No. 07-15164

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE JENNIFER LONDON,

Applicant-Appellee.

APPEAL from the United States District Court
for the Northern District of California
No. 3:06-MC-80196-JSW

BRIEF OF APPELLANTS
RICHARD LONDON and JOHN DOES 1-4

WEIXEL LAW OFFICE
James V. Weixel, Jr. (Bar No. 166024)
2370 Market Street ● No. 133
San Francisco, CA 94114
Telephone: (415) 682-9785
Facsimile: (866) 640-3918
appeals@jimweixel.com

KRONENBERGER BURGOYNE, LLP
Henry M. Burgoyne, III (Bar No. 203748)
Karl S. Kronenberger (Bar No. 226112)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158

Attorneys for Respondents-Appellants
RICHARD LONDON, JOHN DOE 1 (wrest36@yahoo.com),
JOHN DOE 2 (wrest39@yahoo.com), JOHN DOE 3 (readyset44@yahoo.com),
and JOHN DOE 4 (tryit360@yahoo.com)

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JURISDICTIONAL STATEMENT

1. The jurisdiction of the district court arose under 28 U.S.C. § 1782, which empowers the district courts to order the production of evidence in aid of foreign proceedings, and upon 28 U.S.C. § 1331, which vests jurisdiction over matters arising under federal law.

2. The jurisdiction of this Court arises under 28 U.S.C. § 1291. Orders for discovery under § 1782 are final and appealable orders. *United States v. Sealed 1, Letter of Request for Legal Assistance,* 235 F.3d 1200, 1203 (9th Cir. 2000). Orders denying motions to quash subpoenas issued under § 1782 are also final and appealable. *In re Application of Gianoli,* 3 F.3d 54, 57 (2d Cir. 1993).

3. The final order of the district court was entered on January 19, 2007. Respondents filed notice of their appeal from that order on January 24, 2007. Accordingly, this appeal is timely. Fed. R. App. P. 3.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court's grant of Jennifer London's application for a subpoena to Yahoo!, Inc. and its refusal to quash that subpoena were warranted under the factors stated in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004) for the consideration of discovery requests under 28 U.S.C. § 1782(a).

2. Whether the First Amendment privilege of anonymous speech prohibits discovery of the identities of anonymous Internet speakers and evidence of their alleged participation and membership in online groups.

STATEMENT OF THE CASE

The action below was commenced on July 20, 2006. Appellee Jennifer London,[1] a United States citizen who was domiciled in Saint-Martin, a Caribbean territory of France, filed an *ex parte* application for discovery in the United States District Court for the Northern District of California, pursuant to 28 U.S.C. § 1782. Appellants' Excerpts of Record ("ER") 1, Doc. 1. Jennifer sought in that application to obtain evidence from Yahoo!, Inc., located in Santa Clara, California, for use in domestic relations proceedings against her husband, respondent Richard London, also an American citizen, in Saint-Martin. *Id.*

The district court (Zimmerman, M.J.) denied Jennifer's application on July 26, 2006. Doc. 7. Jennifer filed a renewed application on July 28, 2006, ER 25, Doc. 8, which the district court granted in part on July 31, 2006. ER 52, Doc. 10. Jennifer then issued a subpoena to Yahoo! for the information sought. ER 54.

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[1] As is conventional in family matters, the parties will be referred to by their first names for the sake of clarity. No disrespect is intended. *In re Marriage of Freeman,* 132 Cal.App.4th 1, 4 n. 1 (2005).

On August 22, 2006, the four "John Doe" defendants filed a motion to quash Jennifer's subpoena to Yahoo!. ER 58, Doc. 12. Richard joined in that motion *in propria persona*. ER 70, Doc. 14.[2] The magistrate judge denied the motion on October 19, 2006. ER 164, Doc. 31. On October 31, 2006, the Doe defendants and Richard (by then being represented by the same counsel) objected to the magistrate judge's findings and recommendation and moved for a *de novo* determination of their motion by a district judge. Doc. 33. The district court overruled respondents' objections and affirmed the magistrate judge's decision on January 19, 2006. ER 172, Doc. 40. Respondents filed a timely notice of appeal on January 24, 2007. ER 174, Doc. 41.

STATEMENT OF FACTS

In November 2005 Jennifer London filed a domestic relations proceeding against her husband Richard in the courts of Saint-Martin, an overseas department of France located in the Caribbean.[3] Declaration of Anne-Isabelle Gregori ("Gregori Decl."), ¶ 2, ER 6-7. In the course of those proceedings, which involved

[2] The docket text mistakenly indicates that this motion was filed by Jennifer.

[3] Saint-Martin is in the "overseas department" (*département d'outre-mer*) of Guadeloupe. A department is a French administrative political subdivision, and as such Guadeloupe (and Saint-Martin) is as much a part of France as Alaska and Hawai'i are part of the United States.

competing allegations of adultery and other misdeeds by each party, Jennifer alleged that Richard had engaged in sexual relations with other men and had created and used certain e-mail accounts and profiles (including the "John Doe" addresses and profiles on Yahoo) to contact other men for sexual purposes. *Id*.

On July 20, 2006, Jennifer applied to the district court under § 1782 for subpoenas to Yahoo!, Inc. and several other online services for information that she believed to be relevant to her claims in the French proceedings. ER 1, Doc. 1. In a declaration submitted to the district court, Jennifer's counsel in the French proceedings asserted that the identities of the creators and/or users of the "John Doe" e-mail addresses and profiles were in controversy in that matter,[4] and that Jennifer needed to obtain discovery from the internet service providers which hosted those addresses and profiles in order to determine when and by whom they were created. Gregori Decl., ¶¶ 3-4, ER 6. Ms. Gregori's declaration about the relevance of the Yahoo! information to the French proceedings was unaccompanied by any affirmation that she, in fact, was competent to testify

[4] Richard does not contest that he created and used one of the e-mail accounts at issue, that being "parisfait2000@yahoo.com.". The only issue Jennifer raised as to that account was her allegation that she had once sent a photograph of herself to Richard at that account, and that the same photograph had allegedly been placed on one of the personal profiles at issue here. Declaration of Jennifer London in Support of Renewed Application ("Jennifer Decl."), ¶¶ 6, 8, ER 30-31.

expertly about French divorce law and procedure.[5] Her declaration also referred to what she claimed was an English translation of the French court's "Non-Conciliation Order." *Id.,* Ex. B, ER 16. That purported translation carried no evidence of the interpreter's competency. *Id.* and Ex. B, ER 24.[6] The magistrate judge denied Jennifer's application on July 28, 2006, holding that Jennifer had not provided sufficient evidence to overcome privacy concerns associated with commanding the production of Yahoo!'s records. Doc. 7.

Jennifer filed a renewed application on July 31, 2006. ER 25, Doc. 8. She claimed that she needed to ascertain the origin of the "John Doe" accounts in order to defend herself against what she said were Richard's allegations that she had fabricated evidence of the "John Doe" accounts. Declaration of Jennifer London ("Jennifer Decl."), ¶ 3, ER 29-30. Jennifer also claimed that she found indications on the home computer (which she and Richard had shared) that someone had

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[5] In fact, Ms. Gregori did not provide any evidence on a most basic issue: whether she understood English well enough to sign the declaration in the first place.

[6] The proffered translation bears a subscription stating, "This is a true official translation from the French original[,] Made on December 19, 2005[.] The Sworn Translator[,]" followed by the signature, name, and address of the person who provided the translation. Gregori Decl., Ex. B, ER 24. More than that is required; the translation must be accompanied by proof of the interpreter's expertise. Fed. R. Evid. 604. "[T]he record must reflect a determination, based on something more than the individual's say-so, that he has the requisite translating ability." *United States v. Bailon-Santana,* 429 F.3d 1258, 1260-61 (9th Cir. 2005). That determination was absent here.

accessed the "John Doe" profiles from that computer, using the "John Doe" e-mail addresses, and that those profiles contained photos of her and Richard as well as physical and other descriptions that, according to her, matched Richard's description and personal background. Jennifer Decl., ¶¶ 3-10, ER 29-31. She also attached as exhibits several printouts of the "John Doe" profiles which she claimed were at issue. *Id.,* Exs. A-E, ER 33-51. Offering no basis for her assertion, Jennifer opined that the IP ("internet protocol") addresses from which the "John Doe" profiles and addresses were created would be the same IP address as that of Richard's personal e-mail account. *Id.,* ¶ 11, ER 31. Jennifer ended her declaration with the naked and argumentative conclusion that "[t]his will show that it was Richard, and not some other person, who created these accounts, and will establish that his allegations of fabricated evidence in the foreign proceedings are not true." *Id.* However, she did not include any facts showing that she was sufficiently knowledgeable about Internet communications to make these claims, and did not submit any evidence from experts in that field.

The district court granted Jennifer's renewed application in part on July 31, 2006. ER 52, Doc. 10. The court held that Jennifer had shown sufficient evidence to warrant discovery about the Yahoo! user ID's that Jennifer attributed to the "John Doe" Yahoo! addresses, but not about the profiles and messages on other online services. *Id.* The court did not limit its order to the matters delineated in

Jennifer's renewed application – namely, her assertion that she needed the IP addresses from which the "John Doe" addresses and profiles were created to establish whether Richard had created them – but also allowed discovery as to any profiles and messages with which those users may have been associated. *Id.*

On August 22, 2006, the "John Doe" respondents moved to quash the Yahoo! subpoena. ER 58, Doc. 12. The "John Doe" respondents argued that Jennifer had not shown, under *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004) that she should be allowed to obtain the evidence from Yahoo!, and that permitting such discovery violated the First Amendment right to engage in anonymous speech. ER 60-69. The following day, Richard, appearing *in pro per,* filed a motion to quash in which he made the same arguments and pointed out several misstatements in Jennifer's papers. ER 70, Doc. 14. Richard also stated that he had asked the French court for custody of the couple's daughter because Jennifer had engaged in adultery and had interfered with his relationship with their daughter. He also stated that Jennifer was attempting to evade discovery procedures in the French action, and averred that he had never claimed in that court that Jennifer had fabricated evidence about the Yahoo! e-mail accounts and profiles. Declaration of Richard London ("Richard Decl."), ¶¶ 9-13, ER 82-83.

In opposition to the motions to quash, Jennifer claimed that a "Richard" had posted a message on an Internet service, www.ezboard.com, seeking to meet

people during a trip to London, England in September 2005, and that she and Richard had been planning to be in London during that time. Supplemental Declaration of Jennifer London in Opposition to Motions to Quash ("Jennifer Supp. Decl."), ¶ 2 and Ex. A, ER 84, 86.[7] Jennifer also stated that she performed a search on Google and had found various postings under the "John Doe" ID's purporting to be from a man living in Saint-Martin who, according to Jennifer, matched Richard's physical description. *Id.,* ¶¶ 3-5 and Ex. C, ER 84-85, 94. Ms. Gregori stated in another declaration that Richard had submitted evidence to the French court that other persons could have created and/or modified the "John Doe" profiles at issue and could have created the messages posted under those e-mail addresses. As "proof" of Richard's arguments to the French court, Ms. Gregori attached an untranslated document in French of what she claimed was Richard's brief to the French court, which she characterized as containing Richard's denials of Jennifer's allegations. Supplemental Declaration of Anne-Isabelle Gregori in Opposition to Motions to Quash ("Gregori Supp. Decl."), ¶ 3 and Ex. A, ER 105, 108. Ms. Gregori also claimed that Richard had told the French court that Jennifer had created the profiles in question, and that experts could demonstrate that the profiles could have been altered or created by anyone. *Id.,* ¶ 3. Ms. Gregori also

[7] Jennifer's declaration tells only half the story. Richard planned a trip to England so he could meet Jennifer there after she had taken the couple's daughter there in contravention of Richard's custody rights. See Richard Decl., ¶ 9, ER 82.

stated (again, without any qualification of herself as an expert) that the evidence sought by Jennifer from Yahoo! would be relevant to the issues before the French court, and that the French court would consider evidence of untruthfulness in determining those matters. *Id.,* ¶ 5, ER 106-107. Ms. Gregori opined as well that French law allows for discovery in divorce proceedings "in certain circumstances" and that "some discovery [is] available under French law." *Id.,* ¶ 6.

In reply to Jennifer's opposition, Richard, still appearing *in pro per,* submitted a supplemental declaration in which he explained that the physical descriptions and interests (most of which referred to wrestling in some way) of the persons depicted in the materials that Jennifer submitted bore no resemblance to his own. Supplemental Declaration of Richard London in Support of Motion to Quash Subpoena ("Richard Supp. Decl."), ¶ 4, ER 147. Richard also pointed out that Saint-Martin has a population of approximately 77,000 people and a great deal of tourist visitors, leaving open a substantial certainty that there were other men on Saint-Martin that could match the descriptions given in the profiles. *Id.,* ¶ 6. Richard also affirmed that he had never spoken to the French court as Ms. Gregori had claimed, and noted that Ms. Gregori had been criticized by the Saint-Martin prosecutor for sending a letter to the French court in which she made false claims about Richard. *Id.,* ¶¶ 7-8, ER 147-148. Finally, Richard related that he had learned that an investigator had followed him and his current girlfriend to a bar,

where the investigator solicited several young men to state falsely that they had had sexual relations with Richard. *Id.,* ¶ 9, ER 148. Richard stated categorically that "[a]ny such statements would have been, and would be, absolutely false." *Id.*[8]

The district court held a hearing on respondents' motions to quash on October 18, 2006. Transcript of Proceedings, ER 149. In that hearing, the district court made a number of surprising remarks in which it indicated its belief that Richard had implicitly admitted, by failing to deny, that he was the creator of the "John Doe" e-mail addresses. *Id.,* pp. 8:3-11, 15:1-3, 23:23-24, ER 152, 155, 159. The court also opined, without explaining further, that it believed that if the French court were to order Richard to disclose whether he created the messages and profiles at issue, Richard would not comply. *Id.,* pp. 7:10-13, 8:24-9:3, 13:15-20, 19:12-14, ER 151, 152-153, 154, 158. The court also assumed without explanation that the French court would not have jurisdiction to direct Yahoo! to produce the evidence requested by Jennifer. *Id.,* pp. 9:4-5, 13:4-8, 13:18-19, 17:20-25, ER 153, 154, 157. The court also apparently accepted Jennifer's erroneous argument that the IP addresses from which the profiles were created would pinpoint who created those profiles. *Id.,* pp. 15:18-16:5, ER 155-156.

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[8] Richard also provided an amended declaration to correct an error in his original declaration in support of his motion to quash, in which he had failed to indicate properly that the declaration was signed under penalty of perjury under the laws of the United States. Doc. 26; see 28 U.S.C. § 1746.

On October 19, 2006, the magistrate judge denied most aspects of respondents' motions to quash. Order Denying Respondents' Motion to Quash Subpoena to Yahoo, Inc., ER 164, Doc. 31.[9] The court noted that the fifth category of evidence demanded by Jennifer's subpoena (online message board postings by the five e-mail users listed) had been withdrawn by Jennifer. *Id.* In upholding the other four categories, the district court opined that Jennifer's application was not an attempt to avoid procedural or legal obstacles in the French court, and that production of the evidence would not violate respondents' First Amendment right to privacy because Jennifer's application was aimed only at determining the identity of the authors of the online profiles, the authors were not speaking on matters of public concern, and Jennifer was not attaching liability for those statements. *Id.,* pp. 2-6, ER 165-169. The district court did not discuss each of the *Intel* factors with respect to each e-mail address or user ID, or whether Jennifer had presented sufficient evidence to warrant discovery as to each such address or ID. Rather, the district court's decision was phrased generally as to all four "John Doe" addresses and ID's, as well as the "parisfait2000" address that Richard admitted was his and which was not in dispute. *Id.*

[9] Although the magistrate judge's written determination was entitled as an "order" denying the motion to quash, it should have been entitled "findings and recommendations" as respondents never consented to the entry of dispositive orders by the magistrate judge. See 28 U.S.C. § 636; Fed. R. Civ. P. 72; *In re Admin. Subpoena,* 400 F.Supp.2d 386, 388-389 (D.Mass. 2005).

Richard and the "John Doe" respondents, by now represented by the same counsel, objected to the magistrate judge's findings and recommendations on the motions to quash on October 31, 2006 and asked for de novo review by a district judge. Doc. 33. Jennifer opposed respondents' objections. Doc. 35. The district court overruled respondents' objections and affirmed the magistrate judge's findings and recommendations on January 19, 2007. ER 172, Doc. 40. This appeal followed five days later. ER 174, Doc. 41.

SUMMARY OF ARGUMENT

Even if Jennifer London had met the bare statutory standards of § 1782, that does not automatically entitle her to obtain whatever information she wants about the personal lives of Richard London and others. In recognition of that principle, section 1782 required the district court to apply a high degree of scrutiny to Jennifer's discovery requests, which called for the production of privileged and highly private information about Richard and the "John Doe" respondents. The district court's granting of her application and its refusal to quash Jennifer's subpoena to Yahoo! was an erroneous application of the factors that courts are required to consider in ruling upon applications under § 1782, and ignored the Supreme Court's cautions about how that section must be applied.

For Jennifer to be allowed access to the materials she requested from Yahoo! would violate the privacy protections afforded to Richard and the "John Doe" respondents by the First Amendment and United States law. Moreover, Jennifer's efforts to obtain what she believes to be communications from Richard and the "John Doe" respondents are repugnant to the policies of the European Community, of which France is a member. Jennifer's overly broad and intrusive application and her subpoena to Yahoo! should have been rejected by the district court.

ARGUMENT

A. Standard of Review

A district court's determination of the facts relevant to an application under 28 U.S.C. § 1782 is reviewed for abuse of discretion. *Four Pillars Enters. v. Avery Dennison Corp.,* 308 F.3d 1075, 1078 (9th Cir. 2002). However, the court's interpretation and application of the statute is reviewed de novo. *United States v. Sealed 1, Letter of Request for Assistance,* 235 F.3d 1200, 1203 (9th Cir. 2000).

B. There were insufficient grounds upon which the district court could have properly concluded that Jennifer was entitled to the evidence requested in Jennifer's application and subpoena to Yahoo!.

The applicable statute here is Title 28, section 1782 of the United States Code, which provides in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to…produce a document or other thing for use in a proceeding before a foreign or international tribunal[.]…The order may be made…upon the application of any interested person and may direct that…the document or other thing be produced, before a person appointed by the court….The order may prescribe the practice and procedure, which may be in whole or part the practice or procedure of the foreign country or international tribunal, for…producing the document or other thing.
>
> A person may not be compelled to give his testimony of statement or to produce a document or other thing in violation of any legally applicable privilege.

The purpose of § 1782 is "to provide federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 247 (2004). Although the statute empowers the district court to provide assistance, however, it does not require that the court do so. *Id.; United States v. Sealed 1, Letter of Request for Assistance,* 235 F.3d 1200, 1206 (9th Cir. 2000). The district court should give weight to considerations of international comity in determining whether to order production, and should not presume to compel discovery that would be unwelcome in the foreign court. *Intel,* 542 U.S. at 261. Moreover, the statute explicitly provides that privileged materials are shielded from discovery. 28 U.S.C. § 1782(a); *Intel,* 542 U.S. at 260.

In *Intel,* the Supreme Court set forth a number of factors that the district courts must consider in determining whether to order discovery under § 1782 once the statutory requirements of the section have been met:

(1) whether the person from whom discovery is sought is a "participant" in the foreign proceeding;

(2) the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign government or court or agency to the assistance of the American courts;

(3) "whether the…request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the requested discovery is unduly intrusive or burdensome, in which case it should be rejected or "trimmed."

Intel, 542 U.S. at 264-265.

Jennifer did not fulfill these tests. Moreover, her demands violated the well-established First Amendment right to speak anonymously, and also ignored the privacy afforded to online communications by federal law. Those concerns are shared by France and the other nations of the European Community, which have strong public policies that are significantly averse to judicial enforcement of demands for the compelled production of electronic information and communications. The district court's orders to the contrary should be reversed.

1. The French court can order Yahoo! to produce the information sought by Jennifer, and thus Yahoo! is a potential "participant" in the French proceedings.

The first *Intel* factor is a consideration of whether the person from whom discovery is sought is a participant in the foreign proceedings. *Intel,* 542 U.S. at 264. Although Yahoo! is not a party in the domestic relations action between

Richard and Jennifer in the French courts, Jennifer has shown no reason why Yahoo! is not amenable to the discovery mechanisms of the French courts.

In discussing this first factor, the *Intel* Court spoke of a "participant" in the following context:

> A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. * * * In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.

Intel, 542 U.S. at 264 (internal citations omitted). The Court's observation that the evidence "may be unobtainable" to the foreign court without the assistance of American courts shows that the Court's principal concern was whether the foreign tribunal had the ability to compel a nonparticipant to turn over evidence. If that ability was absent, the Court reasoned, district courts should be more inclined to grant relief. That reasoning has been construed as indicating that courts should *not* grant § 1782 applications if nonparties such as Yahoo! here are sufficiently within the foreign tribunal's jurisdiction for discovery purposes. Cf. *In re Microsoft Corp.,* 428 F.Supp.2d 188, 194 (S.D.N.Y. 2006) (first *Intel* factor weighs against commanding discovery from nonparties who are still within the reach of discovery orders of the foreign tribunal).

Here, Jennifer provided nothing to indicate that the French courts would be powerless to direct Yahoo! to produce the information she seeks. Her French

counsel expounded at length about various substantive aspects of French divorce law, yet made no claim that Yahoo! is not amenable to the power of the French courts to obtain discovery. Ms. Gregori gave the district court a very limited outline of French discovery procedures, Gregori Supp. Decl., ¶ 6, ER 107, but never claimed that Jennifer would actually be prevented from asking the French court to direct Yahoo! to produce evidence or that such a request would be futile.

And for good reason. French civil procedure does, in fact, provide for such requests:

> If, during a proceeding, a party wishes to present a notarial instrument or a private document that has not been officially recorded and to which the party was not a party, *or an exhibit that is held by a third party,* then the party may ask the cognizant judge to order the delivery of a duplicate *or the production of the exhibit*.

Nouveau Code de Procédure Civile [New Code of Civil Procedure], art. 138 (emphasis added). Article 139 of the same code allows the court to direct the third party to produce documents if the court "deems this request to be well founded," and Article 141 allows the third party 15 days in which to appeal. Article 199 allows the court to order testimony from third parties as well. Articles 733 *et seq.* of the code allow the court, at its discretion, to issue a letter rogatory to obtain evidence abroad, which is then transmitted to the appropriate foreign authority.[10]

[10] The French code provisions were obtained from www.legifrance.gouv.fr, the French judiciary's statutory website. The French and English versions of the statutes and an interpreter's certificate are reproduced in the addendum hereto.

There are more than sufficient means by which French courts can direct production of the evidence that Jennifer seeks from Yahoo!.

Second, the district court wrongly concluded that the French court would not have jurisdiction over Yahoo!. Indeed, there is more than adequate cause to believe the converse. This Court is well aware that Yahoo! maintains a substantial business presence in France (and throughout the world) through its offering of an expansive and accessible array of Internet services and content, and is thus amenable to French jurisdiction. In a case arising from Yahoo!'s acceptance of advertisements and postings relating to Nazi memorabilia and Holocaust denial theory, both of which are illegal under French law, this Court observed:

> Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs[.]

Yahoo! Inc. v. La Ligue contre le Racisme et L'Antisemitisme, 379 F.3d 1120, 1126 (9th Cir. 2004).[11] Given that this Court (and obviously the French courts, as the underlying dispute in *Yahoo!* originated in that country) has already determined that Yahoo! is subject to French jurisdiction, there is ample basis for the

[11] Yahoo! had been ordered by the French courts to remove the offending postings and advertisements from its online facilities that were available to French viewers, and was fined by the French courts for those violations. *Yahoo!,* 379 F.3d at 1122.

conclusion that the French courts could order Yahoo!, as a third party, to turn over documents and information in an action between other litigants.

There was no basis for the district court's apparent determination or belief that the French court was unable to require Yahoo! to produce the evidence sought by Jennifer through the ordinary processes of French civil procedure. Those facts militate against Jennifer with regard to the first *Intel* factor.

2. The nature of the French tribunal, the character of the proceedings before it, and the receptivity of the French courts to the assistance of the United States courts all weigh against ordering the discovery sought by Jennifer.

The second *Intel* factor requires the district court to take into account the nature of the foreign tribunal, the character of the proceedings there, and the tribunal's receptivity to the assistance of local courts. The circumstances here weigh in favor of respondents with regard to this factor as well.

The problem with the district court's handling of this *Intel* factor is that it failed in large part to consider it. Instead, the court rested its decision entirely on the questionable premise that the French court would be unable or unwilling to obtain the evidence on its own, and the even more dubious belief that any discovery order from that court to Richard would be unavailing. That posture was evinced in the district court's remarks at several points during the hearing on respondents' motion to quash:

> I don't think I would consider it satisfactory to simply have the court in Guadeloupe [in which judicial district Saint-Martin is located] order Mr. London to do things, because, judging from his position here, it doesn't seem like he is going to cooperate. (Transcript of Proceedings, p. 7:10-13, ER 151.)
>
> I don't think I would be satisfied if you were to persuade me that the judge there [in Guadeloupe] has the ability to order Richard London to do things, because, I'm not satisfied, given the position Mr. London is taking here, that he would necessarily cooperate in effect. (*Id.,* pp. 8:24 – 9:3.)
>
> That is sort of what I was alluding to earlier when I said, I'm not sure that I would expect Mr. London to cooperate. It seems to me the best that the foreign court could do would be to order him to serve a subpoena on Yahoo. But I'm back to where we are now. (*Id.,* p. 13:15-20, ER 154.)
>
> The only real question, I guess, I have would be whether, then putting all that aside: is it worth making any effort to have London do these things? (*Id.,* p. 19:12-14, ER 158.)

These assumptions were entirely unfounded, and in many ways were an affront to the French court. First, it was inappropriate for the district court to assume from the fact of respondents' oppositions that they were being obstructionist or that they would defy a lawful order from the French court. The mere fact that a person opposes a discovery request, especially when that request constitutes an effort to delve into private matters, surely cannot be seen as obstinacy. Moreover, *Intel* logically requires the court to consider whether American assistance is *needed* by the foreign court. Permitting § 1782 discovery to proceed where it might be unnecessary or unwelcome in the foreign court is

offensive to notions of international comity, since doing so discourages foreign tribunals from "heeding similar sovereignty concerns posited by our governmental authorities to foreign courts." *Microsoft,* 428 F.Supp.2d at 194, citing *In re Schmitz,* 259 F.Supp.2d 294, 298 (S.D.N.Y. 2003). The district court should have afforded more respect to the ability of the French court to resolve its own discovery issues, rather than assuming that the French court would not or could not do so or that the parties would ignore its orders – orders that, in this case, had not been made or even requested.

The nature of the proceedings in the French court and that court's inherent expertise in divorce matters should have been weighed in respondents' favor as well. The district court did not explain why it felt it was within its discretion to grant Jennifer's discovery request. *Id.,* p. 3:3-5, ER 166. Thus, it is impossible to divine whether or how it applied its discretion under *Intel.* Since the district court's order is devoid of any meaningful analysis of this factor, this Court should reverse the district court's decisions and, at the very least, remand the matter for further consideration and opinion on these points.

Even if the district court's order can be read as having considered the second *Intel* factor, the court misapplied it to the facts here. Richard and Jennifer are embroiled in an obviously difficult and contentious divorce in which the parties have made a series of admittedly personal and inflammatory accusations against

each other. Like any domestic dispute, this one strikes at the heart of the parties' personal interests; feelings of betrayal, loss, bitterness, and even self-preservation abound. The parties are also battling over custody of their minor daughter, a matter which carries the same set of emotions, perhaps even more strident in magnitude and tone. This drama is set in a foreign nation and is being played out under the laws and procedures peculiar to that nation's jurisprudence, before a tribunal that is organized specifically to hear and determine such intensely personal and emotion-driven disputes.[12] As shown previously, the foreign court has a number of procedures available to it to secure whatever evidence it feels is warranted in its consideration of the matter. Those procedures might be somewhat different than those familiar to us in the American legal system, but in the forum court they are well accepted.

In assuming that the French court's orders would be ineffectual, the district court encroached upon the French court's exercise of its own authority. Comity requires our courts to give credit to foreign courts and their inherent fluency and authority in the substantive law and procedure of their home nations. *Microsoft,* 428 F.Supp.2d at 194. For American courts to assume that foreign tribunals cannot operate efficiently or enforce their own orders improperly invites our courts to

[12] The district court even recognized that "the judge in Guadeloupe [whose territorial jurisdiction includes Saint-Martin] is going to ultimately decide all the issues[.]" Transcript of Proceedings, p. 4:16-17, ER 150.

arrogate those powers to themselves and results in the emasculation of the courts of other nations. Such a philosophy is a breach of basic notions of international comity and should not be fostered. *Id.*

Second, the nature of the proceedings before the French court and the issues involve militate toward allowing that court, not the district court, the first chance to determine whether Jennifer should be allowed to seek information from Yahoo!. Domestic relations are an exceedingly specialized and contentious area of litigation in any country, involving intensely personal considerations, inflammatory allegations, and routinely spirited quarrels over family matters. Although respondents have every respect for the abilities of the federal bench, the fact remains that federal courts are institutionally ill-suited for the domestic relations arena and have long been barred from any involvement in divorces. *Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992); *Barber v. Barber,* 62 U.S. (21 How.) 582 (1859). The Supreme Court has long recognized the proficiency required of domestic relations courts and the federal courts' lack of prowess in that field:

> As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, *as a matter of judicial expertise,* it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of *the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.*

Ankenbrandt, 504 U.S. at 704 (emphasis added). No less can be said of the French court here, which retains specialized knowledge necessary for the adjudication of divorce and custody issues under French law just as the courts of our States do under local law. The French court, not the district court, should have the first word (and ultimately the last) as to whether Jennifer may seek information from Yahoo! and whether that information will be admissible or helpful in the divorce action.[13]

The character of the dispute, the specialized nature of the French court overseeing that dispute, and French discovery policies weigh against granting Jennifer's request. The second *Intel* factor should have been resolved squarely in respondents' favor.

3. Jennifer's efforts to obtain discovery from Yahoo! circumvent French proof-gathering restrictions and other applicable domestic and foreign policies.

The issue of comity also arises in the third *Intel* factor: whether the discovery request circumvents foreign proof-gathering restrictions or otherwise do violence to laws and policies here and abroad. A number of circumstances tilt this factor solidly in respondents' favor here.

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[13] As noted *supra,* the French court has the procedural means to request the assistance of the district court through the issuance and transmission of a letter rogatory should it find the evidence necessary to the action. *See Nouveau Code de Procédure Civile,* art. 733 *et seq.* (reproduced in addendum). That power can be exercised at a party's request or on the court's own motion. *Id.,* art. 733.

a. Procedural obstacles in the French court.

The only homage the district court paid to whether Jennifer's request for the Yahoo! information would run afoul of French procedure was its statement that respondents had not offered adequate support for the contention that Jennifer was seeking to "circumvent legal obstacles in the foreign court." Order Denying Respondents' Motion to Quash, p. 2:18-20, ER 165. That is not entirely true, as both Richard and the "John Doe" respondents argued and submitted facts in support of that point. More importantly, a comparison of French and American civil procedure demonstrates that Jennifer's request was precisely the type of evasion of which the *Intel* Court expressly disapproved.

Jennifer's French counsel, Ms. Gregori, made certain assertions about the discoverability and admissibility of the requested information. Those assertions deserve close scrutiny. She opined that the French court would accept such evidence regardless of how it was obtained. Gregori Supp. Decl., ¶ 6, ER 107. However, she admitted that (1) discovery between parties is allowed "in *some* circumstances" upon the order of the court; (2) that the court can draw adverse inferences against a party who refuses to comply, and (3) that therefore, "[i]n this sense there is *some* discovery available under French law." *Id.* (emphasis added).

This artfully phrased recitation demonstrates by omission what it fails to say expressly: that discovery rights in French litigation are more circumscribed than in

American courts. Here, of course, parties can propound discovery to each other as of right without the need for judicial approval before the fact. See, e.g., Fed. R. Civ. P. 30(a)(1), 33(a), 36(a).[14] Only where a dispute over compliance arises is judicial intervention required. Fed. R. Civ. P. 37. In France, however, the parties must make their requests to the court, which approves or modifies the requests. *Nouveau Code de Procédure Civile,* art. 138 (requiring parties to address requests to the court), 139 (permitting discovery if the court "deems [the] request to be well founded"). The French courts thus maintain higher supervision over discovery, with demands emanating from the court rather than the parties.

Jennifer's application and subpoena represent nothing more than a bald attempt to avoid the realities of litigation in the French courts. To obtain discovery there, Jennifer would have to submit her request for the Yahoo! information to the judge presiding over the divorce, who would then decide whether to approve the request. Whether approval would be given would naturally depend upon the legal protections provided in France to Internet users and the information held by online services. If the French judge were to determine that Yahoo!'s disclosure of the information requested by Jennifer would violate French law (which it undoubtedly would, see *infra*), the request would be denied. By resorting to a § 1782

[14] In fact, most relevant information is supposed to be exchanged at the outset of the action, without any formal request being necessary. Fed. R. Civ. P. 26(a)(1).

application in our courts, however, Jennifer has sought to bypass the requirements of the French courts in the hopes that she may eventually be able to sneak the Yahoo! information into the domain of her divorce action without obtaining the requisite judicial approval in the first instance. More significantly, by acceding to Jennifer's requests the district court inserted itself into the dispute between the parties, and effectively stripped the French court of the opportunity to regulate its own discovery processes in the first instance.

It is unacceptable for an American court to substitute its judgment for that of a foreign court. Doing so is an invasion of foreign judicial sovereignty. *Microsoft,* 428 F.Supp.2d at 195. The district court should have refused Jennifer's application and should have granted respondents' motion to quash.

b. Protections of domestic and foreign substantive law.

The third prong of the *Intel* test also includes a substantive consideration which requires the district court to assess whether the application would offend "other policies of a foreign country or the United States." *Intel,* 542 U.S. at 265. The information Jennifer sought from Yahoo! is protected by the laws of the United States and France, and is thus not obtainable under section 1782.

The contents of electronic communications are generally protected from judicially compelled disclosure and production under federal law. The Stored Communications Act, 18 U.S.C. §§ 2701 et seq., prohibits an "electronic

communications service" or a "remote computing service"[15] from knowingly disclosing the contents of electronic communications that are stored by that service. 18 U.S.C. § 2702(a). Exceptions to these prohibitions are provided in cases relating to law enforcement, 18 U.S.C. § 2703, and backup preservation of records, § 2704. 18 U.S.C. § 2701(c)(3); see also 18 U.S.C. § 2518 (procedures for obtaining law enforcement interception authorization). Generally, however, the Act prohibits the use of an ordinary subpoena to obtain electronic communications. See *Theofel v. Farey-Jones,* 359 F.3d 1066, 1074-75 (9th Cir. 2004).

The legal protections for such information under French law must be considered as well. As the *Intel* Court recognized, "Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation." *Intel,* 542 U.S. at 261, citing *In re Application of Asta Medica, S.A.,* 981 F.2d 1, 6 (1st Cir. 1992). Accordingly, in considering a § 1782 application, a

[15] "Remote computing service" is defined in the Act as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2). "Electronic communications system" is "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications[.]" 18 U.S.C. §§ 2510(14), 2711(1). As Yahoo!'s e-mail and personal profile services are available to the public generally and are accessed through the Internet (which in turn operates through transmission over telephone, cable, or other electronic systems), Yahoo! meets both definitions. The provisions of the Act apply to Yahoo! and the communications made through its systems.

court must weigh whether discovery would offend principles reflected in the laws and procedures of the foreign tribunal. *Id.* In that vein, courts must consider whether "a foreign tribunal would reject evidence obtained with the aid of section 1782." *Euromepa S.A. v. R. Esmerian, Inc.,* 51 F.3d 1095, 1100 (3d Cir. 1995).

A French court would view Jennifer's discovery request as highly distasteful and violative of substantive privacy rights in that country. The European Community, of which France is a member (Treaty on European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247), maintains strict controls to ensure the privacy of Internet users in EC nations. Directive 95/46/EC of the European Parliament requires EC member nations to ensure that personal electronic data remains confidential and will not be disclosed to third parties without the consent of the subject. Council Directive 95/46/EC, O.J. L 281 (1995) ("the Directive"). With particular relevance to this case, personal data concerning a subject's sex life is specifically excluded from "processing," which term includes disclosure to others. *Id.,* art. 8(1); see also art. 2(b) ("processing" includes "disclosure by transmission" and "dissemination or otherwise making available).[16] The privacy of Internet users' online communications is thus protected in France, just as it is in this country.

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[16] It should be noted here that the Directive contains an exclusion which permits disclosure of information pertaining to a subject's sex life in instances where disclosure is "*necessary* for the establishment, exercise or defence of legal

Those privacy concerns are directly affected by Jennifer's demands here. By her own admissions, Jennifer aims to adduce evidence about the private sex lives of others, rather than merely their identities. Jennifer seeks information from Yahoo! about the IP addresses from which the "John Doe" addresses were created and/or accessed. ER 31. She expects to use those addresses to establish whether the "John Doe" respondents and Richard are in fact the same person. *Id.* Her assertion has been that the IP addresses will reveal the general geographic location of the person who created the Yahoo! profiles and addresses and who set up the advertisements in question.[17] *Id.* To connect these dots, Jennifer argues that her stretched comparison of Richard's appearance with those of the persons who advertised on the profiles, as well as her unsupported belief that no two similar people could exist on the island of Saint-Martin, ER 85, will establish that Richard

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claims." *Id.,* art. 8(2)(e) (emphasis added). Although Jennifer obviously feels that the evidence sought from Yahoo! would be helpful to her position in the domestic relations case in Saint-Martin, she has not demonstrated that the French court would find such evidence "necessary." Given the EC's strong protections against the forced disclosure of such information, a showing of necessity should be required before a district court grants a foreign litigant discovery of such information, especially when that litigant has not made that same showing before her home court in an EC nation and would likely fail to do so.

[17] It is doubtful, for reasons explained *infra,* that the IP addresses would establish what Jennifer says it would. Furthermore, as is also explained *infra,* the identities of anonymous Internet users are entitled to protection under the First Amendment. Therefore, Jennifer's attempts to secure this information from Yahoo! would lead nowhere and should have been declined.

is, in fact, the same person who created those profiles and posted the advertisements thereon. Those advertisements can be read as being from a man who is seeking to establish relations with other men. ER 34-51, 86-90, 95-103. Logically, then, Jennifer's request for the IP addresses and other information is aimed at determining not only the identities of the "John Doe" respondents, but also at establishing what she believes to be a fact about Richard's sex life: that he has allegedly solicited sexual encounters with other men.[18] Her request thus calls for the disclosure of information concerning a person's sex life, which disclosure is prohibited under the Directive. Since the Directive requires France to give effect to its provisions, endorsing Jennifer's request would violate French policies on the privacy of electronic communications and personal data.

The district court gave absolutely no consideration to these policies. Its order was bereft of any mention of what French or American legal policies might have to say about requests for personal electronic data from an online service, or how the French courts might view such demands. Instead, it substituted its judgment for that of the French court and failed to consider whether discovery

[18] Jennifer argued below, and will likely argue to this Court, that because she is seeking only the IP addresses of the "John Doe" respondents, her request does not seek the *content* of any online communications, but rather the *identities* of the persons sending those communications. Because identification would immediately lead to disclosure of information about those persons' private lives, however, that is a distinction without a difference.

would violate not only U.S. law, but also the privacy protections afforded by the EC law applicable in the French courts. That course offends notions of international comity and runs counter to the mandate of the *Intel* Court.

4. The scope of Jennifer's request was unduly intrusive and burdensome, and should have been rejected.

The final discretionary *Intel* factor required the district court to assess whether the scope of Jennifer's request was unduly intrusive or burdensome. *Intel,* 542 U.S. at 265. In the event that it was, the request must be rejected or "trimmed." *Id.* While the district court did limit the scope of Jennifer's subpoena (albeit on her concession), it should have rejected entirely it as overbroad and overly intrusive.

Jennifer's subpoena to Yahoo! called for the production of an extensive array of evidence that far exceeded the bounds of her application. Jennifer had asked simply for information that, she contended, would identify the IP addresses from which the "John Doe" user ID's were created, and thus establish whether Richard created those user ID's. The subpoena to Yahoo!, on the other hand, required the production of documents and computer printouts which:

> (a) identify the name(s), residential and/or business address(es), e-mail address(e), and telephone number(s) of the person who created the Yahoo! user ID accounts of parisfait2000 [which Richard admits was his], wrest36, wrest39, readyset44, and tryit360, as well as any e-mail accounts related to those ID's;

(b) describe the dates on which those Yahoo! user ID's, and any e-mail accounts associated with those ID's, were created and/or modified;

(c) describe the IP addresses from which those user ID's and any related e-mail accounts were created; and

(d) describe and identify each Yahoo! internet group in which each of those user ID's, and any related e-mail addresses, may have participated as group members.

ER 57. Jennifer withdrew a fifth category relating to documents "reflecting the Yahoo! group board postings" made by each such user. ER 166.

Even as so limited, Jennifer's subpoena was far too broad and intrusive to deserve enforcement. The first three categories of documents, if produced by Yahoo!, would reveal every instance in which a particular person created an e-mail account, where that person lives and works, what his or her telephone number is, and whether he or she posted a particular online personal profile. Those requests are excessively intrusive. Online profiles (and even e-mail addresses, if sufficiently descriptive) usually contain information about a person's lifestyle and activities – marital status, religion, sexual orientation, favorite sports teams, political leanings, etc. – but often omit the person's name or other direct identification because that person wishes to remain personally anonymous. Allowing the wholesale disgorgement of personally identifying information would permit strangers such as Jennifer to identify those persons and learn what personal activities they engage in. The fourth request is even more intrusive; it required the

disclosure of every online discussion group or forum to which a particular person belonged. As such groups are typically formed for the discussion or exchange of information on particular topics (many of them adult or highly personal in nature), anyone could then discover the activities and other personal interests held by each such person, without regard to whether that person wants themselves and their activities and interests to remain anonymous.[19]

If such requests are permitted, it would mean the end of personal privacy on the Internet. As explained in the following section, online users have the right to use the Internet in an anonymous fashion and should be able to expect that their browsing and communications patterns will not be exposed to the public. That right of anonymity encompasses the privilege to associate in groups or to participate in discussions without being named or called to account for entirely lawful speech. *Columbia Ins. Co. v. Seescandy.com,* 185 F.R.D. 573, 578 (N.D. Cal. 1999). Allowing a litigant to use the mechanisms of the courts to discover such matters would violate that right. The district court should have rejected Jennifer's application and subpoena as unduly intrusive.

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[19] Jennifer's own papers bear this out. The online groups that Jennifer has alleged were accessed or used by the "John Doe" Yahoo! user ID's carry such vividly descriptive names as "hotcowboysex," "musclemeat," "marriedmenneeddicktoo," "gaymuscleplace," and "gaybusinessmenthattravel." Jennifer Supp. Decl., ¶¶ 3, 5, ER 85. Privacy interests would be rendered meaningless if litigants are permitted to tie particular persons to such groups through no more than a subpoena.

C. Jennifer's application and subpoena to Yahoo! call for the production of evidence that is protected from disclosure by the First Amendment's right of persons to speak anonymously on the Internet, and are thus barred by Section 1782's prohibition against the compelled production of privileged material.

"A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C. § 1782(a). Jennifer's subpoena violates the First Amendment's privilege to speak anonymously, and should have been rejected.

The First Amendment's guarantee of free speech includes the right to speak and associate anonymously. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342, 357 (1995). Anonymity fosters free speech "because some speakers may be chilled into silence without the cover of anonymity." *Rancho Publications v. Superior Court,* 68 Cal.App.4th 1538, 1547 (1999). Communications made on the Internet are afforded no less protection than speech in a newspaper or other medium; users of online facilities have the same fundamental right to engage in anonymous communication. *Reno v. ACLU,* 521 U.S. 844, 870 (1997); *Doe v. 2theMart.com, Inc.,* 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001). "People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover identity." *Columbia,* 185 F.R.D. at 578. To that end, a party's desire to ascertain facts through discovery

must generally bow to a speaker's right to remain anonymous. *Rancho Publications,* 68 Cal.App.4th at 1549.

The reader's anonymity is protected on the Internet as well. Freedom of speech embraces not only the right to distribute literature, but also necessarily protects the right to receive it. *Martin v. Struthers,* 319 U.S. 141, 143 (1943). This policy is necessary to the free flow of opinions and information. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

Judicially compelled disclosure of a person's membership in a particular group is especially repugnant to First Amendment principles. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958). Demanding the disclosure of a person's online group memberships and his or her postings in those groups is nothing less than a demand for a membership list, and deserves the same censure in the Internet context just as it earns with more traditional advocacy groups. See *2theMart.com,* 140 F.Supp.2d at 1092 (First Amendment protections for speech and association, including the right to anonymous membership, apply to Internet message boards); see generally *Reno v. ACLU,* 521 U.S. at 851 (First Amendment protections apply to "listservs," "newsgroups," "chat rooms," and the Internet).

The First Amendment's anonymity guarantee means that there is a qualified privilege against allowing the courts to pierce an anonymous speaker's privacy. Courts must "be vigilant … [and] guard against undue hindrances to … the exchange of ideas." *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182, 192 (1999). This review "must be undertaken and analyzed on a case-by-case basis," where the court balances the equities of preserving the unrestricted flow of public opinion with the policy of allowing discovery in civil actions. *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975); *Dendrite Int'l v. Doe No. 3,* 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001). In all cases, discovery efforts that would naturally impinge upon the exercise of the fundamental right to speak and associate freely must be subjected to the strictest degree of scrutiny. *NAACP,* 357 U.S. at 461. To that end, the privilege of remaining anonymous is given great weight when courts consider whether to authorize discovery. *Id.;* see also Fed. R. Civ. P. 45(c)(3)(A) (subpoena may be quashed if it "requires disclosure of privileged or other protected matter and no exception or waiver applies")

The district court failed to engage in this balancing test. Instead, it held simply that respondents had not shown that their anonymity rights would be violated by Jennifer's subpoena. That was not respondents' burden to meet; it was Jennifer's. See *Rancho Publications,* 68 Cal.App.4th at 1549. And instead of balancing respondents' privacy rights with Jennifer's professed need for discovery,

the court held simply that respondents' identities and private information were less deserving of protection because they supposedly did not implicate "matters of public concern." Comparing the present case to *Highfields Capital Mgmt L.P. v. Doe,* 385 F.Supp.2d 969 (N.D. Cal. 2004), the court observed:

> *Highfields* is not controlling. [Jennifer] does not seek to impose liability based on anonymous statements regarding *matters of public concern.* Rather, *[Jennifer] seeks discovery to confirm that the user behind specified e-mail accounts is in fact Richard London.* Nor are the users of the e-mail accounts truly anonymous. Richard London admits that he is the user of parisfait2000@yahoo.com.…The internet postings submitted by [Jennifer] strongly suggest that the Does and Richard London are the same person. The fact that neither Richard London nor the Does deny that they are not the same person lends further credence to [Jennifer]'s belief as to their true identity.

ER 166-167 (emphasis added). This was a misapplication of First Amendment anonymity and privacy tests in several respects.

First, the district court erroneously found that the Internet postings by the Does were likely created by Richard, and that Richard's and the "John Doe" respondents' failure to deny that fact led to that conclusion. The error of that logic requires neither discussion nor explanation. But more significant, and perhaps more troubling, was the court's improper limitation of the First Amendment anonymity privilege to "matters of public concern." In *Highfields*, the applicant had sought to determine the identity of an Internet user who had allegedly libeled a publicly traded company. The district court denied the company's application for discovery, stating that the applicant had not given sufficient cause to believe that

the target(s) of its request had engaged in wrongful conduct. *Id.,* 385 F.Supp.2d at 971, 976-980. Here, however, the district court apparently viewed the postings attributed to the "John Doe" respondents as deserving less protection, simply because they related to the personal activities of particular individuals as opposed to speech or debate about a large corporation.

That distinction was inappropriate. The First Amendment guarantee of anonymity protects those who speak of private, even trivial matters just as it does to debaters of far weightier issues. See *Reno v. ACLU,* 521 U.S. at 851 (noting that Internet groups foster discussions on topics "running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls"). In fact, the private affairs of individuals should deserve *more* protection from exposure than those of publicly traded entities like the applicant in *Highfields,* since individuals' private lives are not open to scrutiny through public documents such as prospectuses, annual reports, and statements to the Securities and Exchange Commission. The details of respondents' personal lives should not be available for public consumption, yet they certainly will be if Jennifer has her way.

Against respondents' First Amendment rights to speak anonymously, we must balance Jennifer's showing of necessity for the requested discovery. That is not even a close question here. Even if Jennifer *were* to obtain what she demanded from Yahoo!, it will prove nothing of any benefit to her. Jennifer claims that one

of the issues in the French divorce proceedings is that Richard is guilty of adultery. However, she has never shown that the evidence she seeks *will* demonstrate that he actually *engaged* in adultery. Rather, all she has done is argue that certain postings in online groups reveal an alleged *effort* by Richard to commit adultery, and that he should be deemed guilty of the accomplished fact by extension.

That unsavory argument is one of the basest forms of smear tactics and should not be abided. Membership in a group with a professed interest in certain matters, without more, cannot establish that a particular member of that group has actually engaged in such conduct. Even in extreme cases, the cry of "guilt by association" cannot carry the day. See *Dawson v. Delaware,* 503 U.S. 159, 166-167 (1992) (defendant's membership in "Aryan Brotherhood" was inadmissible as an aggravating death-penalty factor where racial motive for murder was not an issue). Even if Jennifer were to prove that Richard was, in fact, the same person as the "John Doe" defendants, that would not establish perforce that he had *actually* engaged in adultery. More than just online postings would be needed to prove that allegation. Cf. *Guam v. Shymanovitz,* 157 F.3d 1154, 1159 (9th Cir. 1998) (remarking that there is a "wide gulf" between the possession of literature about unlawful acts and the actual commission of those acts). Allowing Jennifer to invade respondents' online privacy for such calumnious goals as hers would create far greater ills than it might resolve.

Jennifer did not demonstrate any solid reasons that would permit her to invade respondents' privacy or anonymity through her subpoena to Yahoo!. Indeed, none existed, and the identification of the "John Doe" respondents here would lead ineluctably to the exposure of private information about their personal lives and their memberships in certain groups. The First Amendment protects respondents against such judicially approved intrusions, and § 1782(a) prohibits discovery into such matters. Therefore, the district court should have denied Jennifer's application and should have quashed the Yahoo! subpoena.

CONCLUSION

The district court's granting of Jennifer London's application and its failure to quash the resulting subpoena to Yahoo! were unfounded under the guidelines set forth by the Supreme Court for consideration of § 1782 requests for discovery in aid of foreign proceedings. Jennifer's requests also seek information that is privileged from discovery under the First Amendment and provisions of American and European Community law. Accordingly, they should have been rejected.

For the foregoing reasons, appellants Richard London, John Doe 1 (wrest36@yahoo.com), John Doe 2 (wrest39@yahoo.com), John Doe 3 (readyset44@yahoo.com), and John Doe 4 (tryit360@yahoo.com) respectfully request that this Court reverse the orders of the district court and remand this

matter with instructions to deny Jennifer's application and/or to grant respondents' motion to quash the Yahoo! subpoena in its entirety, and requests in the alternative that this Court reverse the district court's decision and remand the matter for consideration in accordance with this Court's opinion.

STATEMENT OF RELATED CASES

Appellants are not aware of any cases that should be deemed related to this case within the meaning of Ninth Circuit Rule 28-2.6.

Respectfully submitted this _____ day of May, 2007.

WEIXEL LAW OFFICE

By:_____
James V. Weixel, Jr.

KRONENBERGER BURGOYNE, LLP
Karl S. Kronenberger
Henry M. Burgoyne, III

Attorneys for Appellants
RICHARD LONDON
JOHN DOE 1 (wrest36@yahoo.com)
JOHN DOE 2 (wrest39@yahoo.com)
JOHN DOE 3 (readyset44@yahoo.com)
JOHN DOE 4 (tryit360@yahoo.com)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 10,412 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

Dated: May ____, 2007. WEIXEL LAW OFFICE

By:_____
James V. Weixel, Jr.

Attorney for Respondents-Appellants
RICHARD LONDON
JOHN DOE (wrest36@yahoo.com)
JOHN DOE (wrest39@yahoo.com)
JOHN DOE (readyset44@yahoo.com)
JOHN DOE (tryit360@yahoo.com)

PROOF OF SERVICE

I, James V. Weixel, Jr., declare as follows:

I am employed in the City and County of San Francisco, am over the age of eighteen years at the time of service, and am not a party to this action. My business address is 2370 Market Street ● No. 133, San Francisco, California 94114.

On May ____, 2007, I served two copies of the following document(s):

BRIEF OF APPELLANTS RICHARD LONDON and JOHN DOES 1-4

on the following person(s) by placing the same enclosed in a sealed envelope, addressed as follows, with sufficient postage affixed thereto:

Damien P. Lillis, Esq. THE DAVIS LAW FIRM, APC 625 Market Street, 12th Floor San Francisco, CA 94105	Attorney for Appellee JENNIFER LONDON

Such service was completed by depositing said envelope in a receptacle maintained for that purpose by the U.S. Postal Service in _____, California, on the date set forth above.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct. Executed on May ____, 2007 at _____, California.

_____
James V. Weixel, Jr.

ADDENDUM OF STATUTES, RULES, AND OTHER AUTHORITIES

28 U.S.C. § 1782(a)

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 2701

Section 2701. Unlawful access to stored communications

(a) Offense. - Except as provided in subsection (c) of this section whoever -
(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
(2) intentionally exceeds an authorization to access that facility;
and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

* * *

(c) Exceptions. - Subsection (a) of this section does not apply with respect to conduct authorized -

* * *

(3) in section 2703, 2704 or 2518 of this title.

18 U.S.C. § 2702

Section 2702. Voluntary disclosure of customer communications or records

(a) Prohibitions. - Except as provided in subsection (b) -
(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service -
(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and
(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

18 U.S.C. § 2711

Section 2711. Definitions for chapter

As used in this chapter -
(1) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section; [and]
(2) the term "remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system[.]

18 U.S.C. § 2510

Section 2510. Definitions

As used in this chapter -

* * *

(14) “electronic communications system” means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications[.]

Fed. R. Evid. 604

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Directive 95/46/EC of the European Parliament
[Official Journal L 281(1995)]

Article 2 - Definitions

For the purposes of this Directive:

(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction[.]

Article 8 – The processing of special categories of data

1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

FRENCH STATUTES

Nouveau Code de Procédure Civile
(New Code of Civil Procedure)

Article 138
Si, dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce.

If, during a proceeding, a party wishes to present a notarial instrument or a private document that has not been officially recorded and to which the party was not a party, or an exhibit that is held by a third party, then the party may ask the cognizant judge to order the delivery of a duplicate or the production of the exhibit.

Article 139
La demande est faite sans forme.
Le juge, s'il estime cette demande fondée, ordonne la délivrance ou la production de l'acte ou de la pièce, en original, en copie ou en extrait selon le cas, dans les conditions et sous les garanties qu'il fixe, au besoin à peine d'astreinte.

The request shall be submitted informally.
The judge, if he deems this request to be well founded, shall order the delivery or the production of the document or exhibit, in the form of a copy or an extract, as applicable, under the conditions and subject to the safeguards established by him, which, if necessary, shall include the imposition of a penalty for non-compliance.

Article 141
En cas de difficulté, ou s'il est invoqué quelque empêchement légitime, le juge qui a ordonné la délivrance ou la production peut, sur la demande sans forme qui lui en serait faite, rétracter ou modifier sa décision. Le tiers peut interjeter appel de la nouvelle décision dans les 15 jours de son prononcé.

In case of a difficulty, or if any legitimate impediment is invoked, the judge who ordered the delivery or production may, in response to an informal request submitted to him, withdraw or modify his decision. The third party may file an appeal against the new decision within 15 days after its issuance.

Article 199
Lorsque la preuve testimoniale est admissible, le juge peut recevoir des tiers les déclarations de nature à l'éclairer sur les faits litigieux dont ils ont personnellement connaissance. Ces déclarations sont faites par attestations ou recueillies par voie d'enquête selon qu'elles sont écrites ou orales.

When oral evidence is admissible, the judge may receive from third parties those statements that are likely to provide the judge with an explanation or clarification regarding the facts at issue of which the third parties have personal knowledge. These statements shall be made in the form of written depositions or shall be obtained through an inquiry, depending on whether they are written or oral.

Article 733
Le juge peut, à la demande des parties, ou d'office, faire procéder dans un Etat étranger aux mesures d'instruction ainsi qu'aux autres actes judiciaires qu'il estime nécessaires en donnant commission rogatoire soit à toute autorité judiciaire compétente de cet Etat, soit aux autorités diplomatiques ou consulaires françaises.

At the request of the parties or ex officio*, the judge may cause inquiries, and other judicial actions that he considers necessary, to be conducted in a foreign country, doing so by issuing letters rogatory to any competent judicial authority in that country or to the French diplomatic or consular authorities.*

Article 734
Le secrétaire de la juridiction commettante adresse au ministère public une expédition de la décision donnant commission rogatoire accompagnée d'une traduction établie à la diligence des parties.

The clerk of the commissioning court shall forward to the Office of the Public Prosecutor a duplicate copy of the order for the letters rogatory, accompanied by a translation prepared at the request of the parties.

Article 735
Le ministère public fait aussitôt parvenir la commission rogatoire au ministre de la justice aux fins de transmission, à moins qu'en vertu d'un traité la transmission puisse être faite directement à l'autorité étrangère.

The Office of the Public Prosecutor shall immediately convey the letters rogatory to the Minister of Justice for forwarding, unless, pursuant to a treaty, the letters can be forwarded directly to the foreign authority.