

INTERNATIONAL LAW

Recent 'Yahoo!' Ruling

AMERICAN COMPANIES and litigators should scrutinize the personal jurisdiction and ripeness issues that 11 judges of the 9th U.S. Circuit Court of Appeals addressed en banc in January. *Yahoo! v. La Ligue Contre Le Racisme et l'Antisémitisme*, 2006 WL 60670 (9th Cir. Jan. 12, 2006). The 9th Circuit denied Yahoo! Inc.'s request for a declaratory judgment on the unenforceability of potential penalties under French court orders. Those orders directed Yahoo to restrict access from French territory to Web sites selling certain Nazi memorabilia and denying the Holocaust. Yahoo's request for a merits ruling had strong support from U.S. publishing interests, leading trade associations, Internet public interest groups and free speech advocates. These amici curiae emphasized the First Amendment implications and potential chilling impact on Internet usage from failing to address and hold unenforceable the French court's orders.

Dispute began in 2000 with suit brought in Paris court

In April 2000, a French human rights group, La Ligue Contre le Racisme et l'Antisémitisme (LICRA), mailed and faxed to Yahoo's California headquarters a cease-and-desist letter objecting to the sale of Nazi memorabilia on Web sites accessible through Yahoo.com. The French Criminal Code prohibits possessing, selling or displaying Nazi items (except when part of a historical account). It also prohibits Holocaust-denial

By Peter D. Trooboff



publications or statements inciting racism or anti-Semitism. Shortly after sending the letter (and before its response deadline), LICRA and another French human rights group filed suit in the French Tribunal de Grande Instance de Paris for interim relief against Yahoo and its

9th Circuit decision leaves unresolved several procedural questions and the core First Amendment issue raised by Yahoo!

French subsidiary. The plaintiffs served Yahoo through the U.S. Marshals Service under the Hague Service Convention of 1965.

Denying Yahoo's motion to dismiss on

jurisdictional and standing grounds, the French court found in May 2000 that, although unintentional, a "wrong in the territory of France" occurred by permitting viewing from France of the publications and statements and the sale of Nazi memorabilia. The French court issued an interim order for Yahoo to "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as an apology for Nazism or contesting of Nazi crimes." These measures included removing access to certain sites and headings from directories and certain links. The French court also ordered Yahoo! France to warn Internet surfers accessing Yahoo.com through fr.yahoo.com that they must terminate their session if their searches on Yahoo.com led to sites violating French law.

Yahoo and its French subsidiary proceeded to comply with the French orders. However, the French court found in November 2000 that the measures taken by Yahoo were insufficient. After receiving expert evidence, the French court, recognizing that 100% blocking was impractical, issued another interim order that Yahoo screen as many French-based users as feasible from sites selling Nazi memorabilia or praising Nazism and also adopt an honor system to exclude others. Yahoo had three months to comply, after which it would face fines of 100,000 francs (about \$13,300 at the time) for each day of delay in achieving full compliance. Yahoo did not appeal the modified court order.

Relying on diversity jurisdiction, Yahoo filed suit in late December 2000 in the U.S. District Court for the Northern District of

California against the two French human rights groups. Yahoo asked for a declaratory judgment that the French interim court orders are not recognizable or enforceable in the United States. In early 2001, Yahoo adopted a new policy to “no longer allow items that are associated with groups which promote or glorify hatred and violence...to be listed on any of Yahoo!’s commerce properties. ... Prohibited listings include items such as Nazi militaria and KKK memorabilia.” Yahoo represented to the court that this policy shift was not in response to the French orders.

In two carefully crafted opinions, Judge Jeremy Fogel held that the court had specific personal jurisdiction over the two French human rights groups and that an actual controversy existed. He found that Yahoo faced possible retroactive damages and that some Web sites potentially objectionable under French law were still accessible to French users. The district court granted summary judgment, holding on First Amendment grounds that the French orders were unenforceable in the United States even if Yahoo could find a technological means of compliance. 169 F. Supp. 2d 1181 (N.D. Calif. 2001).

On appeal, a divided 9th Circuit panel reversed and held that the court lacked personal jurisdiction over the French parties. 379 F.3d 1120 (9th Cir. 2004). Yahoo successfully sought en banc review (399 F.3d 1010 (9th Cir. 2005)), and the 9th Circuit, sitting with 11 judges, reversed and remanded the case for dismissal without reaching the merits. Acknowledging that it was a “close question,” eight judges found that there was specific personal jurisdiction in California over the French parties; the other three found there was none. Three judges in this eight-judge majority voted to dismiss for lack of prudential ripeness, resulting in a majority (six votes) for dismissal.

The 9th Circuit analyzed the French parties’ conduct relating to the dispute under the “effects” test that the Supreme Court articulated in *Calder v. Jones*, 465 U.S. 783 (1984), concerning constitutional due process requirements for personal jurisdiction. All the judges agreed that two of the contacts would in themselves have been insufficient—the cease-and-desist letter and the service of process on Yahoo under the Hague Service Convention. The latter holding avoids a major controversy with parties to the Hague

Convention that would not consider following the treaty’s procedures in another state a legitimate basis of personal jurisdiction.

The majority found personal jurisdiction in reliance primarily on the third contact—securing two French interim orders requiring Yahoo to take actions regarding Yahoo.com in California or face substantial penalties. They interpreted *Calder* to require neither that those actions constitute wrongful conduct in California nor that the “brunt” of the suffered harm occur there. It sufficed that the French suit seeking these orders was “expressly aimed at California,” and required “significant acts” in that state where the servers for Yahoo.com are located. Also any French penalty imposed would affect Yahoo in California.

The majority stressed that the French parties had given no binding promises to refrain from enforcing the French court orders in the United States. The majority conceded that the French parties had not sought to enforce the French court orders in California, and that U.S. courts generally would not enforce foreign penalties and fines. In addition, the court gave weight to the “impact and potential impact of the French court’s orders on Yahoo!” absent a clear U.S. court ruling based on First Amendment concerns.

In separate concurring opinions, three judges held that there was no personal jurisdiction. For Judge Warren J. Ferguson, the French suits were not expressly aimed at California but rather sought only a French remedy in France. He also would have withheld judgment on abstention grounds based on the act-of-state doctrine applied to the French court orders. For Judge Diarmuid F. O’Scannlain, *Calder* requires that the French parties be shown to have committed some wrongful act in California, characterizing the majority’s avoidance of this crucial test as an “unseemly act of judicial sleight of hand.” Judge A. Wallace Tashima’s analysis hinges on his view that the French parties were only “petitioning the French court for relief under French law,” and were not, by suing U.S. parties in France, subjecting themselves to U.S. personal jurisdiction.

How the judges split on the ripeness issue

On the ripeness issue, all of the judges agreed that the First Amendment would have precluded a U.S. court from issuing as

to conduct in the United States such far-reaching and vague orders issued by the French court. In his decision for the five judges finding that the case was ripe for decision, Judge Raymond C. Fisher concluded that the French court ordered conduct in the United States, namely, making “changes to its U.S. servers and protocols” to restrict French users from having access to certain Web sites. Further, the French parties had not dismissed their suit in France. Indeed, they stated expressly in court that they would seek to enforce French-imposed penalties if Yahoo and its French subsidiary “revert to their old ways and violate French law.” These judges also regarded as unclear whether the French court order required Yahoo also to restrict access by users in the United States.

The three judges finding against ripeness on prudential (not Article III case or controversy) grounds, concluded that the French plaintiffs were satisfied that Yahoo had “substantially complied” with the French court orders. Further, the record was unclear whether the injunction would be repugnant to U.S. public policy, whether any French penalties would be unenforceable in the United States under long-standing precedent and whether any First Amendment issue remained. If the French court’s orders restricted access by only Internet users in France, then these judges saw Yahoo’s “only argument” to be “that the First Amendment has extraterritorial effect.” To this, the five other majority judges responded that Yahoo seeks only “First Amendment protection from having to compromise its domestic operations to comply with a foreign injunction.”

The 9th Circuit decision is significant because it leaves unresolved several key procedural questions and the core First Amendment issue raised by Yahoo. In the age of the Internet, U.S. courts will surely face more cases requiring the application of established constitutional principles to these new circumstances. **NLJ**

This article is reprinted with permission from the March 2006 edition of THE NATIONAL LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit almreprints.com. #005-03-06-0004