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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

YAHOO! INC., a Delaware corporation,

Plaintiff

v.

LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, a French association, *et al.*,

Defendants.

Case No. C 00-21275 JF

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES, COMMERCIAL INTERNET eXCHANGE ASSOCIATION, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, US INTERNET INDUSTRY ASSOCIATION, ONLINE PUBLISHERS ASSOCIATION, and UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS____ IN SUPPORT OF PLAINTIFF YAHOO!, INC.

Hearing Date:
Time:
Place:
Judge: Hon. Jeremy Fogel

Date of Filing: 12/21/00
Trial Date: Not Yet Set

Amici Curiae the Chamber of Commerce of the United States, Commercial Internet eXchange Association, Information Technology Association of America, US Internet Industry Association, Online Publishers Association, and United States Council for International Business, respectfully submit this brief in support of the plaintiff in this case, Yahoo! Inc.

INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States** (the Chamber) is the world's largest federation of business organizations and individuals, representing an underlying membership of nearly three million businesses and organizations of every size and in every sector of the economy and geographic region of the country. Chamber members transact business in all of the United States as well as a large number of countries around the world.

A principal function of the Chamber is to represent the interests of its members in important matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases involving issues of vital concern to the nation's business community.

The **Commercial Internet eXchange Association** (http://www.cix.org) is a non-profit trade association of public data internetworking service providers which promotes and encourages the development of the industry in both national and international markets. Founded in 1991, CIX is the largest and oldest trade association of ISPs in the United States. It provides a neutral forum for the exchange of ideas and

information and develops positions on legislation and policy issues among suppliers of internetworking services.

The **Information Technology Association of America** (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the U.S.

The **US Internet Industry Association** (USIAA) is the North American trade association for Internet commerce, content, and connectivity. Founded in 1994, USIAA advocates effective public policy for the Internet and provides its members with essential business news, information, support and services. With members of every size, engaged in virtually every facet of the Internet, the USIAA is working to craft a business environment in which Internet companies can thrive.

The **Online Publishers Association** (OPA) is an industry trade organization founded in June 2001 by twelve of the Internet's leading content brands, whose mission is to advance the interests of high-quality online publishers before the advertising community, the press, the government and the public. Members of OPA represent the highest standards in Internet publishing with respect to editorial quality and integrity, credibility and accountability. For more information about Online Publishers Association, visit www.online-publishers.org.

A driving force for American business, the **United States Council for International Business** (USCIB) works to promote an open system of world trade,

finance and investment in which business can flourish and contribute to economic growth, human welfare and protection of the environment. Its membership includes some 300 U.S. companies, professional services firms and associations. As the American affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD and the International Organization of Employers, USCIB provides unparalleled access to international policy makers and regulatory authorities worldwide. USCIB also facilitates international trade by working toward harmonization of international commercial practices in such areas as customs and arbitration.

INTRODUCTION

At issue in this case is whether a foreign country can control the content that U.S. individuals, entrepreneurs, businesses, community organizations, libraries and churches can place on the "exponentially growing, worldwide medium that is the Internet." *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996). *Amici,* which represent both Internet and online service providers (entities that provide access to the virtually limitless range of commercial and non-commercial material found on the Internet) and content providers (including the individuals, large and small businesses and organizations that provide a wide variety of the content found on the Internet) submit this brief *amici curiae* to stress the devastating impact such a result could have on the Internet and internet commerce.

As courts have recognized, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 842. This vibrant medium has

already transformed the way we as a nation do business and access information for personal use. The decision of the French court in this case represents one of the greatest threats to the promise of the Internet seen to date. The French court concluded that, because French citizens sought out and managed to located material on a *U.S.* company's website that is offensive to French law, courts in France can assert jurisdiction over the U.S. company, and mandate that the company restrict French citizens' access to that material.[1] As U.S. courts have recognized, "the Internet has an 'international, geographically-borderless nature,'" and "with the proper software every Website is accessible to all other Internet users worldwide." *ACLU v. Reno*, 217 F.3d 162, 169 (3d Cir. 2000) (citations omitted), *cert. granted*, 121 S. Ct. 1997 (2001). Accordingly, if the French court's decision is recognized in this country, every piece of information posted on the Internet will have to conform to the laws of every country in which that material might be accessed – even if it is clear (as it is in this case) that the U.S. company posting

1/ In particular, two French student unions – La Ligue Contre Le Recisme Et L'Antisemitsme (LICRA) and L'Union Des Etudiants Jurifs de France (UEJF), brought suit against Yahoo!, Inc. ("Yahoo!"), a U.S. company providing Internet services in English, targeted at U.S. citizens, from host computers located in the United States, alleging that Yahoo!, Inc. violated French law by placing on its U.S. website material that is indisputably lawful in the U.S., but banned in France. Although Yahoo! explained, and the French court recognized, that Yahoo!, Inc. maintains an entirely separate corporate subsidiary – Yahoo! France – which offers an Internet service that *is* targeted at French customers, operates in the French language, and is maintained in full compliance with French law, the French court concluded that it had jurisdiction over Yahoo!, Inc. because, due to the seamless nature of the Internet, French citizens are able to access Yahoo!'s U.S.-based website. The French court thus ordered Yahoo! to censor content on its U.S.-based Internet services that is illegal in France but protected by the First Amendment to the U.S. Constitution, and imposed a penalty fine for each day that Yahoo! failed to comply.

that information was targeting U.S. citizens, and operating in a manner fully consistent with U.S. law. Plainly put, such a result would cripple the Internet.

Technology alone is not the issue. Regardless of whether it is technologically possible for a website to recognize the country of origin of all visitors and block those visitors whose home countries ban some of the content on the website (which is technologically difficult if not impossible), this crippling effect would occur. As courts have recognized, the incredible diversity of information on the Internet "is possible because the Internet provides an *easy and inexpensive* way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines. This enables operation of their own Websites not only by large companies, such as Microsoft and Time Warner, but also by small businesses and not-for-profit groups, such as Stop Prisoner Rape and Critical Path AIDS Project." *ACLU v. Reno*, 929 F. Supp. at 843 (emphasis added). Under the French court's jurisdictional theory, however, each individual or company with a presence on the internet would have to constantly monitor the laws of every country in the world, search out content that might be prohibited by one or more of those countries, and implement some sort of blocking software that would screen different categories of material from users in different countries. This would be obviously too burdensome for even enormous companies like Yahoo!, and would literally be a death knell for smaller companies and non-profit

organizations. *Cf. Reno v. ACLU*, 521 U.S. 844, 881 (1997) (noting "that it is not economically feasible for most noncommercial speakers" with websites to screen out underage users by requiring them to submit credit card information).

For these reasons, *amici* urge this Court to recognize the jurisdictional dangers posed by the French court's action in this case. As Yahoo! explains in its Motion for Summary Judgment, the French court's order violates the First Amendment's free speech guarantees. But the mere recognition that the First Amendment would be violated in this case is not enough to ensure that Internet activity is not chilled by the French court's judgment. *Amici*'s activities are not limited to pure expressive activities, but instead include a wide variety of activity on the Internet – including political speech, commercial speech, and business activities. For *amici*, clear recognition of the principle that, where a U.S. company is targeting on-line activities at U.S. citizens, the mere fact that the Internet is involved does not allow every other country in the world to assert jurisdiction over that company and regulate its activity, is absolutely critical.[2]

2/ *Amici* note that judicial resolution of issues that are subject to international treaties, such as cases involving the unauthorized communication of copyrighted materials over the Internet, raise substantially different issues than those raised by the case at bar, and specifically note that this brief does not address those issues. Rather, as explained herein, *Amici* contend that the mere establishment of a website in the United States, by a U.S. company targeting U.S. citizens, is insufficient to support the proper assertion of jurisdiction by a foreign state absent "'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

ARGUMENT

I. THE FIFTH AMENDMENT PROHIBITS ENFORCEMENT OF FOREIGN JUDGMENTS WHERE, AS HERE, THE FOREIGN COURT DID NOT HAVE PERSONAL JURISDICTION OVER THE U.S. DEFENDANT.

Amici submit this brief to highlight a fundamental jurisdictional principle implicated by this case: United States courts may not enforce judgments of foreign courts that lack personal jurisdiction over U.S. defendants, because enforcement of such judgment would violate the Due Process Clause of the Fifth Amendment. In this case, such jurisdiction was plainly lacking. Because LICRA and UEJF have not – and could not – demonstrate that by operating a website hosted in the U.S. and targeted at U.S. citizens, Yahoo! purposefully availed itself of the privilege of doing business in France, there is no basis on which to conclude that French courts can subject Yahoo! to their jurisdiction. And even if LICRA and UEJF could somehow demonstrate the requisite minimum contacts – and they could not – the French court's exercise of personal jurisdiction over Yahoo! was inconsistent with the requirements of due process because it was neither "reasonable" nor consistent with "fair play and substantial justice." Indeed, under the French court's theory of personal jurisdiction, every American company with an Internet presence would be subject to the personal jurisdiction of every foreign country in the world. Such a result would not only be inconsistent with governing law, it would be devastating to the development of the Internet. Individuals or companies who fear being haled into the courts of these countries will almost certainly

self-censor the material placed on the Internet, reducing it from content as "diverse as human thought" to that which satisfies the lowest common denominator of the most restrictive countries in the world.

Foreign judgments have no independent legal force in the United States, and are recognized by U.S. courts simply as a matter of "comity." *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997); *In re Stephanie M.*, 7 Cal.4th 295, 314 (1994). As the U.S. Supreme Court explained in the seminal case on recognition of foreign judgments:

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

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).[3]

The law is clear, however, that a foreign judgment may *not* be enforced in U.S. courts if the foreign court lacked personal jurisdiction over the U.S. defendant. *See id.* at 202-03; *In re Stephanie M.*, 7 Cal.4th at 314 (explaining that a U.S. court should recognize a foreign judgment only where "the foreign court had proper jurisdiction"); *Bank of Montreal v. Kough*, 612 F.2d 467, 470-71 (9th Cir. 1980) (California courts will not enforce foreign judgment where the foreign court did not have personal jurisdiction

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3/ In a diversity suit, state law governs the question of whether a foreign judgment should be recognized. *Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1246 (N.D. Cal. 1977), *aff'd*, 612 F.2d 467 (9th Cir. 1980). The courts of California look to federal

over the defendant); *Restatement (Third) of Foreign Relations Law of the United States* § 482(1)(a) (1987) ("A court in the United States may not recognize a judgment of the court of a foreign state if . . . the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421");[4] *Wilson*, 127 F.3d at 810 n.4 & 5 (9th Cir. 1997) (same). In short, "[i]t can hardly be gainsaid that enforcement will not be permitted under California law if due process was lacking when the foreign judgment was obtained." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995).

In determining whether a foreign court's exercise of personal jurisdiction over a U.S. defendant was consistent with U.S. due process standards, courts begin with the traditional due process test normally used to determine personal jurisdiction *within* the United States. *See, e.g.*, *Kough*, 612 F.2d at 470-71 (applying "American principles of jurisdictional due process" to determine whether Canadian court had personal jurisdiction such that its judgment should be enforced in California)*; Koster v. Automark Industries, Inc.*, 640 F.2d 77, 79 (7th Cir. 1981) ("Whether it be Wisconsin or the Netherlands, the standard of minimum contacts is the same."); *de la Mata v. American Life Ins. Co.*, 771 F. Supp. 1375, 1384 (D. Del. 1991) ("federal courts have held that the issue of whether a foreign court had jurisdiction over a United States national should be

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common law in determining whether to enforce foreign judgments. *See, e.g.*, *In re Stephanie M.*, 7 Cal.4th at 314 (1994) (citing *Hilton* and other federal cases).

4/ As this Court has noted, "[a]lthough the Restatement is not binding authority, it does provide valuable guidance." Order Denying Motion to Dismiss at 9.

determined by our own standards of judicial power as promulgated by the Supreme Court under the due process clause of the Fourteenth Amendment").

The traditional test for determining whether the exercise of personal jurisdiction comports with due process has two distinct components. First, the court must ask whether the defendant "purposefully established minimum contacts within the forum state." *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985); *International Shoe Co. v. Washington Office of Unemployment Compensation and Placement*, 326 U.S. 310, 320 (1945). Next, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 316). If a court concludes either that the requirement of minimum contacts has not been met, or that assertion of jurisdiction would be essentially unfair, it must conclude that personal jurisdiction is lacking.[5]

A. The Maintenance by an American Company of a Website, Directed at U.S. Citizens, Cannot as a Matter of Law Rise to the Level of

5/ Courts may exercise either "general" or "specific" jurisdiction over a defendant. When a defendant's contacts with the forum are "continuous and systematic," general jurisdiction attaches and the defendant may be sued in the forum even if the cause of action is unrelated to the defendant's activities in the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). When a defendant's contacts with the forum are less substantial, it may still be subject to specific jurisdiction if the cause of action arises out of its contacts with the forum and if those contacts are sufficient to make the exercise of jurisdiction comport with due process. This case plainly does not implicate general jurisdiction, because Yahoo! does not conduct any business in France, much less the continuous and systemic conduct necessary to establish general jurisdiction. Nor is there specific jurisdiction here; as explained below, the actions of American companies such as Yahoo! that set up websites that may be accessed by citizens of other forums is not sufficient to give rise to specific jurisdiction.

Purposefully Establishing Minimum Contacts with a Foreign Country.

As the Supreme Court has made clear, in order to find that a defendant has sufficient contacts with a forum to subject itself to personal jurisdiction "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *see also World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997). As this Court recognized in its Order Denying Motion to Dismiss, one way that the purposeful availment requirement can be satisfied is by the "effects test." *Id.* at 5-6. To satisfy the effects test, a defendant must have "engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). As this Court explained, proper application of this test requires a court to consider "whether there is 'express aiming' of the conduct, i.e., targeting of a forum resident." Order Denying Motion to Dismiss at 5.

Although the conduct at issue in this case occurred on a website, the essential analysis remains the same. As the Ninth Circuit has recognized, although "[a]pplying principles of personal jurisdiction to conduct in cyberspace is relatively new," *Panavision International, LP v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998), the same

basic principles apply.[6] Thus, the fundamental question remains whether the defendant has "*purposefully* (albeit electronically) directed his activity in a *substantial* way to the forum state." *Cybersell*, 130 F.3d at 418 (emphasis added). While "'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet,'" *Cybersell*, 130 F.3d at 419 (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), the focus remains on whether or not the activity conducted over the Internet (whatever its volume or nature) can be said in a meaningful sense to have been directed *at the forum* in question.[7]

6/ Thus, in deciding questions of personal jurisdiction among state courts in the United States based on Internet activities, courts have "looked to the 'the level of interactivity and commercial nature of the exchange of information that occurs on the Website' to determine if sufficient contacts exist to warrant the exercise of jurisdiction." *Cybersell*, 130 F.3d at 418 (quoting *Zippo*, 952 F. Supp. at 1124).

7/ The effects test is plainly not satisfied here since Yahoo's conduct was clearly not aimed at the plaintiffs in France and, as even the French court recognized, the "harm" of displaying material that is unlawful in France was "unintentional [in] character." Interim Court Order, No. RG 00/05308 and 00/05309 (The County Court of Paris, rel. May 22, 2000). This case is thus distinct from a case in which a defendant deliberately and substantially consumates transactions in the forum state, such as in *Zippo*, 952 F. Supp. at 1125, where the defendant was found knowingly to have engaged in electronic commerce with individuals and service providers in the forum state, or in *Compuserve Inc. v. Patterson*, 89 F.3d 1257, 1264-66 (6th Cir. 1996), where the defendant "deliberately and repeatedly" transmitted files to the forum state. *See also Cybersell*, 130 F.3d at 419 (declining to find jurisdiction where there was no evidence that anyone in the forum state other than plaintiff had accessed defendant's website, no one in forum state had signed up for defendant's services, no contracts had been enterred into or sales made in the forum state, and no messages had been received over the Internet except from plaintiff); *V'Soske, Inc. v. Vsoske.com*, 2001 U.S. Dist. LEXIS 6675 (S.D.N.Y. 2001) (declining to find jurisdiction over Irish defendant where plaintiff failed to show evidence of a single New York sale resulting from the website).

Although the individualized nature of the jurisdictional inquiry makes it difficult to draw hard and fast lines between conduct that is purposefully directed at a forum in a substantial way, and conduct that is not, courts have made clear that the mere maintenance of a U.S. website is insufficient to confer personal jurisdiction outside the United States. As the Ninth Circuit explained, "'[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, is not an act purposefully directed toward the forum state.'" *Cybersell*, 130 F.3d at 418 (quoting *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997)). In short, an entity must do "'something more'" than merely "posting a website on the Internet" to subject it to jurisdiction in any forum where someone might happen to access the site. *Panavision*, 141 F.3d at 1322 (quoting *Cybersell*, 130 F.3d at 418); *see also, e.g., GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (noting that "personal jurisdiction surely cannot be based solely on the ability of District [of Columbia] residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants in the District" and declining to adopt an "expansive theory" of personal jurisdiction on the Internet that "would shred the[] constitutional assurances" of "predictability . . . that allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.") (internal quotation marks and citations omitted).

The fact that individuals in other countries can access a U.S. company's website does not alter the analysis. As the Supreme Court has made clear, the actions of parties other than the defendant in a foreign forum cannot, standing alone, confer jurisdiction over a defendant in that forum. *See, e.g., Burger King*, 471 U.S. at 474-75 ("[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state"). Indeed, the searching out by individuals in other countries of content deemed offensive in that country is precisely the type of "random, fortuitous or attenuated contacts" caused by "the unilateral activity of another party or third person" on which jurisdiction can not be based. *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted); *Panavision*, 141 F.3d at 1320.

This is true even if it is *foreseeable* to a U.S. company that its website might be visited by persons outside the United States. As the Supreme Court has made clear, "[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there . . . , the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (emphasis in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295 (1980)).[8] Instead, "the forseeability that is critical to the due process analysis . . . is that the defendant's conduct and

8/ Similarly, the "mere likelihood that a product will find its way into the forum State" is not enough. *World-Wide Volkswagen*, 444 U.S. at 297.

connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

For these reasons, this case presents a paradigmatic example of conduct that is not sufficient to confer jurisdiction in another country. Yahoo!, Inc.'s website targets a U.S. audience. Its websites are in English, and its sites all carry the domain suffix ".com," generally indicating a U.S. company, instead of the suffix ".fr" which is used for domains in France. *Cf. Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F. Supp. 2d 1105, 1111-12 (N.D. Cal. 1999) (California court had jurisdiction over New Zealand defendant who sought out a ".com" domain name in the U.S. rather than a ".nz" domain to target the "lucrative American market"). Yahoo! has not invoked the protection of France's laws in the conduct of its business. Indeed, to the contrary, Yahoo! has incorporated a separate subsidiary to do business in France which has established a French website (http://www.yahoo.fr) in French, that complies with French law. In short, Yahoo! has done nothing more than merely "posting a website on the Internet" in the United States. *Panavision*, 141 F.3d at 1322. Because Yahoo!, Inc. did not purposefully avail itself of the privilege of conducting business in France and "there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved in [the foreign state]," *Cybersell*, 130 F.3d at 419, the French court's exercise of personal jurisdiction over Yahoo! violates the first prong of the minimum contacts test.

It is particularly critical to *amici* that this Court recognize that this principle – that the mere ability of foreign actors to access the website of a U.S. company does not

render the U.S. company subject to the personal jurisdiction of the foreign company's courts – applies with particular force in cases such as this one. *Amici* collectively represent a wide range of U.S. entities that either engage in commerce or facilitate commerce and other activity on the Internet. Outside the Internet context, the legal principle that personal jurisdiction may only arise from conduct that is purposefully targeted at a jurisdiction "gives a degree of predictability to the legal system that allows [*amici* and their members] to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297 . That need for certainty takes on even greater force in the context of the Internet. Even the prospect of being haled into court in far-flung countries will inevitably have a chilling effect not only on U.S. citizens' and companies' exercise of their First Amendment rights, but also their willingness and ability to "take their businesses on the web." For *amici*, the lack of certainty that would arise if the French court's judgment was upheld would be debilitating.

B. The French Court's Exercise of Jurisdiction Does Not Comport with "Traditional Notions of Fair Play and Substantial Justice."

In addition to assessing whether there have been "minimum contacts" with a forum, U.S. courts are *also* obliged to determine whether the exercise of jurisdiction would be "reasonable" and comport with "fair play and substantial justice." *See Burger King*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered

in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"); *id.* at 477-78 ("Nevertheless, minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities"); *Panavision Int'l,* 141 F.3d at 1322 ("Even if" the requirement of purposeful minimum contacts is met, court must still ask whether exercise of jurisdiction is "reasonable, *i.e.* whether it comports with "fair play and substantial justice"); Order Denying Motion to Dismiss at 10. As explained below, exercise of jurisdiction in case such as this would be fundamentally unreasonable.

In the domestic context, the inquiry into "fair play and substantial justice" requires courts to consider several factors, including

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

Order Denying Motion to Dismiss at 11 (quoting *Bancroft & Masters*, 223 F.3d at 1088); *Burger King*, 471 U.S. at 477 (courts must "evaluate the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the several States in furthering fundamental substantive social policies.") (internal quotations and citations

omitted); *see also World-Wide Volkswagen*, 444 U.S. at 292; *Core-Vent Corp. v. Nobel Industries, AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993). These factors strongly militate against foreign courts' assertion of personal jurisdiction in cases, like this one, which are premised upon the mere accessibility of a website.

With respect to the first factor, the degree of purposeful interjection, as this Court has recognized, "'[e]ven if there is sufficient 'interjection' into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the reasonableness prong.'" Order Denying Motion to Dismiss at 11 (quoting *Panavision*, 141 F.3d at 1323). Where a U.S. company has simply created a website that is, like all websites, accessible from around the world, the degree of interjection into a foreign forum is minimal.

The second and third factors – the defendant's burden of litigating in the forum and the extent of conflict with the sovereignty of the defendant's state – also weigh heavily against the assertion of personal jurisdiction by foreign courts in cases such as this one.[9] First, the potential burdens on Yahoo! and companies like the Amici's

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9/ As both the Supreme Court and the Ninth Circuit have recognized, it is much more difficult to demonstrate that exercise of jurisdiction would meet these requirements in the international context. Indeed, the Supreme Court has held that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have *significant weight* in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Industry Co.. Ltd. v. Superior Court of California*, 480 U.S. 102, 114 (1987) (emphasis added). The Ninth Circuit has similarly concluded that "a foreign nation presents a higher sovereignty barrier than another state within the United States" and the fact that the plaintiff in the initial suit is a non-U.S. citizen "tends to undermine the reasonableness of asserting personal jurisdiction." *FDIC v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1444 (9th Cir. 1987).

members (not to mention individuals, non-profits, and similar organizations which post material on the web) are enormous. As an initial matter, it is far more burdensome for a California defendant to be haled into court in France than in, for example, Kansas or New York. Although modern technology alleviates the burden, that is outweighed by the fact that the potential burden is not confined to litigating in a single foreign country. Because of the nature of the worldwide web, a U.S. company's website can be accessed from almost anywhere in the world. "Because the Internet has an 'international, geographically-borderless nature,' with the proper software every Website is accessible to all other Internet users worldwide." *ACLU*, 217 F.3d at 169 (citations omitted). Accordingly, businesses face the crippling prospect of defending lawsuits not simply in one inconvenient forum, but in *every* far-flung forum on the globe. *See id.* at 168-69 ("Although estimates are difficult because of the Internet's rapid growth, it was recently estimated that the Internet connects over 159 countries and more than 109 million users.").

The change of venue rules that mitigate this concern in the domestic context do not apply to a case such as the underlying suit that is brought in a foreign country. Although a case brought in federal district court in Texas against a California defendant could be transferred to a California district court "[f]or the convenience of parties and witnesses, in the interest of justice," 28 U.S.C. § 1404(a), this remedy is not available in the international context. *See Burger King*, 471 U.S. at 477 (noting that in the domestic

context, a finding that exercise of jurisdiction violates due process could be obviated if "a defendant claiming substantial inconvenience may seek a change of venue.").

Second – and critically – as this case illustrates it is far more likely that the laws of foreign countries will conflict with the laws and policies of California than would the laws of a sister state. These conflicts increase the burden on the defendant of litigating in the foreign forum and exacerbate the conflicts with the sovereignty of the defendant's home state. Despite our system of dual sovereignty, the United States is one nation with a common legal tradition and commonly bound by the supremacy of the U.S. Constitution and federal law. *See, e.g., Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867) ("'For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and . . . members of the same community . . . .'") (quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849)). The U.S. Constitution and federal laws limit how wide-ranging and disparate the policies of the several states may be with regard to commerce and speech on the Internet. For example, the First and Fourteenth Amendments circumscribe the ability of states to regulate speech on the Internet. *See, e.g., ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Perhaps even more significantly for companies attempting to conduct business over the Internet, the "dormant commerce clause" doctrine of federal constitutional law prevents states from imposing inconsistent regulatory obligations that would burden interstate commerce over the Internet. *See id.* at 1162; *see also American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168-69

(S.D.N.Y. 1997) (applying dormant commerce clause to invalidate state regulation and noting that "[t]he unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.").[10]

There is no limit, however, to how different the laws of foreign countries may be from our own, or from each other, and foreign courts may freely disregard the fact that their laws substantially burden Internet commerce or conflict with the "fundamental substantive social policies" of the United States, including the First Amendment. Indeed, in the underlying case LICRA and UEJF conceded that the speech at issue was protected by the First Amendment, but nonetheless convinced a French court that Yahoo! must censor that speech in order to comply with French law. And, of course, the choice of law principles that might otherwise resolve these conflicts are inapplicable in this context. Although a New York court exercising jurisdiction over a California defendant may decide under its choice-of-law rules to apply California law to the dispute, there is no similar mechanism that would alleviate the harm to a defendant caused by application of foreign, rather than U.S., law in a foreign country. The burden of learning about and attempting to comply with the laws of every foreign nation – let

10/ The federal Communications Decency Act also limits the liability of Internet service providers like Yahoo! for content posted on their sites by individual users. 47 U.S.C. § 230(c)(1).

alone actually going into court to defend lawsuits there – would be devastating to large and small companies alike.

The fourth factor, the forum state's interest in adjudicating the dispute, is insufficient to overcome the other factors and support the exercise of jurisdiction. Here, for example, the activity took place in the United States, not France, and was not directed at France. Indeed, it was only the voluntary actions of French citizens – in deliberately searching out this content on the web and inviting it onto their computers with the volitional click of a mouse – that caused the material to have any effect in France at all.

The fifth factor, consideration of the most efficient judicial resolution of the controversy, also militates against the French court's exercise of jurisdiction in this case. If it was proper for the French court to exert jurisdiction, it would be equally proper for every other country whose citizens can access yahoo.com also to assert jurisdiction. The result would be well over a hundred countries simultaneously exercising jurisdiction over Yahoo!'s U.S.-based websites, which would not only be staggeringly inefficient from a judicial economy perspective, but would also carry with it a grave danger of the court's reaching conflicting judgments.

The sixth and seventh factors – the importance of the forum to the plaintiff's interest in convenient and effective relief and the existence of an alternative forum – are either neutral or insufficient to outweigh the other factors militating against jurisdiction.

Finally, in evaluating whether the exercise of jurisdiction is "reasonable" and consistent with "fair play and substantial justice" in the context of the Internet, it cannot be emphasized enough that if persons or businesses are in danger of being haled into court in any country in the world and subject to its laws simply because a user can passively view the content placed on a site, the Internet will necessarily be reduced to material that satisfies the most restrictive laws throughout the world. *See ACLU v. Reno*, 217 F.3d at 175 (noting danger that regulation of the Internet could "essentially require every Web communication to abide by the most restrictive community's standards."). The People's Republic of China could purport to exercise jurisdiction over Yahoo! based news reporting about the pro-democracy movement in that country accessible through Yahoo!'s site. America Online could be haled into court in Saudi Arabia because content posted on the personal websites of its subscribers offends Islamic law. Barnes & Noble's online division might be held liable in Iran for offering for sale Salman Rushdie's "The Satanic Verses." A radio station in Los Angeles offering live audio feed on its website might be prosecuted anywhere in the world where sexually explicit lyrics are considered unlawful. Such an outcome would plainly be *unreasonable.*

This not mere apocalyptic rhetoric. Threats to free expression are widespread in today's world. A recent study of press freedom around the world, for example, found that 63 percent of countries restrict print and electronic media, and that some 80 percent of the world's people live in nations with less than a free press. *See* Leonard R.

Sussman, *Censor Dot Gov: The Internet and Press Freedom 2000* (Freedom House 2000) (available at www.freedomhouse.org/pfs2000/sussman.html).

Nor is censorship cabined to countries such as China and Saudi Arabia. Even countries like the United Kingdom - which have laws more akin those of the United States -- often have different, and less speech-friendly, rules on libel and defamation. *See, e.g., Telnikoff v.Matusevitch*, 702 A.2d 230, 347 Md. 561 (1997) (declining to enforce British libel judgment on grounds that it conflicted with First Amendment); *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (1992) (same). A recent controversy involving the online bookseller Amazon.com illustrates the potential dangers. The incident concerned a book called "A Piece of Blue Sky," which criticized the scientology religion founded by L. Ron Hubbard. *See* K. Wimmer & J. Berman, *United States Jurisdiction to Enforce Foreign Internet Libel Judgments*, *in* Pike & Fischer's Internet Law & Regulation (available at http://internetlaw.pf.com). In 1995, a British court ruled that the book defamed Hubbard and issued an injunction prohibiting its distribution. When Amazon learned of the injunction in 1999, it removed the book from its catalog, making it unavailable to customers in the United States (and all other countries served by Amazon) as well as in the United Kingdom. Amazon's decision provoked a storm of controversy, with many asserting that "Amazon's actions had the effect of importing the British injunction into foreign jurisdictions in which it had no proper legal effect." *Id.* Although Amazon eventually changed course, this sort of self-

censorship is plainly a danger in the absence of clear rules on the enforceability of foreign judgments in this context. *Id.*

For these reasons, clear rules on the exercise of personal jurisdiction are particularly necessary. Absent the certainty that comes with a clear rule that American entities will not be subject to the jurisdiction of myriad foreign courts whose substantive rules are different from our own (and from each other) every time something is posted on a U.S. website, the vibrancy of the Internet as a forum for speech and commerce will be destroyed. "The unique burdens placed upon one who must defend oneself in a foreign legal system" and the competing demands of substantive laws render stretching the long arm of personal jurisdiction over international borders in this context unconstitutional. *See Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 at 114. This court thus should recognize that, quite apart from the fact that Yahoo! has not purposefully established minimum contacts with France, a finding of personal jurisdiction against Yahoo! (or any other similarly situated entity) would be unreasonable and inconsistent with fair play and substantial justice.

II. THE FIFTH AMENDMENT ALSO PROHIBITS ENFORCEMENT OF FOREIGN JUDGMENTS WHERE, AS HERE, THE FOREIGN COURT DID NOT HAVE PRESCRIPTIVE JURISDICTION OVER THE CONDUCT AT ISSUE.

Amici also note a second jurisdictional issue presented by this case: even if a foreign court properly exercises personal jurisdiction over a given defendant, a foreign judgment should not be enforced if the foreign legal system lacked prescriptive

jurisdiction over the subject matter of the conduct at issue. *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997); *Restatement (Third) Foreign Relations Law of the United States* § 482 (2) (a) ("A court in the United States need not recognize a judgment of a court of a foreign state if . . . the court that rendered the judgment did not have jurisdiction of the subject matter of the action.").[11]

Customary international law holds that a state only has limited jurisdiction to proscribe conduct outside its territory. *Restatement (Third) Foreign Relations Law of the United States* § 402(c); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994) (under international law, a state may assert jurisdiction over foreigners for extraterritorial acts "that may impinge on the territorial integrity, security, or political independence" of the state); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, *J.*, dissenting) ("'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe.") (citing *Restatement*). These limits on prescriptive jurisdiction stem from the notion of territorial sovereignty, which lies at the heart of the current system of international law. *See, e.g.,*

11/ The limits on prescriptive jurisdiction are separate and independent from the limits on a court's personal jurisdiction or jurisdiction to adjudicate. *See Restatement (Third) of Foreign Relations Law of the United States* § 421, comment a ("The fact that an exercise of jurisdiction to adjudicate in given circumstances is reasonable does not mean that the forum state has jurisdiction to prescribe in respect to the subject matter of the action."). Where a legal system lacks the jurisdiction to prescribe conduct, its courts lack the jurisdiction to enforce the proscriptions, whether or not those courts have personal jurisdiction over a defendant. *Id.* § 431(1) ("A state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403.").

Reid v. Covert, 354 U.S. 1, 58-61 (1957) (Frankfurt, *J.*, concurring) (describing historical evolution of notions of territorial sovereignty and noting that "[t]he emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights."); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 386_87 (1818) (holding that "the jurisdiction of a State is coextensive with its territory"); *see also* Harold G. Maier, "Jurisdictional Rules in Customary International Law", in *Extraterritorial Jurisdiction in Theory and Practice* 64 (K. Meessen, ed. 1996) ("Modern customary international legal limitations on a nation's exercise of extraterritorial authority have their roots in those fundamental principles of territorial sovereignty that still inform much of modern international law."). The government of one country is generally not allowed to reach out and control the conduct of persons within the borders of another country, for to do so would infringe on the sovereignty of the regulated nation. As Chief Justice Marshall wrote:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, *C.J.*); *see also* United Nations Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty ("No State

has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.").

Not only does extraterritorial regulation infringe upon the sovereignty of other countries, it infringes upon the fundamental rights of that country's citizens. It is a basic principle of due process that governments "deriv[e] their just Powers from the Consent of the Governed." Declaration of Independence, para. 2 (U.S. 1776). The government of France, for example, has no "just power" over persons residing in the United States because those citizens have not consented to be governed by France. Thus, although the citizens of France, through the government of France, are free to make the choice for *themselves* that it is worth sacrificing some of their freedom of speech to protect other societal values, they are not free to make that choice for the citizens of the United States.

These concerns are not unique to the Internet, although they apply with particular force in this context. International law scholars have long recognized the serious problems posed by nations' attempts to enforce their laws extraterritorially. A 1987 study commissioned by the International Chamber of Commerce, for example, found that "extraterritorial applications of national laws and policies impose significant costs on some sectors of international business." *The Extraterritorial Application of National Laws* 3 (D. Lange & G. Born, eds. 1987). The International Chamber of Commerce committee identified "a number of situations" in which companies were subject to inconsistent obligations, that is, where, national governments had attempted to require companies to take actions in foreign countries that were "*prohibited* by those foreign

countries," placing the companies in a dilemma where they were forced to disobey at least one country's laws and possibly incur substantial fines and civil penalties. *Id.* In addition, uncertainty over what nations' laws might be applied to a particular course of conduct was found to "discourage[] international businesses from engaging in productive trade and investment." *Id.* The International Chamber of Commerce found that "[t]he overall impact of the extraterritorial application of national laws is to discourage or prevent useful economic activity in the form of international investment, and to reduce the profitability of existing investment." *Id. See also generally* Kristina M. Reed, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce,* 13 Transnational Lawyer 451 (2000).

These dangers are heightened in the Internet context, where material posted anywhere in the world is available substantially everywhere else in the world, and companies and individuals have no reasonable way to limit the availability of material they post on the web. *See, e.g., ACLU v. Reno*, 217 F.3d at 175 ("[O]f extreme significance is the fact . . . that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users."); *Macquarie Bank Ltd.*, [1999] NSWSC 526, ¶ 12 ("Once published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication."). And these problems are heightened even further when the business conduct in question involves trade in information, as so much business on the Internet does, because the mere threat of liability may "chill" speech.

An Australian court, in an exercise of admirable self-restraint, recently recognized these principles in declining to issue an injunction against material posted on the Internet by a person in the United States that was defamatory under Australian law. *See Macquarie Bank Ltd. v. Berg* [1999] NSWSC 625 (New South Wales Supreme Ct. 2 June 1999). The court first noted that the global nature of the Internet means that "[o]nce published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication." *Id.* ¶ 12. The court went on to explain that:

> The difficulties are obvious. An injunction to restrain defamation in NSW [New South Wales, one of the states of Australia] is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that, according to the law of the Bahamas, Tashakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.

Id. ¶ 14.

In light of the sovereignty and fundamental rights concerns described above, however, customary international law has narrowly circumscribed the circumstances in which a nation may exercise extraterritorial prescriptive jurisdiction to those situations in which the nation has a vital interest in protecting its own interests or citizens, notably where the conduct "has or is intended to have substantial effect within its territory."

Restatement (Third) Foreign Relations Law of the United States § 402(1)(c). And, in light of the disfavored nature of extraterritorial control, even when conduct would have a substantial effect within a nation, that nation's power is limited by the requirement that the exercise of its prescriptive jurisdiction not be "unreasonable." *See id.* § 403(1); *see also Vasquez-Velasco*, 15 F.3d at 839 (citing *Restatement*). As explained below, these standards must be enforced with particular strictness in the Internet context, because the uniquely global nature of the Internet makes the hazard of inconsistent laws and regulations particularly threatening to American individuals, organizations, and companies.

A. The Maintenance by an American Company of a Website, Directed at U.S. Citizens, Does Not Indicate an Intent to Have a Substantial Effect in a Foreign Country, Nor Does it Demonstrate the Existence of Such an Effect.

As explained above, the threshold question in deciding whether foreign legal systems have prescriptive jurisdiction over conduct occurring outside their boundaries is whether the conduct was intended to, or did, have a substantial effect in the foreign country. The first question – whether a party's conduct was intended to have an effect in a foreign jurisdiction – is similar to the question whether the conduct in question was "expressly aimed" at the jurisdiction. *See* pp. 12-15, *supra*. In the same way that a U.S. company cannot be said to be aiming at any given foreign jurisdiction when it merely posts a website on the Internet, it cannot be said that posting a website demonstrates that the U.S. company intended an effect in doing so.[12]

Nor could a court conclude that the mere presence of material posted on a U.S.-based website (assuming, as is the case here, that the site is not targeted a foreign forum) causes "substantial effects" abroad. In determining whether extraterritorial conduct actually has substantial effects within a territory, courts consider a variety of factors, including: whether the entity engages in substantial business within the territory; whether a large number of a business' customers are residents of the territory; and whether the entity's activities *within* the territory "materially support" the

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12/ In this case, "intent to have a substantial effect" is not at issue, as the French court conceded that the "harm" of displaying material that is unlawful in France was "unintentional [in] character." Interim Court Order, No. RG: 00/05308 and 00/05309 (The County Court of Paris, rel. May 22, 2000).

extraterritorial activity complained of. *Atlantic Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 193 (2d Cir. 1998); *National Transp. Safety Bd. v. Carnival Cruise Lines*, Inc., 723 F.Supp. 1488, 1491 (S.D. Fla. 1989). "Transactions with only remote and indirect effects in the [territory] do not qualify as substantial." *North-South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996). Thus, for example, incidental use of the telecommunications system of a country alone does not suffice. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir.1996) (holding, in deciding whether U.S. law should apply extraterritorially to conduct carried out abroad, that the mere peripheral "use of the mail and wire in the United States" as part of course of conduct outside the U.S. does not suffice to show substantial effects in the U.S.). On the other hand, conducting substantial portions of a business in a forum and intentionally soliciting business from forum residents are sufficient. *See, e.g., People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850-51 (N.Y. Supr. Ct. 1999).

Each of the factors that courts consider in determining whether there is a substantial effect focus on the activities of the company within that country. In this case, Yahoo!, Inc. does not operate in France. It operates a website based in the United States, targeted at U.S. citizens, in the English language. It has established a *separate* French subsidiary that operates a site from France, in French, targeted at French citizens, that complies with French law. Presumably for this reason, there is no mention in the French court's decisions of "substantial effects" within France. Indeed, the only "harm" the court recognizes is the harm purportedly suffered by LICRA and UEJF, who

deliberately sought out and viewed Yahoo!'s U.S. site. In particular, the court noted that an officer of the court confirmed that a French user could access the Yahoo! site and concluded that "by permitting [Nazi] objects to be viewed in France and allowing surfers located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage to be suffered by LICRA and UEJF, both of whom are dedicated to combating all forms of promotion of Nazism in France." May 22, 2000 Order.

Moreover, the only allegation of effects within the French territory at all are the result of deliberate actions taken by LICRA and UEJF themselves. Yahoo!, Inc. did not reach out and impose upon the citizens of France material that the French court found objectionable.[13] As courts have recognized, "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." *ACLU v. Reno*, 929 F. Supp. at 844. Instead, an individual must seek out the material at issue. But that alone cannot suffice to allow any country in the world to ban the material that is sought out in this manner. In the same way that "[t]he unilateral activity" of one in a foreign state cannot show that a *U.S.* entity had contacts within the foreign state such that exercise of personal jurisdiction over the U.S. entity is appropriate, *Burger King*, 471 U.S. at 474-75, the unilateral activity of an actor in a foreign state cannot demonstrate that a U.S. entity caused substantial effects within a foreign state so that

prescriptive jurisdiction attaches. Thus, in this case, Yahoo!, Inc. did not cause any effect at all to be felt in France. It was the actions of the French student unions themselves that caused even the minimal effects they alleged. In such circumstances, it cannot be said that the U.S. entity's conduct in posting material on a U.S. site can be subject to the prescriptive jurisdiction of a foreign court.

To hold otherwise would literally allow every other country in the world to ban any image, any product, any activity whatsoever found on a U.S.-based website that offends the norms of that country. Under the French court's theory of jurisdiction, foreign residents (or governments) are free to surf the Internet, diligently searching out anything they find offensive. Once they manage to find it, a claim could be brought in the courts of that country that the ability of a foreign resident to search out material that is offensive confers jurisdiction on the foreign country to ban it. Simply to state the proposition is to demonstrate why it is untenable. Any government could effectively impose a ban on any material it found offensive simply by searching for, and finding, such material on the Internet, regardless of where it is posted, or at whom it is targeted.

B. France's Exercise of Prescriptive Jurisdiction Is Also Unreasonable

Even where extraterritorial conduct has a substantial effect within a nation's territory, that nation should not exercise prescriptive jurisdiction if it would be "unreasonable." *Restatement (Third) of Foreign Relations Law of the United States* § 403. Whether exercise of jurisdiction is unreasonable is determined by evaluating "all

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13/ To the contrary, Yahoo! took reasonable measures to do the opposite – providing

relevant factors," including the "link of the activity to the territory of the regulating state, . . . the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, . . . , the character of the activity to be regulated, . . . the importance of the regulation to the international political, legal, or economic system, [and] the likelihood of conflict with regulation by another state." *Id.* § 403(2).

It is abundantly clear that France's exercise of prescriptive jurisdiction in this case is unreasonable. There is no question that the U.S. has a paramount interest in the activity in question, which occurs within its territorial boundaries and is lawful here. The activity at issue is fully protected by the First Amendment, and the United States has an overriding interest in protecting such activity.[14] *See, e.g., Telnikoff v. Matusevitch,* 702 A.2d 230, 347 Md. 561 (1997) (declining to enforce British libel judgment on grounds that it conflicted with First Amendment); *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (1992) (same).

In contrast, the interest of foreign forums in cases such as this is, at best, nominal. *See Restatement (Third) of Foreign Relations Law of the United States* § 403(2)(g). Indeed, here the activity took place outside France, and was plainly directed at the U.S., not France. Because Yahoo has incorporated a separate French subsidiary to serve the

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a separate French site that did not contain material banned by French law.

14/ This is so despite the fact that most Americans rightly consider pro-Nazi speech deplorable, for the First Amendment protects even speech that we would rather not hear.

French market, and that subsidiary complies with French law, there is virtually no connection between Yahoo! Inc. and France.

Moreover, foreign countries have several less restrictive means of protecting their interests, without attempting to regulate extraterritorial conduct. First, they can enforce their laws against their own citizens and other persons within their territory, punishing them for accessing materials deemed harmful to civil society. Second, although it is currently impossible for a person posting material on the Internet effectively to restrict access to the material based on the geographic location of the reader, *see, e.g., ACLU v. Reno*, 217 F.3d at 175 ("[O]f extreme significance is the fact . . . that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users."), it is much more possible (albeit difficult and possibly politically unpopular) for a country to limit its own citizens' access to the Internet. Some countries – such as China and Saudi Arabia – "maintain control through government servers that censor incoming news and information." Sussman, *Censor Dot Gov: The Internet and Press Freedom 2000, supra*, at 2. Citizens are only allowed to access the internet through the government servers, and "[p]enalties including imprisonment await citizens who use faxes, cell phones, or codes to circumvent the government ISP [Internet Service Provider]." *Id.* A country such as France that found the extreme methods used by China and Saudi Arabia unpalatable could also explore somewhat less restrictive measures, such as requiring all private French Internet service

providers or users to install blocking software that would screen for particular words.[15] In short, France could take substantial steps to prevent its citizens from being exposed to materials it considers "dangerous" without exerting extraterritorial jurisdiction over U.S. websites.

Nor is the regulation important to the operation of the "international political, legal, or economic system." *See Restatement (Third) of Foreign Relations Law of the United States* § 403(2)(e). Indeed, extraterritorial regulation of the Internet (when not supported by treaties or mutual agreement among nations) is detrimental to the international legal, political, and economic system. It will impede the economic development of the Internet, stifle political discourse, and subject persons around the world to unpredictable legal requirements. Moreover, the international political, legal, and economic system is currently working to deal with transnational problems like the one presented by this case through the treaty process. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law (Oct. 20, 1999) (available at http://www.hcch.net/e/conventions/draft36e.html).

III. CONCLUSION

For the reasons stated above, the court, in ruling on the First Amendment issues, should also be aware of the broader context and the critical jurisdiction issues posed by

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15/ *Amici* find censorship of any sort repugnant, and do not mean to suggest that they encourage or condone in any way any censorship of the Internet. Instead, *amici* merely

this and similar cases, and the threat to the Internet that the lack of clear rules regarding personal and prescriptive jurisdiction would pose.

point out that countries that do engage in censorship do not have to regulate extraterritorially to do so.

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Respectfully Submitted,

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