. art. III). Judge Fogel dealt with this issue initially in a brief footnote, and later in the text of the opinion.

183. *Id.*

184. *Id.*

185. *Id.* at 1179.

186. Opening Brief of Appellants at 31-34, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (9th Cir. 2002) (No. 01-17424).

appellants cited *Garcia v. Brownell* for the proposition that "the mere possibility, *or even probability,* that a person may in the future be affected by acts not now threatened does not create an "actual controversy."[187]

Further, the appellants cited authority that holds no case or controversy exists when enforcement depends on potential actions and the evidence fails to show that the other party will take these actions in the near term.[188] Finally, appellants turned to the Supreme Court and cited the decision in *Poe v. Ullman* for the proposition that "the best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."[189]

In response, Yahoo's defenders repeatedly argue that declining to rule on the issue until the French groups seek to enforce their order will have a chilling effect on Yahoo's freedom of speech.[190] Various parties filed amicus briefs in support of Yahoo. They cautioned that unless the Court of Appeals affirms the finding of ripeness, website hosts will be faced with uncertainty which will, in turn, cause them to engage in self-censorship, allowing their attackers to win without even commencing litigation. They view Yahoo's decision to remove the Nazi memorabilia from its auction sites as proof of this prior restraint.[191]

The difficulty with this argument is that it asks the court to carve out an exception for web-based businesses that does not exist for comparable brick-and-mortar enterprises. This exception could allow some traditional enterprises to avoid responsibility for compliance with local laws. Advertising created for those markets aims to be sensitive to local laws and cultural values. If we accept the argument that web-based marketing

187. *Id.* at 32 (citing Garcia v. Brownell, 236 F.2d 356, 358 (9th Cir. 1956)).

188. *Id.* (citing Int'l Soc. for Krishna Consciousness of Cal., Inc. v. City of Los Angeles, 611 F. Supp. 315, 319-20 (C.D. Cal. 1984) (finding no case or controversy in a situation where a resolution barring First Amendment activities at an airport had not yet been enforced, nor could it be without further action by the City Council) and Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966) (finding no "Damoclean threat" absent evidence that the defendant was going to "act affirmatively to enforce the protection which he claims")).

189. *Id.* at 33 (citing Poe v. Ullman, 367 U.S. 497, 503 (1961)).

190. *See, e.g.*, Brief of Amici Curiae Center for Democracy and Technology, American Civil Liberties Union et al. at 31-32, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (9th Cir. 2002) (No. 01-17424); Brief of Amici Curiae Chamber of Commerce of the U.S. et al. at 23-26, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (9th Cir. 2002) (No. 01-17424).

191. *See, e.g.*, Brief of Amici Curiae Center for Democracy and Technology, American Civil Liberties Union et al. at 31-32, *Yahoo! II* (No. 01-17424); Brief of Amici Curiae Chamber of Commerce of the U.S et al. at 27-28, *Yahoo! II* (No. 01-17424).

originating in the United States need not be sensitive to those laws or values, we provide a means for companies to avoid complying with those restrictions. By withdrawing from actual presence in these foreign countries and maintaining only a virtual presence, U.S. businesses can avoid enforcement of any local judgments rendered against them. A further complication arises from this scenario: web-based businesses in other countries will try to navigate a similar course. Offshore gambling websites have already taken this route,[192] and other businesses are likely to follow.

Yahoo drew support for a finding of ripeness from several Ninth Circuit cases that held that where First Amendment issues are involved, pre-enforcement cases may present a current case or controversy.[193] In one of these decisions, *LSO, Ltd. v. Stroh*,[194] the Ninth Circuit faced a case similar in many ways to the *Yahoo! v. LICRA* case. On appeal, the court may decide that *LSO*'s holding does not apply to this case.

In *LSO*, appellant Life-styles Organization, Ltd. ("LSO"), sought relief from an effort by the California Department of Alcoholic Beverage Control ("ABC") to prevent it from hosting an annual Erotic Art Exhibition and Trade Show at the Palm Springs Convention Center in Southern California.[195] California's Administrative Code prohibits liquor license owners from displaying graphic sexual images on their licensed premises.[196] ABC took the position that this Code section applied to situations where a liquor license holder, such as the Convention Center, allowed the display of these images, even if no liquor was sold or provided at the showing of the images.[197] ABC advised the Conference Center that if it allowed LSO's show to be presented, it could lose its liquor license.[198] The Center, intimidated by this threat, cancelled the show.[199] LSO filed an action in federal district court seeking declaratory and injunctive relief, both as to the present actions of ABC, and to prevent similar actions in the years to come, due to its plans to return to Palm Springs for subsequent conventions. The district court granted injunctive relief, and LSO

192. *See, e.g.*, Schwarz, *supra* note 177 at 1047-49.

193. *See, e.g.*, Brief of Amici Curiae Center for Democracy and Technology at 31, *Yahoo! II* (No. 01-17424) (citing LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000), Bland v. Fessler, 88 F.3d 729, 736-37 & n.11 (9th Cir. 1996), and American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1057-58 (9th Cir. 1995)).

194. 205 F.3d 1146 (9th Cir. 2000).

195. *Id.* at 1150.

196. *Id.* at 1151 (citing CAL. CODE REGS. tit. 4, § 143.4 (2002)).

197. *Id.*

198. *Id.*

199. *Id.* at 1152.

presented the art show. LSO continued on with its action as to future shows, giving rise to the issue of whether there was a present case or controversy.[200]

The Ninth Circuit began its analysis by referring to two U.S. Supreme Court decisions and a Ninth Circuit decision that required a party seeking to challenge a pre-enforcement decision to demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."[201] An additional significant factor was whether there were past instances of enforcement.[202] Finally, the court noted,

> [W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically towards a finding of standing. . . . Accordingly, we have noted that the tendency to find standing absent actual, impending enforcement against the plaintiff is stronger "in First Amendment cases, for free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Bland,* 88 F. 3d at 736-37 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965)). Accord *Navegar, Inc. v. United States,* 103 F. 3d 994, 999 (D.C. Cir. 1997) ("Federal courts most frequently find preenforcement [sic] challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment.").[203]

The weight of this authority suggests that whether Yahoo was likely to face enforcement may prove irrelevant to the outcome of the pending appeal. The mere fact that its First Amendment rights might end up being the subject of an attempt at enforcement seems enough under this line of authority to give the Court of Appeals a basis for affirming Judge Fogel's determination of standing.

However, in this instance, Yahoo was unlikely to face enforcement. By voluntarily removing the auction postings shortly after receiving the orders of the French court, Yahoo dramatically reduced the likelihood of enforcement. Further, no evidence existed that indicated that the French parties were going to seek enforcement of the orders.

Despite all of these facts that distinguish this case from *LSO*, possibly the strong support for finding a case or controversy in matters where First

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200. *Id.*

201. *Id.* at 1154 (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979), Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 143 n.29 (1974), and Bland v. Fessler, 88 F.3d 729, 736-37 (9th Cir. 1996)).

202. *Id.* at 1155.

203. *Id.* at 1155-56.

Amendment claims are involved may lead the Court of Appeals to affirm the finding of ripeness.

b) Jurisdiction

A finding of a ripe case or controversy shifts the jurisdictional analysis to the issue of whether LICRA and UEJF, by their conduct in the United States, meet the other requirements for imposing jurisdiction over them. Given the undisputed fact that neither LICRA nor UEJF regularly conducted business in the United States, the court has no basis for asserting general jurisdiction over them. The question remains whether the Court of Appeals will affirm Judge Fogel's determination that the French defendants' actions meet the criteria for application of specific jurisdiction.

Judge Fogel first noted that the Ninth Circuit applies a three-part test to determine whether a court has grounds to exercise specific jurisdiction: 1) the non-resident defendant must do some act or consummate some transaction within the forum by which the defendant purposely avails itself of the privilege of conducting activities in the forum, thus invoking the benefits and protection of its laws; 2) the claim must be one which arises out of or results from the defendant's forum related activities; and, 3) the exercise of the court's jurisdiction must be reasonable.[204]

The first element of this test, referred to as the "purposeful availment" requirement,[205] is in many ways the most important. Judge Fogel began by noting that the purposeful availment requirement gives "notice to a nonresident that it is subject to suit in the forum state, thereby protecting it from being haled into local courts solely as the result of 'random, fortuitous or attenuated' contacts over which it had no control."[206] Noting that Yahoo properly argued that purposeful availment under the "effects test" was the applicable standard,[207] Judge Fogel concluded that Yahoo "has made a sufficient prima facie showing of purposeful availment under the effects test."[208] Three examples of conduct by the French defendants supported this decision: 1) the "cease and desist" letter sent by the defendants to Yahoo, in Santa Clara, California; 2) the defendants' request

204. *Yahoo! I*, 145 F. Supp. 2d 1168, 1173 (N.D. Cal. 2001) (citing Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082 (9th Cir. 2000); Panavision Int'l. L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998); Cybersell v. Cybersell, 130 F.3d 414, 416 (9th Cir. 1997)).

205. *Id.* (citing Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

206. *Id.*

207. Calder v. Jones, 465 U.S. 783, 789 (1984).

208. *Yahoo! I*, 145 F. Supp. 2d at 1174.

that the French Court order Yahoo to place the geo-location filtering software on its Santa Clara based servers; and 3) the defendants' "utilization of United States Marshals to effect service of process on Yahoo in California."[209]

A significant problem confronting the District Court in its decision to apply the "effects test" to the jurisdictional issue in this case is that previously the Ninth Circuit had applied the test only in cases arising out of a tort or alleged tortious conduct.[210] Judge Fogel acknowledged this history. He then justified his decision to extend the test to this case, despite the absence of tortious conduct by the French defendants, by noting that in several of those prior cases, the Ninth Circuit had focused "less on the characterization of the plaintiff's cause of action than on whether the defendant's forum-related acts evidenced intentional, or at the very least, knowing, targeting of a forum resident(s)."[211]

Judge Fogel asserted that proper application of the effects test requires consideration both of the nature of the defendant's conduct, as well as an evaluation of whether the evidence reflects that the defendant intentionally or knowingly targeted the forum's resident.[212] Bypassing the issue of whether the French defendants' conduct was tortious, Judge Fogel found that the defendants targeted California residents, and on that basis he found that they had met purposeful availment criteria.[213]

Judge Fogel's emphasis on the "targeting" element may be misplaced here. As counsel for LICRA and UEJF argued in their appellate brief, the Ninth Circuit and other jurisdictions have required targeting as an

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209. *Id.* The Court fails to cite any authority to support its determination that these three actions are sufficient to establish that the French defendants purposefully availed themselves to the benefits of California law. The defendants argued in their opening brief on appeal that this determination is contrary to case law establishing that a defendant should not be compelled to risk having to submit to jurisdiction in a distant forum to exercise their rights in their local jurisdiction. *Id.* (citing Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 232 F.3d 1082, 1089 (9th Cir. 2000; Douglas Furniture Co., Inc. v. Wood Dimensions, Inc., 963 F. Supp. 899, 902 & n.1 (C.D. Cal. 1997)).

210. *Yahoo! I*, 145 F. Supp. 2d at 1175 (citing Meyers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001); Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 232 F.3d 1082, 1089 (9th Cir. 2000); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998); Cybersell, Inc., v. Cybersell, Inc., 130 F.3d 414, 429 (9th Cir. 1997); Ziegler v. Indian River County, 64 F.3d 470, 473-74 (9th Cir. 1995); Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 n.1 (9th Cir. 1995)).

211. *Id.* (citing Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 232 F.3d 1082, 1087 (9th Cir. 2000); Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 109-13 (1987); Burger King v. Rudzewicz, 471 U.S. 462, 472-77 (1985)).

212. *Id.*

213. *Id.* at 1175-76.

additional element needed to warrant the imposition of the effects test, never as an element that can *substitute* for the requisite tortious conduct.[214] The district court's decision, now on appeal, presents the Ninth Circuit an opportunity to clarify whether the effects test is limited to tortious or otherwise wrongful conduct cases and whether, in an international context, the definition of wrongful conduct will encompass conduct lawful in another country, but which violates First Amendment rights in the United States.

Having determined based on his targeting analysis that the French defendants purposely availed themselves of the benefits of California law, Judge Fogel had little difficulty finding that Yahoo's claims arose out of the forum-related conduct of the French defendants.[215] Applying a "but for" test,[216] the court found that but for the French defendants having filed and prosecuted a lawsuit in France and having used the U.S. Marshal's office to serve process, Yahoo would have had no need to file an action for declaratory relief seeking an order that the French decision is unenforceable in the United States.[217]

Judge Fogel's determination that the French defendants purposely availed themselves of the benefits of California law became a significant factor in his analysis of the third requirement for specific jurisdiction—that the exercise of jurisdiction be reasonable.[218] Citing the decision in *Bancroft & Masters*, Judge Fogel noted, "When purposeful availment has been established, Defendants have a burden of demonstrating a 'compelling case' of unreasonableness."[219] This standard sets a very high bar for a defendant. *Bancroft & Masters* enumerated seven factors relevant in determining reasonableness, all of which Judge Fogel balances in his decision.[220] The seven factors are:

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214. Opening Brief of Appellants at 14, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (9th Cir. 2002) (No. 01-17424) (citing Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 232 F.3d 1082, 1087 (9th Cir. 2000), for the holding that the purposeful availment test was satisfied "when the defendant is alleged to have engaged in *wrongful conduct* targeted at a plaintiff whom the defendant knows to be a resident of the forum state").

215. *Yahoo! I*, 145 F. Supp. 2d at 1175.

216. *Id.* at 1176 (citing Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995)).

217. *Id.*

218. *Id.* at 1177 (citing from *Burger King*, 471 U.S. at 476 (holding that for the exercise of jurisdiction to be reasonable, it must comport with notions of fair play and substantial justice)).

219. *Id.* (citing *Bancroft & Masters*, 223 F.3d at 1088).

220. *Id.* at 1177-80.

> (1) the extent of the defendant's purposeful interjection into the forum state; (2) the burden on the defendant in defending in the forum; (3) the extent of the conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[221]

In coming to a decision, Judge Fogel applied these seven factors in numerical order. Starting with the purposeful interjection factor, he acknowledged that the court must consider the degree of interjection to determine if jurisdiction is reasonable, even after finding purposeful availment.[222] He concluded that the actions of the French defendants in accessing Yahoo's U.S.-based website, mailing a letter to Yahoo in Santa Clara, using U.S. Marshals to serve Yahoo in Santa Clara, and asking a French court for an order requiring Yahoo to "reconfigure its U.S.-based servers, specifically including servers located in California" were sufficient in degree to support the Court's exercise of personal jurisdiction.[223] As was the case in the analysis of purposeful availment in the order, the court again declined to cite any case or statutory authority that directly supported the view that these actions by the French defendants were sufficient to support a finding of purposeful availment and the imposition of personal jurisdiction.[224]

The court next turned to the second factor, the defendants' burden in litigating a case in a distant forum. Acknowledging that the burden for two French non-profit groups to litigate a case in California is "not trivial," Judge Fogel asserted, however, that the availability of fax machines, telephones, and e-mail greatly reduced this burden.[225] As to the obvious expense for these non-profits needing to hire a U.S. law firm to defend themselves, the court concluded that this was not so severe a burden that it would deprive the French defendants of due process.[226]

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221. *Id.* at 1177 (citing *Bancroft & Masters*, 223 F.3d at 1088).

222. *Id.* (citing Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998).

223. *Id.* The last item cited in this litany, that the French defendants sought an order requiring Yahoo to "reconfigure its U.S.-based servers, specifically including servers located in California," appears to be factually inaccurate. The French court's order requiring the reconfiguration of Yahoo's servers to allow for geo-location filtering came from the court in Paris, not from a request by LICRA or UEJF.

224. *Id.*

225. *Id.*

226. *Id.* at 1178.

The court's analysis leads to the question of whether there are, in the modern world, any circumstances under which a U.S. court will find that the burden for a foreign defendant of litigating a case in the United States is unreasonable. The only possible circumstance to support such a finding, it appears, requires a person to be living in a remote part of the world, without telephones, faxes, e-mail, or easy travel means. Given this interpretation of the reasonableness standard, U.S. citizens should not be surprised to find that the courts of other countries will not accept a similar "burden" argument advanced by them, and they should be prepared to shoulder the cost of defense of any claims brought against them in a foreign country.[227]

The third factor, that a plaintiff seeking to hale a foreign defendant into a U.S. court must meet a "higher jurisdictional threshold" than is required when the defendant is a U.S. citizen, based on respect for the sovereignty of the foreign country, is the next element the court considered.[228] While acknowledging the great respect and deference due to France's sovereign interest in enforcing the orders of its courts, Judge Fogel held that courts must weigh those interests against the sovereign interests of the United States in protecting the statutory and constitutional rights of its citizens.[229] In his view, French sovereignty must give way to the U.S. interest. He reaffirmed the view that in a conflict of laws situation where constitutional rights are involved, domestic law will be enforced.[230]

The court again addressed the issue of ripeness in analyzing the fourth factor, California's interest in adjudicating the dispute. Judge Fogel asserted that the state interest is particularly strong in this case because of

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227. *See, e.g.*, Dow Jones & Co. v. Gutnick (2002) HCA 56 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html (last visited Dec. 2, 2003). In this case, *Barrons Magazine,* a Dow Jones & Co. publication, allegedly defamed Australian businessman Joseph Gutnick through statements included in an online version of the magazine. Gutnick brought suit in the Supreme Court of Victoria, and Dow Jones objected to the jurisdiction of the court. The High Court, applying its own version of the effects test in a tort case, disagreed and held that Dow Jones must respond to the action in the Australian court system. *Id.* ¶¶ 9, 18-24.

228. *Yahoo! I*, 145 F. Supp. 2d at 1178.

229. *Id.* (citing Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 664 (1992) (holding a libel judgment of an English court was held unenforceable because it violated First Amendment protections afforded to the press); Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (finding that an English libel judgment was not enforceable in the U.S. because it was "contrary to U.S. libel standards"); CAL. CIV. PROC. CODE § 1713.4(b)(3) (Deering 2002) (providing that a court need not recognize a foreign money judgment if the cause of action is repugnant to the public policy of the state)).

230. *Id.*

Yahoo's claim that "its fundamental right to free expression has been and will be affected by Defendants' forum-related activities."[231] Judge Fogel acknowledged that the French defendants argued that Yahoo had suffered no actual injury, that the French defendants have not sought to enforce the French Court's judgment, and that they may never seek to do so.[232] Nonetheless, he rejected the defendants' "proposed 'wait and see' approach," claiming that the lack of enforcement could have adverse consequences: "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."[233]

The court's concern may be valid in the abstract, but is it valid given the facts in this case? The French defendants, more than two years after receiving their judgment in France, have never sought to enforce it in the United States. Yahoo made it clear that it would not abide by the French court's order and was deservedly confident that no U.S. court would enforce it. There is, in fact, no demonstrable evidence that Yahoo's business was affected in any way by the November 2000 Order of the French court.

In sum, where online content may be unlawful in another country but lawful protected speech in the United States, there is no legal uncertainty involved. Yahoo cannot have ever seriously doubted that allowing the posting of Nazi memorabilia for auction and of related Nazi texts was protected free speech in the United States. At the time it filed its action in U.S. District Court, it also had clear notice that these same materials were illegal in France. Where was the uncertainty? What there is instead is a stalemate, with two diametrically opposed viewpoints being expressed by two different courts in two different countries. Whether this kind of stalemate has any real impact on the parties this Article will address in Part IV.[234]

Judge Fogel made short shrift of the remaining four factors relevant to determining reasonableness. He found that the fifth factor, the forum best suited for efficient resolution, no longer weighed heavily because of the

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231. *Id.* at 1178-79 (citing CAL. CIV. PROC. CODE § 425.16, which provides a procedural mechanism to dismiss at an early stage cases that "chill the valid exercise of the constitutional right of freedom of speech"). Since no actual enforcement of the French judgment has been sought, presumably the prospect that it might be is the conduct which the Court feels chills Yahoo's freedom of speech.

232. *Id.* at 1179.

233. *Id.*

234. *See infra* Part IV.

ease of modern transportation, and that in this case it is essentially a neutral factor.[235] He next found that a U.S. District Court is the more efficient and effective forum in which to resolve the issue of whether the French court's order is enforceable. Having made this finding, Judge Fogel made moot the possibility of the French court as an alternative forum.[236]

This analysis led Judge Fogel to conclude that the balance of factors weighs in favor of the California court's exercise of personal jurisdiction, and that the French defendants had not met their burden to make a "compelling case" necessary to rebut the presumption that jurisdiction was reasonable.[237] This decision set the stage for the next procedural step in the U.S. case: a ruling on Yahoo's motion for summary judgment on First Amendment grounds.

3. The Ruling Granting Yahoo's Motion For Summary Judgment

Following the court's ruling denying the French defendants' Motion to Dismiss,[238] Yahoo filed a motion for summary judgment on the ground that the French court's November 2000 Order violated Yahoo's First Amendment free speech rights and was therefore unenforceable in the United States. Following the submission of briefs and a September 24, 2001 hearing for oral argument, Judge Fogel granted Yahoo's motion by an order dated November 7, 2001.[239] Although not as controversial or hotly contested as was the motion to dismiss, this order contains an analysis worth examining on the issue of how U.S. courts should deal with the problem of content restrictions for protected speech that originates in the United State, but is accessible online by citizens of other countries, where it is in violation of those countries' laws.

Judge Fogel began with an "Overview" section, in which he acknowledged the sovereign right of a country "to determine by law what forms of speech and conduct are acceptable within its borders."[240] He emphasized that we should respect the French Republic's motivation in designating speech promoting the symbols or propaganda of Nazism.

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235. *Yahoo! I*, 145 F. Supp. 2d at 1179 (citing Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998)).

236. *Id.*

237. *Id.*at 1180.

238. *Id.*at 1168.

239. *See Yahoo! II*,169 F. Supp. 2d 1181 (N.D. Cal. 2001).

240. *Id.* at 1186.

Further he asserted that "vigilance is the key to preventing atrocities such as the Holocaust from occurring again."[241]

However, he noted that the right of a sovereign state to determine the scope of allowable speech within its borders is not what is at issue in the case. He asserted that the issue is "[w]hether 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."[242]

Judge Fogel acknowledged that since the Internet "renders the physical distance between speaker and audience virtually meaningless," the significance of the issue as he has framed it goes "far beyond the facts of this case."[243] Posing the hypothetical situation of another government or party seeking enforcement of its laws against Yahoo or another U.S. based Internet service provider, he asked what principles should guide his, or another U.S. court's analysis.[244] His answer was the Constitution and the laws of the United States.[245] His guide was the First Amendment case law that deems it preferable to permit non-violent speech, however repugnant, rather than to impose a "viewpoint" based regulation of speech.[246]

Judge Fogel concluded this Overview section by foreshadowing his ruling granting Yahoo's motion with what comes close to an apology to the people and judiciary of France: "The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1187. It is noteworthy that the court did not ponder the converse situation: what principles of law will U.S. courts apply when a foreign party or government which operates as an Internet service provider violates U.S. laws? Examples include facilitating gambling, selling alcohol or cigarettes to minors, and providing material legally deemed obscene in the United States. These activities are lawful in some countries but unlawful here. As noted previously using the gambling example, the Courts will apply the principles of U.S. law, and insist that those principles be applied extraterritorially. *See, e.g.*, Schwarz, *supra* note 177.

245. *Yahoo! II*,169 F. Supp. 2d at 1187.

246. *Id.* The history of this doctrine is controversial. See, for example, Justice Brennan's dissent in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986), in which he argued that the "enterprise zone" concept was viewpoint oriented and that the majority of the Court was engaging in a fiction to claim it was not.

United States, the Court intends no disrespect for that judgment or for the experience that has informed it."[247]

The court next turned to its legal analysis of the merits of Yahoo's motion. The legal issues, in the court's view, were whether Yahoo had shown the presence of an actual controversy, justifying the need for declaratory relief,[248] and whether Rule 56(f) of the Federal Rules of Civil Procedure, which allows postponement or denial of a motion for summary judgment due to a need to conduct further discovery, applied in this case.[249]

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247. *Yahoo! II*, 169 F. Supp. 2d at 1178. This statement also foreshadows the court's analysis of the difficult issue of comity as applied in this case, which is examined *infra*.

248. *Id.* at 1187-93; *see, e.g.*, 28 U.S.C. § 2201(a) (2000) (providing a right to a declaratory judgment from any court of the United States in any case "of actual controversy within its jurisdiction"). The U.S. Supreme Court has visited this issue on a number of occasions. In *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969), the court found no actual controversy and reversed a district court decision in a case dealing with an alleged violation of a state statute making it a crime to distribute anonymous literature in connection with an election campaign. Since the politician the literature targeted had, by the time of the hearing on the case, chosen not to stand for re-election, the court found that as of that time there was no actual threat requiring immediate action. The court first noted, "[T]he proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand." *Zwickler*, 394 U.S. at 108. The defendant's argument that the former Congressman could be a candidate again was rejected by the court as "hardly a substitute for evidence that this is a prospect of "immediacy and reality." *Id.* at 109. Citing its prior decision in *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947), the court repeated its statement of the rule announced in that case: "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *Id.* at 89-90. Applying these cases to *Yahoo v. LICRA* suggests that the question for the Court in ruling on Yahoo's summary judgment motion is whether an actual threat existed at the time of the hearing on the motion.

249. *Yahoo! II.*, 169 F. Supp. 2d at 1193-94. The French defendants argued that they needed additional discovery to develop their theory that this case was bound by dictum contained in *Desai v. Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir. 1992), which stated "for purposes of suits brought in United States courts, First Amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution." The French defendants claimed that since Yahoo expressly targeted France, this statement suggested that further discovery might reveal a triable issue of fact. *Yahoo! II.*, 169 F. Supp. 2d at 1193. That issue was the extent to which Yahoo's modifications to its auction sites by removing all Nazi memorabilia offerings reduced its potential liability, which presumably also would affect the need for immediate action via declaratory relief. Judge Fogel rejected this argument. He found *Desai* distinguishable, because in that case the acts at issue took place in a foreign country, whereas in this case, he found, the acts at issue, the requirement that Yahoo

Judge Fogel began the "actual controversy" analysis by rejecting the French defendants' claim that the May and November Orders do not give rise to an actual controversy. The French defendants had reasoned that because Yahoo's subsequent actions restricting Nazi memorabilia from its auction sites may result in a French court determining that those Orders have now been substantially complied with and the need for several more procedural steps to finalize the judgment in France preclude any immediate action in the United States to enforce the orders.[250] In short, the French defendants argued that procedurally, the case is not in an "actual controversy" position.

In rejecting this analysis, Judge Fogel noted that the French defendants took no steps to have the orders withdrawn and that in any subsequent proceeding, any penalties assessed would be retroactive for the entire period of Yahoo's noncompliance.[251] He further noted that the substantial compliance argument lacks support, confirming his view that the French court would make a similar finding. He emphasized that Congress intended the Declaratory Judgment Act to relieve this kind of uncertainty.[252]

Turning to the question of whether the French orders posed any real or immediate threat to Yahoo, Judge Fogel concluded that they did.[253]

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modify its servers, would have taken place in the United States. *Yahoo! II*, 169 F. Supp. 2d at 1193.

250. *Id* at 1188. The French defendants argued that to finalize the judgment embodied in the May and November Orders, they would have to proceed with further evidentiary hearings to set the amount of damages. *Id.* at 1190. They also noted that the damages might not be substantial, since Yahoo removed the Nazi memorabilia within the ninety days given in Judge Gomez's order—a fact which might cause the French court to conclude that Yahoo was in substantial compliance with its order, resulting in a refusal to order any further damages. *Id.* 1190-91.

251. *Id.*

252. *Id.* at 1189 (citing Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 237 (D.N.J. 1966)). The court stated:

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

Id.

253. Judge Fogel distinguished several cases that French defendants asserted should lead the court to the opposite conclusion. *Id.* at 1189-91. The French defendants argued that the decision in *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 611 F. Supp. 315, 319-20 (C.D. Cal. 1984), supported a finding that

Because the French defendants retained the power to finalize their judgment in France and to thereafter enforce that judgment including retroactive penalties in a U.S. court, Judge Fogel decided that the conflict created sufficient uncertainty to constitute a real or immediate threat. The court reasoned that Yahoo might feel compelled to take action in response to the orders and in derogation of those rights, if it was not able to obtain a declaratory judgment. Quoting from the Supreme Court's decision in *Elrod v. Burns*, Judge Fogel asserted that such a limitation creates a serious injury: "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'"[254]

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no actual controversy exists in this case. *Id.* In *International Society,* the district court rejected a claim by the City of Los Angeles that it was entitled to declaratory judgment because the resolution at issue, adopted by the Los Angeles Board of Airport Examiners limiting airport speech activities, had not yet been ratified by the City Council and was therefore unenforceable. *Id.* Judge Fogel distinguished this case on the grounds that if the Council chose not to ratify the Board's resolution, the resolution would have no effect at all, whereas in *Yahoo!*, there was no dispute that Judge Gomez's Orders were valid and enforceable, and would be enforced retroactively. *Yahoo! II*, 169 F. Supp. 2d at 1190.

Similarly, Judge Fogel rejected the French defendants' argument that there was no real or immediate threat to Yahoo because they do not presently intend to seek enforcement of the May and November Orders in the United States. *Id.* The French defendants cited the decision in *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990), in support of this argument. In *Salvation Army*, the well known non-profit group objected to state laws regulating boarding houses as violating its right of freedom of religion. 919 F.2d at 185. In an out-of-court partial settlement, the state authorities agreed to exempt the group from part of the relevant provisions. The district court then granted summary judgment and dismissed the action. *Id.* On appeal, the Salvation Army claimed that it still faced uncertainty because the exemptions granted were not permanent and legally binding, and that the regulations at issue still violated their First Amendment rights. *Id.* The Court of Appeals for the Third Circuit rejected those arguments, agreeing with the district court that since the state had given express assurances that it would not enforce any of the exempted terms of the law, and no criminal penalties could be imposed without additional steps, and no fines could be imposed without notice, the Salvation Army's First Amendment rights would not be actually affected by the threat of future law suits. *Id.* at 192-93.

Judge Fogel distinguished this case by noting that the penalties in the *Salvation Army* case were prospective only, whereas in *Yahoo!* they were also retroactive, and by noting that the exemptions at issue in *Salvation Army* preserved the status quo, while the relevant Orders in *Yahoo!* altered it. Finally, he noted that the provisions in the Orders in *Yahoo!* have never been waived, suspended or stayed and were therefore still in full force and effect, whereas the fear in *Salvation Army* was that exemptions granted might not be still available in the future. For the court, the possibility that the French defendants might seek to enforce the Orders at some time in the future, with retroactive effect, warrants a finding of real and immediate harm. *Yahoo! II*, 169 F. Supp. 2d at 1191.

254. *Yahoo! II*, 169 F. Supp. 2d at 1189 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)).

The court acknowledged that it must weigh the Damoclean possibility hanging over Yahoo's head of retroactive enforcement of the French court's orders against the reality that those orders were incapable of enforcement in any U.S. court. Judge Fogel wrote,

> The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. 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.[255]

In the last section of his order granting Yahoo's motion for summary judgment, Judge Fogel addressed the impact his order would have on international comity. He observed that the extent to which the United States honors the judicial decrees of foreign nations is a matter of choice, governed by the "comity of nations," and that there is no absolute obligation to accept those foreign decrees.[256] He also noted that comity does not require a U.S. court to give effect to a foreign judicial order if it would violate American public policy or fundamental interests.[257] This led the court to conclude that the goal of giving effect to foreign judgments under the principle of comity could not be met in this case because the French court's May 22 and November 20 Orders violated Yahoo's First Amendment rights, which are fundamental rights for U.S. citizens.[258] Judge Fogel ended by noting that he is bound to uphold the First Amendment in this case instead of giving deference to comity because there is no international agreement or treaty providing any other guidelines

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255. *Id.* (citations omitted).

256. *Id.* at 1192 (citing Hilton v. Guyot, 159 U.S. 113, 163 (1895)).

257. *Id.* (citing Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)).

258. *Id.* at 1192-93. In support of this portion of the order, the court cites three cases in which U.S. courts rejected efforts to enforce in the U.S. libel judgments granted under British law. These three cases found that the British defamation law impinged on protected free speech under the First Amendment. *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995); Abdullah v. Sheridan Square Press, Inc., No. 93 1994 WL 419847 (S.D.N.Y. May 4, 1994); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992). As noted previously, the court cites no cases directly on point for the situation where online content violates the law in one country but is lawful in the country where the online provider maintains its principal servers and offices.

for the handling of these kinds of cases: "Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."[259]

The question of whether the creation of international standards is desirable and/or possible, or whether other proposals exist to address the unacceptable recurrence of stalemates such as have occurred in the Yahoo case, is addressed in the final section of this article.

C. The Real Issue: It's Their Law Against Ours

Oral argument on the appellate case was presented in December 2002, and the Court of Appeal has not yet issued its decision. How might this case be resolved? One hoped for result could be that the Court of Appeal will find that there is no actual controversy here and that in essence what Yahoo was seeking was an advisory opinion from the District Court. This result would leave all of the substantive issues addressed in the District Court decision unresolved, with the questions of jurisdiction and the conflict over the regulation of online speech to be argued another day in another context. Alternatively, the Court of Appeals could find that the district court erred in its determination that the exercise of jurisdiction over the French defendants was reasonable. This result might help to clarify the extent to which jurisdiction in Internet related cases will extend, and restrain the application of the effects test to tortious conduct. A third possibility is that the district court decision could be affirmed on all counts, as the Court of Appeals may want to reassert that U.S. courts will find jurisdiction in cases where it feels it necessary to protect First Amendment free speech. Such a finding would reaffirm that U.S. courts will find jurisdiction on minimal showings of fact, particularly in declaratory relief cases where the right of a foreign party to seek enforcement of a foreign judgment whose principal ruling is contrary to U.S. policy is involved.

Whichever of these alternatives the Court of Appeals chooses will have no impact on the real controversy this case has revealed. Recently an *ABA Journal* article captured the conflict's essence with a subheading

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259. *Yahoo! II*, 169 F. Supp. 2d at 1193. In a footnote, the Court added: "The Court expresses no opinion as to whether any treaty or legislation would or could be constitutional." *Id.* at 1193 n.12.

stating, "It's Their Law Against Ours."[260] An attorney quoted in the article, Robert Corn-Revere, put the importance of the First Amendment in international law in this perspective. He explained,

> On the Internet, the First Amendment is just a local ordinance . . . . The practice of law on the Internet is still a very new, very unsettled area, and a lot of American companies that do business on the Net are likely to find themselves in trouble somewhere in the world.[261]

Counsel for Yahoo adopted a more defiant view of the likelihood of getting into trouble for posting content in the U.S. that violates the laws of other countries. Bolstered by the district court's decision, Yahoo Attorney Mary Wirth dismissed the risk of foreign claims against the company. She stated, "Now, every time I get a defamation claim from some other country about something on the U.S. site, I say 'Go ahead and sue.' . . . Even if they rule against us, it's unenforceable."[262]

Mary Wirth may indeed be right. So long as Yahoo stays within U.S. borders, foreign judgments against it that conflict with the company's First Amendment rights will be unenforceable in the United States. However, an ominous development in the case is the companion suit, filed in Paris by a group of Holocaust survivors, against Tim Koogle, chief executive officer of Yahoo, based on the same violation of French criminal law.[263] In that case, the damages sought were symbolic, only one French franc, but it is not beyond the realm of possibility that another case may be filed in the future, seeking greater damages or even criminal penalties. If that happens, then chief executives may have to adjust their travel plans to stay out of countries where enforceable judgments have been entered against them.

U.S. authorities would be hard-pressed to object to such tactics, since they have already been deployed in this country in the highly publicized

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260. Jason Krause, *Casting a Wide 'Net*, 88 A.B.A. J. 20 (2002) (discussing both the *Yahoo!* case and the negotiations which took place between Google, a Silicon Valley search engine, and the Chinese Government). Chinese authorities blocked Chinese surfers from accessing the Google site, redirecting them to government-controlled sites instead. The matter was settled following weeks of negotiation, and the government blacklist was lifted. The article does not disclose the terms of the settlement. *Id.*

261. *Id.* The article closes with this other comment from Corn-Revere: "As the Internet gets more popular around the world, Americans are going to find there's a big difference between doing business on the Net here and doing it overseas." *Id.*

262. *Id.*

263. Associated Press, *Group Sues Yahoo CEO Over Site's Nazi Auctions*, S.F. CHRON., Jan. 24, 2001, at B3.

case filed by the United States government against Russian computer engineer Dmitry Sklyarov for alleged violation of the anti-circumvention sections of the Digital Millennium Copyright Act ("DMCA").[264] The *Sklyarov* case and the case against Koogle are mirror images of each other. They caution that parties who host or post website information legal in their own country but illegal in another country may be safe within their own borders if enforcement of the foreign judgment would violate the laws or policies of their country. Venturing outside their borders, however, may no longer be safe.

Before Yahoo's California lawsuit, Professor Joel Reidenberg[265] offered the optimistic view that U.S. courts would find sufficient basis to grant enforcement of the French court's order. He envisioned that the enforcement ordered therein, for the imposition of geo-location filtering, would usher in a new age of democratization on the Internet.[266] As a result of the French court's decision, Reidenberg predicted, "Internet companies and developers of infrastructure technology will be forced to recognize and accommodate varying national public values."[267]

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264. United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002). Sklyarov developed a software program, Advanced eBook Processor ("AEBPR") for his Russian employer Elcomsoft, which permits eBook owners to translate electronic books from Adobe's secure eBook format to the more common Portable Document Format ("PDF"). When Adobe complained to the U.S. Government, an indictment was issued for Sklyarov's arrest based on his actions, which were allegedly in violation of DMCA anti-circumvention and anti-trafficking statutes. *Id.* at 1119. Although Sklyarov's actions were lawful under Russian law, they were allegedly a violation of U.S. law. When Sklyarov came to the United States in the Fall of 2001 to speak at a conference on computer security, he was arrested and jailed for a period of five months. Elec. Frontier Found., *Frequently Asked Questions (and Answers) About the Dmitry Sklyarov & ElcomSoft Prosecution*, *available at* http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html (last visited Dec. 7, 2003). He was released when he agreed to provide testimony sought by the Government. *Id.* His motions, and those of Elcomsoft, to dismiss the case for lack of subject matter jurisdiction and on First Amendment grounds, were dismissed in March and May 2002, respectively. Elec. Frontier Found., *"Intellectual Property: Digital Millennium Copyright Act (DMCA):* U.S. v. ElcomSoft & Sklyarov" Archive, *available at* http://www.eff.org/IP/DMCA/US_v_Elcomsoft/ (last visited Dec. 7, 2003). In December 2002, the defendants were acquitted of the charges, in part as a result of the successful assertion of a fair use defense. *Id.*

265. Professor Joel Reidenberg is a professor at Fordham University.

266. Joel R. Reidenberg, *Yahoo and Democracy on the Internet,* 42 JURIMETRICS J. 261, 261 (2002).

267. *Id.* at 272. Reidenberg asserted that the French court's rejection of Yahoo's argument that individual countries could not attempt to impose their local laws on the Internet was a positive sign that "Internet companies cannot supplant the rule of law as established by elected representatives." *Id.* at 275. He suggested that the French court's

The decisions in the *Yahoo!* and *Sklyarov* cases appear to be taking us away from Reidenberg's laudable view, and instead in the opposite direction. Yahoo's counsel makes clear that Yahoo has no intention of modifying its infrastructure technology to accommodate the laws of France. The principal impediment to the democratization process espoused by Professor Reidenberg is that U.S. courts, as evidenced by the decisions in the *Yahoo!* case, will not enforce foreign laws that conflict with the First Amendment. Since the courts cannot offer us a path to democratization of the Internet, then we must look elsewhere for possible solutions to this impasse.

III. A MODEST PROPOSAL FOR INTERNATIONAL GUIDELINES, AND A FORMULA FOR NOTICE AND A REDUCTION OF UNCERTAINTY

The search for a solution requires a synthesis of Professor Geist's targeting proposal, Professor Reidenberg's suggestion that geo-location filtering be deployed as a way for nations to control content coming to their own population while leaving the rest of the Internet untouched, and one new element to be added to the mix. This last element is the creation of an international database to provide more notice to website hosts and providers of the scope and nature of each nation's content laws. The database would allow providers and hosts a greater opportunity to choose whether, and to what extent, they wish to tailor their content or impose filters. By relying on the database, they could avoid or limit liability.

A. The Movement Towards an International Treaty Regulating Jurisdiction and Enforcement of Judgments

In his footnote regarding the prospects for an international treaty regarding online content, Judge Fogel noted that he could offer no opinion as to whether any treaty or agreement restricting online content could pass constitutional scrutiny.[268] Despite this skepticism, efforts have been underway before two international organizations to address these issues via the treaty process.

For the past seven years, a Special Commission of the Hague Conference on Private International Law has been working on a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. This effort has produced several drafts. The most

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position "promotes democratic pluralism on the Internet by requiring technological developments that allow states to enforce their local laws." *Id.*

268. *Yahoo! II*, 169 F. Supp. 2d 1181, 1193 & n.12 (N.D. Cal. 2001).

recent, the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commerical Matters* (the "Preliminary Draft"), was completed in November 1999, and remains the subject of considerable discussion.[269] The purpose of this drafting effort is to try to reach an agreement between the forty-seven signatory nations to the Hague Conference on which rules will govern jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters.[270]

While a number of the terms of the Preliminary Draft might have changed the outcome of the *Yahoo!* case had they been in effect,[271] one key term guarantees the same outcome and negates the possibility of the Hague Convention having any significant impact on the impasse the Yahoo case produced. Article 28 lists the grounds for refusal of recognition or enforcement of a foreign court's judgment. The term provides "recognition or enforcement of a judgment may be refused if . . . recognition or enforcement would be manifestly incompatible with the public policy of the State addressed."[272]

This "public policy" exemption is the same ground that Judge Fogel used to deny the application of the principles of comity to the enforcement

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269. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, amended Nov. 16, 1999 [hereinafter Preliminary Draft], *at* http://www.hcch.net/e/conventions/draft36e.html (last visited Nov. 27, 2002).

270. *See generally* Edward C.Y. Lau, *Update On The Hague Convention On The Recognition & Enforcement Of Foreign Judgment* (2000), *at* http://www.launet.com/Hague/Update031700.html (last visited Nov. 27, 2002).

271. *See, e.g.*, Preliminary Draft, *supra* note 269, art. 4.1, 10, 18.1(h) & 21. Article 4.1 places jurisdiction in the forum agreed upon by the parties. Yahoo has argued that its Terms of Service establish jurisdiction over disputes in the United States. *See supra* note 13. Adoption of an international agreement establishing jurisdiction on this basis might be a ground for Yahoo to assert that the French Court could not exercise jurisdiction, unless the act arose from a tort, in which case the provisions of Article 10 might govern. Article 10 reaffirms the "effects test" as applied to tort cases, affirming that jurisdiction in tort matters may be found in the forum where the injury occurred, provided it was foreseeable that the act would result in an injury to the person in that forum. Preliminary Draft, *supra* note 269, art. 10. Article 18.2(h) provides that jurisdiction may not be established based upon the service of a writ upon the defendant in a particular forum—a term which would negate Yahoo's argument that the French Defendant's service of the Notice of Entry of Judgment of the French Court on Yahoo in California was a basis for finding jurisdiction over those defendants. *Id.* art. 18.2(h). Article 21 creates a priority of actions by establishing a *lis pendens* system—requiring, under certain circumstances, the court in a second forum to suspend proceedings in favor of another court which first seized jurisdiction. *Id.* art. 21. The application of this rule might, but for the "public policy" exception found and discussed in Article 28, have been a basis for suspending the U.S. District Court case until all proceedings in the French Court were completed.

272. *Id.* art. 28.1(f).

of the French court's orders.[273] To date, there is no indication that the Hague Conference intends to alter Article 28 or to make any effort to reconcile the "public policy" exemption doctrine with the kind of situation posed by the Yahoo cases.

The need for a uniform system of jurisdiction and recognition of judgments in private international law, particularly where those judgments arise from intellectual property disputes, has also drawn the attention and efforts of the Geneva-based World Intellectual Property Organization ("WIPO"). In January 2001, distinguished Professors Rochelle C. Dreyfuss and Jane C. Ginsburg presented WIPO delegates with a *Draft Convention On Jurisdiction And Recognition Of Judgments In Intellectual Property Matters* (the "WIPO Draft"). The draft provided suggestions for dealing with the regulation of online content, while still retaining the same "public policy" exemption found in the Hague Convention.[274]

The authors based the WIPO Draft on the Hague Convention, but tailored the draft specifically to the issues arising from the recognition and enforcement of intellectual property judgments, as opposed to the more general approach of the Hague Convention.[275] One such issue identified by the WIPO Draft is the problem of adjudicating multiterritorial claims.[276] The draft's authors suggested in Article 13, adapted from Article 22 of the Brussels Convention, that such multiterritorial claims be consolidated and heard by a single court in a single forum.[277] Article 13(3) contains a series of factors for parties to consider in deciding which court should hear the matter.[278] Subsection 5 provides that if consolidation is not agreed to, the judgment in one action will not be preclusive of the other.[279]

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273. *See supra* notes 254-255.

274. *See* Rochelle C. Dreyfus & Jane C. Ginsburg, *Draft Convention On Jurisdiction and Recognition of Judgments In Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002) [herinafter *Draft Convention on Intellectual Property Matters*].

275. *Id.* at 1065-66.

276. *Id.* at 1073. The authors of the WIPO Draft asserted that the digital networked environment makes the likelihood of multiterritorial infringements likely, necessitating the creation of a method for adjudicating such disputes in a single forum to avoid inconsistent judgments.

277. *Id.* at 1080.

278. *Id.* at 1081.

279. *Id.* The factors for consideration in the consolidation analysis include: "the advantages of worldwide resolution of the dispute among the parties through consolidation of related pending actions, and through inviting the parties to assert all intellectual property claims related to the action in a single forum," *id.* at 1080, "whether consolidating would promote efficiency and conserve judicial resources and the resources of the parties," *id.*, "whether or not inconsistent judgments could result if multiple courts adjudicated the related claims," *id.*, and "[in patent cases, the expertise of the judicial

In further recognition of the multiterritorial nature of intellectual property disputes, the WIPO Draft authorizes the kind of injunctive relief the French court ordered in the *Yahoo!* case. Article 19(1) provides: "The court having jurisdiction under the rules of this Convention to determine the merits of the case has jurisdiction to order any provisional or protective measures, including transborder injunctions."[280] Had the parties agreed to the consolidation of the French and U.S. actions in the *Yahoo!* case, Article 19(1) would have made Judge Gomez's interlocutory order directing the use of geo-location filtering software on Yahoo's servers in Santa Clara, California an enforceable trans-border injunction. However, the reiteration of the Hague Convention's "public policy" ground for refusal of recognition or enforcement, found in Article 25 of the WIPO Draft,[281] again leaves us with the same result reached by Judge Fogel: The French court orders are unenforceable as violative of Yahoo's First Amendment rights.

B. Towards an Interim Solution: Effects Plus Targeting Plus Increased Forseeability—Breaking the Egg in the Middle

Although the Hague Convention and the WIPO Draft offer many valuable proposals to move us in the direction of a more universal system of recognition and enforcement of judgments, they do not provide any viable solutions to the impasse epitomized by the *Yahoo!* cases. It appears unlikely that any treaties, conventions, or other public international legal bodies will undertake the seemingly impossible task of reaching agreement on the regulation of online content, for the simple reason that countries' substantive laws differ on what content is acceptable. If a uniform international system of laws regulating content is unattainable, are we left just with the status quo of an endless series of wars fought between nations over which end of the egg to break?

This bleak outlook is not all we have to look forward to. The suggestions of a number of the commentators referenced previously hold out the prospect of improvement, if not solution, of this problem. Professors Geist and Reidenberg, in particular, offer a way out of our dilemma. Professor Geist points out that the foreseeability of jurisdiction

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system of the Contracting State in which the court seized is located]." *Id.* The authors put all suggestions regarding patent law in brackets based on their view that patent litigation should remain outside the convention due both to the lack of universal expertise among convention members required for accurate decision making, and to the low incidence of simultaneous multinational infringements. *Id.* at 1069.

280. *Id.* at 1084.

281. *Id.* at 1086. This section of the WIPO Draft is based on Article 28 of the Hague Convention. *See supra* note 258 and accompanying text.

being imposed in a given situation is at the heart of the reasonableness standard.[282] In short, if a party can reasonably expect that its conduct will result in the imposition of jurisdiction in a foreign country, it can make an informed decision as to whether it wishes to take the risk of posting online content that might give rise to liability.[283]

Neither the *Zippo* passive/active test nor the *Calder* effects tests, Geist argues, have proven very useful or accurate in providing certainty to online content providers as tests of the foreseeability of the imposition of jurisdiction.[284] As an alternative, he offers a "targeting test" through which jurisdiction would be based on the application of three factors: contracts, technology, and actual or implied knowledge.[285] The contracts factor looks to the evidence of agreement between the parties on forum selection as a means of determining foreseeability. Geist acknowledges that in some contexts, particularly consumer transactions, courts must use care in interpreting "clickwrap" agreements as true acknowledgments of forum selection.[286] He notes that the conditions of assent are also significant and bear scrutiny.[287] He suggests that self-declaration, where a consumer affirmatively declares where jurisdiction is acceptable to them, is a better alternative.[288] The second targeting factor, technology, refers to the use of software programs such as the geo-location filtering ordered by Judge Gomez. Geist provides a detailed analysis of some of the technology methods available at the time his article was written (early 2001), all of which allow online content providers to identify, and where appropriate, block access based on jurisdiction or user identity.[289]

Geist acknowledges that these screening methodologies are not foolproof, but points out in response that "few users of technology actually demand perfection."[290] As noted previously, Judge Gomez concluded that

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282. Geist, *supra* note 35, 1356.

283. *Id.* at 1355-56. Professor Geist points out that worldwide Internet availability makes foreseeability difficult to gauge. *Id.* at 1357.

284. *Id.* at 1371-80.

285. *Id.* at 1380.

286. *Id.* at 1387.

287. *Id.* at 1386-87.

288. Geist, *supra* note 35, at 1391. Professor Geist acknowledges that self-declaration has its problems, notably when a mistake in the self-declaration occurs. In those circumstances, he points out that "courts have ruled that companies cannot rely on the self-declaration of a user where they know or suspect it to be false." *Id.* at 1392 (citing People v. World Interactive Gaming, 714 N.Y.S.2d 844 (Sup. Ct. 1999)).

289. *Id.* at 1393-1401.

290. *Id.* at 1394 (quoting Lawrence Lessig, *The Zones of Cyberspace,* 48 STAN. L. REV. 1403, 1405, when he opined that "[a] regulation need not be absolutely effective to be sufficiently effective").

the 80-90% level of protection the experts predicted would follow geo-location filtering and self-identification on the Yahoo U.S. site would be sufficient.[291]

Professor Reidenberg enthusiastically supports Professor Geist's recommendation that courts accept and adopt the use of these technological aids.[292] Reidenberg hopes that through the application of technology to identify users and to protect national laws through screening of content, "states will regain their voice in the global network as participants in a pluralistic international democracy."[293]

At its core, the pro-filtering argument relies on the assurance that courts will choose to under-filter as opposed to over-filter. Geo-location filtering seems to offer just such an assurance, since there appears to be no evidence that a properly configured geo-location software program will screen out more than those users who come from the designated location.[294] Further, as noted, there appears to be little opposition or dissatisfaction with the less than complete success of this software in screening out all prospective users coming from the targeted location.[295]

The last targeting factor discussed by Professor Geist is the assessment of whether the content provider has actual or implied knowledge of the geographical location of the user or participant in the online activity. Citing the tort cases that gave rise to the *Calder* "effects analysis," he notes that courts have generally accepted that the defendant either knew or should have known that defamatory content would cause injury in the plaintiff's home forum. He points out that courts have applied this same knowledge-based analysis in Internet gambling and intellectual property disputes.[296]

This factor of the targeting analysis gives rise to an issue when applied to the *Yahoo!* cases. While it is fairly easy in tort cases or infringement cases to prove knowledge, actual or implied, attributable to the defendant, the situation in the *Yahoo!* cases poses a more difficult issue of proof.

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291. *See supra* notes 114-128.

292. Reidenberg, *supra* note 266, at 261-280.

293. *Id.* at 280.

294. *See* Beverley Earle & Gerald A. Made, *International Cyberspace: From Borderless to Balkanized*, 31 GA. J. INT'L & COMP. L. 225, 258 (2003); *see also* Matthew Fagin, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 424 (2003).

295. *See* Fagin, *supra* note 294, at 424.

296. Geist, *supra* note 35, at 1402-04 (citing Star Media Network, Inc. v. Star Media, Inc., No. 00 Civ. 4647, 2001 WL 417118 (S.D.N.Y. Apr. 23, 2001); People v. World Interactive Gaming, 714 N.Y.S.2d 844 (Sup. Ct. 1999)).

How, one asks, is Yahoo or any other company to know whether the content it posts or allows to be posted will violate the laws of another country? Yahoo's efforts to shift the burden of obtaining that knowledge via its Terms of Service[297] were rejected by the French court, but the question remains unanswered.

Geist has acknowledged that although he believes website hosts need to be aware of the laws of foreign countries, an effects test without an actual or implied knowledge requirement would pose great risks and uncertainties for providers:

> First, foreign law matters. Once a company has assets or customers in a foreign country, it can ill afford to ignore the local legal system.
>
> . . . .
>
> The movement toward an effects based analysis marks an important shift in the understanding of Internet jurisdiction since it may breed increased uncertainty for site operators. While a Web site [sic] operator may be aware of its effect locally, it is unrealistic to expect the site operator to identify the effects in every jurisdiction worldwide.[298]

One possible solution to this notice problem would be to develop a system for providing notice to all parties who obtain the right to host a website available to the public on the Internet. At present, any person who wishes to host a website must apply for a domain name (essentially an address on the Internet) from the Internet Corporation for Assigned Names and Numbers ("ICANN").[299] This makes ICANN an ideal locus for the dissemination of information about the content laws of all of the nations of the world where the Internet is presently accessible.

The Internet Assigned Numbers Authority ("IANA") maintains the list of all country code Top Level Domain names ("ccTLDs"), of which 243

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297. See *supra* note 13 and accompanying text.

298. Lionel Thoumyr, *The Legal Implications of the Yahoo!, Inc. Nazi Memorabilia Dispute: An Interview with Professor Michael Geist,* JURISCOM.NET, *at* http://www.juriscom.net/en/uni/doc/yahoo/geist.htm (last visited Nov. 27, 2002).

299. *See* ICANN, *at* http://www.icann.org (last visited Nov. 27, 2002). ICANN is a technical coordination body for the Internet. A coalition of Internet communities created ICANN in 1998, and assumed responsibility for a set of technical functions previously performed by IANA and other groups under the supervision of the U.S. Government. ICANN assigns all Internet domain names, IP address numbers, and coordinates the functionality of all Internet protocol parameters and port numbers.

have been assigned to the countries of the world to date.[300] If each of those nations were required, as a condition for the right to obtain and maintain their ccTLD, to provide ICANN with a copy of or at least a link to all of the statutes identifying what forms of expressive content would, if posted and accessible to their citizens, be deemed a violation of their local laws, a gap in the present notice available to website providers would be filled.

Filling this gap would provide further foreseeability for website providers to determine whether content they host or allow to be posted would cause them to incur liability in a foreign country. The choice to post or host would then become an informed business decision of whether to incur the risk of suit in a foreign court, to employ technology to filter visitors from that country, or to employ blocking software based on user identification from that country's users. A website host who employed such technology could, as an incentive to make that use, be deemed exempt from liability for claims arising from parties who circumvented the technology and gained access to the prohibited material.

The implementation of this proposal is fraught with landmines and problems. What happens if a country fails to update its data and a party violates a new law not posted on the ICANN database? Is the burden of reviewing this database too onerous, such that imposing it on small companies is unfair? These are legitimate issues, but not so daunting as to render the proposal one not worth considering as a way to fill the foreseeability gap that now exists.

IV. CONCLUSION

Judge Fogel concluded his analysis of the comity issue in *Yahoo! v. LICRA* by noting that there are no international standards governing the regulation of online content.[301] His French counterpart, Judge Gomez, agreed that there are no such standards. Judge Gomez hoped that they would be developed to provide guidance for courts in the future.[302] While establishing such guidelines is undeniably difficult, the certainty that cases similar to the Yahoo-LICRA dispute will continue to challenge the international legal system mandates that the international community undertake the effort, if only because in the process we may be able to better preserve the principles of international comity—principles that the

300. *See IANA Root-Zone Whois Information, at* http://www.iana.org/cctld/cctld-whois.htm (last visited Nov. 27, 2002).

301. See *supra* note 239 and accompanying text.

302. Interview, Gomez, *supra* note 160, at 8.

uncertainties of Internet jurisdiction may fundamentally endanger.[303] For now, the adoption of the targeting approach to jurisdiction, enhanced by the creation of a database of content related laws of each country, may prevent a repetition of the endless battles presented by the *Yahoo!* case and its progeny.

303. Thournyr, *supra* note 298.