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Cyber-Libeling the Glitterati: Protecting the First Amendment for Internet Speech

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Cyber-Libeling the Glitterati: Protecting the First Amendment for Internet Speech

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The First Amendment is a local ordinance in cyberspace.
- John Perry Barlow[1]

[I]f all printers were determined not to print anything till they were sure it would offend nobody, there would be very little printed.
- Benjamin Franklin[2]

"Tom Cruise is gay."[3] "Paris Hilton is a drug smuggler."[4] Michael Jackson "practices bestiality."[5] "Lindsay Lohan is suicidal, possible lesbian."[6] "George W. Bush, Jr. has a cocaine problem."[7] "Britney Spears smokes a joint" and "forces marijuana onto minors."[8] "Mel Gibson hates Jews."[9] In the age of the Internet, rumors such as these spread as fast as high-speed connections can carry them and may cause widespread injury to a person's reputation. The First Amendment nearly protects all of this speech. However, thanks to the Internet and the complex choice of law problems it presents, publishers of such celebrity gossip may face liability in defamation actions abroad, where courts often value free speech and expression considerably less than their American counterparts.

The First Amendment to the U.S. Constitution protects the freedom of American speech and expression, especially when that speech is political and related to matters of public concern. In light of

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1. Craig E. Cline et al., *Digital World '95: It's the Point of View*, SEYBOLD REPORT ON DESKTOP PUBLISHING (Resource Information Systems Inc., Boston, Mass.), vol. 9, issue 11, July 17, 1995, at 3, *available at* Thomson Gale, doc. no. A17210027.

2. Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE, June 10, 1731, *reprinted in* BENJAMIN FRANKLIN, AN APOLOGY FOR PRINTERS 7 (Randolph Goodman ed., Acropolis Books, Ltd. 1973).

3. Jossip.com, Tom Cruise is Gay: Now with Substantially More Fake Evidence, http://www.jossip.com/gossip/tom-cruise/tom-cruise-is-gay-now-with-substantially-more-fake-evidence-20050629.php (June 29, 2005).

4. TheSuperficial.com, Nick Carter Says Paris Hilton is a Drug Smuggler, http://thesuperficial.com/2006/10/nick_carter_says_paris_hilton.html (Oct. 23, 2006).

5. MoxieGrrrl.com, Michael Jackson is a Freakish Pervert, http://www.moxiegrrrl.com/2005/06/michael-jackson-is-freakish-pervert.html (June 14, 2005).

6. TheSuperficial.com, Lindsay Lohan is Suicidal, Possible Lesbian, http://thesuperficial.com/2006/11/lindsay_lohan_is_suicidal_poss.html (Nov. 17, 2006).

7. Adam J. Smith, Governor Bush's Cocaine Problem, http://www.progress.org/drc12.htm (last visited Feb. 4, 2007).

8. TheSuperficial.com, Britney Spears Smokes a Joint, http://thesuperficial.com/2006/04/britney_spears_smokes_a_joint.html (Apr. 25, 2006).

9. Pinkdome.com, Mel Gibson Hates Jews, http://pinkdome.com/archives/2006/07/mel_gibson_hate.html (July 29, 2006).

this protection, the U.S. Supreme Court has recognized a broad immunity from defamation suits for publishers when the content of their speech concerns a public figure, including politicians as well as those in the public eye.[10] To succeed in an American defamation suit, public figures such as celebrities, pop stars, and other members of the "glitterati" must prove that false information was published with "actual malice."[11] This is a very difficult burden to meet, and most public figures–if they even choose to file suit–will fail in American courts.[12]

Other nations, however, have much more "plaintiff friendly" standards for defamatory speech. For example, Australian law, unlike the broad privilege granted in the United States to publishers of material about public figures, is "considerably more favorable to the plaintiff than that of the United States."[13] Until recently, how defamation law was applied "down under" and around the globe was of little concern for American publishers; when publication occurred in the United States, foreign courts did not (and could not) exercise jurisdiction over them. All of this changed, however, when a foreign court cavalierly exercised a broad jurisdictional reach over an American publisher. In the recent landmark case of *Dow Jones & Co. v. Gutnick*, the Australian High Court exercised jurisdiction over an American publisher simply because material was accessed "on-line" from a computer located in Australia.[14] The *Gutnick* decision could sound the death-knell for First Amendment protection in a digitized world, as smart plaintiffs will begin to file suits in Australian courts, where they are more likely to succeed.

Celebrity gossip is disseminated on the Internet not only by profitable publications and Internet tabloids with professional writers and sophisticated legal teams, but also by countless numbers of "blogs" posted by ordinary individuals, often with nothing more than a dial-up connection. Americans posting speech on the Internet must be

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10. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

11. *Id.* at 254.

12. *See, e.g.*, Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) (denying defendant *Time*'s motion for summary judgment and stating that plaintiff bears the burden of establishing actual malice by "clear and convincing" proof); Spears v. US Weekly, No. SC087989 (Ca. Super. Ct. Nov. 3, 2006), *available at* http://news.lp.findlaw.com/hdocs/docs/spears/uswkly110306ord.pdf (holding that it was not defamatory to state that Plaintiff Britney Spears and her then-husband Kevin Federline taped themselves having sex, because she had "put her modern sexuality squarely, and profitably, before the public eye").

13. Nathan W. Garnett, Dow Jones & Co. v. Gutnick: *Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM L. & POL'Y J. 61, 69-70 (2004).

14. Dow Jones & Co., Inc. v. Gutnick (2002) 194 A.L.R. 433 (Austl.).

aware of the implications of the *Gutnick* decision and recognize that they could be dragged into court and held liable for defamation abroad. This note explores theoretical changes to the law that should be adopted to protect the First Amendment as it applies to Internet speech. Additionally, this note discusses various practical tactics that publishers–both professionals and bloggers alike–may employ to prevent liability.

I. BACKGROUND

"[T]he press has been making mistakes from its earliest days, and like any human enterprise, always will."[15] The law of defamation attempts to provide an outlet for individuals to avenge their reputation after it has been tarnished by the publication of false statements. However, defamation law involves a clash of two important societal values: freedom of speech and freedom to protect one's own reputation.[16] "The proper balance between these two goals has been vigorously debated over the years," and different nations have crafted varying approaches to deal with this tension.[17]

A. Defamation Law in the United States

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[18] Defamation law in the United States has struggled to protect this freedom of speech and press, while protecting individuals whose reputations may be injured by a false publication.

Defamation law in the United States includes civil actions for both libel (written words) and slander (spoken words).[19] Defamation provides personal reputational protection for individuals harmed by the speech of others.[20] American defamation jurisprudence is characterized by two distinct time periods: pre-1964 (the common law)

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15. RODNEY A. SMOLLA, SUING THE PRESS 10 (1986).

16. Everette E. Dennis & Eli M. Noam, *Introduction* to THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, at vii (Everette E. Dennis & Eli M. Noam eds., 1989).

17. *Id.*

18. U.S. CONST. amend. I.

19. *See* WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 785-87 (W. Page Keeton et al. eds., 5th ed. 1984) (noting the distinctions between libel and slander).

20. *See id.* at 772; Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by* Gutnick v. Dow Jones & Co., 62 WASH. & LEE L. REV. 279, 285-86 (2005).

and post-1964, the year of the landmark case *New York Times v. Sullivan*.

1. American Common Law: Strict Liability

In the United States, the common law of defamation set the balance between free speech and reputation firmly in favor of reputation.[21] Traditionally, American defamation law closely mirrored English common law.[22] The law of defamation was left to state control,[23] and the prevailing rule reflected a theory of "strict accountability for the substance of a defamatory statement."[24] Publishers were, in effect, "insurers of the reputations of those affected partly because the press was viewed as a powerful force with considerable ability to harm innocent persons." [25] Additionally, it was argued that the press could mitigate the harmful effects of the strict liability rule by risk spreading and insurance.[26] To succeed in a defamation suit at common law, a plaintiff needed only to prove:

> by a bare preponderance of the evidence (the normal burden of proof in civil, as opposed to criminal, cases) that the defendant had uttered (or, more commonly, published) words tending to injure the alleged victim's reputation. The plaintiff/victim was not required to prove that the defendant/publisher was negligent or in any other way at fault, and indeed the plaintiff did not even have to prove that the imputation was false. The defendant could, to be sure, prevent recovery by asserting an affirmative defense and showing that the words were true.[27]

In other words, the law required the plaintiff to show merely that (1) a publication or utterance (2) caused (3) injury to his or her reputation. Under this common law tradition, defamation law was not a subject of constitutional concern.[28]

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21. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 17 (G. Edward White ed., 1986).

22. Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 38 (Michael Ignatieff ed., 2005).

23. *See, e.g.*, Okla. Publ'g Co. v. Givens, 67 F.2d 62 (10th Cir. 1933); Walker v. Bee-News Publ'g Co., 240 N.W. 579 (Neb. 1932); *see also* WILLIAM L. PROSSER, THE LAW OF TORTS 596-604 (2d ed. 1955) (providing many additional state cases, leading to the inference that common law defamation was left entirely to state law).

24. *Developments in the Law – Defamation*, 69 HARV. L. REV. 875, 904-05 (1956).

25. Stephen M. Renas et al., *An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?*, *in* THE COST OF LIBEL, *supra* note 16, at 41, 44.

26. *Id.*

27. Schauer, *supra* note 22, at 38.

28. *See* SMOLLA, *supra* note 15, at 25 (indicating that the 1964 *Sullivan* decision marked the first time that constitutional restraints were applied to state defamation law).

2. American Law Today: *New York Times v. Sullivan* and its Progeny

In 1964, the United States departed dramatically from its common law tradition. In *New York Times v. Sullivan*,[29] the Supreme Court "revolutionized the modern law of libel by declaring for the first time that state libel laws were subject to First Amendment restraints."[30] The Court feared that the traditional common law approach imposed all risk of falsity upon the publisher, which in turn made publishers wary of reporting even those charges that were in fact true.[31] Justice Brennan expressed this concern:

> [C]ritics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make statements which steer far wider of the unlawful zone.[32]

This phenomenon, now widely termed "the chilling effect,"[33] was, in the Court's opinion, "inconsistent with a First Amendment[,] part of whose goal was to encourage exposing and thus checking the abuses of those in power."[34] The Court reasoned that if public officials were allowed to recover damages for any false and defamatory statement, regardless of the level of care taken in printing such a story, then newspapers would be discouraged, or "chilled," from printing stories on matters of public interest.[35] To remove the "chilling effect" of defamation law, the Court imposed, as a matter of constitutional law,

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[36]

The Court held that the police commissioner's case was "constitutionally insufficient to support a finding" for the plaintiff.[37]

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29. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). For a detailed description of the factual background of the *Sullivan* decision, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

30. SMOLLA, *supra* note 15, at 25.

31. *See Sullivan*, 376 U.S. at 279.

32. *Id.*

33. *See* Arielle D. Kane, Note, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L. REV. 159, 181 (2001); Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of First Amendment Doctrines*, 78 B.U. L. REV. 507, 526-27 (1998).

34. Schauer, *supra* note 22, at 39 (referencing Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J., at 521-97 (1977)).

35. *See Sullivan*, 376 U.S. at 279.

36. *Id.* at 279-80.

37. *Id.* at 292.

The *Sullivan* Court acknowledged the idea that "politicians . . . must accept the risk of criticism as a consequence of their entry into public life, but the ordinary citizen should not be held to that risk."[38] As such, the Court created two distinct standards for fault: one for defamed public officials and one for defamed private individuals.[39] Under *Sullivan*, a public official must prove by clear and convincing evidence that the material was published with constitutionally defined "actual malice"; that is, that the defendant published false, defamatory material with knowledge or reckless disregard of its falsity.[40] Private individuals speaking on private issues, however, need only show by a mere preponderance of the evidence that the defendant was at fault in publishing the defamatory falsehood[41]; in most jurisdictions, this requires a showing of simple negligence.[42] Under this framework, public officials have a much more difficult time succeeding in a defamation suit.

In the years following *Sullivan*, the Supreme Court has refused to back away from its approach, instead choosing to extend it. The Court has applied the "actual malice" standard to candidates for public office as well as to office holders[43] and extended the standard to "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."[44] As a result, courts have applied the rule to pop stars, television chefs, authors, corporate executives, professional athletes, and other such members of the "glitterati."[45]

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38. ERIC BARENDT, FREEDOM OF SPEECH 208 (2d ed. 2005).

39. *See generally* BRUCE W. SANFORD, *Who Is the Plaintiff? The Public v. Private Person Determination*, *in* LIBEL AND PRIVACY 7-1 (2d ed. 1991 Supp. 2006). This is admittedly a simplified version of American defamation law.

40. *Sullivan*, 376 U.S. at 279-80.

41. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); SMOLLA, *supra* note 15, at 114.

42. *See, e.g.*, Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983); Brown v. Kelly Broad. Co., 771 P.2d 406 (Cal.1989); Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980); Rouch v. Enquirer & News of Battle Creek, Mich., 398 N.W.2d 245 (Mich. 1986); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976).

43. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

44. *Gertz*, 418 U.S. at 342 (though the Court eventually held that the plaintiff, a prominent Chicago attorney retained in a civil suit against a Chicago policeman, was not a public figure).

45. *See generally* Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (holding that a wealthy socialite whose divorce was mischaracterized in Time magazine was not a public figure because she did not "assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it").

The *Sullivan* decision undoubtedly changed defamation doctrine in the United States by bringing the once private law governing defamatory speech under the ambit of First Amendment constitutional jurisprudence.[46] The decision also mandated a showing of "falsity as a constitutional prerequisite to a public figure's recovery for defamation"[47] and introduced drastically different standards of fault for publishers, depending upon the public status of the defamed plaintiff.[48] The decision also changed the practice of defamation suits, as it "effectively ended civil defamation suits by public officials in the United States."[49] Today, "the law of libel involving public [figures] ha[s] been all but abolished."[50]

B. Defamation Law in Australia[51]

There is no explicit "freedom of speech" guarantee in the Australian Constitution.[52] The freedom, like all civil liberties in Australia, is recognized and protected by the common law. Additionally, Australia does not have a uniform national defamation law.[53] Instead, each of Australia's eight states and territories has its own defamation law. However, the Australian High Court is the final arbiter of the common law throughout the country, and need not defer to a state court to interpret state legislation or the common law.[54] As

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46. Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 66-67 (2005) [hereinafter Weaver & Partlett, *Democratic Governance*].

47. Ronald A. Cass, *Principles and Interest in Libel Law After* New York Times*: An Incentive Analysis*, *in* THE COST OF LIBEL, *supra* note 16, at 70 (citing *Sullivan*, 376 U.S. at 279-80).

48. *Sullivan*, 376 U.S. at 269, 279-80.

49. Weaver & Partlett, *Democratic Governance*, *supra* note 46, at 66-67.

50. Dennis, *supra* note 16, at viii.

51. This note focuses on Australian defamation law because it differs in many crucial aspects from American law and offers an interesting comparative perspective to American law. Additionally, Australia was the first nation to hold an American publisher liable for speech published in the United States, simply because of the material's presence on the Internet. *See* Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austl.). This broad reach of jurisdiction is unique and carries major implications for American publishers.

52. *See generally* COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT (Austl.), *available at* http://www.comlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/$FILE/ConstitutionAct.pdf.

53. There have been attempts to achieve uniformity. *See, e.g.*, Michael D. Kirby, *"The Purest Treasure?" National Defamation Law Reform in Australia*, 8 FED. L. REV. 113, 136 (1977); Sally Walker, *The New South Wales Law Reform Commission's Discussion Paper on Defamation*, 2 TORTS L.J. 69, 69 (1994) (Austl.).

54. *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 562-64 (Austl.).

a result, the High Court's judicial decisions apply throughout the nation.

Despite the *Sullivan* decision in the United States, the Australian High Court, like most other Commonwealth countries, "steadfastly clung to the notion that defamation is a necessary protection lest good people fall to foul rumor."[55] There are three distinctive stages in Australia's defamation law history: the common law, the era of *Theophanous v. Herald & Times Weekly*, and the current era of *Lange v. Australian Broadcasting Corporation*.

1. Australian Common Law

In Australia, like in the United States, defamation law provides separate actions for libel and slander.[56] Prior to 1994, Australian defamation law was similar to English and American common law: publishers of defamatory material were strictly liable for false statements, regardless of the publisher's knowledge or intent.[57]

2. Australian Defense of Privilege: *Theophanous v. Herald & Times Weekly*

Although the Australian Constitution contains no explicit protection for free speech, it has been interpreted to contain an implied protection for political communication.[58] In 1994, in *Theophanous v. Herald & Weekly Times*, Australia's High Court relied upon these implied protections to create a constitutional defense of "privilege" for defamatory publication of political and governmental matters.[59] The defense was applicable so long as defendants could show that: (1) they were unaware that the publications were false; (2) they had not published recklessly, without caring about truth or falsity; and (3) publication was reasonable under the circumstances.[60]

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55. Russell L. Weaver et al., *Defamation Law and Free Speech:* Reynolds v. Times Newspapers *and the English Media*, 37 VAND. J. TRANSNAT'L L. 1255, 1258 (2004).

56. Ray Watterson, *Defamation*, *in* MEDIA LAW IN AUSTRALIA 9, 11 (Mark Armstrong et al. eds., 3d ed. 1995).

57. *Id.* at 25.

58. *See* Australian Capital Television v. Commonwealth (1992) 177 C.L.R. 106, 107-08 (Austl.); Nationwide News v. Wills (1992) 177 C.L.R. 1, 2 (Austl.). The implication has been confirmed and expanded in subsequent cases. *See Lange*, 189 C.L.R. at 556 (Austl.); Theophanous v. Herald & Weekly Times (1994) 182 C.L.R. 104, 121 (Austl.).

59. *Theophanous*, 182 C.L.R. at 140.

60. *Id.* at 104.

The exception was strictly limited, however, to publications about political or government matters.[61]

3. Australian Law Today: *Lange v. Australian Broadcasting Corporation*

Less than three years later, the High Court, which was divided in *Theophanous*, readdressed the issue of qualified privilege in *Lange v. Australian Broadcasting Corp.*[62] In a unanimous judgment, "the High Court solidly established the existence of the implied protection for political communication and refashioned the common law of defamation to accord with it."[63] Per that decision, a defense of qualified privilege requires that the defendant establish: (1) it had reasonable grounds to believe the publication was true; (2) it did not believe the publication was false; and (3) it had made proper inquiries to verify the publication.[64] In addition, defendants must have sought and published a response from the potential plaintiff, except when neither practical nor necessary.[65] Although *Lange*'s qualified privilege can be defeated by a showing of malice, the court's focus is almost always on the reasonableness inquiry in the first prong.[66]

The qualified privilege espoused by *Lange* is limited to publication related to the conduct of governmental affairs.[67] The High Court explicitly refused to accept the American extension of a broad privilege to all public figures, as such an "extension would reach far beyond the representative government rationale" that supported a move away from strict liability for political speech.[68] The Australian High Court seemed to agree with the proposition that "*Sullivan* tilt[ed] the balance too far away from the protection of individual reputation."[69]

Subject to limited qualifications, such as those set out by the High Court in *Lange*, liability for publication of defamatory material

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61. Weaver & Partlett, *Democratic Governance*, *supra* note 46, at 69-70.

62. *Lange*, 189 C.L.R. at 571, 572.

63. Russell L. Weaver & David F. Partlett, *Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 GEO. WASH. INT'L L. REV. 377, 386 (2004) [hereinafter Weaver & Partlett, *Free Speech*].

64. *See Lange*, 189 C.L.R. at 574.

65. *Id.*

66. Weaver & Partlett, *Free Speech*, *supra* note 63, at 386-87.

67. Weaver et al., *supra* note 55, at 1258.

68. Leonard Leigh, *Of Free Speech and Individual Reputation:* New York Times v. Sullivan *in Canada and Australia*, *in* IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH AND EUROPEAN LAW 51, 64 (Ian Loveland ed., 1998).

69. *Id.*

in Australia remains strict. It matters not that an author did not understand that the words were defamatory, did not intend to harm the plaintiff, or took all reasonable care in checking the material to avoid defamatory content.[70] However, under *Lange*, defendants do enjoy a qualified privilege in publications related to governmental affairs, so long as they had reasonable grounds to believe the publication was true, did not believe it was false, and made the proper inquiries to verify the publication. This qualified privilege is narrowly restricted to public officials such as elected representatives and candidates for office, and does not extend to public figures such as celebrities or pop stars.

C. Cyber-Libel: Defamation and the Internet

Different nations place different premiums on free speech and, as a result, have varying levels of protection for defamatory speech. Until recently, disparities in defamation laws made little difference as "defamation laws, and their application[s], [were] restricted to their respective counties."[71] This changed, however, with the advent of the Internet: "As communications technology advanced, the effect of a statement became more and more widespread, until the Internet gave communicators the ability to send one line to the entire world instantaneously."[72] "Cyber-libel," defamation claims for material posted on web-pages, in chat-rooms, or in electronic newspapers, has complicated defamation jurisprudence.[73]

Defamation claims often raise choice of law questions.[74] This is especially true when the defamatory speech is disseminated in several different nations. Because defamation law "clearly applies to communications on the Net,"[75] the number of claims arising from multi-national defamation undoubtedly has increased.[76] Traditional choice of law principles instruct that a tort dispute is governed by the law of the locale where the harm occurred.[77] "In [typical] defamation cases, 'the place of the wrong' [is] the jurisdiction where the

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70. Watterson, *supra* note 56, at 25.

71. Garnett, *supra* note 13, at 68.

72. Bone, *supra* note 20, at 290.

73. *See* SANFORD, *supra* note 39, at 13-8.

74. *See* James R. Pielemeier, *Choice of Law for Multistate Defamation – The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 55 (2003).

75. BARENDT, *supra* note 38, at 463.

76. Pielemeier, *supra* note 74, at 111.

77. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER AND RELATED PROBLEMS 759 (2d ed. 1994) (quoting RESTATEMENT OF CONFLICT OF LAWS § 378 (1934)).

defamatory matter was heard or read by a third person, regardless of the place of broadcasting or writing."[78] The Internet is "ubiquitous, borderless, global and ambient" by nature, however.[79] Both the United States and Australia have crafted different approaches to addressing the complicated choice of law concerns raised by such global defamation actions.

1. American "Choice of Law"

American courts that have addressed the jurisdiction questions arising from Internet defamation have "exhibit[ed] a general unwillingness to allow libel plaintiffs to assert personal jurisdiction over defendants simply based on the ability of individuals in a plaintiff's own forum to access allegedly defamatory material via the Internet."[80] Most American courts hold that Internet content must be "expressly targeted at or directed to the forum state" to support jurisdiction, and that jurisdiction is proper only if the publishers "manifested an intent to direct their website content" to a particular jurisdiction's audience.[81] These courts would not support an exercise of jurisdiction simply because material was accessible within the jurisdiction.

2. Australian "Choice of Law:" *Dow Jones & Co. v. Gutnick*

While American courts are increasingly unwilling to recognize personal jurisdiction over defamation defendants based solely on the ability of individuals in the defendant's forum to access the material on the Internet, Australian courts have no such qualms. In 2002, the High Court of Australia issued a landmark decision in *Dow Jones & Co. v. Gutnick*.[82] Gutnick was the subject of an exposé in Barron's Online magazine and the Wall Street Journal Online newspaper, both accessible on the Internet, and claimed that he was defamed by the article.[83] Gutnick, a citizen of Australia, filed the suit in Australian courts.[84] Dow Jones, an American company and the parent of Barron's and the Wall Street Journal, contended that the transformation of an

78. *Id.*

79. Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575, 616 (Austl.) (Kirby J., concurring) (noting that there are more than 650 million people connected by the internet).

80. SANFORD, *supra* note 73, at 13-8 (citing Griffis v. Luban, 646 N.W.2d 527, 534-35 (Minn. 2002)).

81. Young v. New Haven Advocate, 315 F.3d 256, 262-63 (4th Cir. 2002).

82. *Gutnick*, 210 C.L.R. at 575.

83. *Id.*

84. *Id.*

article from print format to electronic format is similar to the traditional publication of an article.[85] Because Dow Jones' electronic conversion sites were located in New Jersey, the defendant argued that New Jersey was the site of publication and jurisdiction for the suit was vested in New Jersey courts.[86]

The High Court rejected Dow Jones' argument, relying instead on Australian common law precedent, which states that the place where defamatory material is "comprehended" is the place of the tort.[87] Rigidly applying this rule to the facts, the Court articulated the following rule:

> In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.[88]

Though Dow Jones did not aim its allegedly defamatory statements at Australia,[89] the court reasoned that "those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction."[90] Because the allegedly defamatory statement was downloaded and viewed in Australia, the High Court held that jurisdiction was proper in Australia.[91]

3. Implications of *Gutnick*

Legal scholars immediately criticized the Australian High Court's decision in *Gutnick*, arguing that it "places the Internet's utility as a form of mass communication at risk."[92] It was reasoned that "the law of the country with the lowest level of speech protection would become the de facto law of the Internet."[93] One critic recognized the practical implications that the *Gutnick* decision will have on Internet communications:

> The burden of liability that the *Gutnick* decision places on an Internet media defendant will dry up the flow of information distributed via the Internet. A media entity prepared to place an article on the Internet will have to apprize itself of the

85. *Id.*
86. *Id.*
87. *Id.* at 586.
88. *Id.* at 607.
89. *See* Garnett, *supra* note 13, at 63-64.
90. *Gutnick,* 210 C.L.R. at 605.
91. *Id.* at 605-07.
92. Garnett, *supra* note 13, at 76.
93. *Id.* at 68.

> gamut of international defamation law and make a calculated judgment whether or not to print based on a comparison of that law to the contents of the article. The effect of that will likely be one of two results: either (1) the media defendant will forego printing on the Internet because the potential liability is incalculable or (2) the media defendant will have to go through a screening process that would make printing on the Internet unwieldy and delay information flow. . . . This self-censorship will cause a drastic speed bump in the fast lane that is information exchange on the Internet.[94]

Reducing the level of speech protection to that provided by Australian law[95] negates the First Amendment right to speech about public figures recognized by the Supreme Court in *Sullivan* and its progeny, and greatly restricts the ability of the American media to encourage frank speech on matters of public interest. As Dow Jones' general counsel predicted, the *Gutnick* decision has created a "kind of tyranny of the lowest common denominator and . . . inhibit[s] free speech."[96]

II. DISCUSSION

Before the Internet, publishers could make conscious choices about where their written material was disseminated. "If the risk of being sued for defamation was too great in a country, the publisher could forego selling it there."[97] However, the Internet has drastically changed the landscape of defamation law, especially as foreign courts begin to exercise jurisdiction on the basis of where material is downloaded.[98] Today, most published material can be downloaded anywhere with a click of a mouse, which means that authors may be subject to liability in various countries following varying standards for defamation.[99]

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94. Bone, *supra* note 20, at 309-10.

95. *See* Garnett, *supra* note 13, at 75-76.

96. Matthew Rose, *Leading the News: Australia to Hear Web Libel Suit in Landmark Case*, WALL ST. J., Dec. 11, 2002, at A3.

97. GEORGE B. DELTA & JEFFREY J. MATSUURA, *Defamation*, in LAW OF THE INTERNET 8-66.1 (2d ed. 2002 Supp. 2006).

98. *See, e.g.*, Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austl.).

99. *See* DELTA & MATSUURA, *supra* note 97, at 8-66.1. Of great interest, though outside the purview of this note, will be the effect of Google's current efforts to digitize books, creating cyberspace's version of the Library at Alexandria. *See* Chris Gaither, *Google Puts Book Copying on Hold*, L.A. TIMES, Aug. 13, 2005, at C1; Brewster Kahle, Speech to the Library of Congress as part of the "Digital Future" Series (Dec. 13, 2004), *available at* http://www.archive.org/details/cspan_brewster_kahle. As books never intended for world-wide dissemination suddenly become available for global Internet download, publishers may find themselves facing multiple defamation suits in foreign jurisdictions.

U.S. defamation law is drastically different from that of foreign nations, as foreign laws do not provide defendants with the broad range of protection granted by the First Amendment. As a result, it is considerably "easier to win defamation judgments in other countries than in the United States."[100] As foreign nations, following Australia's lead, begin to exercise jurisdiction over American defendants, there is a significant risk of self-censorship and that American speech will be chilled as a preventative measure.[101] Given the importance of the First Amendment and free speech in the United States, this is not an acceptable option.[102] Publishers of defamatory material should seek theoretical changes in the law as well as various practical solutions to avoid liability in foreign jurisdictions.

A. Theoretical Proposals for Change

Numerous scholars have proposed theoretical changes to counter the long jurisdictional reach exercised by the Australian High Court in *Gutnick*. While the *Gutnick* decision struck a deep blow against the First Amendment, some solutions tip the balance too far in favor of free expression without any consequences. Others, however, propose solutions that adequately address the complicated choice of law concerns that arise from celebrity cyber-libel.

1. Eliminate Internet Defamation

Some scholars have argued that defamation law should not apply to Internet speech, and call for the complete elimination of cyber-libel altogether.[103] These critics argue that any false and defamatory statement appearing on the Internet can easily be counteracted by an on-line response,[104] and that those participating in the Internet's free-for-all environment "should have very thick skins."[105] Even if an individual "cannot be deemed to have agreed to [the Internet's] free-for-all environment solely by communicating on-line, anyone defamed on-line presumably has access to the same

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100. DELTA & MATSUURA, *supra* note 97, at 8-67.

101. *See* Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3145 (2006).

102. *See* BARENDT, *supra* note 38, at 1.

103. *See* DELTA & MATSUURA, *supra* note 97, at 8-28.5, 8-28.6; Mike Godwin, *Libel Law: Let it Die*, WIRED, Mar. 1996, at 116, 118, *available at* http://www.wired.com/wired/archive/4.03/letitdie.html.

104. Godwin, *supra* note 103, at 116, 118.

105. DELTA & MATSUURA, *supra* note 97, at 8-28.5, 8-28.6.

channels of communication and can defend himself on-line."[106] This opportunity for personal response arguably negates the damages caused by defamatory speech.[107]

This proposal inadequately addresses the concerns raised by cyber-libel today. Eliminating all claims of Internet defamation would result in harm to individuals who are unable to adequately counteract posted defamatory statements. The belief that a simple posted response on the Internet provides an adequate remedy for defamation is naïve.

> [E]ven false accusations are often difficult to counteract no matter how widely disseminated and thoroughly reasoned the response. Furthermore, as anyone who has logged onto Web sites that espouse unsubstantiated rumors, controversial positions, or even hatred (for example, white supremacy sites) can attest, it is highly debatable whether access to on-line communication is an effective channel for any response, including a response to a false statement.[108]

In defamation suits, especially those brought by celebrities, the victims usually have not entered into voluntary relationships with the people who libeled them, and may have no knowledge that the statements were made until the harmful speech has been posted on-line. Defamatory speech about the glitterati is so quickly and widely spread on the Internet today that a personal response on a single Web-page would be virtually ineffective.[109] While free speech and other First Amendment rights are invaluable, the ability of an injured person to seek adequate redress against her defamer is also important, and a proposal that requires complete abandonment of that principle is not a solution at all.

2. Create an Independent Internet Law

Other scholars have argued that because the Internet offers a unique world of communication, it requires its own independent

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106. *Id.*

107. William B. Turner, *What Part of "No Law" Don't you Understand?*, WIRED, Mar. 1996, at 104, 110, *available at* http://www.wired.com/wired/archive/4.03/no.law.html.

108. DELTA & MATSUURA, *supra* note 97, at 8-28.6.

109. Defamatory statements about celebrities are not simply posted on web-sites by major news publications such as *People* or *Entertainment Weekly*. Instead, the Internet is saturated with personal "blogs" that disseminate often false statements to a broad audience. *See, e.g*, TheSuperficial.com, About the Superficial, www.thesuperficial.com/about.php (last visited Mar. 11, 2007) (a "celebrity gossip cite which publishes rumors and conjecture in addition to accurately reported facts," and whose stated goal is to "make fun of as many people as possible," especially celebrities); PinkIsTheNewBlog, www.trent.blogspot.com (last visited Mar. 11, 2007) (a popular blog known for posting "Hearsay & Gossip, Rumor & Fact").

law.[110] This approach, however, has serious flaws, given the difficulty of enforcing such rules of conduct among all Internet users.[111] Additionally, the chances of a new, independent law granting Americans the protection afforded by the First Amendment are slim. Rules or standards that supersede U.S. constitutional jurisprudence for American citizens are neither acceptable nor enforceable.[112] Therefore, this suggestion is not an appropriate solution to the complicated choice of law questions raised by cyber-libel.

3. Abandon the *Gutnick* Standard

Numerous critics have argued for the abandonment of the *Gutnick* standard, and have proposed varying standards to adopt in lieu of the High Court's approach.

a. "Location of Servers" Standard

Geoffrey Robertson, the attorney for Dow Jones in *Gutnick*, argued that "the publisher of material on the World Wide Web be able to govern its conduct according only to the law of the place where it *maintained its web servers*."[113] Adoption of this "location of servers" standard protects freedom of expression by limiting liability in foreign jurisdictions. Publishers would no longer be subject to liability in any nation where the Internet is accessible.

This approach is seriously flawed, however. "As the Australian High Court noted, this is a vague rule that presents problems of interpretation,"[114] especially in the computer age where publishers often have servers in dozens of jurisdictions. Additionally, the rule fails to provide plaintiffs with an opportunity to bring suit where the most reputational harm usually occurs–their country of residence.

This standard also creates a giant loophole for publishers who have engaged in the recent trend of "territorial succession."[115] Take for instance HavenCo. Ltd., an Internet start-up that built its servers on the small island of Sealand. Originally a man-made military base about three miles off the coast of the British Isles, Sealand was

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110. Bone, *supra* note 20, at 315-16.

111. *Id.* at 317-18.

112. *See supra* Part III.A.1.

113. *Id.* (emphasis added).

114. Garnett, *supra* note 13, at 87 (citing Dow Jones & Co. v. Gutnick (2002) 310 C.L.R. 575 (Austl.)).

115. *See* Richard Ford, *Against Cyberspace*, *in* THE PLACE OF LAW 147 (Austin Sarat et al. eds., 2003).

privately purchased in the late 1960's and proclaimed a sovereign nation.[116] Today, Sealand boasts particularly lax laws: "there are no direct reporting or registration requirements," making it "ideal for [W]eb business."[117] HavenCo. is self-described as a "place for secure e-Commerce, privacy-protected Internet services and *uncensorable free speech*."[118] Sealand offers no remedy for reputational injury as a result of cyber-libel, and therefore, under a "location of servers" standard, any publisher utilizing HavenCo.'s services would completely escape liability.

The "location of servers" standard is inherently flawed because publishers that utilize servers located in nations with lax (or nonexistent) defamation laws would be free to publish malicious false statements at will, with zero legal consequence. While the *Gutnick* standard destroys the protection afforded to public figures by the First Amendment, this "location of servers" standard presents the opposite problem of allowing publishers to completely avoid the legal consequences of cyber-libel.

b. "Minimum Contacts" Standard

The U.S. Supreme Court in *Calder v. Jones* articulated an effects test for resolving choice of law questions.[119] This test maintains that if a defendant directs his tortious activities at a resident of another state, causing harm, the majority of which he knows will be suffered in that state, he has established "minimum contacts," and courts in that forum state can exercise jurisdiction over the defendant.[120] Though *Calder v. Jones* dealt with a non-Internet publication, some scholars urge international adoption of this standard for cyber-libel,[121] arguing for the following rule: "an action based on material placed on the Internet outside of Australian borders

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116. The Principality of Sealand, http://www.sealandgov.org/history.html (last visited Feb. 8, 2007).

117. HavenCo., The Free World Just Milliseconds Away, http://www.havenco.com/index.html (last visited Feb. 8, 2007).

118. HavenCo., Products and Services, http://www.havenco.com/products_and_services/index.html (last visited Feb. 8, 2007) (emphasis added).

119. Calder v. Jones, 465 U.S. 783, 788-90 (1984). In *Calder*, the National Enquirer, a Florida corporation, its publisher and a reporter were sued in California. *Id.* The National Enquirer is a tabloid newspaper circulated nationwide, but California is its largest market, accounting for about twelve percent of the copies sold. *Id.* at 785. The court held that the Defendant purposely performed an action that it knew would have a significant impact in California; this was sufficient contact with the forum for the Court to assert jurisdiction. *Id.* at 789-90.

120. *Id.* at 788-90.

121. *See, e.g.*, Garnett, *supra* note 13, at 87.

may only be commenced where the publisher has sufficient contacts with the forum or has taken affirmative steps to target the forum."[122]

This analysis, while sufficient to address traditional choice of law questions, has serious flaws in the realm of cyber-libel. Initially, the nature of the Internet is such that individuals who utilize it for communication simply put their speech on the Web without directing it to any specific locale. Especially in the instance of blogs, where content is free,[123] one can hardly argue that speech is being directed at any particular jurisdiction. The only contact the publisher maintains is where his servers are located. As a result, in many instances of celebrity cyber-libel, the "minimum contacts" standard will be the same as in the "location of servers" standard.[124] Thus, like the "location of servers" standard, the "minimum contacts" standard does not remedy the problems raised by cyber-libel.

c. "Situs of Harm" Standard

In his concurrence to the *Gutnick* decision, Justice Michael Kirby suggested applying a traditional conflict of laws analysis to cyber-libel, using a "place of residence" standard to choose the applicable law.[125] According to Justice Kirby, a publisher is "constructively aware that the *place of residence* of the defamed person" is the center of reputational harm, and therefore jurisdiction is proper there.[126] This standard, however, fails to take into account that harm caused by Internet defamation of celebrities can, in some instances, be centered outside of the person's home jurisdiction.[127]

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122. *Id.*

123. *See* Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1448 n.3 (2006) (noting that "blog sites offer free space and user-friendly features").

124. *See supra* Part III.A.3.a.

125. Bone, *supra* note 20, at 306.

126. *Id.*

127. For example, consider the much publicized case of glitterati star Madonna's recent adoption of a Malawian child. Numerous Websites and blogs have recently termed her actions "controversial," "exploit[ative]" and "shameful." *See, e.g., Madonna Calls Adoption Scrutiny "Depressing"*, MSNBC DATELINE, Oct. 31, 2006, http://www.msnbc.msn.com/id/15502754/; Mary Mitchell, *Madonna's Adoption*, CHI. SUN TIMES Oct. 26, 2006, http://blogs.suntimes.com/mitchell/2006/10/madonnas_adoption_1.html; Rachel's Tavern, Random Thoughts #1 (Country Music Conservatives, Madonna Adoption, and Caffeine), http://www.rachelstavern.com/?p=228 (Oct. 16, 2006, 20:22). Madonna, a citizen of the United States, currently resides in Wilshire, England with her family. *See* Daniela Deane, *Madonna Speaks Out on Adoption*, WASH. POST Oct. 26, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501243.html. However, the majority of her career, both in music and film, is centered in the United States. *See* Wikipedia.org, Madonna (Entertainer),

In response to this critique, one scholar has proposed a "situs of harm" standard that modifies Justice Kirby's approach by focusing on where the harm to a plaintiff's reputation is centered.[128] This standard consists of a two part inquiry:

> First, the [court] will determine the place of domicile of the plaintiff at the time when the defamatory statement was published, and this home location's law will be the presumptive law for the action for damages. Then both the plaintiff and the defendant should be provided with the opportunity to prove by clear and convincing evidence that the reputation of the plaintiff was "centered" in a [different] jurisdiction.[129]

While this test creates a presumption that the plaintiff's place of residence will be the place of greatest reputational harm, it allows both parties to prove that the harm occurred elsewhere. This will assure that the "law governing [a] defamation dispute coincides with the purposes of defamation law, namely to provide the plaintiff with a recovery for the harm that has been done to him or her in the eyes of the community in which he or she associates."[130]

This test most effectively addresses the choice of law concerns that arise from Internet defamation of the glitterati. Publishers of defamatory material, both professionals and bloggers, can determine the place of residence of those about whom they wish to write. The place where the greatest reputational harm will occur will often be clear as well.[131] Thus, a "situs of harm" standard best addresses the complicated choice of law concerns raised by international cyber-libel claims, as it best reconciles the tension between personal protection for defamed individuals and freedom for publishers to speak freely and anticipate possible litigation.

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http://en.wikipedia.org/wiki/Madonna_%28entertainer%29 (last visited Mar. 13, 2007) (detailing the star's American based music and film career). *If* she wished to bring suit, the "place of residence" standard would ignore that the majority of harm done by defamatory publications would be in the United States.

128. Bone, *supra* note 20, at 332-34.

129. *Id.*

130. *Id.*

131. For example, it should be clear to any person posting material on the Internet that defamatory statements about celebrity Reese Witherspoon, including her highly publicized divorce from actor Ryan Phillippe, will cause the greatest reputational harm in the United States. *See* Wikipedia.org, Reese Witherspoon, http://en.wikipedia.org/wiki/Reese_Witherspoon (last visited Mar. 13, 2007) (describing that the American actress' family, home and career is in the United States). This is because the U.S. is not only her place of residence, but the place where her entire career as a Hollywood starlet is based. *See id.* Even if Ms. Witherspoon was temporarily residing abroad (for example, to film a movie or escape the paparazzi), clear evidence would show that her greatest reputational harm occurred within the United States and jurisdiction would be proper there.

4. Dispute Resolution in an International Arbitration Forum

Some scholars have suggested that "an international arbitration forum is the best solution for future *Gutnick* cases."[132] Such a forum will provide unity in implementing a global standard for determining choice of law in cyber-libel cases. Drawing parallels to the World Intellectual Property Organization arbitration panel,[133] scholars argue that a "supranational solution [is] necessary, combining the rights of nations to protect their citizens from . . . harm with the need to have a universal, not a balkanized, Internet."[134]

It is suggested that such an international arbitration forum panel, consisting of both defamation law experts and practitioners, have two primary purposes.[135] First, the panel should decide if the allegedly defamatory statements are actually true or false. If the statement is determined to be true, the charge will be dismissed, as truth is an absolute defense to defamation liability.[136] If determined to be false, the plaintiff will be presented with a choice of remedy:

> If the plaintiff opts to pursue a nontraditional retraction remedy, the panel will be given the power to . . . order [a media defendant] to retract the defamatory statements. If the plaintiff opts to pursue damages [in a domestic court], however, the *panel will make a binding determination of the law governing the dispute,* leaving the plaintiff's ability to recover damages to the substantive provisions of that law.[137]

If a plaintiff chooses to pursue damages, the arbitration forum will make a binding determination of which nation's law should be applied. As already discussed, a "situs of harm" standard is the best solution to addressing the choice of law concerns raised by a cyber-libel suit,[138] and therefore should be the standard adopted by such an international defamation arbitration forum.

132. Bone, *supra* note 20, at 315.

133. The World Intellectual Property Organization arbitration panel was created to remedy a situation where the Internet was allowing persons to infringe upon the rights of businesses protected under geographically centered trademark rights. *See id.* at 319-24. The arbitration forum has "gone a long way towards uniform regulation of trademark infringement on the Internet." *Id.* at 322.

134. *Id.* at 321-22.

135. *Id.* at 325.

136. *Id.*

137. *Id.* (emphasis added).

138. *See supra* Part III.A.3.C.

B. Practical Solutions for Protection from Liability

While possibly effective in addressing the problems raised by cyber-libel of celebrities, none of the previously discussed theoretical solutions will be of much practical assistance to a publisher attempting to protect himself from present liability. Though such a form is probably the best solution for resolution of cyber-libel suits, it does not yet exist. Moreover, the creation of an arbitration forum will take time, energy, and acceptance. Therefore, publishers of material on the Internet must consider concrete, feasible solutions to protect themselves today.

1. Silencing Speech

Logically, it makes sense that the best way to avoid liability for defamation is to keep one's (metaphorical) mouth shut. However, suggesting that publishers chill their speech, especially regarding public figures, is contrary to the spirit of the First Amendment and American freedom of expression. Abandoning free speech is an unacceptable option, and is not a feasible solution for publishers to consider.[139]

2. Education in Lowest-Common Denominator Law

Traditionally, knowledge of the particular defamation law governing the country in which a book or newspaper was published was sufficient protection to avoid defamation suits.[140] However, in today's legal landscape–marked by Internet publications and uncertainty over which law will be applied to a publisher–a simple "knowledge is the best offense" approach to avoiding defamation liability is no longer practical. Such a defense would require a publisher to be well-versed in the defamation law of every nation in the world. Once armed with knowledge of the world's approach to defamation, a publisher would be required to abandon the First Amendment and follow the law of the nation with the most stringent restrictions on speech. As already discussed, such an abandonment of American free speech is highly objectionable.[141]

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139. BARENDT, *supra* note 38, at 1.

140. PAUL P. ASHLEY, SAY IT SAFELY: LEGAL LIMITS IN PUBLISHING, RADIO AND TELEVISION 7-8 (4th ed. 1970).

141. BARENDT, *supra* note 38, at 1.

3. Declaratory Judgments

In the face of international defamation litigation, American defendants may find a source of relief in American courts. The Declaratory Judgment Act (DJA)[142] is a procedural device that allows a party to seek a declaration of "'rights and other legal relations' between parties without seeking any coercive relief against the defendant."[143] In determining whether declaratory relief is appropriate, a district court must first determine whether it has subject matter jurisdiction, which includes both typical subject matter jurisdiction[144] and a determination of whether there is an actual controversy.[145] Once a court has found that jurisdiction is proper, it may elect at its discretion whether or not to hear the case.[146]

One consideration that may "militate against a court exercising its discretion is the availability of other remedies."[147] Additionally, courts are less likely to grant declaratory relief when there is evidence that the plaintiff "forum shopped" by bringing her declaratory relief action solely "to get a more advantageous forum and in anticipation of an action filed by the opposing party."[148] A final factor a court will consider in determining whether to exercise discretion is comity, which "takes on particular importance when considering DJA actions in the international context."[149] The "comity of nations" doctrine mandates that American courts heed and enforce the judgments of foreign nations as part of a greater effort to maintain peaceful relations.[150] International comity

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142. 28 U.S.C. § 2201 (2000).

143. Beauchamp, *supra* note 101, at 3091.

144. Pursuant to 28 U.S.C. §§ 1331, 1332, a court must find either federal question or diversity jurisdiction.

145. In DJA actions, for a district court to have subject matter jurisdiction, there is an additional requirement that the matter present an "actual controversy." *Id.* § 2201. When faced with an action seeking declaratory relief, a district court "must determine whether the issue is 'an abstract, hypothetical or academic question' or 'a real and substantial controversy.'" Beauchamp, *supra* note 101, at 3095-96. It should be noted that, "[a]lthough not statutorily prohibited, federal courts have been reluctant to resolve constitutional controversies by means of declaratory judgments. In many instances, such relief has been denied on grounds the need for it was 'remote' or 'speculative.'" Russell L. Weaver et al., *Declaratory Judgments*, *in* MODERN REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 510, 552 (1997).

146. Beauchamp, *supra* note 101, at 3095, 3099; *see* 28 U.S.C. § 2201.

147. Beauchamp, *supra* note 101, at 3100.

148. *Id.* at 3100-01.

149. *Id.* at 3101.

150. *See* Sheldon R. Shapiro, Annotation, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. FED. 208

> is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another man, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[151]

Because American courts are not required to give extraterritorial effects to foreign judgments,[152] the U.S. Supreme Court has ruled that comity "does not require, but rather forbids [recognition], where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens."[153]

If an American court grants a motion for declaratory judgment, then it "shall have the force and effect of a final judgment or decree and shall be reviewable as such" within the United States.[154] While foreign courts may consider such a judgment, they are not required to heed the rulings of American courts.[155] As a result, American courts have exhibited hesitation in their exercise of discretion to grant declaratory relief.[156]

a. Declaratory Relief Following a Foreign Judgment

American courts will not automatically enforce the judgment of a foreign court.[157] Instead, foreign parties must file suit in an American court to seek enforcement of a foreign judgment.[158] At that time, the American court will determine whether the foreign judgment violates American public policy and fundamental notions of justice.[159]

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§ 4 (1972 & Supp. 2005) (listing cases where comity has been the reason for granting extraterritorial effect to foreign judgments).

151. Beauchamp, *supra* note 101, at 3101-02.

152. The United States Constitution requires that full faith and credit be given to judgments of sister states, territories, and possessions of the United States. U.S. CONST. art. IV, § 1, cl. 1; 28 U.S.C. § 1738 (2000). However, the full faith and credit requirement does not apply to judgments rendered by foreign courts. The extent to which such foreign judicial decrees are recognized is a matter of choice and discretion, governed by the "comity of nations" doctrine. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895); Yahoo!, Inc. v. LaLigue Contre le Racisme et l'Antisemitisme (*Yahoo! I*), 169 F. Supp. 2d 1181, 1192 (N.D. Ca. 2001).

153. *Hilton*, 159 U.S. at 193 (quoting De Brimont v. Penniman, 7 F. Cas. 309 (C.C.S.D.N.Y. 1873)).

154. 28 U.S.C. § 2201. Because declaratory judgments are final, principles of res judicata and collateral estoppel will apply. *See* Beauchamp, *supra* note 101, at 3102.

155. Beauchamp, *supra* note 101, at 3102.

156. *See, e.g., Hilton*, 159 U.S. at 113.

157. *See, e.g., id.*; Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme (*Yahoo! II*), 433 F.3d 1199 (9th Cir. 2006).

158. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. g (1986).

159. *Id.* § 482 cmt. f.

If it does, it will not be enforced.[160] Because the United States' broad protection of First Amendment speech is not paralleled by foreign nations, foreign defamation judgments will often infringe upon the First Amendment rights of American defendants. When a foreign judgment prima facie infringes on an American defendant's First Amendment rights, declaratory relief should be granted.[161]

Such post-judgment relief is not without its flaws, however. Litigants are still faced with the often-cumbersome costs of defending litigation abroad. Additionally, while a judgment may be nullified on American soil, it will still stand in the foreign nation, and any assets held there may be seized to fulfill a monetary award.[162] Furthermore, the defendant publication may no longer be allowed to conduct business with members of the foreign nation. If criminal sanctions are imposed (as is often allowed in foreign defamation cases), the defendant or its representatives may still be detained in accordance with foreign law. Finally, the issuance of a foreign judgment by an American court could project a cavalier attitude of superiority, and disrupt foreign dealings between the United States and other nations. Therefore, declaratory relief following a foreign judgment is not an ideal solution for defendants to seek.

b. Declaratory Relief before a Foreign Judgment

Courts often dismiss general claims for declaratory relief prior to foreign judgments on the grounds that there is no actual

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160. *Id.* § 482(2) ("A court in the United States need not recognize a judgment of the court of a foreign state if: . . . (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought."). *See also id.* § 482 cmt. f ("Courts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice.").

161. "Before dismissing this principle as American arrogance, it should be noted that U.S. courts are not alone in their efforts to export the laws of their home country. For example, German courts have not enforced U.S. monetary judgments that far exceed the German norm." DELTA & MATSUURA, *supra* note 97, at 8-68 (citing Gertried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199 (1994)).

162. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (stating that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987) (stating that, "[I]n the absence of a treaty . . . courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory").

controversy.[163] The reluctance to find actual controversy may stem from deeper concerns over whether a judgment by an American court will be regarded by a foreign court.[164] While one American court took a skeptical view and questioned whether foreign nations would accord any recognition to a preemptive declaration of rights by American courts,[165] another court in the same circuit observed that there is no reason to believe that a foreign court would question an American ruling, especially when the central events leading to the dispute took place within the United States.[166] While foreign courts may be "reluctant to give effect to any injunctions purporting to restrain their own citizens and transactions,"[167] those courts will likely take "less umbrage with U.S. courts [exercising] jurisdiction of cases that naturally fit in a U.S. forum."[168]

Additionally, a declaration by American courts would "not affect or purport to interpret [a] foreign court's laws"; rather, it would only "impact and interpret U.S. legal rights."[169] Finally, foreign courts should recognize that a declaratory judgment issued prior to a foreign judgment is in the interest of judicial efficiency, as it indicates that an American court would most likely refuse to uphold a foreign judgment against the defendant. For all of these reasons, American courts should not allow their determination of whether an actual controversy is present to be clouded by the possibility that a declaratory judgment would be disregarded by foreign courts.

There are several unique attributes of cyber-libel suits that should lead a court to conclude that there is an actual controversy, even before a final judgment. Initially, the danger of a chilling effect is "inherent in defamation laws . . . [and] can manifest long before there is a judgment for damages."[170] Additionally, if defamatory material remains posted on the Internet prior to a judgment, damages will continue to accrue.[171] A refusal by American courts to intervene "may place the hapless plaintiff between the Scylla of intentionally

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163. *See, e.g.*, *Yahoo! II*, 433 F.3d 1199; Dow Jones & Co. v. Harrods (*Harrods*), 237 F. Supp. 2d 394 (S.D.N.Y. 2002); Basic v. Fitzroy Engineering, Ltd., 949 F. Supp. 1333 (N.D. Ill. 1996).

164. Beauchamp, *supra* note 101, at 3145.

165. *See, e.g.*, *Harrods*, 237 F. Supp. 2d at 413.

166. *See, e.g.*, Boeing Co. v. EgyptAir (*In re* Air Crash near Nantucket Island, Mass., on Oct. 31, 1999), 392 F. Supp. 2d 461, 478 (E.D.N.Y. 2005).

167. *Harrods*, 237 F. Supp. 2d at 413 (citing ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 51, at 183 (1962)).

168. Beauchamp, *supra* note 101, at 3142.

169. *Id.*

170. *Id.* at 3139.

171. *Id.* at 3140.

flouting [the] law and the Charybdis of forgoing what he believes to be constitutionally protected activity."[172] This uncertainty over future damages and the state of legal rights is exactly the type of "actual controversy" for which declaratory judgments were created.[173] Therefore, courts should find that actual controversy exists in Internet defamation suits, even prior to a foreign judgment, and should grant declaratory judgments for American publishers facing litigation.[174]

4. Internet Protocol Filtering

Publishers, both professionals and bloggers, may utilize Internet Protocol (IP) filtering to ensure that their material is viewed only in nations with acceptable legal standards for free expression and speech. IP filtering is ideal for Webpages containing "sensitive content which can/cannot be seen by visitors of specific countries."[175] Each computer that is connected to the Internet is assigned a unique IP address, made of a combination of numbers.[176] Addresses are assigned in blocks of numbers per country.[177] Therefore, by viewing particular IP addresses, it is possible to determine the country from which each user is viewing the Internet.[178]

Internet protocol filtering allows on-line publishers to restrict who views their Website by country.[179] This is a relatively easy process by which a publisher determines which countries to accept or block, and then simply places a short html code in their web pages.[180] When individual browsers visit a webpage, their country settings are

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172. Steffel v. Thompson, 415 U.S. 452, 462 (1974).

173. *See* Martin H. Redish, *Considerations in Exercising Discretion*, *in* MOORE'S FEDERAL PRACTICE – CIVIL § 57.42[1] (2006) (stating that the remedy "is appropriate when a declaratory judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding"); Martin H. Redish, *Nature and Purpose of Declaratory Relief*, *in* MOORE'S FEDERAL PRACTICE – CIVIL § 57.04[3] (2006) (stating that the declaratory judgment remedy "permits parties to minimize the accrual of avoidable losses and damages").

174. Beauchamp, *supra* note 101, at 3141.

175. TrafficCleaner.com, What is IP Filtering and How it Works?, http://www.trafficcleaner.com/index.php?data[action][]=footer&data[action][]=howitworks (last visited Feb. 8, 2007).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* A.P. Lawrence, *Web Site IP Filtering*, *available at* www.webpronews.com/expertarticles/expertarticles/wpn-62-20051208websiteIP Filtering.html (last visited Feb. 8, 2007).

checked based on their IP addresses.[181] If a visitor's country is allowed, the page will load and the visitor may browse the site per usual.[182] However, if a country is not allowed, the visitor will be re-routed to an alternative site of the publisher's choosing.[183] Visitors will not notice any abnormal browsing experience, and will not be aware that they are viewing different material based on their country.[184]

Because publishers can set up an unlimited number of filters–directing different users to multiple alternate sites–they may provide different content to viewers from different countries.[185] This allows publishers to post varying content for different nations, depending on the level of speech protection in each. Thus, regardless of the choice of law standard applied by a foreign court, a publisher can ensure that they will not face defamation claims abroad. Because IP filtering is currently free, publishers need not worry about any prohibitive costs for this service.[186] Such filtering may be utilized by both professional on-line publications as well as individual blogs. Because of a filter's ability to cost-effectively and easily allow speech to be published to Americans, but not disseminated to nations with undesirable defamation laws, it is the best way for publishers to avoid foreign liability.

III. CONCLUSION

In 2005, 4.7 million Australians had Internet access in their homes.[187] As personal computers and Internet access become more affordable, that number will only increase. As it does, the potential for suits in Australian courts against foreign defendants by members of the glitterati, defamed in on-line publications, will increase as well.

Australian defamation law, dramatically less protective of speech than its American counterpart, should now be of great interest

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181. TrafficCleaner.com, What is IP Filtering and How it Works?, *supra* note 175.

182. *Id.*

183. TrafficCleaner.com, Frequently Asked Questions, http://www.trafficcleaner.com/index.php?data[action][]=footer&data[action][]=faq (last visited Feb. 8, 2007).

184. TrafficCleaner.com, What is IP Filtering and How it Works?, *supra* note 175.

185. TrafficCleaner.com, Frequently Asked Questions, *supra* note 183.

186. TrafficCleaner is one service that currently offers free IP filtering. *See* www.trafficcleaner.com (last visited Feb. 8, 2007).

187. Australian Bureau of Statistics, Household Use of Information Technology, Australia, 2005-06, http://www.abs.gov.au/Ausstats/abs@.nsf/lookupMF/ACC2D18CC958BC7BCA2568A9001393AE (last visited Feb. 8, 2007).

to American publishers.[188] In the wake of *Gutnick*, the Australian High Court has started exercising jurisdiction over American defendants simply because their publications were accessed on-line in Australia.[189] The current problem is not with Australian defamation law per se.

> Australia is of course free to adopt whatever rules it feels are necessary for the protection of the reputation of its people. However, in the way that it has done so, Australia has expanded its jurisdictional boundaries such that its rules infringe on the ability of other countries to protect their own citizens. There is no problem if Australia wants to apply [its defamation laws] within its own borders, but when it attempts to control the speech in other countries, we should all be concerned.[190]

The concern with Australian law, which should be shared by both scholars and publishers, is with the country's broad exercise of jurisdiction over American defendants, causing the elimination of First Amendment free speech rights on the Internet.[191]

Publishers and scholars should lobby for theoretical changes to help correct the problems raised by the Australian High Court in *Gutnick*.[192] The ideal result is the complete abandonment of the *Gutnick* standard, and its replacement by a "situs of harm" standard."[193] Alternately, however, the more realistic proposal is the creation of an international arbitration forum to address Internet defamation claims.[194] If plaintiffs choose to pursue relief beyond simply the removal of the material, the forum will make a binding determination of law, following the "situs of harm" standard. This would effectively limit the reach of the Australian High Court, restoring the First Amendment rights for cases in which publications were written in the United States, published in the United States, and caused the greatest amount of harm in the United States.

As theoretical change will almost surely take considerable time, publishers may employ various practical solutions to protect themselves now from foreign liability.[195] Publishers already facing liability may seek declaratory judgments from American courts.[196] While such relief following a foreign judgment is not ideal for publishers given high costs of litigation and tensions of international

188. *See supra* Parts II.A, II.B.
189. *See supra* Part II.C.2.
190. Garnett, *supra* note 13, at 88.
191. *See supra* Part II.C.3.
192. *See supra* Part III.A.
193. *See supra* Part III.A.3.c.
194. *See supra* Part III.A.4.
195. *See supra* Part III.B.
196. *See supra* Part III.B.3.

comity, such relief before a foreign judgment issues is much more effective. However, while courts should find an actual controversy in such cases and grant a declaratory judgment, there is often a reluctance to do so stemming from questions of global recognition. Therefore, publishers should not rely on declaratory judgments as absolute protection from foreign liability for American publications.

The most effective tool American Internet publishers can employ is the use of IP filtering.[197] Both professional publishers and individual bloggers can utilize affordable software that effectively blocks the viewing of their site in certain nations. Publishers that are educated in the defamation law of other nations will have better control over where and under what law they could face liability. If material cannot be read and accessed in Australia, then the Australian High Court will no longer be in the position to exercise jurisdiction over American defendants.

By implementing change, both in the form of new theoretical approaches to cyber-libel as well as practical safeguards for speech, American publishers of on-line material may once again enjoy First Amendment protection for their speech. Unfortunately for the glitterati, the gossip and rumors written about public figures may continue to entertain and delight Internet users across the country.

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197. *See supra* Part III.B.4.

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