Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo v. Licra

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ENFORCEMENT OF FOREIGN JUDGMENTS, THE FIRST AMENDMENT, AND INTERNET SPEECH: NOTES FOR THE NEXT YAHOO! V. LICRA

Molly S. Van Houweling*

INTRODUCTION

In Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme (LICRA), a U.S. district court declared unenforceable a French judgment against a California-based company that displayed Nazi memorabilia on the Internet in violation of French law. The case provides an early illustration of the issues that arise when plaintiffs attempt to enforce foreign judgments based on Internet-mediated harms. In particular, Yahoo! raises the question whether such judgments should be enforced in the United States if they are based on foreign laws that restrict speech—a question of increasing importance as the Internet lowers the cost of interacting with foreigners, and thus raises the stakes for domestic enforcement of foreign judgments.


This Article was originally prepared as a panel presentation to the Association of American Law Schools Section on Conflict of Laws. Thanks to the participants in that session, to Section Chair Mathias W. Reimann, and to Kenneth Bamberger, Omri Ben-Shahar, Don Herzog, Nina Mendelson, Mark Rosen, and Jonathan Zittrain for their feedback.

1. In Yahoo!, the plaintiffs did not seek to have the French judgment enforced in the United States. Yahoo! launched a preemptive strike by asking the district court to declare the judgment unenforceable. See id. at 1186. The substantive issues are the same regardless of the procedural posture.

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2. In Yahoo!, the plaintiffs did not seek to have the French judgment enforced in the United States. Yahoo! launched a preemptive strike by asking the district court to declare the judgment unenforceable. See id. at 1186. The substantive issues are the same regardless of the procedural posture.
The Yahoo! court, following analysis in the few prior cases considering the enforcement of speech-restrictive foreign judgments, makes this question look easy: of course U.S. courts should not enforce speech-restrictive foreign judgments that could not be promulgated here. Few commentators have objected to the Yahoo! court's conclusion. But the cases on which the Yahoo! court confidently relies have received harsh criticism, and with good reason. My own complaints are that these cases ignore constitutionally significant differences between promulgation of speech-restrictive rules and mere enforcement of them; and that the cases fail to explain why speech directed abroad necessarily deserves First Amendment protection. This Article will expand on this critical view and extend the criticism to Yahoo!.

Although the Yahoo! court oversimplified the enforceability analysis, there may in fact be serious First Amendment problems with enforcing this type of speech-restrictive foreign judgment, especially in the context of Internet speech. First, enforcement may chill legal speech to a U.S. audience if the technology for identifying the location of Internet users is ineffective or expensive. Second, and of more enduring concern, enforcement may chill even legal speech to a foreign audience as U.S. speakers forgo speech directed abroad in order to avoid the expense of complying with inconsistent foreign laws. This Article attempts to supply the justification—missing from Yahoo! and its predecessors, and disputed in the commentary and case law—for applying the First Amendment to this transborder speech.

The Article begins with a review of the relevant rules governing enforcement of foreign judgments in the United States. Part II explains how courts have unpersuasively applied these rules when refusing to enforce foreign libel judgments. Part III then explains how the Yahoo! court adopted much of this faulty reasoning. Finally, Part IV explains the considerations that better justify judicial refusal to enforce speech-restrictive foreign judgments, especially those triggered by Internet speech. The Article concludes that the prospect that U.S. Internet speakers will choose to speak only to a U.S. audience—even when their speech would be legal everywhere—is the most serious problem with enforcing speech-restrictive foreign judgments triggered by Internet speech.

I. ENFORCEMENT OF FOREIGN JUDGMENTS IN U.S. COURTS

A civil money judgment cannot be enforced in a foreign country if the defendant has no assets there. If the defendant holds assets in the United States, then the prevailing plaintiff might seek to have the judg-
Enforcement of Foreign Judgments

U.S. courts enforce these foreign judgments—most of the time. The question of enforceability is treated as a question of state law, and over thirty states have adopted versions of the Uniform Foreign Money-Judgments Act. It provides that a foreign money judgment “that is final and conclusive and enforceable where rendered . . . is conclusive between the parties . . . . The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.” The Restatement (Second) of Conflict of Laws and the Restatement (Third) of Foreign Relations are to similar effect.

This general rule of enforceability is subject to various limitations. It applies to civil money judgments, not to injunctions or penal judgments. Courts may not enforce if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,” or if the foreign court lacked personal or subject matter jurisdiction.

Courts also have discretion to refuse enforcement on the ground (among others) that the cause of action or claim for relief on which the judgment rests is “repugnant to the public policy of [the enforcing] state.” Various judicial formulations of this “public policy exception” reject enforcement where “the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is

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3. Before a foreign judgment can be enforced, it must be recognized. Restatement (Second) of Conflict of Laws ch. 5, topic 2, introductory note (1971). I treat both recognition and enforcement as part of the enforcement process for simplicity here.
7. Restatement (Second) of Conflict of Laws § 98; id. § 117 cmt c; Restatement (Third) of Foreign Relations § 481.
8. For purposes of the Uniform Foreign Money-Judgments Recognition Act, “‘foreign judgment’ means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.” Uniform Foreign Money-Judgments Recognition Act § 1; see also Restatement (Third) of Foreign Relations § 481 (“Judgments granting injunctions, declaring rights or determining status, and judgments arising from attachments of property, are not generally entitled to enforcement . . . .”); id. § 483 (“Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.”); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (no enforcement of foreign penal judgments).
10. Id.
11. Id.
sought,"12 and where enforcement would "‘tend[] clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.'"13

This public policy exception is rarely applied.14 Courts explain that a mere difference between the foreign forum’s laws or procedures and those that would be followed in a U.S. court does not amount to the “repugnance” necessary to trigger the exception.15 Beyond this high threshold of repugnance, the exception has little clear content.

II. THE PUBLIC POLICY EXCEPTION AND THE FIRST AMENDMENT

Among the cases in which courts have struggled to define the contours of the public policy exception are several where plaintiffs sought to enforce foreign libel judgments. In two widely cited cases,16 U.S. courts refused to enforce English libel judgments rendered according to procedures inconsistent with N.Y. Times v. Sullivan and its progeny. In Bachchan v. India Abroad Publications, Inc.,17 a New York court refused to enforce an English libel judgment against the operator of a New York news wire service, declaring that “[t]he protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.”18 Similarly,

12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c.
15. E.g., Ackerman, 788 F.2d at 842 (“[M]ere variance with local public policy is not sufficient to decline enforcement.”); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c; Brand, supra note 14, at 275 & n.86 (citing cases).
16. For commentary on the two cases, see sources cited infra note 21.
18. Id. at 235.
Enforcement of Foreign Judgments in *Telnikoff v. Matusevich,* the Court of Appeals of Maryland declared that an English libel judgment should not be enforced in Maryland because “[t]he principles governing defamation actions under English law . . . are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law.”

*Bachchan* and *Telnikoff* have been criticized for oversimplifying the public policy analysis regarding speech-restrictive foreign judgments. I see two key problems with the reasoning in these cases. First, the courts seem incorrectly to assume that mere enforcement of a foreign speech-restrictive judgment has the same First Amendment (and, thus, public policy) implications as imposition of a speech-restrictive rule by a state actor in the first instance (the “state actor animus” problem). Second, the courts appear to apply First Amendment-inspired public policy analysis regardless of where the speech at issue originated and where it was directed—without explaining how speech directed abroad necessarily implicates First Amendment interests (the “extraterritoriality” problem).

### A. State Actor Animus

Should the speech-restrictive policies of English libel law be imputed to a U.S. court asked to enforce an English libel judgment? *Bachchan* and *Telnikoff* suggest as much by insisting that enforcement raises free speech concerns of the magnitude at issue in *N.Y. Times v. Sullivan.* But unlike imposition of libel liability based on overbroad

20. Id. at 249.
22. It is not entirely clear whether the *Bachchan* holding is based on the First Amendment or on a subconstitutional public policy problem. In either event, the decision is clearly
state law, enforcement of a speech-restrictive foreign judgment does not necessarily involve animus toward—or at least targeting of—speech by any state actor bound by the First Amendment.

Courts routinely enforce speech-restrictive judgments where the source of the speech-limiting rule is something other than state or federal law—where, for example, speech is limited by a private contract in which the defendant has promised not to speak. Contract law is law, of course, and judicial enforcement of a speech-restrictive contract is state action that has the effect of restricting speech. But courts typically view contract law as generally applicable law with a merely incidental impact on speech, subject to little if any First Amendment scrutiny. Courts do not impute any content-based, censorial motives of the contract drafter to the state. The Supreme Court held in Cohen v. Cowles Media Co. that even when a court goes beyond the four corners of a contract and entertains a promissory estoppel claim, judicial enforcement of the promise does not trigger heightened First Amendment scrutiny.

based on the court's apprehension of problems akin to those raised by the N.Y. Times v. Sullivan line of cases. See Bachchan, 154 Misc. 2d at 232–35. In Telnikoff the Maryland court explicitly based its decision upon Maryland "public policy concerning freedom of the press and defamation actions," and not directly upon the state or federal constitution. Telnikoff, 702 A.2d at 239. But the court then turned to the First Amendment and the Maryland constitution to determine the content of the state's public policy. Id. at 240–51 (describing history of First Amendment and Maryland constitutional protection of free speech and applying policies drawn from that history).


24. When state action regulates speech more directly, however, courts reject the argument that the regulation is content neutral because it is triggered by offense to a non-state actor. See, e.g., Forsyth City v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (invalidating a county ordinance that based permit fees on "the amount of hostility likely to be created by the speech based on its content"); Texas v. Johnson, 491 U.S. 397, 411–12 (1989) (holding that a flag-burning statute triggered by the likelihood that observers would be offended was not content neutral); Boos v. Barry, 485 U.S. 312, 315–29 (1988) (invalidating a statutory provision prohibiting display of any sign within five hundred feet of a foreign embassy if the sign tends to bring the foreign government into public "odium" or "disrepute"—despite the government's argument that the provision was a content-neutral attempt to comply with "our international law obligation to shield diplomats from speech that offends their dignity").

25. 501 U.S. at 669 ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").
Courts could view the enforcement of foreign judgments, like enforcement of contracts, as generally applicable, only incidentally speech-burdening state action.\textsuperscript{26} Enforcement is not necessarily motivated by government hostility toward, or even targeting of, speech. The state actor's motivation could instead be something like "an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction"\textsuperscript{27}—an interest that supports generally applicable rules of enforcement of foreign judgments.\textsuperscript{28} In \textit{Cohen}, application of similarly generally applicable contract rules did not even trigger First Amendment scrutiny, much less violate the First Amendment or "undermine that sense of security for individual rights . . . which any citizen ought to feel,"\textsuperscript{29} as the public policy exception supposedly requires. Neither \textit{Bachchan} nor \textit{Telnikoff} explains why enforcement of foreign judgments should be treated so differently.


\textsuperscript{27} Von Mehren & Trautman, supra note 14, at 1604.

\textsuperscript{28} Elsewhere the Court has suggested that mere enforcement of another court's judgment does not trigger the same procedural safeguards as issuance of the judgment in the first instance. \textit{See} Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1976) ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.").

\textsuperscript{29} Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971) (quoting Goodyear v. Brown, 26 A. 665, 666 (Pa. 1893)).
B. Extraterritoriality

Even if enforcement of a foreign judgment involves no evident hostility toward or targeting of speech on the part of a state actor subject to the First Amendment, heightened First Amendment scrutiny could be triggered by a significant negative effect on speech.\(^\text{30}\) But this possibility merely highlights another shortcoming in Bachchan and Telnikoff. Both cases involved liability for speech to a foreign audience, yet neither opinion offers support for the controversial proposition that limiting speech directed abroad is an effect that comes within the ambit of the First Amendment.

In Bachchan, the speech at issue was a story about an international scandal allegedly involving the plaintiff—an Indian national living in Europe.\(^\text{31}\) The defendant (the operator of a New York wire service) wired the story to India, where it was picked up by newspapers distributed in India and England.\(^\text{32}\) In refusing to enforce the British judgment against the New York defendant, the Bachchan court explains that under British libel law the plaintiff did not bear the burden of proving the falsity of the defendant's story, and that:

> [p]lacing the burden of proving truth upon media defendants who publish speech of public concern has been held unconstitutional because fear of liability may deter such speech. Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. . . . The

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30. Some commentators focus on effect to argue that the Court refused to apply heightened scrutiny in Cohen because enforcement of the type of promise at issue there (a newspaper's promise not to reveal the identity of a source) was likely to promote speech in the long run by encouraging confidential informants to speak frankly to the media. E.g., Daniel A. Farber, Free Speech Without Romance, 105 Harv. L. Rev. 554, 575 (1991); The Supreme Court, 1990 Term—Leading Cases, 105 Harv. L. Rev. 277, 280–86 (1991). But see generally Frederick Schauer, Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications, 26 WM. & MARY L. REV. 779, 780 (1985) ("[F]or me the focus of the first amendment is on the motivations of the government."). Cohen by its terms only applies to generally applicable rules with a "merely incidental" effect on speech. See Cohen, 501 U.S. at 669. So a substantial negative effect might take a rule outside of Cohen's coverage altogether. But see Arcara v. Cloud Books, Inc., 478 U.S. 697, 705–07 (1986). Moreover, some generally applicable rules with merely incidental effects on speech do trigger First Amendment scrutiny. See supra note 25.


32. The story was also reported in the defendant's New York newspaper, an edition of which was printed and distributed in England by the defendant's English subsidiary. But a separate judgment based on that publication was not at issue in Bachchan. Id. at 229–30.
“chilling” effect is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants. Accordingly, the failure of Bachchan to prove falsity in the High Court of Justice in England makes his judgment unenforceable here.

The Bachchan court is concerned with the speech-restrictive effects of enforcing the foreign judgment—in particular the indirect chilling of lawful speech. But the court never explains exactly what speech will be chilled. One possibility is that enforcement will chill speech by U.S. speakers directed abroad. But it is not clear that the First Amendment (and, hence, First Amendment-based public policy) protects speech directed to a foreign audience. Some courts and commentators suggest that it does not, and the Supreme Court has never settled the question. The argument for nonprotection is typically that the First Amendment is concerned foremost with promoting self-governance by the U.S. polity, and that speech to foreigners does not contribute to American self-governance. I will examine this proposition critically below; suffice it to say for now that the Bachchan opinion does not grapple with it at all.

Perhaps the Bachchan court was concerned not only with the restriction and chilling of speech directed to foreigners, but also with chilling speech to a U.S. audience. The facts in Bachchan make this concern

33. Id. at 234.
34. E.g., Desai v. Hersh, 719 F. Supp. 670, 676 (N.D. Ill. 1989) (“[F]irst amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution.”); Devgun, supra note 21, at 203 (arguing that the reasoning in Bachchan is troublesome because “there is no logical connexion between [the] decision to recognize the judgment in New York and the possibility of chilling speech in any place that should be within the court’s proper concern”); Sharon E. Foster, Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?, 10 PACE INT’L L. REV. 361, 390 (1998) (questioning Bachchan on the ground that “it is difficult to see how recognition of the English judgment would affect free speech in the United States, which should be the focus of the court’s concern”); Robert D. Kamenshine, Embargoes on Exports of Ideas and Information: First Amendment Issues, 26 WM. & MARY L. REV. 863, 866 (1984–1985) (“When scientific or technological information is communicated solely to a foreign person, corporation, or government, the generally cited first amendment values have little or no application.”); Joel R. Reidenberg, Yahoo! and Democracy on the Internet, 42 JURIMETRICS J. 261, 267 (2002) (“The American [First Amendment] right does not apply to the dissemination of web pages in France to French web users.”); Maltby, supra note 21, at 2007 n.160 (“If the foreign audience has no constitutional right to hear the information, the U.S. media have correspondingly little ‘right’ to publish abroad, since they derive no self-fulfillment from the act, and in no way contribute to the enlightenment, truth seeking, or self-government of the domestic audience.”).
36. See, e.g., Stern, supra note 21, at 1014–15, 1033; Maltby, supra note 21, at 2007 n.160.
relevant, as the defendant published the disputed story in its New York newspaper as well as wiring it to India. U.S. speakers who reach a global audience but who do not have the resources to tailor their messages to many different jurisdictions might water down their domestic publications to avoid speech-restrictive foreign judgments. Some defenders of the result in *Bachchan* have focused on this domestic chilling effect. But the *Bachchan* opinion does not allude specifically to the prospect of chilling purely domestic speech, or give any indication of the locus of the court's First Amendment concern.

In *Telnikoff*, the potential effects on speech were more clearly extra-territorial. There, the disputed publication was an article written by one British resident about another British resident. The speech at issue neither originated from, nor was sent to, the United States. Again, the court fails to explain how restricting this extraterritorial speech necessarily violates the First Amendment or public policy. *Bachchan* and *Telnikoff*, the two most prominent cases addressing the question of the enforceability of speech-restrictive foreign judgments in the United States, both strongly endorse the view that judgments based on speech-restrictive rules that could not be promulgated by a U.S. state actor cannot be enforced here. The courts fail to explain why the censorial infirmities of foreign judgments must be imputed to enforcing courts. Moreover, they fail to locate the speech-restrictive effects that they purport to avoid and to address the argument that the First Amendment does not operate vis-à-vis speech directed abroad.

**III. YAHOO! v. LICRA**

In *Yahoo! v. LICRA*, a U.S. district court relied heavily on *Bachchan* in declaring unenforceable a French judgment triggered by Yahoo!'s violation of a law against displaying Nazi memorabilia in France. Few observers of the Yahoo! litigation have objected to the U.S. court's holding, and the French litigants themselves have appealed only

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37. *See supra* note 32 and accompanying text.
39. *Telnikoff*, 702 A.2d at 259 (Chasanow, J., dissenting). The libel defendant later moved to Maryland, where the plaintiff sought enforcement against him. *Id.* at 232, 235 n.9.
40. It did, however, relate to a U.S. corporation (Radio Free Europe/Radio Liberty) for which the plaintiff and defendant both worked. *Id.* at 232–33.
42. *Id.* at 1192–94.
43. In the most detailed analysis of the controversy to date, Joel Reidenberg defends the French court's judgment without objecting to the U.S. court's refusal to enforce it. *See* Rei-
the court’s exercise of jurisdiction, not the substance of its declaration that the French judgment is unenforceable.\textsuperscript{44} But, like Bachchan and Telnikoff, the Yahoo! court makes the enforceability analysis look too easy.

Yahoo! is a Delaware corporation operating out of California.\textsuperscript{45} On its flagship website, www.yahoo.com, the company provides various Internet search tools, directories, other resources, and—most important for present purposes—an online auction where Yahoo! users can post descriptions and photos of items for sale.\textsuperscript{46} The auction site features a variety of sporting goods, electronic equipment, antiques, and the like. It also includes Nazi coins, stamps, and other relics of the Nazi era.\textsuperscript{47} These Yahoo! auctions are viewable by Internet users in France, where exhibition of Nazi propaganda and artifacts is prohibited.\textsuperscript{48} In 2000, two French non-profit organizations filed a civil suit in French court accusing Yahoo! of violating that French law.\textsuperscript{49}

Yahoo! argued that the French court did not have jurisdiction over it and that it would be impossible to avoid displaying Nazi memorabilia in France without limiting Yahoo!’s offerings for all Internet users worldwide.\textsuperscript{50} After receiving an expert report on the state of technology for geographic filtering of Internet traffic, the French court ruled for the plaintiffs, ordering Yahoo! to block French Internet users from viewing the displays of Nazi memorabilia on www.yahoo.com or else face daily fines for noncompliance.

Yahoo! responded by bringing an action against the French plaintiffs in U.S. district court in California, seeking a declaration that the French judgment was unenforceable in the United States (while claiming that it had no assets against which the judgment could be enforced in France). Yahoo! presented several theories of unenforceability, including that the French judgment was based on penal law and that enforcement would be repugnant to U.S. and California public policy. After rejecting the French organizations' various jurisdictional challenges, the district court opinion focuses on the public policy exception, specifically on First Amendment problems posed by the French judgment. The court summarizes enforcement practice, noting that "United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests." It observes that "the French order's 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." It then cites Bachchan for the proposition that enforcing a foreign judgment granted pursuant to standards contrary to U.S. constitutional protections would jeopardize the protections embodied in the First Amendment. With little additional analysis, the court declares the French judgment unenforceable in the United States.

The Yahoo! opinion shares the shortcomings of Bachchan and Telnikoff. First, the Yahoo! court overlooks the state actor animus problem. The court stresses that "this Court may not enforce a foreign order that violates the protections of the United States Constitution." The court thus suggests that it would necessarily violate the First Amendment to enforce a foreign judgment that would violate the First Amendment had it been promulgated by a U.S. court. But a rule in favor of enforcing foreign judgments is not infused with state actor animus toward certain speech the way a rule against displaying Nazi memorabilia is; enforcing the French judgment against Yahoo! would require invoking only the

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52. Complaint at 9, 12-13, Yahoo! (No. C-00-21275). But see Reidenberg, supra note 34, at 269 (identifying Yahoo! assets in France).
53. Complaint at 10-11, Yahoo! (No. C-00-21275). U.S. courts do not enforce foreign penal judgments. See supra note 8. Although the French action was based on a provision in the French criminal code, it took the form of a civil action brought by private parties to enforce that provision. See Yahoo!, 169 F. Supp. 2d at 1184 (describing the French judgment). The Restatement (Third) of Foreign Relations suggests that such a judgment should not be classified as penal for purposes of the rule against enforcing penal judgments. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 cmt. b ("A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its subdivisions . . . ").
54. Yahoo!, 169 F. Supp. 2d at 1192.
55. Id.
56. Id. at 1193-94.
57. Id. at 1192.
former rule, not the latter. Like Bachchan and Telnikoff, Yahoo! fails to explain why employing a generally applicable rule of judgment enforcement necessarily poses a First Amendment and public policy problem.58

Unlike the Bachchan and Telnikoff courts, the Yahoo! court appears to have considered the extraterritoriality issue; it repeatedly emphasizes that its concern lies not with speech to foreigners, but rather with speech “within our borders.”59 The problem with Yahoo! on this score is that the court does not convincingly explain how enforcing the judgment could restrict or chill purely domestic speech.

The Yahoo! court alludes to a chilling effect on speech within the United States: “[T]his Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.”60 But the mechanism of this purported chilling effect remains unclear. The district court accepts, arguendo, the French court’s finding that it is technologically feasible for Yahoo! to identify and block French Internet users from viewing the Nazi material while continuing to speak to a non-French audience.61 On that assumption, the French order could be enforced without any effect on speech that is meaningfully “within our borders.”

Similarly unconvincing, if we take the French court’s technological conclusions at face value, is the argument pressed in an amicus brief before the Ninth Circuit:

Under the French court’s theory, every individual or company with a presence on the Internet would have to constantly monitor the laws of every country in the world, search out content that might be prohibited by one or more of those countries, and implement some sort of blocking software that would screen different categories of material from users in each particular country.62

58. Mark Rosen, who is also analyzing Bachchan, Telnikoff, and Yahoo!, similarly faults these courts for imputing the First Amendment shortcomings of foreign laws to the enforcing courts. Rosen, supra note 43 (manuscript at 91–92). Unlike Rosen, I conclude below that even without imputing foreign law to the enforcing court, the speech-restrictive effects of enforcement may be severe enough to pose a First Amendment problem. Cf. id. at 31.


60. Id.

61. Id. at 1194.

62. Brief of Amicus Curiae Chamber of Commerce of the United States et al. at 6, Yahoo! (No. C-00-21275); see also Berman, supra note 43, at 386.
An Internet speaker based in the United States could instead undertake the less onerous task of monitoring the laws of the United States and blocking all foreigners. The district court does not explain how this alternative method of complying with foreign laws would chill speech within the United States. Yet, like Bachchan and Telnikoff, it also fails to explain how chilling speech to a foreign audience triggers First Amendment concerns.

IV. NOTES FOR THE NEXT YAHOO!

Like its predecessors, the Yahoo! court fails to explain convincingly why enforcing a speech-restrictive foreign judgment is repugnant to public policy where any animus toward speech is expressed only by a non-state actor, and where enforcement is unlikely to restrict or chill speech within the United States. There are, however, several serious problems—overlooked by the Yahoo! court—with enforcing speech-restrictive foreign judgments against Yahoo! and other Internet speakers.

First, there are reasons to be skeptical about the ability of geographic filtering technologies to keep illegal Internet speech from reaching a regulating jurisdiction. The French court argued that Yahoo! could feasibly use filtering technology in part because Yahoo! already used such technology to determine where users were located for purposes of displaying geographically and linguistically appropriate advertisements. But the fact that filtering technology works reasonably well for targeted advertising says little about its ability to prevent people within certain jurisdictions from obtaining illicit materials. Users have little incentive to circumvent technology that merely determines what type of advertisements they will receive. Surely some Internet users will object to being denied other types of speech that their governments want to keep away from them. One of the experts who advised the French court has since argued that even the measures he recommended could be "trivially circumvented." Some language in the French opinion suggests that Yahoo! would be held strictly liable for reasonable but imperfect

filtering. Therefore, one might conclude that enforcing the French judgment would significantly chill speech within the United States because speakers would fear liability-triggering leakage into France.

Second, adverse effects on speech within our borders might arise if geographic filtering technology was prohibitively expensive for some Internet speakers. In its first cases addressing limitations on Internet speech, the Supreme Court has been reluctant to impose expensive technology requirements on an otherwise relatively inexpensive speech medium. Justice Kennedy recently expressed what appears to be a

66. "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...." Yahoo!, 169 F. Supp. 2d at 1185 (quoting French judgment) (emphasis added); see also Edward Lee, Rules and Standards for Cyberspace, 77 Notre Dame L. Rev. 1275, 1329–31, 1329 n.239 (2002) (criticizing the French judgment for failing to adopt a reasonableness standard). But see Reidenberg, supra note 34, at 268 (interpreting the French judgment to apply only a reasonableness standard).

67. In Reno v. Am. Civil Liberties Union, the Supreme Court invalidated provisions of the Communications Decency Act (CDA) designed to protect minors from harmful material on the Internet—in part because the technological safe harbors in the statute were either ineffective or "not economically feasible for most noncommercial speakers." 521 U.S. 844, 881–82 (1997). Elsewhere in the opinion the Court noted the Internet's potential to enable speech by poorly-financed speakers:

[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . 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.

Id. at 870; see also Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 877 (Dalzell, J.) (E.D. Pa. 1996).

Congress revised the invalidated provisions of the Communications Decency Act in the form of the Child Online Protection Act (COPA). COPA was preliminarily enjoined by a U.S. district court; the court of appeals affirmed on the ground that COPA applies a "community standard" to gauge what material qualifies as "harmful to minors" although "material posted on the Web is accessible by all Internet users worldwide," and "current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user." As the court explained:

COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.

Am. Civil Liberties Union v. Reno, 217 F.3d 162, 166 (3d Cir. 2000). The Supreme Court disagreed with the conclusion that application of a community standard necessarily violated the First Amendment. But five justices expressed discomfort with the notion that Internet speakers should be forced to develop or adopt technology to geographically locate their audience. Justice Kennedy, joined by Justices Souter and Ginsburg, observed that "it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach
prevailing view: Because “it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset,” Internet speakers should not be forced to adopt technology that keeps Internet speech that is legal in some places from reaching places where it is illegal. For Internet speakers who use the Internet as an inexpensive speech medium but (unlike Yahoo!) cannot afford to take advantage of geographic filtering technology, enforcement of a foreign judgment requiring filtering might shut down the Internet speaker altogether.

The potential inadequacy and expense of geographic filtering technologies are two reasons why enforcement of a speech-restrictive foreign judgment might chill Internet speech to a U.S. audience, triggering valid First Amendment and public policy concerns. But these problems with the technology and expense of geographic filtering may be temporary. It therefore seems worth considering whether, assuming cheap and effective geographic filtering technology, enforcement of foreign judgments against speakers like Yahoo! still poses First Amendment problems that justify refusing domestic enforcement.

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a geographic subset.” Ashcroft v. Am. Civil Liberties Union, 122 S.Ct. 1700, 1719 (2002) (Kennedy, J., concurring in the judgment); see also id. at 1714 (O’Connor, J., concurring in part and concurring in the judgment) (“I agree with Justice Kennedy that, given Internet speakers’ inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.”); id. at 1716 (Breyer, J., concurring in part and concurring in the judgment) (“To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.”); id. at 1724 (Stevens, J., dissenting) (“COPA . . . covers a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors. The Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once. The speaker cannot control access based on the location of the listener, nor can it choose the pathways through which its speech is transmitted.”). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took the contrary view that “[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” Id. at 1712 (Thomas, J.). Cf. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125–26 (1989); Hamling v. United States, 418 U.S. 87, 106 (1974).

68. Ashcroft, 122 S.Ct. at 1719 (Kennedy, J., concurring in the judgment); see also supra note 67.

69. See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 193 (1999) (arguing that traditional conflict-of-laws rules do not necessarily work well “in a world where anyone could be a multinational”).

Even if geographic filtering worked effectively and inexpensively, as it might someday, compliance with the French order would of course burden Yahoo!'s speech to French recipients. As noted above, some courts and commentators have suggested that the First Amendment does not protect speech directed to a foreign audience, and the Supreme Court has never clearly settled the question. Bachchan and Telnikoff were therefore disappointing in their failure to address the issue. Still, some case law and commentary suggests that the First Amendment does afford protection to U.S. speakers targeting foreign listeners. This appears to be the better view.

71. See supra note 34 and accompanying text.

72. See, e.g., Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) (suggesting, without discussion of extraterritoriality issue, that restrictions on export of encryption technology are subject to First Amendment scrutiny); DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 295 (D.C. Cir. 1989) (observing that "the right of Americans to maintain First Amendment relationships with foreigners has been upheld in Lamont v. Postmaster General" but then concluding that "the right of Americans to associate with nonresident aliens 'is not an absolute'"); id. at 303 (Ginsburg, J., concurring in part and dissenting in part) ("The First Amendment secures to persons in the United States the respect of our government for their right to communicate and associate with foreign individuals and organizations, as well as with individuals and organizations stateside."); Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 509 n.9 (9th Cir. 1988) ("[T]here can be no question that, in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders.") (quoting and affirming 646 F. Supp. 492, 502 (C.D. Cal. 1986)); Karn v. U.S. Dep't of State, 925 F. Supp. 1, 9–12 (D.D.C. 1996) (suggesting, without discussion of extraterritoriality issue, that restrictions on export of encryption technology are subject to First Amendment scrutiny); Pathfinder Fund v. Agency for Int'l Dev., 746 F. Supp. 192, 196 (D.D.C. 1990) ("[A] First Amendment violation is not found if governmental action has merely made it somewhat more difficult for domestic organizations to associate with the organizations of their choice. . . . If, however, it 'directly and substantially' interferes with plaintiffs' ability to associate with foreign NGO's, then it is reviewed under a strict scrutiny standard."); see also Albert J. Rosenthal, International Population Policy and the Constitution, 20 N.Y.U. J. INT'L L. & POL. 301, 313–19 (1987); Louis Henkin, The Constitution As Compact and As Conscience: Individual Rights Abroad and at Our Gates, 27 WM. & MARY L. REV. 11, 34 (1985). Cf. Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (invalidating statute directing Post Office to inspect mail to inspect mail to foreign correspondents). Despite these indications, First Amendment protection for speech to foreigners is by no means well-established. See generally Burt Neuborne & Steven R. Shapiro, The Nylon Curtain: America's National Border and the Free Flow of Ideas, 26 WM. & MARY L. REV. 719, 745–46 (1985). Neuborne and Shapiro observe:

Federal courts on occasion, have been protective of first amendment values in cases affecting the free flow of information across our national border. More typically, however, national border cases have been regarded as sui generis by the federal courts and, consequently, the doctrinal protections of the first amendment have not been applied. The net result of the Court's ambivalence about classic first amendment review in national border cases has been the gradual emergence of a degree of censorship at the border that would not be tolerated in any other sphere of our national life.

Id.
The First Amendment should protect speech to foreign audiences even if the amendment is concerned primarily with domestic self-government. For one thing, speech to foreigners often indirectly impacts U.S. policy discussions and U.S. policy making. More generally, at least some speech has attributes of a network good. It is more valuable when more people use it—more valuable for building communities, for igniting illuminating debates, and for spreading ideas. Therefore, even a First Amendment theory concerned only with speech’s political value to U.S. speakers and listeners should acknowledge that our domestic dialogue benefits when we have more people (from more places) in on the conversation.

This First Amendment interest in speech to foreigners does not settle the question of the enforceability of foreign speech-restricting judgments. Perhaps the First Amendment interest in reaching a global audience is outweighed by the (generally applicable) governmental interest in maintaining neighborly relations by enforcing judgments against activities, including speech, that do harm in other countries. I do not intend here to settle that question, but merely to identify the First Amendment interest in speech to foreigners that has not been articulated clearly in cases like Bachchan, Telnikoff, and Yahoo!

There is a concern that lingers even if we conclude that policies in favor of enforcing foreign judgments outweigh a speaker’s interest in reaching a foreign audience with speech that is illegal in the foreign jurisdiction. Assuming that technology continues to improve, it may become easier to withhold speech from foreign countries than to sort out

73. See generally Zemel v. Rusk, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting) (“The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press.”); Neuborne & Shapiro, supra note 72, at 765–76 (arguing for “a more extensive judicial role in protecting the flow of ideas across our national border”).


75. See, e.g., Daniel A. Farber, Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech, 16 GA. ST. U. L. REV. 789, 792 (2000) (“Humans are social animals, and information may have more value when they share it. Being the only person in an Internet discussion group is essentially valueless; only the participation of others makes the activity worthwhile.”).

76. Cf. supra note 25.
inconsistent foreign laws that specify what counts as harmful where. At that point, the private benefit speakers receive from choosing to reach a global audience may not be worth the extra cost, in terms of legal research and compliance, of speaking globally—even if the public benefits from creating a global conversation exceed the costs. Internet speakers may therefore react to enforcement of speech-restrictive foreign judgments by using geographic filtering technology to send all of their speech—harmful and harmless, illegal and legal, racist rants and recipes—only to a U.S. audience. Limiting Internet speech to only U.S. recipients could thus sacrifice not only the speech to foreigners that would violate foreign laws, but also speech that would be perfectly legal everywhere.

The *Yahoo!* district court unconvincingly suggests that enforcing the French court's judgment against *Yahoo!* would chill speech from *Yahoo!*

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77. This concern will strike some as overblown because Internet speakers need not fear liability everywhere—only where personal jurisdiction may properly be exercised based on some intentional conduct by the speaker. See generally Goldsmith, *Against Cyberanarchy*, supra note 43, at 1216–18; Reidenberg, *supra* note 34, at 276–77; Rosen, *supra* note 43 (manuscript at 91–92). But availability of geographic filtering technology may alter the jurisdictional analysis such that failure to use technology to avoid reaching a jurisdiction counts as intentional targeting. See Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 Mich. J. Int'l L. 673, 687 (2003) (suggesting that if offensive speech is made available in France despite the feasibility of limiting access in France, "it cannot be the result of an accident").

78. See generally Farber, *supra* note 30, at 558–89. Farber observes:

> [I]nformation, like clean air or national defense, has many of the attributes of a public good. That is, the benefits of information cannot be restricted to direct purchasers but inevitably spread to larger groups. The production of information often produces positive externalities—that is, benefits to third parties. Because the producer does not consider these benefits in his production decision, less information is produced than is socially optimal.

*Id.*

79. Because I am particularly worried about limiting even that speech that is legal in the receiving jurisdiction, my emphasis is slightly different from Paul Berman's when he notes that "[a] cyberspace where individuals could only access content that was approved by their government would be a very different cyberspace from the one most people have experienced so far." Berman, *supra* note 43, at 390–91.

One potential response to my concern is that if enforcement of judgments like that at issue in *Yahoo!* has the effect of discouraging international transmission of even harmless speech, then France and other regulating states will modify (and perhaps harmonize) their laws in order to reassure foreign speakers and thus to preserve the benefits associated with receiving foreign speech. See, e.g., Jonathan Zittrain, *Be Careful What You Ask For: Reconciling a Global Internet and Local Law* 12–13 (Apr. 16, 2003) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=395300). But there is no reason to assume that regulating states will modify their laws in a way that takes full account of the benefits to U.S. speakers, and the U.S. polity, of sending speech abroad. So I remain concerned about the disincentive effects of enforcing judgments based on inconsistent foreign laws.
to U.S. recipients. That might be true if geographic filtering technology was ineffective or prohibitively expensive, but the Yahoo! court made neither of those findings, and problems with the technology are likely temporary. The enduring problem with enforcing this type of judgment is that it might encourage U.S. Internet speakers to communicate only with U.S. audiences, sacrificing even legal communication with foreign audiences—communication that is valuable here, and does no harm there. This possible consequence of enforcing foreign judgments that restrict Internet speech, an effect ignored by the Yahoo! court, strikes me as the most repugnant feature of enforcing speech-restrictive foreign judgments in the United States.  

CONCLUSION

The Internet, by providing a relatively inexpensive way to interact with (and harm) people in faraway countries, increases the potential for harm by, and judgments against, U.S. defendants who have no assets in the foreign forum. The Internet thus raises the stakes for domestic enforcement of foreign judgments. As the stakes rise, so will the pressure on the seldom-used and ill-defined public policy safety valve, and the pressure on courts (or legislators, or international treaties) to define it. Yahoo! v. LICRA illustrates this phenomenon, but the court’s analysis adds little to the heretofore unsatisfying judicial analysis of the public

80. Nonenforcement need not mean that a foreign country’s regulatory goals go unrealized. As Horatia Muir Watt explains, the regulating state could bear the burden of employing technology to block offensive speech in the absence of enforcement jurisdiction over the speaker. Muir Watt, supra note 77, at 692–94; see also Jonathan Zittrain, Internet Points of Control, 43 B.C. L. REV. (forthcoming 2003), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=388860. If crudely implemented, such methods could limit even more speech than the self-imposed balkanization that I fear would result from enforcement of foreign judgments. This important question is a topic for future research.


82. See generally Henry H. Perritt, Jr., Will the Judgment-Proof Own Cyberspace?, 32 INT’L LAW. 1121, 1122–23 (1998) (“Interesting jurisdiction issues are only at the periphery of the new universe of activities. The real problem is turning a judgment supported by jurisdiction into meaningful economic relief.”).

policy exception in the context of speech-restrictive foreign judgments. The question of enforceability is more difficult than Yahoo! and its predecessors have made it look. Courts refusing to enforce foreign speech-restrictive judgments should not assume that a judgment that could not be imposed by a U.S. court in the first instance because it reflects state hostility toward speech should not be enforced here on First Amendment grounds. Courts concerned with the chilling effects of foreign judgments imposed based on speech sent to foreigners need to grapple with the difficult question of whether the First Amendment and the policy concerns it represents operate with regard to speech to a foreign audience.

This Article has tried to describe how the Yahoo! court could have improved on its predecessors’ analysis. There are problems with geographic filtering technology that suggest that enforcement of speech-restrictive foreign judgments could chill Internet speech directed to a U.S. audience. There are even First Amendment concerns with foreign judgments that chill legal speech to a foreign audience. This may be the best reason to find enforcement of foreign speech-restrictive judgments repugnant to courts concerned with preserving the benefits of the Internet as an inexpensive, global forum for speech.