Washington and Lee Law Review

Volume 62 | Issue 1 Article 8

Winter 1-1-2005

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The Washington Post once had an advertising slogan for its home delivery service that warned "if you don't get it, you don't get it." The play on words was intended to convince nonsubscribers that if they did not get the newspaper every day, they would not know what was going on in the world. As Shawn Bone explains in his excellent Note,[1] the *Post* slogan may well apply in Australia under a different play on words. If the Australians don't get the online version of *The Washington Post* (or the *New York Times* or *Wall Street Journal* for that matter), it may be because their courts don't get the importance of First Amendment principles in circumscribing libel liability to foster free speech and a free press. The online publications may vanish from Australia because of the potentially multiple and unlimited exposure to damages that resulted from *Gutnick v. Dow Jones & Co.*[2] The "if you don't get it, you don't get it" admonition has special meaning for Australians in the post-*Gutnick* world.

Australia is not alone, of course. Much of the rest of the world simply does not "get" our First Amendment free speech and free press protections. The English High Court of Justice recently ruled in agreement with its Australian counterpart, finding that the publication of an Internet posting takes place when it is downloaded, thus reinforcing the potential for multiple libel judgments for one work of authorship.[3] France does not "get" our First Amendment, as evidenced by the decision of its courts to hold a website operator liable, in

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1. Shawn Bone, Note, *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 (2005).

2. Gutnick v. Dow Jones & Co. (2002) 210 C.L.R. 575 (Austl.).

3. *See* King v. Lewis, (2004) EWHC 168 (Q.B.), 2004 WL 62126 (holding that, for purposes of Internet libel actions, publication is regarded as taking place where the defamatory words are downloaded and that the natural forum in which to try the dispute is the jurisdiction where the tort was committed).

damages and under criminal law, for content posted to the website by a third party over whom the operator has no affiliation or control.[4] And certainly countries like Saudi Arabia, China, Singapore, Malaysia, Kenya, and Egypt do not "get" it, where access to content on the Internet is strictly regulated and violations harshly prosecuted.[5]

The United States is alone among nations in having a legal bulwark to protect the expression of ideas. Unpopular ideas, offensive images, and even most mistakes by the press are not only tolerated, but are celebrated as evidence of our free society. Free speech is a bedrock element of the American way of life. Our legal system permits—indeed, encourages—all manner of expression unless it constitutes actionable threats of harm (like screaming "fire" in a crowded theater), obscenity, infringement of intellectual property, or harmful mistakes of fact by or about private persons.

When the Supreme Court decided *New York Times Co. v. Sullivan*[6] in 1964, it erected a touchstone for First Amendment law, recognizing in no uncertain terms that a free media is essential to our system of government.[7] The Court specified that a public official could not sue a newspaper that had been critical of the official's behavior unless the official could prove either that the newspaper published something it knew was false or that it recklessly disregarded the truth or falsity of what it published.[8] This bright-line standard of liability sets the United States apart from the rest of the world. Likewise, our "single publication rule," which allows one cause of action for libel regardless of how many copies were printed and where they were distributed, distinguishes our law.[9] Today, we look with astonishment at our common law

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4. *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001) (recounting the May 22, 2000 decision of a French court to hold Yahoo! responsible under section R645-2 of the French Criminal Code, which bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing such material), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc).

5. *See* Reporters Without Borders, *About Us*, *at* http://www.rsf.org/rubrique.php3?id_rubrique=280 (last visited Oct. 20, 2004) [hereinafter *About Us*] (describing various controls on speech and journalism throughout the world) (on file with the Washington and Lee Law Review).

6. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

7. *See id.* at 293–98 (discussing the significance of the media in our society) (Black, J., concurring).

8. *Id.* at 283.

9. *See* Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 123 (1948) (describing the "single publication rule"). The court defined the rule by stating:

> [T]he publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of copies widely

ancestor, Great Britain, when it engages in open censorship of the press and when libel plaintiffs in the United Kingdom succeed in suing for mere mistakes of fact and nothing more.

Three decades after *Sullivan*, the Internet revolution began. The ability of individuals to publish text and images effortlessly at their desktops and across the globe resulted in an explosion of information, entertainment, and communication accessible by millions. It also resulted in the publication and easy accessibility of unpopular messages and unseemly images. To put it more directly, kids gained access to pornography.

The immediate political response to this phenomenon was for Congress to enact the sweeping Communications Decency Act of 1995 (CDA),[10] designed to protect the nation's children. The eventual legal response was for the Supreme Court, in *Reno v. ACLU*,[11] to declare the Act overbroad and unfocused.[12] This clash between expedient politics and more reasoned legal analysis presented the Supreme Court with the opportunity to make clear the applicability of the First Amendment to the Internet. It did so in *Reno* when Justice Stevens, writing for the Court, said:

> [The Internet—t]his dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.[13]

Since the *Reno* decision, the full applicability of the First Amendment to the Internet has resulted in the Supreme Court, on two occasions, seriously questioning Congress's attempt to make the Internet safer for children through speech control.[14] In only one case so far—*American Library Ass'n v. United*

> distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable Statute of Limitations runs from the date of publication.

Id.

10. Communications Decency Act of 1995, 47 U.S.C. §§ 223(a)(1)(B)(ii), (d) (1997).

11. Reno v. ACLU, 521 U.S. 844 (1997).

12. *See id.* at 849 (holding that the CDA's "indecent transmission" and "patently offensive display" provisions abridge the freedom of speech protected by the First Amendment).

13. *Id.* at 870.

14. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2789 (2004) (holding that the Attorney

States[15]—has the Supreme Court upheld any limits on Internet content, and that was done narrowly.[16] The Children's Internet Protection Act of 2000 (CIPA),[17] linking federal funds to the use of filtering technology at public libraries, is the single Internet-control law to reach the Supreme Court and to receive full First Amendment approval.[18]

Another important aspect of Internet freedom is found in a portion of the federal CDA that was not involved in *Reno*—Section 230.[19] That section continues to provide immunity to online service providers with respect to content created by third parties. This means that companies like America Online (AOL) are immune from libel actions that challenge content provided by others.[20] Absent a deep-pocket like AOL to sue, people unhappy with online postings will likely forego litigation. That lack of litigation means there would be no chilling effect on speech. If there had been a French equivalent of Section 230, Yahoo! would not have been subject to suit for its users' advertisements for Nazi paraphernalia.

It is interesting to observe how eager an American court was to insulate Yahoo! from liability for the French judgment in the Nazi paraphernalia case.[21] Too eager, as it turns out: The district court in San Jose, California, took jurisdiction over the parties in the French action and issued an order blocking enforcement of the French judgment in the United States, relying substantially on First Amendment arguments.[22] The Ninth Circuit recently ruled that the

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General failed to rebut Internet providers' contention that filtering software was a plausible, less restrictive, and available alternative to accomplish the congressional purpose of the Child Online Protective Act); Ashcroft v. ACLU, 535 U.S. 564, 578 (2002) (noting that the statute in question avoided the CDA's problems of over-inclusiveness and overbreadth).

15. Am. Library Ass'n v. United States, 539 U.S. 194 (2003).

16. *See id.* at 212, 214 (holding that public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights because "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity").

17. The Children's Internet Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-335 (codified at 20 U.S.C. § 6777, 20 U.S.C. § 9134, 47 U.S.C. § 254(h) (2000)).

18. *Am. Library Ass'n*, 539 U.S. at 199.

19. Communications Decency Act of 1995, 47 U.S.C. § 230(c)(1) (1998).

20. *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding that a service provider could not be held liable for libel by making a gossip column available to its subscribers).

21. *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1187–91 (2001) (finding the existence of an "actual controversy" for purposes of issuing a declaratory judgment), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2004) (en banc).

22. *See id.* at 1189–93 (discussing First Amendment concerns and blocking enforcement of the judgment).

lower court jumped the gun jurisdictionally in decreeing the French judgment unenforceable in the United States because the French had not yet even come to the United States to enforce their judgment.[23] I expect that if the French ever do come to the United States to collect their judgment, jurisdiction will exist and the court will block enforcement of the French judgment, as it tried to do prematurely.

In *Dow Jones & Co. v. Harrods, Ltd.*,[24] Dow Jones, the Barrons magazine publisher involved in the *Gutnick* case, tried a *Yahoo!*-style declaratory judgment action in federal court in New York.[25] The action was brought against Harrods, which had commenced a libel action in the United Kingdom over an online article in the *Wall Street Journal*, also published by Dow Jones.[26] Not surprisingly, the Court dismissed the Dow Jones action as premature because no judgment had even been rendered in the United Kingdom action.[27] Apparently, pre-emptive lawsuits in the United States to protect First Amendment interests from foreign court interference will only be sustainable if and when an action is brought here to enforce the offending foreign judgment.

Even with that minor limitation on the timing of an action against a foreign judgment, the state of the Internet in the land of the First Amendment is one of extremely limited government control and restricted potential for liability. There are occasions when Internet speech is prosecuted successfully, such as when anti-abortion protesters used their website to target abortion providers for murder in the so called "Nuremberg Files" case.[28] Overall, however, our legal system's tolerance for objectionable speech is high.

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23. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 379 F.3d 1120, 1123 (2004) (explaining that because the French parties took no action to enforce their legal rights under French law and Yahoo! made no allegation that could lead a court to conclude that there was anything wrongful in the organization's conduct, the district court improperly exercised personal jurisdiction over the controversy), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc).

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

25. *Id.* at 399.

26. *Id.*

27. *See id.* at 410 (holding that a potential chilling effect on the publisher's First Amendment rights did not present an "actual controversy" under the Declaratory Judgment Act).

28. *See* Planned Parenthood for the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001) (holding that actions of anti-abortion activist organizations, including the public disclosure of names and addresses of abortion providers, constituted true "threats of force" within the Freedom of Access to Clinic Entrances Act and thus were not protected speech under the First Amendment), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002).

The textbook example of our off-line tolerance for objectionable speech is the Nazi march through the Jewish neighborhood of Holocaust survivors in Skokie, Illinois.[29] As abhorrent as the marchers' message was and as vulnerable as the intended audience may have been, the Seventh Circuit held that free speech principles demanded that the march be allowed to proceed.[30] The Skokie example has real resonance for me. In my life away from the law, I serve in leadership positions in the Anti-Defamation League (ADL), including chair of the ADL Internet Task Force.

It should not surprise you to learn, as I have in my ADL role, that hate has gone high tech. Hatemongers used to meet in dingy basements; now they meet online. And instead of sending their propaganda in plain brown wrappers to a limited audience, they use the Internet to distribute graphic racist images, Holocaust denials, and venomous music around the globe.

A visceral reaction to this kind of disgusting material is to exclaim, "There oughta be a law!" But in the land of the First Amendment, we catch ourselves and say, "Even haters have a right to free speech. The best antidote to hate speech is more truthful speech, exposing the lies of the haters." That is the strategy of the ADL, to rebut and to educate, having faith that truth will overcome evil speech. As an aside, our philosophy reminds me of a bumper sticker I once saw that read, "I may not agree with your bumper sticker but I defend to the death your right to stick it!"

In June of this year, I participated in the first-ever conference on Internet hate speech hosted by the French government and conducted under the auspices of the Organization for Security and Cooperation in Europe (OSCE). The purpose of the gathering was to examine how governments and nongovernment organizations can work together to fight the harmful effects of Internet use by anti-Semites, racists, and xenophobes. While many constructive ideas were expressed, many speakers at the fifty-five nation gathering harped on how the First Amendment impedes global efforts to reduce the incidence of online hate. The United States was labeled a free-speech Wild West—a place where speech has no limitations or legal consequences. Europe was portrayed as a place populated by those who have learned wisely from the horrors of World War II that dangerous speech can lead to real violence, and therefore it must be stopped in its earliest stages. A number of Europeans bragged that their governments regularly censor harmful content on the Internet, and that the

29. *See* Collin v. Smith, 578 F.2d 1197, 1198–99 (7th Cir. 1978) (recounting how the National Socialist Party of America, a self-described Nazi party, and its leader, Frank Collin, announced plans to march in front of the Village Hall, an area with a large Jewish population).

30. *See id.* at 1207 (holding that ordinances subsequently enacted by village officials to prohibit such demonstrations violated the First Amendment right to free speech).

world is a better place for it. The "Atlantic Divide" perception was reinforced by Robert Badinter, former French Minister of Justice and current president of the OSCE Court of Arbitration and Conciliation, who, in a keynote address, dramatically appealed to the United States to "stop hiding behind the First Amendment."

I mention this recent international gathering and the First Amendment bashing in light of Bone's "modest proposal," as he has labeled it in his Note, for an international system of arbitration for Internet libel cases.[31] Although I am not sure Bone intended the comparison, I am reminded of the original *Modest Proposal* by Jonathan Swift, written as satire in 1729, proposing the consumption of children to solve the hunger problem in Ireland.[32] The reason I am reminded of the original *Modest Proposal* is that to allow the rest of the world to attack our online publications at will may result in consequences as dire for free speech as Swift's proposal portended for children.

Bone's proposed arbitration system is patterned on the system of the World Intellectual Property Organization (WIPO) for objections to trademark infringing domain names.[33] There is an important difference, however, between the bodies of law involved. The domain name arbitration system works because most countries in the world share the same organic views on the legal rights that attach to a trademark or trade name.[34] Thus, there is little potential for national laws and traditions to color a transborder online arbitration result.

The world's view of freedom of speech is distinctly at odds with the American view. More than one-third of the world's people live in countries where there is no freedom of the press at all.[35] A recent report indicated that 130 journalists around the world are in prison for reporting the news in an objectionable fashion, according to their government jailers.[36] In Nepal, Eritrea, and China, reporters can spend years in jail just for using the "wrong"

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31. Bone, *supra* note 1, at 282.

32. JONATHAN SWIFT, A MODEST PROPOSAL AND OTHER SATIRICAL WORKS, *excerpted in* THE LIBRARY BOOK OF ECONOMICS (Michael Watts ed., ISI Books 2003) (1729).

33. *See* Bone, *supra* note 1, at 321–24 (describing the origins of the basic framework for his proposal).

34. *See* World Intellectual Property Organization, *About Trademarks*, *at* http://www.wipo.int/about-ip/en/about_trademarks.html#how_extensive (last visited Oct. 20, 2004) (describing how nearly all countries have a system to register and protect trademarks, and how those systems are linked through the WIPO's system of international registration of marks) (on file with the Washington and Lee Law Review).

35. *See About Us*, *supra* note 5 (describing various controls on speech and journalism throughout the world).

36. *Id.*

word or photo.[37] In China, Vietnam, the Maldives, and Syria, for example, ordinary citizens can spend up to fifteen years in jail for what they say on the Internet, on websites, or in discussion forums.[38] Earlier this month, it was reported that Brazil is considering creating a "National Journalists Council, which would be empowered to 'orient, discipline, and monitor' journalists."[39] Penalties for violations of the council's rules or rulings would range from fines to revocation of a reporter's official registration, without which he or she cannot work in the profession.[40] Even progressive democracies, like Australia and France, take views on freedom of expression that are distinctly at odds with the law in the United States.[41] In short, they just don't get it—*it* being the freedom of expression principles embodied in the First Amendment.

Arbitration, by its nature, results in compromise and what we litigators call "splitting the baby." There is simply no way to be true to the First Amendment and at the same time allow for split-the-baby compromises. So where does that leave us? Some commentators believe that the United States should push for international agreements that will ensure worldwide respect for the First Amendment on the Internet.[42] But those proposals are unrealistic in my view. Even if new agreements are not in the offer, an international framework may already be in place for limiting extraterritorial jurisdiction by foreign countries that do not respect our First Amendment values. Three treaties administered by the World Trade Organization (WTO) offer some hope.[43] Under these treaties, the

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37. *See id.* (providing statistics on punishments for journalistic speech in different countries).

38. *See* Reporters Without Borders, *Internet Under Surveillance*, *at* http://www.rsf.org/article.php3?id_article=10760 (last visited Oct. 20, 2004) (tracking international governmental control over the Internet) (on file with the Washington and Lee Law Review).

39. *See* Larry Rohter, *Plan to Tame Journalists Just Stirs Them Up in Brazil*, N.Y. TIMES, Sept. 6, 2004, at A6 (describing journalist's reaction to the proposal as a "serious threat to freedom of expression").

40. *Id.*

41. *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal 2001) (discussing a French case in which the court imposed a much more inflexible law of Internet content than that employed in the United States), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc); Gutnick v. Dow Jones & Co. (2002) 210 C.L.R. 575 (Austl.) (applying a more inflexible law of libel than that employed in the United States).

42. *See* Michael Sutton, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 429–35 (2004) (arguing that "[s]ome degree of international agreement about the regulation of Internet content is necessary, so that domestic news organizations and other content providers at least have adequate notice and understanding of the broad array of various national laws that regulate content online").

43. Three treaties administered by the WTO have potential for use in challenging foreign

world's major trading countries have agreed to limit their regulatory authority in order to permit international trade. A cogent argument can be made that subjecting online publishers to multiple liability threatens to limit the use of the Internet by companies engaged in international online publishing and thus runs afoul of the treaties. The *Gutnick* ruling could thus be challenged for limiting the international publishing business of Dow Jones. Earlier this year, the Caribbean nation of Antigua and Barbuda brought an action against the United States under the WTO-administered General Agreement on Trade in Services challenging United States laws that restrict online gambling.[44] The island nation hosts numerous online gambling enterprises, and the United States is the biggest market for their services. It also faces a panoply of laws that restrict United States citizens use of online gambling sites.[45] A WTO panel found for Antigua, ruling that the United States was in violation of its treaty obligations.[46] Although the United States has indicated it will appeal the ruling, a settlement is a likely outcome. Thus, the United States may have a precedent—albeit one it resisted in the making—on which to base an argument that international treaty law is violated by the extraterritorial application of a domestic law that injures online businesses hosted in a foreign country. The unstated premise for such a challenge would be protection of First Amendment principles.

I also hold out hope that the current domestic legal framework will work to protect online free speech against foreign judicial and regulatory interference. The jurisdiction, forum selection, choice of law, and enforceability of judgment issues so well illuminated in Bone's Note all have potential utility. The ultimate weapon against foreign infringement of the free speech rights of online publishers may be to block access by citizens whose countries threaten United States publishers. If the citizens do not get it, it will be because their governments do not get it. And that will be too bad.

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limitations on the First Amendment and also have international trade implications: the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Further information on the WTO and the various treaties it administers is available at http://www.wto.org.

44. *See United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Request for Consultations by Antigua and Barbuda*, *at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm (last visited Nov. 2, 2004) (discussing Antigua and Barbuda's complaints against the United States) (on file with the Washington and Lee Law Review). The arbitration panel's decision is not yet available to the public.

45. *See id.* (listing seven pages of United States laws that Antigua and Barbuda alleged infringe on the obligations of the United States under the GATS).

46. *See* Richard Waddington, *Antigua Claims Win over U.S. in Gambling Dispute*, *at* http://www.msnbc.msn.com/id/4594859/ (Mar. 24, 2004) (discussing the panel's ruling on the matter) (on file with the Washington and Lee Law Review).