

**YAHOO! INC., a Delaware corporation**  
v.  
**LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME;  
L'UNION DES ETUDIANTS JUIFS DE FRANCE**

**No. 01-17424**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIR-  
CUIT**

**433 F.3d 1199 (9th Cir. 2006)**

**JUDGES:** Before: Mary M. Schroeder, Chief Judge, and Warren J. Ferguson, Diarmuid F. O'Scannlain, Michael Daly Hawkins, A. Wallace Tashima, William A. Fletcher, Raymond [\*\*2] C. Fisher, Ronald M. Gould, Richard A. Paez, Richard R. Clifton, and Carlos T. Bea, Circuit Judges. Opinion by Judge William A. Fletcher; Concurrence by Judge Ferguson; Concurrence by Judge O'Scannlain; Concurrence by Judge Tashima; Partial Concurrence and Partial Dissent by Judge Fisher. W. FLETCHER, Circuit Judge, with whom SCHROEDER, Chief Circuit Judge, and GOULD, Circuit Judge, join as to the entire opinion, and with whom HAWKINS, FISHER, PAEZ, CLIFTON and BEA, Circuit Judges, join as to Parts I and II. FERGUSON, Circuit Judge, with whom O'SCANNLAIN and TASHIMA, Circuit Judges, join with respect to Part I, concurring in the judgment. O'SCANNLAIN, Circuit Judge, with whom FERGUSON and TASHIMA, Circuit Judges, join, concurring only in the judgment. TASHIMA, Circuit Judge, with whom FERGUSON and O'SCANNLAIN, Circuit Judges, join, concurring in the judgment. FISHER, Circuit Judge, with whom HAWKINS, PAEZ, CLIFTON and BEA, Circuit Judges, join, concurring in part and dissenting in part.

**OPINION BY:** William A. Fletcher

**OPINION**

**[\*1201] PER CURIAM:**

A majority of the en banc court (Judge W.A. Fletcher, joined by Chief Judge Schroeder and Judges Hawkins, Fisher, Gould, Paez, Clifton, and Bea) concludes that the district court had personal jurisdiction over the defendants. Of that majority, three judges (Chief Judge Schroeder, and Judges W.A. Fletcher and Gould) conclude that the action should be dismissed for lack of ripeness. Five judges (Judge Fisher, joined by Judges Hawkins, Paez, Clifton, and Bea) conclude that the case is ripe for adjudication. The three remaining judges (Judges Ferguson, O'Scannlain, and Tashima) conclude that the action should be dismissed because the district court lacked personal jurisdiction over the defendants.

A majority of the en banc court having voted therefor, the judgment of the district court is **REVERSED** and the case **REMANDED** with directions to dismiss the action without prejudice.

W. FLETCHER, Circuit Judge, with whom SCHROEDER, Chief Circuit Judge, and GOULD, Circuit Judge, join as to the entire opinion, and with whom HAWKINS, FISHER, PAEZ, CLIFTON and BEA, Circuit Judges, join as to Parts I and II:

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 *First Amendment*. The district court did not reach the question whether the orders are recognizable. LICRA and UEJF appeal only the personal jurisdiction, ripeness, and abstention holdings. A majority of the en banc panel holds, as explained in Part II of this opinion, that the district court properly exercised personal jurisdiction over LICRA and UEJF. A plurality of the panel concludes, as explained in Part III of this opinion, that the case is not ripe under the criteria of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). We do not reach the abstention question.

## 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:

We 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, five (rather than eight) days after the date on the letter, 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).<sup>1</sup> Among other things, the French court required Yahoo! to take particular specified actions "by 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.

<sup>1</sup> The French court's orders are written in French. We quote from the English translation provided in the record. Counsel for LICRA and UEJF contended at oral argument that the words "all necessary measures" (underlined and italicized above) are a mistranslation of the French text. The original French for the entire phrase (italicized above) is "prendre toutes les mesures de nature a dissuader et a rendre impossible." Counsel contended that the words "toutes les mesures de nature a" are more accurately translated as "all reasonable (or available) measures."

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 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, and stated that the "possibility of liquidation

of the penalties thus pronounced" was "reserved." The order also awarded 1 Franc in "provisional damages," payable by Yahoo! and Yahoo! France to UEJF, and awarded an additional 1 Franc against Yahoo! and Yahoo! France for expenses under Article 700 of the New Code of Civil Procedure. The French court also awarded 10,000 Francs against Yahoo! for expenses under Article 700, payable to LICRA, and 10,000 Francs each against Yahoo! and Yahoo! France under Article 700 (a total of 20,000 Francs), payable to UEJF.

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. He did not, however, specify an alternative number of users -- say, 15% or 10% -- who would respond truthfully.

With respect to sites denying the existence of the Holocaust or constituting an apology for Nazism, the report was not able to "propose suitable and effective technical solutions" because no "grievance" against those sites had been made with "sufficient precision." In consequence, as to these non-auction sites, the report did not estimate how many Yahoo! users above the base 70% number could be identified by an 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 "reserved the possible liquidation of the penalty" against Yahoo!. The French court's November 20 order required Yahoo! France (as distinct from Yahoo!) to display "a warning to surfers even before they have made use of the link to Yahoo.com, to be brought into effect within 2 months following notification of the present order." 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. It also awarded a total of 20,000 Francs against Yahoo! for expenses under Article 700, payable to LICRA and UEJF, and an unspecified amount of costs against Yahoo!, payable to LICRA and UEJF. The court specifically stated that it was not awarding any expenses or costs against Yahoo! France (which it had found to have complied "in large measure" with its order). LICRA and UEJF used United States Marshals to serve both orders on Yahoo! in Santa Clara, California.

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."

The record reveals that the French "public prosecutor" participated in the proceedings against Yahoo! and Yahoo! France in the French court, but it does not reveal whether he has the authority to seek a penalty against Yahoo! under the interim orders, either on his own or pursuant to a request by LICRA and/or UEJF. The public prosecutor was not made a party to the suit in the district court, and has made no appearance in the district court or on appeal to this court. If LICRA, UEJF, or the public prosecutor were to seek the imposition of a penalty by the French court pursuant to the interim orders, that court would have to determine the extent of Yahoo!'s violation, if any, of the orders, as well as the amount of any penalty, before an award of a penalty could be entered.

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in federal district court, seeking a declaratory judgment that the interim orders of the French court are not recognizable or enforceable in the United States. Subject matter jurisdiction is based solely on diversity of citizenship. 28 U.S.C. § 1332(a)(2). In a thoughtful opinion, the district court concluded that it had personal jurisdiction over LICRA and UEJF. *et l'Yahoo! Inc. v. La Ligue Contre le Racisme Yahoo! Inc.*, 145 F. Supp. 2d 1168, 1180 (N.D. Cal. 2001). Several months later, in another thoughtful opinion, the district court concluded that the suit was ripe, that abstention was not warranted, and that "the *First Amendment* precludes enforcement within the United States." *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

In early 2001, after both interim orders had been entered by the French court, and after Yahoo! had filed suit in federal district court, Yahoo! adopted a new policy prohibiting use of auctions or classified advertisements on Yahoo.com "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." Yahoo! has represented, in this court and elsewhere, that its new policy has not been adopted in response to the French court's orders, but rather for independent reasons. Yahoo's new policy eliminates much of the conduct prohibited by the French orders. However, after conducting its own Internet research on yahoo.com, the district court found that even after this policy change, Yahoo! "appear[s]" not to

have fully complied with the orders with respect to its auction site. *169 F. Supp. 2d at 1185*. For example, the district court found that Yahoo! continued to allow the sale of items such as a copy of *Mein Kampf* and stamps and coins from the Nazi period on which the swastika is depicted. *Id.* The district court also found that access was available through yahoo.com to various sites in response to searches such as "Holocaust/5 did not happen." *Id.*

LICRA and UEJF timely appealed the district court's rulings on personal jurisdiction, ripeness, and abstention.

[As noted in the per curiam opinion, a majority of the *en banc* panel would have found personal jurisdiction, and a different majority would have found the case ripe for adjudication. But since a majority of judges voted to dismiss on one ground or the other, dismissed it was.]