

Yahoo! Inc.
v.
La Ligue Contre Le Racisme Et L’antisemitisme
and L’union Des Etudiants Juifs De France

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, 2006
433 Fed. Reporter 3d 1199 (en banc), cert. denied, 126 S.Ct. 2332 (2006)

Author’s Note: A federal Ninth Circuit Court of Appeals *three*-judge panel initially decided this appeal of the U.S. federal trial court’s decision in 2004. The opinion below—by an *eleven*-judge panel of the same court—was rendered two years later. The Ninth Circuit’s comparatively elaborate “en banc” procedure is reserved for cases which are especially important—often containing major constitutional issues, such as the First Amendment matter decided (or arguably left undecided) by dismissal of this case without a hearing on the merits. The following U.S. version of this litigation contains various opinions which align certain judges on specific issues the various jurists wished to address/emphasize. (Some opinions have been excluded, and all below have been edited.)

I deleted the two, small Nazi memorabilia examples appearing on the 5th edition Course Web Page from this 6th edition’s *French Yahoo!* web case. I thus avoid potential prosecution under French or like European laws. (This is, of course, only a remote possibility. I am not employed by Yahoo! or a like large entity. However, were I one of my school’s visiting professors, in our French summer abroad program, I could become a convenient example of one who brazenly violates French law.) The academic rationale for illustrating these historical symbols of the horrors spawned by the Nazis— e.g., via its French Vichy regime—would be trumped by French criminal law. It prohibits the very appearance of such materials on a webpage which, while hosted in California, would be available to students in France.

As you read this case, consider whether the U.S. would have a like prohibition, had the Holocaust occurred in the U.S.

Court’s Opinion: PER CURIAM [lead author anonymous]:

...

Yahoo!, an American Internet service provider, brought suit in federal district court in diversity against La Ligue Contre Le Racisme et L’Antisemitisme (“LICRA”) and L’Union des Etudiants Juifs de France (“UEJF”) seeking a declaratory judgment that two interim orders by a French court are unrecognizable and unenforceable. The district court held that the exercise of personal jurisdiction over LICRA and UEJF was proper, that the dispute was ripe, that abstention was unnecessary, and that the French orders are not enforceable in the United States because such enforcement would violate the [freedom of expression provision in the U.S. Constitution’s] First Amendment. ...

I. BACKGROUND

Yahoo! is a Delaware corporation with its principal place of business in California. Through its United States-based website yahoo.com, Yahoo! makes available a variety of Internet services, including a search engine, e-mail, web page hosting, instant messaging, auctions, and chat rooms. While some of these services rely on content

created by Yahoo!, others are forums and platforms for user-generated content.

Yahoo! users can, for example, design their own web pages, share opinions on social and political message boards, play fantasy baseball games, and post items to be auctioned for sale. Yahoo! does not monitor such user-created content before it is posted on the web through Yahoo! sites.

Yahoo!'s United States website is written in English. It targets users in the United States and relies on servers located in California. Yahoo!'s foreign subsidiaries, such as Yahoo! France, Yahoo! U.K., and Yahoo! India, have comparable websites for their respective countries. The Internet addresses of these foreign-based websites contain their two-letter country designations, such as fr.yahoo.com, uk.yahoo.com, and in.yahoo.com. Yahoo!'s foreign subsidiaries' sites provide content in the local language, target local citizens, and adopt policies that comply with local law and customs. In actual practice, however, national boundaries are highly permeable. For example, any user in the United States can type www.fr.yahoo.com into his or her web browser and thereby reach Yahoo! France's website. Conversely, any user in France can type www.yahoo.com into his or her browser, or click the link to Yahoo.com on the Yahoo! France home page, and thereby reach yahoo.com.

Sometime in early April 2000, LICRA's chairman sent by mail and fax a cease and desist letter, dated April 5, 2000, to Yahoo!'s headquarters in Santa Clara, California. The letter, written in English, stated in part:

[W]e are particularly choked [sic] to see that your Company keeps on presenting every day hundreds of nazi symbols or objects for sale on the Web.

This practice is illegal according to French legislation and it is incumbent upon you to stop it, at least on the French Territory.

Unless you cease presenting nazi objects for sale within 8 days, we shall seize [sic] the competent jurisdiction to force your company to abide by the law.

On April 10, ... LICRA filed suit against Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris. On April 20, UEJF joined LICRA's suit in the French court. LICRA and UEJF used United States Marshals to serve process on Yahoo! in California.

After a hearing on May 15, 2000, the French court issued an "interim" order on May 22 requiring Yahoo! to "*take all necessary measures to dissuade and render impossible any access [from French territory] 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*" (emphasis added). Among other things, the French court required Yahoo! to take particular specified actions "[b]y way of interim precautionary measures." Yahoo! was required "to cease all hosting and availability in the territory of [France] from the 'Yahoo.com' site ... of messages, images and text relating to Nazi objects, relics, insignia, emblems and flags, or which evoke Nazism," and of "Web pages displaying text, extracts, or quotes from 'Mein Kampf' and the '[Protocols of the Elders of Zion]' " at two specified Internet addresses. Yahoo! was further required to remove from "all browser directories accessible in the territory of the

French Republic” the “index heading entitled ‘negationists’ ” and any link “bringing together, equating, or presenting directly or indirectly as equivalent” sites about the Holocaust and sites by Holocaust deniers.

The May 22 interim order required Yahoo! France (as distinct from Yahoo!) to remove the “negationists” index heading and the link to negationist sites, described above, from fr.yahoo.com. The order further required Yahoo! France to post a warning on fr.yahoo.com stating to any user of that website that, in the event the user accessed prohibited material through a search on Yahoo.com, he or she must “desist from viewing the site concerned[,] subject to imposition of the penalties provided in French legislation or the bringing of legal action against him.”

The order stated that both Yahoo! and Yahoo! France were subject to a penalty of 100,000 Euros per day of delay or per confirmed violation....

Yahoo! objected to the May 22 order. It contended, among other things, that “there was no technical solution which would enable it *to comply fully* with the terms of the court order.” (Emphasis added.) In response, the French court obtained a written report from three experts. The report concluded that under current conditions approximately 70% of Yahoo! users operating from computer sites in France could be identified. The report specifically noted that Yahoo! already used such identification of French users to display advertising banners in French. The 70% number applied irrespective of whether a Yahoo! user sought access to an auction site, or to a site denying the existence of the Holocaust or constituting an apology for Nazism.

...

With respect to auction sites, the report concluded that it would be possible to identify additional users. Two out of the three experts concluded that approximately an additional 20% of users seeking access to auction sites offering Nazi-related items for sale could be identified through an honor system in which the user would be asked to state his or her nationality. In all, the two experts estimated that almost 90% of such auction site users in France could be identified: “The combination of the two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%.” The third expert expressed doubts about the number of additional users of the auction site who would respond truthfully under the honor system.

...

In a second interim order, issued on November 20, 2000, the French court reaffirmed its May 22 order and directed Yahoo! to comply within three months, “subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.” (The May 22 order had specified a penalty of 100,000 Euros rather than 100,000 Francs.) The court “reserve[d] the possible liquidation of the penalty” against Yahoo!. ... However, the French court found “that YAHOO FRANCE has complied *in large measure* with the spirit and letter of the order of 22nd May 2000.” (Emphasis added.)

The November 20 order required Yahoo! to pay 10,000 Francs for a report, to be prepared in the future by one of the experts previously appointed by the court, to determine whether Yahoo! was in compliance with the court’s orders. ...

Yahoo! did not pursue appeals of either interim order.

The French court has not imposed any penalty on Yahoo! for violations of the

May 22 or November 20 orders. Nor has either LICRA or UEJF returned to the French court to seek the imposition of a penalty. Both organizations affirmatively represent to us that they have no intention of doing so if Yahoo! maintains its current level of compliance. Yet neither organization is willing to ask the French court to vacate its orders. As LICRA and UEJF's counsel made clear at oral argument, "My clients will not give up the right to go to France and enforce the French judgment against Yahoo! in France if they revert to their old ways and violate French law."

...

III. RIPENESS

Because we conclude that the exercise of personal jurisdiction over LICRA and UEJF is proper, we turn to the question of ripeness. Ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."

...

In determining whether a case satisfies prudential requirements for ripeness, we consider two factors: "the fitness of the issues for judicial decision," and "the hardship to the parties of withholding court consideration." We address these two factors in turn.

A. Fitness of the Issue for Judicial Decision

1. *The Substantive Legal Question at Issue*

Whether a dispute is sufficiently ripe to be fit for judicial decision depends not only on the state of the factual record. It depends also on the substantive legal question to be decided.

...

In a typical enforcement case, the party in whose favor the foreign judgment was granted comes to an American court affirmatively seeking enforcement. ... However, this is not the typical case, for the successful plaintiffs in the French court do not seek enforcement. Rather, Yahoo!, the unsuccessful defendant in France, seeks a declaratory judgment that the French court's interim orders are unenforceable anywhere in this country.

...

[W]e look to general principles of comity followed by the ... courts. We may appropriately consult the Restatement (Third) of the Foreign Relations Law of the United States ("Third Restatement" or "Restatement"), given that ... courts frequently cite the Restatement, as well as earlier Restatements, as sources of law. The general principle of enforceability under the Third Restatement is the same as under California's Uniform Act. That is, an American court will not enforce a judgment if "the cause of action on which the judgment was based, or the judgment itself, is *repugnant to the public policy* of the United States or of the State where recognition is sought[.]" Restatement § 482(2)(d) (emphasis added)....

There is very little case law in California dealing with enforceability of foreign country injunctions under general principles of comity, but that law is consistent with the repugnancy standard of the Restatement. ...

California courts have also relied on public policy in the analogous context of injunctions entered by other American courts. ...

The repugnancy standard is also generally followed in states other than California.

...

2. *Fitness of the Question for Judicial Decision*

With the suit in its current state, it is difficult to know whether enforcement of the French court's interim orders would be repugnant to California public policy. The first difficulty is evident. As indicated by the label "interim," the French court contemplated that it might enter later orders. We cannot know whether it might modify these "interim" orders before any attempt is made to enforce them in the United States.

A second, more important, difficulty is that we do not know whether the French court would hold that Yahoo! is now violating its two interim orders. After the French court entered the orders, Yahoo! voluntarily changed its policy to comply with them, at least to some extent. There is some reason to believe that the French court will not insist on full and literal compliance with its interim orders, and that Yahoo!'s changed policy may amount to sufficient compliance.

...

A third difficulty is related to the second. Because we do not know whether Yahoo! has complied "in large measure" with the French court's orders, we cannot know what effect, if any, compliance with the French court's orders would have on Yahoo!'s protected speech-related activities. We emphasize that the French court's orders require, by their terms, only a limitation on access to anti-semitic materials *by users located in France*. The orders do not by their terms limit access by users outside France in any way. Yahoo! contended in the French court that it was technically too difficult to distinguish between users inside and outside France. As described above, the French court commissioned a report by three experts to determine if Yahoo!'s contention were true. The experts disagreed with Yahoo!, concluding that Yahoo! is readily able to distinguish between most users inside and outside France.

...

However, it is possible, as Yahoo! contends, that it has not complied "in large measure" with the French court orders, and that the French court would require further compliance. ...

The possible—but at this point highly speculative—impact of further compliance with the French court's orders on access by American users would be highly relevant to the question whether enforcement of the orders would be repugnant to California public policy. But we cannot get to that question without knowing whether the French court would find that Yahoo! has already complied "in large measure," for only on a finding of current noncompliance would the issue of further compliance, and possible impact on American users, arise.

...

We are thus uncertain about whether, or in what form, a First Amendment question might be presented to us. If the French court were to hold that Yahoo!'s voluntary change of policy has already brought it into compliance with its interim orders "in large measure," no First Amendment question would be presented at all. Further, if the French court were to require additional compliance with respect to users in France, but that additional compliance would not require any restriction on access by users in the United States, Yahoo! would only be asserting a right to extraterritorial application of the First Amendment. Finally, if the French court were to require additional compliance with respect to users in France, and that additional compliance would have the necessary

consequence of restricting access by users in the United States, Yahoo! would have both a domestic and an extraterritorial First Amendment argument. The legal analysis of these different questions is different, and the answers are likely to be different as well.

B. Hardship to the Parties

...

Yahoo! contends that it will suffer real hardship if we do not decide its suit at this time. Yahoo! makes essentially two arguments. First, it argues that the potential monetary penalty under the French court's orders is mounting every day, and that the enforcement of a penalty against it here could be extremely onerous. Second, it argues that the French court's orders substantially limit speech that is protected by the First Amendment. We take these arguments in turn.

1. Enforceability of the Monetary Penalty

Yahoo! contends that the threat of a monetary penalty hangs like the sword of Damocles. However, it is exceedingly unlikely that the sword will ever fall. ... Further, LICRA and UEJF have represented that they have no intention of seeking a monetary penalty by the French court so long as Yahoo! does not revert to its "old ways."

...

California courts follow the generally-observed rule that, "[u]nless required to do so by treaty, no state [country] enforces the penal judgments of other states [countries]."

...

There are a number of indications that the French judgments are penal in nature. ... [T]he French court held that Yahoo! was violating Section R645-1 of the French Penal Code, which declares it a "crime" to exhibit or display Nazi emblems, and which prescribes a set of "criminal penalties," including fines. Fr. C. Pén. § R645-1.

...

2. First Amendment

Yahoo! argues that any restriction on speech and speech-related activities resulting from the French court's orders is a substantial harm under the First Amendment. We are acutely aware that this case implicates the First Amendment, and we are particularly sensitive to the harm that may result from chilling effects on protected speech or expressive conduct. ...

The only potential First Amendment violation comes from the restriction imposed by the interim orders-if indeed they impose any restrictions-on the speech-related activities in which Yahoo! is now engaged, and which might be restricted if further compliance with the French court's orders is required. For example, Yahoo! continues to allow auctions of copies of *Mein Kampf*, and it maintains that the French court's orders prohibit it from doing so. The French court might find that Yahoo! has not yet complied "in large measure" with its orders, and that Yahoo! is prohibited by its orders from allowing auctions of copies of *Mein Kampf*.

...

The core of Yahoo!'s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France. Yet under French criminal law, Internet service providers are forbidden to permit French users to have access to the

materials specified in the French court's orders. French users, for their part, are criminally forbidden to obtain such access. In other words, as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. As we indicated above, the extent-indeed the very existence-of such an extraterritorial right under the First Amendment is uncertain.

3. Summary

In sum, it is extremely unlikely that any penalty, if assessed, could ever be enforced against Yahoo! in the United States. Further, First Amendment harm may not exist at all, given the possibility that Yahoo! has now "in large measure" complied with the French court's orders through its voluntary actions, unrelated to the orders. Alternatively, if Yahoo! has not "in large measure" complied with the orders, its violation lies in the fact that it has insufficiently restricted access to anti-semitic materials by Internet users located in France. There is some possibility that in further restricting access to these French users, Yahoo! might have to restrict access by American users. But this possibility is, at this point, highly speculative. This level of harm is not sufficient to overcome the factual uncertainty bearing on the legal question presented and thereby to render this suit ripe.

...

CONCLUSION

First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power.

...

A three-judge plurality of the panel concludes ... that the suit is unripe for decision.... When the votes of the[se] ... judges ... are combined with the votes of the three dissenting judges who conclude that there is no personal jurisdiction over LICRA and UEJF [because of their insufficient ties to the California forum], there are six votes [out of eleven judges] to dismiss Yahoo!'s suit.

We therefore REVERSE and REMAND to the district court with instructions to dismiss without prejudice [leaving Yahoo! free to refile again, should the French court decide to enforce its judgment against Yahoo! in France].

...

FERGUSON, Circuit Judge, with whom O'SCANNLAIN and TASHIMA, Circuit Judges, join with respect to Part I, concurring in the judgment:

...

French justice Jean-Jacques Gomez expressly recognized in his court orders the compelling interest of France to rid its country of anti-Semitic merchandise and speech within its borders. In his May 22, 2000 interim order, for example, he called Yahoo.com "the largest vehicle in existence for the promotion [of] Nazism" and described the commercial sale of Nazi objects as "an affront to the collective memory of a country

profoundly traumatized by the atrocities committed by and in the name of the criminal Nazi regime against its citizens.” Access to Nazi memorabilia on Yahoo!’s auction sites “constitute[d] a threat to internal public order” and a “wrong in the territory of France.” ... [T]he French court here gave clear effect to the collective efforts of French civil liberties organizations, the French government, and French law enforcement to enforce French criminal provisions against anti-Semitism. Justice Gomez’s opinion sets forth the moral judgment of France itself.

[T]he French court orders reflected judicial enforcement of a robust French state policy against racism, xenophobia, and anti-Semitism. France has acceded to the International Convention on the Elimination of all Forms of Racial Discrimination (ICEFRD) (1965) and the International Covenant on Civil and Political Rights (ICCPR) (1966), both of which include provisions against racist speech. *See* ICCPR, Art. 20-2; ICEFRD, Art. 4(a). Since World War II, France has introduced sweeping legislation to combat anti-Semitism. In July 1972 it passed “Loi Pléven,” which criminalized a range of racist behavior from racial defamation and provocation to racial hatred and violence, and in July 1990 it passed “Loi Fabius-Gayssot,” which criminalized speech that denied the existence of the Holocaust or that celebrated Nazism. The Nazi Symbols Act, which Yahoo! was found guilty of violating, encompassed France’s earlier dramatic efforts to criminalize racist speech within its borders.

It is apparent then that the French court orders were not merely private judgments but, in fact, reflected the sentiments of two French civil liberties organizations, the French public prosecutor, and, indeed, France itself. ...

The District Judge sitting in San Jose, California did not have the authority to second guess these orders and should have abstained from invalidating them. He should have deferred to the Executive and Congress to assess the foreign consequences of France’s broad policy against anti-Semitic hate speech. ...⁴

The criminal statutes of most nations do not comport with the U.S. Constitution. That does not give judges in this country the unfettered authority to pass critical judgment on their validity, especially where, as here, the criminal statute embodies the determined will of a foreign sovereign to protect its borders from what it deems as morally reprehensible speech of the worst order.

...

TASHIMA, Circuit Judge, with whom FERGUSON and O’SANNLAIN, Circuit Judges, join, concurring in the judgment:

...

I. OVERVIEW

Stated simply, the issue before us is whether a United States Internet service provider, whose published content has been restricted by a foreign court injunction, may look to the United States federal courts to determine the enforceability of those restrictions under the United States Constitution’s First Amendment. The French injunctive orders—backed by substantial, retroactive monetary penalties for

⁴ Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, REPORT ON GLOBAL ANTI-SEMITISM, 5-6, 13-15 (January 2005) (discussing France’s efforts to combat anti-Semitism). On October 16, 2004, President George W. Bush signed into law the Global Anti-Semitism Review Act, which authorized the 2005 report, the first of its kind.

noncompliance—require Yahoo! to block access from French territory to Nazi-related material on its website.² Some prohibited content is readily identifiable, such as Nazi artifacts or copies of *Mein Kampf*. Much, however, is not. The orders impose the following sweeping mandate:

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*.

(Emphasis added.) In traditional First Amendment terms, this injunctive mandate is a prior restraint on what Yahoo! may post (or control access to) on its U.S.-located server-imposed under principles of French law and in such facially vague and overbroad terms that even the majority does not know “whether further restrictions on access by French, and possibly American, users are required” to comply with the French orders. Yahoo! can either hope to comply with what the French court (and the defendants here) deems to be inappropriate content by attempting to block access to material Yahoo! *thinks* the orders cover or by simply removing any questionable content altogether. Or Yahoo! can ignore the French court’s mandate in whole or in part and accept the risk of substantial accruing fines. The majority, however, is unmoved. For it, Yahoo!’s proper recourse is to take its case back to France. We cannot agree.

As the district court readily concluded in its thoughtful opinion, “[a] United States court constitutionally could not make such an order.” It specifically found that the orders are “far too general and imprecise to survive the strict scrutiny required by the First Amendment,” and that “[p]hrases such as ‘all necessary measures’ and ‘render impossible’ instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech.” The district court emphasized that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”

The issue is not whether the French defendants who obtained the injunctive orders, or the French court that issued them, are justified in trying to suppress hateful speech. We of course recognize the horrors of the Holocaust and the scourge of anti-Semitism, and France’s understandable interest in protecting *its* citizens from those who would defend or glorify either. Nor is the issue one of extra-territorial application of the First Amendment; if anything, it is the extra-territorial application of French law to the United States. We do not question the validity of the French orders on French soil, and Yahoo! has complied with the orders as they relate to its <fr.yahoo.com> website. Rather the question we face in this federal lawsuit is whether our own country’s fundamental constitutional guarantee of freedom of speech protects Yahoo! (and, derivatively, at least its users in the United States) against some or all of the restraints the French defendants have deliberately imposed upon it *within the United States*. “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First

² As the majority recognizes, any Internet user in France or a French territory—whether or not a French citizen or resident—can gain access to Yahoo!’s U.S.-based server by typing into her browser or linking through <fr.yahoo.com>.

Amendment rights.’ ”

The majority ... turns a blind eye to the constitutional free speech interests of Yahoo!, throwing it out of court because those interests are not “ripe” for adjudication. The majority’s thesis rests on the contention that the French “orders do not by their terms limit access by users outside France in any way.”

...

By their terms, the orders reach “any other site or service [in addition to the auction service] that *may be construed as* constituting an apology for Nazism or a contesting of Nazi crimes.” (Emphasis added.)

...

This is to apply First Amendment precedents exactly backwards. As the majority admits, “[t]he boundary line between what is permitted and not permitted is somewhat uncertain for users in France.” Under such circumstances, we blame the law, not the speaker.

Instead, the majority effectively imposes an exhaustion requirement on Yahoo! to litigate this issue in France, confirm that it is still is not in compliance with the orders (just as it was not on May 22 and November 20, 2000) and obtain a “final” adverse judgment before the majority will consider this case ripe.

...

By preemptorily terminating Yahoo!’s access to federal court, the majority establishes a new and burdensome standard for vindicating First Amendment rights in the Internet context, threatening the Internet’s vitality as a medium for robust, open debate. ... Accordingly, although we concur in that part of the majority’s opinion upholding ... jurisdiction, we respectfully dissent from its ultimate holding that this case is not ripe for adjudication.

...

II. PRUDENTIAL RIPENESS

...

A. Fitness of the Issues for Judicial Resolution

...

2. *Comity and the repugnance of unconstitutional injunctions*

We do not agree with the majority’s professed uncertainties as to whether a California court, under principles of comity, would be inclined to enforce a foreign court order that infringes upon a U.S. corporation’s First Amendment rights. The “repugnancy” standard the majority invokes is easily satisfied here. California’s case law and its federal underpinnings tell us to honor foreign court judgments unless they “prejudice the rights of United States citizens or violate domestic public policy.” The French orders on their face—and by putting Yahoo! at risk of substantial penalties—violate the First Amendment and are plainly contrary to one of America’s, and by extension California’s, most cherished public policies. In short, they constitute a foreign judgment that is “repugnant to public policy.”

...

The majority goes to great lengths to avoid labeling a prior restraint on speech—overbroad and vague by its terms—as “repugnant to public policy” and is content to leave

in place foreign court orders that so obviously violate the First Amendment.

...

People in the United States and France should abhor anti-Semitism and the horrors perpetrated by the Nazi Party. Nonetheless, our constitutional law differs from French jurisprudence in our approach to hate speech. Our law reflects deeply held political beliefs about freedom of expression in this country. Borrowing Justice Brandeis's formulation, "the remedy to be applied [to expose falsehood and fallacies] is more speech, not enforced silence."

...

Clouding the majority's view of the facts are the [French] defendants' assertions before us and in the district court that they "have no present intention of taking legal action against Yahoo! in the United States" because they consider Yahoo! to be in "substantial compliance with the French order." But the French court has never made such a determination of Yahoo!'s alleged compliance. Instead, the majority speculates that because *Yahoo! France* has "complied [in France] in large measure with the spirit and letter" of the May 22 French order, "compliance 'in large measure' by Yahoo! is very likely to be satisfactory to the French court." But *Yahoo!* is not *Yahoo! France*, and the French court did not explain the factual basis for its finding of compliance.

Nor have the defendants ever taken any steps to stipulate in a legal forum that Yahoo! is in compliance with the injunction. Thus the district court properly gave no weight to the defendants' professions of Yahoo!'s substantial compliance. The court pointedly observed that the defendants "have not taken steps available to them under French law to seek withdrawal of the orders or to petition the French court to absolve Yahoo! from any penalty," and they gave no indication they would pursue such measures when pressed on the subject.

...

The majority claims that "we do not know whether the French court would hold that Yahoo! is now violating its two interim orders." Ironically, the majority thereby highlights the very threat Yahoo! faces. Uncertainty about whether the sword of Damocles might fall is *precisely* the reason Yahoo! seeks a determination of its First Amendment rights in federal court.

In sum, the uncertainties Yahoo! faces are not reasons to delay adjudication. Rather, they provide a compelling basis for a federal court to hear Yahoo!'s First Amendment challenge at this time, as the district court did.

The fact that Yahoo! does not know whether its efforts to date have met the French Court's mandate is the *precise harm* against which the Declaratory Judgment Act is designed to protect. The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never. ([E]mphasis added).

Instead, the majority turns Yahoo!'s uncertainties against it—relegating it to the French courts for clarification and absolution.

B. Substantial Hardship of Withholding Judicial Consideration

Even more perplexing is the majority's conclusion that Yahoo! does not face "substantial hardship" because of our unwillingness to adjudicate its First Amendment claim. The majority attempts to avoid the obvious chilling effect of an overbroad and

vague injunction in two creative and troubling ways. First, the majority opines “with some confidence” that Yahoo! need not fear the enforcement of a fine because “it is exceedingly unlikely that the sword [of Damocles] will ever fall”—another speculative assessment, we submit. It also faults Yahoo! for failing to proffer examples of “anything that it is now not doing but would do if permitted by the orders” and thereby imposes a new, higher burden on a First Amendment plaintiff to establish a chilling effect.

1. The French orders chill speech

First, the majority overlooks Yahoo!’s claim that it faces actual abridgment of its current speech—not just a chilling effect on its ever-changing Web content. As the majority does acknowledge, Yahoo! hosts content on its auction site, including the sale of *Mein Kampf*, that is specifically prohibited by the terms of the injunction. The district court’s findings of impermissible material still present on the auction site demonstrate that Yahoo! is currently engaged in speech that the French orders—by their terms—*compel* it to foreclose to some users or forgo entirely. Yahoo! opts not to accede to the injunction, thereby incurring daily accumulating fines should its current or future behavior displease LICRA or UEJF. Certainly Yahoo! should not have to abstain from conduct it believes is constitutionally protected solely for us to find its claim ripe.

More importantly, the majority largely ignores the broad and diffuse scope of the French injunction—which extends well beyond Yahoo!’s auction site and clearly raises the question whether it is substantively possible for Yahoo! to comply. Apart from entirely obvious cases, how can one determine with any certainty whether something “may be construed as constituting an apology for Nazism or a contesting of Nazi crimes”? The majority makes the rather startling assertion that “[b]efore the district court can engage in useful factfinding, it must know whether (or to what extent) Yahoo! has already sufficiently complied with the French court’s interim orders.” Of course, this is precisely the crux of Yahoo!’s predicament—and highlights the vagueness and overbreadth of the orders. We know the actions Yahoo! has taken and not taken with respect to Nazi paraphernalia appearing on its site. The only reason we cannot determine “whether (or to what extent) Yahoo! has already sufficiently complied” with the French orders is because we cannot assess the scope of the orders themselves.⁷

It is this very kind of uncertainty that epitomizes a purely legal question of facial infringement of First Amendment rights and the harms routinely associated with such an infringement.

In plain terms, if no one but the French court can decipher the meaning of its injunction aimed at Yahoo!’s speech, how can Yahoo! comply? Yahoo! has to know what content it has to screen from France-based users. The French orders contain no meaningful instructions for Yahoo! to winnow permitted speech from unpermitted speech. It is the absence of a discernible line between the permitted and the unpermitted that makes the orders facially unconstitutional. As the district court concluded, and as

⁷ It is telling that even the Internet experts relied upon by the French court were unable to recommend a “suitable and effective technical solution” for Yahoo! to screen out France-based users from any of its sites or services, other than the auction site, that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes because “[n]o grievance against any ... Yahoo! sites or services [other than the auction site] is formulated with sufficient precision.”

discussed previously, “compliance would still involve an impermissible restriction on speech” because it would require Yahoo! to interpret the vague and overbroad injunction as to what content is prohibited and which users should be denied access, on pain of substantial penalty should it guess wrong.

Ultimately, the majority’s parsimonious treatment of the free speech issues here culminates with its reducing Yahoo!’s argument to an interest in merely “allowing access by users in France” to Nazi materials. Yahoo! is allegedly seeking “a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others.”⁸ Notably, even the defendants have not construed Yahoo!’s First Amendment argument in such crabbed terms.

But suppose Yahoo! really were concerned only with not having to act *in the United States* as an enforcer of France’s restrictions on Internet access by France-based users. That would not make the constitutional implications of the effects on Yahoo!’s United States operations go away. Yahoo! cannot merely act in France to restrict access by users located in France; the French orders require Yahoo! to make changes to its servers and protocols in the United States. That Yahoo! seeks First Amendment protection from having to compromise its domestic operations to comply with a foreign injunction does not translate into its seeking the right simply to violate French law. This case is *not* about the extra-territorial application of the First Amendment; it *is* about the extra-territorial application of France’s anti-Holocaust denial speech codes and the extent to which compliance may infringe Yahoo!’s rights of free speech here in the United States.

The majority, however, views the French orders as concerning “speech accessible solely by those outside the United States.” Additionally, it accepts that Yahoo! can screen out access to any prohibited materials by “most”—estimated to be 70–90%—of France-based users. This reasoning is flawed in several respects.

First, Yahoo! does not target specific users by initiating content directed solely at them. Rather, anyone who logs on to, including users in France, gains access to material on Yahoo!’s message boards, search engines, auction sites and other services. It is the *accessing* of vaguely and overbroadly described content-by anyone in French territory—that the orders prohibit and hold Yahoo! responsible for preventing. Thus, even if one could readily and reliably limit the universe of Internet users whose access must be censored—an assumption the record before us does not justify—Yahoo! would still be at a loss to define the universe of content it must censor.

Second, [is] the factual question of whether it *is* technologically feasible for Yahoo! to monitor the postings and filter the millions of users accessing the website—an issue that should be returned to the district court. The parties have not addressed [it] ...

⁸ According to the majority, “the French court’s interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States.” This is not Yahoo!’s position. The company has asserted that complying with the French orders would compel it to remove prohibited material from its United States-based Internet services and reengineer its servers, also located in the United States, to identify both France-based users and prohibited material that may be posted in the future; therefore, it may not be possible to comply with the French orders without rendering certain content inaccessible to *all* users, including those in the United States and not just those in France. Nor does Yahoo! appear to be interested in asserting its constitutional rights solely for the sake of violating French law. To comply with the orders as they affect the company’s French services, Yahoo! now removes any posted material it becomes aware of on its <fr.yahoo.com> site that would violate French law.

nor the validity of the experts' report. Thus the 70% and 90% figures the majority adopts from that report depend solely on the majority's reading of a translated technical and ambiguous document, the scientific merits of which have not been addressed even in the district court. LICRA and UEJF did raise the issue of feasibility below, but the district court denied them discovery regarding technological feasibility of screening France-based users because it deemed the issue immaterial to the court's First Amendment ruling. The defendants *have not appealed* either the district court's First Amendment decision or its discovery ruling. To the extent that the technological feasibility issue has been argued at all on appeal, Yahoo! has said that it "could not monitor the content of these millions of postings and listings to its U.S.-based Internet services" and that it essentially faces a binary choice between self-censorship and paying the French fines.

On the record before us—lacking expert testimony and cross-examination, much less district court findings of fact—we do not believe we as appellate judges can or should accept as a given that Yahoo! can readily and reliably identify 70% of the users it must censor, "irrespective of whether a Yahoo! user sought access to an auction site, or to a site denying the existence of the Holocaust or constituting an apology for Nazism."

This is particularly true given that the experts' report is replete with hearsay, technological assumptions and disclaimers. Most importantly, the experts explicitly limited their analysis to how an Internet "surfer" in France could be prevented from accessing prohibited content *only* on Yahoo!'s *auction* site, not all such content that might find its way onto generally. As the experts emphasized—echoing Yahoo!'s own concern about the imprecision of the orders:

The decisions of the [French] court and the demands made are precisely directed against the auctions site. *No grievance against any other Yahoo! sites or services is formulated with sufficient precision to enable the consultants to propose suitable and effective technical solutions.* In these circumstances, the consultants will therefore confine their answers to the matter of the auctions site....⁹

(Emphasis added.) The experts also emphasized, "[t]he measures to be taken depend upon the particular case in point. They cannot be generalised to all sites and services on the Internet. In this case, the site in question is *pages.auctions.yahoo.com*." (Emphasis added.)

Of course, the French orders do not solely prohibit content on Yahoo!'s auction site but, by their terms, encompass content on *all* of Yahoo!'s services. Yahoo!'s services extend far beyond its auction site and include its search engine, e-mail, classified listings, personal Web pages, shopping, message boards, chat rooms and news stories. ...

⁹ Even as to screening content on the auction site, the experts acknowledged that it was not possible for Yahoo! to "exclude *a priori* items which have not been described by their owner as being of Nazi origin or belonging to the Nazi era." How then would Yahoo! keep the prohibited material from being accessed? The report suggested that a more "radical solution" might be warranted, essentially prohibiting any search containing the word "Nazi" by an identified French user. How such Nazi paraphernalia which has not been described by its owners with the label "Nazi" could be screened remains a mystery.

The third expert, Vinton Cerf, a 1997 recipient of the United States National Medal of Technology for co-designing the architecture of the Internet, disavowed relying on users' self-identification at all, concluding that "it does not appear to be very feasible to rely on discovering the geographic locations of users for purposes of imposing filtering of the kind described in the [French] Court Order."

...

Indeed, the method the experts proposed for Yahoo! to identify users is imprecise. The experts noted that for a number of reasons the "real world" location of a user may not be readily identifiable. For instance, a French citizen who uses AOL for Internet service may be shown as having an IP address from Virginia, where AOL's network is located. In other instances, users may choose to mask the geographical origin of their Internet address.

...

Lastly, there is the issue of cost of compliance. There can be no dispute that the very nature of the French orders puts Yahoo! to the choice of incurring the costs to develop and implement mechanisms to filter out individual users based on location or removing content from its service altogether. This type of immediate financial burden clearly suffices to make a case ripe for adjudication, even if we accept the majority's proposition that the threat of enforcement is remote....¹³

2. The enforceability of foreign penal judgments

Recognizing that the risk of a large monetary penalty must inevitably weigh heavily in Yahoo!'s assessment of its options, the majority tries to neutralize the risk-creating a protective shield by invoking the doctrine that United States courts will not enforce the penal judgments of other countries. It thus assures Yahoo! that "even if the French court were to impose a monetary penalty against Yahoo!, it is exceedingly unlikely that any court in California—or indeed elsewhere in the United States—would enforce it" because it is a penal judgment.

It is true as Justice Marshall observed that "[t]he courts of no country execute the penal laws of another." But that begs the question whether the French injunction itself or the accruing fines are truly penal. Although we respect the majority's scholarship, this issue has not been the focus of the parties' briefs or arguments, and thus we cannot share the majority's level of confidence that its dictum is sufficiently accurate—or binding—that we should remove the risk of a substantial, retroactive monetary penalty from the First Amendment or ripeness analysis. As with the French defendants' assurances that they consider Yahoo! currently in substantial compliance, absent a binding court order actually freeing Yahoo! from the enforcement of the French orders, Yahoo! remains at serious risk if it fails to conform its web content to the dictates of those orders.

¹³ The mere possibility of future fines can have very real financial consequences for a publicly held corporation like Yahoo!. To the extent it is material to a corporation's financial condition, such companies are required to disclose contingent liabilities in Form 10-Q and 10-K statements filed with the Securities and Exchange Commission. Such filings may adversely affect the credit ratings and hence the valuation of shares of such companies. In another context, we have held that financial impacts on a business resulting from legal uncertainty support a finding that a case is ripe.

...
Although LICRA and UEJF's substantive claims against Yahoo! in French court depended in part upon Yahoo!'s violations of French criminal law,¹⁵ the record suggests that the French lawsuits were civil rather than criminal and, more importantly, that the French orders primarily sought to redress a wrong to LICRA and UEJF rather than a wrong to the French public. ...

French law gives standing to [this case's] public interest, non-governmental organizations dedicated to defending the interests of members of certain victimized groups, including victims of the Holocaust (*déportés*), to initiate enumerated types of civil actions (but not criminal prosecutions) on behalf of such victims. Yahoo!'s challenge to UEJF's standing under Article 48-2 of the French Law on Freedom of the Press and the French court's subsequent finding that LICRA and UEJF "are dedicated to combating all forms of promotion of Nazism in France" suggest that the French trial was a civil proceeding under one of the specialized French standing statutes. This conclusion is further supported by the French court's reliance on Article 809 of the New Code of *Civil Procedure* for its authority to issue orders.

...
For these reasons, unlike the majority we cannot take the monetary penalty out of the ripeness analysis and assume that Yahoo! is not harmed by the very threat of the French orders' possible enforcement. Once again, at the least this is another issue that could and should be remanded to the district court for appropriate briefing and factfinding [rather than dismissing Yahoo!'s case].

3. A new, higher burden for proving chilling effect

Finally, the majority dismisses the chilling effect of the orders by placing the burden on Yahoo! to identify *other* speech it wants to engage in but which is foreclosed by the French orders. What more should Yahoo! have to specify about the exact manner in which the objectionable content would appear on its site? Millions of postings and other material flow through Yahoo!'s networks each day.¹⁹ Yahoo! cannot possibly predict when and how specific content prohibited by the French orders will make its way onto its service. For example, a user could decide at any time to post a message or a link to a website containing impermissible content. Because it acts as a platform for other speakers, Yahoo! cannot, as the majority demands, identify the specific speech it wishes to engage in that is prohibited by the injunction.

¹⁵ LICRA and UEJF's claims are based in part on a French law that criminalizes the public wearing or display of the uniforms, insignias and emblems of any organization declared criminal by the post-World War II International (Nuremberg) Military Tribunal (e.g., the Nazi Party). *See* C. Pén. R645-1. One of the most serious penalties for violation of this provision of the penal code is a fine. Their claims also appear to rely on the French Law of July 29, 1881 (Law on Freedom of the Press) (2004), which, among other things, criminalizes Holocaust denial, and the incitement of discrimination, hatred or violence on the basis of belonging to a particular ethnic, national, racial group. Both crimes carry a penalty of one year imprisonment or a fine of 45,000 Euros or both.

¹⁹ The record indicates that as of July 2000, Yahoo! and its subsidiaries had 146 million users worldwide. Each month Yahoo! users added or edited more than 15 million Geocities web pages and posted more than 6 million classified advertisements. There were more than 2.5 million active auction items viewable on Yahoo! each day and 200,000 Yahoo! clubs were accessed each day by members who posted messages, uploaded photos or added Internet links.

Nor should it have to. To place such a requirement on an Internet provider—essentially forcing it to speculate as to the particular speech activity its millions of users “might” engage in as senders or recipients—is to afford it no First Amendment protection at all. As the Supreme Court has recognized, “[t]he Internet ... offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” ...

The majority would impose on Yahoo! far greater burdens and litigation risks than those alleging First Amendment violations by domestic parties would have to bear. Yahoo! is expected to try to persuade the French court to narrow or eliminate the very injunction Yahoo! has unsuccessfully fought against in France from the beginning. Unconstrained by our First Amendment, the French court might well take the opportunity to sanction Yahoo! for noncompliance—and do nothing to alleviate the sweeping restraint on the content of the website. If the defendants want to narrow the injunction such that it might warrant comity, that burden should fall on them, not Yahoo!.

But even if Yahoo! went to the French court and obtained a ruling that its current auction site policy and Internet services content comply with the orders, that would not resolve Yahoo!’s First Amendment problem unless the sweeping injunction itself were permanently withdrawn or narrowed. All Yahoo! would obtain would be clearance for its *current* operations; it would remain exposed to the risk of violating the orders and incurring penalties should it deviate from those current practices or should the defendants decide that Yahoo!’s content has become objectionable. The very nature of Yahoo!’s business is inherently mutable—that is the essence of the Internet, because of the sheer number and constantly changing identity of its users and of the content those users may seek or themselves post on. Only a United States court can provide Yahoo! with a legal resolution of its claim that the injunctive order, as written, cannot be enforced in the United States without infringing the company’s First Amendment rights, thereby relieving it of the coercive threat hanging over its website and the operation of its business. By denying adjudication, the majority abdicates our proper role in protecting Yahoo!’s constitutional rights.

In so doing, it leaves in place a foreign country’s vague and overbroad judgment mandating a U.S. company to bar access to prohibited content by Internet users from that country. This astonishing result is itself the strongest argument for finding Yahoo!’s claims ripe for adjudication. Are we to assume that U.S.-based Internet service providers are now the policing agencies for whatever content another country wants to keep from those within its territorial borders—such as, for example, controversial views on democracy, religion or the status of women? If the majority’s application of the First Amendment in the global Internet context in this case is to become the standard—whether as a matter of constitutional law or comity—then it should be adopted (or not) after full consideration of the constitutional merits, not as a justification for avoiding the issue altogether as not ripe for adjudication.

III. CONCLUSION

Without doubt, the hateful speech the defendants in this case seek to suppress is to be condemned. But censoring speech we find repugnant does not comport with our cherished First Amendment. It is well-settled that a hate speech code which “prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses” is

“facially unconstitutional.”

Under the majority’s reasoning, a party targeted for enforcement of a foreign judgment restricting its speech in the United States will have no recourse but to appeal to the foreign court, which does not recognize the First Amendment, to try to escape the strictures of the decree-or to demonstrate compliance, either through voluntary action or by submitting to its terms. Only after enduring the decree’s chilling effects while this process plays out, and then faced with whatever sanction the foreign court may impose for noncompliance, may the doors of the United States District Court be opened.

We should not allow a foreign court order to be used as leverage to quash constitutionally protected speech by denying the United States-based target an adjudication of its constitutional rights in federal court. By invoking the doctrine of prudential ripeness-notwithstanding having found both personal jurisdiction over the two foreign defendants and a constitutional case or controversy—the majority does just that, denying Yahoo! the only forum in which it can free itself of a facially *unconstitutional* injunction. Moreover, in doing so the majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted with foreign court orders that require them to police the content accessible to Internet users from another country. We therefore respectfully dissent from the majority’s ripeness decision.
