

# Wired But Mired: Legal System Inconsistencies Puzzle International Internet Publishers

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## Introduction

The Internet is the only media segment experiencing growth and attracting young people to news.<sup>1</sup> So it is not surprising that media companies are developing websites to take advantage of the medium's capabilities. What is surprising is the number of lawsuits they are facing in international jurisdictions for material they put online. *The Washing-*

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1. See Project for Excellence in Journalism, *The State of the News Media 2005: An Annual Report on American Journalism*, [http://www.stateofthemedias.org/2005/narrative\\_online\\_audience.asp?cat=3&media=3](http://www.stateofthemedias.org/2005/narrative_online_audience.asp?cat=3&media=3) (last visited Feb. 3, 2006).

ton Post, Wall Street Journal, Barrons, Forbes, The Christian Science Monitor and numerous other publications and commercial content providers are finding that operating online amounts to entering into uncharted territory in the legal sense.<sup>2</sup> Nowhere is the problem more pronounced than in the area of defamation, but transnational disputes also involve speech restrictions and copyright and trademark infringement.<sup>3</sup>

The concern expressed by information providers—particularly those in the United States who enjoy the robust protection of the First Amendment—is that they will fall victim to the laws of other countries that are more restrictive. Parties involved in these cases, media organizations, and academic commentators have argued that this vulnerability and uncertainty could force content providers to erect technical barriers to prevent their information from flowing into other jurisdictions or to water it down to that which is palatable to the most restrictive jurisdictions.<sup>4</sup> It may be unreasonable to expect all countries to agree on what expression should be protected when cultures vary so much. But that is not really what is required to reduce the level of uncertainty now associated with Internet publication. What is required is a better system to negotiate differences in the way various countries handle jurisdiction, choice of law, and enforcement of foreign judgments—the central branches of private international law.

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2. See generally *Bangoura v. Washington Post Co.*, [2004] 235 D.L.R. 4th 564 (Ont. Super. Ct. J.), rev'd, [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2005] SCCA No. 497 (February 16, 2006). (reversing earlier judgment that Ontario has jurisdiction over a libel lawsuit based on articles the Washington Post published online about a Canadian plaintiff living in Kenya), available at <http://www.ontario.courts.on.ca/decisions/2005/september/C41379.htm>; *Harrods v. Dow Jones & Co.*, [2003] EWHC 1162 (QB)(UK) (holding that England's High Court of Justice had jurisdiction over a libel suit based on an article about Harrods department store printed in the American edition of the Wall Street Journal and published online), available at <http://www.bailii.org/ew/cases/EWHC/QB/2003/1162.html>; *Dow Jones & Co. v. Gurnick*, (2002) 210 C.L.R. 575 (Austl.) (holding that the Supreme Court of Victoria had jurisdiction over a libel suit based on a Barron's magazine article about the plaintiff that was accessible in Australia through the Internet), available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html); *Berezovsky v. Michaels*, [2000] 2 All E.R. 986 (H.L.) (U.K.) (House of Lords decision upholding jurisdiction by England's Court of Appeal over libel lawsuit filed by two Russian citizens against American publication, Forbes), available at <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000511/ber-1.htm>; Jamie Wilson, *Galloway wins damages for Iraq libel*, THE GUARDIAN, Mar. 20, 2004, <http://www.guardian.co.uk/Iraq/Story/0,2763,1174073,00.html>, (last visited Feb. 14, 2005) (describing a settlement between the Christian Science Monitor and George Galloway, after Galloway sued the Boston-based newspaper for libel in the High Court in London).

3. Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 31 (2004).

4. Scott Sterling, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327, 345-46 (2001).

This article examines transnational approaches to private international law involving material on the Internet, looking for areas of commonality that may be cultivated to facilitate the development of international agreements. It has four main objectives. The first is to briefly explain the basic concepts of jurisdiction, choice of law, and enforcement of foreign judgments to set the groundwork for the rest of the discussion and supply additional information to readers who may be less familiar with these concepts. The second is to examine transnational cases involving the Internet, particularly those related to defamation, and to understand how different countries have resolved issues of jurisdiction and choice of law. The cases come primarily from Australia, Canada, England and the United States, countries whose courts have had the most experience with this issue. The third is to examine the European Union's (EU) approach to harmonization of laws among its twenty-five member States<sup>5</sup> through its treaties governing jurisdiction and proposed treaty on choice of law in non-contractual disputes.<sup>6</sup> The fourth is to consider the impact of EU treaties on the development of alternative international agreements. In taking the initiative to harmonize its laws in these areas, the EU has transformed itself into a power player on the world stage with the ability to influence the development of other transnational agreements.

The information presented here indicates that in its approach to private international law, particularly in the area of defamation, the United States differs from its commonwealth counterparts as well as civil law countries in the EU. But there are also areas of commonality, which through the push and pull of the Internet and e-commerce, are growing, indicating that although past attempts at global agreements have been unsuccessful, these agreements may have failed because they were premature.

### **I. Jurisdiction, Choice of Law and Enforcement**

A discussion of this issue must begin with a clarification of private international law (more commonly referred to in the United States as

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5. In this article, the word "state" is capitalized when it refers specifically to a country and lowercase when it refers specifically to a state within a federation, such as the United States, or when the term applies equally to a country or a state. The confusion arises because in the United States, determination of jurisdiction, choice of law and enforcement of foreign judgments is largely a matter of state law.

6. EU member States are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT* 2 (2004).

conflict of laws) and its three branches: jurisdiction, choice of law and enforcement. Very broadly, jurisdiction refers to a court's prerogative to hear and adjudicate a case, in other words, the forum in which the case will be decided.<sup>7</sup> Choice of law—a separate issue—refers to the law to be applied in the case once jurisdiction is determined.<sup>8</sup> The law applied may or may not be the law of the forum. Enforcement refers to the willingness of a court in another jurisdiction to enforce the judgment rendered by the forum court.<sup>9</sup>

#### A. *Jurisdiction*

There are three kinds of jurisdiction: a) jurisdiction to prescribe, b) jurisdiction to adjudicate, and c) jurisdiction to enforce, according to the Restatement (Third) of the Foreign Relations Law of the United States.<sup>10</sup>

##### 1. JURISDICTION TO PRESCRIBE

Jurisdiction to prescribe refers to a state's authority to apply its substantive law<sup>11</sup> to particular individuals and circumstances.<sup>12</sup> A state may proscribe norms for private conduct as long as there is a sufficient nexus between the state and the conduct at issue to justify the state action.<sup>13</sup> There are three bases of jurisdiction: territory, nationality and effect.<sup>14</sup> A state has the right to exercise jurisdiction over activities that take place in its territory. Likewise, it may exercise jurisdiction over its citizens or businesses based within its territory or its nationals abroad. A state may also exercise jurisdiction over conduct that has particular kinds of effects within its territory.<sup>15</sup> The third factor, known as the

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7. See BLACK'S LAW DICTIONARY 867 (8th ed. 2004).

8. See BLACK'S LAW DICTIONARY 258 (8th ed. 2004).

9. See BLACK'S LAW DICTIONARY 569 (8th ed. 2004).

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

11. Substantive law defines the rights and limitations that govern a society, as opposed to procedural law, which defines the rules to access a legal system, or constitutional law, which defines the limits of government authority and the rules that may be created. See BLACK'S LAW DICTIONARY 1470 (8th ed. 2004).

12. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

13. David J. Gerber, *Symposium: Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L 287, 290 (2004).

14. *Id.* at 290-91.

15. The Restatement (Third) of the Foreign Relations Law of the United States § 402 summarizes the circumstances likely to lead a state to assert jurisdiction to prescribe:

Subject to section 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

“effects principle,” is the one most often invoked in conflicts over jurisdiction involving material on the Internet.<sup>16</sup> In this case, jurisdiction is based on the location of the injurious effect, regardless of where that conduct takes place. Although widely accepted as a legitimate source of jurisdiction, its scope can be controversial because it creates the possibility of “concurrent jurisdiction,” in which more than one state seeks to exercise jurisdiction and prescribe different norms.<sup>17</sup>

An interesting aspect of the effects principle is that it was propagated by the United States in conjunction with the Sherman Act.<sup>18</sup> According to Professor David Gerber, “Many foreign countries challenged the effects principle and U.S. assertion of it, particularly in the 1950s and 1960s. Both governments and scholars claimed that effects had not been accepted as a basis for jurisdiction” and looked on it as an attempt to expand American hegemony.<sup>19</sup> Now that the effects principle is internationally accepted, American publishers are being summoned to foreign courts to answer for the effects of publications that would be protected in the United States.

In exercising prescriptive jurisdiction, a state should consider the interests of other states that might assert jurisdiction. This is referred to as comity. “The doctrine of comity asserts that the courts of each country should exercise their judicial powers in a manner that takes into consideration the aims and interests of other states in order to further cooperation, reciprocity and international courtesy.”<sup>20</sup> Many courts equate comity with reasonableness, and assume it is unlawful to exercise jurisdiction over a person or activity connected with another state unless such an exercise is reasonable.<sup>21</sup> In determining whether

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- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
  - (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
  - (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.
- RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

16. See Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?* 50 FED. COMM. L.J. 117, 132-135 (1997), available at <http://www.law.indiana.edu/fclj/pubs/v50/no1/wilske.html>.

17. Gerber, *supra* note 10, at 292.

18. Sherman Antitrust Act of 1890, 15 U.S.C. 1, §§ 1-7 (2000) (prohibiting any contract or conspiracy that restrains trade or commerce).

19. Gerber, *supra* note 13, at 294.

20. Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2109 (2004).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a. (1987).

exercise of jurisdiction over a person, company or activity is reasonable, a court must consider:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.<sup>22</sup>

## 2. JURISDICTION TO ADJUDICATE

Once a court has determined that, as a matter of law, it can exercise jurisdiction over a foreign defendant, it must then decide whether it should.<sup>23</sup> Jurisdiction to adjudicate refers to a state's authority to subject persons or things to the process of its courts or administrative tribunals, regardless of whether the state is a party to the proceedings.<sup>24</sup>

As with jurisdiction to prescribe, standards of reasonableness apply. Jurisdiction to adjudicate is not triggered by simple accessibility. In disputes involving material on the Internet, jurisdiction should not lie at any point from which the particular content can be accessed. A rule to the contrary would promote forum shopping among plaintiffs who seek an unfair advantage. "Furthermore, exorbitant assertions of jurisdiction could provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."<sup>25</sup>

Consequently, courts that have the power to assert jurisdiction may still decide not to under the doctrine of *forum non conveniens*.<sup>26</sup> The

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22. *Id.* § 403(2).

23. This is the standard two-step analysis for determining the convenient forum in Canada under *Muscutt v. Courcelles*, [2002] 60 O.R.3d 20, 35-36 (C.A.).

24. Restatement (Third) of the Foreign Relations Law of the United States § 401(b) (1987).

25. Wilske & Schiller, *supra* note 16, at 175.

26. See generally Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117 (1996).

doctrine of *forum non conveniens* permits a court to dismiss or stay an action when it finds that in the interest of justice and the convenience of the parties involved, it would be more appropriate to try the case in an alternative forum.<sup>27</sup> In Canada, for example, a court would consider the following factors in an analysis of *forum non conveniens*:

1. Where each party resides;
2. Where each party carries on business;
3. Where the cause of action arose;
4. Where the loss or damage occurred;
5. Any juridical advantage to the plaintiff in the jurisdiction of the suit;
6. Any juridical advantage to the defendant in the jurisdiction of the suit;
7. Convenience or inconvenience to potential witnesses;
8. Cost of conducting the litigation in the jurisdiction of suit;
9. Applicable substantive law;
10. Difficulty and cost of proving foreign law, if necessary; and
11. Whether there are parallel proceedings in any other jurisdiction.<sup>28</sup>

It is the plaintiff's responsibility to demonstrate a real and substantial connection between the case and the forum.<sup>29</sup> Once the plaintiff has done so, it falls to the defendant to produce evidence that another forum would be more appropriate.<sup>30</sup> Frequently, courts assign greater weight to the plaintiff's preference when the forum in question is the plaintiff's home jurisdiction.

### 3. JURISDICTION TO ENFORCE

Jurisdiction to enforce refers to a state's authority to induce or compel compliance or to punish noncompliance with its laws and regula-

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27. Forum non conveniens is mainly applied by common law countries. Most civil law countries follow the doctrine of *lis alibi pendens*, which requires a court to stay or dismiss proceedings in a case if another court is already considering proceedings on the same cause of action. *Lis alibi pendens* is not discretionary. There are no factors to be weighed. It simply requires that the first court to commence proceedings on a case has jurisdiction. Trevor C Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L & COMP. L.Q. 813, 815-816 (Oct. 2005).

28. *Imagis Technologies v. Red Herring*, 2003 B.C.S.C 366, ¶ 17 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/sc/03/03/2003bcsc0366.htm> (citing B.C. R. 14(6)(c)).

29. See, e.g., *Trizec Prop. v. Citigroup Global Markets, Inc.*, No. 03-CV-253286CM1, 128 A.C.W.S (3d) 910, ¶ 28 (Ont. S.C. Feb. 2, 2004), available at 2004 A.C.W.S.J LEXIS 717; *Imagis Technologies*, 2003 B.C.S.C 366, ¶ 13.

30. *Amchem Products, Inc. v. British Columbia (Worker's Compensation Board)*, [1993] 1 S.C.R. 897, 915 (Can.).

tions.<sup>31</sup> At the international level, enforcement measures, whether judicial or nonjudicial, are also subject to the requirement of reasonableness.<sup>32</sup> Jurisdiction to enforce depends on the interests of the territorial state, suggesting that enforcement of a foreign judgment is dependent on the territorial state's consent.

### B. *Choice of Law*

Once jurisdiction is settled, a court must determine the law that applies to the particular conflict. A court can apply the law of its own forum (*lex fori*), which is generally the case when the law in question is procedural. Or it may apply the law of the site where the harm took place (*lex loci delicti commissi*), which is generally the case when the applicable law is substantive.

Historically, courts have applied the law of the “place of wrong”—particularly when that location coincides with the plaintiff's domicile.<sup>33</sup> However, in a cyber-setting, applying the “place of wrong” rule can lead to confusion. In a cyber-defamation case, for example, the place of injury is the place where the information is published.<sup>34</sup> Depending on how the court defines publication, this could be everywhere.<sup>35</sup>

In the United States, courts generally apply the law of the forum with the “most significant relationship to the occurrence and the parties.”<sup>36</sup> Courts using this approach consider factors, such as the needs of the interstate or international system; policies of the forum and interested states; protection of the parties' expectations; general policies underlying the particular area of law; the need for certainty, predictability and uniformity of result; and ease in determining and applying the law.<sup>37</sup> Using this methodology, courts also consider the place where the injury

31. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(c) (1987).

32. *Id.* § 431 cmt. d.

33. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934) (described as “the state where the last event necessary to make an actor liable for an alleged tort takes place”—defined as “the state where the injury occurred.”).

34. *Id.* § 377 n. 5.

35. Hao-Nhien Q. Vu, *Choose or Lose: Choice-of-Law Issues in Cyberspace Cases Remain Unresolved*, L.A. DAILY JOURNAL, May 22, 1997, at 7.

36. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (Montana is the most recent state to adopt the Restatement's “most significant relationship” approach. In *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1007-8 (Mont. 2000), the Montana Supreme Court noted deficiencies in the *lex loci delicti* rule as well as its declining use. See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 2-5 (2001) (describing the fourteenth Annual Survey of American Choice-of-Law Cases, which indicates that for tort cases only 10 U.S. states still follow the *lex loci delicti* rule).

37. *Id.* § 6.

and conduct causing the injury occurred, the nationalities of the parties, their residence or place of incorporation, and where the relationship between the parties, if any exists, is centered.<sup>38</sup> Of course, in cyberspace, factors other than the parties' nationality and domicile are subject to dispute.<sup>39</sup>

### C. Enforcement

Standard among conflict of law rules is the principle "that foreign laws and judgments will not be enforced if they conflict with the fundamental public policy of the forum country or its mandatory rules."<sup>40</sup> This rule, however, is meant to be applied narrowly. A foreign judgment will normally be enforced, unless, in the words of then Associate Judge of the New York State Court of Appeals Benjamin Cardozo, enforcement "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."<sup>41</sup>

## II. Transnational Cases Involving Conflicts over Jurisdiction and Choice of Law

Courts in Australia, Canada, the United Kingdom, and the United States have all dealt with transnational cases involving the Internet and conflicts over jurisdiction and choice of law. Each country's legal system is based on common law, and their approach to jurisdiction was once very similar. But in 1945, the United States veered off on its own path, developing enhanced protection for defendants upon whom states exercised long-arm jurisdiction. The U.S. Supreme Court interpreted the Due Process Clause of the Constitution to mean that in the interest of "traditional notions of fair play and substantial justice," a defendant must have sufficient "minimum contacts" with a forum state, before the defendant may be subjected to the jurisdiction of that state.<sup>42</sup> Then in the 1980s, the Court required the defendant's "contact and connection with the forum state [be] such that he should reasonably anticipate being haled into court there"<sup>43</sup> and that the "action of the defendant [be] purposefully directed toward the forum state."<sup>44</sup>

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38. *Id.* § 145, cited in *Vu*, *supra* note 35, at 7.

39. *Vu*, *supra* note 35, at 7.

40. *Ben-Ezer & Bendor*, *supra* note 20, at 2133; *See also* *Bachchan v. India Abroad Publ'n., Inc.* 585 N.Y.S.2d 661, 662 (N.Y. Gen. Term 1992).

41. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

42. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

43. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

44. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987).

The United States also granted additional protection to defendants accused of defamation. In the landmark case, *New York Times Co. v. Sullivan*,<sup>45</sup> the Supreme Court rejected strict liability for defamation as antithetical to the Constitution's protection for freedom of expression and, in matters of public interest, required the plaintiff to prove falsity of the defendant's statement. In other commonwealth and civil law countries, fault is presumed in defamation cases until the defendant can prove otherwise.

The cases examined below illustrate the differences in approach taken among these countries. Because Australia has been the only country to address the issue of jurisdiction and choice of law regarding material on the Internet in its highest court, the analysis will begin there. The 2002 Australian case of *Dow Jones v. Gutnick* is particularly important because it has been persuasive authority among other courts seeking guidance on these issues.

#### A. Australia's Approach

*Dow Jones & Co. v. Gutnick*<sup>46</sup> is an Australian defamation case that attracted international attention when Australia's High Court determined that an American publisher fell under its jurisdiction and was thus subject to Australian law. Dow Jones publishes *The Wall Street Journal* and *Barron's* magazine, both of which are available online.<sup>47</sup> *Barron's* carried a story about Joseph Gutnick, a resident of the state of Victoria in Australia, which implied that he was involved in money-laundering and tax evasion.<sup>48</sup> Gutnick sued the publisher for defamation in Victoria.

In most commonwealth countries, under the doctrine of *forum non conveniens*, a court may stay or dismiss an action if another forum is clearly more appropriate. But Australia has adopted the "clearly inappropriate forum" test, which requires a defendant seeking a declaration of *forum non conveniens* to show that the forum in Australia is wholly inappropriate.<sup>49</sup> In asserting jurisdiction, the Australian High Court con-

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45. 376 U.S. 254, 280 (1964).

46. (2002) 210 C.L.R. 575 (Austl.), available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html).

47. *Barron's* is located at <http://online.barrons.com/public/main/> (last visited Jan. 30, 2006); *The Wall Street Journal* is at <http://online.wsj.com/public/us> (last visited Jan. 30, 2006).

48. The article, titled "Unholy Gains," appeared on *Barron's* website on Oct. 29, 2000.

49. *Dow Jones & Co.*, 210 C.L.R. 575, ¶ 9. See also Richard Garnett, *Case Notes: Dow Jones & Company v. Gutnick: An Adequate Response to Transnational Internet Defamation?* 4 MELB. J. INT'L L. 196, 202-203 (2003); Richard Garnett, *Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?* 23 MELB. U. L. REV. 30-31 (1999).

sidered it sufficient that the *Barron's* article was available online, where Australian readers could download it, and that any harm to Gutnick's reputation would have occurred in Victoria.<sup>50</sup> Once jurisdiction was determined, the Court observed that "matters of substance are governed by the law of the place of commission of the tort," and consequently chose to apply Australian law.<sup>51</sup> Of its 550,000 subscribers to *Barrons*, Dow Jones conceded that around 1,700 were from Australia and several hundred resided in Victoria.<sup>52</sup> Nevertheless, Dow Jones argued that the appropriate jurisdiction and choice of law should be that of New Jersey, where the material was uploaded onto the website, and where it considered publication to have taken place.<sup>53</sup> But the Australian Court disagreed, distinguishing "between the (publisher's) act of publication and the fact of publication (to a third party)," which the court believed took place at the time the material was downloaded in Victoria.<sup>54</sup> The Court reasoned that "[h]arm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. . . . This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone."<sup>55</sup> In fact, the Court added, it is "the bilateral nature of publication [that] underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action."<sup>56</sup>

Australia's law of defamation differs substantially from that of the United States. Australia recognizes multiple causes of action for a single publication, while the United States recognizes only one.<sup>57</sup> Australia also views defamation as a strict liability tort, in which intent to harm is not a factor and damage is assumed upon proof of publication.<sup>58</sup> American law requires an element of intent for media defendants under *New York Times Co. v. Sullivan*.<sup>59</sup>

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50. Dow Jones & Co., 210 C.L.R. 575, ¶ 44.

51. *Id.* ¶ 9.

52. *Id.* ¶ 169.

53. *Id.* ¶ 9.

54. *Id.* ¶ 11.

55. *Id.* ¶ 26.

56. *Id.* ¶ 27.

57. The Single Publication Rule is explained in the Restatement (Second) of Torts in § 577A (4) (1977):

As to any single publication,

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

RESTATEMENT (SECOND) OF TORTS IN § 577A (4) (1977).

58. *Dow Jones & Co.*, 210 C.L.R. 575, ¶ 25.

59. 376 U.S. 254 (1964).

Under the circumstances, Dow Jones naturally would have preferred to litigate the case in the United States. It argued that if publication is understood to occur at the place material is downloaded and separate causes of action are allowed, then content providers will be forced to litigate in any and every jurisdiction in which their content is accessible<sup>60</sup> But the Australian court inferred natural limits to actions emanating from content on the web. It considered that substantial damages were likely to be awarded only if the plaintiff has a reputation in the place where the material is received, that plaintiffs would be unlikely to sue in another jurisdiction unless the judgment obtained would be of value to them, and that the value of a judgment in another jurisdiction would depend on whether the defendant had assets there.<sup>61</sup>

Although the decision surprised many Americans who consider it an invitation to chaos, the case was not decided haphazardly. Justice Kirby of the High Court, in particular, showed a significant understanding of the stakes involved. In his concurring opinion, he acknowledged the uniqueness and potential benefits of the Internet,<sup>62</sup> the difficulty of controlling access to content across international borders,<sup>63</sup> the potential threat to freedom of expression if publishers are liable for content in every jurisdiction,<sup>64</sup> the negative potential of doing so on comity of nations,<sup>65</sup> the potential advantages of a single publication rule,<sup>66</sup> and the difficulty of enforcing judgments in other jurisdictions.<sup>67</sup> Nevertheless, he rejected Dow Jones' argument that appropriate jurisdiction should be where content is uploaded or that the single publication rule should apply. He indicated that while the Internet is a unique medium, the law should be technologically neutral;<sup>68</sup> that even if the Court altered common law, legislative reform would be required in some parts of the country;<sup>69</sup> and that the suggested change would make it difficult for plaintiffs to vindicate their reputations in the place that matters most.<sup>70</sup>

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60. *Dow Jones & Co.*, 210 C.L.R. 575, ¶ 20.

61. *Id.* ¶ 53.

62. *Id.* ¶ 88 and 164.

63. *Id.* ¶ 84.

64. *Id.* ¶ 117.

65. *Id.* ¶ 114.

66. *Id.* ¶ 120.

67. *Id.* ¶ 121.

68. *Id.* ¶ 125.

69. *Id.* ¶ 126.

70. *Id.* ¶ 133.

### B. Canada's Approach

The Australian approach to Internet defamation is not unique. Canada has decided several cases involving international jurisdiction and the Internet, based on similar reasoning. One, which Justice Hedigan, the trial judge in *Gutnick*, considered was *Kitakufe v. Oloya Ltd* (1998).<sup>71</sup> The case involved a Canadian court's decision to assume jurisdiction over a defamation suit resulting from an article published in a Ugandan newspaper that was available via the Internet. Both the plaintiff and the defendant were Canadian residents of Ugandan descent. The defendant, a reporter for the Ugandan newspaper "The New Vision," wrote an article about the plaintiff titled "Uganda Doctor Arrested in Toronto."<sup>72</sup> When the plaintiff sued, the defendant argued that the most appropriate jurisdiction for the suit would be Uganda because the suit involved allegations of ethnic rivalry and questioned the defendant's credibility. Nevertheless, an Ontario court assumed jurisdiction based on Canadians' ability to access the website.<sup>73</sup> The court was also concerned that if the case were tried in Africa the plaintiff might be deprived of a legitimate juridical advantage.<sup>74</sup> Canadian courts consider juridical advantage a factor in *forum non conveniens* analysis. They assume that all things being equal, plaintiffs fighting for their reputation should be allowed to do so in the forum in which they are most familiar and have the best advantage.<sup>75</sup>

Canada, like Australia, assumes that exercise of personal jurisdiction over a foreign defendant is appropriate if the tort in question was committed within its boundaries or if the damage from the tort was sustained there.<sup>76</sup> However, a case must have a "real and substantial connection" to the forum.<sup>77</sup> This issue, in fact, was key in *Braintech, Inc.*

71. 67 O.T.C. 315 (Ont. C.J. June 18, 1998), available at 1998 O.T.C. LEXIS 1265, cited in *Gutnick v. Dow Jones & Co.*, [2001] V.S.C. 305 (Vict. Aug. 28, 2001), available at <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html>; see also Andrew Nicholson, *The Expanding Web of Defamation: Gutnick v. Jones*, 8 MURDOCK U. ELEC. J. L., ¶ 19 (2001), [http://www.murdoch.edu.au/elaw/issues/v8n4/nicholson84\\_text.html](http://www.murdoch.edu.au/elaw/issues/v8n4/nicholson84_text.html) (last modified, Dec. 2001).

72. *Kitakufe*, 67 O.T.C. 315, cited in *Gutnick*, [2001] V.S.C. 305.

73. *Id.* ¶ 48.

74. *Id.* ¶ 47.

75. *Wiebe v. Bouchard*, 2005 B.C.S.C 47 (Can.), available at [http://www.fathers.ca/law\\_suit\\_judgements\\_on\\_sow.htm](http://www.fathers.ca/law_suit_judgements_on_sow.htm).

76. Ontario Rules of Civil Procedure allow for service on foreign defendants without leave of the court. Ont. R. Civ. P. 17.02(g), (h), available at [http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a_e.htm).

77. See *Jordan v. Schatz*, 77 B.C.L.R.3d 134 (2000) (Can.) available at <http://www.cle.bc.ca/CLE/Cases+and+Law/caseBrowse.htm?strLetter=J>; *Imagis Technologies v. Red Herring*, 2003 B.C.S.C 366, ¶ 14 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/sc/03/03/2003besc0366.htm>; *Trizec Prop. v. Citigroup Global*

v. *Kostiuk*,<sup>78</sup> when the British Columbia Court of Appeal refused to enforce a Texas judgment based on lack of jurisdiction. A British Columbia company sued a resident of British Columbia in Houston, Texas, for defamation regarding material the defendant had placed on the Internet.<sup>79</sup> A Texas court accepted jurisdiction, based on the fact that the material was accessible in Texas, and rendered a default judgment when the defendant failed to answer the claim.<sup>80</sup> No evidence existed that anyone in Texas had read the material; there was also a question of whether the defendant had been properly served. Aside from the fact that Braintech had once operated an office in Austin, Texas, the Canadian court thought Braintech had no real and substantial connection with the state and that, under the circumstances, Texas was not the appropriate forum.<sup>81</sup>

In contrast, the Supreme Court of British Columbia believed a substantial connection did exist in *Imagis Technologies v. Red Herring*,<sup>82</sup> when it asserted jurisdiction over a California-based magazine because the publication was available in British Columbia both in print and through the Internet. As in *Gutnick*, defendants supported their argument for *forum non conveniens* by citing *New York Times Co. v. Sullivan*.<sup>83</sup> Presumably, because the U.S. Supreme Court rejected strict scrutiny in the landmark case, any judgment rendered under a strict scrutiny analysis would be unenforceable in the United States. But the Canadian court pointed out that because the “plaintiff has a reputation to protect in the province, the plaintiff is at liberty to decide whether it wishes to pursue judgment [there] in order to have the benefit of finding in its favour, whether or not any monetary damages may be recovered. . . .”<sup>84</sup> The court also considered the juridical disadvantage the company would face if it had to prove fault and malice under *Sullivan* in the United States.<sup>85</sup>

The Superior Court of Ontario also cited *Gutnick* when it assumed jurisdiction over *The Washington Post* and three of its writers in *Ban-*

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Markets, Inc., No. 03-CV-253286CM1, 128 A.C.W.S (3d) 910, ¶ 28 (Ont. S.C. Feb. 2, 2004), available at 2004 A.C.W.S.J LEXIS 717; *Wiebe*, 2005 B.C.S.C 47, ¶ 23, available at [http://www.fathers.ca/law\\_suit\\_judgements\\_on\\_sow.htm](http://www.fathers.ca/law_suit_judgements_on_sow.htm); see also MC-CONCHIE AND POTTS, CANADIAN LIBEL AND SLANDER ACTIONS, 144-159 (2004).

78. 63 B.C.L.R.3d 156 (1999) (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/ca/99/01/c99-0169.txt>.

79. *Id.* ¶ 3.

80. *Id.* ¶ 58, 64.

81. *Id.* ¶ 66.

82. 2003 B.C.S.C 366, ¶ 20.

83. 376 U. S. 254 (1964).

84. *Imagis Technologies*, 2003 B.C.S.C 366, ¶ 35.

85. *Id.* ¶ 26.

*goura v. Washington Post*,<sup>86</sup> a decision that was subsequently reversed by the Ontario Court of Appeals.<sup>87</sup> The plaintiff in the defamation case, Cheickh Bangoura, was a native African who attained Canadian citizenship during the period in which *The Post* published three articles questioning his job performance as a representative for the United Nations in Kenya.<sup>88</sup> Bangoura moved to Ontario three years after the articles were published in *The Post*.<sup>89</sup> Although the articles were still available on *The Washington Post's* website, Bangoura's attorney was the only person who had accessed them.<sup>90</sup> The defendants had no real connection to Ontario (*The Washington Post* had only seven subscribers there), but the Superior Court reasoned that as a "major newspaper in the world's most powerful country . . . made figuratively smaller by, *inter alia*, the Internet . . . [f]ew well-informed North Americans (including Canadians) do not encounter, at least indirectly, views expressed in the Post."<sup>91</sup> Meanwhile, the lower court noted that the plaintiff had no connection with the jurisdictions in which the defendants resided, but would have a juridical advantage in Ontario.<sup>92</sup>

In its argument for *forum non conveniens*, *The Washington Post* also questioned whether a Canadian libel judgment inconsistent with *New York Times v. Sullivan* would be enforceable in the United States. This argument carried no weight with Judge Pitt, who cited *Hill v. Church of Scientology*,<sup>93</sup> in which the Supreme Court of Canada expressly rejected the importation of U.S. First Amendment standards into Canadian law. In fact, it appeared to antagonize him because he added reproachfully, "Our courts do not share the American view that British libel law, which is similar to our own, is any less civilized than the American law."<sup>94</sup> Remarking that the Australian High Court did not share that view either, Judge Pitt devoted seven paragraphs to the *Gutnick* decision and finished by adding, "Frankly, I see the unwillingness of an American court to enforce a Canadian judgment as an unfortunate expression of lack of comity."<sup>95</sup>

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86. 235 D.L.R. 4th 564 (Ont. Super. Ct. J. 2004).

87. *Bangoura v. Washington Post*, [2005] O.J. No. 3849 (Ont. C.A.), *cert denied* [2006] S.C.R., available at <http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm>.

88. *Id.* ¶ 1.

89. *Id.* ¶ 8.

90. *Id.* ¶ 11.

91. *Bangoura*, 235 D.L.R. 4th at 572.

92. *Id.*

93. [1995] 2 S.C.R. 1130, 1187-1188 (Can.).

94. *Bangoura*, 235 D.L.R. 4th at 573.

95. *Id.* ¶ 20; see also *Trizec Prop. v. Citigroup Global Markets, Inc.*, No. 03-CV-253286CM1, 128 A.C.W.S (3d) 910, ¶ 45 (Ont. S.C. Feb. 2, 2004), available at 2004 A.C.W.S.J LEXIS 717 (Ontario Superior Court assumed jurisdiction over a New York-

Judge Armstrong, who wrote the Ontario Court of Appeals decision reversing the lower court's ruling, took a different perspective.

The motion judge's conclusion does not take into account that the rule in *New York Times v. Sullivan* is rooted in the guarantees of freedom of speech and of the press under the First Amendment of the U.S. Constitution. In any event, the reality is that American courts will not enforce foreign libel judgments that are based on the application of legal principles that are contrary to the actual malice rule. Although the Supreme Court of Canada has rejected the rule for perfectly valid reasons, it is, in my view, not correct to say that the American courts' unwillingness to enforce a Canadian libel judgment is "an unfortunate expression of lack of comity." Canada and the U.S. have simply taken different approaches to a complex area of the law, based upon different policy considerations related to freedom of speech and the protection of individual reputations.<sup>96</sup>

Judge Armstrong also distinguished *Bangoura* from *Gutnick* in which the plaintiff was clearly a resident of the jurisdiction when the publication occurred and there were 1,700 Australian subscribers to the publication in question.<sup>97</sup>

The same day the Ontario Court of Appeals released its decision, the Supreme Court of British Columbia asserted jurisdiction over the *New York Post* in a libel case, based on the newspaper's accessibility via the Internet.<sup>98</sup> Plaintiff Brian Burke, the general manager of the Vancouver Canucks hockey team, contended that a *New York Post* column damaged his reputation by claiming that he encouraged his players to hurt an opposing team member. The *New York Post* is not sold in British Columbia and the *Post* was not able to determine if anyone from British Columbia had accessed the article electronically. But the court in *Burke v. NYP Holdings, Inc.* was satisfied that the plaintiff had established a "real and substantial connection" between the jurisdiction and the subject matter, based on its publication on the Internet.<sup>99</sup> In explaining its decision, the court quoted extensively from Justice Pitt's writings in *Bangoura*.<sup>100</sup>

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based defendant for allegedly defamatory comments about Trizec's Canadian chairman. The court concluded that "[t]o require the plaintiffs to clear their reputations in Ontario by forcing them to proceed with an action in New York State under First Amendment standards would be unfair.").

96. *Bangoura v. Washington Post Co.*, [2004] 235 D.L.R. 4th 564 (Ont. Super. Ct. J.), rev'd, [2005] O.J. No. 3849 (Ont. C.A.), *leave to appeal dismissed*, [2005] SCCA No. 497 (February 16, 2006). *available at* <http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm>.

97. *Id.* ¶ 44-45.

98. *Burke v. NYP Holdings, Inc.*, 2005 B.C.S.C 1287 (Can.), *available at* <http://www.courts.gov.bc.ca/jdb-txt/sc/05/12/2005bcsc1287.htm>.

99. *Id.* ¶ 31.

100. *Id.* ¶ 21-22, 34, *citing* *Bangroua v. Washington Post*, 235 D.L.R. 4th 564 (Ont. Super. Ct. J.) (Pitt, J.).

### C. *The United Kingdom's Approach*

As Judge Pitt pointed out, Canadian and English approaches to libel law are similar, so when *The Wall Street Journal* published an article comparing well-known London retailer Harrods to the disgraced American company Enron, it was not surprising that Harrods was allowed to sue for defamation in England.<sup>101</sup> Because the article in question only appeared in the American version of the newspaper, Dow Jones applied for a stay on the grounds of *forum non conveniens*.<sup>102</sup>

The court acknowledged that only ten printed copies of the American edition were sent to England and that there were “a very small number of ‘hits’” on the *The Wall Street Journal* website. However, it decided the case should proceed in England because it involved a claim by an English company whose reputation is vulnerable in England.<sup>103</sup> In making this determination, the court cited *Gutnick v. Dow Jones & Co.*<sup>104</sup> The court observed that it was not surprising that proceedings had not been filed in the United States, considering First Amendment protection against libel claims.<sup>105</sup>

In fact, Dow Jones had already tried and failed to persuade a U.S. District Court in New York to issue a declaratory judgment in the matter. But, in that case, Judge Victor Marrero held that “. . . a more appropriate alternative remedy exists for the parties in proceeding with the London action.”<sup>106</sup> He noted that if Dow Jones lost its case in England it would not necessarily be left without a remedy in the United States. Writing for the English court, Justice Eady opined, “That was, I believe, a reference to the unwillingness of courts there to enforce judgments based upon legal principles inimical to prevailing American First Amendment jurisprudence and public policy.”<sup>107</sup>

As in Australia and Canada, English libel law has three features that distinguish it from U.S. libel law: (1) England does not recognize a single publication rule<sup>108</sup> so each communication is considered

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101. *Harrods v. Dow Jones & Co.*, [2003] EWHC 1162 (QB)(UK), available at <http://www.bailii.org/ew/cases/EWHC/QB/2003/1162.html>; see also Matthew Collins, *The Law of Defamation and the Internet*, <http://www.mattcollins.com.au/oupupdate12.htm>, (last visited Jan. 27, 2006).

102. *Harrods*, [2003] EWHC 1162, ¶ 35.

103. *Id.* ¶ 36.

104. *Id.*

105. *Id.* ¶ 6.

106. *Dow Jones & Co. v. Harrods*, 237 F. Supp. 2d 394, 445 (S.D.N.Y. 2002).

107. *Harrods*, [2003] EWHC 1162, ¶ 9.

108. The single publication rule is inconsistent with the policy underlying the acceptance by the European Court of Justice in Case C-68-93, *Fiona Shevill v. Presse Alliance S.A.*, [1995] ECR-I-415, that separate actions in each relevant jurisdiction are in principle permissible.

a separate libel,<sup>109</sup> (2) publication takes place where the words are heard or read,<sup>110</sup> and (3) and damage is presumed.<sup>111</sup> Justice Eady explained:

Even though a newspaper's primary circulation may be in one or more foreign jurisdictions, English law recognises that there may also be separate publications in other jurisdictions, each being sufficient to found a separate cause of action. Thus, however limited and technical it may appear, there have been publications within this jurisdiction which are arguably tortious and which give rise to a cause of action here.<sup>112</sup>

Furthermore, he pointed out that even though any damages that might be won would be "very nominal or limited" and likely unenforceable, the point of "involving no doubt considerable inconvenience and expense to parties outside this jurisdiction" is still "vindication of reputation"—the main public policy consideration underlying defamation law.<sup>113</sup>

Justice Eady also cited *Berezovsky v. Michaels*<sup>114</sup> in which an English Court of Appeals allowed two Russian citizens to sue the American publication, *Forbes*, in the United Kingdom. In an exposé on crime in Russia, *Forbes* compared the plaintiffs to mobsters.<sup>115</sup> Circulation for the magazine, which appeared in print and on *Forbes*' website, amounted to 785,710 subscribers in the United States and Canada, 1,915 in the England and Wales, and 13 in Russia. *Forbes* asked for a stay on the grounds that either the United States, the source of publication, or Russia, the claimant's primary residence, would be a more appropriate jurisdiction for the suit. However, the plaintiffs conducted business in London and kept apartments there, indicating to the court "a substantial connection" to England and "an important business reputation to protect" there.<sup>116</sup>

With respect to jurisdiction, *Forbes* argued that "the correct approach is to treat the entire publication—whether by international newspaper circulation, transborder or satellite broadcast or Internet posting—as if it gives rise to one cause of action and to ask whether it has been clearly proved that this action is best tried in England."<sup>117</sup> The House of Lords'

109. See *Duke of Brunswick v. Harmer*, (1849) 14 Q.B. 85 (U.K.); *McLean v. David Syme & Co.*, (1970) 92 W.N.(N.S.W.) 611(U.K.).

110. See *Bata v. Bata*, (1948) W.N. 366 (U.K.); *Lee v. Wilson and Mackinnon*, (1934) 51 C.L.R. 276 (U.K.).

111. *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, 529 (U.K.) (Bowen, L.J.).

112. *Harrods*, [2003] EWHC 1162, ¶ 38.

113. *Id.* ¶ 41.

114. *Berezovsky v. Michaels*, [2000] 2 All E.R. 986 (H.L.) (U.K.).

115. *Id.*

116. *Id.*

117. *Berezovsky*, 2 All E.R. 986.

opinion on the case rejected the “one cause of action” proposal, observing that its natural result would be to favor trial in the foreign publisher’s jurisdiction, the United States, where the bulk of publication takes place.<sup>118</sup> It rejected this arrangement as “not underpinned by considerations of justice.”<sup>119</sup>

The Boston-based publication, *The Christian Science Monitor*, also faced libel charges in the United Kingdom. Relying on false documentation, the newspaper published an article in its print and online editions, alleging that George Galloway, a former British Labor Party member, opposed sanctions on Iraq and its subsequent invasion because he had been paid by Saddam Hussein’s regime.<sup>120</sup> In 2004, England’s High Court awarded Galloway £ 50,000 for libel damages and a public apology.<sup>121</sup>

More recently, however, in *Dow Jones & Co., Inc. v. Jameel*,<sup>122</sup> an English court concluded that assertion of jurisdiction over a U.S. publisher for a libel suit would be an abuse of the legal process, after it came to light that only two neutral subscribers had read the disputed material. The claimant in the case, Saudi businessman Yousef Jameel, sued Dow Jones for publishing a Wall Street Journal.com article that implied he supported the terrorist group Al Qaeda. The article did not identify Jameel directly, however, it contained a link to another document that included Jameel’s name among a list of former donors to Osama bin Laden during his fight against the Soviet invasion of Afghanistan.<sup>123</sup> Only five subscribers to the online publication followed the link to the donor list; three of them were connected to Jameel’s legal team.<sup>124</sup> Although the court acknowledged that publication to the other two readers may have caused the claimant modest damage, it concluded that committing the court’s resources to an action in which so little was at stake would be an abuse of process.<sup>125</sup> Interestingly, in dicta, the court also noted that Section 6 of the Human Rights Act of 1998,<sup>126</sup> which incorporated the European Convention on Human

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118. *Id.*

119. *Id.*

120. Jamie Wilson, *Galloway wins damages for Iraq libel*, THE GUARDIAN, Mar. 20, 2004, <http://www.guardian.co.uk/Iraq/Story/0,2763,1174073,00.html>, (last visited Feb. 14, 2005).

121. *Id.*

122. [2005] EWCA (Civ.) 75 (U.K.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/75.html>.

123. *Id.* ¶ 8.

124. *Id.* ¶ 17.

125. *Id.* ¶ 70.

126. Human Rights Act of 1998, 1998 Ch. 42, available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

Rights<sup>127</sup> into UK law, required the court to administer the law in a manner compatible with the convention:

Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation.<sup>128</sup>

#### D. *The American Approach*

Even in the United States, it has been a common practice to assert long-arm jurisdiction in cases when the defendant appears to target another jurisdiction, leading to a negative effect in that jurisdiction. In fact, the trial court in *Gutnick* considered U.S. cases dealing with long-arm jurisdiction before rendering its opinion. One of those cases was *Edias Software International v. Basis International*,<sup>129</sup> an Arizona case holding a defendant who posted statements concerning the plaintiff on a website based in New Mexico subject to Arizona jurisdiction. Another was *Telco Communications v. An Apple a Day*,<sup>130</sup> a case in which the Virginia Supreme Court held a defendant who published two press releases about the plaintiff that were written in Missouri, but published in Connecticut, New York and New Jersey, subject to Virginia jurisdiction.

But the United States offers an added protection to defendants. Assertion of personal jurisdiction must be consistent with due process requirements of the Constitution.<sup>131</sup> To ensure due process is met, a court must be certain that the defendant has established "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>132</sup> The Supreme Court has said the defendant must have personally availed "of the privilege of conducting activities within the forum"<sup>133</sup> in such a way that the defendant "should reasonably anticipate being haled into court there."<sup>134</sup>

So while most countries exert jurisdiction over a defendant based on

127. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaties, ETS No. 5, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

128. *Dow Jones & Co., v. Jameel*, [2005] EWCA (Civ.) 75, ¶ 55 (U.K.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/75.html>.

129. 947 F. Supp. 413 (D. Ariz., 1996).

130. 977 F. Supp. 404, 407 (E. D. Va. 1997).

131. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

132. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

133. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

134. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

the connection between the court and the claim (based on effect), the United States requires a connection between the court and the defendant as well.<sup>135</sup> This has been called jurisdiction based on effects plus targeting.<sup>136</sup> In other words, American courts look not only at effects, but also for an element of intent.

Although approaches to determine personal availment in the United States have varied, at present, courts predominantly rely on a test originated in the non-Internet case *Calder v. Jones*.<sup>137</sup> In *Calder*, the Supreme Court determined that it was appropriate to go beyond the forum to exercise personal jurisdiction over a defendant if the defendant intentionally committed a tortious act aimed at the forum, knowing that the brunt of the harm would result there.<sup>138</sup>

Three days after Australia's High Court rendered its decision in *Gutnick*, the U.S. Court of Appeals for the Fourth Circuit applied the *Calder* effects test in *Stanley Young v. New Haven Advocate*<sup>139</sup> to reach a different conclusion. The case concerned a Virginia prison warden who sued two Connecticut newspapers, accessible via the Internet, in Virginia for articles he considered defamatory. In deciding that Virginia was not a suitable forum for the case, the Fourth Circuit considered that the newspapers were directed toward Connecticut readers, had no offices or personnel in Virginia, and had not sent reporters there.<sup>140</sup> In other words, there was no evidence the defendants had targeted Virginia.

In relation to the media, the "targeting" approach to Internet jurisdiction is publisher-focused. It considers the effects caused in the defendant's jurisdiction, but also looks at the publisher's intentions. Other countries that focus on the place where the harm occurs consider effects, but reduce the concept of "targeting" to the choice to write about the plaintiff with reasonable foreseeability that a suit is possible.

Still, levels of gradation blur what constitutes targeting in the United States. For example, in *Northwest Healthcare Alliance, Inc. v. Healthgrades.Com, Inc.*,<sup>141</sup> a case concerning alleged defamation and

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135. Ronald Brand, *Community Competence for Matters of Judicial Cooperation at the Hague Conference on Private International Law: A View from the United States*, 21 J.L. & COM. 191, 199-200 (2002).

136. Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! case and the Regulation of Online Content in the World Market*, 18 BERKELEY TECH. L.J. 1191, 1193 (2003).

137. 465 U.S. 783 (1984).

138. *Id.* at 788-89.

139. 315 F.3d 256 (2002).

140. *Id.* at 260.

141. No. 01-35648 (9th Cir. Oct. 7, 2002), *cert. denied*, 538 U.S. 999 (2003), available at <http://www.techlawjournal.com/courts2001/healthgrades/20021007.asp>.

violation of Washington's Consumer Protection Act, the U.S. Court of Appeals for the Ninth Circuit allowed the state of Washington to assert personal jurisdiction over a Colorado company. The court determined that the Colorado company "purposely interjected itself" into the Washington market through its intentional act of offering healthcare ratings information of interest to Washington residents on its website.<sup>142</sup> The ratings provided by Healthgrades.com were obtained from public sources, including the federal government and the state of Washington.<sup>143</sup>

Due to its multi-jurisdictional nature, the United States has produced more cross-jurisdictional Internet cases than any other country in the world, and the outcomes of those cases are sometimes contradictory. The difference, of course, at least in defamation cases, is that while common law may vary somewhat from state to state, all jurisdictions in the United States are subject to First Amendment restrictions under the U.S. Constitution.

Conflicts arise between the United States and other nations when U.S. courts refuse to enforce foreign judgments that fail to take into account the level of due process required under the U.S. Constitution. Although not a defamation case, *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*<sup>144</sup> (Yahoo v. LICRA) is often cited as an example of this pattern. This case is frequently contrasted with *Gutnick* to illustrate contradictory approaches to Internet jurisdiction and choice of law.<sup>145</sup> In *Yahoo! v. LICRA*, a U.S. district court refused to enforce a French judgment against an American Internet company. After finding that Nazi paraphernalia sold on Yahoo's auction site violated French laws prohibiting exhibition and sale of Nazi propaganda, a Paris court ordered the California-based company to block French users' access to Nazi material on its website.<sup>146</sup> Failing to persuade the French court

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142. *Id.* ¶ 7.

143. *Id.*

144. 145 F. Supp. 2d 1168 (N.D. Cal. 2001), available at <http://cyber.law.harvard.edu/seminar/internet-client/readings/Week9/Yahoo.doc>.

145. See Marc Greenberg, *supra* note 136, at 1239 n.227; Beverly Earle, *International Cyberspace: From Borderless to Balkanized?* 31 GA. J. INT'L & COMP. L. 225, 230, 255 (2003); Cherie Dawson, *Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction*, 44 VA. J. INT'L L. 637, 644-45 (2004); Mark F. Sutton, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 419 n.4, 430 (2004); Brian Fitzgerald, *Case Note: Dow Jones & Co Inc v Gutnick: Negotiating 'American Legal Hegemony' in the Transnational World of Cyberspace*, 27 MELB. U. L.R. 590, 595 n.22, 604 n.74 (2003); Cindy Chen, *Comment: United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce*, 25 U. PA. J. INT'L ECON. L. 423, 447-48 (2004).

146. Tribunal de grande instance [T.G.I.] Paris, Nov. 20, 2000, J.C.P. 2000, Actu., 2219, obs. J. Gomez, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>. An

that it was impossible to block access to the site, Yahoo! turned to the American judicial system for relief. The Internet company asked a federal district court in California to issue a declaratory judgment finding the French order unconstitutional and, consequently, unenforceable in the United States. The district court held that the French order violated Yahoo's rights to freedom of expression under the First Amendment.<sup>147</sup> In 2004, the Ninth Circuit Court of Appeal reversed the decision, holding that the district court did not have jurisdiction over the French defendants because they had not yet "personally availed" themselves of the forum by attempting to enforce the French judgment in California.<sup>148</sup> Yahoo! petitioned the court for a rehearing en banc. The full court also concluded that the lower court's decision should be reversed, but on justiciability grounds that the case was not yet ripe.<sup>149</sup>

There have been other instances in which American courts have refused to enforce foreign judgments that appeared to run counter to domestic public policy regarding freedom of expression. The district court in *Yahoo!* relied on *Bachchan v. India Abroad Publications, Inc.*,<sup>150</sup> a case in which the Supreme Court of New York refused to enforce a libel judgment rendered by the High Court of Justice in London against a New York newspaper. The American court determined that the case concerned a private figure plaintiff and a matter of public concern. Under English law, the defendant bears the burden of proving the truth of a statement. But the U.S. Supreme Court rejected that practice in *Philadelphia Newspapers, Inc. v. Hepps*.<sup>151</sup> The N.Y. Court of Appeals explained that "[p]lacing the burden of proving truth upon media defendants who publish speech of public concern has been held

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English translation is available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. See also Center for Democracy and Technology, *International Jurisdiction: French Court rules in Favor of Yahoo in Internet Free Speech Case*, at <http://www.cdt.org/jurisdiction> (Feb. 11, 2003).

147. *But see* *Playboy Enter. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996) (demonstrating that American judges are not above attempts to control content on foreign websites. A New York District court barred an Italian publisher from soliciting American subscriptions to its Playmen.com website because it infringed upon Playboy Magazine's trademark. But no attempt was made to shut the website down or block Americans' access to it. The court reasoned the defendant could not be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned without asserting that jurisdiction applies in every court all over the world.).

148. *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, a French association, No. 01-17424, D.C. No. CV-00-21275-JF, at 5, 9th Cir., filed Aug. 23, 2004.

149. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004), *rev'd en banc* No. 01-17424, 2006 U.S. App. LEXIS 668, at 447 (9th Cir. 2005).

150. 585 N.Y.S.2d 661, 664 (N.Y. Sup. Ct. 1992).

151. 475 U.S. 767, 775 (1986).

unconstitutional because fear of liability may deter such speech.”<sup>152</sup> The court stated that this “chilling effect” is antithetical to the First Amendment. By extension, it argued “[t]he ‘chilling’ effect is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants.”<sup>153</sup> Some commentators have criticized this holding because the alleged libel appeared in a story published by a British subsidiary of the defendant’s American company. The article ran in *India Abroad’s* newspapers in England and New York, but the complaint, which was filed in England, only addressed the story printed there.<sup>154</sup>

The Maryland Court of Appeals also rejected a libel judgment by England’s High Court of Justice as offensive to public policy in *Telnikoff v Matusевич*.<sup>155</sup> The case concerned a letter that Matusевич, the defendant, sent London’s *Daily Telegraph* in response to an article the newspaper had published by Telnikoff. At the time, both men were residents of England who had emigrated from Russia. As the case moved through the appeals process, Matusевич, who worked for an American corporation, moved to Maryland. After winning the suit in England, Telnikoff sought to enforce the judgment through the Maryland court system. The Maryland Court of Appeals concluded that “[a] comparison of English and present Maryland defamation law does not simply disclose a difference in one or two legal principles. Instead, present Maryland defamation law is totally different from English defamation law in virtually every, significant respect.”<sup>156</sup> The Maryland court refused to enforce the English judgment because the defendant’s statements, which it considered rhetorical hyperbole, were presumed to be false by the English court and examined in isolation rather than in context of the plaintiff’s statements. This decision is also considered controversial by some because when the suit was initiated both parties lived in England and the alleged libel took place there; then defendant relocated to the United States after the initial judgment.<sup>157</sup>

More recently, a New York court refused to enforce a French copyright judgment against an American website operator for First Amendment reasons. In *Sarl Louis Feraud International v. Viewfinder*,<sup>158</sup> a

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152. *Bachchan*, 585 N.Y.S.2d at 664.

153. *Id.*

154. See Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 172 (2004).

155. 702 A.2d 230 (Md.1997), available at <http://lw.bna.com/lw/19971202/941151a.htm>.

156. *Id.* at 248 (citations omitted).

157. See Rosen, *supra* note 154, at 182-84.

158. No. 04 Civ. 9760 GEL, 2005 WL 2420525 (S.D.N.Y. Sept. 29, 2005).

French clothing designer sued the publisher of a fashion website for unauthorized use of intellectual property and unfair competition because the website posted pictures of models wearing its designs without permission. The couture photos were taken at fashion shows open to the press and public. When Viewfinder did not answer the claim in a timely manner, a default judgment was issued against it. While French copyrights would normally be protected in the United States, the case in question really concerned fashion reporting, an activity that falls “within the purview of the First Amendment.”<sup>159</sup>

A few commentators have been highly critical of U.S. courts’ decisions to allow the Constitution to trump foreign judgments. As Mark Rosen explains, “[c]ategorically refusing to enforce such Un-American Judgments is tantamount to imposing U.S. constitutional norms on other countries.”<sup>160</sup> Professor Rosen argues that

The First Amendment does not preclude an American court from enforcing a foreign judgment that is based on substantive law that the First Amendment would not have allowed an American polity to enact, because the substance of the judgment would not be attributed to the court for purposes of the state action doctrine. Attribution to the court occurs only if the underlying legal right was created by an American polity.<sup>161</sup>

Professor Rosen considers the enforcement of foreign law analogous to the enforcement of contract law. U.S. courts will enforce contracts that require action that the government could not require.<sup>162</sup> But contracts involve mutual agreements between actors who voluntarily assume those commitments. A publisher distributing a magazine in a foreign country through traditional channels arguably may be said to have agreed implicitly to be bound by the foreign country’s laws, based on the publisher’s voluntary decision to distribute the magazine there. But the same publisher who places the magazine on the Internet cannot be said to have agreed to fall under the jurisdiction of every country with Internet access.

Other commentators have asserted that refusing to enforce a judgment on constitutional grounds is not unreasonable. As Professor Ayelet Ben-Ezer and Dean Ariel Bendor point out, private international law is technically a branch of domestic law.<sup>163</sup> Countries decide unilaterally how to resolve situations involving conflicts of law. And therefore, “[b]ecause the conflict of law question is a domestic one, each country’s

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159. *Id.* at \*7.

160. Rosen, *supra* note 154, at 172.

161. *Id.* at 186.

162. *Id.* at 207.

163. Ben-Ezer & Bendor, *supra* note 20, at 2092.

conflict of law rules must conform to its constitution,” which is the supreme law of the land.<sup>164</sup> It is, in fact, the Constitution that empowers governmental bodies, including courts, to promulgate rules of private international law in the first place.<sup>165</sup> American rules regarding private international law “cannot be structured to create outcomes that are themselves unconstitutional,” noted Ben-Ezer and Bendor, particularly “in cases involving human or civil rights.”<sup>166</sup> Since a country’s constitution generally embodies the political, social and moral principles of that country, application of foreign laws or judgments that conflict with it may be seen as a violation of public policy.<sup>167</sup>

In *Yahoo! v. LICRA*, Judge Fogul wrote:

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based government regulation upon speech. The government and the people of France have made a different judgment based on their own experience.<sup>168</sup>

With its focus on areas that affect individuals, such as contracts, property, torts, trusts and estates, private international law has long been assumed to be unaffected by constitutional principles.<sup>169</sup> But particularly when a judgment interferes with the transmission of information valuable to the public, the distinction between public and private law is blurred and public policy becomes a relevant issue.<sup>170</sup>

Even the *Gutnick* opinion took constitutional law into consideration. In his concurring opinion, Justice Kirby pointed out that “the Court is bound by the Constitution. No principle of the common law may be inconsistent with its language or implications.”<sup>171</sup> He used this assertion as a justification to deny Dow Jones’ request to contradict established Australian law by adopting the single publication rule and the principle that publication takes place where the material is uploaded onto the Internet.

A number of law review articles have mentioned the need for a treaty to regulate international jurisdiction and choice of law in Internet cases.<sup>172</sup> In *Yahoo! v. LICRA*, Judge Fogul also referred to the need to

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164. *Id.* at 2095.

165. *Id.* at 2102.

166. *Id.* at 2105.

167. *Id.* at 2133.

168. 169 F. Supp. 2d 1181, 1187 (N.D. Cal. 2001).

169. Ben-Ezer & Bendor, *supra* note 20, at 2099-2100.

170. *Id.*

171. *Dow Jones & Co. v. Gutnick*, (2002) 210 C.L.R. 575, ¶ 75 (Austl.), available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html).

172. See Charles T. Kotuby, Jr., *International Developments and External Effects:*

balance First Amendment interests in absence of a treaty.<sup>173</sup> Such a treaty would certainly promote greater consistency and predictability regarding the application of private international law in cases involving Internet publishing and e-commerce. Theoretically, if the United States were to sign an international agreement or treaty establishing jurisdictional and choice of law standards for speech on the Internet, the treaty would take precedence over domestic rules on private international law.<sup>174</sup> However, the federal government's power to enact international treaties emanates from the U.S. Constitution. Therefore, any treaty that operated in opposition to the Constitution would be unenforceable.<sup>175</sup>

### III. The European Union Approach

It is perhaps instructive to examine how the European Union is attempting to resolve transnational conflicts over jurisdiction and choice of law. As the European Union continues its efforts to resolve these conflicts, it is not only acting as a model for harmonization of laws, but also as a powerbroker in the larger global community.

In an effort to facilitate a strong European market, the twenty-five member States of the European Union are harmonizing their laws through a series of treaties, and in the process creating a supranational government with a structure of its own.<sup>176</sup> The European Union includes

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*The Federalization of Private International Law in the European Community and its Consequences for Transnational Litigants*, 21 J.L. & COM. 157 (2002) (indicating a need for an international treaty, but also warning against the format proposed by the EC at the Hague Convention); Marc H. Greenberg, *supra* note 136, at 1251-53 (2003) (acknowledging the value of an international treaty, but also pointing out that public policy exceptions in proposed treaties would still lead to conflicts over constitutionality like that in the Yahoo! case); Mark F. Kightlinger, *Cyberage Conflicts of Law: A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law*, 24 MICH. J. INT'L L. 719 (2003)(focusing on commercial speech).

173. *Yahoo! v LICRA*, 169 F. Supp. 2d at 1193.

174. U.S. CONST. art. VI (declaring that the laws and treaties of the United States are the supreme law of the land).

175. Ben-Ezer & Bendor, *supra* note 20, at 2136.

176. *See generally* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (ECSC Treaty or Treaty of Paris); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 259, 5 Eur. Y.B. 454 (Euratom Treaty); Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1967 J.O. 152/1 (Merger Treaty); Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506; Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 (Union Treaty or Maastricht Treaty); Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56 (Treaty of Amsterdam); Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts,

several legislative bodies: the European Parliament, which is elected by the citizens of member states; the Council of the European Union, which represents the governments of the member states; and the European Commission, which is the EU's executive body.<sup>177</sup> When these bodies are acting together in operational mode, they are called the European Community. Together these legislative bodies are responsible for efforts to harmonize the disparate laws of member nations, which might otherwise act as a barrier to a strong European market. The law that results from these treaties and the provisions enacted by these bodies and interpreted by the European Court of Justice is called Community law.<sup>178</sup>

Members of the EU have already agreed upon a treaty to settle the question of international jurisdiction—known as the 1968 Brussels Convention (recently updated by the Brussels Regulation)<sup>179</sup>—and a treaty to settle choice of law in contractual disputes—known as the 1980 Rome Convention.<sup>180</sup> The European Community is now in the process of negotiating a new treaty to settle choice of law procedures in non-contractual disputes, which would include Internet cases related to defamation, invasion of privacy or copyright infringement that might have an impact on freedom of expression. The proposal has been dubbed “Rome II.”<sup>181</sup>

#### A. *EU Jurisdiction*

In 2000, the EU adopted the Brussels Regulation, which codified and essentially replaced the earlier Brussels Convention determining juris-

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Feb. 26, 2001, 2001 O.J. (C 80) 1 (Treaty of Nice); Treaty on European Union, 2002 O.J. (C 325) 5; and Treaty Establishing the European Community, 2002 O.J. (C 325) 33. A comprehensive list and access to the European Community's 195 treaties is available at the Council of Europe Legal Affairs website at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Mar. 30, 2005).

177. See Europa.eu, European Union institutions and other bodies, [http://europa.eu.int/institutions/index\\_en.htm](http://europa.eu.int/institutions/index_en.htm) (last visited Feb. 12, 2006).

178. See generally Europa.eu, The European Union at a Glance, [http://europa.eu.int/abc/index\\_en.htm](http://europa.eu.int/abc/index_en.htm) (last visited Mar. 30, 2005).

179. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes (also called the Brussels I Regulation because it replaces the Brussels Convention of 1968) [hereinafter Brussels Regulation], available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_012/l\\_01220010116en00010023.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf).

180. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1998 O.J. (C 27) 36 (entered into force Apr. 1, 1991).

181. *European Parliament, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law applicable to Non-Contractual Obligations* [hereinafter *Rome II*], PR/546929EN.doc., available at [http://www.euro-parl.eu.int/registre/commissions/juri/project\\_rapport/2004/349977/JURI\\_PR\(2004\)349977\\_EN.pdf](http://www.euro-parl.eu.int/registre/commissions/juri/project_rapport/2004/349977/JURI_PR(2004)349977_EN.pdf).

diction in cross-border disputes regarding civil and commercial matters. The treaty refers to its signatories as “Member States.” All EU Member States, except Denmark, are now governed by the Brussels Regulation.<sup>182</sup>

Under its general provisions, the Brussels Regulation requires that defendants of Member States be sued in their home countries.<sup>183</sup> Article 3 effectively prohibits a plaintiff from invoking national rules of jurisdiction against an EU defendant based on the plaintiff’s domicile.<sup>184</sup> Exceptions to this general rule fall under the category of specific jurisdiction, which includes torts. Litigation involving a tort, such as defamation or invasion of privacy, takes place “where the harmful event occurred or may occur.”<sup>185</sup> Moreover, Article 3 does not apply to defendants who reside outside the European Union. Article 4 of the Brussels Regulation stipulates that when an EU plaintiff sues a defendant domiciled outside the EU’s borders, the national provisions of the plaintiff’s state apply.<sup>186</sup>

In reference to Internet publication, this means that when EU plaintiffs sue content providers outside the EU, the plaintiff’s country will assume jurisdiction. Thus EU plaintiffs enjoy the use of their own national provisions.<sup>187</sup> But when non-EU parties initiate suits against EU defendants, the foreign plaintiffs will fall under the jurisdiction and legal rules set up for the European Community as a whole.

While this inequity might frustrate publishers outside the EU, it is not particularly unusual. The United States also favors its own plaintiffs when determining jurisdiction. The Supreme Court has held that in *forum non conveniens* analysis, foreign plaintiffs are entitled to less deference than domestic plaintiffs.<sup>188</sup> Specifically, the Court stated:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less

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182. Denmark continues to follow the original Brussels Convention. Other European states belong to a parallel treaty known as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, 28 I.L.M. 620 (1989) [hereinafter Lugano Convention] (Signatories of the convention include the first 15 member states of the European Union and European Free Trade Area nations Austria, Finland, Iceland, Norway, Sweden and Switzerland.), available at <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm>.

183. Brussels Regulation, art. 2.

184. See Kotuby, *supra* note 172, at 166 (2002).

185. Brussels Regulation, art. 5, No. 3.

186. Brussels Regulation, art. 4.

187. See *Id.*

188. See Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT’L. L.J. 239, 270 (2004).

reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.<sup>189</sup>

Although the Brussels Regulation controls jurisdiction in the EU, the treaty does not address which country's laws apply in a particular case. In the case of contractual disputes, the 1980 Rome Convention controls choice of law selection. In the case of non-contractual disputes, choice of law is still in question. This is the purpose of the proposed Rome II treaty.

### B. *EU Choice of Law*

For several years, the EU has been attempting to negotiate the Rome II treaty to resolve questions of choice of law in non-contractual cross-border disputes. Both the European Council and the European Parliament must approve the treaty before it can take effect.

The EU is largely made up of civil law countries, which traditionally follow the principle that, in fairness to the victim, the choice of law should be that of the claimant's habitual residence or where the damage occurs. However, proposals to make this the standard choice of law met with vocal opposition from publishers and broadcasters, particularly in the United Kingdom, a common law country that has traditionally protected its citizens using a "double actionability rule."<sup>190</sup> Under England's double actionability rule, claims must be justified under UK law as well as the law of the country where the harm occurs.<sup>191</sup> English courts cannot recognize rights that do not exist under English law.

The most disputed section of the Rome II treaty is Article 3(1), which relates to online publishing. The first draft of Rome II provided that the applicable law in a dispute should be that of the claimant's habitual residence.<sup>192</sup> This standard was rejected because publishers conceivably could be tried under the laws of a country in which they never published.<sup>193</sup> A second draft provided that disputes be resolved under the

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189. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

190. European Broadcasting Union Legal and Public Affairs Department, EBU position paper on the draft Regulation on the law applicable to non-contractual obligations ("Rome II"), Jan. 23, 2004, available at [http://www.ebu.ch/departments/legal/pdf/leg\\_pp\\_rome2\\_230104.pdf?display=EN](http://www.ebu.ch/departments/legal/pdf/leg_pp_rome2_230104.pdf?display=EN).

191. Private International Law (Miscellaneous Provisions) Act 1995 (c. 42), available at [http://www.hms.o.gov.uk/acts/acts1995/Ukpga\\_19950042\\_en\\_4.htm](http://www.hms.o.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm).

192. Justice and Home Affairs, *Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations*, Article 3(2)—General rule, available at [http://europa.eu.int/comm/justice\\_home/unit/civil/consultation/index\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm).

193. Olswang, Online publishing: *Media friendly changes to Rome II proposals?* Dec. 14, 2004, <http://www.olswang.com/news.asp?page=newssing&sid=101&aid=804>, (last visited Mar. 26, 2005).

law of the country in which the damage occurred.<sup>194</sup> This standard, while more favorable to publishers, was still problematic because content providers would be subject to the laws of any country in which their content was available, as opposed to the laws of their own country.<sup>195</sup> The European Commission presented this version of Rome II to the European Parliament, which amended it and released a third iteration in June of 2005. The European Parliament suggested that, in general, the applicable law should be that of the country “in which the most significant element or elements of the loss or damage occur.”<sup>196</sup> But Parliament added that with respect to the law applicable in tort actions, such as a violation of privacy or rights relating to the personality,

*a manifestly closer connection* with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply *mutatis mutandis*<sup>197</sup> to Internet publication.<sup>198</sup>

Parliament’s amended provision retained the traditional *lex loci* aspect of choice of law applied by most countries. But it also provided additional security to publishers who principally target a domestic audience, but who might circulate a few publications in another country or whose publications are accessible online.<sup>199</sup>

Parliament’s proposed wording was also extremely similar to the choice of law provision for torts in the United States. According to the Restatement (Second) of Conflict of Laws,

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles . . . to the occurrence and the parties, in which event the local law of the other state will be applied.<sup>200</sup>

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194. *Commission of the European Communities Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations*, Article 3 (1) COM (2003) 0427 FINAL; 2003/0168 (COD) (“Rome II”) (July 22, 2003), available at [http://www.aig.org/r2g/downloads/rome\\_ii\\_final\\_proposal\\_en\\_220703.pdf](http://www.aig.org/r2g/downloads/rome_ii_final_proposal_en_220703.pdf).

195. Olswang, *supra* note 187.

196. *Final Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual obligations (“Rome II”)*, (COM (2003) 427; 2003/0168 (COD) (June 27, 2005), Eur. Parl. Doc. A6-0211/2005 [hereinafter European Parliament].

197. A Latin term meaning “with respective differences taken into consideration.”

198. European Parliament, *supra* note 190, amend. 30, art. 6 (1), at 21-22 (emphasis added).

199. Olswang, *supra* note 193.

200. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

In the case of multi-state defamation, which might occur through a regional, national or international publication, for example, “the state of most significant relationship will usually be the state where the person was domiciled at the time.”<sup>201</sup> The tort of invasion of privacy is handled in the same way.<sup>202</sup>

Choice of law in copyright infringement cases was not a point of contention because it is generally settled from a European Community perspective. Under the Berne Convention, courts apply the law of the country in which the act of infringement took place.<sup>203</sup> However, an earlier draft by Parliament clarified that in “the case of infringements committed over the Internet or as a result of satellite broadcasts, the applicable law is that of the country of reception.”<sup>204</sup>

Parliament also clarified Rome II’s scope by adding that it would not interfere with existing provisions, such as the E-Commerce Directive.<sup>205</sup> The E-Commerce Directive is commonly understood to assert that in cross-border commercial disputes, the applicable law should be that of the country of origin.<sup>206</sup> In other words, under the directive, an EU-based website operator generally would be subject only to the laws of the Member State in which the operator is based.<sup>207</sup> As such, the rule would prevent a *Yahoo!*-like situation from occurring between EU Member States.<sup>208</sup> Mark Kightlinger, who participated in the policy-making process that led to the legislation, notes that the E-Commerce Directive is unusual in the context of Community law because it applies a country of origin rule without first harmonizing the relevant laws of Member States.<sup>209</sup> The measure includes an override mechanism to assuage the concerns of Member States that feared the directive would

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201. *Id.* § 150.

202. *Id.* § 152-53.

203. Berne Convention for the Protection of Literary and Artistic Works art. 5 (2), July 24, 1971, 102 Stat. 2853, 828 U.N.T.S. 221. However, in the United States courts apply the law of the state with the most significant relationship. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998).

204. *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”)* amend. 11, recital 14, at 10, COM (2003) 0427 (Nov. 11, 2004).

205. *European Parliament*, *supra* note 196, amend. 24, art. 1, ¶ 2 a (new), at 15-16.

206. Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of the Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 4.

207. *See* Kightlinger, *supra* note 172, at 723 (noting that the directive excludes certain areas of law, such as copyright, taxation, and data privacy, and also contains a safe harbor for laws related to national culture).

208. *Id.*

209. *Id.* at 732.

limit their power to protect their citizens against Internet content that violated their national policies.<sup>210</sup> In situations in which online material violates an important public policy of the country of reception, that country can launch discussions with the country of origin to determine how best to regulate the offending content.<sup>211</sup> Kightlinger argues that the E-Commerce Directive should serve as a model for an international agreement on jurisdiction and choice of law rules for the Internet.<sup>212</sup>

However, at this point, that seems unlikely. In February of 2006, the European Commission responded to Parliament's suggested changes. Unable to accept Parliament's amendments concerning press liability, it withdrew the provision related to defamation.<sup>213</sup> Calling the move extremely disappointing, Rapporteur on Rome II for the European Parliament's Legal Affairs Committee Diana Wallis stated that

the European Parliament will have to consider its stance when we receive the Common Position from the Council (scheduled for June 2006). It is inconceivable that we should regulate Private International Law at European level without including the media because this is an area which is so much cross border. Even if we agree to leave the media out of the scope of the Regulation, this would have to be on the understanding that it should be revisited promptly, soon, i.e. within two years.<sup>214</sup>

#### IV. Other Intergovernmental Agreements

The world has no other comparable intergovernmental convention on private international law.<sup>215</sup> But in light of transnational disagreements over jurisdiction and choice of law emanating from the Internet's reach, the need for such an agreement is obvious. In 1992, the United States asked the Hague Conference on Private International Law to negotiate a global convention on jurisdiction and recognition of civil judgments.<sup>216</sup> The Hague agreed and formal negotiations began in 1997, leading to a preliminary draft in 1999 and a second interim draft in 2001.<sup>217</sup> Ultimately, though, the attempt was unsuccessful. To salvage the process, the Hague Convention Commission on General Affairs and

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210. *Id.* at 733.

211. *Id.* at 737.

212. *Id.* at 721.

213. *Commission of the European Communities Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations*, COM [2006] 83 FINAL; 2003/0168 COD; "Rome II", (February 21, 2006), available at [http://www.eur-lex.europa.eu/Result.do?T1=V5&T2=2006&T3=0168&RechType=RECH\\_natural&Submit=Search](http://www.eur-lex.europa.eu/Result.do?T1=V5&T2=2006&T3=0168&RechType=RECH_natural&Submit=Search).

214. Diana Wallis, *Rome II Latest News*, ¶ 1, 3, <http://www.dianawallismep.org.uk/pages/rome2.html?PHPSESSID=801ceb21> (last visited May 28, 2005).

215. Kotuby, *supra* note 172, at 167.

216. See Brand, *supra* note 135, at 191; Teitz, *supra* note 3, at 59.

217. Brand, *supra* note 135, at 192-193.

Policy decided in 2002 to focus on the much narrower goal of developing a treaty on choice of court agreements in business-to-business cases.<sup>218</sup> According to Masato Dogauchi and Trevor Hartley, who drew up the later convention draft on this topic, failure to achieve the larger goal was due to “wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention.”<sup>219</sup> Others also argue that the EU’s Euro-centric policy was the problem.<sup>220</sup>

During the Hague negotiations, members of the European Community signed The Treaty of Amsterdam, which extended Community authority to represent members’ interests beyond EU borders in matters related to its internal market.<sup>221</sup> The Treaty of Amsterdam, and subsequent interpretations of it by the European Court of Justice,<sup>222</sup> provided that where international action is “inextricably linked” to an express internal power, “[c]ommunity authority on the international plane is exclusive and irreversible.”<sup>223</sup> Although the Treaty of Amsterdam did not include a provision on responsibility for judicial cooperation, the passage of the Brussels Regulations brought the issue of jurisdiction under the Community law umbrella, giving the European Community leverage on the world stage that it used at the Hague.<sup>224</sup>

As negotiations proceeded, the Hague document began to reflect the

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218. Hague Conference on Private International Law, *Preliminary Draft Convention on Exclusive Choice of Court Agreements*, at 7, Prel. Doc. No. 26 (Dec. 2004) (prepared by Masato Dogauchi and Trevor C. Hartley), available at [http://www.hcch.net/upload/wop/jdgm\\_pd26e.pdf](http://www.hcch.net/upload/wop/jdgm_pd26e.pdf).

219. *Id.* at 6.

220. See Kotuby, *supra* note 172, at 168. See also, Hague Conference on Private Law, Press Release, 6/6/2001, available at [http://hcch.e-vision.nl/index\\_en.php?act=events.details&year=2001&varevent=29&zoek=Convention%20on%20jurisdiction%20and%20foreign%20jud...](http://hcch.e-vision.nl/index_en.php?act=events.details&year=2001&varevent=29&zoek=Convention%20on%20jurisdiction%20and%20foreign%20jud...)

221. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 7.

222. See generally Opinion 1/76 re: The Draft Agreement for a Laying-Up Fund for Inland Waterway Vessels, 177 E.C.R. 741, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61976V0001:EN:HTML>; Opinion 1/94 re: The Uruguay Round Treaties, 1995 C.M.L.R. 205, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994V0001:EN:HTML>.

223. Kotuby, *supra* note 172, at 168. See also Case 22/70, *Comm’n v. Council (ERTA)*, 1971 E.C.R. 263, ¶17, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61970J0022:EN:HTML> (explaining that “each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules . . . the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries.”).

224. See Kotuby, *supra* note 172, at 167.

Brussels Regulation.<sup>225</sup> According to Professor Ronald Brand, a member of the U.S. delegation negotiating the convention, there was common ground between the EU and American positions.<sup>226</sup> For example, both agreed, in general, that jurisdiction is proper in the courts of the defendant's habitual residence or in the courts of a state where the defendant operates a branch establishment if the claim arises from its activities.<sup>227</sup> Also, both agreed on jurisdiction based on effects.<sup>228</sup> However, to meet constitutional requirements for due process, the United States needed recognition of the defendant's intent as well, or at least a greater focus on the nexus between the court and the defendant.<sup>229</sup> The American delegation thought this might be possible, considering that a general provision of the Brussels Regulation provides that jurisdiction is proper in the defendant's habitual residence.<sup>230</sup> However, the EU delegation focused instead on the treaty's provision for specific jurisdiction, which concentrates on the nexus between the court and the claim in tort cases. It suggested wording that would give the plaintiff a right to bring an action related to tort claims in the state:

- a) in which the act or omission that caused injury occurred, or
- b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in the State.<sup>231</sup>

The U.S. delegation offered the following alternative:

A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity in that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in the state.<sup>232</sup>

An attempt was made to reconcile the two approaches in proposed wording, but the conference concluded without an agreement to include the second paragraph.<sup>233</sup> While American representatives could not get

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225. See Hague Conference on Private International Law, *Some Reflections on the Present State of Negotiations of the Judgments Project in the Context of the Future Work Programme of the Conference*, at 7, Prel. Doc. No. 16 (Feb. 2000), available at [http://www.hcch.net/upload/wop/gen\\_pd16e.pdf](http://www.hcch.net/upload/wop/gen_pd16e.pdf). See also Teitz, *supra* note 3, at 60.

226. Brand, *supra* note 135, at 199.

227. *Id.*

228. *Id.*

229. *Id.* at 202.

230. *Id.*

231. Hague Conference on Private International Law, *Special Commission on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Working Doc. No. 98 (June 2001), cited in Brand, *supra* note 135, at 206.

232. Hague Conference on Private International Law, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference*, Art. 6, Interim Text (June 2001), available at [http://www.hcch.net/upload/wop/jdgm2001\\_draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001_draft_e.pdf), cited in Brand, *supra* note 135, at 206.

233. See Brand, *supra* note 135, at 207.

past EU standards that, from a U.S. perspective, lacked sufficient due process, European representatives took issue with what they considered insufficient protections for plaintiffs.<sup>234</sup> There were other aspects of American jurisprudence that disturbed Member States as well. These included high jury awards, class action suits, anti-suit injunctions<sup>235</sup> and tag jurisdiction<sup>236</sup>—factors which make foreign courts reluctant to uphold some U.S. judgments.<sup>237</sup>

The U.S. government had hoped the Hague treaty would encourage greater acceptance of U.S. judgments abroad. To facilitate the process, the American Law Institute (ALI) initiated a parallel effort called the International Jurisdiction and Judgments Project.<sup>238</sup> This project's original purpose was to draft federal legislation to codify the Hague treaty expected to emerge from the negotiations.<sup>239</sup> When the treaty project was scaled back, the ALI decided to draft a federal statute "to make recognition and enforcement of foreign-country judgments uniform through the United States."<sup>240</sup> The proposed legislation adopts a modified version of the *lis pendens* principle, favored by the EU and civil law nations, which assumes that the court in which an action is first filed will assume jurisdiction and that, barring certain exceptions, U.S. courts will enforce the judgments of those courts.<sup>241</sup> But it also bases U.S. recognition and enforcement of foreign judgments on reciprocity from other countries.<sup>242</sup> Although this provision will likely decrease the number of foreign judgments recognized and enforced by the United States, at least initially, the ALI considers this carrot and stick approach a way to exert pressure on other nations to enforce U.S. judgments.<sup>243</sup>

The proposed statute, the Federal Judgments Recognition and Enforcement Act, contains the standard provision rejecting foreign judgments that violate public policy.<sup>244</sup> But it also includes a discussion of

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234. *See id.*

235. Anti-suit injunctions enjoin parties from proceeding in another forum, which may be perceived by another court as a challenge to its authority. *See* The American Law Institute, International Jurisdiction and Judgments Project § 5 at 72 (Tentative Draft No. 2, 2004) [hereinafter International Jurisdiction and Judgments Project], <http://www.ali.org/ali/IJ&J2004.pdf>.

236. Tag jurisdiction refers to the practice of asserting jurisdiction over a defendant solely on the basis of the defendant's temporary presence within the forum. *Id.* at 176.

237. *See* Anglim, *supra* note 188, at 284.

238. *See* International Jurisdiction and Judgment Project, *supra* note 235, at xi. *See also* Anglim, *supra* note 188, at 242.

239. *See* International Jurisdiction and Judgment Project, *supra* note 235, at xi.

240. *Id.*

241. *Id.*

242. *Id.* at xi-xii.

243. *See* Anglim, *supra* note 188, at 243, 294; Teitz, *supra* note 3, at 70.

244. International Jurisdiction and Judgments Project, *supra* note 235 § 5(h) at 54.

the exception's relationship to the First Amendment.<sup>245</sup> The ALI is of the opinion that American courts should enforce judgments, such as those in *Bachchan v. India Abroad Publications* and *Telnikoff v. Matusevitch*, in which the plaintiffs were seeking defendants' assets in the U.S., but "values represented in differences about the limits of free expression do not appear to be engaged."<sup>246</sup> The ALI is suggesting that the United States has no public policy interest to protect in cases involving complaints initiated in another country over material produced abroad. Both *Telnikoff* and *Bachchan* involved suits filed in England over material produced there. The ALI is more sympathetic to cases such as *Yahoo! v. LICRA* and *Dow Jones v. Gutnick*, "where expression emanates from the United States or is directed or connected to the United States in some way."<sup>247</sup> But The ALI's reasoning is somewhat strained in reference to *Bachchan* because, while the article in question was produced in England and the lawsuit was filed there, the article was produced by an English subsidiary of an American company and published in New York as well as England. By The ALI's definition, it was connected to the United States.

The ALI offers no other substantive guidelines on First Amendment concerns related to jurisdiction other than expressing its hope that other treaties, such as the EU's European Convention on Human Rights and the United Nations' International Covenant of Civil and Political Rights, may foster "greater sensitivity to principles akin to the First Amendment."<sup>248</sup>

### Conclusion

Four years have passed since negotiation of the broader treaty on jurisdiction and recognition of foreign judgments failed, and during this period European Community and American law have taken steps toward one another. The European Community passed the E-Commerce Directive, making the country of origin the choice of law in product liability cases. This indicates a practical awareness that consistency and predictability facilitate market productivity. Also, in Rome II, the European Parliament suggested wording that retains a traditional focus on choice of law based on the place where harm occurs, while offering a second alternative—the "manifestly closer connection," which is very

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245. *Id.* § 6(d) at 67-70.

246. *Id.* at 68.

247. *Id.*

248. *Id.* at 70.

similar to the standard used in the United States. Although the European Commission rejected the compromised wording, it is significant that the elected body of EU government with co-decision making power on EU law recognizes the need for flexibility in determining the law that will be applied to media operating on the Internet and intends to keep working toward that goal.

Recent changes in U.S. law suggest that the United States may have to compromise as well. Despite recent set-backs involving the adoption of an EU Constitution, the European Union is gaining power on the world stage and influencing American policy in the process.<sup>249</sup> European Community law precipitated a substantial change in American copyright law in 1998, when Congress extended copyright terms by twenty years both prospectively and retrospectively to bring U.S. copyright law in line with EU copyright law.<sup>250</sup> Fearing the loss of twenty years of returns on intellectual property—one of the main exports in the United States—Congress enacted the law, despite its negative effects on expression.<sup>251</sup> Also, to preserve American companies' access to the EU electronic market, the U.S. Department of Commerce was forced to create a "safe harbor" database of U.S. companies with privacy standards similar to those mandated by the EU.<sup>252</sup> The Safe Harbor was developed in response to the European Community's Electronic Communications Data Protection Directive, which prohibits Member States from engaging in electronic commerce with countries that do not protect EU citizen's privacy rights.<sup>253</sup>

Continued negotiations at The Hague on a Choice of Court Conven-

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249. See Peter Ford, *European Union's woes a storm in a teacup*, CHRISTIAN SCIENCE MONITOR, June 3, 2005, at <http://www.csmonitor.com/2005/0603/p07s01-woeu.html>.

250. Sony Bono Copyright Term Extension Act, 17 U.S.C. § 304 (2000). See also Jenny Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM/ENT L.J. 945, 968 (1996).

251. See H.R. Rep. No. 105-452 at 4 (1998) ("U.S. works will generally be protected for the same amount of time as works created by the European Union authors; therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States.") and The Copyright Term Extension Act of 1995: Hearings on S4839 Before the Senate Judiciary Comm., 104th Cong. 4 (1995) (statement of Sen. Feinstein) (observing that "perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms.").

252. See U.S. Department of Commerce Safe Harbor, <http://www.export.gov/safe-harbor/> (last updated Mar. 2, 2005).

253. Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, 1995 O.J. (L 281) 31.

tion for contract disputes—while much smaller in scope than the original treaty conceived—signal a willingness among Member States to seek compromise where it can be found.<sup>254</sup> The ALI's proposed federal statute is also a move toward compromise. If Congress passes the measure, the Act would provide uniform standards for recognition of foreign judgments across the fifty states, making future negotiations with the United States much less unwieldy. But the provision on reciprocity is a step backward that will likely antagonize other convention members.

Undoubtedly financial considerations are an incentive for change in the legal arena. The American trade deficit is now more than \$600 billion.<sup>255</sup> The United States imports fifty four percent more than it exports.<sup>256</sup> Meanwhile, growth in domestic sales is slower due to increasing consumer debt.<sup>257</sup> While Internet sales in the United States remain strong, a recent Nielson NetRatings report on e-commerce indicates that growth in mature markets like the United States is “flat-lining.”<sup>258</sup> Opportunities for growth are to be found in “emerging markets,” such as Australia, France, Hong Kong, Italy and Japan.<sup>259</sup> Meanwhile, a survey by the International Chamber of Commerce showed that companies are foregoing opportunities abroad due to their concerns about which courts would adjudicate disputes and which nation's law would apply.<sup>260</sup> The United States has an extraordinary interest in facilitating international opportunities in e-commerce, and one way to do that is to make the legal implications of operating on the Internet as predictable as possible.

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254. For a discussion of the work yet to be accomplished, *see generally* Hague Conference on Private International Law, *The Relationship Between the Judgments Project and Other Institutional Instruments*, Prelim. Doc. No. 24 (Dec. 2003) (prepared by Andrea Schulz), available at [http://www.hcch.net/upload/wop/jdgm\\_pd24e.pdf](http://www.hcch.net/upload/wop/jdgm_pd24e.pdf).

255. Elizabeth Becker, '04 Trade Deficit Sets Record, \$617 Billion, N.Y. TIMES, February 11, 2005, at C1.

256. *Id.*

257. *See* Lauren Weber, *Consumer Debt May Drag Retail Sales*, NEWSDAY, Jan. 18, 2005, at A34.

258. *See* Rob McGann, *Web Usage Growth Flatlines in U.S., Other Mature Markets*, CLICKZ NETWORK: SOLUTIONS FOR MARKETERS, Mar. 21, 2005, <http://www.clickz.com/stats/sectors/geographics/article.php/3491501> (last visited Feb. 17, 2006).

259. *Id.*

260. *See* Anglim, *supra* note 188, at 288 (describing the International Chamber of Commerce survey, in which 40 of the 100 respondents indicated that uncertainties about jurisdiction and choice of law often factor into business decisions.). *See also* Hague Conference on Private International Law, Report on the work of the Informal Working Group on the Judgments Project, in particular on the preliminary text achieved at its third meeting of March 2003, Prel. Doc. No. 22, available at [http://hcch.e-vision.nl/index\\_en.php?act=progress.listing&cat=4](http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=4).

Transnational cases involving conflicts over jurisdiction and choice of law indicate a disparity in approaches between the United States and other countries, which courts are obviously unwilling to bridge. For practical, if not for noble reasons, governments are going to have to negotiate a solution.