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

REPLY BRIEF OF APPELLANTS RICHARD LONDON and JOHN DOES 1-4

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INTRODUCTION

In her brief, appellee Jennifer London ("Jennifer") stakes her entire position upon what she assumes the facts to be, and inappropriately urges this Court to do likewise. Her legal contentions also rest upon several flawed premises regarding French and European Community law and procedure, the First Amendment, and the lack of protections provided by the district court. None of Jennifer's contentions have any merit. Therefore, this Court should reverse the decision of the district court and remand this matter with instructions to proceed accordingly.

ARGUMENT

A. Jennifer's arguments rely upon improper assumptions about unproven facts, and demonstrate that assistance from the United States courts would not help her divorce action.

Much of Jennifer's position is staked on her flawed assumption that certain pivotal facts have already been established. A simple review of her factual recitations shows the surprising degree to which she takes liberties with the record and her assertions about Richard's alleged infidelity. For example, Jennifer asserts that she "had discovered that Richard London was using [the "John Doe"] Yahoo! accounts to solicit adulterous sex," Appellee's Brief at 1; characterizes the "John Doe" accounts as "controlled by [Richard]," *id.,* or "associated with him," *id.* at 7; speaks of that purported "connection" as though it were an established fact, *id.* at

4; states that Richard, through those accounts, "solicited adulterous, extramarital sex," *id.* at 7; and makes similarly stretched factual assertions in numerous other places in her brief. See, e.g., Appellee's Brief at 8, 10, 11, 12, 44, 46, 48.[1]

It should be remembered that these facts are not proven, but are all still in dispute. Indeed, they form the very core issue of this proceeding: Jennifer's professed need for evidence from Yahoo! to establish her claim in the French divorce proceedings that Richard is guilty of adultery.[2] The fact that Jennifer has applied to the district court for a subpoena to obtain proof of her assertions about Richard's alleged conduct, must lead to the conclusion that those assertions are still unproven. This Court should ignore Jennifer's protestations about what she

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[1] This last cite is to Jennifer's crabbed quotation of Richard's motion to quash the subpoena. In her answering brief here, Jennifer claims that "Richard London concedes that his 'adulterous affairs… are relevant, if at all, to [Jennifer London's] claim for divorce.'" Appellee's Brief at 48. That is not at all what Richard said in his motion. The entire passage actually reads, "Furthermore, as Applicant concedes in her declaration, again at ¶ 4, Respondent's *supposed* adulterous affairs (in relation to which Applicant first produced the materials printed from the Internet) are relevant, if at all, to Applicant's claim for divorce." Appellants' Excerpts of Record ("ER") 77:17-20 (emphasis added). Jennifer's self-serving misquotation of Richard's assertion in his motion is nothing more than an attempt to portray Richard as having admitted the point, which he did not.

[2] Again, as Richard pointed out in his opening brief, the fact that someone might have *solicited* adulterous relations does not establish that he or she *actually* committed adultery. Even if Jennifer can prove that Richard created the "John Doe" profiles (which she cannot), that would not establish that Richard actually engaged in adulterous relations with anyone. Thus, even if Jennifer obtained the information that she seeks from Yahoo!, it would not prove anything of any worth to her divorce claim in the French court.

believes Richard allegedly did, and should not give undue credence to Jennifer's argument simply because she is convinced of the truth of her version of the facts.[3]

Jennifer's professed faith in her assertions leads to an even more fundamental question. If Jennifer is so confident that Richard and the "John Doe" defendants are the same, why does she need records from Yahoo! to prove it? According to Jennifer, that basic factual premise has already been established – so convincingly, she argues, that she can be sufficiently comfortable with phrasing her statement of facts around the assumption that the proof of that premise was already a *fait accompli.* If that is so – and Richard still contends that it is not – then Jennifer has completely undercut the most basic reason for her application: that the information sought from Yahoo! would be *of assistance* to her in proving her case before the French court. See *Intel Corp. v. Advanced Micro Designs, Inc.,* 542 U.S. 241, 247 (2004) ("Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court *assistance* in gathering evidence for use in foreign tribunals" [emphasis added]); *In re Letters Rogatory*

[3] In fact, many of the underlying facts in this matter are deeply disputed, even including disputes over what has actually been disputed. For example, Jennifer asserted that Richard did not respond to her allegations of infidelity in the French court. In fact, he did do so during the preliminary custody proceedings in the French court. See Richard London's Motion to Quash at 3, 8, ER 73, 78. Both parties have traded sordid accusations of each other in the French proceedings, with Richard contending that Jennifer committed adultery and abused alcohol and drugs. Given the nature and intensity of the dispute, therefore, it is difficult to imagine taking *any* of the factual allegations herein as having been proven.

from Tokyo Dist., 539 F.2d 1216, 1218(9th Cir. 1976) (same). Jennifer's own position demonstrates that she has no reason to seek records from Yahoo!, because what she seeks from those records has, according to her, already been established. Further discovery with the aid of the United States courts would add nothing to the equation, and would not be useful or helpful to Jennifer in the French proceedings. Thus, Jennifer's application should have been denied.

B. Both Jennifer and the district court erroneously assumed what law and procedure apply in the French court, and the district court should have held that Jennifer's application was an attempt to circumvent foreign restrictions.

Jennifer's argument also demonstrates her fundamental misunderstanding about the applicable law and procedure in the French court. Unfortunately, the district court made the same erroneous assumptions, and held that Jennifer had not attempted to circumvent discovery requirements in the foreign proceeding.[4]

First, Jennifer characterizes the foreign proceedings as taking place "on the Caribbean island of Basse-Terre-Guadelupe [*sic*], near Saint Martin," Appellee's Brief at 1, and treats Basse-Terre and "the government of Basse-Terre" as

[4] Jennifer complains that respondents did not raise issues of French and EC law or the Stored Communications Act in the district court. Those points are purely legal issues whose resolution does not depend upon further factual development. *Wallis v. Princess Cruises, Inc.,* 306 F.3d 827, 834-835 n. 2 (9th Cir. 2002); *Harden v. Roadway Package Sys., Inc.,* 249 F.3d 1137, 1141 (9th Cir. 2001). Accordingly, no error has been waived and those issues are properly before this Court.

somehow different from France. *Id.* at 15, 29, 30. At the same time, Jennifer does seem to admit in several places that French law, and not some undefined "Basse-Terre" law, applies to the foreign proceedings. See Appellee's Brief at 5, 6, 7.

The fact is, of course, that Basse-Terre, Saint-Martin, and Guadeloupe are all indivisible from France. Jennifer and Richard lived on Saint-Martin,[5] which is a separate island from the island of Guadeloupe, but is in the same *département,* also called Guadeloupe. Basse-Terre, the seat of the French court, is the capital of the *département* of Guadeloupe. The *département* of Guadeloupe (including Saint-Martin) is part of the French Republic and is thus governed by French law. France, moreover, is a part of the European Community ("EC") and adheres to EC law.

The district court seemed to understand that French and EC law apply in the Londons' divorce action. Transcript of Proceedings at 7:19-21, 19:11, ER 151, 158; Order Denying Respondents' Motions to Quash Subpoena to Yahoo, Inc. at 5:18, ER 168. However, the court did not attempt to determine whether there were any restrictions under French or EC law against the discovery that Jennifer sought, or whether obtaining that evidence in the manner Jennifer requested would offend French or EC public policy or notions of fairness.

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[5] Jennifer also treats "Saint Martin" and "St. Maarten" as the same. They are not. St. Maarten is the Dutch side of the island; Saint-Martin is the French side. That is a significant point, as some of the postings at issue indicated that the author was in "St. Maarten." Appellee's Brief at 12-13. The Court should not be confused by Jennifer's erroneous treatment of the two as the same place.

In *Intel,* the Supreme Court held that a court must consider whether a § 1782 application represents an attempt to circumvent the evidence-gathering restrictions in the foreign court. *Intel,* 542 U.S. at 264-265. The district court 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). The proof of that point does not require the extensive measures that Jennifer suggests.[6] Respondents are not required to establish that the French court would have ruled in a particular way, that the French government had objected or would object, or make any other such definitive showing. Nor are respondents required to present a declaration from a French attorney as Jennifer suggests. Instead, courts may "consider any materials, *typically statutes or case law from the foreign jurisdiction,* that may be presented by the parties." *In re Bayer AG,* 146 F.3d 188, 195 (3d Cir. 1998) (emphasis added). By furnishing French and EC statutory law to this Court, respondents have done exactly that.[7]

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[6] The case that Jennifer cites for this proposition is cited as *In re Joint Eastern & Southern Dist. Asbestos Litigation,* 964 F.2d 92 (2d Cir. 1992). The actual name of the case is *In re Application of Malev Hungarian Airlines,* 964 F.2d 92 (2d Cir. 1992). Regardless of the name, the case provides no support for her argument.

[7] Jennifer argues that "Respondents cite no evidence or authority that articles 138, 139, 141, 199, or 733 of France's New Code of Civil Procedure even apply to the foreign proceedings[.]" Appellee's Brief at 27. Respondents are confident that the Court requires no explanation of the unsurprising concept that French law applies in French courts.

The provisions of French law and procedure provided by respondents are entirely clear on how evidence is to be obtained. Litigants in French proceedings must direct a discovery request to the court, which approves, denies, or modifies the request before it is sent out. *Nouveau Code de Procédure Civile,* art. 138, 139. To avoid those strictures, Jennifer filed her 28 U.S.C. § 1782 application directly to seek evidence protected from disclosure under EC law. That tactic is at odds with French procedure and substantive law. Her § 1782 application is therefore nothing less than a complete circumvention of the foreign court's discovery procedures, as well as the substantive protections provided by the law applicable in that court.

C. The First Amendment applies to this Court's consideration of Jennifer's application and this appeal.

Jennifer argues further that the speech at issue here took place entirely outside of the United States, and thus the First Amendment provides no protection for appellants here. That argument is wrong on several counts.

First, Jennifer's application is subject to the First Amendment because she is seeking discovery through the mechanisms of our courts. Issues of privilege in a § 1782 proceeding are questions of federal law. *McKevitt v. Pallasch,* 339 F.3d 530, 533 (7th Cir. 2003). First Amendment concerns apply to § 1782 proceedings as well. *McKevitt,* 339 F.3d at 531-533; see also *Yahoo!, Inc. v. La Ligue contre le Racisme et L'antisemitisme,* 433 F.3d 1199, 1217-18 (9th Cir. 2006) (en banc)

(noting that French court's ruling might eventually be challenged on First Amendment grounds, but holding that the issue was not yet ripe). The courts have applied First Amendment protections to speech occurring outside of the United States during ancillary proceedings arising out of foreign actions, when to ignore those protections would do violence to American public policy and constitutional guarantees of freedom of speech. See *Matusevitch v. Telnikoff,* 877 F.Supp. 1, 3-4 (D.D.C. 1995) (refusing to enforce British defamation judgment where the speech at issue would be protected if uttered here); *Bachchan v. India Abroad Publications, Inc.,* 154 Misc.2d 228, 585 N.Y.S.2d 661 (Sup.Ct. 1992) (same).

Here, Jennifer seeks the assistance of a United States court in obtaining evidence from a U.S.-based internet content provider (in fact, the same one as in *Yahoo!*) for use in a French proceeding. The First Amendment restricts her ability to obtain that evidence, notwithstanding the fact that the evidence she seeks is alleged to include speech made within France's territorial jurisdiction.[8]

The place of the speech brings up a second issue. Here, the content that Jennifer seeks, while perhaps having been physically *typed* abroad, can be

[8] It is instructive to consider the portion of § 1782 which requires discovery under that section to proceed in accordance with the Federal Rules of Civil Procedure in the absence of any direction from the district court. 28 U.S.C. § 1782(a). Those rules allow for the restriction of discovery if it "requires disclosure of privileged or other protected matter[.]" Fed. R. Civ. P. 45(c)(3)(A)(iv). Obviously, a discovery request that violates the First Amendment guarantee of freedom of speech, as this request does, falls within such restrictions.

considered as having also occurred simultaneously within our borders. Yahoo!'s servers and other computing facilities, through and on which the creation and dissemination of the speech at issue were allegedly accomplished, are located in the Northern District of California. In order to create, post, and maintain the profiles at issue, the authors – whoever they might be – had to transmit electronic data and instructions to a server located in the United States.

The courts already recognize the multinational nature of such transactions. In *Yahoo!,* the district court observed that "the Internet in effect allows one to speak in more than one place at the same time." *Yahoo! Inc. v. La Ligue contre le Racisme et L'antisemitisme,* 169 F.Supp.2d 1181, 1192 (N.D. Cal. 2001), *rev'd on other grounds,* 433 F.3d 1199 (en banc).[9] By the same reasoning, when the author or authors of the profiles in question created and posted that content on a U.S.-based server, they did so in the United States as well.

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[9] The district court's decision in *Yahoo!* was ultimately reversed en banc on the grounds that personal jurisdiction over the defendants did not exist, with three judges also concluding that the controversy was unripe. *Yahoo! Inc. v. La Ligue contre le Racisme et L'antisemitisme,* 433 F.3d 1199, 1224 (9th Cir. 2006) (en banc). The opinion of the previous three-judge panel of this Court was vacated. 399 F.3d 1010. The en banc Court proceeded under the same premise for which the three-judge panel's opinion was cited in respondents' opening brief – that Yahoo! operated within French jurisdiction, and thus the issue of the French courts' jurisdiction over Yahoo! was not at issue. *Yahoo!,* 433 F.3d 1199.

Nevertheless, respondents acknowledge that the vacated panel opinion should not have been cited to in their opening brief, and offer their apology for their oversight. See Advisory Committee Note 3 to Ninth Circuit Rules 35-1 to 35-3.

This is not an instance in which two private individuals had an oral conversation in a foreign country and an action arose therefrom in that country. In such a case, jurisdiction would naturally be confined to the locus of the conversation. This proceeding, on the other hand, involves foreign litigants whose alleged speech is contended to have been accomplished through the use of a U.S.-based internet facility, the records of which have now been made subject to the special discovery processes of the American courts. When a litigant in a foreign proceeding comes to our shores for judicial assistance, the Constitution must govern regardless of whether the underlying conduct at issue took place abroad. The First Amendment is clearly applicable to Jennifer's application.

D. Disclosure of the information requested in Jennifer's application and subpoena would violate respondents' rights to privacy and anonymity.

Jennifer argues that (1) her application and subpoena do not implicate any privacy concerns because she does not seek private messages or other content, and (2) respondents have no interest in preserving the anonymity of speech made on the Internet because personal information was posted in the profiles at issue. Those arguments are incorrect.

First, we must consider what Jennifer asks for. The IP addresses for the "John Doe" Yahoo! profiles are, according to Jennifer, indicators of the location(s) of the computer(s) at which those profiles were created. The same applies to the IP

address of the "parisfait2000" Yahoo! e-mail address that Richard used.[10] Moreover, Jennifer asks not only for the IP addresses attributable to each user, but also the personal contact information for each such user; all dates on which those accounts were created, changed, or otherwise accessed; and a description of each online group in which that user (or any other user with an e-mail address "associated" with that account)[11] participated at any time. ER 57. Her ultimate goal, of course, is to establish that Richard created the "John Doe" addresses and profiles, and thus that Richard in fact posted the messages seeking adulterous sex.

If such efforts are not an attempt to uncover information about a person's identity, private life, and anonymous speech, then nothing is. If the identities of

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[10] Richard has acknowledged, several times, that the "parisfait2000" address is his. Therefore, there is no reason for Jennifer to have to obtain information from Yahoo! about the IP address, profile, or other information related to that account. It is not at issue here, and for Jennifer to attempt to obtain more information about that account would simply be a further intrusion on Richard's privacy.

[11] This provision is an additional example of why the subpoena is too broad. The subpoena does not describe the limits of the ambiguous term "associated with." Conceivably, the subpoena might be read as encompassing not only the profiles of those users that own the particular e-mail addresses referred to in the subpoena, but also the profiles of any *other* users who might have profiles mentioning those e-mail addresses (i.e., by listing them as friends, contacts, other group members, and the like). Section 1782 should not serve as a license for Jennifer to troll through the records of a large Internet service to uncover every user who might have had some contact, no matter how attenuated, with the users in question here. Contrary to Jennifer's assertions about the scope of this subpoena, therefore, it is plain that such inartful and overly vague subpoenas can lead to extreme breaches of privacy, especially the privacy of entirely uninvolved persons.

the "John Doe" respondents are surrendered as Jennifer demands, those persons will be inextricably linked to the profiles at issue (and the groups in which they participated), and thus to the personal information and messages associated with those profiles. Those messages and information are of a highly personal nature and are constitutionally protected anonymous speech. The subpoena thus seeks to link the identities of the speakers with the content of their communications.

That leads us to the second point. Jennifer makes the unfounded argument that respondents have no cognizable interest in remaining anonymous because they might have posted information about themselves in online profiles. Entitlement to the First Amendment's guarantee of anonymous speech is not an "all or nothing" proposition. Speakers can remain anonymous by name even though they may have posted personal characteristics or other information online. See *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150, 166-167 (2002) (distribution of literature in person did not obviate distributors' right to remain anonymous by name); cf. *Peterson v. National Telecoms. & Information Admin.,* 478 F.3d 626, 632-633 (4th Cir. 2007) (website owner who linked to other websites containing his name and contact information waived anonymity; distinguishing *Watchtower*). Jennifer, on the other hand, treats respondents' constitutional right to anonymous speech as entirely forfeit because she believes the profiles identify Richard. None of the profiles, however, expressly identify the

writers by name or provide their address. That demonstrates that the writers wanted to keep their actual identities anonymous.

There is nothing unusual about this "partial" anonymity. The Internet is teeming with communications from people who want to have their voices heard or who ask for contacts from others with similar interests, while remaining anonymous by name. As anyone who has ever read an online profile or advertisement knows, online postings often contain some personal details while omitting the authors' names or other identification. The reason is simple: the authors have aimed their words at a discrete audience, but wish to remain anonymous to others who might retaliate against them. Such motives are not confined to online adult personal ads; they can be harbored by anyone, be it an employee looking for another job, a citizen unhappy with his city council, or a teenager venting to his friends on Myspace about a disagreeable teacher. In each case, the author wants to be heard by a particular person or group sharing his or her interests (prospective employers, like-minded citizens, or classmates), but not by others (present employers, political opponents, or teachers and parents) who might be spurred to retaliation. The First Amendment protects speakers' right to remain anonymous even though their speech might contain information about themselves.

The First Amendment's guarantee of anonymous speech does not evaporate just because the speaker might include some personal information in his

communications. Respondents are entitled here to have their personal information and identification, which Jennifer's subpoena seeks to uncover, remain anonymous regardless of what they might have posted online anonymously.

E. The district court's production procedures were entirely insufficient and provided Jennifer with an inappropriate amount of control over the discovery process.

Finally, Jennifer's attempt to assuage the harmful nature of the district court's order by pointing to its supposed protections is ineffective. The district court ordered Yahoo! to produce documents to Jennifer's local counsel, who would then determine whether Richard was the same person as one or more of the "John Doe" respondents, and send the records to Jennifer's French counsel. See Order Denying Respondents' Motions to Quash at 7:1-11, ER 170. That is not protection; rather, it represents an abdication of the court's responsibility over regulation of discovery.

A longstanding maxim holds that "no man can be a judge in his own case." *In re Murchison,* 349 U.S. 133, 136 (1955). The same proscription against self-interested decision-making must apply here. The counsel at this Court's bar are advocates, not adjudicators. Although one might naturally hope that Jennifer's counsel, as a respected professional and an officer of this Court, would proceed in fairness and good faith, that sentiment does not permit a court to delegate adjudicatory functions to one side's attorneys as though counsel were a magistrate

or special master.[12] Not only is such a scheme unfair to opposing litigants, but it also puts counsel in an irreconcilable conflict between a judicially imposed duty of adjudication and the professional obligation to represent the client zealously within the bounds of the law. *Hawk v. Superior Court,* 42 Cal.App.3d 108, 126 (1974). The order was thus inappropriate and must be reversed.

CONCLUSION

For the foregoing reasons, as well as those expressed in respondents' opening brief, the orders of the district court should be reversed.

Respectfully submitted this 30th day of July, 2007.

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[12] These objections are not meant to cast aspersions on Jennifer's counsel or to imply any lack of professionalism on his part. Rather, they are based only on principles of sound legal policy.

CERTIFICATE OF COMPLIANCE

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

1. This brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

Dated: July 30, 2007. WEIXEL LAW OFFICE

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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 July 30, 2007, I served two copies of the following document(s):

REPLY 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:

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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 July 30, 2007 at San Francisco, California.

_____
James V. Weixel, Jr.