

Appeal No. 01-17424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YAHOO!, INC., a Delaware Corporation,
Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, a French association, and
L'UNION DES ESTUDIANTS JUIFS DE FRANCE, a French association,
Defendants-Appellants.

Appeal from the U.S. District Court for the Northern District of California,
San Jose Division, Case No. C 00-21275-JF-RS
The Honorable Jeremy Fogel

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION,
AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, AMERICAN SOCIETY OF NEWSPAPER EDITORS,
ASSOCIATION OF AMERICAN PUBLISHERS, INC., CENTER FOR DEMOCRACY AND
TECHNOLOGY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, DKT LIBERTY
PROJECT, DOW JONES & COMPANY, INC., ELECTRONIC FRONTIER FOUNDATION,
FIRST AMENDMENT PROJECT, FREEDOM TO READ FOUNDATION, INFORMATION
TECHNOLOGY ASSOCIATION OF AMERICA, NETCOALITION, ONLINE PUBLISHERS
ASSOCIATION, PEOPLE FOR THE AMERICAN WAY FOUNDATION; SOCIETY OF
PROFESSIONAL JOURNALISTS, and U. S. INTERNET SERVICE PROVIDER
ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLEE'S PETITION FOR
REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The following *amici curiae*:

American Booksellers Foundation For Free Expression
American Civil Liberties Union
American Civil Liberties Union of Northern California
American Society of Newspaper Editors
Association of American Publishers, Inc.
Center for Democracy and Technology
Computer & Communications Industry Association
Computer Professionals for Social Responsibility
DKT Liberty Project
Electronic Frontier Foundation
First Amendment Project
Freedom to Read Foundation
Information Technology Association of America
NetCoalition
Online Publishers Association
People For the American Way Foundation
Society of Professional Journalists
U. S. Internet Service Provider Association

are not publicly traded companies, and are not corporate entities for which a corporate disclosure statement would apply (i.e., these *amici* do not have any parent corporations, and no publicly held company owns ten percent or more of stock in any of these *amici*, see FRAP 26.1).

Amicus curiae Dow Jones & Company, Inc., is a publicly traded company, but has no parent corporation and no publicly held company owns ten percent or more of stock in Dow Jones & Company, Inc.

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INTERESTS OF THE *AMICI CURIAE* AND
STATEMENT OF AUTHORITY FOR FILING

This brief *amici curiae*, filed pursuant to motion, urges that the Court grant rehearing or rehearing *en banc*. This brief is submitted on behalf of a broad spectrum of publishing trade associations, Internet trade associations and companies, and public interest organizations that share a deep commitment to ensuring that the Internet achieves its full promise as an innovative medium of communication. *Amici* variously constitute and represent:

- authors, publishers, editors, and distributors of textual, audio, and audio-visual material, both on- and off-line;
- educators and librarians whose students and patrons desire access to the widest possible range of informative material;
- Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it; and
- public interest organizations dedicated to ensuring that the Internet remains a dynamic medium for free speech.

A brief description of each *amici* is provided below following the Argument.

ARGUMENT

The undersigned *amici* represent a diverse group of public interest organizations and industry associations who collectively urge that this Court grant the petition of Yahoo!, Inc. for rehearing, or for rehearing by the *en banc* court. If the panel's ruling is permitted to stand it will have a broad chilling effect on free expression and e-commerce in the United States. Although the undersigned may not agree on all issues (as reflected in the two distinct *amicus* briefs submitted to the panel), they agree on two critical points: First, the issues raised by the panel decision involve "one or more questions of exceptional importance" warranting *en banc* consideration. Fed. R. App. P. 35(b)(1)(B). Second, if a foreign person or entity takes affirmative steps both in a foreign court and in the United States to force a U.S.-based speaker to censor lawful, constitutionally protected speech aimed at U.S. listeners, U.S. courts should and do have jurisdiction to protect the speech and vindicate the First Amendment protections afforded to both speakers and listeners.

A foreign court judgment imposing significant daily fines on U.S.-based speech that is perfectly lawful in the U.S. can create a substantial chilling effect on the U.S. speaker. Without an ability to ask a U.S. court to remove the cloud created by such a foreign judgment, a U.S. speaker would face a choice of self-censorship or continuing to speak under the threat of a massive and growing

financial risk. Although some speakers might have the confidence and resources to withstand such pressure, others would have little choice but to remove lawful content from the Internet. The chilling effect would be particularly acute for the many individuals and small organizations for whom the Internet is an indispensable means of reaching an audience but who lack the resources to participate in overseas legal proceedings.

The threat to free speech on the Internet is of particular concern in light of the pressure a foreign court judgment could impose on a service provider like Yahoo! Many Internet providers like Yahoo! create valuable fora for speech and communication – fora that are available to millions of speakers at little or no charge. If service providers face growing fines imposed by foreign courts because of constitutionally protected speech posted by the service provider’s users, many service providers will curtail their users’ ability to engage in the open and robust speech and debate that is the hallmark of this medium. Indeed, the pressure created by a mounting foreign judgment, if insulated from quick challenge in U.S. courts by means of the declaratory judgment process, would threaten the business model of some service providers, and thus could reduce the ability of millions of Americans to speak freely and lawfully over the Internet.

Beyond the impact on service providers, the panel’s decision would create great risk for a broad range of U.S.-based and U.S.-focused commercial and e-

commerce sites on the Internet. If a foreign court can impose fines on a U.S. merchant or advertiser attempting to sell a lawful product to U.S. consumers simply because an Internet website or advertisement can be viewed from outside the United States, and the U.S. entity has no prompt recourse to the U.S. courts, the harm to Internet commerce could be substantial. *See* Brief of Amici Curiae Chamber of Commerce of the United States *et al.*, at 7-16 (filed May 6, 2002) (detailing potential impact on e-commerce).

These risks are not speculative, and France is not the only country that rejects the free and unfettered debate that is constitutionally protected in the United States. China prohibits discussion of the events at Tiananmen Square, Saudi Arabia censors criticism of that country's government, Syria bans Internet speech that is considered to be pro-Israel, and even countries such as Australia and Italy impose far stricter limits on public discourse than would be permitted in the United States. *See* Brief of Amici Curiae Center for Democracy & Technology *et al.* (filed May 6, 2002) (detailing numerous cases of Internet censorship around the world). Often the speech foreign governments attempt to suppress is political speech, a category of speech that warrants the highest possible constitutional protection.

If the panel's decision stands, Internet speakers, publishers, merchants, and service providers will face mounting persecution abroad for speech that is lawful in

the United States, and foreign entities will have the power to manipulate the timing of any enforcement action to maximize the pressure on the U.S. speaker. Because of the exceptional threat to free speech created by the panel decision in this case, and the exceptional importance of these issues, the undersigned *amici* support the motion of Yahoo! for rehearing by the *en banc* court.

CONCLUSION

The petition for rehearing and rehearing *en banc* should be granted.

IDENTIFICATION OF INDIVIDUAL *AMICI*

The *amici* submitting this brief are:

American Booksellers Foundation For Free Expression (“ABFFE”) is a not-for-profit organization dedicated to educating members of the book industry and the public about the dangers of censorship and protecting the free expression of ideas. ABFFE members’ right to learn about, acquire, and distribute First Amendment protected books and other materials will be seriously abridged if they must worry about the application of the laws of every country in the world to their U.S.-centered Internet communications.

American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit,

nonpartisan organization with over 400,000 members dedicated to the Constitutional principles of liberty and equality. American Civil Liberties Union of Northern California is its regional affiliate. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet.

The American Society of Newspaper Editors (“ASNE”) is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies.

The Center for Democracy and Technology (“CDT”) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet and other communications networks.

The Computer & Communications Industry Association (“CCIA”) is an association of computer, communications, Internet and technology companies that

range from small entrepreneurial firms to some of the largest members of the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and online services, resellers, systems integrators, and third-party vendors.

Computer Professionals for Social Responsibility ("CPSR") is a public interest alliance of information technology professionals and others concerned about the impact of computer technology on society (www.cpsr.org). With over 1,200 members and 23 chapters worldwide, CPSR has played an active role on a variety of public policy issues related to the Internet, including First Amendment matters.

The DKT Liberty Project is a not-for-profit organization that advocates vigilance over government regulation of all kinds, especially restrictions of individual civil liberties, such as the right to free speech.

Dow Jones & Company, Inc. publishes The Wall Street Journal, a daily newspaper with a national circulation of over 2 million each business day, WSJ.com, a news website with approximately 700,000 paid subscribers, Dow Jones Newswires, a collection of real-time electronic news services, Barron's, a weekly business and finance magazine, and, through its Ottaway Newspapers subsidiary, community newspapers, most of which have websites.

The Electronic Frontier Foundation (“EFF”) is a nation-wide, nonprofit, civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society and maintains one of the most-linked-to Web sites (www.eff.org) in the world.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. It provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The Freedom to Read Foundation (“FTRF”) is a non-profit membership organization established by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; and to set legal precedent for the freedom to read on behalf of all citizens.

The Information Technology Association of America (“ITAA”) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world. NetCoalition's members include leading Internet Service Providers (ISPs) and associations of ISPs.

The Online Publishers Association ("OPA") is an industry trade organization of online content publishers whose purpose is to represent its members on issues of importance with the press, government, public, and advertising community. OPA members are some of the most trusted and well respected content brands on the Internet.

People For the American Way Foundation is a nonpartisan citizens' organization established to promote constitutional liberties, and has litigated to protect Internet freedoms. With over 500,000 members and supporters nationwide, it works to ensure that the First Amendment provides the foundation for an open and tolerant society and a critical tool for countering hate, discrimination and division.

The Society of Professional Journalists ("SPJ") is the nation's largest, most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

U. S. Internet Service Provider Association (“US ISPA”) is a national trade association that represents the common policy and legal concerns of the major Internet service providers (ISPs).

Dated: September 13, 2004

Respectfully submitted,

JOHN B. MORRIS, JR.
Center for Democracy
and Technology

ANN BRICK
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By: _____
ANN BRICK

Counsel for Amici

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached amicus brief in support of a petition for panel rehearing/petition for rehearing en banc/answer is:

(check applicable option)

Proportionately spaced, has a typeface of 14 points or more and contains **1864** words (petitions and answers must not exceed 4,200 words).

Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

ANN BRICK

PROOF OF SERVICE BY U.S. MAIL

Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme

Appeal No. 01-17424

I, Leah Cerri, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 1663 Mission Street, Suite 460, San Francisco, California 94103.

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BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, INC., CENTER FOR DEMOCRACY AND TECHNOLOGY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, DKT LIBERTY PROJECT, DOW JONES & COMPANY, INC., ELECTRONIC FRONTIER FOUNDATION, FIRST AMENDMENT PROJECT, FREEDOM TO READ FOUNDATION, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, NETCOALITION, ONLINE PUBLISHERS ASSOCIATION, PEOPLE FOR THE AMERICAN WAY FOUNDATION; SOCIETY OF PROFESSIONAL JOURNALISTS, and U. S. INTERNET SERVICE PROVIDER ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

On each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2004 at San Francisco, California.

Leah Cerri