Much Yahoo! About Nothing: The Ninth Circuit, Jurisprudential Schizophrenia, and The Road Not Taken in *Yahoo! v. La Ligue Contre le Racisme et l'Antisémitisme*

I. INTRODUCTION

Plaintiff Yahoo!, an American corporation headquartered in California, provides a multitude of online services, among them auctions and a search engine, through its Web site yahoo.com.[1] Users can discuss political and social issues on Yahoo! message boards and post items for sale through its auction sites.[2] Yahoo! does not monitor user-created content before it is posted on the Internet.[3] Such policy results in the expression of myriad viewpoints on Yahoo!'s forums, including those espousing Nazi and Holocaust-denialist ideologies, and allows a vast array of items—including Adolf Hitler's *Mein Kampf*—to be auctioned to anyone with access to the Internet.[4]

Yahoo! maintains national subsidiary Web sites targeting users around the world, each presented in the local language (e.g., fr.yahoo.com, in French), and each embracing policies that comply with local laws.[5] In the United States, user-created content is protected by the First Amendment of the Constitution.[6] France, however, criminalizes any public display of Nazi regalia or insignia as well as Holocaust denial.[7]

On April 5, 2000, defendant La Ligue Contre le Racisme et l'Antisémitisme (LICRA) sent a cease-and-desist letter to Yahoo!'s

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1. Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisémitisme (*Yahoo II*), 433 F.3d 1199, 1201 (9th Cir. 2006).
2. *Id.*
3. *Id.* at 1201-02.
4. *Id.* at 1202.
5. *Id.*
6. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . .").
7. *See* C. PÉN. art. R645-1 (Fr.). The Pleven Law of 1972 further allows French antiracist groups, such as La Ligue Contre le Racisme et l'Antisémitisme and l'Union des Étudiants Juifs Français, to invoke "civil status" for filing suits to combat racism. *See Yahoo II*, 433 F.3d at 1226 n.1 (Ferguson, J., concurring).

headquarters in Santa Clara, California, informing plaintiff of the illegality, under French law, of auctions of Nazi memorabilia available to French citizens through Yahoo!'s French subsidiary.[8] LICRA threatened legal action if Yahoo! did not cease offering Nazi items for auction in France within eight days.[9] Five days later LICRA, joined eventually by l'Union des Étudiants Juifs Français (UEJF), sued Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris, serving process on Yahoo! in California.[10] On May 22, the French court issued an "interim" order directing Yahoo! to "take all reasonable measures" to forbid access to any Yahoo! auction involving Nazi or anti-Semitic material to anyone in French territory.[11] The order subjected Yahoo! and Yahoo! France to a penalty of 100,000 euros per day of delay or per "confirmed violation."[12]

A second "interim" order was issued on November, 20, 2000, reaffirming the initial order and commanding Yahoo! to comply within three months.[13] The court noted, however, that Yahoo!'s French subsidiary had "complied *in large measure* with the spirit and letter of the [May] order."[14] As well, both LICRA and UEJF asserted that they had no intention of seeking penalties for Yahoo!'s breach of the May orders so long as it "maintains its current level of compliance."[15]

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in the United States District Court for the Northern District of California, seeking a declaratory judgment that the interim orders issued by the French court are not cognizable or enforceable in the United States as

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8. *Yahoo II*, 433 F.3d at 1202.

9. *Id.*

10. *Id.* (citing Ligue Contre le Racisme et L'Antisémitisme v. Yahoo!, Inc., Tribunal de Grande Instance de Paris [TGI Paris] [Superior Court of Paris], May 22, 2000, Interim Court Order Nos. 00/05308, 00/05309, Gomez, J., *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm (in French); http://www.lapres.net/yahen.html (English translation)).

11. *Id.*; *see also id.* at 1202 n.1 (noting accurate translation of French order "prendre toutes les mesures de nature"). The French court also enjoined Yahoo! to restrict all access in France to Nazi apologist Web sites, as well as to "messages, images and text relating to Nazi objects, relics, emblems and flags, or which evoke Nazism," and to Web sites quoting *Mein Kampf* and other white supremacist literature. *Id.* at 1202 (internal quotations omitted).

12. *Id.* at 1203. Yahoo! objected to the May order, arguing that there was no way for it technically to comply fully with the order to screen and deny access to French Web surfers. The court, through several experts, concluded that approximately seventy percent of French Yahoo! users could be identified, with an additional twenty percent able to be identified through an "honor system" in which the user would state his nationality upon accessing the auction site. *See id.*

13. *Id.* at 1203-04 (assessing a new 100,000 francs per diem penalty commencing the first day after the expiration of the three-month period).

14. *Id.* at 1204.

15. *Id.* The French public prosecutor revealed that, in order to award penalties against Yahoo! pursuant to the interim orders, the court would first have to determine the scope of Yahoo!'s breach and the amount of any penalty. *See id.*

violative of the First Amendment.[16] The district court concluded that it had personal jurisdiction over defendants, that the suit was ripe, and that no abstention was warranted.[17]

Yahoo! subsequently adopted a new policy prohibiting auctions or advertisements of items associated with groups that promote racial hatred, emphasizing that the policy shift was of its own accord, entirely independent of the French orders.[18] LICRA and UEJF appealed the findings of personal jurisdiction, ripeness, and abstention.[19] The United States Court of Appeals for the Ninth Circuit *held* that although the district court had personal jurisdiction over the defendants, Yahoo!'s case must be dismissed. *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 433 F.3d 1199, 1200 (9th Cir. 2006).

II. BACKGROUND

On October 15, 1894, Captain Alfred Dreyfus, an officer in the French artillery and a Jew, was arrested for the crime of high treason.[20] His subsequent trial, conviction, and exile, which would consume France for more than a decade, marked the height of Gaullist anti-Semitism, which one prominent scholar noted was "as French as croissants."[21]

In the succeeding 112 years since *l'Affaire Dreyfus*, France has taken a most active role in combating the evils of anti-Semitism. Most profoundly, invasion by the Nazis during World War II laid bare to the French the sheer horror of vehement anti-Semitism.

The "profound[] traumatiz[ation of] the atrocities committed by and in the name of the criminal Nazi regime against its citizens" has spurred France to seek to eradicate anti-Semitism from its soil.[22] To this end, France has enacted "a robust . . . state policy against racism, xenophobia, and anti-Semitism," which has led it to join both the International Convention on the Elimination of all Forms of Racial Discrimination and

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16. *Id.*

17. Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 145 F. Supp. 2d 1168, 1180 (N.D. Cal. 2001); Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001) (collectively *Yahoo I*).

18. *Yahoo II*, 433 F.3d at 1205. The district court later determined, upon its own investigation, that Yahoo! had not fully complied with the interim orders, as items such as *Mein Kampf* and Nazi coins were still available for auction and links to Holocaust denial sites were still accessible. *Id.*

19. *Id.*

20. MARTIN P. JOHNSON, THE DREYFUS AFFAIR: HONOUR AND POLITICS IN THE BELLE ÉPOQUE 5, 15 (1999).

21. *Id.* at 1, 6; EUGEN WEBER, FRANCE: FIN-DE-SIÈCLE 130 (1986).

22. *Yahoo II*, 433 F.3d at 1227 (Ferguson, J., concurring) (internal quotations omitted).

the International Covenant on Civil and Political Rights, both of which expressly prohibit racist speech.[23]

In addition, France has passed "sweeping [domestic] legislation to combat anti-Semitism," including the Fabius-Gayssot Law criminalizing Nazi apologism and Holocaust denial.[24] The Pleven Law allows private anti-defamation groups to bring suits against entities who allegedly violate French law by providing a forum or marketplace for anti-Semitic viewpoints and memorabilia in French territory.[25]

The United States Full Faith and Credit Statute governs the extraterritorial applicability of judgments rendered in state courts.[26] However, there is currently no federal statute concerning the recognition of foreign judgments in federal courts.[27] At present, enforcement of such judgments in diversity cases (such as the noted case) "is generally governed by the law of the state in which enforcement is sought."[28]

California, among several other states, has adopted the Uniform Foreign Money-Judgments Recognition Act (Act) to aid in determining the applicability of such judgments.[29] The "relevant standard" under the Act is "whether 'the cause of action or defense on which the judgment is based is *repugnant to the public policy* of [the] state.'"[30] The Act does not speak to enforcement of injunctions (such as fines or penalties) but its savings clause stipulates that it is not meant to foreclose such enforcement "in situations not covered by [the Act]."[31] The Ninth Circuit has stated that the Act was "intended to leave the door open for the recognition by California courts of foreign judgments rendered in accordance with American principles of jurisdictional due process."[32]

While such a proper constitutional jurisdictional analysis may determine a foreign judgment's enforceability in a particular state, the

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23. *See id.*; *see also* International Convention on the Elimination of all Forms of Racial Discrimination art. 4(a), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195. *See generally* International Covenant on Civil and Political Rights art. 20-2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

24. *See Yahoo II*, 433 F.3d at 1227; *see also* C. PÉN. art. R-645-1 (Fr.).

25. *See* C. PÉN. art. R645-1 (Fr.).

26. 28 U.S.C. § 1783(a) (2000).

27. *Yahoo II*, 433 F.3d at 1212; *see also* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Proposed Official Draft 2005) (advocating for adoption of General Convention on International Jurisdiction and Judgments, or, in the alternative, a federal statute governing enforcement of foreign judgments).

28. *Yahoo II*, 433 F.3d at 1212.

29. *See* CAL. CIV. PROC. CODE §§ 1713.1-1713.8 (Deering 1981).

30. *Yahoo II*, 433 F.3d at 1213 (quoting CAL. CIV. PROC. CODE § 1713.4(b)(3)).

31. CAL. CIV. PROC. CODE §§ 1713.1(2), 1713.7; *see also Yahoo II*, 433 F.3d at 1213.

32. Bank of Montréal v. Kough, 612 F.2d 467, 471 (9th Cir. 1980); *see also* U.S. CONST. amends. V, XIV.

multijurisdictional applicability of such a judgment is "less clear."[33] The determination of multistate enforcement is informed in large part by considering the extent of personal jurisdiction the forum state has over the defendants.[34]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit framed its personal jurisdiction analysis with a straightforward reading of its decision in *Schwarzenegger v. Fred Martin Motor Co.* and a distinctive reading of the United States Supreme Court's "effects" test in *Calder v. Jones*.[35] Acknowledging the "minimum contacts" standard for establishing a court's personal jurisdiction under *International Shoe v. Washington*, the Ninth Circuit found that the French court's "interim" orders satisfied the *Calder* test, thereby establishing such contacts and giving it jurisdiction, although the court noted that it was "a close question."[36] Applying the ripeness formula set out in *Abbott Laboratories v. Gardner*, the court cast into doubt the fitness of the determination of enforcement of foreign judgments for judicial review and the certainty of hardship that would be visited upon Yahoo! were a decision regarding the French orders not made, holding ultimately that the case was not ripe for review.[37]

The court began its analysis by denoting the only three possible bases for *in personam* jurisdiction over defendants: defendant LICRA's cease and desist letter sent to Yahoo!'s California headquarters, service of process in California to commence the French suit, and obtaining and serving two French orders on Yahoo! in California.[38]

Addressing personal jurisdiction generally, the court looked to California's "long-arm" statute to establish the contact requirements for ascertaining jurisdiction, noting both the lack of an applicable federal statute governing the matter and the California statute's coextensiveness with the bounds of federal due process.[39] The court held that the contacts established by either of the above bases would be insufficient for a

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33. *See Yahoo II*, 433 F.3d at 1213.

34. *See generally id.* at 1205-12.

35. *See* Schwartzenegger v. Fred Martin Motor Co., 374 F.3d 797 (2004); Calder v. Jones, 465 U.S. 783, 789-90 (1984).

36. *Yahoo II*, 433 F.3d at 1211; *see Calder*, 465 U.S. at 789-90; Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945).

37. *See Yahoo II*, 433 F.3d at 1224; *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

38. *See Yahoo II*, 433 F.3d at 1205.

39. *Id.*; *see* FED. R. CIV. P. 4(k)(1)(A); CAL. CIV. PROC. CODE § 410.10 (Deering 1981); *see also* U.S. CONST. amend. V.

finding of general jurisdiction.[40] Thus, only specific jurisdiction could be found over the defendants.[41]

To this end, the court invoked the three-prong specific jurisdiction test laid out in *Schwarzenegger*, namely, ascertaining whether (1) LICRA "purposefully direct[ed its] activities . . . [at] the forum or [a] resident thereof; or . . . purposely avail[ed itself] of the privilege of conducting activities in the forum"; (2) the claim was one "aris[ing] out of or relat[ing] to the defendant's forum-related activities"; and (3) the exercise of jurisdiction "comport[s] with fair play and substantial justice, i.e., [is] reasonable."[42]

The court regarded the first prong as "determinative" in the noted case, observing that it enquires as to both "purposeful availment" and "purposeful direction" and may be satisfied by either or some combination of the two.[43] The traditional contract/tort dichotomy for treatment of "purposeful availment" was abandoned, the court noting that this is instead a First Amendment case.[44] Agreeing with defendants that the *Calder* test (traditionally used in "purposeful direction" cases) was most appropriate in this instance, the court applied it to determine the extent of LICRA's contacts with California.[45]

Calder is itself a three-prong test.[46] The court looks to whether the defendant allegedly "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."[47] In delineating the test, the court explicitly rejected the notion, espoused in some earlier circuit case law, that the "brunt of the harm" must be suffered in the forum state in order for its courts to assert jurisdiction over the defendant.[48] The court

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40. *See Yahoo II*, 433 F.3d at 1205 (citing *Int'l Shoe*, 326 U.S. at 316 (noting *International Shoe*'s dictum that general jurisdiction is appropriate only where defendant's contacts with the forum are "so substantial, continuous, and systematic that the defendant can be deemed to be 'present' in that forum for all purposes" "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (citations omitted))).

41. *Yahoo II*, 433 F.3d at 1205; *see Int'l Shoe*, 326 U.S. at 159.

42. *Yahoo II*, 433 F.3d at 1205-06 (quoting Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)).

43. *Id.* at 1206.

44. *Id.* Tort and contract cases typically employ the *Calder* "effects" test to determine the extent of defendant's contacts with the forum; tort cases typically involve a "purposeful direction" analysis, whereas contract cases generally look to the defendant's "purposeful availment" within the forum. *See Schwarzenegger*, 374 F.3d at 802-03.

45. *Yahoo II*, 433 F.3d at 1206.

46. *Id.*

47. *Id.* (quoting *Schwarzenegger*, 374 F.3d at 803 (internal quotations omitted)).

48. *Id.* at 1206-07 (noting that only a "jurisdictionally sufficient" amount of harm need be suffered). *Compare* Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 1990) (stating that defendant's act must have "caused harm, *the brunt of which is suffered . . . in*

also disagreed with defendants' contention that their acts needed to be "tortuous or otherwise wrongful" in order to satisfy *Calder*.[49]

Turning to LICRA's three aforementioned contacts with California regarding "whether or not those contacts involve wrongful activity by the defendant," the court determined that the first two contacts (the cease-and-desist letter and service of process) were alone insufficient bases for jurisdiction.[50] Combined with the third contact (the French court orders) however, the court held that the aggregation "does provide such a basis."[51]

Examining the French "interim" orders under the *Calder* test, the court stated that it was "obvious that [the first two] requirements [(commission of an intentional act directed at the forum)] are satisfied."[52] The third factor, the court noted, was "somewhat problematic" for plaintiff, as Yahoo! did not allege any harm actually caused to it by the French orders.[53] In fact, the court recalled Yahoo!'s claim that its policy change (the desired effect of the orders) had nothing to do with defendants' suit.[54] "Nor is it clear," the court added, "that, absent the interim orders, Yahoo! would change its policy in the future."[55] Finally, the court recollected Yahoo!'s admission that "there is nothing that it would like to do, but is refraining from doing, because of the interim orders."[56]

Plaintiff raised the possibility that substantial penalties may be assessed to plaintiff under the order of November 20, 2000, as a basis for establishing that harm would likely be suffered and that the third *Calder* prong was therefore met.[57] The court, however, recalled the defendants' promise not to seek enforcement of the orders if Yahoo! remained in "substantial compliance" therewith, even if acknowledging that they

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the forum state"), *with* Keeton v. Hustler Mag., 465 U.S. 770, 780 (1984) (rejecting the idea that the brunt of the harm need be suffered in the forum).

49. *Yahoo II*, 433 F.3d at 1207-08 ("[We] do not read *Calder* necessarily to require . . . that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts.").

50. *Id.* at 1207-09 (noting "strong policy reasons" for disallowing either as a basis for jurisdiction alone; namely, that cease and desist letters encourage nonlitigious means of dispute resolution and should not be punished by opening up the sender to foreign jurisdiction, and that allowing jurisdiction for service of process would be "providing a forum-choice tool" to the recipient thereof "regardless of any other basis for jurisdiction").

51. *Id.* at 1208.

52. *Id.* at 1209 (noting that "LICRA intentionally filed suit in French court," that "LICRA and UEJF's suit was expressly aimed at California," and that, while the desired effects "would be felt in France, . . . significant acts were [still] to be performed in California").

53. *Id.*

54. *Id.*

55. *Id.* at 1209-10.

56. *Id.* at 1210.

57. *Id.*

"stopped short of making a binding contractual commitment . . . and . . . have taken no action to have the orders withdrawn."[58]

The court summed up its jurisdiction analysis by applying a balancing of *International Shoe*'s specific jurisdiction test, namely, comparing the extent of defendants' contacts with California and the degree to which the suit was related to those contacts.[59] Calling this a "classic polar case" involving few but directly related contacts, the court held that LICRA and UEJF were subject to its jurisdiction.[60] The court, however, announced its concerns about the uncertainty of whether the defendants would seek to enforce the orders and whether an American court would then agree to recognize them stateside.[61]

The court briefly asserted its subject matter jurisdiction over Yahoo!'s claims before turning to the question of ripeness.[62] To this, the court applied the *Abbott Laboratories* factors: the fitness of the issues for judicial decision and the hardship to the plaintiff of withholding a decision.[63]

As to the fitness consideration, the court looked first to the precise substantive legal question to be answered.[64] "Pure legal questions that require little factual development," the court explained, "are more likely to be ripe."[65] Contrarily, questions requiring "extensive factual development" were deemed by the court to likely be too premature to require immediate judicial determination.[66] The court stated the issue as "whether enforcement of these interim orders would be 'repugnant' to California public policy" and violative of the First Amendment.[67]

The court seized upon the "atypical" nature of the case, in that the enforcement question could not be easily dissected by applying standard rules.[68] Unlike the "typical" case, in which a party in whose favor a foreign judgment was rendered comes to an American court seeking affirmative enforcement (in which case the court applies the law of the

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58. *Id.*

59. *Id.* ("A strong showing on one axis will permit a lesser showing on the other.").

60. *Id.* at 1211.

61. *Id.* (noting both that "enforcement is extremely unlikely" in the United States and "the general principle of comity under which American courts do not enforce monetary fines or penalties awarded by foreign courts").

62. *Id.*

63. *Id.* (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)).

64. *Id.* at 1212.

65. *Id.* (quoting San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1132 (9th Cir. 1996)).

66. *Id.*

67. *Id.*

68. *See id.* at 1213.

state in which it sits), here plaintiff approached the court seeking a declaratory judgment that the foreign court's order is unenforceable.[69] Further, Yahoo! was seeking a declaration of unenforceability *in all states*, a situation in which the court admitted "it is less clear whose law governs."[70]

Observing that the Uniform Foreign Money-Judgments Act (the law applicable in "typical" enforcement cases) does not address injunctions, the court turned instead to "general principles of comity" as the source of law.[71] Like the Act, comity, as expressed in the *Restatement (Third) of the Foreign Relations Law of the United States* refuses to enforce a foreign judgment that is "repugnant to the public policy" of the forum.[72] The majority went on to note the lack of California authority on the issue of enforcement of foreign judgments, but observed that the "repugnancy standard" is generally followed by a number of states, on whose precedent California courts often rely.[73]

None of this, however, resolved the enforceability issue, and therein for the court lay the problem. They opined that "[t]here is only one court that can authoritatively tell us whether Yahoo! has complied 'in large measure' with the French court's interim orders. That is, of course, the French court."[74] Taken together with a "third difficulty," the resulting uncertainty as to what effect Yahoo!'s compliance had on its First Amendment claim, the court surmised that any possible injuries to Yahoo! were too vague to be "pure legal questions" requiring little factual discovery.[75] Moreover, since Yahoo! claimed that its restrictive policy changes were made of its own accord, the question of First Amendment violations by the French court was deemed possibly inapposite.[76]

The court summed up its analysis of the first ripeness factor by restating the sole question, "whether California public policy and the

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69. *Id.*; *see* Bank of Montreal v. Kough, 612 F.2d 467, 469-70 (9th Cir. 1980); AM. LAW INST., *supra* note 27, at 12.

70. *Yahoo II*, 433 F.3d at 1213.

71. *Id.*; *see* CAL. CIV. PROC. CODE § 1713.4(b) (Deering 1981).

72. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (1987).

73. *Yahoo II*, 433 F.3d at 1214. The court pointed to *In re Stephanie M.*, 867 P.2d 706 (1994), as the only forum case dealing with the same issue as the noted case.

74. *Yahoo II*, 433 F.3d at 1216.

75. *Id.*; *see also id.* at 1212. The court noted that the French orders, on their face, only require a restriction of access to Yahoo! users *in France*, not the United States, and thus "Yahoo! simply cannot know what effect (if any) further compliance might have on access by American users." *Id.* at 1217.

76. *Id.* at 1220.

First Amendment require unrestricted access by internet users *in France*."[77] Such extraterritorial application of the First Amendment presented "a difficult and . . . unresolved issue," rendering the court "uncertain about whether . . . a First Amendment question might be presented to us."[78]

The second ripeness factor, hardship to the parties, presented similar uncertainties that led the court to hold Yahoo!'s claim unripe. Noting the "high threshold requirement for hardship" in light of the uncertainty of the legal question, the majority repeated admissions by both defendants that they were not likely to seek enforcement of the monetary penalties as long as Yahoo! maintained its current level of compliance.[79]

Furthermore, even if the French court were to enforce the monetary penalty, comity, the court opined, would again counsel against its recognition in the United States.[80] Combined again with Yahoo!'s own assertions that any restrictions on access are entirely "voluntary and self-imposed," the court explained for a final time that any monetary or First Amendment injuries suffered by Yahoo! were far too speculative to require immediate judicial determination or declaratory action.[81] Because the French orders did not require restriction of access to users in the United States, "[t]he core of Yahoo!'s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France .... [T]he extent—indeed the very existence of such an extraterritorial right under the First Amendment is uncertain."[82] With effective consideration of possible hardship contingent on such a factual and legal uncertainty, the Ninth Circuit held that Yahoo!'s claims were unripe and reversed the district court's decision, dismissing the case without prejudice.[83]

A three-judge concurrence agreed with the judgment, but argued strenuously that the proper ground for dismissal was lack of personal jurisdiction rather than ripeness.[84] Assailing the majority for their

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77. *Id.* at 1217.

78. *Id.*

79. *Id.* at 1218; *see supra* text accompanying note 15.

80. *Yahoo II*, 433 F.3d at 1218; *see* 30 AM. JUR. 2d *Execution and Enforcement of Judgments* § 846 (2004) ("Courts in the United States will not recognize or enforce a penal judgment rendered in another nation.").

81. *Yahoo II*, 433 F.3d at 1220.

82. *Id.* at 1221.

83. *Id.* at 1224. The court began its conclusion by noting that "[p]recisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power." *Id.* at 1223.

84. *Id.* at 1224 (Ferguson, J., concurring).

treatment of *Calder*, the concurring judges argued that the second prong of that test was not satisfied because LICRA and UEJF did not "expressly aim" their suit at California, but rather at Yahoo!'s activities in France.[85] The judges found unpersuasive the majority's "one sentence explanation" for why defendants' suit was "expressly aimed" at California.[86] Further, the concurrence argued for the district court's abstention ab initio, relying on the idea of comity to emphasize judicial respect for the "act[s] of state" of the French court.[87] The concurrence opined that the district court should have respected France's significant state interest in combating anti-Semitism.[88]

A second three-judge concurrence agreed with the majority's conclusion to dismiss the case, but dissented in the opinion, asserting that the district court's exercise of jurisdiction did not "comport with 'traditional notions of fair play and substantial justice.'"[89] Specifically, the concurrence stressed a fundamental tenet of the due process that underlies constitutional jurisdiction analysis; namely, that a defendant's "conduct and connection with the forum [be] such that he should *reasonably anticipate* being haled into court there."[90] The concurrence derided the majority's holding that defendants' litigating a bona fide claim in France and obtaining a favorable judgment automatically subjected them to jurisdiction in Yahoo!'s home forum, calling it a "radical extension of personal jurisdiction."[91]

The second concurrence likewise took issue with the majority's reading of *Calder*, quoting that case's relevant holding that "a valid basis for jurisdiction existed *on the theory that petitioners intended to, and did, cause tortious injury* to respondent in California."[92] "The wrongfulness of the defendants' acts," the concurrence noted, "was, therefore, a key

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85. *Id.*; *see* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 807 (9th Cir. 2004) (denying jurisdiction to California courts over defendant for advertisement in Ohio newspaper depicting governor of California because advertisement "was expressly aimed at Ohio rather than California").

86. *Yahoo II*, 433 F.3d at 1225 (detailing myriad examples of application of the court orders to France, not California).

87. *Id.*; *see* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of government of another."); *see also* Philippine Nat'l Bank v. U.S. Dist. Court of Haw., 397 F.3d 768, 773 (9th Cir. 2005) (overruling district court judgment that Philippine Supreme Court decision violated due process because Philippine decision was "act of state" beyond judgment of foreign court).

88. *Yahoo II*, 433 F.3d at 1225-26.

89. *Id.* at 1228 (O'Scannlain, J., concurring) (citation omitted).

90. *Id.* at 1227 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985) (internal quotations omitted) (emphasis added)).

91. *Id.* at 1229.

92. *Id.* at 1230 (quoting Calder v. Jones, 465 U.S. 783, 785 (1984)).

element in the jurisdictional calculus."[93] A third concurrence parrots in relevant part the reasoning of the first two.[94]

The final concurrence also disagreed with the majority's handling of the case, but for entirely different reasons. They felt that the district court should not have stopped with exercising jurisdiction over LICRA and UEJF; rather, they asserted that the case should have been decided squarely in favor of Yahoo! on First Amendment grounds.[95] The concurrence underscored the overbreadth of the French court's "sweeping mandate."[96] In their opinion, this was not an issue of the extraterritorial application of the First Amendment; conversely, they saw an overreaching application of *French* law into the United States.[97] Importantly, the concurrence agreed with the majority as to the uncertainty of the application of the penalties handed down by the French Court, but would hold that such uncertainty does not render the issue unripe, but rather makes the French orders "facially unconstitutional" instead.[98]

The concurrence chided the majority for "establish[ing] a new and burdensome standard for vindicating First Amendment rights in the Internet context."[99] To that end, the judges took issue with the majority's schizophrenic harm analysis, calling it "seriously flawed."[100] As to ripeness, the concurrence stated its opinion that "this case fundamentally involves a straight-forward legal question: whether the French injunction as ordered against Yahoo! runs afoul of the First Amendment."[101] Even if the question of harm was somewhat less than certain, the concurrence observed that *Abbott Laboratories*, the majority's "lynchpin" for ripeness analysis, itself involved a "far less definitive or targeted mandate[]" that was still found to be ripe for adjudication.[102]

Speaking to the issue of comity, the concurrence was equally inflexible, finding the French orders to be an unconstitutional prior

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93. *Id.*

94. *Id.* at 1232 (Tashima, J., concurring).

95. *Id.* at 1233-34 (Fisher, J., concurring in part, dissenting in part).

96. *Id.* at 1234.

97. *Id.* at 1234-35.

98. *Id.* at 1235; *see also* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisémitisme, 169 F. Supp. 2d 1181, 1193-94 (2001) (finding "an impermissibly overbroad and vague definition of the content that is proscribed" and "an impermissible restriction on speech" if Yahoo! were forced to comply with the orders).

99. *Yahoo II*, 433 F.3d at 1236 (Fisher, J., concurring in part, dissenting in part).

100. *See id.* (deriding "the majority's rationale for finding the harm [suffered by Yahoo!] sufficient in one instance [(personal jurisdiction)] and deficient in the other [(ripeness)]").

101. *Id.* at 1237.

102. *Id.*; *see* Abbott Labs. v. Gardner, 387 U.S. 136, 151-53 (1967).

restraint on speech and that "*this* particular judgment is so vague and overbroad that it fails the repugnancy analysis."[103] Underscoring that "[o]ur law reflects deeply held political beliefs about freedom of expression in this country," the concurrence upbraided the majority for its implication that "a violation of the U.S. Constitution is no different from any other '[i]nconsistency with American law.'"[104]

IV. ANALYSIS

Presented with the opportunity to render a definitive decision in one of the most anticipated and important Internet cases in the medium's short history, the Ninth Circuit chose instead to take the easy way out.[105] In eschewing its responsibility, Judge Fletcher and the majority invoked one of several favorite judicial tools, in this case ripeness, in order to forgo a difficult constitutional question.[106]

In *Elk Grove Unified School District v. Newdow* the Court stipulated its "heavy obligation" not to pass on issues of constitutionality "unless adjudication of the constitutional issue is necessary."[107] It can hardly be argued that establishing the parameters of so central an issue as freedom of expression in cyberspace is not necessary, both to Yahoo! and society in general.[108]

In a startling bout of jurisprudential schizophrenia, both Judges Fletcher and Fisher pointed out the substantial uncertainties facing Yahoo! in regards to the severe monetary penalties (100,000 francs *per diem* of noncompliance).[109] Yet only the concurrence seemed to follow these facts to the right conclusion. "Uncertainty about whether the sword

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103. *Yahoo II*, 433 F.3d at 1239 (Fisher, J., concurring in part, dissenting in part).

104. *Id.* at 1240 (citation omitted).

105. *See* Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1349 (2001) (noting that "[f]ew internet cases have attracted as much attention as the Yahoo! France case").

106. *See Yahoo II*, 433 F.3d at 1221. *See generally* Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 16-17 (2004) (refusing to pass on constitutionality of phrase "under God" in Pledge of Allegiance based on respondent's lack of prudential standing).

107. *Newdow*, 542 U.S. at 11 (citations omitted).

108. *See Yahoo II*, 433 F.3d at 1223 (noting that "First Amendment issues arising out of international use are new, *important* and difficult" (emphasis added)); *see also* Geist, *supra* note 105, at 1345 (noting "[t]he unique challenge presented by the internet" in regards to "compliance with local laws").

109. *See Yahoo II* at 1215 ("[W]e [the majority] do not know whether the French court would hold that Yahoo! is now violating its two interim orders."); *see also id.* at 1241 (stating in the concurrence that defendants have not taken steps to "stipulate . . . that Yahoo! is in compliance with the injunction"); Mark Thompson, *Lawyers Alarmed by International Libel Lawsuit Trend*, USC ANNENBERG ONLINE JOURNALISM REV., *posted* Nov. 2, 2004, http://ojr.org/ojr/law/1099435840.php (noting that the fines against Yahoo! have been growing "at the rate of nearly $10 a minute or nearly $5 million a year").

of Damocles might fall," Judge Fisher correctly surmised, "is *precisely* the reason Yahoo! seeks a determination of its First Amendment rights in a federal court."[110]

Yahoo! is not the only party harmed by the Ninth Circuit's punting of the First Amendment issue. An American Bar Association survey found that over half of media companies surveyed claimed to have "adjusted their business operations out of fear of getting sued overseas for content published on the Internet."[111] Professor Michael Geist has highlighted both the scope and the severity of the problem: "Since Web sites are accessible worldwide, the prospect that a Web site owner might be hauled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise . . . it is a very real possibility."[112]

In this light, Judge Fisher's concurrence correctly criticized the court for passing on the issue: "If the majority's application of the First Amendment in the global Internet context is to become the standard . . . then it should be adopted . . . *after full consideration of the constitutional merits*, *not as a justification for avoiding the issue altogether as not ripe for adjudication*."[113]

Moreover, Judge Fisher's concurrence rightly took the court to task for its very application of the ripeness standard. Adding insult to injury, the majority not only employed ripeness as poor excuse not to render an important but necessary constitutional decision, but grossly misapplied the doctrine in doing so. Acknowledging Yahoo!'s uncertain financial burden, the court strangely failed to appreciate that burden either as a matter of common judicial sense or precedent.[114] Judge Fisher, conversely, wisely marshaled precedent to refute such misperceptions, correctly affirming that "[t]his type of *immediate financial burden* clearly suffices to make a case ripe for adjudication, even if . . . *the threat of enforcement is remote*."[115]

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110. *Yahoo II*, 433 F.3d at 1242 (Fisher, J., concurring in part, dissenting in part) ("The fact that Yahoo! does not know whether its efforts to date have met the French Court's mandate is the *precise harm* against which the Declaratory Judgment Act is designed to protect.").

111. Thompson, *supra* note 109.

112. Geist, *supra* note 105, at 1345; *see also* Braintech, Inc. v. Kostiuk, [1999] 171 D.L.R. (4th) 46 (Can.).

113. *Yahoo II*, 433 F.3d at 1252 (Fisher, J., concurring in part, dissenting in part) (emphasis added).

114. *See id.* at 1241-42.

115. *Id.* at 1247; *see* Chang v. United States, 327 F.3d 911, 922 (9th Cir. 2003) (holding that financial burdens on businesses due to legal uncertainty counsel finding an issue ripe for review).

Even the case cited by the majority as the source of its ripeness test, if read carefully, counsels against its finding.[116] As Judge Fisher elucidated, the Supreme Court in *Abbott Laboratories* held that a manufacturer's challenge of Food and Drug Administration labeling regulations was ripe for review even though they had yet to be enforced, because they effectively left the manufacturers with two choices: comply with the new regulations or "follow their present course and risk prosecution," which could include "serious criminal and civil penalties."[117] It is hard to discern a cognizable factual difference between the situations of the *Abbott Laboratories* petitioners and Yahoo!. It is likewise hard to detect exactly to what absurd extent an Internet petitioner must suffer—financially and constitutionally—to render its case ripe under the Ninth Circuit's new precedent.

The ultimate result of the Ninth Circuit's "decision" in the noted case is "much ado about nothing." The court wastes twenty-six pages on a critical constitutional application and leaves in its wake no more resolution than existed before, and a multitude of Internet content providers still holding their breath. Even more dangerous, "in doing so the majority creates a new and troubling precedent for US-based Internet service providers."[118] The *Yahoo!* court has in fact made only one thing clear, that all must now wait for another court to "relieve [them] of the coercive threat hanging over [their] website[s] and the operation of [their] business[es]."[119]

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116. *See* Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

117. *Id.* at 152-53 (noting that petitioners were in a "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate").

118. *Yahoo II*, 433 F.3d at 1253 (Fisher, J., concurring in part, dissenting in part).

119. *Id.* at 1252.

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