

YAHOO! INC. v. LICRA

By Christine Dub

*Yahoo! v. LICRA*¹ is a harbinger of the problems that Internet companies will face in a borderless world. Because the United States is unusual in its broad freedom of speech guarantees, a person's speech may be legal in the United States but illegal in another country. In physical space, a person's communications can be directed to an audience that is defined and somewhat limited. Physical borders are tangible with traditional entry and exit points.² The Internet, however, presents a new challenge because there are no clear borders.³ Generally, a speaker on the Internet cannot geographically limit where he is heard.⁴ Thus, the speaker is susceptible to being charged with violating another country's speech regulations.

The *Yahoo!* decision offers some solace for U.S.-based websites by holding that a U.S. court will not enforce a foreign order which violates a U.S. citizen's right to free speech.⁵ In doing so, the court applies fundamental law on the enforcement of foreign judgments to the context of the Internet.⁶ Notwithstanding the protection offered to websites in this country, U.S.-based websites continue to be viewed in other countries. Therefore, they may still be subject to the laws of foreign countries. Consequently, Internet companies that wish to do business or maintain a physical presence in a foreign country should become familiar with and attempt to conform to the laws of that country.

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1. 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

2. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1368 (1996) (“Territorial borders . . . delineate areas within which different sets of legal rules apply. There has until now been a general correspondence between borders drawn in physical space (between nation states or other political entities) and borders in ‘law space.’”).

3. *Id.* at 1375 (“[I]n Cyberspace, physical borders no longer function as signposts informing individuals of the obligations assumed by entering into a new, legally significant, place.”).

4. Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, 50 (1997) (“The structure of the network is such that there is no meaningful opportunity to avoid contact with a given jurisdiction—except perhaps to stay off the Internet altogether.”).

5. *Yahoo!*, 169 F. Supp. 2d at 1194.

6. *See infra* Part III.B.

I. THE CASE

A. Facts and Background

Yahoo!, an Internet service provider, is a Delaware corporation with its principal place of business in Santa Clara, California.⁷ Yahoo! operates various Internet websites and services, including a search engine, an automated auction site, personal web page hosting services, and chat rooms.⁸ Yahoo!'s auction site offers for sale many different types of items, including Nazi-related propaganda and memorabilia, the display and sale of which are illegal in France.⁹ Historically, Yahoo! has not removed such items from its auction site because they may be protected by the First Amendment of the U.S. Constitution.¹⁰

On April 5, 2000, La Ligue Contre Le Racisme Et L'Antisemitisme (LICRA)¹¹ sent a cease and desist letter to Yahoo!'s headquarters in Santa Clara, California, threatening to take legal action if Yahoo! did not stop displaying Nazi objects for sale on its auction site.¹² Shortly thereafter, LICRA, along with L'Union Des Etudiants Juifs De France (UEJF),¹³ used the U.S. Marshal's Office to serve process on Yahoo! in California. LICRA and UEJF then separately filed civil complaints against Yahoo! in the Tribunal de Grande Instance de Paris ("French Court"), alleging a violation of a French criminal statute which bars the public display of Nazi-related "uniforms, insignia or emblems" in France.¹⁴

On May 22, 2000, the French Court, in an opinion written by Judge Gomez, held Yahoo! liable under French law for allowing French citizens to access auction sites presenting Nazi memorabilia.¹⁵ The court issued an order ("French Order") directing Yahoo! to:

take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service

7. *Yahoo!*, 169 F. Supp. 2d at 1183.

8. *Id.* at 1184.

9. *Id.*

10. Complaint for Declaratory Relief at 4, *Yahoo! Inc. v. LICRA*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. C00-21275).

11. The League Against Racism and Anti-Semitism.

12. *Yahoo! Inc. v. LICRA*, 145 F. Supp. 2d 1168, 1172 (N.D. Cal. 2001) (order denying motion to dismiss).

13. The Union of French Jewish Students.

14. LE NOUVEAU C. PÉN. art. R.645-2.

15. *Yahoo!*, 145 F. Supp. 2d at 1172.

and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.¹⁶

On November 20, 2000, after seeking expert opinion on the matter,¹⁷ the French Court reaffirmed the order and commanded Yahoo! to (1) re-engineer its content servers in the United States and elsewhere to allow them to recognize French Internet Protocol (IP) addresses and block access to Nazi artifacts by users associated with such addresses; (2) require users with ambiguous IP addresses to make a declaration of nationality upon arriving at Yahoo!'s home page or upon initiating any search using the word "Nazi"; and (3) comply with the order within three months or face a penalty of 100,000 Francs (approximately \$13,300) per day of delay.¹⁸ Although Yahoo! subsequently amended its auction policy to prohibit individuals from auctioning certain Nazi materials, the auction site still offers items, such as stamps and coins from the Third Reich and a copy of Adolf Hitler's *Mein Kampf*, which appear to violate the French Order.¹⁹ Further, Yahoo! does not prevent access to numerous other sites with materials prohibited by France.²⁰

B. Procedural History—Determining Jurisdiction

On December 21, 2000, Yahoo! filed a Complaint for Declaratory Relief with the U.S. District Court for the Northern District of California.²¹ It sought a declaration that the French Order was neither recognizable nor enforceable in the United States because it violated the Constitution and laws of the United States.²² Defendants LICRA and UEJF moved to dismiss for lack of personal jurisdiction.²³

The District Court, in an opinion written by Judge Fogel, held that it had personal jurisdiction over the defendants.²⁴ It used the Ninth Circuit's three-part test for determining whether a court may exercise specific juris-

16. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>. See also *Yahoo!*, 145 F. Supp. 2d at 1185 (translation of French Order attested to be accurate by Isabelle Camus, February 16, 2001).

17. See *infra* Part I.D.

18. *Yahoo!*, 145 F. Supp. 2d at 1172.

19. *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181, 1185 (N.D. Cal. 2001).

20. *Id.*

21. *Id.* at 1186.

22. *Yahoo!*, 145 F. Supp. 2d at 1171.

23. *Id.* See FED. R. CIV. P. 12(b)(2).

24. *Yahoo!*, 145 F. Supp. 2d at 1180.

diction.²⁵ First, the District Court found that the defendants knowingly engaged in actions intentionally targeted at Yahoo!'s Santa Clara headquarters "for the express purpose of causing the consequences of such actions to be felt in California."²⁶ In doing so, the court used the Ninth Circuit's "effects test."²⁷ Second, the District Court found that the claim arose out of or resulted from the defendants' forum-related activities and therefore satisfied the Ninth Circuit's "but for" test.²⁸ Third, the District Court found that it had jurisdiction.²⁹ Accordingly, the court denied the defendants' motion to dismiss the case.³⁰

25. *Id.* at 1173. *See also* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997). Specific jurisdiction exists if (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. *Id.*

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

27. *See* *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) ("To meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state."). Previously, every Ninth Circuit decision applying the "effects test" had done so only with respect to wrongful or tortious conduct on the part of the defendant. *Yahoo!*, 145 F. Supp. 2d at 1174. "[F]iling a lawsuit in a foreign jurisdiction might be entirely proper under the laws of that jurisdiction." However, the District Court here found that "such an act nonetheless may be 'wrongful' from the standpoint of a court in the United States if its primary purpose or intended effect is to deprive a [U.S.] resident of its constitutional rights." *Id.* at 1175.

28. *Yahoo!*, 145 F. Supp. 2d at 1176. *See also* *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (plaintiff must demonstrate that it would have no need for a judicial declaration but for the defendant's forum-related activities). The *Yahoo!* court determined that but for the defendants' forum-related activities (i.e., filing and prosecuting the French lawsuit), Yahoo! would have no need for a declaration that the orders of the French Court were unenforceable in the United States. *Yahoo!*, 145 F. Supp. 2d at 1176.

29. *Yahoo!*, 145 F. Supp. 2d at 1177. The court balanced seven factors:

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

Id. at 1177 (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000)). The court emphasized that this case involved "only the limited question of whether [a U.S. court] should recognize and enforce [the] French Order [requiring] Yahoo! to censor its U.S.-based services to conform to French penal law." *Yahoo!*, 145 F.

C. The District Court's Analysis

On November 7, 2001, the District Court for the Northern District of California granted summary judgment on behalf of Yahoo!.³¹ The court held that Yahoo! had shown that the French Order was valid under the laws of France, the French Order could be enforced with retroactive penalties, and the ongoing possibility of its enforcement in the United States chilled Yahoo!'s First Amendment rights.³²

In reaching this decision, the District Court analyzed the requirements of the Declaratory Judgment Act,³³ which allows potential defendants to avoid multiple actions by providing a means by which a court may declare the rights and obligations of the litigants in one action.³⁴ The key question was whether "there [was] substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."³⁵

The District Court found that an actual controversy existed.³⁶ Because the French Order subjected Yahoo! to a fine of \$13,300 for each day of noncompliance, Yahoo! faced a present and ongoing threat.³⁷ Even though any penalty would be provisional and require further legal proceedings in France prior to any enforcement action in the United States, the French Court could assess penalties retroactively for the entire period of Yahoo!'s noncompliance.³⁸ The court believed that Yahoo! could not rely upon assessments in the defendants' declarations that Yahoo! was in "substantial compliance" with the French Order because the defendants had not requested, and the French Court had not made, such a finding.³⁹

Supp. 2d at 1178. Taking all of these factors into consideration, the court found that its exercise of personal jurisdiction over the defendants was reasonable. *Id.* at 1180.

30. The District Court further denied without prejudice the defendants' request to certify its jurisdictional determination for interlocutory appeal pending the outcome of Yahoo!'s motion for summary judgment. *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

31. *Id.* at 1183.

32. *Id.* at 1188-90.

33. 28 U.S.C. § 2201 (1994).

34. *See infra* Part II.A.

35. *Yahoo!*, 169 F. Supp. 2d at 1187-88 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

36. *Yahoo!*, 169 F. Supp. 2d at 1187-88.

37. *Id.* at 1191. Yahoo! did not appeal the French Order. *Id.* at 1188.

38. *Id.* at 1188.

39. *Id.* at 1189.

Next, the District Court found that the French Order presented a real and immediate threat to Yahoo!'s First Amendment rights.⁴⁰ Because of this, a U.S. court could not constitutionally enforce the French Order. The court reasoned that "[t]he 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."⁴¹ Further, the court found the French Order's requirement that Yahoo!

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

to be "too general and imprecise to survive the strict scrutiny [test] required by the First Amendment."⁴²

Having found that grounds for declaratory relief existed, the District Court then relied on principles of comity to refuse to enforce the French Order because it was inconsistent with the First Amendment.⁴³ Although France could regulate what speech was permissible within its own borders, the District Court could not enforce a foreign order that violated the U.S. Constitution by chilling protected speech that occurred simultaneously within U.S. borders.⁴⁴ The District Court concluded that because there was no body of law which established international standards with respect to speech on the Internet, nor an appropriate treaty or piece of legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity was outweighed by the court's obligation to uphold the First Amendment.⁴⁵

40. *Id.* at 1191.

41. *Id.* at 1189.

42. *Id.* Although the defendants argued that the court should abstain from deciding the instant case, the court found no basis for abstention. Abstention is an appropriate remedy where a plaintiff is forum shopping. *Id.* at 1191. The court determined that Yahoo! sought declaratory relief not to avoid an unfavorable result in the French courts (i.e., to forum shop), but rather to determine whether a U.S. court could enforce the French Order without running afoul of the First Amendment. *Id.* at 1191-92.

43. *Id.* at 1192.

44. *Id.*

45. *Id.* The court expressed no opinion as to whether such a treaty would be constitutional. *Id.* at 1193 n.12. However, the First Amendment would probably trump any attempts to enter into a treaty not harmonious with the outcome of this case.

Finally, the Court denied the defendants' motion for a continuance for further discovery pursuant to Rule 56(f).⁴⁶ The defendants asserted that further discovery could "lead to the development of triable issues of fact concerning the extent to which Yahoo!'s modifications to its auction site [had] affected its potential liability under the French Order and as to Yahoo!'s technological ability to comply with the order."⁴⁷ The District Court reasoned that because enforcement of the French Order by a U.S. court would be inconsistent with the First Amendment, the factual question of whether Yahoo! possessed the technology to comply with the order was immaterial.⁴⁸ Even if Yahoo! did possess such technology, compliance would still involve an impermissible restriction on speech.⁴⁹ The defendants have appealed to the Ninth Circuit.⁵⁰

D. The Expert Panel's Findings

On August 11, 2000, the French Court appointed a panel of experts ("Expert Panel") to report on whether compliance with the French Order was technically feasible.⁵¹ The Expert Panel consisted of François Wallon of France, Ben Laurie of the United Kingdom, and Vinton Cerf of the United States.⁵² The French Court asked the Expert Panel to consider whether it was technically possible for Yahoo! to comply with the judgment against it, and, if not, to what extent compliance could be achieved.⁵³ Specifically, the Expert Panel investigated whether Yahoo! could determine the geographical origin and nationality of users wishing to access its auction site and prevent French users from perusing the description of Nazi objects posted for auction.⁵⁴ The Expert Panel submitted its findings on November 6, 2000.

46. *Id.* at 1194.

47. *Id.* at 1193.

48. *Id.* at 1194.

49. *Id.*

50. *Yahoo! v. LICRA*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *appeal docketed*, No. 01-17424 (9th Cir. Dec. 7, 2001).

51. *LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr.*, T.G.I. Paris, Nov. 20, 2000, at 5, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. The French Court ordered the formation of the panel to investigate Yahoo!'s assertion that no technical solution existed that would enable Yahoo! to comply fully with the terms of the French Order. *Id.*

52. *Id.* at 15.

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

54. *LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr.*, T.G.I. Paris, Nov. 20, 2000, at 7-10, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

The Expert Panel determined that full compliance was impossible; however, it suggested ways in which a reasonable level of compliance could be achieved.⁵⁵ The Expert Panel found that seventy percent of the IP addresses assigned to French users could be matched with certainty to a service provider located in France.⁵⁶ This moderate level of accuracy was attributed to the fact that Internet protocols were not designed to facilitate geographic documentation. Although Internet machines have “addresses,” these locate the machine on a logical network, not in physical space.⁵⁷ The Expert Panel further suggested that Yahoo! ask users with ambiguous IP addresses to make a declaration of nationality.⁵⁸ The combination of the two procedures, namely geographical identification of the IP address and declaration of nationality, would achieve a filtering success rate approaching ninety percent.⁵⁹ After identifying a surfer’s origin as France, Yahoo! could then block access to items that had been described by their owner as being of Nazi origin, or simply require the search engine to not execute requests including the word “Nazi.”⁶⁰

II. LEGAL BACKGROUND

A. Declaratory Relief

The Declaratory Judgment Act protects potential defendants from multiple actions by allowing a court to declare, in one action, the rights and obligations of the litigants.⁶¹ Congress designed the Act “to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating his suit at his leisure—or never.”⁶² The Act permits parties to prevent the “accrual of potential damages by suing for a declaratory judgment, once the adverse po-

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

56. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, Nov. 20, 2000, at 11, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. This same fact enables Yahoo! to display French advertising banners on its auction site. *Id.*

57. Burk, *supra* note 4, at 15.

58. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, Nov. 20, 2000, at 10, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. One of the three experts, Vinton Cerf, found this approach problematic. *Id.* at 15.

59. *Id.* at 14.

60. *Id.* at 10-11.

61. 28 U.S.C. § 2201 (1994).

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

sitions have crystallized and the conflict of interests is real and immediate.”⁶³

A federal District Court may issue a declaratory judgment in a given matter only if an actual controversy exists.⁶⁴ The threshold question is whether “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”⁶⁵ The “[m]ere possibility, even probability, that a person may in the future be adversely affected by official acts not yet threatened does not create an actual controversy”⁶⁶ necessary for declaratory relief. The party invoking the federal jurisdiction bears the burden of showing that it faces an immediate or actual injury.⁶⁷

B. Enforcement of Foreign Judgments

1. Comity

In determining whether to recognize and enforce foreign court judgments, U.S. courts follow the principle of international comity.⁶⁸ Comity refers to “the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.”⁶⁹ Comity helps to ensure that litigation ends after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction.⁷⁰ In deciding whether to grant comity, U.S. courts balance two interests—international duty and convenience versus the rights of U.S. citizens or other persons under the protection of U.S. laws.⁷¹ In general, U.S. courts respect and enforce foreign judgments and decrees unless enforcement would be prejudicial or contrary to the United States’s interests.⁷²

63. *Id.*

64. 28 U.S.C. § 2201 (1994).

65. *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

66. *Garcia v. Brownwell*, 236 F.2d 356, 358 (9th Cir. 1956).

67. *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 5 (9th Cir. 1974).

68. DAVID EPSTEIN ET AL., *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY* § 11.02 (3d ed. 1998).

69. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

70. *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

71. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

72. *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440-41 (3d Cir. 1971).

2. *The Public Policy Exception*

U.S. courts deny enforcement of foreign judgments which violate U.S. public policy.⁷³ The judgment must be "repugnant to fundamental notions of what is decent and just in the [country] where enforcement is sought."⁷⁴ For example, U.S. courts will not recognize or enforce a foreign judgment based on laws which do not comport with fundamental First Amendment principles.⁷⁵

Both state and federal courts have denied enforcement of foreign judgments which offend free speech values protected by the First Amendment. In the seminal case of *Bachchan v. India Abroad Publications, Inc.*,⁷⁶ the Supreme Court of New York held that the enforcement of an English libel judgment against the operator of a New York news service violated the First Amendment of the U.S. Constitution.⁷⁷ Here, the defendant distributed a defamatory report on the plaintiff's alleged crimes in the United Kingdom.⁷⁸ The plaintiff brought an action against the defendant in London, England, and was awarded £40,000 in damages in addition to attorney's fees.⁷⁹ The plaintiff then sought to enforce the U.K. libel judgment in the United States. However, because the U.K. court had applied libel standards deemed appropriate in the United Kingdom but considered antithetical to the protections afforded the press by the U.S. Constitution,⁸⁰ the U.S. court found that enforcement of the U.K. judgment would have a chilling effect on speech and seriously jeopardize the First Amendment's protection of free speech and the press.⁸¹

Similarly, in *Matusevitch v. Telnikoff*,⁸² a U.S. District court denied enforcement of a U.K. libel judgment because U.K. libel standards "deprive[d] the plaintiff of his [U.S.] [C]onstitutional rights."⁸³ In this case, the defendant Matusevitch, a Russian émigré living in the United King-

73. EPSTEIN, *supra* note 68, § 11.07.

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. C (1971).

75. *See, e.g.*, *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995), *aff'd on other grounds*, 159 F.3d 636 (D.C. Cir. 1998); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

76. 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

77. *Id.* at 665.

78. *Id.* at 661.

79. *Id.* at 662.

80. *Id.* at 665. English libel law does not distinguish between private persons and public figures involved in matters of public concern. Moreover, plaintiffs need not prove falsity of the libel or fault on the part of the defendant. *Id.* at 663.

81. *Id.* at 664-65.

82. 877 F. Supp. 1 (D.D.C. 1995).

83. *Id.* at 4.

dom, made statements in the London Telegraph that the plaintiff was racist and anti-Semitic.⁸⁴ The plaintiff filed a libel action in London, England, and was awarded £240,000.⁸⁵ Matusевич sought a declaration in a U.S. district court that the English judgment was repugnant to the First and Fourteenth Amendments of the U.S. Constitution.⁸⁶ In refusing to enforce the English libel judgment, the U.S. court found that the plaintiff's offending statement was considered protected speech under the First Amendment.⁸⁷

III. DISCUSSION

The District Court's application of traditional law on the enforcement of foreign judgments to the Internet context in *Yahoo!* is relatively straightforward. The holding is fairly narrow, limited to the proposition that the United States will not enforce another country's unconstitutional orders.⁸⁸ Clearly, France and other foreign countries can still regulate speech within their own borders. However, the case does demonstrate that a U.S. court may grant declaratory relief on a thin showing of imminent harm, particularly where a First Amendment violation is concerned.

The United States is unusual in its broad freedom of speech guarantees.⁸⁹ At least fifty-nine countries currently impose limitations on the freedom of speech online.⁹⁰ For example, the People's Republic of China "severely restricts communication via the Internet, including all forms of dissent and the free reporting of news."⁹¹ Thus, while a person's speech may be legal in the United States, it may not be legal in another country. This notion is nothing new. However, in today's world of widely divergent value systems, the Internet's far-reaching capabilities and lack of clear borders may cause countless online speakers to be subject to the laws of other countries.

84. *Telnikoff v. Matusевич*, 702 A.2d 230, 256 (Md. 1997).

85. *Id.* at 235.

86. *Id.*

87. *Matusевич v. Telnikoff*, 877 F. Supp. 1, 2 (D.D.C. 1995).

88. *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181, 1185, 1192 (N.D. Cal. 2001).

89. Joel R. Reidenberg, *The Yahoo! Case and the International Democratization of the Internet*, Fordham University School of Law, Research Paper 11, April 2001, at 12 ("[O]ther democracies do not have as an expansive view of free speech as the United States.").

90. Brief of Amici Curiae Center for Democracy & Technology (CDT) et al. at 6, *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. C00-21275 JF), available at <http://www.cdt.org/jurisdiction/010406yahoo.pdf>.

91. *Id.*

In physical space, a person's communications can be directed to an audience that is defined and somewhat limited.⁹² The Internet renders the physical distance between speaker and audience virtually meaningless, allowing ideas and information to easily transcend borders.⁹³ Thus, the Internet speaker is more susceptible to being charged with violating another country's speech regulations. Internet users in the United States routinely engage in speech that violates, for instance, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, and even the United Kingdom's restrictions on freedom of the press.⁹⁴ More lawsuits in the vein of the French action will surely follow.⁹⁵

The *Yahoo!* decision offers some solace to website owners who may be worried about the possibility of getting dragged into court in foreign jurisdictions. However, as a practical matter, as long as companies like Yahoo! want to do business or maintain a physical presence in other countries,⁹⁶ they should become familiar with and attempt to conform to the laws of those countries.⁹⁷ In that sense, *Yahoo!* serves as a harbinger of the problems that Internet websites will face in a borderless world.⁹⁸

92. See, e.g., Burk, *supra* note 4, at 14 ("In real space, a business can usually locate the person or entity with whom it is interacting; this tends to facilitate identification of partners and validation of transactions.").

93. *Yahoo!*, 169 F. Supp. 2d at 1186. See also Johnson & Post, *supra* note 2, at 1370-71 ("Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another.").

94. *Yahoo!*, 169 F. Supp. 2d at 1186-87.

95. See, e.g., Center for Democracy & Technology, *International Jurisdiction*, at <http://www.cdt.org/jurisdiction> (Dec. 27, 2000) ("An Italian court . . . recently issued a similar ruling [to the French Order] regarding a case of libel carried out online.").

96. See Reidenberg, *supra* note 89, at 15 ("Yahoo! . . . actively sought global business from its web sites in the United States and had significant activity in France through ownership and control of its French subsidiary.").

97. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1217 (1998) ("A [company's] physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws.").

98. The United States has itself exercised jurisdiction over Internet sites based in other nations for conduct that is purportedly legal in those nations but illegal in the United States. See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (1999) (ordering an Antigua-based casino to stop offering gambling over the Internet to New Yorkers); *Twentieth Century Fox v. iCraveTV.com*, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. 2000) (prohibiting a Canadian web site from transmitting U.S. copyrighted

A. The Granting of Declaratory Relief for First Amendment Violations

Yahoo! v. LICRA suggests that, particularly where a First Amendment violation is concerned, U.S. courts may grant declaratory relief on a thin showing of imminent harm. In this case, it was not clear that the defendants would seek to enforce the French Order in the United States. In fact, the defendants disclaimed any intent to seek enforcement in the United States or France, since Yahoo! had already removed certain Nazi-related materials from its auction and other sites.⁹⁹ Further, even if the defendants wanted to seek enforcement in the United States, they would first have to bring an action in France to liquidate the penalty.¹⁰⁰ The French Court would then have to assess Yahoo!'s compliance with the French Order and determine whether or not to impose penalties.¹⁰¹ Only after the French Court assessed penalties against Yahoo! could the defendants seek enforcement of the French Order in the United States.¹⁰² Thus, it seemed that Yahoo! was multiple steps away from facing an imminent threat of harm.¹⁰³

Nevertheless, the District Court found that a real and immediate threat to Yahoo! existed.¹⁰⁴ The court relied on the possibility that the defendants might actually attempt to enforce the French Order, stressing that the provisions of the French Order requiring Yahoo! to regulate the content on its websites remained in full force and effect.¹⁰⁵ Moreover, because the French Order could assess the penalties retroactively,¹⁰⁶ the court found that the ongoing possibility of its enforcement had the immediate effect of inducing Yahoo! to implement new restrictive policies on its auction site, thus chilling Yahoo!'s First Amendment rights.¹⁰⁷ Although Yahoo! had

programming into the United States); *Playboy Enters., Inc. v. Chuckleberry Publ'g Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996) (prohibiting the use of an American trademark, PLAYMEN, by an Italian web server that offered a magazine available in the United States through the Internet). In the third case, the U.S. court required that the defendant block website access to U.S. users. *Id.*

99. Opposition to Motion for Summary Judgment at 7-8, *Yahoo! Inc. v. LICRA et al.* (N.D. Cal. 2001) (No. C00-21275).

100. *Id.* at 8. There was no final order imposing a penalty in any amount. *Id.*

101. *Id.* at 7-8.

102. *Id.* at 8.

103. *Id.*

104. *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181, 1189-90 (N.D. Cal. 2001).

105. *Id.* at 1191 (“[T]he provisions of the French [O]rder [have not] been waived, suspended or stayed . . .”).

106. *Id.* at 1190.

107. *Id.* at 1189-91.

removed a number of Nazi materials from its websites, Yahoo! continued to offer at least some Third Reich memorabilia as well as *Mein Kampf* on its auction site and permitted access to numerous web pages with Nazi-related content.¹⁰⁸ The fact that Yahoo! did not know whether its efforts to date had met the French Court's mandate was the precise harm against which the Declaratory Judgment Act was designed to protect.¹⁰⁹

In sum, *Yahoo! v. LICRA* demonstrates that as long as a foreign judgment against a U.S. company exists, with retroactive penalties attached, a U.S. court may find the existence of an actual controversy and grant declaratory relief. In this case, the court determined that Yahoo! faced immediate harm even though the defendants had not sought, and might possibly never seek, enforcement of the judgment in the United States.

B. The Application of Fundamental Law to Foreign Internet Judgments

After deciding that grounds for declaratory relief existed, the District Court went on to extend basic laws on the enforcement of foreign judgments to the Internet context.¹¹⁰ U.S. courts will refuse to enforce foreign judgments that violate the First Amendment.¹¹¹ The French Order's content and viewpoint-based regulation of Yahoo!'s web pages and auction site impinged on Yahoo!'s First Amendment right.¹¹² Therefore, the U.S. court correctly denied enforcement of the French Order. Although France may regulate speech within its own borders,¹¹³ the United States cannot enforce France's speech-restrictive judgments for France if they violate the First Amendment.¹¹⁴ The District Court's application of this fundamental principle to the Internet context is relatively straightforward.

Because the Internet allows the same speech to be communicated in two places at once (e.g., in the United States and abroad),¹¹⁵ a case could be made that an order requiring a website to make certain items inaccessible in a foreign nation may not necessarily contravene the First Amend-

108. See *supra* note 19 and accompanying text.

109. *Yahoo!*, 169 F. Supp. 2d at 1189.

110. *Id.* at 1192-93.

111. See *supra* Part II.B.2.

112. *Yahoo!*, 169 F. Supp. 2d at 1192. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that the First Amendment does not permit the government to impose special prohibitions on speakers who express views on disfavored subjects).

113. *Yahoo!*, 169 F. Supp. 2d at 1192.

114. See *supra* Part II.B.2.

115. *Yahoo!*, 169 F. Supp. 2d at 1192. The unique challenge of the Internet stems in part from its ability to allow a person to speak in more than one place simultaneously. *Id.*

ment.¹¹⁶ If Yahoo! could employ substantially successful measures to discriminate between French and other users and effectively filter out Nazi-related materials for just the French users, then arguably only speech occurring *in France* would be affected. However, the District Court stated that whether Yahoo! possessed the technology to comply with the French Order was immaterial.¹¹⁷

The District Court correctly noted that even if Yahoo! possessed the technical means to comply with the French Order, compliance would still involve an impermissible restriction on speech.¹¹⁸ There is no way to enforce an order such as this in a manner which does not violate the First Amendment. In *Matusevitch*, the statements at issue were made entirely outside the U.S., yet the U.S. court still refused to uphold the foreign judgment.¹¹⁹ Thus, it seems to make no difference that a plaintiff's speech took place entirely *outside* the United States. If enforcement of a foreign judgment would violate the First Amendment, a U.S. court will not likely enforce it.

The French Order states that requiring Yahoo! to ban symbols of Nazism is mandated by "simple public morality" and has "the merit of satisfying an ethical and moral imperative shared by all democratic societies."¹²⁰ While the fight to continue displaying Nazi artifacts may not seem particularly appealing, it is only the beginning of a string of speech-related fights. A U.S. court's endorsement of a seemingly harmless speech restriction is the first step on a dangerous slippery slope of prohibiting broad categories of protected speech. If U.S. courts enforced foreign speech standards such as the French law that gave rise to the French Order, other countries would be likely to pursue similar penalties in the hopes of silencing other disfavored categories of speech online.¹²¹ "Freedom of expression would be crippled were online speakers in the United States required to conform their speech to the restrictions of foreign nations."¹²² In the end, absent an effective means of technological compliance, all websites

116. *But see id.* at 1190 (Defendants did not "argue directly that the French [O]rder somehow could be enforced in the United States in a manner consistent with the First Amendment.").

117. *Id.* at 1194.

118. *Id.*

119. *See supra* notes 82-87 and accompanying text.

120. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, Nov. 20, 2000, at 18, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

121. Brief of Amici Curiae Center for Democracy & Technology (CDT) et al. at 7, Yahoo!, Inc. v. LICRA, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. C00-21275 JF), available at <http://www.cdt.org/jurisdiction/010406yahoo.pdf>.

122. *Id.* at 10.

would be forced to comply with the rules of the most restrictive nation. Thus, the District Court rightly extended the U.S.'s general refusal to enforce foreign judgments contrary to the First Amendment to a violation of this type on the Internet.

C. The Need for U.S.-Based Websites Doing International Business to Comply With Foreign Laws

The *Yahoo!* ruling is actually a very narrow one, limited to the proposition that under normal principles of comity, a U.S. court will not enforce a foreign order that violates the public policy of this country. This ruling does not mean that U.S.-based websites no longer need to comply with foreign speech restrictions. As the District Court stressed, this case is not about "the right of France or any other nation to determine its own laws and social policies."¹²³ "France clearly has the right to enact and enforce laws such as those relied upon by the French Court" in issuing its order.¹²⁴ Therefore, an Internet company like Yahoo! would still need to comply with French speech regulations if it wished to do business or maintain a physical presence in France. Because that seems to be the case here,¹²⁵ it is important to consider ways in which Yahoo! could comply with the French Order.¹²⁶

1. Removal of Prohibited Content to Achieve Compliance

In order to comply with the French Order, Yahoo! could alter its business model and not permit the posting of any materials that violate the French Order. Prior to the French action, Yahoo! already regulated its auction site by banning particular items from being sold (e.g., stolen goods, body parts, prescription and illegal drugs, weapons, and goods violating U.S. copyright laws or the Iranian and Cuban embargos).¹²⁷ The French Court suggested in its Order that Yahoo! could easily (and at a low cost) extend this ban to symbols of Nazism.¹²⁸

123. *Yahoo!, Inc. v. LICRA*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

124. *Id.*

125. Ben Laurie, *An Expert's Apology*, at <http://www.apache-ssl.org/apology.html> (Nov. 21, 2000) ("If Yahoo! wants to be beyond France's reach, they can surely achieve that, by withdrawing their operations from France. The fact that they don't means that, presumably, they see an economic advantage in continuing to maintain a presence there, despite this problem.").

126. Technical compliance may also be important in future opinions involving a foreign order that the United States might have no problems enforcing.

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

128. *LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris*, Nov. 20, 2000, at 18, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

In an attempt to comply with the French Order, Yahoo! amended its policy to also prohibit individuals from auctioning “[a]ny item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan.”¹²⁹ Examples of prohibited “hate materials” include Hitler mousepads, swastika flags, patches, and posters, and KKK patches, belt buckles, and hats.¹³⁰ Yahoo! still offers certain items for sale that appear to violate the French Order.¹³¹ The defendants apparently found this to be a reasonable level of compliance, stating that they no longer intended to seek enforcement of the French Order “in light of Yahoo!’s removal of offending matter from its Auction and other sites.”¹³²

2. *Employing Technical Measures to Achieve Compliance*

In order to comply with the French Order, Yahoo! could employ technical measures to identify French users and then filter out Nazi-related propaganda for them.¹³³ According to the Expert Panel, full compliance with the French Order was not possible.¹³⁴ However, the Expert Panel believed that Yahoo! could achieve a reasonable level of compliance by implementing specified technical measures.¹³⁵ While Yahoo! could possibly achieve a reasonable level of compliance with the French Order, it seems clear that the technical measures suggested by the Expert Panel may not be scalable.

The Expert Panel determined that Yahoo! could achieve a filtering success rate approaching ninety percent by first using IP addresses to match users to French service providers and then asking users with ambiguous IP addresses to make a declaration of nationality.¹³⁶ Even so, there are many means by which IP address technology may be circumvented.¹³⁷ A French web surfer may simply use an anonymizer to conceal

129. *Yahoo!*, 169 F. Supp. 2d at 1185. *See also* *Yahoo! Auctions, Yahoo! Auctions Guidelines*, at <http://user.auctions.shopping.yahoo.com/html/guidelines.html> (last visited Feb. 8, 2002).

130. *Yahoo! Auctions, What Am I Not Allowed to Sell?*, at <http://help.yahoo.com/help/us/auct/asell/asell-21.html> (last visited Feb. 8, 2002).

131. *See supra* note 19 and accompanying text.

132. Opposition to Motion for Summary Judgment at 8, *Yahoo! Inc. v. LICRA et al.* (N.D. Cal. 2001) (No. C00-21275).

133. *See supra* Part I.D.

134. *See supra* note 55 and accompanying text.

135. *Id.*

136. *See supra* note 59 and accompanying text.

137. *LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr.*, T.G.I. Paris, Nov. 20, 2000, at 10-11, 14, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

his IP address.¹³⁸ He may also lie when asked to declare his nationality.¹³⁹ The technical remedies have therefore been called “inaccurate, ineffective and trivially avoided.”¹⁴⁰ However, imperfect regulation does not equal ineffective regulation.¹⁴¹ The French Court would not likely have held Yahoo! responsible for users who sought to affirmatively circumvent responsible measures that Yahoo! put in place. Democracies do not normally hold citizens liable for the illegal acts of third parties.¹⁴² Thus, Yahoo!’s less-than-perfect identification of French users would probably have satisfied the French Court.

Even if Yahoo! could determine geographic location at an acceptable level, blocking access by French users to Nazi artifacts might be more difficult. The French Court reasoned that since Yahoo! could use French banner ads in targeting France, it probably possessed the technological capability to comply with the French Order.¹⁴³ However, filtering out offending material is much more difficult than triggering particular banner ads.¹⁴⁴ The Expert Panel noted that “there [was] no automatic or infallible approach for identifying images or items that ‘constitute an apology for Nazism or a contesting of Nazi crimes.’”¹⁴⁵ It suggested that Yahoo! could block access to items that had been described by their owner as being of Nazi origin. Still, blocking automatically by keywords, like “Nazi” or “Hitler,” would surely block permitted content as well (e.g., historical discussions of WWII, anti-Nazi materials, or literary works like *The Diary of Anne Frank*).¹⁴⁶ Further, numerous offending materials would not be blocked out by a simple keyword search.¹⁴⁷ The Expert Panel recom-

138. Ben Laurie, *An Expert’s Apology*, at <http://www.apache-ssl.org/apology.html> (Nov. 21, 2000).

139. *Id.*

140. *Id.*

141. Goldsmith, *supra* note 97, at 1229.

142. No legal system in a democracy can assure full compliance with all laws without resorting to police state tactics. Reidenberg, *supra* note 89, at 16.

143. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, Nov. 20, 2000, at 13, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

144. See Troy Wolverton & Erich Luening, *Will Yahoo’s ban on auctioned Nazi items work?*, CNET News.com, Jan. 3, 2001, at <http://news.com.com/2100-1017-250484.html?legacy=cnet&tag=r1tdnws>.

145. Complaint for Declaratory Relief at 7, Yahoo! Inc. v. LICRA, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. C00-21275).

146. Motion for Summary Judgment at 10, Yahoo! Inc. v. LICRA et al. (N.D. Cal. 2001) (No. C00-21275).

147. For example, not all Nazi-related materials will contain the word “Nazi” in their product names or descriptions. Moreover, it is not feasible to have a human being manually examine every web page for offending materials.

mended that, as an alternative, Yahoo! could require the search engine to not execute requests including the word "Nazi."¹⁴⁸

Although the French Court found that this level of compliance would be reasonable,¹⁴⁹ it seems clear that technical compliance with even one speech restriction of one foreign country presents many difficulties. As increasingly more lawsuits like the French action arise, compliance with speech-restrictive judgments will grow even more burdensome and difficult.

IV. CONCLUSION

Yahoo! v. LICRA offers some protection for U.S.-based websites which find themselves unexpectedly in a foreign court. As long as U.S.-based websites keep all their assets in the United States, they will be protected against foreign judgments which impose unconstitutional speech restrictions upon them. As a result of this ruling, U.S.-based websites may move all their assets to the United States, so that foreign courts will not be able to collect on any money judgments. At least one commentator believes that "[t]he United States [may] turn into a haven for extremists and racists using the Internet to spread their beliefs."¹⁵⁰ However, the *Yahoo!* court's extension of fundamental laws on enforcement of foreign judgments to the Internet was both necessary and relatively straightforward. A U.S. court's endorsement of a seemingly harmless speech restriction could have been the first step on a dangerous slippery slope. The decision might have encouraged "international forum shopping by people looking for the best country in which to sue."¹⁵¹ In the end, countries would have been able to use their laws to force Internet companies to answer to the lowest common denominator.¹⁵²

As a practical matter, if a U.S.-based website wants to do business or maintain a physical presence in another country, it needs to become familiar with and attempt to conform to that country's laws. Moreover, even if a U.S.-based website kept all its assets in the United States, other considerations might cause the site to attempt to comply with foreign judgments

148. See *supra* note 60 and accompanying text.

149. LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, Nov. 20, 2000, at 21, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

150. Nikla Gibson, *French Say U.S. Yahoo Ruling Poses Extremism Risk*, Tech News from Reuters, Nov. 9, 2001, available at <http://news.excite.com/news/t/011109/10/net-tech-yahoo-ruling-dc>.

151. Tamara Loomis, *Internet Companies Sighing With Relief, For Now*, New York Law Journal, Nov. 15, 2001, at <http://www.law.com>.

152. *Id.*

against it.¹⁵³ In order to achieve a reasonable level of compliance, a website would have to remove content altogether or employ technical filtering measures.¹⁵⁴ This leads to problems of scalability. Conducting business in a country-by-country basis is impractical.¹⁵⁵ Even if a website achieves a reasonable level of compliance with the laws of one country, in the end, scalability issues might require most sites to tailor all their content to fit the laws of the most restrictive country.

New legal rules may affect technological evolution.¹⁵⁶ In June 2001, Yahoo! signed a deal to use geographic targeting technology from Akamai Technologies to deliver online ads to consumers based on their physical location.¹⁵⁷ Akamai geo-targeting technology can pinpoint a person's location by city, state, and country with, on average, a ninety-eight percent accuracy.¹⁵⁸ Another technology company, Digital Envoy, recently received \$10.5 million in funding for its work in developing an Internet-mapping technology, which can pinpoint the geographic location of computer users by country, state, city and demographic marketing area. Digital Envoy states that its geo-mapping technology is roughly ninety-nine percent accurate at determining the consumer's country of origin.¹⁵⁹ This would take care of the first step involved in complying with the French Order. However, Yahoo! would still need to find a way to identify banned material or stop French users from viewing it. Perhaps the threat of enforcement of foreign judgments will spur the development of technologies that allow a level of compliance that today seems impossible. For now, most companies may have to follow Yahoo!'s lead by removing the offending items from the site altogether.

153. See, e.g., Center for Democracy & Technology, *International Jurisdiction*, at <http://www.cdt.org/jurisdiction> (Dec. 27, 2000) (“[A] German court ruled that an Australian web site owner—whose web site questioning the Holocaust is illegal in Germany but not in Australia—could be jailed for violating German speech laws.”).

154. See *supra* Part III.C.

155. Tamara Loomis, *Internet Companies Sighing With Relief, For Now*, New York Law Journal, Nov. 15, 2001, available at <http://www.law.com>.

156. Goldsmith, *supra* note 97, at 1229.

157. Stefanie Olsen, *Yahoo ads close in on visitors' locale*, CNET News.com, Jun. 27, 2001, at <http://news.cnet.com/news/0-1005-202-6397360.html>.

158. *Id.*

159. See Stefanie Olsen, *Investors follow trail of geo-tracking firm*, CNET News.com, Aug. 13, 2001, at <http://news.cnet.com/news/0-1005-202-6860853.html?tag=prntfr> (last visited Feb. 2, 2002).