

United States Court of Appeals  
FOR THE  
Ninth Circuit

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YAHOO! INC., a Delaware corporation,

*Plaintiff-Appellee,*

v.

LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, a French association; L'UNION  
DES ETUDIANTS JUIFS DE FRANCE, a French association,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA, HON. JEREMY FOGEL, JUDGE  
CASE No. CV-00-21275-JF

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**APPELLEE'S ANSWERING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to FRAP 26.1, Plaintiff-Appellee Yahoo! Inc. identifies the following parent corporations and publicly held companies that own 10% or more of its stock: None.

# TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
JURISDICTIONAL STATEMENT .....	3
STATEMENT OF ISSUES .....	3
STATEMENT OF THE CASE .....	4
STATEMENT OF FACTS .....	6
Yahoo!'s U.S.-Based Internet Services .....	6
Yahoo! France Does Not Permit The Content At Issue .....	9
Defendants' Intentional Targeting Of Yahoo! In California .....	10
Yahoo!'s Failure To Comply With The French Judgment .....	14
The Continuing Accrual Of Fines Against Yahoo! .....	15
SUMMARY OF ARGUMENT .....	16
STANDARD OF REVIEW .....	18
ARGUMENT .....	20
I.    THE COURT PROPERLY EXERCISED SPECIFIC JURISDICTION OVER DEFENDANTS .....	20
A.    Under The Governing "Effects" Test, Defendants Purposefully Availed Themselves Of The California Forum By Targeting Yahoo! In California And Obtaining A Judgment That Impacts Yahoo! In The Forum .....	21
B.    Yahoo!'s Claim For Declaratory Relief Arose Out Of Defendants' California-Directed Activities .....	32
C.    Jurisdiction Was Reasonable .....	34
1.    Purposeful Interjection .....	35

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
2. Defendants' Burden in Litigating .....	36
3. Sovereignty .....	39
4. Forum State's Interest.....	41
5. Efficient Resolution .....	43
6. Convenient & Effective Relief for Plaintiff .....	43
7. Availability of Alternative Forum .....	44
8. Balancing the Factors .....	45
II. THE COURT CORRECTLY HELD THAT THE CASE WAS RIPE FOR DECLARATORY RELIEF .....	45
III. THE COURT CORRECTLY REFUSED TO ABSTAIN FROM ISSUING A DECLARATORY JUDGMENT.....	55
IV. CONCLUSION .....	59
CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1.....	60
STATEMENT OF RELATED CASES.....	61

# TABLE OF AUTHORITIES

Page(s)

## CASES

<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967) .....	48
<i>Al-Abood v. El-Shamari</i> , 217 F.3d 225 (4th Cir. 2000).....	57
<i>Allen v. Wright</i> , 468 U.S. 737 (1984) .....	48
<i>Americans for Medical Rights v. Heller</i> , 2 F.Supp.2d 1307 (D.Nev. 1998) .....	53
<i>ANR Pipeline Co. v. Corporation Commission of Oklahoma</i> , 860 F.2d 1571 (10th Cir. 1988), <i>cert. denied</i> , 490 U.S. 1051 (1989).....	54
<i>Asahi Metal Industry v. Superior Court</i> , 480 U.S. 102 (1987) .....	37
<i>Ashcroft v. The Free Speech Coalition</i> , 122 S.Ct. 1389, 2002 WL 552476 (2002) .....	30, 40
<i>Babbitt v. United Farm Workers National Union</i> , 442 U.S. 289 (1979) .....	47
<i>Bachchan v. India Abroad Publications Incorporated</i> , 585 N.Y.S.2d 661 (1992) .....	40
<i>Ballard v. Savage</i> , 65 F.3d 1495 (9th Cir. 1995).....	19, 34, 38, 39
<i>Bancroft &amp; Masters, Inc. v. Augusta National Inc.</i> , 223 F.3d 1082 (9th Cir. 2000).....	20, 24, 25, 32, 33, 34
<i>Bland v. Fessler</i> , 88 F.3d 729 (9th Cir.), <i>cert. denied</i> , 519 U.S. 1009 (1996) .....	47, 48
<i>Brainerd v. Governors of the University of Alberta</i> , 873 F.2d 1257 (9th Cir. 1989).....	27
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985) .....	27, 34
<i>Calder v. Jones</i> , 465 U.S. 783 (1984) .....	21, 22, 25, 27

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Caruth v. International Psychoanalytical Association</i> , 59 F.3d 126 (9th Cir. 1995) .....	23, 24, 38, 45
<i>Culinary Workers Union, Local 226 v. Del Papa</i> , 200 F.3d 614 (9th Cir. 1999) .....	19, 48, 50, 53
<i>Cybersell, Inc. v. Cybersell, Inc.</i> , 130 F.3d 414 (9th Cir. 1997) .....	25, 26
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965) .....	55
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	47
<i>Finova Capital v. Ryan Helicopters USA</i> , 180 F.3d 896 (7th Cir. 1999) .....	55, 56, 58, 59
<i>Gates Learjet Corporation v. Jensen</i> , 743 F.2d 1325 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985) .....	38, 39, 44
<i>Gordy v. Daily News, L.P.</i> , 95 F.3d 829 (9th Cir. 1996) .....	26
<i>Government Employees Insurance Co. v. Dizol</i> , 133 F.3d 1220 (9th Cir. 1998) .....	19
<i>Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.</i> , 784 F.2d 1392 (9th Cir. 1986) .....	20, 38
<i>Her Majesty The Queen v. Gilbertson</i> , 597 F.2d 1161 (9th Cir. 1979) .....	39
<i>Huntington v. Attrill</i> , 146 U.S. 657 (1892) .....	39
<i>International Shoe Co. v. State of Washington</i> , 326 U.S. 310 (1945) .....	20
<i>International Society for Krishna Consciousness v. Los Angeles</i> , 611 F.Supp. 315 (C.D.Cal. 1984) .....	54
<i>Keyser v. Sacramento City Unified School District</i> , 265 F.3d 741 (9th Cir. 2001) .....	19
<i>KVUE, Inc. v. Austin Broadcasting Corp.</i> , 709 F.2d 922 (5th Cir. 1983), aff'd, 465 U.S. 1092 (1984) .....	51

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Lake v. Lake</i> , 817 F.2d 1416 (9th Cir. 1987) .....	21, 26, 33, 37
<i>Linear Products, Inc. v. Marotech</i> , 189 F.Supp.2d 461, 2002 WL 337416 (W.D.Va. 2002) .....	57
<i>Macconnell v. Schwamm</i> , No. 00-CV-0439 W(LSP), 2000 WL 1409758 (S.D.Cal. 2000) .....	38
<i>Matusevitch v. Telnikoff</i> , 877 F.Supp. 1 (D.D.C. 1995), <i>aff'd</i> , 159 F.3d 636 (D.C.Cir. 1998) .....	40
<i>McGee v. International Life Insurance</i> , 355 U.S. 220 (1957) .....	41
<i>Michigan State Chamber of Commerce v. Austin</i> , 788 F.2d 1178 (6th Cir. 1986) .....	53
<i>Myers v. Bennett Law Offices</i> , 238 F.3d 1068 (9th Cir. 2001) .....	26
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) .....	55
<i>Nebraska Press Association v. Stuart</i> , 427 U.S. 539 (1976) .....	40
<i>Nissan Motor Co., Ltd. v. Nissan Computer Corp.</i> , 89 F.Supp.2d 1154 (C.D.Cal. 2000), <i>aff'd</i> , 246 F.3d 675 (9th Cir. 2000) .....	30, 35
<i>Panavision International L.P. v. Toeppen</i> , 141 F.3d 1316 (9th Cir. 1998) .....	19, 21, 22, 24, 25, 26, 27, 30, 31, 33, 34, 36, 38, 41, 43, 45
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986) .....	30
<i>Quokka Sports, Inc. v. Cup International Ltd.</i> , 99 F.Supp.2d 1105 (N.D.Cal. 1999) .....	38, 44
<i>R.A.V. v. City of St. Paul, Minnesota</i> , 505 U.S. 377 (1992) .....	40
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) .....	7, 30

**TABLE OF AUTHORITIES**  
(continued)

	Page(s)
<i>Republic of the Philippines v. Westinghouse Electric</i> , 821 F.Supp. 292 (D.N.J. 1993).....	39
<i>Rio Properties, Inc. v. Rio International Interlink</i> , 284 F.3d 1007 (9th Cir. 2002).....	19, 22, 25, 38, 44
<i>Robins v. Pruneyard Shopping Center</i> , 23 Cal.3d 899 (1979), <i>aff'd</i> , 447 U.S. 74 (1980) .....	41
<i>San Diego County Gun Rights Committee v. Reno</i> , 98 F.3d 1121 (9th Cir. 1996).....	47
<i>San Francisco County Democratic Central Committee v. Eu</i> , 826 F.2d 814 (9th Cir. 1987).....	48
<i>Seattle Audubon Society v. Moseley</i> , 80 F.3d 1401 (9th Cir. 1996).....	46
<i>Seguros Del Estado v. Scientific Games</i> , 262 F.3d 1164 (11th Cir. 2001).....	58
<i>Seltzer Sister Bottling Co., Inc. v. Source Perrier</i> , 19 U.S.P.Q.2d 1898 (N.D.Cal. 1991).....	44
<i>Sher v. Johnson</i> , 911 F.2d 1357 (9th Cir. 1990).....	36
<i>Socialist Workers Party v. Leahy</i> , 145 F.3d 1240 (11th Cir. 1998).....	50
<i>Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.</i> , 655 F.2d 938 (9th Cir. 1981).....	46
<i>Supermicro Computer Inc. v. Digitechnic, S.A.</i> , 145 F.Supp.2d 1147 (N.D.Cal. 2001).....	55, 56, 57, 58
<i>The Antelope</i> , 23 U.S. (10 Wheat.) 66 (1825) .....	39
<i>Turner Entertainment v. Degeto Film GmbH</i> , 25 F.3d 1512 (11th Cir. 1994).....	55, 56, 58, 59
<i>United Food and Commercial Workers International Union v. IBP, Inc.</i> , 857 F.2d 422 (8th Cir. 1988).....	50



**TABLE OF AUTHORITIES**  
**(continued)**

**Page(s)**

<i>Virginia v. American Booksellers Association</i> , 484 U.S. 383 (1988) .....	47
<i>Walker &amp; Zanger Ltd. v. Stone Design S.A.</i> , 4 F.Supp.2d 931 (C.D.Cal. 1997), <i>aff'd</i> , 142 F.3d 447 (9th Cir. 1998) .....	38
<i>World-Wide Volkswagon v. Woodson</i> , 444 U.S. 286 (1980) .....	27
<i>Ziegler v. Indian River County</i> , 64 F.3d 470 (9th Cir. 1995) .....	21, 22, 34, 36, 41, 45

**STATUTES AND CONSTITUTIONAL PROVISIONS**

28 U.S.C. §2201 .....	45
42 U.S.C. §1983 .....	24
47 U.S.C. § 230(c)(1) .....	8
C.C.P. §410.10 .....	20
C.C.P. §425.16 .....	41
Cal. Const. Art. I, § 2(a) .....	41

## INTRODUCTION

This case is of extraordinary constitutional importance. A Paris Court recently ordered U.S. Internet service provider Yahoo! to censor constitutionally protected content on its U.S.-based Internet services -- which are hosted on servers in the U.S., operated in English and targeted to U.S. users -- so that French users who access the U.S. site are not exposed to Nazi-related material that is legal in the U.S. but illegal in France:

We order the Company Yahoo! Inc. 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 constituting an apology for Nazism or a contesting of Nazi crimes.

The Paris Court imposed a fine on Yahoo! of 100,000 French Francs (at the time, approximately \$13,400) *for each day* that its U.S. Internet services do not comply with the judgment.

If this French judgment is enforceable in the U.S. (the only place it could be enforced), the free speech rights of all American Internet service providers -- indeed, of all Americans using the Internet -- are subject to censorship by foreign governments, who will be able to order Americans to conform their speech to comply with the restrictive speech laws of their nations. This is true not just of France, but of every nation; and those countries will be able to enforce their censorship of Americans in our own courts, through injunctions and fines. It is

tempting to forget this when the regulated speech is repugnant,<sup>1</sup> but the principle would be no different if China ordered Yahoo! to insure that its citizens who access Yahoo!'s U.S. site are not exposed to American political ideas, or if Cuba ordered U.S. ISPs to bar access to anti-Castro teachings. The issue is whether Americans must conform their speech on the Internet to the sensibilities of other nations, and whether foreign nations can enlist our citizens and courts as reluctant policemen to insure that their own citizens are not exposed to ideas the foreign governments consider offensive.

Knowing that the District Court ("Court") properly concluded that neither the First Amendment nor principles of comity permit such a result, defendants do not appeal the Court's determination that the French judgment is irreconcilable with our nation's constitutionally mandated policy against content-based prior restraints on speech. Rather, they attack only (1) the Court's exercise of personal jurisdiction, (2) its determination that the case was ripe for adjudication, and (3) its refusal to abstain in favor of the French proceedings. As described below, the Court was correct on all three accounts. Therefore, the Court's denial of

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<sup>1</sup> Yahoo! has no sympathy with any expressions of racism or anti-Semitism and has publicly commended defendants' commitment to fighting bigotry. However, this case is not one between supporters and detractors of Nazism; it concerns whether France has the right to regulate web sites located in and targeting the U.S. because it disagrees with the way the Constitution and Congress protect the speech interests at stake.

defendants' jurisdictional motion to dismiss and its grant of summary judgment declaring the French judgment against Yahoo! unenforceable in the U.S. should be affirmed. Otherwise, Yahoo! again will face a no-win dilemma: comply with foreign censorship of content posted on its U.S. Internet services or face accumulation of fines in excess of \$400,000 per month and prospective collection of those fines in the U.S. by defendants, who obtained the French judgment.

### **JURISDICTIONAL STATEMENT**

Yahoo! agrees with defendants' statement.

### **STATEMENT OF ISSUES**

Did the Court properly exercise personal jurisdiction over nonresidents who committed intentional acts targeted at a California resident that were calculated to and did cause harm in the forum, and where the Court's exercise of jurisdiction was limited to undoing the effects caused in the forum by defendants' targeted acts?

Did the Court properly conclude that Yahoo!'s request for a declaration that a French judgment was unenforceable in the U.S. presented a justiciable controversy, where the judgment required Yahoo! to choose between censoring constitutionally protected content on its U.S.-based Internet sites and risking having to pay speech-chilling fines of up to \$13,400 for each day of noncompliance, the judgment was enforceable only in the U.S., and, despite their

conditional disavowal of a present intent to enforce the judgment, defendants served the judgment on Yahoo! in the U.S. and refused to take steps in the U.S. or French courts to absolve Yahoo! from any penalties?

Did the Court act within its discretion by refusing to abstain from exercising jurisdiction in favor of a French lawsuit, where the U.S. and French actions involved distinct legal issues, and the U.S. case concerned only the enforceability of the French judgment in the U.S. under the U.S. Constitution rather than the propriety of the judgment in France under French law?

### **STATEMENT OF THE CASE**

On December 21, 2000, Yahoo! filed a complaint for declaratory relief against La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France ("UEJF"). (SER:1-83.) Yahoo! requested that the Court declare unenforceable in the U.S. two orders defendants obtained in a Paris court directing Yahoo! to reengineer its U.S.-based servers to censor constitutionally protected content on its U.S. Internet services, subject to fines of approximately \$13,400 for each day of non-compliance. (SER:1-83.)

On February 7, 2001, LICRA filed a motion to dismiss for lack of personal jurisdiction, which UEJF joined on February 9, 2001. (SER:84-87.) On February 20, 2001, Yahoo! moved for summary judgment. (ER:21-51.) The Court

continued Yahoo!'s motion until after it ruled on defendants' motion. (SER:162-163.)

On June 7, 2001, the Court denied defendants' jurisdictional motion. While observing that the case presented a "novel ... fact pattern" (ER:197), the Court applied "traditional principles of personal jurisdiction" (ER:197) in ruling that (1) Yahoo! showed purposeful availment under the *Calder* effects test, (2) Yahoo!'s claims arose out of defendants' California contacts, and (3) defendants failed to make the compelling case necessary to rebut the presumption that jurisdiction was reasonable. (ER:190-204.)

On June 8, 2001, defendants filed a motion requesting that the Court certify its jurisdictional determination for interlocutory appeal. (SER:466.) On July 16, 2001, Yahoo! re-noticed its summary judgment motion. (SER:371-372.) On August 29, 2001, the Court denied defendants' certification motion without prejudice, pending the outcome of Yahoo!'s summary judgment motion, which the Court heard on September 24, 2001. (SER:466-468.)

On November 7, 2001, the Court granted Yahoo!'s motion. (ER:230-252.) First, the Court held that the case was ripe for declaratory relief because the Paris Court's orders inducing Yahoo! to implement restrictive policies on its U.S. Internet services (subject to daily fines for noncompliance) posed a "real and immediate" threat to Yahoo!'s and its users' First Amendment interests. (ER:238-

245.) Second, the Court declined defendants' request that it abstain from deciding the case in light of the French proceedings, because the two actions "involve distinct legal issues" and "a United States court is best situated to determine the application of the United States Constitution to the facts presented." (ER:245-247.)

Third, while recognizing that the Paris Court's orders are "entitled to great deference as an articulation of *French* law," the Court held that such "content and viewpoint-based regulation of the web pages and auction site on Yahoo.com ... clearly would be inconsistent with the First Amendment if mandated by a court in the United States." (ER:247-248.) Accordingly, on November 8, 2001, the Court entered judgment declaring that the Paris Court's Orders "and any comparable orders hereafter issued against [Yahoo!], are unenforceable in the courts of the United States." (ER:254.)

## STATEMENT OF FACTS

### **Yahoo!'s U.S.-Based Internet Services**

Yahoo! is a U.S. Internet service provider with its principal place of business in Santa Clara County, California. (ER:1.) Yahoo! operates an array of services that Internet users can access via the URL <http://www.yahoo.com>. (ER:55.) All Yahoo! services ending in the ".com" suffix (*e.g.*, yahoo.com and geocities.com), without another associated country code as a prefix or extension, are hosted on

Yahoo!'s U.S. servers, operated in English, targeted to an American audience, and operated under U.S. law. (ER:55.)

Through its U.S.-based services, Yahoo! provides a variety of means by which people can communicate with one another over the Internet. (ER:55-56,231.) Examples include a search engine, e-mail, an automated auction site, classified listings, personal web page hosting, shopping services, message boards on numerous subjects, chat rooms, news stories, clubs relating to countless topics that users create or join, instant messaging, streaming video, calendaring services, expert consultation services, sites to post and share photos, and numerous other services. (ER:55-56.) The hallmark of this myriad of services is that Yahoo! does not create the content; Yahoo!'s users or other third parties do. (ER:56.) Yahoo! simply provides the tools and platforms for people to communicate and share content with one another. It is a modern town square, a genuine "marketplace of ideas" in the truest sense of that phrase.<sup>2</sup>

The magnitude of content that, as of July 2000, the more than 146 million users of Yahoo! add each day is staggering. For example, (a) over 15 million

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<sup>2</sup> As Justice Stevens observed in *Reno v. ACLU*, 521 U.S. 844, 870 (1997): "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.... '[T]he content on the Internet is as diverse as human thought.'"



Geocities web pages were added or edited monthly; (b) over six million classified ads were posted monthly; (c) on average, 2.5 million active auction items were viewable daily, a collection that changes constantly as auctions are closed and new ones are added; and (d) over 200,000 clubs were accessed each day by members who post messages, upload photos or add Internet links. (ER:56.)

Yahoo! does not and could not monitor the content of these millions of postings and listings to its U.S.-based Internet services (ER:232), nor is it required to do so by U.S. law.<sup>3</sup> Therefore, Yahoo! users (like the users of other American ISPs) are able to post, and some users have posted, information on Yahoo!'s U.S. servers that many would find offensive, including Nazi-related discussions, hate speech, publications such as *Mein Kampf* (which, ironically, are often posted in an anti-Nazi context, but whose circulation would still violate French law), and auctions of World War II memorabilia (including collectibles from the Nazi era, such as military uniforms, coins, stamps or other items displaying the swastika).<sup>4</sup> (ER:191,232.)

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<sup>3</sup> Reflecting a national policy that freedom of expression is best served when ISPs are not held liable for the content of communications originating from third-party users of their services, Congress enacted the Communications Decency Act, which states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

<sup>4</sup> In January 2001, Yahoo! modified its auction policy to prevent posting of items deemed to promote hate. (See *infra*, p.14.)

## **Yahoo! France Does Not Permit The Content At Issue**

In addition to its U.S.-based services, Yahoo! has subsidiaries -- separate foreign corporations -- that operate Internet services similar to (but smaller in scope than) “yahoo.com” in twenty other countries, including Yahoo! France, Yahoo! U.K., Yahoo! India, and Yahoo! Korea. (ER:57.) Each of these regional sites -- accessible by an Internet URL containing the country’s two-letter code -- is operated in the primary local language, targeted to the local citizenry, and operated under the local jurisdiction’s laws (including ones that regulate content) and in a manner sensitive to local cultural mores. (ER:57.) For example, the French corporation Yahoo! France S.A.S. -- whose French language Yahoo! France site is accessed via the Internet portal <http://www.yahoo.fr>. -- removes any user-posted material it becomes aware of that would violate French laws such as Le Nouveau Code Penal Art. R.645-2 (“Nazi Symbols Act”), which prohibits, among other things, the public display of Nazi-related “uniforms, insignia or emblems.” (ER:57.)

Although Yahoo! France complies with French law, French computer users nonetheless may access Yahoo!’s U.S. Internet services via the URL [www.yahoo.com](http://www.yahoo.com) -- including content posted by users that is prohibited by the Nazi Symbols Act. (ER:97,232.) This ability of French web surfers to access Yahoo!’s U.S. services is what gave rise to the current litigation.

## **Defendants' Intentional Targeting Of Yahoo! In California**

On or about April 5, 2000, after accessing Yahoo!'s U.S.-based auction site (<http://auctions.yahoo.com>) and discovering material that would be banned under the Nazi Symbols Act,<sup>5</sup> LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters. (ER:57,142.) In its letter, LICRA threatened to sue Yahoo! in France "to force your company to abide by [French] law" unless, within eight days, Yahoo! ceased allowing users to sell Nazi memorabilia on its U.S. auction site. (ER:57,142.)

Although LICRA gave Yahoo! until April 13, 2000 to respond, on or about April 10, 2000, LICRA filed a complaint against Yahoo! in the Tribunal de Grande Instance de Paris ("Paris Court") for allegedly violating the Nazi Symbols Act.<sup>6</sup> (ER:53,57-64,142.) LICRA's complaint sought to compel Yahoo! to prevent users of its U.S. auction site from posting Nazi-related items for sale or to reengineer its U.S. servers so that such items would be blocked from the view of French Internet

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<sup>5</sup> The terms of service posted on the "yahoo.com" site state that the relationship between its users and "Yahoo shall be governed by the laws of the State of California without regard to its conflict of law provisions. You and Yahoo agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California." (SER:166,292.)

<sup>6</sup> Yahoo! respects the right of French citizens, in view of their own national experience in World War II, to enact laws relating to Nazism as they deem necessary, consonant with their own constitution and traditions. Hence, Yahoo! *France* operates pursuant to French law. Yahoo! disputes only France's right to apply its laws to *U.S.*-based websites.

users. (ER:53,59-64.)

On or about April 20, 2000, UEJF filed a second complaint against Yahoo! in the Paris Court. (ER:53,65-84.) Despite acknowledging that the display of Nazi-related items on Yahoo!'s U.S. auction site is legal under "a certain concept of freedom of speech having currency only in the United States," UEJF asserted that "French law is incontestably applicable to *any* message accessible received in [French] territory, *irrespective of the location of the server.*" (ER:80-81) (emphasis added). Accordingly, in addition to the relief requested by LICRA, UEJF sought to compel Yahoo! to "cease all hosting" of user-posted writings on Geocities webpages that allegedly violate French law, such as English translations of *Mein Kampf*, or other material considered anti-Semitic or that "trivializes Nazism," or to block access to such material by people in France. (ER:82.) LICRA and UEJF used the U.S. Marshal's Office to serve their complaints on Yahoo! in California. (ER:2.)

Both defendants played active roles in the French litigation.<sup>7</sup> They filed pleadings and briefs, had counsel argue at hearings, employed experts, and contested Yahoo!'s legal positions. (SER:165,167-236.) As UEJF lawyer

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<sup>7</sup> Throughout the French proceedings, Yahoo! objected to the Paris Court's exercise of jurisdiction over it. (ER:96.) The Paris Court rejected Yahoo!'s objections and, over its further objection, elected to hear the LICRA and UEJF matters as an emergency proceeding on an expedited basis before a single judge. (ER:53,85-99.)

Stephane Lilti told the Paris Court: "We are demanding that the hard disc be cleaned in the name of morality and French law. If access cannot be filtered, it should be suppressed." (SER:166,251.) Defendants also attacked Yahoo! in the international media to pressure Yahoo! in California to censor its U.S.-based Internet services. (SER:166,237-279.)

One month after LICRA and UEJF filed their complaints, the Paris Court issued a sweeping order affecting not only Yahoo!'s auction site, but *all* of its U.S.-based Internet services. (ER:53,85-99.) The May 22<sup>nd</sup> Order required 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 constituting an apology for Nazism or a contesting of Nazi crimes." (ER:53,99) (emphasis added). Because no party alleged that materials unlawful in France were posted on Yahoo! France, the Paris Court's edict pertained only to Yahoo! -- the U.S. service provider -- not Yahoo!'s French subsidiary. (ER:99.) Although the Paris Court ordered further proceedings concerning Yahoo!'s ability to comply technologically with the May 22<sup>nd</sup> Order, the presiding judge telegraphed the outcome when he stated in an October 2000 interview that the case raised the question of whether American Internet companies will be able to "take shelter behind the First Amendment to the American Constitution which guarantees absolute freedom of speech in that

country,” or instead will “be willing to accept a line of international public morality that would be acceptable to everybody?” (SER:90,104.)

Soon thereafter, after receiving expert reports, the Paris Court issued a second order (the “November 20<sup>th</sup> Order” or “French judgment”). (ER:53-54,100-141.) Citing the “ethical and moral imperative shared by all democratic societies” and “simple public morality,” the November 20<sup>th</sup> Order directed Yahoo! to “comply within 3 months ... with the injunctions contained in our Order of 22<sup>nd</sup> May 2000” or face a penalty of 100,000 francs (then, approximately \$13,400) for each day of non-compliance. (ER:138,140.) The Paris Court provided that fines against Yahoo! may not be collected from its subsidiary, Yahoo! France. (ER:140-141.) Because Yahoo! has no assets in France or other European Union country and the content on its U.S.-based Internet services is hosted on servers located in the U.S., the injunctive and penalty provisions of the November 20<sup>th</sup> Order can be enforced against Yahoo! in the U.S. only. (ER:55,58.)<sup>8</sup>

Following LICRA and UEJF’s victory in the Paris Court, LICRA representative Marc Knobel told the press: “We have won this first battle, but there will be others. We won’t let people get away with racism or anti-Semitism on the net, whatever the site.” (SER:166,273.) Knobel later warned that LICRA will

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<sup>8</sup> Because the November 20<sup>th</sup> Order was enforceable pending appeal and stays are difficult to obtain in France, Yahoo! did not appeal the order. (ER:54.)

continue to battle Yahoo! on U.S. soil to get it to comply with the Paris Court's speech-suppressing directives. In a December 25, 2000 cnn.com story, Nobel admonished: "[Yahoo!] seem[s] to think that they can publish anything, that there are no morals. I can't accept that. We'll go to the end of the line on this one. We'll fight them at every turn – including through the American legal system." (SER:461-462,464.) Less than two months later, on February 15, 2001, LICRA and UEJF again used the U.S. Marshal's Office to serve Yahoo! in California with copies of the November 20<sup>th</sup> Order. (SER:94,109-161.)

### **Yahoo!'s Failure To Comply With The French Judgment**

Yahoo! has not complied with the French judgment. After the Paris Court's ruling but before the three-month compliance period expired, Yahoo! modified its hate speech policy to prohibit use of its commerce services (such as auctions or classifieds) "to offer or trade in items that are associated with or could be used to promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors." (ER:56.) Under this policy, only some of the items prohibited by France's Nazi Symbols Act and the Paris Court's Orders are banned from Yahoo!'s commerce sites. (ER:56.) For example, because Yahoo!'s modified commerce policy does not apply to books, films or music (which are evaluated under Yahoo!'s less restrictive "communities" policy), historical books such as *Mein Kampf* may still be auctioned. Yahoo!'s

new policy also does not apply to officially issued government coins and stamps, even though they may display Nazi-associated emblems. (ER:56.) Furthermore, Yahoo!'s new policy is limited to *commerce* sites and services; it does not extend to Yahoo!'s public or private communication forums, such as message boards, e-mail, and chat rooms. (ER:56-57.) Thus, on October 24, 2001, the Court was able to perform the key word search "nazi" on the yahoo.com auction site, which called up sixty-nine Nazi-related items for sale. (ER:235.) A search on yahoo.com of "Jewish conspiracy" produced 3,070 sites; the search "Protocols/10 Zion produced 3,560 sites; and the search "Holocaust/5 'did not happen'" produced 821 sites. (ER:235.)

### **The Continuing Accrual Of Fines Against Yahoo!**

The Paris Court's injunction currently is in effect, with Yahoo! subject to a fine of 100,000 French Francs (about \$13,400) for each day of non-compliance.<sup>9</sup> (ER:136-138,140.) While the Paris Court has not yet formally levied fines against Yahoo! (ER:141;SER:380), it is *defendants* who have the power to bring an action to set the penalty. (Appellants Opening Brief "AOB":34.) Defendants do not dispute that, if they initiated the penalty enforcement process, the Paris Court could assess fines retroactively for the *entire* period of Yahoo!'s non-compliance.

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<sup>9</sup> Yahoo! did not pursue appeals of the Paris Court's orders and they are, therefore, final. (ER:54;SER:452,454-455.)



(ER:240-241;SER:474-475,477-480,486,502-504.) In other words, defendants could request and the Paris Court could order that Yahoo! pay up to \$13,400 for each day since February 23, 2001 that Yahoo! has not complied with the Paris Court's directives. As of April 29, 2002, the total potential fines exceed \$5,700,000. They continue to increase daily.

While defendants *now* say that they do not intend to enforce the French judgment because they *presently* are satisfied by the change in Yahoo!'s commerce policy (ER:214,216;SER:378,380), neither has taken steps available under French law to seek withdrawal of the Paris Court's Orders or to petition the Paris Court to absolve Yahoo! from any penalty. (ER:241;SER:474-475,480.) Nor has the Paris Court made any finding that Yahoo! is in compliance with its Orders; certainly defendants have not requested or stipulated that such a finding be made. (ER:241.) Nor have defendants disavowed seeking enforcement of the French judgment should Yahoo! change its policies again or otherwise allow its users to post content deemed offensive by defendants. (ER:214,216;SER:378,380.)

### **SUMMARY OF ARGUMENT**

The Court properly concluded that it had specific jurisdiction over defendants under this Circuit's three-part inquiry. First, applying the traditional *Calder* "effects" test for purposeful availment, the Court correctly determined that, regardless of the propriety of their conduct under *French* law, defendants should

reasonably have anticipated being haled into court in California because they engaged in conduct intentionally targeting Santa Clara-based Yahoo! with the specific purpose of causing harmful effects in California: (a) LICRA sending a demand letter to Yahoo! in California asking that Yahoo! modify its U.S. services to comport with French law; (b) both defendants using U.S. Marshals to serve on Yahoo! in California the complaints that brought it into French court; (c) both defendants using the U.S. Marshals office to serve on Yahoo! in California with the order Yahoo!'s declaratory relief action challenged as unenforceable; and (d) both defendants, having played active roles in the French litigation against Yahoo!, securing a judgment compelling Yahoo! to reengineer its U.S.-based servers to censor content they knew was constitutionally protected or to pay fines accruing at the rate of about \$13,400 daily.

Second, the Court correctly held that Yahoo!'s declaratory relief action arose out of defendants' California-directed activities. But for defendants' filing, service and prosecution of the lawsuit aimed at modifying Yahoo!'s U.S. Internet services operating out of California, Yahoo! would have no need for a declaration the French judgment is unenforceable. Third, the Court properly concluded that defendants failed to present the required "compelling case" rebutting the strong presumption that jurisdiction is reasonable. There was nothing unreasonable about asking defendants to appear in a matter contesting the enforceability of a

judgment, enforceable only in the forum, that they worked for months to obtain.

The Court's exercise of jurisdiction was exactly congruent with the harmful effects defendants targeted at this forum.

Apart from jurisdiction, the Court also properly held the case was ripe for declaratory relief. Prior to the Court's ruling, Yahoo! was faced with a real and imminent threat to its First Amendment interests by having to choose every day between censoring constitutionally protected content on its U.S.-based Internet services or risking having to pay significant fines still accruing daily. While the Paris Court has not yet formally levied the fines, it can assess them retroactively for the entire period of Yahoo!'s non-compliance whenever defendants decide to bring an action to set the penalties.

Finally, the Court properly refused to abstain from hearing the case in favor of the French tribunal because the U.S. and French actions were not parallel proceedings; they involved completely different legal issues. The U.S. case concerned only whether the Paris Court's orders may be enforced in the U.S. consistent with the First Amendment and U.S. law; the French litigation involved the application of French law to content on Yahoo!'s U.S. website.

### **STANDARD OF REVIEW**

A district court's determination that it can exercise personal jurisdiction over a nonresident is reviewed *de novo*. *Panavision International L.P. v. Toepfen*, 141

F.3d 1316, 1319-20 (9th Cir. 1998). Factual findings regarding jurisdiction are reviewed for clear error. *Id.* at 1320. Where, as here, there was no evidentiary hearing, “the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion....” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Uncontroverted allegations in the complaint must be taken as true, and all factual disputes must be resolved in the plaintiff’s favor. *Rio Properties v. Rio International Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

“[R]eview of a district court’s decision to entertain an action under the Declaratory Judgment Act is deferential, under the abuse of discretion standard.” *Government Employees Insurance v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998). Whether a dispute presents a case or controversy is reviewed *de novo*. *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617 (9th Cir. 1999).

While this Court reviews *de novo* a district court’s grant of summary judgment, it “may affirm [summary judgment] on any ground [with] support in the record.” *Keyser v. Sacramento City Unified School District*, 265 F.3d 741, 750 (9th Cir. 2001).

## ARGUMENT

### I. THE COURT PROPERLY EXERCISED SPECIFIC JURISDICTION OVER DEFENDANTS

“California permits the exercise of personal jurisdiction to the full extent permitted by due process.” *Bancroft & Masters v. Augusta National*, 223 F.3d 1082, 1086 (9th Cir. 2000); C.C.P. §410.10. “[D]ue process requires only that in order to subject a defendant to [personal] jurisdiction, if [the defendant is] not present within the territory of the forum, [the defendant need only] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

Where a defendant has not had continuous contacts with the forum sufficient to subject it to general jurisdiction, “a court may still assert jurisdiction [over that defendant] for a cause of action which arises out of the defendant’s forum-related activities.” *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986). “This ‘specific’ jurisdiction exists if (1) the defendant has ... purposefully availed [itself] of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant’s forum-related activities, and (3) the exercise of jurisdiction is reasonable.” *Bancroft & Masters*, 223 F.3d at 1086. The Court correctly found that all three elements were present here, and thus that defendants were subject to its specific jurisdiction.

**A. Under The Governing “Effects” Test, Defendants Purposefully Availed Themselves Of The California Forum By Targeting Yahoo! In California And Obtaining A Judgment That Impacts Yahoo! In The Forum**

As the “first step of the specific jurisdiction analysis..., [courts] look for ‘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.’” *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987) (citation omitted). The fact that defendants allegedly have “no commercial contacts” or “presence in the United States” (AOB:4,8) does not preclude the Court’s exercise of specific jurisdiction. “It is not required that a defendant be physically present or have physical contacts with the forum.” *Panavision*, 141 F.3d at 1320. The purposeful availment requirement is satisfied “if an out-of-forum defendant merely engages in conduct aimed at, *and having effect in*, the situs state.” *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995) (emphasis added).

This “effects test” was first enunciated by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* arose from an allegedly libelous article about California actress Shirley Jones. The Court, focusing on the “relationship among the defendant, the forum and the litigation,” *id.* at 788, held that a California court had personal jurisdiction over two Florida journalists, despite their lack of physical presence in California, because the journalists’ actions in writing and editing the

article had intentionally caused injury to Jones in California:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.... [T]he brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction is therefore proper in California based on the "effects" of their Florida conduct in California.

*Id.* at 788-89.

This Circuit interprets *Calder* as establishing that "a non-resident defendant purposefully avails itself of the forum if its contacts with the forum are attributable to (1) intentional acts; (2) expressly aimed at the forum; (3) causing harm, the brunt of which is suffered -- and which the defendant knows is likely to be suffered -- in the forum." *Rio Properties*, 284 F.3d at 1019. Applying this three-part test, this Circuit frequently has upheld the exercise of jurisdiction over nonresidents based on the forum effects of their acts outside the forum. *See, e.g. Panavision*, 141 F.3d at 1321-22 (California had jurisdiction over nonresident who purposefully adopted trademarks of California corporation as his own domain names; defendant's "conduct, as he knew it likely would, had the effect of injuring [the plaintiff] in California"); *Ziegler*, 64 F.3d at 473-474 (California had jurisdiction over Florida sheriff's officers who obtained Florida warrant leading to arrest of plaintiff in California; defendants "purposefully availed themselves of California law" because "[t]he harm -- [plaintiff's] arrest -- was anticipated to occur in California"); *Caruth v. International Psychoanalytical Association*, 59

F.3d 126, 127-28 (9th Cir. 1995) (international nonprofit association subject to California jurisdiction by intentionally denying membership to California resident; defendant “knew that any harm allegedly suffered from its decision would be suffered ... in California”).

Defendants claim the Court erred by allegedly holding “that the ‘effects’ test does not require anything more than a foreign act having an effect on a local resident.” (AOB:13.) They claim this Circuit requires “something more,” and the “something more” is “tortious, wrongful conduct.” (AOB: 14, 15.) According to defendants, their actions -- sending a demand letter to Yahoo! in California, using the U.S. Marshal’s office to serve on Yahoo! in California the French complaints and the order Yahoo!’s declaratory relief action challenges as unenforceable, and securing a judgment that compels Yahoo! to censor its U.S.-based services in California -- merely reflected a “good faith exercise of legitimate interests” under French law. (AOB:15.) Defendants assert that in the absence of tortious conduct, the Court applied “a new interpretation of the effects test” and erroneously concluded that they purposefully availed themselves of the law of the forum. (AOB:18-20.)

The premise of defendants’ argument, however, is incorrect because the Court *did* base its finding of purposeful availment on “something more” than conduct having foreseeable effects in the forum. According to the Court, the



“something more” was defendants’ “‘express aiming’ of the conduct, *i.e.*, targeting of a forum resident.” (ER:197.) This Circuit’s recent decisions prove that the Court’s interpretation of the “effects” test -- and the “something more” required for purposeful avilment -- is correct.<sup>10</sup>

In *Bancroft & Masters*, plaintiff B&M, a corporation operating in California, sought a declaration that its registered domain name “masters.com” did not infringe the “Masters” trademark and “masters.org” domain name owned by defendant ANI, which sponsors the Masters golf tournament. *Id.* at 1084-85. ANI previously had sent a letter to the Virginia headquarters of Network Solutions, Inc. (NSI), until recently the sole registrar of domain names in the U.S., challenging B&M’s use of the masters.com domain name, and a letter to B&M in California demanding that B&M cease and desist its use of masters.com. *Id.* at 1085.

Reversing the district court’s order granting ANI’s motion to dismiss for

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<sup>10</sup> Even if tortiousness rather than intentional targeting were that “something more,” the allegations in plaintiffs’ complaint -- taken as true for jurisdictional purposes (*supra*, p.19) -- refer to defendants’ wrongfulness and sound in tort. *See, e.g., Panavision*, 141 F.3d at 1321 (trademark infringement “akin to a tort”). Yahoo! alleged that defendants “committed acts expressly and repeatedly targeted at U.S.-based Yahoo! ... [by] seeking an obtaining an injunction that forces Yahoo! to suppress and restrain constitutionally protected speech in the U.S.” (ER:2.) It would put form over substance to require Yahoo! to amend its complaint to allege that any attempt by defendants to use a U.S. court to enforce the speech-suppressing French Orders would constitute, among other things, a violation of 42 U.S.C. §1983. *See Caruth*, 59 F.3d at 128 n.1 (applying effects test where plaintiff “alleged facts that could possibly give rise to several tort claims” not pled in complaint).

lack of personal jurisdiction, the appellate court acknowledged that “something more” than a foreign act with foreseeable effects in the forum is required to find purposeful availment. It then held -- as the Court did here -- that the “something more” is ... ‘express aiming,’” *i.e.*, the “individualized targeting” of the plaintiff in the forum. *Id.* at 1087-88. According to the court, ANI’s single act of sending the letter to NSI in Virginia, which forced B&M to bring suit or lose control of its California-based website, constituted the individualized targeting of the plaintiff in California necessary to satisfy the *Calder* effects test:

ANI acted intentionally when it sent its letter to NSI. The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California. Finally, the effects of the letter were primarily felt, as ANI knew they would be, in California.... ANI was well aware that B&M currently held the masters.com website and that it was B&M that would be affected if the NSI dispute resolution procedures were triggered. This is sufficient to satisfy *Calder* and thereby demonstrate the purposeful availment necessary for an exercise of specific jurisdiction.

*Id.* at 1088.

Other cases from this Circuit bear out the *Bancroft & Masters* court’s conclusion that the “presence of individualized targeting” – and not the tortiousness of the defendant’s conduct – “is what separates ... cases [in which it found purposeful availment] from others in which [it has] found the effects test unsatisfied.” *Id.* at 1087.<sup>11</sup> *See, e.g., Rio Properties*, 284 F.3d at 1020 (finding

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<sup>11</sup> A comparison of this Circuit’s decisions in *Panavision* and *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) illustrates that, contrary to defendants’ suggestion, tortiousness is not the *sine qua non* of purposeful

purposeful availment based on allegation that nonresident defendant “specifically targeted consumers” in forum); *Gordy v. Daily News*, 95 F.3d 829, 833 (9th Cir. 1996) (California distribution of libelous article about California resident constituted “targeting” sufficient for purposeful availment); *Lake*, 817 F.2d at 1423 (California lawyer’s procurement of *ex parte* order in California that he knew would be used by others in Idaho to deprive plaintiff of custody of his son “amount[ed] to more than ... untargeted negligence” and thus met test for purposeful availment); *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1074 (9th Cir. 2001) (Utah resident’s retrieval of credit report of Nevada resident “indicates ‘the presence of individualized targeting’” constituting purposeful availment).

Although tort-like conduct has been a common feature of effects test cases (ER:195-196), the defendant’s wrongfulness has been material only to the extent that -- as the name “effects” test suggests -- the defendant is alleged to have

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availment under the effects test. In both cases, the plaintiff alleged trademark infringement arising from the use of the plaintiff’s mark on a nonresident’s Internet website. Although the plaintiff asserted claims akin to a tort in both cases, this Circuit found purposeful availment in *Panavision*, but not in *Cybersell*. The difference was that by “scheming to register Panavision’s trademarks as his domain names for the purpose of extorting money from Panavision,” including sending a letter to Panavision in California offering the “panavision.com” domain name for \$13,000, the *Panavision* defendant intentionally targeted the plaintiff in the forum. *Panavision*, 141 F.3d at 1319, 1322. In contrast, in *Cybersell*, there was no intentional targeting of the forum; the defendant merely used the plaintiff’s mark passively on its Internet website. *Cybersell*, 130 F.3d at 420 (defendant’s “web page simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there”).

intentionally caused harmful *effects* in the forum. “The purposeful availment requirement ensures that a nonresident will not be haled into court based upon ‘random, fortuitous or attenuated’ contacts with the forum state.” *Panavision*, 141 F.3d at 1320 (*quoting Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985)). If a nonresident has taken deliberate action toward the forum by knowingly harming one of its residents -- whether or not permissible abroad -- the nonresident has the Due-Process-mandated notice that it is subject to suit in the forum with respect to its forum-targeted activities. *See World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (jurisdiction comports with Due Process where “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”). Therefore, regardless of whether a nonresident’s foreign actions are proper under the law where the actions took place, such actions are “wrongful” if their intended effect is to harm a plaintiff whom it knows is a forum resident. *See, e.g., Calder*, 465 U.S. at 791 (“jurisdiction ... in California is proper because of [defendants’] intentional conduct in Florida calculated to cause injury to [plaintiff] in California”); *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (Arizona may exercise jurisdiction over Canadian who “knew the injury and harm stemming from his [libelous] communications would occur in Arizona”); *Panavision*, 141 F.3d at 1318 (California jurisdiction over Illinois resident proper

because defendant's "acts were aimed at [plaintiff] in California, and caused it to suffer injury there").

Therefore, here, the Court did nothing "new" or "novel" (AOB:18), as defendants claim. It merely concluded that defendants knowingly engaged in actions targeted at the Santa Clara-based Yahoo! for the very purpose of having their harmful effects felt in California -- the "something more" required by this Circuit for purposeful availment. The Court's conclusion was correct.

First, defendants acted intentionally: LICRA sent its cease-and-desist letter to Yahoo!'s California headquarters (ER:57,142); LICRA and UEJF filed complaints against the California-based company in the Paris Court seeking to have Yahoo! reengineer its U.S.-based Internet services (ER:53,59-84); both defendants filed pleadings throughout the French proceedings, had counsel argue at hearings, employed experts, and contested Yahoo!'s positions (SER:165,167-236); and both used U.S. Marshals to serve process on Yahoo! in this state. (ER:2;SER:94,109-161.)

Second, their actions were expressly aimed at California because they purposefully sought to compel Yahoo!, whom they knew is based in California (ER:55,59,65), to censor content on its U.S.-based Internet services that defendants *knew* was constitutionally protected. (ER:53,59-84;SER:248.)

Third, the harmful effects of defendants' filing and litigation of the French

lawsuits were felt, as defendants knew they would be, in California. The Paris Court granted defendants the relief they sought, as it required 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 constituting an apology for Nazism or a contesting of Nazi crimes." (ER:99,140.) To ensure compliance, the Paris Court imposed a fine on Yahoo! of approximately \$13,400 for each day that its U.S. Internet services do not comport with the judgment.<sup>12</sup> (ER:140.) The California effects of the order sought by defendants are obvious, as Yahoo! must (a) hunt for and remove in Santa Clara any Nazi-related expression on its U.S.-based Internet services, where the majority of Yahoo!'s customer care and engineering staff reside, or (b) reengineer its servers in Santa Clara (and other U.S. locations) to identify French users who access its U.S. site, pinpoint each item posted daily by users that violate the Nazi Symbols Act, and block such items from view. (ER:121-141.)

The order's harmful effects were felt by Yahoo! in California, even prior to its enforcement. Yahoo!'s speech was being chilled -- itself a First Amendment injury -- as Yahoo! had to choose daily between censoring the constitutionally protected content on its U.S.-based Internet services or risking having to pay

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<sup>12</sup> If Yahoo! fails to follow the Paris Court's dictates, the fines are recoverable in the U.S. only. The penalties may not be recovered from Yahoo! France, and Yahoo! has no other assets within the Paris Court's jurisdiction. (ER:58,140-141.)

significant fines *still* accruing daily. *See Reno*, 521 U.S. at 871-72 (statute’s “chilling effect on free speech” on the Internet “raises special First Amendment concerns”); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (“‘chilling’ effect would be antithetical to the First Amendment’s protection of ... speech”); *Ashcroft v. The Free Speech Coalition*, 122 S.Ct. 1389, 2002 WL 552476 at \*7 (2002) (“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere”). The effect of that chill was felt in Santa Clara County, the location of Yahoo!’s principal place of business. (ER:1.) *See, e.g., Panavision*, 141 F.3d at 1321 (“brunt of the harm [from alleged Lanham Act violation] to Panavision was felt in California ... because, although at all relevant times Panavision was a Delaware limited partnership, its principal place of business was in California...”); *Nissan Motor Co. v. Nissan Computer*, 89 F.Supp.2d 1154, 1160 (C.D.Cal. 2000), *aff’d*, 246 F.3d 675 (9th Cir. 2000) (“the brunt of the harm [from alleged trademark infringement] was suffered in the forum state because [plaintiff] ... is based in Gardena, California”).

Defendants predict the “obliterat[ion of] any notion of Due Process” and the assertion by U.S. courts of “worldwide jurisdiction over any non-forum conduct

that has the potential of offending local sensibilities”<sup>13</sup> if this Circuit affirms the Court’s opinion. (AOB: 19.) However, defendants’ parade of horrors simply is unfounded. There is nothing unreasonable or contrary to Due Process in subjecting someone who intentionally targets a forum resident for harm in the forum to jurisdiction in forum. This is the essence of the effects test.

Given that defendants chose to access content posted in the forum, served legal papers on Yahoo! in the forum, won an order compelling Yahoo! to make changes to its services hosted in the forum, served that order on Yahoo! in the forum, knew any enforcement would have to take place in the forum, knew the speech they attempted to censor is constitutionally protected in the forum, and were on notice that Yahoo! would seek to resolve disputes with its users in the forum, defendants hardly can say they are being haled into court based upon ‘random, fortuitous or attenuated’ contacts with the forum.” *Panavision*, 141 F.3d at 1320. Due Process requires nothing more. (*See supra*, p.27.)

Indeed, *reversal* of the Court’s jurisdictional ruling would raise grave constitutional concerns. Under defendants’ interpretation of the effects test, anyone outside the U.S. can -- with impunity -- deliberately deprive U.S. residents

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<sup>13</sup> Defendants’ suggestion is ironic because this is precisely how defendants asserted jurisdiction over Yahoo! in France. Defendants brought Yahoo! into a foreign court because Yahoo!’s dissemination of constitutionally protected expression in the U.S. “offend[ed]” local [French] sensibilities.” (AOB:19.)



of their constitutional rights as long as the conduct causing harm in the U.S. is privileged abroad. A failure to exercise jurisdiction would be particularly injurious to First Amendment freedoms in this case, because the longer defendants sit on their rights to seek enforcement of the French judgment, the greater the chilling effect on Yahoo! becomes: \$4.8 million after a year, \$9.6 million after two years, *etc.* By their jurisdictional challenge, defendants seek nothing more than to keep Yahoo! in a state of legal limbo -- uninformed of its rights and obligations and under increasing pressure to censor its services as fines mount.

In sum, defendants should reasonably have anticipated being haled into court in California, regardless of whether they acted within the parameters of French law. By filing and prosecuting the French case to judgment against Yahoo! and serving that judgment on Yahoo! in California, they committed an intentional act that was aimed at a California resident and caused harm in California.

Accordingly, the Court properly concluded under long-standing jurisdictional principles that defendants purposefully availed themselves of the law of the forum.

**B. Yahoo!'s Claim For Declaratory Relief Arose Out Of Defendants' California-Directed Activities**

“The second requirement for specific jurisdiction is that the contacts constituting purposeful availment must be the ones that give rise to the current suit. [This Circuit] measure[s] this requirement in terms of ‘but for’ causation.”

*Bancroft & Masters*, 223 F.3d at 1088.

Defendants contend “the only forum contacts which could give rise to jurisdiction consist of one ‘cease and desist’ letter and the service of process incident to the French proceeding.” (AOB:22-23.) However, they ignore that they also secured a French judgment that compels Yahoo! to censor its U.S.-based services in California, an act directed at and calculated to cause harm in the forum. *But for* defendants’ filing and prosecution of the French lawsuit (in addition to the demand letter and use of California process), Yahoo! would have no need for a declaration that the French judgment is unenforceable in the U.S. *See id.* (“But for the letter to NSI, which ... forced [plaintiff] to choose between bringing this suit and losing the use of its website, ... [plaintiff] would have no need for a judicial declaration of its right to use masters.com”); *Lake*, 817 F.2d at 1423 (“the alleged injury to the [plaintiff] arose out of [the defendant-lawyer’s] acts in procuring the ex parte order”); *Panavision*, 141 F.3d at 1322 (defendant’s “registration of Panavision’s trademarks as his own domain names on the Internet had the effect of injuring Panavision in California”; “[b]ut for [defendant’s] conduct, this injury would not have occurred”). Indeed, the connection between defendants’ California-directed conduct and Yahoo!’s claim for declaratory relief is total. Yahoo! sought *only* to undo the U.S. effects of defendants’ conduct. Therefore, the Court correctly concluded that Yahoo!’s declaratory relief action arose out of defendants’ forum-targeted acts.

### C. Jurisdiction Was Reasonable

The final requirement for specific jurisdiction is reasonableness. This Circuit considers seven factors: “(1) the extent of the defendant’s purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant’s state, (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief, and (7) the existence of an alternative forum.” *Bancroft & Masters*, 223 F.3d at 1088. “No one factor is dispositive; a court must balance all seven.” *Panavision*, 141 F.3d at 1323.

Defendants bear the burden of showing that the Court’s exercise of jurisdiction was unreasonable. *Burger King*, 471 U.S. at 477; *Bancroft & Masters*, 223 F.3d at 1088. “Once purposeful availment has been established [as it was here], the forum’s exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant must present a compelling case that the exercise of jurisdiction would, in fact, be unreasonable.” *Ziegler*, 64 F.3d at 476 (citation omitted); *Burger King*, 471 U.S. at 477 (same).

In this case, the Court correctly concluded that defendants failed to carry their “heavy burden of rebutting the strong presumption in favor of jurisdiction.” *Ballard*, 65 F.3d at 1500. As described below, the balance of factors failed to

favor defendants to the degree required to constitute the “compelling case” rendering jurisdiction unreasonable. Moreover, the Court’s exercise of jurisdiction was reasonable because Yahoo! sought only to undo the effects caused in this forum by defendants’ purposeful acts aimed at Yahoo!. It did not seek damages, nor did it ask the Court to order defendants to do or not do anything. The relief Yahoo! requested was limited to a declaration that the French judgment cannot be enforced in the U.S. Thus, the jurisdiction the Court exercised was congruent with defendants’ forum-targeted effects.

### **1. Purposeful Interjection**

“The first factor, purposeful interjection, is analogous to that of purposeful availment.” *Nissan*, 89 F.Supp.2d at 1161. Defendants’ filing and prosecution of the French lawsuit, which substantially effected Yahoo! in California, satisfies this requirement.<sup>14</sup> In addition, LICRA sent Yahoo! a demand letter and both defendants used U.S. Marshals in California to serve Yahoo! with their French complaints and the Paris Court’s final order to accomplish their intended forum effects. (ER:2,57,142;SER:94,109-161.) Therefore, the degree of defendants’

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<sup>14</sup> Defendants’ refer to their “initiating the proceedings in France” (AOB:26), but omit mention of their extensive courtroom role in bringing about the French judgment. Their filing of pleadings, arguing at hearings, employing of experts, and contesting of Yahoo!’s positions (SER:165,167-236) were performed deliberately to cause harm to Yahoo!’s speech interests in California and, thus, contribute to their interjection into the forum.

interjection into the forum favors jurisdiction. *See Panavision*, 141 F.3d at 1323 (registering plaintiff's trademarks as defendant's Internet domain name and sending letter to plaintiff's California headquarters demanding \$13,000 constituted purposeful interjection "weigh[ing] strongly in favor of the district court's exercise of personal jurisdiction"); *Ziegler*, 64 F.3d at 475 ("purposeful injection into California was significant" where defendant "direct[ed] his action toward a person whom he knew to be in California, with the intention of causing that person to be arrested in California").

## 2. Defendants' Burden in Litigating

Defendants' burden in litigating in California was *de minimis*, because Yahoo! sought only a declaration as to the unenforceability, on constitutional and other legal grounds, of the French judgment. This question was resolved as a matter of law on summary judgment. This was not a case requiring extensive discovery or a lengthy trial in the forum. Defendants were able to oversee the litigation and confer with their counsel by telephone and fax. *See Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) ("in this era of fax machines and discount air travel" the burden of litigating over distance is considerably lessened).

The only burden defendants potentially faced here was the cost of paying for California attorneys (if the case was not *pro bono*). This undertaking pales in comparison to the lengths to which defendants went to obtain the French judgment.

Certainly the burden of defending this lawsuit in California was no greater than the burden defendants would assume were they to seek enforcement of the judgment in the U.S. -- the only place it *can* be enforced. Moreover, defendants were on notice that Yahoo! would seek redress in California to resolve disputes about their use of the "yahoo.com" service, as Yahoo!'s "Terms of Service" provides that users like defendants "agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California." (SER:166,292.)

Defendants made no showing as to the severity of their burden other than stating that as "foreign non-profit organizations, [they] have and will continue to face considerable burdens in litigating this suit in California."<sup>15</sup> (AOB:26.) But this Circuit recognizes that "whenever a defendant is made to answer in a state other than his or her residence, an element of hardship exists." *Lake*, 817 F.2d at

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<sup>15</sup> Defendants' reliance on *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1987), is misplaced. In *Asahi*, the Supreme Court ruled that it would be unreasonable for California to exercise jurisdiction over a Japanese company in an indemnification action brought by a Taiwanese company arising from an accident caused by an exploding tire tube that the Taiwanese company manufactured and to which the Japanese company contributed a component valve. *Id.* at 105-06. According to the Court, the interest of the plaintiff Taiwanese company and the forum in California's assertion of jurisdiction over the Japanese company was slight: the transaction on which the indemnification claim was based took place in Taiwan, the indemnitor was not a California resident, the dispute could have been litigated in Taiwan or Japan, and it was unclear whether U.S. law governed the dispute. *Id.* at 114-15. *Asahi* is inapposite because in this case (1) there is no alternative forum since the French judgment can be enforced only in the U.S., and (2) California has a strong interest in protecting California-based Yahoo! from the forum-felt effects that violate U.S. law.

1423. “[U]nless the ‘inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.’”

*Ballard*, 65 F.3d at 1501; *Panavision*, 141 F.3d at 1323 (same).

In light of this strict standard, this Circuit and district courts located within it often find jurisdiction over non-U.S. defendants to be reasonable, notwithstanding the normal costs imposed on nonresidents having to litigate abroad. *See, e.g., Rio Properties*, 284 F.3d at 1021 (forum’s exercise of jurisdiction over Costa Rican entity reasonable); *Caruth*, 59 F.3d at 128-29 (non-profit organization in Argentina); *Ballard*, 65 F.3d at 1500-02 (Austrian bank); *Gates Learjet Corporation v. Jensen*, 743 F.2d 1325, 1332-34 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (Philippine corporation); *Haisten*, 784 F.2d at 1401-02 (Cayman insurer); *Macconnell v. Schwamm*, No. 00-CV-0439 W(LSP), 2000 WL 1409758 at \*6-7 (S.D.Cal. 2000) (Japanese individual); *Quokka Sports v. Cup International*, 99 F.Supp.2d 1105, 1113-14 (N.D.Cal. 1999) (New Zealand individuals and corporation); *Walker & Zanger v. Stone Design S.A.*, 4 F.Supp.2d 931, 940 (C.D.Cal. 1997), *aff’d*, 142 F.3d 447 (9th Cir. 1998) (French corporation; “[d]efendants have not asserted any hardship beyond the expense of participating in litigation in a foreign country”).

In sum, the Court correctly held that defendants did not show a significant burden from having to defend the enforceability of the French judgment in California, let alone a burden so great as to deprive them of due process.

### 3. Sovereignty

The next factor considers whether jurisdiction would conflict with France's sovereignty. Although sovereignty concerns generally arise when a U.S. court exercises jurisdiction over foreigners, the sovereignty factor is "by no means controlling," *Ballard*, 65 F.3d at 1501; otherwise, "it would always prevent suit against a foreign national in a United States court." *Gates*, 743 F.2d at 1333. Because the proper inquiry, instead, is whether jurisdiction would conflict with the foreign state's *legitimate* interests, sovereignty interests weigh heavily *in favor* of jurisdiction here.

While France may have an "interest in creating, interpreting, and enforcing its law *in France*" (AOB:28) (emphasis added), it has no legitimate interest in enforcing its penal statutes *in the U.S.* See *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another"); *Her Majesty The Queen v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979) (same); *Republic of the Philippines v. Westinghouse Electric*, 821 F.Supp. 292, 300 (D.N.J. 1993) (same). Nor does France have a legitimate interest in enlisting U.S. courts to impose prior restraints on U.S. citizens. *Nebraska Press Association v. Stuart*, 427



U.S. 539, 559 (1976) (prior restraints “are the most serious and the least tolerable infringement on First Amendment rights” because they constitute “an immediate and irreversible sanction” that “freezes” speech). This is particularly true where, as here, the foreign country’s justification for the prior restraint is contrary to our nation’s long-standing policy prohibiting contest-based discrimination of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Ashcroft*, 2002 WL 552476 at \*7 (“speech may not be prohibited because it concerns subjects offending our sensibilities”).

Conversely, the U.S. has an interest in protecting the constitutional and statutory public policy interests of *this* country with respect to the speech rights of U.S. citizens and ISPs. Despite principles of international comity, U.S. courts will not enforce foreign judgments that are repugnant to American public policy, including speech values protected by the First Amendment. *See, e.g., Bachchan v. India Abroad Publications*, 585 N.Y.S.2d 661, 665 (1992) (English libel award unenforceable because it was “antithetical to the protections afforded the press by the U.S. Constitution); *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995), *aff’d*, 159 F.3d 636 (D.C.Cir. 1998) (granting summary judgment to plaintiff seeking declaration that English libel judgment was not enforceable in U.S. because judgment “contrary to U.S. libel standards”). Thus, this case implicates the exercise of French sovereignty *only to the extent that such exercise improperly*

*contravenes governing American law.* Accordingly, the Court properly held that, unlike in most cases, the sovereignty factor weighs *in favor* of jurisdiction.

#### 4. Forum State's Interest

California has a strong interest in protecting its citizens from intentional acts of nonresidents that cause harm in California. *Ziegler*, 64 F.3d at 475; *Panavision*, 141 F.3d at 1323; *McGee v. International Life Insurance*, 355 U.S. 220, 223 (1957). That interest is stronger than usual here, because Yahoo!'s and its millions of users' right to free expression, which has been chilled by defendants' forum-directed activities, is of constitutional dimension. California expressed its interest in safeguarding the speech rights of its citizens by adopting a constitutional provision that affords greater protection to such rights than even the First Amendment. *See* Cal. Const. Art. I, §2(a); *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 908-910 (1979), *aff'd*, 447 U.S. 74 (1980). *See also* C.C.P. §425.16 (providing for early dismissal of lawsuits that "chill the valid exercise of the constitutional right[] of freedom of speech"). Similarly, American policy interests in freeing U.S. ISPs from responsibility for policing content on their U.S. Internet sites -- a policy set forth in the CDA (*see supra*, p.8 n.3) -- also weigh heavily in favor of jurisdiction in this case.

Defendants contend "California has no interest in providing Yahoo! a means to redress its speculative, non-ripe claims based upon enforcement of a French

order in France.” (AOB:29.) However, as the Court observed:

Defendants’ “wait and see” approach ... only highlights the importance of California’s policy interest in providing a means for obtaining declaratory relief under circumstances such as those presented here. Many nations, including France, limit freedom of expression on the Internet based upon their respective legal, cultural or political standards. Yet because of the global nature of the Internet, virtually any public web site can be accessed by end-users anywhere in the world, and in theory any provider of Internet content could be subject to legal action in countries which find certain content offensive [even content promoting U.S. constitutional values such as democracy, equality or religious freedom.] Defendants’ approach would force the provider to wait indefinitely for a determination of its legal rights, effectively causing many to accept potentially unconstitutional restrictions on their content rather than face prolonged legal uncertainty.

(ER:202-203.)

Defendants argue that under the Court’s analysis, California “could start dragging [foreign] nation[s] into the district courts because their laws may potentially cause California citizens to submit to these [foreign] laws with respect to their conduct in the foreign nation.” (AOB:29.) Defendants, however, turn the facts -- and what is at stake in this appeal -- upside down. This case is not about a U.S. court exercising jurisdiction over nonresidents who merely are attempting to regulate conduct in their own country. It is about the ability of nonresidents to use U.S. courts to restrict the constitutionally protected expression of U.S. citizens *in the U.S.*

Thus, in light of California’s interest in safeguarding the right of U.S.-based

ISPs and Internet users to speak *in and from the U.S.* without the looming threat of liability based on the content of their speech, the Court properly concluded that the fourth factor weighs strongly in favor of jurisdiction.

### **5. Efficient Resolution**

The fifth factor “focuses on the location of the evidence and witnesses. It is no longer weighed heavily given the modern advances in communication and transportation.” *Panavision*, 141 F.3d at 1323. Regardless, because the enforceability of the French judgment was a question of law (*i.e.*, whether the judgment is irreconcilable with the First Amendment),<sup>16</sup> there was no need for live trial testimony, and the limited documentary evidence easily was submitted by motion.

### **6. Convenient & Effective Relief for Plaintiff**

Yahoo! sought only a declaration that the French judgment is not enforceable in the U.S. Defendants present no authority that any entity other than a U.S. court has the jurisdiction to make that determination. The importance of the California forum to Yahoo! is magnified by the fact that the enforceability of the French judgment is a question of American constitutional, statutory and common

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<sup>16</sup> Even if the case had not been resolvable on summary judgment, Yahoo! disputes that the “relevant witnesses and pertinent documents are located in France.” (AOB:30.) This case concerns the French judgment’s impact on the speech of Yahoo! and its American users, not the propriety of the underlying French litigation.

law, which a U.S. court is uniquely equipped to decide. *See Quokka Sports*, 99 F.Supp.2d at 1114 (sixth factor favored plaintiff because plaintiff was “seeking an application of U.S. trademark law to correct alleged offenses to U.S. trademarks”); *Gates*, 743 F.2d at 1334 (“Arizona is more efficient forum to resolve ... interpretations of Arizona law” than Philippines); *Seltzer Sister Bottling Co. v. Source Perrier*, 19 U.S.P.Q.2d 1898, 1905 (N.D.Cal. 1991) (defendant failed to establish “that there are [French] fora that could interpret and apply law that is idiosyncratic to the United States”). *See also Rio Properties*, 284 F.3d at 1021 (Nevada can more efficiently adjudicate case relating to Internet gambling than Costa Rica because Nevada is “the gambling center of the United States” and its courts have “expertise resolving disputes involving gambling entities”). Therefore, the Court correctly determined that the sixth factor favors jurisdiction.

#### **7. Availability of Alternative Forum**

Defendants contend that “France was the proper, available and convenient forum to challenge the French order.” (AOB:30.) However, “[t]he United States has a strong interest in adjudicating its own laws as they affect its own citizens.” *Quokka Sports*, 99 F.Supp.2d at 1114. Yahoo! is not challenging the findings of the French tribunal, but rather addressing only the enforceability of the judgment *in the U. S.* The Paris Court does not have the jurisdiction or expertise to make such a determination.

## 8. Balancing the Factors

Because all factors favor Yahoo!, the Court correctly held that defendants failed to present the “compelling case” necessary to rebut the strong presumption that jurisdiction is reasonable. *See Panavision*, 141 F.3d at 1324 (“although some factors weigh in [defendant’s] favor, he failed to present a compelling case that the district court’s exercise of jurisdiction in California would be unreasonable”); *Ziegler*, 64 F.3d at 476 (“presumption that exercising jurisdiction would be reasonable has not been overcome” where “balance of factors ... favors [plaintiff]”); *Caruth*, 59 F.3d at 129 (defendant “has not presented a ‘compelling case’” where “[n]either party is clearly favored in the final balance”).

## II. THE COURT CORRECTLY HELD THAT THE CASE WAS RIPE FOR DECLARATORY RELIEF

The Court properly concluded that the case presented a justiciable controversy because, prior to the Court’s decision, Yahoo! faced imminent potential enforcement by defendants of substantial penalties for exercising rights guaranteed under the First Amendment. Pursuant to the Declaratory Judgment Act, “[i]n a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. §2201(a). The Act was designed to relieve potential defendants like Yahoo! “from the Damoclean threat of impending litigation which a harassing

adversary might brandish, while initiating his suit at his leisure -- or never. The Act permits parties so situated to forestall the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate.” *Societe de Conditionnement en Aluminium v. Hunter Engineering*, 655 F.2d 938, 943 (9th Cir. 1981) (citation omitted). *See also Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) (“Act is intended to allow earlier access to federal courts in order to spare potential defendants from the threat of impending litigation”).

The conflict of interests between Yahoo! and defendants *was* real and immediate. Daily fines of up to \$13,400 were and still are accruing against Yahoo! *for each day* after February 23, 2001 that Yahoo!’s U.S.-based Internet services are not in compliance with the November 20<sup>th</sup> Order. These fines are enforceable only in the U.S. because Yahoo! has no assets within France or the E.U., and the fines may not be recovered from Yahoo! France. (ER:58,140-141.)

Without a declaration that the French judgment is unenforceable in the U.S. (as opposed to having to wait for defendants to move to enforce the judgment at their leisure), Yahoo! was faced with the unenviable dilemma of choosing between censoring the constitutionally protected content on its U.S.-based Internet services, or risking having to pay significant fines accruing daily. Therefore, even if defendants never attempted to enforce the French judgment, Yahoo!’s speech

inevitably would have been chilled -- indeed the potential chill would have grown as the accumulated fines increased daily -- an injury sufficiently real and immediate to support declaratory relief. *See, e.g., Virginia v. American Booksellers Association*, 484 U.S. 383, 393 (1988) (allowing pre-enforcement challenge to statute restricting display of sexually explicit material because statute's chilling effect is "a harm that can be realized even without an actual prosecution"); *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) ("Supreme Court has recognized 'chilling' effect as an adequate injury for establishing standing" for declaratory relief); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir.), *cert. denied*, 519 U.S. 1009 (1996) (plaintiff had standing to bring declaratory relief action challenging statute that had not been enforced against him; "the alleged danger of this statute is, in large measure, one of self-censorship, a harm that can be realized even without actual prosecution"); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm").

Defendants contend the case was not ripe because they "never sought to enforce the French Order in the U.S." (AOB:7.) However, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979). "This



is especially true in a First Amendment case because of ‘the sensitive nature of constitutionally protected expression.’”<sup>17</sup> *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 821 (9th Cir. 1987). As long as the *threat* of injury is “credible,” “that is enough.” *Bland*, 88 F.3d at 736 and n.11.

This is not a case in which Yahoo! had only a speculative fear of being prosecuted for violating a generally applicable law at some future date. Yahoo! did not claim that its speech was being chilled by the mere existence of France’s Nazi Symbols Act. Rather, the Paris Court already ruled that Yahoo! *has* violated it. As a result, Yahoo! -- and Yahoo! only -- was ordered to screen and censor its Internet services, subject to daily fines for noncompliance. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (“impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue

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<sup>17</sup> While defendants assert that “a heightened standard for ‘actual controversy’” applies in this case (AOB:32), if anything, the opposite is true, given the speech interests at stake. *See, e.g., Culinary Workers Union*, 200 F.3d at 618 (“[W]e do not require, *especially in First Amendment cases*, that the plaintiff risk prosecution by failing to comply with state law” as a prerequisite to declaratory relief) (emphasis added). A relaxed standard is particularly appropriate here, because the Article III limitations underlying the “case or controversy” requirement are not implicated in this case. The Court decided the enforceability of a foreign judgment, not a Congressional statute. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) (“[T]he ‘case or controversy’ requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.... ‘All of the doctrines that cluster about Article III ... relate ... to an idea ... about the ... limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’”)

appropriate for judicial review at this stage”; the regulations have “a direct effect on the day-to-day business of all prescription drug companies ... [and] puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate”). Following the Paris Court’s decision, LICRA warned that it would pursue Yahoo! in the U.S. to force Yahoo!’s compliance: “[Yahoo!] seem[s] to think that they can publish anything, that there are no morals. I can’t accept that. We’ll go to the end of the line on this one. We’ll fight them at every turn – including through the American legal system.” (SER:461-462,464.) Thus, the threat against Yahoo! was credible.

Despite their aggressive pursuit of Yahoo! under French law, threatening statements, and unambiguous message when they served Yahoo! with the French judgment in California (SER:94,109-161,166, 273,461-462,464), defendants suggest that the threat of enforcement was not sufficiently imminent because they “disavowed an intention to seek enforcement of the French orders in the United States.” (AOB:7.) Their subsequent and nonbinding disavowal of any intent to enforce did not, however, ameliorate the severity or immediacy of the threat to Yahoo!’s speech interests.

First, defendants’ disavowal was conditional: they “disclaimed any intent *under the circumstances* to seek enforcement,” *i.e.*, as long as they believe that Yahoo! has complied with the French Order by removing Nazi-related items from

its commercial sites. (ER:214,216;SER:378,380.) Defendants left the door open to enforce the French judgment whenever *they* believed that Yahoo! had disseminated content that *they* considered to be in violation of the French Order. Defendants certainly never took steps to seek withdrawal of the French judgment. (ER:241;SER:474-475,480.) Nor do their current representations bind defendants if new management takes a different view in the future. Thus, despite their stated intent not to enforce the judgment (conveyed only *after* Yahoo! filed suit), defendants *still* were suspending above Yahoo!'s head the very Damoclean sword that gave rise to the need for declaratory relief. Nothing had changed. *See Culinary Workers Union*, 200 F.3d at 618 (where attorney general threatened to enforce statute, her subsequent disavowal of authority to do so held *not* “to eliminate either the ‘credibility,’ the ‘genuineness,’ or the ‘effectiveness’ of her threat”); *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1246 (11th Cir. 1998) (despite Secretary’s disavowal of authority to enforce allegedly unconstitutional provisions, “credible threat of application remains” because his current representations “would not bind future Secretaries”); *United Food and Commercial Workers International Union v. IBP*, 857 F.2d 422, 429-430 (8th Cir. 1988) (controversy justiciable even though on day of TRO hearing defendants disclaimed intent to enforce statute because “defendants -- even by their own statements -- are ‘free to return to [their] old ways’”); *KVUE v. Austin*

*Broadcasting*, 709 F.2d 922, 929-30 (5th Cir. 1983), *aff'd*, 465 U.S. 1092 (1984) (county attorney's statement that "it's safer for me to say I'm not going to prosecute anyone than it is to say I am given the situation at this time" did not constitute sufficient assurance of non-enforcement to render controversy non-justiciable).

Indeed, Yahoo! still has not satisfied the condition for defendants' non-enforcement of the judgment -- removal of all material that violates the Nazi Symbols Act from its auction and other sites. (ER:214,217.) Although Yahoo!'s modified hate speech policy prohibits sale of several Nazi-themed items, other forbidden items are still sold on Yahoo!'s commercial sites. (ER:56,235; SER:452-453,456-459.) In addition, Yahoo!'s amended policy was limited to commerce sites and services; it did not extend to Yahoo!'s public or private communication forums, all of which *are* encompassed by the French judgment's reference to "any other site or service" (in addition to the auctions site). (ER:56,99,235.) Moreover, regardless of defendants' intent, it is not clear that Yahoo! can rely upon defendants' assessment that Yahoo! has complied with the French judgment. The Paris Court made no such finding, nor did defendants request that such finding be made. (ER:241.) Therefore, Yahoo!'s fear of injury remained genuine.

Second, the credibility of defendants' claim that they did not intend to

enforce the judgment was dubious, at best. If defendants did not intend to enforce the Order, why did they oppose Yahoo!'s request for declaratory relief? Why would organizations that claim to be "unable to finance foreign litigation" (ER:211) *continue* to vigorously contest this litigation, including seeking to undertake time-consuming and expensive discovery? (ER:221-227.)

Surely defendants wanted to preserve their ability to enforce the French Order, even if they chose never to do so. In light of the unique chilling effect of the accumulating penalties, it was not difficult to imagine defendants *intentionally delaying* attempts to enforce the French judgment. Indeed, it was in defendants' best interest *not* to attempt to enforce the Order, *as long as they retained the power of enforcement*. Until a U.S. court definitively ruled that the French judgment is unenforceable, the constant, looming and growing threat of having to pay daily fines increasingly pressured Yahoo! to censor content in order to satisfy the Paris Court's speech directives. Defendants should not be able to suspend a sword of Damocles over Yahoo!'s head indefinitely.

Defendants further assert that Yahoo! is "multiple steps away from being faced with an imminent threat of 'harm'" because the Paris Court "retained jurisdiction to determine – in an appropriate future proceeding – whether any fines would be assessed." (AOB:34.) They claim that the French judgment is merely an "interim" order because "[t]here are no penalties unless the French court sets an

amount and orders Yahoo! to pay them.” (AOB:3,34.) However, the fact that the Paris Court may not yet have formally set the fines at their daily maximum (or some other amount) does not lessen the credibility of the threat against Yahoo! where, as here, defendants promised to fight Yahoo! in the American legal system and ominously served Yahoo! with a copy of the French Order, which was the end result of litigation that *they* filed and prosecuted. (SER:94,109-161,461-462,464.)

*See Culinary Workers Union*, 200 F.3d at 618 (threat of prosecution by attorney general adequate even though enforcement of statute must be initiated by D.A. where attorney general previously “threatened ... to refer prosecution [of plaintiffs] to ‘local criminal authorities’”). Moreover, given that the presiding judge stated in a published interview that Yahoo! should not be able to “take shelter behind the First Amendment” (SER:90,104), there is no reason to believe that the Paris Court will reduce or eliminate the fines. *See Americans for Medical Rights v. Heller*, 2 F.Supp.2d 1307, 1311-1312 (D.Nev. 1998) (challenge to spending limits on contributions to ballot-question campaigns ripe for adjudication even though initiative had not yet qualified for the ballot because there was a “reasonable probability” plaintiff would meet requirements for qualification); *Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (same).

Most importantly, the fact that the Paris Court may have to act ministerially

before its judgment can be enforced did not change the nature of the speech-suppressing dilemma Yahoo! faced. Defendants never disputed that the Paris Court could assess fines retroactively for the entire period of Yahoo!'s non-compliance.<sup>18</sup> (ER:240-241;SER:474-475,477-480,486,502-504.) As of the California court's November 7, 2001 decision, the potential fines were approximately \$3,443,800 *and continue to increase daily*. Thus, every day prior to the Court's ruling, Yahoo! still had to choose between complying with the French judgment by censoring speech on its U.S.-based Internet services (pursuant to an injunction *presently* in effect) and watching potential draconian fines mount, subject to an uncertain legal outcome. It is this no-win dilemma that made the case ripe for declaratory relief. *See ANR Pipeline Co. v. Corporation Commission of Oklahoma*, 860 F.2d 1571, 1578 (10th Cir. 1988), *cert. denied*, 490 U.S. 1051 (1989) (finding actual controversy where company faced dilemma of complying with regulation requiring it to alter pipelines or risking \$5,000 fine per day; "[o]nce the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act").

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<sup>18</sup> Defendants' reliance on *International Society for Krishna Consciousness v. Los Angeles*, 611 F.Supp. 315, 319-20 (C.D.Cal. 1984) (AOB:32) is misplaced, because the subject resolution had no legal effect. In contrast, the French judgment presently compels Yahoo! to reengineer its U.S. servers and the Paris Court may fix penalties retroactive to February 2001.

As the Court observed, “the coercive effect of such a situation is self-evident.” (ER:193.) As the potential fines against Yahoo! increased daily -- even if never collected -- so did the chilling effect on Yahoo!’s speech, an injury sufficiently real and serious to support declaratory relief. (*See supra*, p.47.) *See also NAACP v. Button*, 371 U.S. 415, 433 (1963) (“threat of sanctions may deter ... almost as potently as the actual application of sanctions”); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (“prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms”). Therefore, the Court’s holding that the case was ripe for declaratory relief should be affirmed.

### **III. THE COURT CORRECTLY REFUSED TO ABSTAIN FROM ISSUING A DECLARATORY JUDGMENT**

Defendants also contend the Court abused its discretion by refusing to abstain from exercising jurisdiction over Yahoo!’s claim for declaratory relief. (AOB:35.) Citing a trio of cases -- *Supermicro Computer v. Digitechnic, S.A.*, 145 F.Supp.2d 1147 (N.D.Cal. 2001), *Finova Capital v. Ryan Helicopters USA*, 180 F.3d 896 (7th Cir. 1999), and *Turner Entertainment v. Degeto Film GmbH*, 25 F.3d 1512, 1523 (11th Cir. 1994) -- defendants argue that the Court should have declined jurisdiction because Yahoo!’s California lawsuit allegedly was “nothing more than forum shopping” to obtain a more favorable result in the U.S. than in France. (AOB:35.)



Under *Supermicro*, *Finova*, and *Turner*, a federal court has discretion to abstain from hearing a case that presents a justiciable controversy or for which jurisdiction otherwise is proper when parallel proceedings are pending in a foreign court. “Suits are parallel if substantially the same parties are litigating substantially the same issues simultaneously in two fora.” *Finova*, 180 F.3d at 898. In all three cases, the courts abstained in favor of foreign proceedings where the U.S. and foreign litigations concerned the same issues.

For example, in *Supermicro*, a French buyer of computer parts sued the California seller in France seeking damages from a fire caused by malfunctioning parts. 145 F.Supp.2d at 1149. While the French suit was ongoing, the seller sued the French buyer in the U.S., seeking a declaration that the computer parts were not defective, that the parts failed from misuse and, if the plaintiff were at fault, the defendants’ remedy was repair or replacement. *Id.* The court declined jurisdiction over the seller’s declaratory relief action because (1) both lawsuits concerned “the same disputed transaction,” were governed by the same international contracts law and, thus, hearing the U.S. case would “lead to duplicative litigation,”<sup>19</sup> (2) the plaintiff initiated the U.S. proceeding “in the

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<sup>19</sup> In *Finova* and *Turner*, the U.S. and foreign proceedings also concerned the same issues. In *Finova*, 180 F.3d at 897-898, the lessor and lessee of helicopters brought suit in the U.S. and St. Lucia, respectively, to determine who owned the aircraft. Similarly, in *Turner*, 25 F.3d at 1516-18, 1522, U.S. and German parties to a

hopes of obtaining a more favorable result in its home forum,” and (3) the French court was “competent ... to hear this dispute and render an enforceable final judgment.” *Id.* at 1151.

Notwithstanding the superficial similarity of *Supermicro* involving French and American parties engaged in a declaratory relief action, *Supermicro* (and *Finova* and *Turner*) are inapposite because Yahoo! and defendants are not parties to “parallel” proceedings; the Paris and California cases concern distinct legal issues. Defendants’ Paris lawsuit concerned whether the display of Nazi-related expression on Yahoo!’s U.S.-based Internet services violates *French* law. Conversely, this case concerns whether enforcement of the French judgment in the U.S. violates *American* free speech policies. By filing its U.S. action, Yahoo! was not attempting to relitigate the Paris Court’s application of French law with respect to Yahoo!’s conduct in France. *See Linear Products, v. Marotech*, 189 F.Supp.2d 461, 2002 WL 337416 (W.D.Va. 2002) (denying stay request under international abstention doctrine because “not clear that the issues in [U.S. and Canadian] lawsuit[s] are in fact the same”); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232-33 (4th Cir. 2000) (affirming refusal to abstain in favor of Monaco proceeding; “although the parties in the two suits are substantially the same, the issues are

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license for satellite television programming sued one another in their respective countries concerning the license’s scope.

not”); *Seguros Del Estado v. Scientific Games*, 262 F.3d 1164 (11th Cir. 2001) (same as to Columbian proceeding; “the two cases are not parallel since they involve materially different issues...”).

Defendants contend the Court erroneously concluded that the U.S. and French proceedings were not parallel by allegedly “ignor[ing] the undisputed facts ... that the French order was interim in nature and further proceedings would be necessary to determine whether the order was even enforceable in France, let alone the United States.”<sup>20</sup> (AOB:38.) However, as discussed above, whether or not the Paris Court decides to levy fines against Yahoo!, the fact remains that the Paris Court *could* assess fines retroactively for the entire period of Yahoo!’s non-compliance and that the U.S. court was asked to decide -- for the first time -- whether the chilling effect of the potential fines conflicted with the First Amendment.

In addition, unlike *Supermicro*, *Finova* and *Turner*, the Paris Court is not competent -- nor does it have the jurisdiction -- to decide the issues at stake in this litigation. Even if Yahoo! could challenge the extraterritorial application of the French judgment in France, the California court was the more efficient and effective forum in which to resolve whether the judgment is enforceable in the U.S.

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<sup>20</sup> In fact, the opposite was true. Because Yahoo! has no assets in France or other E.U. country and all of the content on its U.S.-based Internet services is hosted on

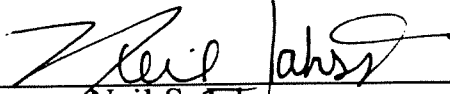
in light of the Constitution and laws of the U.S. (*See supra*, pp.43-44.) Compare *Finova*, 180 F.3d at 900 (“[t]his is not a case involving the application of legal rights or principles unique to, or specially protected by, federal law”); *Turner*, 25 F.3d at 1521 (“the salient issues ... are of great moment to the state of television in Germany”; “[t]here is no comparable federal interest”). Therefore and in light of the distinct issues raised in the U.S. and French proceedings, the Court did not abuse its discretion by refusing to abstain from exercising jurisdiction.

#### IV. CONCLUSION

The judgment of the Court should be affirmed.

Dated: April 29, 2002

ROBERT C. VANDERET  
NEIL S. JAHSS  
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By   
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servers located in the U.S., both the Paris Court’s injunctive and penalty provisions can be enforced against Yahoo! in the U.S. only. (ER:55,58.)

**-CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND  
CIRCUIT RULE 32-1**

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,966 words.

Dated: April 29, 2002

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By



Neil S. Janss

*Attorneys for Plaintiff-Appellee*

**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, appellee states that this case is not related to any appeals pending in this Court.

Dated: April 29, 2002

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NEIL S. JAHSS  
KERRY LYON-GROSSMAN  
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## PROOF OF SERVICE

I, Susan E. Coates, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 South Hope Street, Los Angeles, CA 90071-2899. On April 29, 2002, I served the within documents:

### **APPELLEE'S ANSWERING BRIEF**

- by transmitting via facsimile machine the document(s) listed above to the fax number(s) set forth below on this date at approximately 10:25 AM. The outgoing facsimile machine telephone number in this office is 213-430-6407. The facsimile machines used in this office create a transmission report for each outgoing facsimile transmitted. A copy of the transmission report(s) for the service of this document, properly issued by the facsimile machine(s) that transmitted this document and showing that such transmission was (transmissions were) completed without error, is attached hereto.
  
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
  
- by putting a true and correct copy thereof, together with an unsigned copy of this declaration, in sealed boxes designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed above, and placing the boxes for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier boxes. In the ordinary course of business, such boxes collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a facility regularly maintained by Federal Express, which is an express carrier.



by putting a true and correct copy thereof, together with an unsigned copy of this declaration, in a sealed envelope, with Express Mail postage fully prepaid to the person(s) listed above, and placing the envelope for collection and mailing today with the United States Postal Service as an Express Mail item in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of Express Mail correspondence for mailing with the United States Postal Service. In the ordinary course of business, Express Mail correspondence collected from me would be processed on the same day, with Express Mail postage thereon fully prepaid, and placed for deposit that day with the United States Postal Service by depositing it that same day in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail.

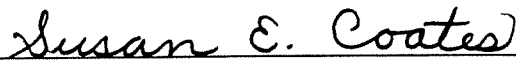
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Appellee's Answering Brief is being filed on April 29, 2002, by Federal Express by putting true and correct copies thereof in sealed boxes designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the United States Court of Appeals for the Ninth Circuit, U.S. Court of Appeals Building, 95 Seventh Street, San Francisco, CA 94103, and placing the boxes for collection today by the overnight courier in accordance with the firm's ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 29, 2002, at Los Angeles, California.



Susan E. Coates