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# International Law and the Internet: An Ill-Suited Match

## Case Note on *UEJF & LICRA v. Yahoo! Inc.*

BY CAITLIN T. MURPHY\*

### Introduction

Internet users, legal scholars, and international observers have been predicting a clash over ideas on the Internet for quite some time. The truly global nature of the medium, the uncertain status of Internet jurisdiction, and the fact that international laws about speech are divergent have created a sense that a collision of ideology and practical legal concerns was imminent. In May 2000, those predictions were realized.<sup>1</sup> Somewhat unsurprisingly, France and the United States have become the first combatants in the fight over free speech on the Internet.<sup>2</sup> Representatives of various human rights groups in France filed suit against the American Internet giant Yahoo! Inc. (“Yahoo!”) over the posting and selling of Nazi paraphernalia on American Web sites that French users can access.<sup>3</sup> The resulting order from the French court reads:

[We] [o]rder[] Yahoo! Inc. to take all measures at their availability, to dissuade and make impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects, as well as to render impossible any other site or service which makes apologies of Nazism or that contests Nazi crimes; [o]rder[] Yahoo France to

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1. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Nov. 10, 2002).

2. *Id.*

3. *Anti-Racism Group Calls for Internet Boycott of Yahoo!*, AGENCE FR.-PRESSE, Feb. 19, 2000, available at 2000 WL 2736634.

warn all surfers visiting Yahoo.fr, and prior to making available the usage of the link which permits them to pursue their research on Yahoo.com, where the result of their search, whether by arborescence or through the use of key words, leads them towards sites, pages or forums of the title and/or content which constitutes an infraction of French law, as well for visitation of sites which make the apology of Nazism and/or exhibit uniforms, insignia, emblems reminiscent of those which were worn or exhibited by nazis, or offering the sale of objects and works where the sale is strictly prohibited in France, it must interrupt the visitation onto the site in question, otherwise it will incur the sanctions stipulated by the French legislation or answer to the legal actions which can be initiated against it.<sup>4</sup>

Both sides have fervently proclaimed the rights of their citizens; in the United States the sacred right to free speech has been invoked; in France, the right to prohibit hate-mongering and racism. This note will examine the issues present in *UEJF v. Yahoo! Inc.*, with special emphasis placed on concerns raised by Yahoo! over jurisdiction, the feasibility of installing technology that would identify users geographically, and the tension between American free speech and French anti-racism law. A close examination of the November 20, 2000 decision of the Tribunaux de Grande Instance de Paris<sup>5</sup> will illuminate why the decision has had such an impact on the World Wide Web and on the world itself.

### I. Factual Background of *UEJF v. Yahoo! Inc.*

On February 19, 2000, the Union of Jewish Students in France ("UEJF") and the International League Against Racism and Anti-Semitism ("LICRA"), a France-based organization, called for a boycott of Yahoo!, an American Internet company.<sup>6</sup> LICRA requested the boycott because Yahoo! was allowing the international sale of neo-nazi and World War II Nazi memorabilia through its Internet provider.<sup>7</sup> A similar call was taken up by law professor David Rosenthal at a United Nations ("UN") seminar on eliminating

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4. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Nov. 10, 2002).

5. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

6. *Anti-Racism Group Calls for Internet Boycott of Yahoo!*, *supra* note 3.

7. *Id.*

racism on the Internet.<sup>8</sup> Professor Rosenthal stated that “[i]mportant efforts have been made to fight this abusive use of the Internet, but they have been only partly successful.”<sup>9</sup>

On May 15, 2000, UEJF and LICRA filed suit in France’s Tribunal de Grande Instance de Paris asking Yahoo! to shut down the auction sight where Nazi paraphernalia was being traded.<sup>10</sup> The plaintiffs also requested a fine of \$91,000 per day if Yahoo! left its auction site up and running.<sup>11</sup>

To complicate matters, the site that the human rights groups are protesting is not designed for French consumption.<sup>12</sup> Indeed, the offensive materials are not available on the French version of Yahoo.com, which in France operates as Yahoo.fr.com. The U.S. Yahoo.com is run out of Yahoo!’s Santa Clara, California office and is intended for American Web-surfers’ eyes only. Given the nature of the Internet, however, boundaries, such as that between Yahoo! France and Yahoo! USA, are totally arbitrary. A user in France can easily leave out the “fr” when typing Yahoo.com and view, buy, and sell items that are illegal in her own country. Thus, French users can access the protested Nazi paraphernalia, which includes merchandise such as replicas of Zyklon-B gas canisters used to kill people in concentration camps.<sup>13</sup>

Two opposing views expressed by individuals involved in the lawsuit illustrate how divergent opinions are about the responsibility of Yahoo! and other Internet companies. Christophe Pecnard, an attorney for Yahoo!, argues that “[t]he facts in question aren’t illegal in the United States. Does Yahoo! have to verify that its site conforms to the laws of all the countries of the world?”<sup>14</sup> French Prosecutor Marc Dillange, on the other hand, maintains that “directly or indirectly, this company is exercising an activity on our soil and should comply with the law.”<sup>15</sup>

On May 22, 2000, Paris Judge Jean-Jacques Gomez agreed with

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8. *Id.*

9. *Id.*

10. *Yahoo Defends Itself in France Court over Neo-Nazi Auctions*, DOW JONES INT’L NEWS, May 15, 2000.

11. *Id.*

12. *Id.*

13. Eduardo Cu, *French Antiracism Laws Meet Internet Free Speech*, CHRISTIAN SCI. MONITOR, August 14, 2000, available at 2000 WL 4430205.

14. *Yahoo Defends Itself in France Court over Neo-Nazi Auctions*, *supra* note 10.

15. *Id.*

Dillange and found that Yahoo! had broken French law.<sup>16</sup> Judge Gomez explained that exposing France to Nazi artifacts is “an offense to the collective memory of a nation profoundly murdered by the atrocities committed by and in the name of the Nazi criminal enterprise.”<sup>17</sup> The judge ordered Yahoo! to pay \$1,390 to each plaintiff and also ordered the company to implement a way to bar French users from Yahoo! USA auction pages by July 24, 2000.<sup>18</sup> Judge Gomez also stated that if Yahoo! did not comply with the ruling by July 24, 2000, he would instate the \$91,000 a day injunction requested by the plaintiffs.<sup>19</sup>

In the face of protests by Yahoo! that such filtering measures were impossible, Judge Gomez appointed a team of experts “to examine the technological possibilities of filtering technology that would block French users from accessing the pages in question.”<sup>20</sup> In an effort to create a fair panel, the judge appointed one French, one American, and one European expert to assess the feasibility of filtering technology.<sup>21</sup> The panel labored for nearly two months on possible solutions.<sup>22</sup> However, Jerry Yang, the co-founder of Yahoo!, derided the effort and opined that one country’s effort to ban material should not affect the rest of the world.<sup>23</sup> Yang stated, “[a]sking us to filter access to our sites according to the nationality of Web surfers is very naive.”<sup>24</sup>

Despite Yang’s protestations, programs exist that enable portals to censor users from certain countries by looking at the Internet Service Provider (“ISP”) address.<sup>25</sup> The ISP address is the number

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16. Dick Kelsey, *Yahoo Neo-Nazi Auction Broke French Law*, NEWSBYTES NEWS NETWORK, May 22, 2000, available at 2000 WL 21177579.

17. UEJF v. Yahoo! Inc., T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Nov. 10, 2002).

18. Steve Gold, *French Users Lose Some Yahoo Access*, NEWSBYTES NEWS NETWORK, May 25, 2000, available at 2000 WL 21177720.

19. *Id.*

20. Steve Gold, *Yahoo in French Court Again Over Nazi Issues*, NEWSBYTES NEWS NETWORK, July 25, 2000, available at 2000 WL 21180398.

21. Victoria Shannon, *Yahoo Faces Deadline to Block Nazi Items, French Court Affirms Auction Sites Ruling*, INT’L HERALD TRIB., Nov. 21, 2000, available at 2000 WL 4126008.

22. Cu, *supra* note 13.

23. Brian Love, *Auctions of Nazi Gear May Yet Cost Yahoo*, THE SEATTLE TIMES, Aug. 11, 2000, available at 2000 WL 5550270.

24. *Id.*

25. *Id.*

that identifies a computer on the Internet and often indicates where that computer is in the world.<sup>26</sup> The expert panel appointed by Judge Gomez surmised that Yahoo! could block about sixty percent of French visitors to Nazi auction sites using this method.<sup>27</sup>

However, the geographical blocking method is not comprehensive.<sup>28</sup> A smart Web-surfer can use a service that blocks ISP address-tracking such as anonymizer.com to circumvent the regulation.<sup>29</sup> Consistent with the ever-changing digital world, however, new and more efficient technology is already being developed. EdgeScape, a new service developed by the Internet firm Akamai “allows websites to determine exactly where a visitor is, at the time he visits, in order to customi(s)e content by region or country.”<sup>30</sup> Cyndi Houri, the founder of another firm which develops identifying technology called Infosplit, stated that experienced Web-surfers can get around any technology of this type but said that “[the court-appointed experts are] looking at the bulk of Internet users, not the exceptions.”<sup>31</sup> Yahoo! doubts these systems will work and claims that implementing systems to comply with different sets of regulations for individual countries will create huge problems for Internet companies.<sup>32</sup>

Despite such objections, Judge Gomez issued a ruling that complied with the recommendations of the experts on November 20, 2000.<sup>33</sup> Judge Gomez gave Yahoo! three options: to impose filtering measures, shut down its auction site, or pay a \$12,000 a day fine for each day Nazi material is available on Yahoo! to people in France.<sup>34</sup> The ruling essentially affirmed the judge’s May 22, 2000 decision and gave Yahoo! three months to comply.<sup>35</sup>

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26. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*7, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

27. *Id.* at \*13.

28. *Id.*

29. *Stop Signs on the Web, The Battle Between Freedom and Regulation on the Internet*, THE ECONOMIST, Jan. 13, 2001, available at 2001 WL 7317239.

30. *Id.*

31. Shannon, *supra* note 21.

32. Samantha King, *Wartime Past Tangles Web’s Future Freedom*, SOUTH CHINA MORNING POST, Aug. 17, 2000, available at 2000 WL 24577288.

33. Susan Bell, *Anti-Racism Groups Win Court Case Against Yahoo*, THE SCOTSMAN, Nov. 21, 2000, available at 2000 WL 28887575.

34. *Id.*

35. *Id.*

As a result, Yahoo! banned all Nazi-related items and other hate material from its auction Web site.<sup>36</sup> In addition, Yahoo! plans to implement a filtering device and employ individuals to monitor and block the appearance of Nazi memorabilia on the auction site.<sup>37</sup> Civil liberties groups in the United States expressed concern about the firm's compliance. Alan Davidson, Staff Counsel for the Center for Democracy and Technology, queried, "Where will on-line services draw the line about whose laws they will try to . . . be sensitive to?"<sup>38</sup> Davidson also voiced concern that Yahoo!'s compliance would initiate a "race to the bottom where services try to accommodate every complaint."<sup>39</sup>

Although Yahoo! is complying with the French court's ruling, company officials indicate Yahoo! has no intention of discontinuing its fight on the case. Greg Wrenn, Yahoo!'s International Associate General Counsel, declared that Yahoo! would continue to pursue the matter.<sup>40</sup> On December 22, 2000 the company filed suit in the U.S. District Court for the Northern District of California in San Jose in an attempt to block enforcement of the May 22, 2000 and November 20, 2000 decisions of the French court.<sup>41</sup> Yahoo! claims that the orders violate the U.S. Constitution and therefore maintains that the company should not have to obey them.<sup>42</sup> Yahoo! also claims that the French court had no jurisdiction over the matter, and that the court should have imposed French penal law on French citizens who broke the law rather than prosecuting Yahoo!.<sup>43</sup> Yahoo! claims the decisions violate several U.S. laws, including the Communications Decency Act, which protects third-party ISPs from liability for what their members post.<sup>44</sup> The complaint also cites violations of international law by France.<sup>45</sup>

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36. Mylene Mangalindan & Kevin Delany, *Yahoo Ban on Hate Material Stirs Debate*, 22 WALL ST. J. EUR., Jan. 5, 2001, available at 2001 WL-WSJE 2839994.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Yahoo Seeks Ruling That it Need Not Obey French Court Order*, 18 No. 8 ANDREWS COMPUTER & ONLINE INDUSTRY LITIG. REP. 3 (Jan. 3, 2001).

42. *Id.*

43. *Id.*

44. *Id.*

45. Yahoo! claims that the Nov. 20, 2000 French order violates Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 19 of the

## II. Jurisdictional Issues

Jurisdiction was one of the main issues surrounding the *UEJF v. Yahoo! Inc.* litigation. The French court felt that it had the right to bring Yahoo! into court in Paris. However, Yahoo! believed that France had exceeded its jurisdictional reach. While the concept of international jurisdiction is already complicated, it becomes more cloudy when applied to the boundary-free structure of the Internet. If an individual from Australia uses a server located in the United States to post offensive content that can literally be accessed anywhere in the world, many questions are raised. Who has the right to sue? Where will that suit take place?

### A. American Jurisdictional Requirements

U.S. law requires that a defendant have “minimum contacts” with the state that claims jurisdiction in order to be drawn into court there.<sup>46</sup> The U.S. Supreme Court also recognizes that states can exercise jurisdiction based on the defendant’s purposeful availment of that state’s laws.<sup>47</sup> More specifically, an active/passive test pertaining to Internet jurisdiction emerged from cases interpreting conduct under the purposeful availment umbrella.<sup>48</sup> In *Zippo Manufacturing Company v. Zippo Dot Com Inc.*, a U.S. district court developed a scale on which to measure an Internet defendant’s susceptibility to personal jurisdiction.<sup>49</sup> The *Zippo* court held:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site, which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.<sup>50</sup>

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Universal Declaration of Human Rights. *Id.*

46. *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945).

47. *See, e.g., World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

48. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997).

49. *Id.*

50. *Id.*



The *Zippo* active/passive test has been used to measure the minimum contacts and purposeful availment facets of the personal jurisdiction inquiry in most Internet cases since its decision.

A discussion of U.S. rules governing personal jurisdiction is necessary because U.S. courts will refuse to enforce a foreign decision based on improper personal jurisdiction.<sup>51</sup> Jurisdiction in the United States has its foundation in the Due Process Clause of the U.S. Constitution.<sup>52</sup> The United States will not enforce a judgment that does not comport with American ideas about due process.<sup>53</sup> Therefore, a case decided in a foreign court that does not satisfy U.S. requirements for jurisdiction will be held unenforceable in the United States for non-compliance with due process. In the realm of international jurisdiction, the Court maintains that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”<sup>54</sup> U.S. courts obviously expect reciprocal respect in this matter from foreign legal bodies.

### ***B. International Law and Jurisdiction***

Three of the traditional bases for exerting personal jurisdiction in international law are the subjective territoriality principle, the nationality principle, and the objective territoriality principle.<sup>55</sup> A short discussion of each will illuminate the choices faced by the French court in deciding to try this case.

First, the subjective territoriality principle encompasses the most basic right of states to regulate actions of persons within the state. If an individual commits an illegal act within its territory, the state has a right to exert jurisdiction no matter what the citizenship of that actor is. This principle is one of the most basic in international law.<sup>56</sup>

Second, the nationality principle allows a state to control persons or entities of its own nationality regardless of the location of these

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51. Kurt A. Wimmer & Joshua A. Berman, *United States Jurisdiction to Enforce Foreign Internet Libel Judgments*, 639 PLI/Pat 493 (2000) (Practicing Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series).

52. *Id.* at 500.

53. *Id.*

54. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965)).

55. Patrick G. Crago, Note, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 467, 481 (1997).

56. *Id.*

persons or entities. Therefore, a person or entity who commits an illegal act in a foreign country may be held accountable under the laws and in the courts of his own nation of origin.<sup>57</sup>

Finally, the objective territoriality principle extends jurisdiction to acts committed outside the controlling state's territory by non-nationals, which have an effect in the controlling state.<sup>58</sup> This more controversial type of jurisdiction extends control to "the act itself, whether the locus of the act was territorial or extra territorial."<sup>59</sup>

For obvious reasons, the Internet muddies the already unclear demarcations of international jurisdiction. Conducting an analysis under the subjective territoriality principle is exceedingly difficult. An action originating on a server in the United States may become an illegal act in a foreign country when it is viewed online there. For example, the sale or display of Nazi memorabilia is illegal in France and Germany. If a U.S.-based dealer posts Nazi items for auction using an American server and the items are displayed on a computer screen in Berlin when a German user executes a search for them, has the act been committed in the United States or Germany? The act of posting the pictures originated in the United States where such an act is legal. However, the illegal display occurred in Germany as a result of the U.S. action. The alternative is to prosecute the German citizen who displays the material, but this is practically impossible.

Because of the difficulty presented with using the subjective territoriality principle, most multinational disputes about the Internet utilize the effects-based objective territoriality principle.<sup>60</sup> U.S. courts find that minimum contacts and purposeful availment requirements lend themselves to the effects-based test of objective territoriality, and have been "quite willing to extend U.S. law outside [the] country's borders" in using them.<sup>61</sup>

### ***C. Exercise of Jurisdiction in UEJF v. Yahoo! Inc.***

The issue of jurisdiction was naturally the first to arise at the start of the *UEJF v. Yahoo! Inc.* trial. Yahoo! contested the jurisdiction of

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57. *Id.* at 482.

58. *Id.* at 483.

59. *Id.*

60. Interview by Lionel Thoumyre with Michael Geist, Professor of Law, Ottawa School of Law, The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute (Jan. 18, 2001), available at <http://www.juriscom.net/en/uni/doc/yahoo/geist.htm> (last visited Nov. 10, 2002).

61. *Id.*

the French court by arguing that the company's servers were located in America and that its auction site was intended for American Web-surfers only.<sup>62</sup> Yahoo! offered several factors in support of its argument that the site was designed for American use: the language of the site was in English, the payment method allowed was U.S. credit cards, the mode of delivery was U.S.-based delivery services, and the currency used was U.S. dollars.<sup>63</sup> Yahoo! also asserted that it displayed a special French version of the Web site that did not contain the illegal material. Finally, Yahoo! maintained that the contested site was not intended for French viewers, nor purposefully aimed at them.

However, Judge Gomez held that Yahoo! knew the site was being accessed by French Web-surfers because "upon making a connection to its auctions site from a terminal located in France, [Yahoo!] respond[ed] by transmitting advertising banners written in the French language."<sup>64</sup> Professor Joe Reidenberg of Fordham University School of Law concurred with the judge and stated, "[o]nce the [c]ourt established that Yahoo! Inc. displayed advertisements in French to visitors at the U.S.-based server, Yahoo! could not seriously contend that it did not intend those services to reach a French audience and that it did not intend to profit from French visitors."<sup>65</sup>

Along with the active/passive line of reasoning, the court added a mixed subjective and objective territoriality argument to assert its jurisdiction. Regarding subjective territoriality, Judge Gomez pointed out that "the simple act of displaying [symbols of Nazi ideology] in France constitutes a violation of Article R645-1 of the Penal Code . . . ."<sup>66</sup> Thus the judge viewed the display, and not the posting or sale of the material, as the act. As the illegal act occurred in France, the judge held that Yahoo! was subject to jurisdiction in

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62. UEJF v. Yahoo! Inc., T.G.I. Paris, Nov. 20, 2000, *available at* <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

63. *Id.* at \*1.

64. *Id.* at \*4.

65. Interview by Lionel Thoumyre with Joel R. Reidenberg, Professor of Law, Fordham University School of Law, *The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute*, (Jan./Mar. 2001), *available at* <http://www.juriscom.net/en/uni/doc/yahoo/reidenberg.htm> (last visited Nov. 10, 2002).

66. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*4, Nov. 20, 2000, *available at* <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

the French court because the company displayed Nazi symbols on its Web site that were viewed by users in France.

The French court also evaluated the matter under the objective territoriality test. Although French advertisements appeared on the page when viewers in France accessed the Web site, Judge Gomez accepted Yahoo!'s claim that the company did not intentionally aim the illegal material at France.<sup>67</sup> In this way, Yahoo! passed the *Zippo* active/passive test.<sup>68</sup> However, the court also noted that the display of the Nazi paraphernalia was an offense to the collective memory of the nation and "a threat to internal order."<sup>69</sup> Thus, Judge Gomez held that the groups suing had suffered because of Yahoo!'s display of the racist items.<sup>70</sup> Ultimately, the court concluded that the Web site had the requisite effect in France.

The objective territoriality analysis incorporates the idea of an "effects-based" test for personal jurisdiction.<sup>71</sup> Professor Michael Geist argues that courts around the world are abandoning the active/passive test and "moving toward an effects based analysis whereby jurisdiction will be asserted where the court believes that the Web site has had an effect within the jurisdiction."<sup>72</sup>

Many, including this author, feel that Judge Gomez's application of the subjective territoriality test was interesting but also rather disturbing. Perhaps it is logical to view the display of offensive images by Yahoo! in France as an illegal act in France even if the images were posted and intended for an American audience. However, the implications of allowing jurisdiction for such acts are enormous. An Internet environment where any country can bring an individual into court for posting an offensive piece of information accessed within that country would cease to be the Internet we recognize today. As Alan Davidson, an attorney for the Washington, D.C. based Center for Democracy and Technology says, "the French approach would lead to a lowest common denominator world where

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67. *Id.*

68. *See Zippo*, 952 F. Supp. at 1124.

69. UEJF v. Yahoo! Inc., T.G.I. Paris, May 22, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Nov. 10, 2002).

70. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*4, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

71. Crago, *supra* note 55, at 483.

72. Geist, *supra* note 60.

the most restrictive rule of any country would govern all speech on the Internet.”<sup>73</sup>

### III. Technological Issues

After determining that it had jurisdiction, the French court addressed Yahoo!'s second concern regarding the court's May ruling; namely that the blocking and screening methods proposed by the court were impossible to implement. In the May ruling, Judge Gomez appointed a panel of experts to explore whether or not “the means [to screen French users from Yahoo.com's auction site] existed, [and] if their implementation would entail unduly high costs for the company, [which] might even place the company in jeopardy.”<sup>74</sup> The court hoped for a solution that would use an individual computer's Internet Protocol (“IP”) address to locate that Web-surfer in the world. If the program found that the user was in France, it would then block all illegal material from that individual's computer screen.<sup>75</sup> In order to understand the findings made by the panel of experts, it is necessary to explain the way the Internet works and detail the methods of blocking and screening that were proposed.

#### A. *History and Structure of the Internet*

The Internet began in 1969 as a series of computers linked together to form a communication device for the U.S. Army.<sup>76</sup> The device was called ARPANET, and was a network that connected defense contractors to the military and to universities working on defense-related research.<sup>77</sup> The network was designed to survive an attack, such as a nuclear war, that more traditional means of communication would not survive.<sup>78</sup> The ARPANET “provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts

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73. Editorial, *A Firm Stand By Yahoo!*, DENVER POST, Nov. 24, 2000, available at 2000 WL 25835305.

74. UJF v. Yahoo! Inc., T.G.I. Paris, at \*3, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

75. *Id.*

76. *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997).

77. *Id.* at 850.

78. *Id.*

of information around the world.”<sup>79</sup>

The World Wide Web is the most recognizable and often-used facet of the Internet. The Web consists of thousands of documents or Web Sites housed all over the globe. One can access a Web Site by using a search engine such as Yahoo! or Lycos or by typing the Web Site’s unique address or Uniform Resource Locator (“URL”) into the search field. The U.S. Supreme Court has likened the Web to a “vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”<sup>80</sup>

The hardware of the Web includes routers or computers that are dedicated to the interconnection of networks.<sup>81</sup> Transmission Control Protocol (“TCP/IP”) is the procedure at the core of the Http protocols and Html language is used to drive the Internet.<sup>82</sup> The Internet can be accessed through telephone lines, through digital portals (“ISDN”), or through cable television lines (“DSL”).<sup>83</sup> ISPs give individual users access to the Internet through one of these means. America Online, Prodigy, and AT&T are such providers. Yahoo! itself has an extremely popular search engine, a free e-mail service, and a network of Web sites.

Each computer connected to the Internet has an IP address. Originally the IP address was a number, “represented by four series of bytes converted into decimal numbers in the range of 0-255.”<sup>84</sup> Since this type of codification was confusing and difficult to remember, words began being matched up with these numbers to form domain names.<sup>85</sup> Hence, the IP address for Yahoo! France is <http://www.yahoo.fr.com>. Thousands of databases around the world work to translate the words of domain names into the numerical IP addresses to deliver the user to the requested Web site.<sup>86</sup>

However, a domain name itself does not necessarily indicate where a user is from. “For example, [www.yahoo.fr.com](http://www.yahoo.fr.com) does not

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79. *Id.*

80. *Id.*

81. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*5, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

82. *Id.*

83. *Id.* at \*6.

84. *Id.*

85. *Id.*

86. *Id.*

correspond to an IP address of a French network.”<sup>87</sup> In order to locate an IP address in the world, it is necessary to work backward. This is possible because IP address allocation follows a tree structure from the main network to the sub network to the individual user.<sup>88</sup> Web sites find it profitable to identify the nationality of their users. The practice enables companies to tailor their advertising banners to reflect the language that the user speaks or the products that the surfer uses.<sup>89</sup> Companies exist solely to develop and market this geography-identifying technology.<sup>90</sup>

The question before the expert panel in *UEJF v. Yahoo!* was whether or not Yahoo! could implement this user-identifying technology without major inconvenience and expense to the company.<sup>91</sup> The French court wanted to know how effective the technology would be, how many users it would block, and if any other means of screening and blocking were practicable for Yahoo!<sup>92</sup>

### ***B. Expert Panel's Opinion on Blocking and Screening Technology***

The expert panel appointed by Judge Gomez consisted of three members: Francois Wallon, Ben Laurie, and Vinton Cerf.<sup>93</sup> Essentially, Wallon and Laurie worked together to create a way for Yahoo! to comply with the court's demands;<sup>94</sup> while Cerf pointed out possible problems with their plan.<sup>95</sup> The court required Yahoo! to comply with two duties: 1) know the geographical origin and nationality of surfers wishing to access its auctions site; and 2) prevent French Web-surfers and other Web-surfers connecting from French territory from perusing the description of Nazi objects posted for auction, and from bidding on the aforementioned objects online.<sup>96</sup>

Laurie and Wallon were asked to measure the feasibility of each

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87. *Id.*

88. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, at \*6, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

89. *See Stop Signs on the Web*, *supra* note 29.

90. *Id.*

91. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, at \*3, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

92. *Id.*

93. *Id.*

94. *Id.* at \*13.

95. *Id.* at \*14.

96. *Id.* at \*7.

of the above requirements imposed on Yahoo! The panel first spoke to the French association of access and ISPs (“AFA”) to find out how many users could be identified as French by their IP addresses.<sup>97</sup> The AFA concluded with certainty that twenty percent of users could not be identified as such.<sup>98</sup> The panel decided that seventy percent was a fair estimate of the number of individuals that would be identifiable as French users.<sup>99</sup> The court noted that this technology already enabled Yahoo! to post French advertising banners on its American site when French users logged on.<sup>100</sup>

The panel also discussed the large percentage of users who could not be identified using this technology. If a user has an account with a multinational carrier, that user will likely be identified as being located in whatever state or nation the carrier is located in. For example, if the user has an AOL account, the user will appear to be from Virginia because all of AOL’s servers are in Virginia.<sup>101</sup> Large multinational corporations with their own intranets can also disguise users because the user’s nationality appears to be whatever it is at the ‘tunnel exit’ of the company.<sup>102</sup> There are also sites devoted solely to making it impossible to determine a user’s nationality.<sup>103</sup> These sites are called anonymizers and exist to help people circumvent such systems as the one the court is proposing.<sup>104</sup>

Laurie and Wallon suggested that Yahoo! could ask for a declaration of nationality to identify the remaining 30% who couldn’t be tagged by their ISPs.<sup>105</sup> A prompt with this question could come up once a user accessed the auction site or, more specifically, once the user typed a request that included the word ‘Nazi’. The program would then plant a ‘cookie,’ or piece of information, in the user’s hard drive that identifies the user as French from that moment on.<sup>106</sup>

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97. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*8, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at \*9.

102. *Id.*

103. Shannon, *supra* note 21.

104. *Id.*

105. UEJF v. Yahoo! Inc., T.G.I. Paris, at \*13, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

106. *Id.* at \*15.



Expert Cerf furnished a rebuttal to the proposals of the other two panel members. In his rebuttal, Cerf noted that users sometimes lie about their whereabouts to circumvent such laws.<sup>107</sup> Cerf also stated that cookies are seen as an invasion of privacy by many users of the Internet.<sup>108</sup>

Ultimately, however, the court affirmed the judgment based on the reports of the first two experts.<sup>109</sup> Although he realized that not all users in France could be identified through their ISPs, Judge Gomez was satisfied with at least a large number being banned.<sup>110</sup> He stated that Yahoo!'s pre-existing use of geographic identification to target advertising proved the program would not be too great a burden on the company.<sup>111</sup> Judge Gomez also noted that Yahoo! could prevent Nazi paraphernalia from being delivered to France if it was purchased by a user.<sup>112</sup> Finally, the judge held that other morally objectionable items such as pedophilia, live animals, cigarettes, human organs, and pharmaceutical drugs are banned from the Yahoo! site.<sup>113</sup>

#### IV. Freedom of Speech Protections v. Anti-Racism Laws

Despite the French court's successful assertion of jurisdiction and the expert panel's findings regarding viable solutions for blocking French users, one large issue remained: the question of freedom of speech. The First Amendment right to freedom of speech in the United States is virtually unmatched in the world. Many countries, including France, place the right of privacy and the right to not tolerate racism above the freedom of the citizenry to speak or write almost anything. Conflicts of law, such as the immediate one, occur when the United States feels its sacred right to free speech is being fettered abroad, and when other countries feel that their citizens are being subjected to offensive or even illegal material. The Internet is perhaps unique in its ability to create such conflicts.

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107. *Id.*

108. *Id.*

109. *Id.* at \*16-20.

110. *Id.* at \*16.

111. UJEF v. Yahoo! Inc., T.G.I. Paris, at \*16, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

112. *Id.*

113. *Id.* at \*18.

### A. *Freedom of Speech in the United States*

The First Amendment command that “Congress shall make no law . . . abridging the freedom of speech, or of the press” is among the most enshrined political ideas in the United States.<sup>114</sup> The concept behind the famous words finds value in what Justice Holmes dubbed the “marketplace of ideas.”<sup>115</sup> In Justice Holmes’ “marketplace of ideas,” the “best test of truth is the power of thought to get itself accepted in the competition of the market,” which must be free from government regulation.<sup>116</sup> The marketplace must allow all ideas, including those that are repellent to some listeners, to circulate freely. Theoretically, without this freedom to express even unpopular philosophies, a steady encroachment will take all ideas that are offensive to any listener out of the marketplace. The result is an environment like that in Singapore where heavy censorship interferes with political debate and artistic expression.<sup>117</sup> In the United States, protected speech ranges from private speech, which is given the most protection, to commercial speech, where the levels of protection can vary.<sup>118</sup>

Until recently, freedom of speech on the Internet was a topic of much debate. Some groups “[s]uggested that the Internet should not be treated any differently than other existing forms of media,” while others, such as the American Civil Liberties Union (“ACLU”) and the Electronic Frontiers Foundation (“EFF”), “urge(d) unfettered access to materials online.”<sup>119</sup> In 1997, the U.S. Supreme Court settled some of these debates with its ruling in *Reno v. ACLU*, which remains controlling law on the subject.<sup>120</sup> *Reno v. ACLU* examined the issue in light of the Communications Decency Act (“CDA”) and held that even though “the CDA dealt primarily with pornography and material that should not be viewed by minors, th[e] decision ha[d]

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114. U.S. CONST. amend. I.

115. Rachel Weintraub-Reiter, Note, *Hate Speech Over the Internet: A Traditional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 146-47 (1998).

116. *Id.*

117. Amy Knoll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT’L. & COMP. L. 275, 292-94 (1996).

118. Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 386 (1999).

119. *Id.* at 378.

120. 521 U.S. 844 (1997).

ramifications [for] the area of hate speech and civil rights.”<sup>121</sup> The Supreme Court held that “no basis for qualifying the level of First Amendment scrutiny should be applied to [the Internet].”<sup>122</sup> The Court also recognized the unique boundary-free nature of the medium by referring to the “vast, democratic forums” of the Internet, and even indicated that the medium should receive more free speech protection than the broadcast industry.<sup>123</sup> This ruling reveals that speech on the Internet now receives the highest level of protection under the First Amendment in the United States.<sup>124</sup>

Because freedom of speech is considered such a sacred American right, U.S. courts generally do not enforce judgments of foreign courts that try to abridge it.<sup>125</sup> Any curtailment of the American right to freedom of expression is seen as a violation of public policy and therefore requires no enforcement under the Uniform Enforcement of Foreign Judgments Act of 1964.<sup>126</sup> Several recent U.S. district court cases illustrate that U.S. courts refuse to enforce libel judgments rendered abroad if they do not pass muster under the First Amendment.<sup>127</sup> Therefore, it is unlikely that the judgment rendered by the court in *UEJF v. Yahoo! Inc.* would be enforced in the United States. Yahoo!’s recent filing of a suit to block enforcement of the French order appeared in the U.S. District Court for the Northern District of California in San Jose and will most likely be upheld on First Amendment grounds.<sup>128</sup> As Professor Paul Schiff Berman of the University of Connecticut School of Law states, “[r]ealistically, given the First Amendment repercussions here, only informal diplomatic pressure could help” to get the French decision enforced in the United States.<sup>129</sup>

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121. Siegel, *supra* note 118, at 388.

122. *Reno v. ACLU*, 521 U.S. at 870.

123. *Id.* at 868.

124. *Id.*

125. Wimmer & Berman, *supra* note 51, at 507.

126. *Id.*

127. *Id.* at 508.

128. *ANDREWS COMPUTER & ONLINE INDUSTRY LITIG. REP.*, *supra* note 41.

129. Peter Sayer & Sarah Deveaux, *Court in the Net: Jurisdiction in Cyberspace*, IDG NEWS SERVICE PARIS BUREAU, July 28, 2000, available at <http://www.pcworld.com/resource/printable/article/0,aid,17868,00.asp> (last visited Nov. 10, 2002).

### ***B. Right to Privacy and Anti-Racism Laws in France***

Since 1789, French law has provided for the freedom of speech.<sup>130</sup> The Declaration of the Rights of Man states, “The free communication of thought and opinions is one of the most precious rights of man. Every citizen can therefore freely speak, write, and publish save that he is responsible for the abuse of this freedom as determined by law.”<sup>131</sup> The ideas contained in this statement are similar to those in the First Amendment of the U.S. Constitution. However, French courts have interpreted the breadth of these ideas rather differently than American courts.

Freedom of speech is not an absolute in France.<sup>132</sup> Indeed, the French have passed several laws banning certain types of speech. In 1990, the Gayssot Act was passed, which levies a prison term of up to one year or a fine of up to 300,000 francs against a person who denies or contests the existence of a crime against humanity defined in Article 6 of the International Military Tribunal.<sup>133</sup> Denying the Holocaust or questioning the existence of gas chambers at Auschwitz, as Probert Faurisson a Professor of Literature at Lyon University contended, can garner a conviction.<sup>134</sup> Another example of censorship arose from French testing of nuclear bombs underground in the Pacific Ocean.<sup>135</sup> Twenty five Danish students visiting Paris wore shirts with the exclamation “Chirac Non!” in protest of the bombing and all were promptly deported.<sup>136</sup> In addition, casting “discredit on a judicial decision” is against the law in France.<sup>137</sup> In the United States, the sight of lawyers on the news criticizing judicial rulings is a common one. Whereas in France, this behavior would guarantee jail time.<sup>138</sup>

An internationally famous instance of French censorship on the

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130. Ronald P. Sokol, *Freedom of Expression in France: The Mitterand-Dr.Gubler Affair*, 7 TULJ. INT'L & COMP. L. 5 (1999).

131. *Id.*

132. *Id.* at 33.

133. Sionaidh Douglas-Scott, *The Hatfulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 318 (1999).

134. *Id.*

135. Sokol, *supra* note 130, at 33-34.

136. *Id.* at 34.

137. *Id.* at 36.

138. *Id.*

Internet involves former French President Francois Mitterand.<sup>139</sup> Mitterand's personal physician, Dr. Claude Gubler, wrote a book after the President's death revealing the fact that Mitterand had been afflicted by cancer, had hidden it from the French people, and for his last few years in office had been incapable of performing his duties.<sup>140</sup> Dr. Gubler's book, *Le Grande Secret*, was immediately banned in France because according to French law, it violated the Mitterand family's privacy and contained the revelation of 'medical secrets.'<sup>141</sup> Pascal Barbaud, a cyber cafe owner, was outraged by what he saw as an abridgement of free speech.<sup>142</sup> In protest, he uploaded the book and it was accessed over 8,000 times per hour. Barbaud was arrested soon thereafter.<sup>143</sup>

These examples of French limits on freedom of speech along with the example shown in *UEJF v. Yahoo!*, show a very different interplay between speech, privacy, and unpopular thought in France. Instead of speech being sovereign above all other rights as it is in the United States, speech in France undergoes a balancing test when it comes up against the right to privacy or the right not to be subjected to hate mongering or racism.<sup>144</sup>

The court in *UEJF v. Yahoo!* has fairly little to say about freedom of speech abridgement, which indicates that the right is seen as less important than eliminating symbols of hate and racism from French computer screens.<sup>145</sup> Judge Gomez remarks that "it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies."<sup>146</sup> With this comment, the judge appears to be criticizing the American commitment to free speech at the expense of 'ethics' or 'morality,' which he sees as necessary components of a democratic society. Judge Gomez also chose to disregard the fact that his command to Yahoo! to ban the Nazi materials has ramifications in

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139. See generally Sokol, *supra* note 130.

140. *Id.* at 9.

141. *Id.* at 6.

142. Knoll, *supra* note 117, at 290.

143. *Id.*

144. Sokol, *supra* note 130, at 34.

145. *UEJF v. Yahoo! Inc.*, T.G.I. Paris, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Nov. 10, 2002).

146. *Id.* at \*18.

the United States, stating, “any possible difficulties in executing our decision in the territory of the United States as argued by Yahoo! Inc., cannot by themselves justify a plea of incompetence.”<sup>147</sup> The court’s inattention to the freedom of speech issue, which most likely would have been the most important issue in an American courtroom, illustrates how divergent the French and American perspectives on free speech are. In this context, the differences appear irreconcilable.

## V. Possible Solutions

Aside from the blocking and filtering techniques explored by the court-appointed experts in this case, several other solutions to conflicts of law on the Internet have been proposed. A pro-free speech faction points out that international law has “leaned toward unfettered freedom of speech and thought” through Articles 18 and 19 of the Universal Declaration of Human Rights.<sup>148</sup> The Declaration states: “Everyone has a right to freedom of opinion and expression . . . includ[ing] freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers.”<sup>149</sup> This philosophy supports almost unlimited freedom of expression on the Internet and would most likely discount the *UEJF v. Yahoo!* ruling.

An alternative solution that has been proposed attempts to respect the laws of each country by drawing up a “reciprocal treaty of accessibility.”<sup>150</sup> However, this solution is rife with problems, including “scope issues, cultural differences, varying standards of computer technology, . . . difficulties in reaching a consensus, and [difficulty with] enforce[ment].”<sup>151</sup> Similar problems exist with the concept of an international governing body for the Internet.<sup>152</sup> As technology develops and changes so quickly, any such international bureaucratic and deliberative body would likely fall hopelessly behind the new problems that will inevitably develop in this area.

Instead of relying on standard legal methods to solve the riddle

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147. *Id.* at \*4.

148. Siegel, *supra* note 118, at 396.

149. G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/PV.183 (1948).

150. Michael H. Spencer, *Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty*, 3 VA. J. L. & TECH. 1, 34 (1998).

151. Knoll, *supra* note 117, at 300.

152. Spencer, *supra* note 150, at 39.

of international conflicts of law on the Internet, it is imperative to use the technology itself. Only the programs and techniques that form the Internet are capable of growing and changing apace with the medium to produce real solutions. Blocking, filtering, and identifying programs may allow an international compromise to be struck through countries' self-regulation. France would not have to tolerate ideas that are repellent to its collective memory, and the United States would be able to preserve near-unlimited freedom of speech. The goal is for each government to explore such technological solutions and to keep problems that are legally unsolvable out of court.

### Postscript

Subsequent to the completion of this note, the U.S. District Court for the Northern District of California in San Jose granted summary judgement to plaintiff Yahoo! Inc. in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*.<sup>153</sup> While remaining respectful of the French judgement as applied to France and of French law in general, the court maintained that "the extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice."<sup>154</sup> Correspondingly, a ruling would not be upheld if "enforcement would be prejudicial or contrary to the country's interests."<sup>155</sup>

The court stressed that the U.S. Constitution could not support an order such as the one made by the French court. Specifically, the court stated that "the First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling government interest, such as averting a clear and present danger of imminent violence."<sup>156</sup> Furthermore, the court felt that the French order was "far too general and imprecise to survive the strict scrutiny required by the First Amendment."<sup>157</sup>

Finally, the judgement indicated a need for legislative guidance on this subject, stating that "absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such

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153. 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

154. *Id.* at 1192.

155. *Id.*

156. *Id.* at 1189.

157. *Id.*

standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."<sup>158</sup> As indicated in the note above, this result was not unexpected in light of U.S. First Amendment jurisprudence. Perhaps if more lawsuits of this type begin appearing in courts around the world, the international community will be forced to look at solutions that exist outside the realm of law.

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158. *Id.* at 1193.



