PURPOSEFULLY DIRECTED: FOREIGN JUDGMENTS AND THE *CALDER* EFFECTS TEST FOR SPECIFIC JURISDICTION

*ANDERSON BAILEY**

I. INTRODUCTION

"We must secure the existence of our people and a future for White children." So reads a banner that runs along the website of the American Nazi Party.[1] At the same time, a cursory search found that as of February 8, 2007, nineteen copies of Adolf Hitler's *Mein Kampf* were available to bidders on eBay, the Internet auction site.[2] Sellers there were also offering almost 300 separate pieces of Nazi memorabilia, including SS medals and propaganda posters.[3] Meanwhile, the web-host Yahoo! was facilitating auctions for antiquarian Reichmarks and Nazi-era postage stamps.[4] Browsers could also access an extensive archive of Nazi material, such as speeches, propaganda art, and photographs through the website of Calvin College.[5]

In the United States, basic First Amendment doctrine protects each of these speakers from government restriction. The Supreme Court has upheld the right of American Nazis to demonstrate in predominantly Jewish neighborhoods[6] and has invalidated an ordi-

* N.Y.U. School of Law, 2006. I am particularly grateful to Prof. Linda Silberman for her guidance, patience, and friendship. I would also like to express my thanks to Crystal, Jake, and my parents for their unquestioning support.

1. The American Nazi Party, http://www.americannaziparty.com/ (quoting David Lane's 14 Words, a saying frequently used by White Nationalists) (last visited Mar. 21, 2007).

2. *See* eBay, http://www.ebay.com (search for "Mein Kampf" in "Books" category) (last visited Feb. 8, 2007).

3. *See* eBay, *supra* note 2 (search for "Nazi" in "Collectibles" category) (last visited Feb. 8, 2007). R

4. *See* Yahoo! Auctions, http://auctions.yahoo.com/ (search for "Reichmark" in "All of Auctions" category and "Nazi" in "Stamps" category) (last visited Feb. 8, 2007).

5. German Propaganda Archive, http://www.calvin.edu/academic/cas/gpa/ (last visited Mar. 21, 2007).

6. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43-44 (1977) (per curiam).

nance prohibiting the public display of swastikas.[7] Commercial speech has also received strong constitutional protection.[8] Though the First Amendment may not protect all forms of hate speech under all circumstances,[9] the paucity of relevant litigation suggests that there has been little domestic controversy over the sale and dissemination of hate-related items, which can easily be found on eBay and Yahoo!.

This is not necessarily the case abroad. While Yahoo! can be confident that there won't be any serious challenge to the content of its auction site in an American court, the company has spent over six years embroiled in highly-publicized French litigation over that very issue.[10] Nor is Yahoo! alone. Some countries have considerably stricter limitations on hate speech,[11] libel,[12] and the use of intellectual property,[13] and many American firms are discovering that these restrictions can apparently be reverse-transmitted over the same servers that carry American websites abroad.

These divergent speech laws are producing transnational litigation that sets in opposition two important values. On the one hand, domestic courts have the authority to protect constitutional rights from foreign restrictions. On the other hand, such assertions of

7. R.A.V. v. City of St. Paul, 505 U.S. 377, 380-81 (1992). *But cf.* Virginia v. Black, 538 U.S. 343, 347-48 (2003) (upholding a statute that criminalizes burning crosses with the intent to intimidate).

8. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) (limiting the ability of states to restrict cigarette advertisements); Rubin v. Coors Brewing Co., 514 U.S. 476, 479-80 (1995) (finding that a ban on disclosure of alcohol content on beer labels violates the First Amendment).

9. *See, e.g.*, *Black*, 538 U.S. at 358-63; Wiegand v. Motiva Enters., LLC, 295 F. Supp. 2d 465, 466-67 (D.N.J. 2003) (dismissing a claim for wrongful termination after plaintiff was fired from his private-sector job for disseminating neo-Nazi material over the Internet).

10. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1202-05 (9th Cir. 2006) (describing the history of the case).

11. For more on the differences between U.S. and foreign hate speech laws, see generally Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253 (2003); Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 391-93 (1999).

12. For more on the differences between U.S. and foreign libel laws, see generally Blake Cooper, Note, *The U.S. Libel Law Conundrum and the Necessity of Defensive Corporate Measures in Lessening International Internet Libel Liability*, 21 CONN. J. INT'L L. 127 (2005).

13. For more on the differences between U.S. and foreign intellectual property laws, see generally Symposium, *Intellectual Property Online: The Challenge of Multi-Territorial Disputes*, 30 BROOK. J. INT'L L. 813 (2005).

authority can raise concerns over international comity and the extent to which U.S. courts recognize the legitimacy of foreign adjudication. The results of this tension can have significant implications for the current tests federal courts use to determine *in personam* jurisdiction.

This Note argues that U.S. courts can constitutionally assert judicial jurisdiction over foreign defendants whose only connection to the forum is having served a speech-restrictive foreign judgment on an American speaker. The acquisition of the foreign judgment derogates an important First Amendment right by making uncertain the speaker's liberties of expression. Meanwhile, by serving the order in the United States, the alien intentionally directs her action into a domestic forum. These actions satisfy the injury and purposeful direction requirements that the Supreme Court has established for specific jurisdiction.

Part II begins by tracing the development of the current law on personal jurisdiction. It demonstrates how courts that once closely tied their authority to the defendant's physical presence in the forum state adapted to a changing society and developed a more abstract approach to jurisdiction. It then traces the rise of specific jurisdiction and its formulation in the Supreme Court.

Part III then compares the three procedural postures in which transnational Internet litigation is most likely to reach American shores: when a foreign judgment-holder seeks domestic enforcement, when a domestic speaker faced with an adverse foreign order seeks declaratory relief, and when a domestic speaker attempts to preempt threatened litigation abroad by filing her own suit at home. Examining three particular cases, Part III traces the dimensions of the jurisdictional inquiry and distinguishes between cases where a speech-restrictive foreign judgment has been issued, and cases where foreign litigation is ongoing or imminent.

Part IV looks at the law of judgment recognition and explores the extent to which the jurisdictional analysis proposed in Part III undercuts or reinforces the respect for foreign process that often animates U.S. courts. Part IV posits that the international system is not threatened by a world in which independent sovereignties issue conflicting judicial rulings. Just as the United States has found ways to balance comity interest with domestic constitutional concerns, countries can continue to be respectful of foreign law while protecting the policies embedded in their own jurisprudence.

When extant foreign orders hang uncertainly in the ether above web-based conduct, American speakers are left with little knowledge or guidance as to their rights, domestic expression is

necessarily hampered, and valid constitutional claims may go unvindicated. Operating in the background is the strong emphasis that the United States Constitution places on free speech. The dynamics of the Supreme Court's jurisprudence throughout the First Amendment's complex history are beyond our immediate scope, as are arguments that the Internet should receive lesser constitutional protection in general. This Note instead proceeds from the baseline presumption that freedoms of speech and of association will protect the type of content that is creating disputes abroad from serious domestic challenge, and that courts will analogize web-based speech to traditional forms of expression. In doing so, courts cannot only adhere to the established law of jurisdiction, but also account for the interests of American speakers and constitutional rights more generally.

II.
CONSTITUTIONAL PERSONAL JURISDICTION DOCTRINE

In the first instance, judicial jurisdiction is a question of state law: A court must ensure that the assertion of its power over an unwilling litigant complies with the forum-state's long-arm statute. In many states, that statute is coincident with the Fourteenth Amendment's Due Process Clause, meaning that the state legislature has expanded the authority of the forum's judiciary to the fullest extent that Supreme Court precedent allows.[14] Between states that have enacted such long-arm statutes and states whose highest courts have broadly interpreted more narrowly drawn statutes,[15] most of the long-arm statutes in the United States are in this category.[16] In some states, however, legislatures have constrained the authority of the courts to an enumerated list of situations.[17] In this second category of states, jurisdiction over a defendant might be consistent with the Federal Constitution, yet a case could still be

14. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2003) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

15. *See, e.g.*, S.C. CODE ANN. § 36-2-803 (2004); Triplett v. R. M. Wade & Co., 200 S.E.2d 375, 378-80 (S.C. 1973) (interpreting an older version of the statute).

16. *See* Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212, 216-17 (1994) (dividing the state laws into these categories).

17. *See, e.g.*, GA. CODE ANN. § 9-10-91 (1982). For more on the panoply of state long-arm statutes, see 2 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS app. E (3d ed., Lexis Law Publ'n 1998) (1983); Zbaracki, *supra* note 16, at 216-19. R

dismissed for want of jurisdiction under the governing state statute.[18]

No matter which long-arm statute applies, however, courts in all states must still make certain that any assertion of jurisdiction over an unwilling defendant complies with the mandate of federal due process,[19] under which, according to the *Calder* effects test,[20] courts must analyze the effects of action taken outside the forum. This divorce from a defendant's physical presence inside the forum represents the nuances of a process that has significant implications for the jurisdictional scheme this Note advances.

A. The Minimum Contacts Standard and the Split from Physical Presence

In 1877, the Supreme Court's decision in *Pennoyer v. Neff* settled the principle that a forum's power over an individual is mitigated through the due process restrictions of the Fourteenth Amendment.[21] In *McDonald v. Mabee*, Justice Holmes spoke of the "fair play" that must referee between states bound by a single Constitution[22] and posited that "substantial justice" must set the minimum requirements for due process to be achieved in the area of judicial jurisdiction.[23] By 1940 the concepts had been combined to form the "traditional notions of fair play and substantial justice" that determined whether service of process was sufficient to validate judgment against a defendant.[24]

Beginning with *International Shoe Co. v. Washington*, the Supreme Court started to reconfigure the "traditional notions" to suit a more mobile society and began to apply them to personal jurisdiction questions more generally.[25] The restrictions set by the require-

18. Presumably, in some of these states, the long-arm statutes would not allow an American speaker caught in the second scenario to bring an action for declaratory relief. This Note does not consider how the laws of these states might affect the analysis, but it is worth noting that this scenario may raise some difficult questions, such as to what extent the First Amendment creates a public policy broad and strong enough to supplant state statutory authority, and, if not, to what extent do variations in state long-arm statutes create a regime wherein speakers in different locations enjoy different levels of First Amendment immunity.

19. It is possible for jurisdiction to be valid under a narrower long-arm statute, yet still violate due process.

20. Calder v. Jones, 465 U.S. 783, 790 (1984).

21. 95 U.S. 714, 733 (1877).

22. 243 U.S. 90, 91 (1917).

23. *Id.* at 92.

24. Milliken v. Meyer, 311 U.S. 457, 463 (1940) (citing *McDonald*, 243 U.S. 90).

25. 326 U.S. 310 (1945).

ments of due process came to depend on the extent of the contacts that a court could discern between the forum and the defendant before it. In *International Shoe*, for instance, a company with no corporate presence in the state of Washington was held subject to suit there because of its incidental activities.[26] According to the Court, these activities

> were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.[27]

The physical presence component of jurisdiction theory was being marginalized. The Court implicitly contemplated the exertion of judicial power over defendants with increasingly slight physical connections to the forum.

At the same time, if the Court was willing to concede that the enumeration and evaluation of various contacts would sometimes be relevant to the jurisdictional inquiry, it would not do so without establishing some limiting principle to help define when contacts were wanting and when they had reached the necessary minimum. Chief Justice Warren offered that principle in *Hanson v. Denckla*, wherein he wrote that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[28]

Having laid down the twin concepts of minimum contacts and purposeful availment, the Court was left only to supervise their evolution in the case law, and in two libel cases decided on the same day—*Keeton v. Hustler Magazine, Inc.*[29] and *Calder v. Jones*[30]—the Court rearticulated the purposeful availment standard. Thereafter, conduct that a defendant "purposefully directed" toward the

26. *Id.* at 313-14, 321.
27. *Id.* at 320.
28. 357 U.S. 235, 253 (1958).
29. 465 U.S. 770, 774 (1984).
30. 465 U.S. 783, 790 (1984).

forum state could establish personal jurisdiction;[31] a court's dependence on physical presence—no matter how slight—was growing more tenuous. In what has become known as the *Calder* effects test, jurisdiction could now be established if defendants were "primary participants in an alleged wrongdoing intentionally directed at a [forum] resident."[32] The assertion of judicial authority could be based on intentional acts committed outside a jurisdiction if the effects of those acts were intended to be felt inside that jurisdiction.

As always, the variety of life proved a willing match to the flexibility of the common law, and the tests for personal jurisdiction mutated to meet new circumstances. In *Burger King Corp. v. Rudzewicz*, the Court addressed a claim arising out of a contractual relationship after a fast-food corporation sued a Michigan-based franchisee in federal court in Florida.[33] That the defendant had never set foot in the forum state did not mean that he had not "purposefully avail[ed himself] of the privilege of conducting activities" there.[34] For parties to a contract, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, . . . an absence of physical contacts can[not] defeat personal jurisdiction there."[35] The elements of physical presence and susceptibility to jurisdiction that *International Shoe* began to stretch apart were now formally split. Defendant's deliberate contractual affiliation with the plaintiff and the purposeful direction of injurious conduct made it foreseeable—and coincident with due process—to hale the defendant into a Florida court.

This disjunction between jurisdiction and presence created space for the development of a new theory of jurisdiction. If the language of *International Shoe* gave birth to the requirement of minimum contacts, it also contained the seed for a second concept, one that required twenty-seven years of gestation before its official introduction in the U.S. Reports: specific jurisdiction.

31. *See Keeton*, 465 U.S. at 774 (citation omitted); *see also Calder*, 465 U.S. at 790 (using the phrase "intentionally directed").

32. *Calder*, 465 U.S. at 790.

33. 471 U.S. 462, 466, 468 (1985). A choice-of-law clause in the franchise agreement stipulated that Florida law would govern the relationship, but was agnostic as to where suit could be brought. *Id.* at 481 (citation omitted).

34. *Id.* at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)); *id.* at 476.

35. *Id.* at 476.

B. The Emergence of Specific Jurisdiction

1. The Supreme Court Formally Recognizes Specific Jurisdiction

This concept was first described in the academy in 1966 by Professors von Mehren and Trautman as "the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate."[36] Lower courts quickly adopted the term,[37] but the notion of specific jurisdiction was implicit in many of the Supreme Court's jurisdiction cases that followed *International Shoe*, even if the justices didn't officially recognize its name until 1984.[38] Moreover, from an early point the Court began to set parameters for this new approach, stating in dicta that even a single contact between forum and defendant could suffice for purposes of finding jurisdiction. In *McGee v. International Life Insurance Co.*, the Court declared that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State."[39] This language opened the possibility that the minimum contacts needed to assert judicial jurisdiction could number as few as one.

The greater dimensions of specific jurisdiction have also become clear. Due process requires that the contact between a defendant and the forum satisfies the "purposeful availment" test first articulated in *Hanson v. Denckla*.[40] This ensures that the defendant has "fair warning" that it is susceptible to jurisdiction in the forum.[41] Physical presence is of course not necessary here; it can be enough that a defendant's conduct was "purposefully directed" at the forum state:

> Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will . . . reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is trans-

36. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

37. *See, e.g.*, Atl. Tubing & Rubber Co. v. Int'l Engraving Co., 364 F. Supp. 787, 791 (D.R.I. 1973) (noting the increasing use of jurisdiction "based on isolated events or episodes"); *see also* Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 232 n.24 (D.N.J. 1966) (citing von Mehren & Trautman, *supra* note 36). R

38. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & n.8 (1984).

39. 355 U.S. 220, 223 (1957).

40. *See supra* note 28 and accompanying text. R

41. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

> acted solely by mail and wire communications . . . thus obviating the need for physical presence . . . .[42]

The "purposeful" requirement is not meaningless, however. The general foreseeability of a forum contact may not be enough to make that contact strong enough to justify the assertion of judicial jurisdiction.[43]

Additionally, for specific jurisdiction to attach, the cause of action must actually arise from defendant's contact. As the Court said in *Burger King*, due process is satisfied if "the litigation results from alleged injuries that 'arise out of or relate to' [defendant's] activities."[44] "Unrelated contacts" may be relevant, however, insofar as they help determine how "purposeful" the defendant's conduct was.[45]

Lastly, any claim of specific jurisdiction must meet a basic standard of fairness. Once a plaintiff established the purposefulness of the defendant's conduct, the defendant may still defeat jurisdiction by showing that any assertion of the court's power would violate the "traditional notions of fair play and substantial justice."[46] In *Burger King*, the Court suggested that this determination would depend on the balance of five factors: "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution

42. *Id.* at 476.

43. This is particularly relevant in the "stream of commerce" cases wherein plaintiff-consumers attack deeper pockets located at higher points in the chain of distribution. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (declining jurisdiction over a manufacturer with no contacts to the forum state other than the sale of its product); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289-91 (1980) (holding that an Oklahoma state court lacked jurisdiction over a New York-area retailer in an Oklahoma-based tort action).

44. 471 U.S. at 472 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

45. *See Asahi*, 480 U.S. at 112 ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . .").

46. *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (citing McDonald v. Mabee, 243 U.S. 90 (1917)); *Burger King Corp.*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'"[47]

2. Lower Courts and the *Calder* Effects Test

The concept of specific jurisdiction conjoins baseline due process requirements with a factor-based test, springs from a dizzying watershed of modern case law, and involves complicated factors not discussed here.[48] It is therefore little wonder that, as the First Circuit often intones, "[d]etermining personal jurisdiction has always been more an art than a science."[49]

At the most basic level, all circuits agree on the fundamental three-part test for specific jurisdiction: "(1) whether the defendant purposefully directed its activities at the residents of the forum; (2) whether the claim arises out of or is related to those activities, and (3) whether assertion of personal jurisdiction is reasonable and fair."[50]

Some circuits, however, have perceived in the Supreme Court's case law a doctrinal difference in specific jurisdiction inquiries between tort and contract cases, and have formally distinguished the two. The distinction was captured in the Ninth Circuit's most recent summation of its jurisdiction law:

> We have typically treated "purposeful availment" somewhat differently in tort and contract cases. In tort cases, we typically

47. *Burger King Corp.*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

48. For instance, the foreseeability of contact based on participation in the stream of commerce has caused considerable problems that are still unresolved. *See supra* note 43. Additionally, the federal circuits have developed varying tests for when defendant's contacts with the forum are related enough to plaintiff's that they may be considered in the jurisdictional analysis, even if they do not actually give rise to the claim. *See, e.g.*, Chew v. Dietrich, 143 F.3d 24, 29-30 (2d Cir. 1998); Brunner v. Hampson, 441 F.3d 457, 465-66 (6th Cir. 2006); Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1269 (5th Cir. 1981); Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764, 767 (D. Kan. 1981). R

49. United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 617 (1st Cir. 2001) (quoting Donatelli v. Nat'l Hockey League, 893 F.2d 459, 468 n.7 (1st Cir. 1990)) (alteration in original); *see also* Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995) (quoting Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994)).

50. HollyAnne Corp. v. TFT, Inc., 199 F.3d 1304, 1307–08 (Fed. Cir. 1999); *see also* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (identifying an essentially identical test); New Wellington Fin. Corp. v. Flagship Resort Dev. Corp., 416 F.3d 290, 294–95 (4th Cir. 2005) (same); Intera Corp. v. Henderson, 428 F.3d 605, 615 (6th Cir. 2005) (same); Guidry v. U.S. Tobacco Co., 188 F.3d 619, 625 (5th Cir. 1999) (same); *Chew*, 143 F.3d at 28 (same); Francosteel Corp. v. M/V Charm, 19 F.3d 624, 627 (11th Cir. 1994) (same).

> inquire whether a defendant "purposefully direct[s] his activities" at the forum state, applying an "effects" test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum. By contrast, in contract cases, we typically inquire whether a defendant "purposefully avails itself of the privilege of conducting activities" or "consummate[s] [a] transaction" in the forum, focusing on activities such as delivering goods or executing a contract.[51]

A variation of this principle can be found in the First Circuit, where tort claimants do not get the benefit of inferences that courts may draw from the circumstances surrounding contract formation, but instead "must show a sufficient 'causal nexus' between [defendant's] contacts with [the state] and [plaintiffs'] causes of action."[52]

Similarly, the Third Circuit examines "different considerations in analyzing jurisdiction over contract claims and over certain tort claims."[53] Whereas "in contract claims [the court] analyze[s] the totality of the circumstances surrounding a contract,"[54] in tort claims courts rely on the *Calder* effects test to find purposeful direction. Under that analysis "a party is subject to personal jurisdiction . . . when his or her tortious actions were intentionally directed at that state and those actions caused harm in that state."[55] According to the court, the effects test reasonably requires a showing more rigorous than in contract cases so that courts can ensure that a defendant with no physical contact with the forum jurisdiction purposefully directed her tortious conduct at the forum.[56]

The Fourth Circuit also applies the effects test when "an out-of-state defendant has acted outside of the forum in a manner that injures someone residing in the forum."[57] According to that court's typical formulation of the test, jurisdiction is proper when:

> (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum,

51. *Yahoo! Inc.*, 433 F.3d at 1206 (alterations in original) (citations omitted).

52. Platten v. HG Berm. Exempted Ltd., 437 F.3d 118, 135 (1st Cir. 2006) (quoting Jet Wine & Spirits, Inc. v. Bacardi & Co., 298 F.3d 1, 7 (1st Cir. 2002)).

53. Remick v. Manfredy, 238 F.3d 248, 255-56 (3d Cir. 2001).

54. Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 99 (3d Cir. 2004).

55. *Id.* at 96 n.2.

56. *Id.* at 99.

57. Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 397 (4th Cir. 2003).

such that the forum can be said to be the focal point of the tortious activity.[58]

C. Specific Jurisdiction Applied to Internet Litigation

In the last decade, courts have begun to face the jurisdictional dilemma that the Internet presents. In a host of cases, the question of whether online activity can subject someone to the jurisdiction of a distant tribunal consistent with the demands of due process and the traditional notions of fair play and substantial justice has resulted in the widespread adoption of the *Zippo* sliding scale.[59] According to this standard, the constitutionality of jurisdiction is tied to the level of activity conducted via cyberspace, so that a defendant who "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet" has also subjected himself to the jurisdiction of the residents' home-forum.[60] Meanwhile a defendant who "has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions" is not vulnerable to world-wide jurisdiction.[61] In cases falling between these two poles, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[62] This standard first enjoyed widespread popularity,[63] but has been criticized,[64] particularly by scholars who feel that it gives courts little guidance and offers no change in jurisdictional law for an area that desperately needs its own principles.[65]

58. *Id.* at 398 n.7.

59. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also infra* note 63. R

60. *Id.* at 1124.

61. *Id.*

62. *Id.*

63. *See, e.g.*, Cadle Co. v. Schlichtmann, 123 Fed. App'x 675, 678 (6th Cir. 2005); Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003); Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452-53 (3d Cir. 2003); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713-14 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997).

64. *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004).

65. *See* Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 411 & n.1 (2004); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1166 & n.130 (2005).

For Americans faced with an adverse foreign judgment over their constitutionally-protected, Internet-based speech, the question of what contacts made them vulnerable to litigation abroad will seem moot.[66] Instead, their most salient concern will be what contacts make their foreign adversary susceptible to jurisdiction here at home. An action for a judicial declaration that a foreign order is unenforceable in the United States is available to domestic speakers, provided that there are sufficient minimum contacts to warrant haling the alien litigant before a federal court. If jurisdiction is found, American speakers might obtain relief for their valid constitutional claims and courts might nullify the threat to the First Amendment that foreign speech restrictions pose.

III.
HOW INTERNATIONAL INTERNET CASES MEET THE MINIMUM-CONTACTS REQUIREMENT

There are three basic scenarios for preempting the enforcement of a speech-restrictive foreign law. In the first, the American speaker defends against an alien who asks a U.S. court to recognize an order that the alien obtained abroad. This kind of case presents few jurisdictional problems for a party seeking a declaration of unenforceability.

In the second category of cases, the alien holds a final judgment against the speaker but has not yet sought enforcement in the United States. Instead, the American speaker has lost in a foreign court and turned to a domestic tribunal for a declaratory judgment that the foreign order is unenforceable at home. The challenge to the speaker is to demonstrate contacts between the American forum and the foreign defendant sufficient to meet the due process requirements for judicial declaration.

In the above two species of cases, American courts should assert their authority over the alien litigant. The third scenario helps us understand the limits of this principle. In this situation, a domestic speaker is threatened with litigation abroad over her constitutionally-protected Internet speech and asks a United States court for declaratory or injunctive relief from the imminent or ongoing foreign lawsuit. When the only contact between the litigant and the

66. If the foreign tribunal's exercise of jurisdiction over the speaker does not comported with our notions of due process, that—or any other significant procedural deficiency—may of course be relevant in any subsequent domestic recognition proceeding. However, some speakers may not want to wait that long, and may wish to attack the judgment on constitutional, rather than procedural grounds.

domestic forum is a foreign lawsuit that has not yet resulted in a judgment, the speaker's claim should be dismissed for lack of personal jurisdiction.

A. When the Judgment-Holder Attempts Enforcement— Sarl Louis Feraud Int'l v. Viewfinder Inc.

The first scenario is embodied in *Sarl Louis Feraud International v. Viewfinder Inc.*, wherein two French firms had successfully obtained a French judgment against a Delaware company, Viewfinder, Inc.[67] The controversy began after Viewfinder posted on its website photographs of models wearing the plaintiffs' clothing designs at various fashion shows.[68] Plaintiffs claimed unauthorized use of their intellectual property, as the designs were protected by French law. The U.S. Marshals served process on Viewfinder in the United States pursuant to the Hague Convention on Service Abroad, but Viewfinder did not appear in the foreign litigation and suffered a default judgment. The terms of the French order included 1,000,000 francs in damages (over $183,000), plus costs, and stipulated that a fine of 50,000 francs per day would be levied against Viewfinder until the photos were removed from the Internet.[69]

The French plaintiffs then sought to enforce the judgment in the Southern District of New York; Viewfinder opposed the suit on several grounds. Though the court declined to investigate whether the damages calculation contravened French law and did not accept the argument that the judgment contravened American intellectual property law, Judge Gerald Lynch did find traction in Viewfinder's First Amendment claim.[70] The court found it unquestionable that Viewfinder's activities fell within the ambit of the First Amendment and held that enforcing the French order would violate Viewfinder's constitutionally-protected speech rights. Because the First Amendment and its analog in the New York State Constitution[71] created a strong public policy in favor of the free dissemination of ideas and information, the court vacated a previously entered order of attachment, concluding that enforcement of the French order would be "repugnant to fundamental notions of what is decent and just."[72]

67. 406 F. Supp. 2d 274, 276 (S.D.N.Y. 2005).
68. *Id.* at 276.
69. *Id.* at 276-77.
70. *See id.* at 279-85.
71. N.Y. CONST. art. I, § 8.
72. *Sarl Louis Feraud Int'l*, 406 F. Supp. 2d at 281 (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986)).

The issue of personal jurisdiction over the French plaintiffs never arose in this case for the simple reason that the foreign litigants consented to the court's jurisdiction when they initiated the American enforcement proceeding. Hence, the case, in addition to illustrating in a useful way the First Amendment freedoms involved, also represents the ideal scenario for American speakers who find their domestic constitutional rights hampered by litigation abroad. The more difficult cases arise when it is the speaker who initiates the domestic lawsuit.

B. When There Has Been No Attempt to Enforce the Foreign Order—Yahoo! Inc. v. La Ligue Contre Le Racisme

Where the foreign judgment-holder does not seek enforcement in the United States, American speakers face a difficult scenario: not only are they left with a constitutional claim that a foreign tribunal will not adjudicate, but they may have difficulty meeting the requirements of due process in bringing the judgment-holder to a domestic forum.[73] This situation introduces the threat that Americans' domestic rights of expression will be circumscribed by foreign courts. As a result, speech may be silenced by the uncertainty created in the multitude and variety of possibly applicable foreign laws, and important First Amendment questions might be withheld from domestic adjudication due to the whims of alien litigants.[74]

Such were the stakes in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*.[75] The foreign complainant, La Ligue Contre Le Racisme et L'Antisemitisme (LICRA), is a French nongovernmental, nonprofit organization opposed to racism and anti-Semitism.[76] Their involvement with Yahoo! began when they faxed a cease-and-

73. The alien may have no contacts with the United States, or, alternatively, may have a few connections to the United States, but none collectively sufficient to merit a finding of general jurisdiction in a United States court. If none of those connections could be conceived as arising from the issue *sub judice*, then such a case would be the functional equivalent of an instance where the alien has no connections with the United States at all.

74. For example, an alien judgment-holder could opt to delay any attempted recognition, leaving the speaker uncertain of its rights. Alternatively, the judgment-holder could attempt to enforce the foreign order in a state court. Because cases cannot be removed on the basis of a defense, this strategy would keep the constitutional claim away from federal adjudication.

75. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1201-02 (9th Cir. 2006).

76. For more information on LICRA, see http://www.licra.org.

desist letter to Yahoo!'s headquarters in Santa Clara, California.[77] The letter notified Yahoo! that the company's auction site was hosting the sale of Nazi-related objects in violation of French law and warned that litigation would soon follow if the objects were not made unavailable, at least to French users.[78] Five days after the date of the fax, LICRA filed, with the Tribunal de Grande Instance de Paris, a lawsuit that was soon joined by L'Union des Etudiants Juifs de France (UEJF).[79] As was their right under the Hague Convention on service abroad,[80] LICRA and UEJF used U.S. Marshals to serve process on Yahoo! in California.[81]

The order of the French court on May 22, 2000, mandated that Yahoo! must "*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."[82] More specifically, "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."[83]

In November 2000, the French court ordered Yahoo! to comply with the earlier judgment 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."[84] Yahoo! was also required to finance an independent expert report to substantiate their compliance to the French tribunal and pay various damages

77. *Yahoo! Inc.*, 433 F.3d at 1202.

78. *Id.*

79. *Id.* UEJF is a French group with a similar mission to LICRA's. For more information on UEJF, see http://www.uejf.org.

80. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

81. *Yahoo! Inc.*, 433 F.3d at 1202.

82. *Id.* at 1202 (alteration in original) (quoting from an English translation of the French order that was entered into the record).

83. *Id.* (alterations and omissions in original). Yahoo! France, a French subsidiary of Yahoo!, was also named as a defendant in the French lawsuit, and the French court had specific orders relating to Yahoo! France. *Id.* Because that company was incorporated under French law and has no claim to First Amendment protection relevant here, that facet of the case does not bear on the argument presented here.

84. *Id.* at 1204 (quoting the French order of November 20, 2000).

and costs to LICRA and UEJF. The French complainants used U.S. Marshals to serve the judgments on Yahoo! at the latter's California headquarters.[85]

Rather than appealing the French orders, Yahoo! turned homeward and filed suit in the Northern District of California, asking for a declaration of unenforceability.[86] The district court granted Yahoo! summary judgment in November of 2001,[87] having premised its jurisdiction on LICRA's wrongful attempt to deprive Yahoo! of its constitutional right and taking steps to have that effect in Yahoo's principal place of business.[88] That decision was reversed by a divided panel of the Ninth Circuit, which found in 2004 that it was not wrongful for the foreign complainants to litigate their claims under French law and that Yahoo! would have to wait for a domestic enforcement proceeding to vindicate its First Amendment rights.[89]

After rehearing, a fractured en banc panel again reversed on the personal jurisdiction issue.[90] The majority concluded without elaboration that the *Calder* effects test was the applicable standard[91] and then focused on three contacts between LICRA/UEJF and the United States: sending the initial cease-and-desist letter to Yahoo! headquarters; obtaining the two French judgments against Yahoo!; and serving process on Yahoo! in their California offices both to commence the French proceeding and to notice Yahoo! of the French orders.[92] The court found that defendants' first two contacts were not strong enough to meet the demands of *Calder* and due process. The third contact, however, "considered in conjunction with the first two," justified jurisdiction.[93] LICRA intentionally initiated litigation in France against Yahoo! and UEJF intentionally joined that suit. The litigation was also intended to have effects in California, where the servers that host Yahoo!'s auction sites are located. Moreover, the impact of any fines the French court might levy against Yahoo! would be felt in California. Thus the district

85. *Id.* at 1204.

86. *Id.*; *see also* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

87. *Yahoo!, Inc.*, 169 F. Supp. 2d at 1181, 1194.

88. Yahoo! Inc. v. La Ligue Contre Le Racisme et, L'Antisemitisme, 145 F. Supp. 2d 1168, 1174-77 (N.D. Cal. 2001).

89. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120, 1126-27 (9th Cir. 2004).

90. *Yahoo! Inc.*, 433 F.3d at 1211 (en banc).

91. *Id.* at 1207.

92. *Id.* at 1208-11.

93. *Id.* at 1208.

court had properly exercised personal jurisdiction over the French defendants.[94] Had LICRA/UEJF contractually promised not to enforce the outstanding French orders, the court might have reached a different result, but absent such a promise, the threat of enforcement[95] satisfied the requirement that a "jurisdictionally sufficient" harm was visited upon Yahoo! in the forum state. The court held that under Ninth Circuit precedent, the defendant's acts need not be wrongful.

In the most powerful of the three dissents on the jurisdiction question, Judge Diarmuid O'Scannlain focused on personal jurisdiction doctrine as a constraint on state power, establishing *a priori* that the interests of Yahoo! and California were not sufficiently strong to compel the court to hale LICRA and UEJF before a distant forum.[96] If foreseeability is the constitutional touchstone of personal jurisdiction, then, according to Judge O'Scannlain, the instigation of foreign litigation is never a sufficient basis, unto itself, to justify the assertion of domestic jurisdiction.[97] Furthermore, Judge O'Scannlain read circuit precedent to require that the acts underlying jurisdiction in a non-contract case must be tortious or wrongful, and criticized the majority for finding otherwise.[98]

Though eight judges agreed that personal jurisdiction was proper, three of those also found on prudential grounds that the case was not yet ripe for adjudication, as LICRA and UEJF were evidently satisfied with Yahoo!'s compliance with the orders. Combined with the three judges who found no personal jurisdiction over the foreign parties, these judges constituted a slim plurality to reverse the lower court and direct the dismissal of Yahoo!'s complaint.[99]

1. The *Calder* Effects Test Should Govern

As already discussed, some circuits have different approaches to finding purposeful availment, and the analysis often may depend on whether the case under consideration is a tort or contract action.[100] Actions for declaratory relief do not comfortably fit into

94. *Id.* at 1209-11.

95. LICRA and UEJF intentionally left this threat open. *See id.* at 1210 ("As [counsel to LICRA/UEJF] made clear at oral argument, LICRA and UEJF want to be able to return to the French court for enforcement if Yahoo! returns to its 'old ways.'").

96. *Id.* at 1229 (O'Scannlain, J., concurring only in the judgment).

97. *Id.*

98. *Id.* at 1231.

99. *Id.* at 1201 (plurality opinion).

100. *See supra* Part II.B.2.

either category, however, which can lead to disputes, as in *Yahoo!*, about how the analysis should properly proceed.[101] A foreign litigant responding to Internet-based content, suing under foreign law, and acting in a foreign forum, has not availed herself in any meaningful way of U.S. law.[102] The strength of the First Amendment principles at stake in these cases, however, generates significant policy interests in finding safe harbor for the domestic expression of American speakers. These interests militate for the use of purposeful direction analysis, and the *Calder* effects test should be the governing standard for jurisdictional inquiries where a foreign order implicates domestic constitutional rights.

Judge O'Scannlain is surely correct that due process is meant to cabin state power by limiting the reach of judicial jurisdiction. Applying *Calder*, his emphasis on the wrongfulness requirement is also the most faithful reading of that case, even if it stands in stark contrast to the law of most circuits.[103] The wrongfulness of a defendant's conduct remains an important element in the law of specific jurisdiction, as it helps ensure the injury that cements the forum's authority over a foreign litigant.

Judge O'Scannlain's reading, however, does not require the dismissal of Yahoo!'s claim against LICRA. As an analysis of the latter's contacts with California reveals, the decision to assert jurisdiction over the French defendants was perfectly consistent with the full body of Supreme Court precedent. First, it passes *Calder* scrutiny, even under Judge O'Scannlain's faithful construction of the effects test. Second, jurisdiction over LICRA and UEJF pays proper respect to the Supreme Court holding that defendants' interests are

101. *Compare Yahoo! Inc.*, 433 F.3d at 1207 ("[W]e must evaluate all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant.") *with id.* at 1231 (O'Scannlain, J., concurring only in the judgment) ("With a stroke of its pen, the majority extends the analysis previously applied only to commercial and contract cases to all assertions of personal jurisdiction.").

102. The only perceivable way in which LICRA and UEJF availed themselves of foreign law was by using U.S. Marshals to serve process under the Hague Convention on Service Abroad. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. Service of process will be addressed in greater detail below. *See infra* text accompanying notes 135-36. **R**

103. Only the Fifth Circuit seems to have adopted this reading of *Calder*. Whereas most courts are content to simply evaluate the defendant's contacts with the forum—regardless of their wrongfulness—the Fifth Circuit has held that the effects of those contacts must be "seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct." Guidry v. U.S. Tobacco Co., 188 F.3d 619, 628 (5th Cir. 1999).

by no means the only ones relevant to the jurisdictional calculus.[104] The Ninth Circuit's decision on jurisdiction also best serves the interests of domestic speakers, First Amendment jurisprudence, and American fora.

2. LICRA/UEJF's Minimum Contacts Established Specific Jurisdiction

The Ninth Circuit's assertion of personal jurisdiction over LICRA met the demands of due process by virtue of two principal contacts: the cease-and-desist letter, which established that LICRA's actions were purposefully directed at California, and the acquisition of a foreign order, the enforcement of which would threaten Yahoo!'s domestic expression, thus providing the wrongfulness element that *Calder* requires.

First, cease-and-desist letters should be important factors in any jurisdictional analysis, as they represent conduct intentionally directed at the forum state and meant to cause effects therein. Such effects in the context of Internet speech might involve reprogramming servers, engineering various protocols to discriminate between users of different nationalities, installing filter software, or a combination of these and other activities. In short, such a letter is intended to force—at the threat of litigation—American speakers to shoulder the burden of enforcing foreign speech laws. That warning letters of this type are purposefully directed is self-evident: they are knowingly sent into the recipient's home state.[105]

A cease-and-desist letter that seeks to undermine an established First Amendment right with the threat of foreign litigation also gives rise to the reasonable anticipation of being brought before an American court. Recipients will seek to vindicate their constitutional rights, and the only forum available for doing so will be one that acknowledges that right.

Cease-and-desist letters have had a somewhat uncertain role in personal jurisdiction law, however. At times, a single letter has provided the basis for specific jurisdiction. In *Dolco Packaging Corp. v. Creative Industries, Inc.*, the court found that one cease-and-desist letter "purposefully directed . . . at a forum resident with the intent of having an effect in" the forum state established jurisdiction over

104. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

105. This assumes that, as was the case in *Yahoo!*, the recipient's home state is also the location of its servers. Such does not have to be the case, of course, but even if the recipient's servers are housed in a different jurisdiction than its headquarters, the letter is still clearly meant to cause effects in the state where relevant decisions will be made and the most immediate action taken, regardless of server location.

defendant in plaintiff's action for a declaratory judgment.[106] By sending the letter, the out-of-state defendant had "purposefully availed itself of the privilege of conducting activities in this forum."[107]

Dolco may be something of an aberration, and its definition of purposeful availment is considerably broad. As a case from the Central District of California, it has essentially been overruled by *Yahoo!*. Nonetheless, *Dolco* testifies to the impact cease-and-desist letters can have in jurisdictional analyses. Further, it is only one of a large group of cases wherein jurisdiction has been based on some combination of a warning letter and similar conduct, such as faxes, other letters, and phone calls.[108] Even the Federal Circuit, which has held that "without more," sending a cease-and-desist letter or licensing offer should not constitute minimum contacts in declaratory judgment actions,[109] concedes that such warning letters, if "cast[ ] . . . too widely," can give rise to a declaratory judgment action in the recipient's home forum to disentangle legitimate legal rights.[110]

As the presence of the Federal Circuit suggests, the relationship between cease-and-desist letters and judicial jurisdiction often arises in intellectual property disputes.[111] The reason most often posited for discounting the jurisdictional importance of a warning letter is the policy of incentivizing disclosure as a means of facilitating settlement. The *Yahoo!* court cited similar concerns about discouraging cease-and-desist letters by making them portals of

106. Dolco Packaging Corp. v. Creative Industries, Inc., 1 U.S.P.Q.2d (BNA) 1586, 1587 (C.D. Cal. 1986).

107. *Id.*

108. *See, e.g.*, Open LCR.com, Inc. v. Rates Tech., Inc., 112 F. Supp. 2d 1223, 1227-30 (D. Colo. 2000); Meade Instruments Corp. v. Reddwarf Starware LLC, 47 U.S.P.Q.2d 1157, 1158 (C.D. Cal. 1998) (a single letter constituted sufficient minimum contacts); Bounty-Full Entm't, Inc. v. Forever Blue Entm't Group, Inc., 923 F. Supp. 950, 956 (S.D. Tex. 1996) (same); Burbank Aeronautical Corp. II v. Aeronautical Dev. Corp., 16 U.S.P.Q.2d 1069, 1070-71 (C.D. Cal. 1990); Tandem Computers Inc. v. Yuter, No. C 89-20646 RFP, 1989 U.S. Dist. LEXIS 18384, at *8-15 (N.D. Cal. Dec. 20, 1989). *But see* Ham v. La Cienega Music Co., 4 F.3d 413, 416 (5th Cir. 1993) (finding that a letter notifying plaintiff of copyright infringement did not relate to the "merits of the copyright question" and thus was an insufficient basis for personal jurisdiction); Peterson v. Kennedy, 771 F.2d 1244, 1261-62 (9th Cir. 1985) (holding that telephone calls and mailings are insufficient for personal jurisdiction).

109. Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1360 (Fed. Cir. 1998).

110. *Id.*

111. *See* 8 DONALD S. CHISUM, CHISUM ON PATENTS § 21.02[3][a][ii] n.67 (2006) (listing cases).

jurisdiction.[112] The court noted that these letters initiate a dialogue necessary for non-litigation resolution mechanisms to flourish, and found that this function would be drastically undercut—and cross-border disputes made more complicated—if the letters instead gave rise to duplicative litigation. However, the differences between intellectual property cases and First Amendment litigation draw into question the Ninth Circuit's policy rationales regarding cease-and-desist letters, while the similarities between the two contexts highlight the salience such letters should have in any jurisdictional inquiry.

That cease-and-desist letters are intentionally aimed at the enjoyment of a legitimate right accentuates the similarity of these two kinds of cases. One complaint often leveled against cease-and-desist letters is that they can be used as a mechanism by which the owners of questionable patents can extort licensing fees from alleged infringers who opt not to pursue a more expensive resolution method, such as litigation.[113] Thus, courts that refrain from considering warning letters when ruling on a 12(b)(2) motion[114] to dismiss may be inadvertently condoning such dubious practices. Restraint intended to encourage settlement can actually give a party with legitimate patent rights more reason to succumb to greater bargaining leverage and agree to superfluous licensing fees.

The constitutional equivalent of the foregoing scenario is a cease-and-desist letter intended to restrict well-known free speech rights. Moreover, remember that any action for a declaratory judgment—whether it arises in the context of intellectual property or the First Amendment—is meant only to decide the legal rights of the parties involved. Declaratory relief has no direct effect on either the pecuniary or penal interests of the litigants; it is solely an adjudication of legal rights, be they proprietary or constitutional. As the Federal Circuit acknowledges, a declaratory judgment action can adeptly disentangle rights infringed by overbroad cease-and-desist letters. Analogously, when the speech rights of an American speaker are encumbered by the threat of foreign litigation, a declar-

112. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1209 (9th Cir. 2006).

113. Bronwyn H. Hall & Dietmar Harhoff, *Post-Grant Reviews in the U.S. Patent System—Design Choices and Expected Impact*, 19 BERKELEY TECH. L.J. 989, 993 (2004) ("[P]aying licensing fees may be cheaper than going to court, even if the patent in question is viewed as low quality by the accused infringer."); Edward Hsieh, Note, *Mandatory Joinder: An Indirect Method for Improving Patent Quality*, 77 S. CAL. L. REV. 683, 685-87 (2004).

114. *See* FED. R. CIV. P. 12(b)(2).

atory judgment may be the most effective method of disentanglement.

This also highlights an important difference between First Amendment and patent cases and reveals why courts should show greater flexibility in allowing cease-and-desist letters to be more determinative in a jurisdictional inquiry. Putting aside the notion that warning letters empower illegitimate patentees and accepting that costly litigation is a less preferable method of resolving intellectual property disputes, settlement should nonetheless be discouraged in First Amendment law, where any out-of-court agreement necessarily comes at the expense of free speech rights.

For these reasons, the presence of a cease-and-desist letter by itself should factor heavily into any jurisdictional inquiry. For one, such a letter clearly represents an intentional act purposefully directed into the forum-state and meant to elicit effects there. In that vein, cease-and-desist letters play central roles in a *Calder* analysis. Moreover, the nature of any subsequent litigation is meant only to finally decide the speech rights of American speakers, and such questions should not be decided by private agreement between the parties involved. Even if cease-and-desist letters by themselves cannot justify jurisdiction,[115] they certainly constitute highly significant contacts between a foreign defendant and the adjudicating forum.

Second, much like the cease-and-desist letter, the acquisition and service of a speech-restrictive foreign order are intentional acts purposefully directed at and meant to force specific effects in the recipient's jurisdiction. Indeed, an order strengthens the purposeful direction and intended effects, as the imprimatur of a foreign sovereign naturally invokes the coercive power of government and conveys a greater threat of sanction.[116]

115. *See infra* Part III.C. It is interesting to note that in some other countries cease-and-desist letters represent a distinct form of legal action and are regulated by law. In the United Kingdom, for instance, it is illegal under the UK Trade Marks Act for a UK trademark owner to make unjustifiable threats of legal proceedings for infringement. Under Section 21 of the Act, the recipient of such a letter may seek declaratory relief, injunctive relief, and damages from the sender. Trade Marks Act, 1994, c. 26, § 21 (Eng.). In England therefore, sending a cease-and-desist letter can itself be the wrongful act that American jurisdictions should require.

116. Arguably, orders regarding Internet-based content and its accessibility to foreign citizens are not conduct expressly aimed at the forum-state where the speaker may keep its servers or its corporate headquarters. This was the position taken by two of the judges in *Yahoo!* who dissented on the issue of personal jurisdiction. *Yahoo! Inc.*, 433 F.3d at 1224-25 (Ferguson, J., concurring in the judgment); *id.* at 1232-33 (Tashima, J., concurring in the judgment). This, however,

But an extant foreign order has its most significant jurisdictional impact by satisfying *Calder*'s wrongfulness requirement. The removal of content from the Internet comes at a First Amendment cost; the effect is similar to a conversion. Whereas the speaker once had an inviolable constitutional right to expression on the Internet, the foreign litigation has compromised—and thus devalued—that right by making it less certain. This is the case regardless of whether the alien complainant has tried to enforce the foreign order. Yahoo!'s ability to exercise its freedom of expression to the extent that those freedoms are protected by the United States Constitution is analogous to a property right that was wrongfully converted to LICRA and UEJF.[117]

The Supreme Court has been reluctant to stifle public discourse in this way.[118] No longer is the speaker able to reach the broad audience that cyberspace allows with the convenience and low cost that the Internet offers. Requiring the speaker to install filters may have a similar derogation with regard to less sophisticated or less wealthy speakers. When foreign countries that choose to restrict speech more liberally than the United States export the burden of enforcing those laws to the American speaker, they wrongfully contravene federal constitutional liberties and risk delimiting the spectrum of public debate that the First Amendment is designed to keep wide-ranging.

3. The Five Reasonableness Factors Favor Jurisdiction

As the Supreme Court held in *Burger King Corp. v. Rudzewicz*, any claim of specific jurisdiction can be undercut—regardless of contacts—if it does not meet a basic test of fairness and "comport with 'fair play and substantial justice.'"[119] The Court suggested five factors that can "sometimes serve to establish the reasonableness of

ignores the fact that the judgment holder knows that in order to comply with an adverse foreign judgment, the speaker must take action in a specific place.

117. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 543 (1972) (holding in the context of § 1343 jurisdiction that there is no distinction between personal and property rights). This argument could also explain why the Ninth Circuit implied that had LICRA and UEJF contractually abandoned their ability to enforce the French orders—thus restoring Yahoo!'s complete interest in its First Amendment rights—they would not have been subject to jurisdiction in the United States. 433 F. 3d at 1210.

118. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 766, 768-70 (1976) (striking down a law that prohibited pharmacies from advertising the price for prescription drugs).

119. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); *supra* note 46 and accompanying text. R

jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[120] Though contacts such as a cease-and-desist letter and the acquisition and service of a foreign speech restriction should be sufficient to justify the jurisdiction of a U.S. court, it is important to show that such jurisdiction is not only foreseeable to the foreign litigant, but also that is is necessary to protect the substantial interests of the plaintiff and the American judicial system.[121]

Four of these five factors strongly and obviously militate in favor of jurisdiction. The forum state has an interest in vindicating its speech-protective public policies. Secondly, the vindication of plaintiff's constitutional rights in its home-forum will not only provide the most convenient relief, but also the most effective, given that a declaratory judgment will assure the harmlessness of the extant foreign order. Third, a declaration of the unenforceability of the foreign judgment will give the international system a final resolution of the dispute. Finally, because of this final resolution and the pronounced strength of domestic free speech rights, specific jurisdiction will serve the interests of the involved nations by properly allocating to each sovereignty the responsibility for enforcing its own speech laws. The onus for ensuring compliance with The Nazi Symbols Act should be on France, not Yahoo! or an American court. Neither a domestic speaker nor his American audience should have their First Amendment rights infringed simply because a French citizen chooses to listen.

To be sure, specific jurisdiction does impose a burden on the foreign litigant, who is now forced to defend its judgment in a distant tribunal. Their inconvenience—discounted by the fact that in order to have the judgment recognized it may be necessary for them to litigate in the United States anyway—should not outweigh the strong countervailing factors, and should certainly not dispose of the constitutional inquiry that decides the jurisdictional issue.

C. The Limits of Personal Jurisdiction— Dow Jones & Co. v. Harrods, Ltd.

As Yahoo!'s case demonstrates, an alien who uses a foreign judicial order to threaten an American's constitutional speech rights effects an injury on that speaker that satisfies the wrongfulness requirement in *Calder*. Moreover, where the alien's efforts—cease-

120. *Burger King Corp.*, 471 U.S. at 477; *see supra* note 47 and accompanying text. R

121. *See Burger King Corp.*, 471 U.S. at 477.

and-desist letters or, more powerfully, service of judgment—have been purposefully directed toward a domestic forum, specific jurisdiction over the alien is appropriate even in the absence of any other contact with the United States. To outline the limits of this argument, it is helpful to examine a case similar to *Yahoo!* in all respects but one: the possession of a speech-restrictive foreign order.

The case of *Dow Jones & Co. v. Harrods, Ltd.*[122] illustrates this third procedural posture by which international Internet cases can reach domestic shores. The situation arises when an American's Internet speech has incited a lawsuit abroad, but the foreign court has not yet issued an order. The speaker then tries to preempt any judgment by asking a United States court for a declaratory judgment, an antisuit injunction, or both.

In *Dow Jones*, the series of events started innocently enough with an April Fool's Day joke. Perhaps sadly telling of the current temperament of corporate managers, the prank led to unusual results: demands for an apology, avowals of injured reputations, and threats of litigation. The English firm Harrods, Ltd. released a statement on April 1, 2002, claiming that it would soon build a floating version of its world-famous department store.[123] Press releases accompanying the announcement received serious reportage in the *Wall Street Journal*, owned by Dow Jones & Co., which published a correction in its April 2 issue once the true frivolity was revealed.[124] Demonstrating a considerable lack of nuance and sensitivity, but in a way its lawyers later described as "wry [and] lighthearted,"[125] the paper then decided to play its own joke and headlined an April 5 story—which appeared on the *Journal*'s website, www.wsj.com—with "The Enron of Britain?" According to the court, the first line of the article averred that "[i]f Harrods . . . ever goes public, investors would be wise to question its every disclosure."[126]

If the *Journal*'s poor judgment was surprising, unsurprising were Harrods ensuing claims of injury. After Dow Jones interpreted Harrods' request for pre-action disclosures concerning the English readership of the paper's website, the company filed an action in the Southern District of New York seeking a declaration that

122. 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

123. *Id.* at 400.

124. *Id.*

125. Complaint for Declaratory Judgment at ¶ 17, *Dow Jones*, 237 F. Supp. 2d 394 (No. 02 CV 3979), 2002 WL 32595749.

126. *Dow Jones*, 237 F. Supp. 2d at 400 n.5, 401.

any English judgment that might arise from its prank would not be enforceable in the United States.[127] Five days after that filing, Dow Jones indeed found themselves the defendants in a suit for libel that Harrods filed in the High Court of Justice in London.[128] Dow Jones thus added to their American lawsuit a claim for an antisuit injunction against the litigation abroad.[129] Harrods made a special appearance to make 12(b)(1) and (b)(2)[130] challenges to the subject matter and personal jurisdiction of the court. Judge Victor Marrero dismissed Dow Jones' claims as nonjusticiable, finding plaintiff's "unsubstantiated contingent fears"[131] concerning a potential future judgment in an incomplete foreign lawsuit insufficient to create an actual controversy:

> [W]hat Dow Jones has erected as its case for the existence of an actual controversy justifying declaratory relief is merely guesswork, an abstract tower of hypotheticals stacked like a house of cards on suppositions piled on top of speculations all founded on conjectures and contingent "ifs", "mays" and "to the extents."[132]

Because the matter was dismissed pursuant to Harrods' 12(b)(1) motion, the court did not have the opportunity to analyze its *in personam* jurisdiction over the defendant.[133] Nonetheless, the facts of this case help illustrate the outer boundaries of the jurisdictional scheme for which this Note argues.

Harrods' contacts with the United States consisted of a series of letters sent to Dow Jones. The first letter demanded substantial damages for perceived injury to Harrods' reputation, as well as an in-print apology in each of the *Wall Street Journal*'s editions. The second rebutted Dow Jones' belief that its April 5 story was humorous, restated the firm's earlier demands, and raised for the first time the possibility of an English defamation suit. Finally, Harrods' third letter "informed Dow Jones that in preparation for filing a defamation suit in the United Kingdom, Harrods requested Dow Jones to provide certain 'pre-action disclosure' concerning" the latter's worldwide circulation numbers.[134]

127. *Id.* at 402.
128. *Id.*
129. *Id.* at 403.
130. *See* FED. R. CIV. P. 12(b)(1)-(2).
131. *Dow Jones*, 237 F. Supp. 2d at 417.
132. *Id.*
133. *Id.* at 447.
134. *Id.* at 401-02. Harrods, a world-renowned department store, has many other considerable contacts with the United States, including a long history of advertising and business solicitation, the maintenance of thousands of credit ac-

These contacts are analytically the same as the cease-and-desist letters in *Yahoo!*. Though such contacts are targeted at a specific jurisdiction, they lack the injurious impact that an extant foreign order causes, and for that reason should not by themselves support judicial jurisdiction over an unwilling defendant. In *Yahoo!*, the Ninth Circuit recognized as much and held that premising jurisdiction on the domestic service of an alien litigant's complaint would provide "a forum-choice tool by which any United States resident sued in a foreign country and served in the United States could bring suit in the United States."[135] The court suggested that the opposite result would make it virtually impossible for alien complainants to sue American defendants in foreign courts without being sunk in a morass of duplicative and harassing collateral attacks that would strain international relations.

The Ninth Circuit applied this reasoning to both service of process meant to provide a domestic speaker notice of foreign proceedings and service of an outstanding, speech-restrictive foreign order. In doing so, the court missed an easily perceived analytical distinction between the two. By itself, the service of documents relating to pre-final judgment litigation is not a significant enough contact to give rise to specific jurisdiction, for it fails to have the injurious effect that *Calder* requires. Rather than the infringement of a protected speech right, the speaker faces only a more attenuated threat that foreign legal action might redound to her detriment.

On the other hand, a foreign order limiting free speech is an official restriction that directly results in either economic harm or the loss of a constitutional right. Speakers facing an adverse judgment from abroad must choose to either curb their expression or suffer the economic sanctions mandated by the order. Speakers threatened with litigation, however, must choose to either ignore it or pursue their defenses. In the former case, the speaker risks a default judgment ordering some form of speech restriction. In the latter case, the plaintiff risks an adverse judgment, but also stands at least some chance of prevailing on the merits, thereby avoiding altogether the need to defend her constitutional rights at home.

---

counts, and mail-order sales. *See* Plaintiff's Memorandum in Opposition to Motion to Dismiss at 21, *Dow Jones*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002) (No. 02 CV 3979), 2002 WL 32595754. This Note, however, assumes that these were not enough to establish general jurisdiction, and thus would have been irrelevant to the jurisdictional analysis, because it is unrelated to the lawsuit at bar.

135. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1209 (9th Cir. 2006).

Either the entry of a default judgment or an adverse judgment on the merits would constitute the kind of injury that warrants haling the foreign complainant into an American suit for declaratory relief. Further, such injury makes it foreseeable to the foreign complainant that he is almost certain to face litigation in the United States to protect the speaker's First Amendment immunity. When the only injury is the possible future infringement of a constitutional protection, it is much less likely that the foreign complainant can reasonably foresee being brought into a U.S. court.[136] As the contact between the alien litigant and the domestic forum becomes stronger, however, the need to defer to the international system dissipates. Thus, the discrepancy between these two types of service both accounts for their different weights as contacts in the jurisdictional inquiry, and, as we shall see, provides space for concerns of international comity to inhabit.

IV.
PLAINTIFF'S AVAILMENT, THE BREADTH OF THE CONSTITUTIONAL INJURY, AND RESPECT FOR THE INTERNATIONAL SYSTEM

Cases that feature international litigants strain more than just the law of jurisdiction. When a domestic tribunal scrutinzes the judgment of a foreign court, it also implicates two parrallel doctrines: international comity and judgment recognition. Comity concerns in this area counsel against *in personam* jurisdiction over alien litigants, but in doing so they also help advance the principles described in this Note. Similarly, the law of judgment recognition presents no obstacle to the jurisdiction scheme outlined here.

A. International Comity

International comity, a rather loose term that the Seventh Circuit has defined as "the respect that sovereign nations . . . owe each other,"[137] has long played a role in American jurisprudence. It "is a traditional, although in the nature of things a rather vague, consideration in the exercise of equitable discretion."[138] In the words of the Supreme Court:

136. Such an attempt to preempt foreign litigation might also implicate other doctrines, notably forum-shopping and *forum non conveniens*, which could operate through the five factor test of reasonableness to discourage personal jurisdiction.

137. Philips Med. Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 604 (7th Cir. 1993).

138. *Id.*

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[139]

While this concern should not guide the development of constitutional jurisdiction doctrine, it naturally warrants consideration whenever a litigant has already invoked the power of a foreign tribunal. Contacts analyses in transnational Internet speech cases therefore stand atop the intersection of two sensitive questions: the proponent of a 12(b)(2) motion challenges the reach of the instant court's authority; meanwhile, the court must investigate the potential friction between complementary jurisdictions. Simultaneously, while the involvement of a foreign tribunal cannot strip a U.S. court of its jurisdiction, neither should a U.S. court denude the authority of a foreign state to adjudicate matters within its own sovereign power.

Fortunately, U.S. courts already have a test by which they can balance the countervailing interests of international comity and the domestic vindication of constitutional rights. For determining when the former must give way to the latter, American judges should turn to the useful proxy of constitutional personal jurisdiction analysis. When the contacts between the alien litigant and the domestic court are substantial enough to justify the assertion of specific jurisdiction, the interests in international comity must be subordinated to the speaker's constitutional claim. In contrast, when the contacts are not substantial enough to satisfy *Calder*—when the action is insufficiently direct and injurious because there is not yet a foreign order or an attempt to use a foreign order—then concerns for protecting constitutional rights are overwhelmed by the interests of international comity. In this way, the amount of respect appropriately given to the international system is decided by the fairness of haling an alien before a U.S. court.

B. Judgment Recognition

The result in these situations creates a world where two countries issue contradictory rulings, each of which necessarily frustrates the other. To some extent, such a situation is nothing particularly extraordinary. It is an aspect of the conflicts-of-laws issues that arise

139. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

in the federal system every day; the mere existence of conflicting judgments is not something that necessarily demands resolution.

The enforcement of foreign judgments is a matter of state law, but most jurisdictions in the United States follow substantially similar common law or statutory procedures,[140] and the amenability to recognition that foreign judgment holders find in U.S. courts is not without both mandatory and discretionary exceptions. Principally, the foreign tribunal must have substantially complied with American notions of due process before a court will enforce any judgment against the debtor. The foreign judgment must also be final and enforceable where issued.

More pertinent to international cases arising from protected Internet-based speech, most domestic jurisdictions recognize a discretionary public policy exception whereby foreign judgments that contravene a strong public policy—but otherwise conform to the requirements of American due process—need not be enforced.[141]

Some commentators argue that the existence of cases like *Yahoo!* demonstrates the need for an international treaty on judgment recognition.[142] But the existing exceptions in domestic enforcement law suggest that the current situation takes adequate account of international legal disparities. If respect for the international system sometimes compels the recognition of foreign judgments, concerns for national sovereignty must occasionally prioritize the domestic rights of citizens who have not subjected themselves to the purview of foreign law. The fact of differing legal regimes does not require international accord. Sovereign nations have the right to prioritize the policies embodied in their laws over the conflicting policies of foreign nations. The notion of dueling judgments is not a crisis of justice, but the result of disagreement on individual liberties, which in turn is the natural byproduct of an international system. The solution rests in the internal development in each

140. More than thirty states and territories have enacted some version of the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1962). *See* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 547 & n.21 (2005). Variances do exist, however, particularly with regard to reciprocity requirements. *Id.*

141. The First Amendment has already become a strong shield for American defendants subjected to foreign orders that seek to vindicate more restrictive laws on defamation. *See, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274 (S.D.N.Y. 2005); Telnikoff v. Matusevitch, 702 A.2d 230, 232, 251 (Md. 1997); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992).

142. *See, e.g.*, Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 NW. J. INT'L L. & BUS. 267, 288 (2006).

country of respect for foreign law that does not contravene the fundamental policies of the forum state. As can be seen in the generous recognition laws of the United States, such respect need not be the result of international agreement.

V.
CONCLUSION

The traditional doctrine of *in personam* jurisdiction accommodates actions for declaratory relief against defendant with no other connection to the United States than the acquisition abroad of a judicial order restricting Internet speech. Such orders by themselves provide the purposeful direction and injurious effect that established case law requires. Keying on the difference between papers served on a domestic speaker to provide her with notice of impending transnational litigation based on her domestic Internet-based speech and a foreign order meant to curtail that speech through the coercive power of the state, American courts can protect fundamental public policies without disrespecting notions of international comity.

It is worth noting, of course, that personal jurisdiction is not the only obstacle to relief. Only in *Viewfinder*, where the foreign complainant acceded to the jurisdiction of the American court, were the domestic speaker's constitutional claims vindicated. That Yahoo!, an entity entitled to First Amendment immunity against regulation of its protected speech, was left without relief for the infringement of its rights should leave many troubled. Though the ultimate disposition of the case is unfortunate, the court's ruling that a foreign judgment can support specific jurisdiction over a foreign defendant is reason for great optimism. As the court found, the circumstances of that case fit neatly within existing personal jurisdiction doctrine, opening the door for future Internet speakers whose rights are imperiled by more restrictive foreign law to find a remedy in domestic courts.