

CONCURRENT WORKSHOP: CIVIL PROCEDURE

By:

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I. Introduction

In this presentation, I offer suggestions for using *Yahoo! v. LICRA & UEJF* (the so-called “Nazi memorabilia” case) to teach various aspects of personal jurisdiction in a first-year civil procedure course.

Most professors (and many students) are familiar with the basic facts of the Yahoo! case. In 2000, French plaintiffs brought suit against Yahoo! (a U.S. company) in a French trial court, alleging that Yahoo!’s auction website was in violation of a French law prohibiting the display for sale of Nazi memorabilia. The French court ordered Yahoo! to block French citizens’ access to Yahoo!’s auction website, and to any links to other websites advocating Nazism or Holocaust denial. Yahoo! argued that the French court’s exercise of jurisdiction over its activities was impermissibly broad and ran afoul of the First Amendment of the U.S. Constitution. When the French court rejected its argument, Yahoo! filed suit against the French plaintiffs in a U.S. district court in California requesting a declaration that the French court’s orders were not recognizable or enforceable in the United States. The trial court found for Yahoo!, but a panel of the Ninth Circuit reversed, holding that the court lacked personal jurisdiction over the French plaintiffs. The case is currently pending before the Ninth Circuit en banc, which is expected to issue a decision in the next several weeks.

The Yahoo! case provides an excellent vehicle for exploring various aspects of personal jurisdiction. For example, I use it over the course of the semester to introduce the following concepts:

- Territoriality as a basis for personal jurisdiction: Possibilities and limitations
- Comparison of U.S. personal jurisdiction rules and international jurisdictional principles: Similarities and differences, as well as the interrelationship between the two concepts
- The reach of the “effects test” under both U.S. and international jurisdictional principles
- Challenges to the traditional doctrine of personal jurisdiction posed by the Internet and other technological advances

I have found that the *Yahoo!* case is a particularly effective teaching tool if it is introduced early in the teaching unit on personal jurisdiction, and then revisited and developed over the course of the semester as the students broaden their understanding of the various jurisdictional issues facing the courts. The following outline will briefly describe one possible approach.

II. Introducing *Yahoo!*: Territoriality and *Pennoyer v. Neff*

- The *Yahoo!* case can be introduced early in the teaching unit on personal jurisdiction – e.g., at the end of a discussion of the seminal case of *Pennoyer v. Neff*.
- The rule of territoriality announced in *Pennoyer* is based in part on general principles of public law drawn from international jurisdictional principles.
- But is territoriality a sound basis for the exercise of jurisdiction? International jurisdictional principles have expanded to recognize other forms of jurisdiction beyond mere territoriality. E.g., in *Yahoo!*, the French court exercised jurisdiction based on “objective territoriality” – *Yahoo!*’s actions in the U.S. caused harmful effects on French soil.
- Student debate: Was the French court’s exercise of extraterritorial jurisdiction over *Yahoo!* a legitimate use of the court’s power? How should a U.S. court respond?
- I introduce *Yahoo!* through an informal discussion, but one could also assign readings from the French court’s order and/or the U.S. district court’s decision declaring the French order invalid. (See bibliography for references.)

III. Revisiting *Yahoo!*: The Reach of the Effects Test

- In *Yahoo!*, the Ninth Circuit panel reversed the trial court’s declaratory judgment in favor of *Yahoo!* on the ground that the court lacked specific jurisdiction over the French plaintiffs. The Ninth Circuit rejected *Yahoo!*’s argument that the French plaintiffs had “expressly aimed” their conduct at California, thus falling within the “effects test” set out by the Supreme Court in *Calder v. Jones*.
- After introducing *Yahoo!* as described above, I revisit the case toward the end of the teaching unit on personal jurisdiction, after the students have studied *Calder* and the effects test (along with other major Supreme Court cases on personal jurisdiction).

- I introduce a hypothetical (which I have attached) based on the Ninth Circuit panel's decision in *Yahoo!* Students do a writing assignment and/or an oral argument based on the hypothetical. I then assign the Ninth Circuit panel decision, which we compare with their own analyses of the issues presented. Finally, I ask the students to predict what will happen in the en banc decision.
- The hypothetical and the panel decision allow exploration of various issues relating to the reach of the effects test – e.g., intentional torts, wrongful conduct, etc.

IV. Bibliography

- *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001)
- *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004)
- A good (unofficial) translation of the French court's decision is available at: <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>. The official French text is available at: <http://www.juriscom.net/txt/jurisfr>.

Addendum
Hypothetical for Use in Teaching *Yahoo! v. LICRA & UEJF*
Melissa A. Waters, Washington & Lee Law School

You are a summer associate at Bruner & Murphy, a litigation firm in Portland, Oregon. One of the partners, Melanie Bruner, has asked you to do some research that will help to determine whether the firm should take on a new client, James Roy. Bruner describes Mr. Roy's situation to you as follows.

Roy has dual Canadian and U.S. citizenship. In 2001, Roy, who was living in Saskatchewan, Canada, at the time, ran an advertisement in a local Saskatchewan paper entitled, "The Bible says no to homosexual behavior." (Roy decided to run the ad as his "personal response" to Canada's Homosexual Pride Week. It listed the references to four Bible passages addressing homosexuality, and included a drawing of two men holding hands, overlaid by a red circle and a slash.) The Canadian Gay & Lesbian Association ("CGLA") filed complaints before the Saskatchewan Human Rights Tribunal on behalf of three homosexual men, alleging that Roy's conduct violated the Saskatchewan Human Rights Code. The Human Rights Tribunal ruled that Roy's advertisement "can objectively be seen as exposing homosexuals to hatred or ridicule," and thus violated the Code's prohibition on "inciting hatred" against homosexuals. It ordered him to pay \$1,500 Canadian to each of the three men on whose behalf the complaints had been brought. Roy paid the judgments in full.

Six months after the Tribunal's decision, Roy moved to Oregon. From a small office in Portland, Roy established and now maintains a website devoted largely to decrying what he terms "Canada's increasingly repressive anti-speech regime." The website discusses in some detail the Saskatchewan Human Rights Tribunal's decision against him, and it also chronicles other "anti-speech" cases in the Canadian courts. The website also discusses in some detail Roy's view that the Bible prohibits homosexual behavior, and it includes an exact replica of his "no to homosexual behavior" advertisement (discussed above).

In June 2002, members of CGLA discovered that they could gain access to the entire content of Roy's Oregon-based website from the CGLA offices in Ontario, by simply logging on to the site. On June 5, the president of CGLA telephoned Roy in Portland, informed him that certain content on his website violated Canadian law, and asked that he remove the offending content from the website. Roy refused to do so. Five days later, CGLA sent a "cease-and-desist" letter to Roy's office in Portland. The letter stated, in relevant part:

As CGLA informed you by telephone on June 5, 2002, certain content on your website incites hatred against homosexuals and is thus in violation of Canadian hate crimes legislation. Indeed, the Saskatchewan Human Rights Tribunal has already ruled that content

identical to that posted on your website violates Canadian law. You therefore have an obligation under Canadian law to cease and desist the publication of such content in Canadian territory.

On June 20, CGLA filed a complaint against Roy in a Canadian trial court, alleging that Roy's Oregon-based website violated Canadian hate crimes legislation by inciting hatred against homosexuals. The complaint asked the Canadian court to compel Roy either to remove the offending content from his website or to block all access to the content to Canadian Internet users. Pursuant to the requirements of the Hague Convention on Service Abroad, CGLA utilized the U.S. Marshals Service in Portland to serve a copy of the Canadian complaint on Roy. Roy participated fully in the Canadian litigation through Canadian counsel.

In June 2004, the Canadian court found for the plaintiffs and issued a final decree against Roy, ordering Roy to remove from his website all content referring to the Bible's prohibitions on homosexual behavior, or to block Canadian Internet users' access to the material. The Canadian decree assesses a \$15,000 fine for each day that Roy fails to comply with the decree. CGLA again utilized the U.S. Marshals Service in Portland to serve a copy of the Canadian decree on Roy.

Instead of complying with the terms of the Canadian decree or appealing the decree to the Canadian Supreme Court, Roy wishes to bring a lawsuit against CGLA in a U.S. District Court in Portland. Roy's lawsuit would request a declaration that the Canadian decree is void and unenforceable under U.S. law, because the Canadian decree violates the free speech protections of the First Amendment.

Bruner (your boss) is intrigued by Roy's idea of using the U.S. courts as a "shield" from Canadian hate crimes legislation, and she would like to take him on as a client. Before doing so, however, she wants to assess the strengths and weaknesses of Roy's case. For example, if Roy files a complaint against CGLA, one of CGLA's likely lines of attack will be on the issue of personal jurisdiction. Specifically, CGLA will likely argue that the U.S. District Court in Portland lacks *in personam* jurisdiction over it.

To assist her in determining whether to take Roy's case, Bruner asks you to prepare a memorandum on the following issue: On the facts as stated above, would the U.S. District Court in Oregon have *in personam* jurisdiction over CGLA in a lawsuit brought by Roy?

PLEASE NOTE: Another summer associate has been asked to address the issue whether the Oregon long-arm statute would apply to CGLA. Therefore, you need not address that issue in your memorandum.

