

International Considerations in Libel Jurisdiction

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Abstract

Because of the international reach of the Internet, Web site operators must be concerned about the international reach of jurisdiction. Jurisdictions differ not only on jurisdictional matters but on substantive libel issues.

For example, an article posted on the *Wall Street Journal's* Web site arguably depicted Australian businessman Joseph Gutnick as a tax-evading money launderer. Unanimously, in 2004, the Canberra High Court affirmed an Australian court's assertion of jurisdiction, ruling the article had been "published" in Australia when downloaded, instead of in New Jersey when uploaded. Gutnick settled out of court for \$580,000. But in 2005, Yousef Jameel from Saudi Arabia failed in his attempted suit in England over a *Wall Street Journal* online article. The London court ruled that Internet publishers could only face suit in England if there were a "substantial" publication there. Only five people in England had read the article that purportedly portrayed Jameel as a fundraiser for Osama bin Laden.

In the United States, California accepted jurisdiction when Yahoo! challenged a case it lost in France, but in *Ehrenfeld v. Bin Mahfouz*, New York rejected Ehrenfeld's challenge to the libel case she lost in England. Ehrenfeld did score a victory, however: New York law changed in April 2008 as a direct result of her loss with enactment of the "Libel Terrorism Protection Act." The U.S. federal government is considering similar legislation.

The world of cyberspace with no boundaries continues to collide with the world of jurisdiction that is defined by boundaries.

International Considerations in Libel Jurisdiction

Introduction

International considerations in libel jurisdiction constitute an increasingly important and controversial topic as more and more individuals and media outlets post information on Web sites. Of course, the Web sites are available for viewing and sometimes for listening on a world-wide basis. Each Web site exposes the world to the views and alleged facts of that particular news organization. In return, the Web site's creator is exposed, worldwide, to potential charges of libel. If a lawsuit is filed, the question that emerges is this: Does the country where the suit is filed have jurisdiction and thus have the power to decide the libel case?

The question of what country can hear a libel suit makes a great deal of difference to a media corporation that is facing potential liability. Why? Because libel laws vary so much from country to country.

For example, the notion that truth is an absolute defense in libel cases is not a notion universally shared. A differing viewpoint is that regardless of the truth, words that damage an individual's reputation are libelous. And yet another viewpoint says that truth is an aggravating circumstance, that is, that truth makes the libel just that much worse.¹

¹In fact, the United States, in early seditious libel cases, embraced the notion that truth was an "aggravating circumstance."

Seditious libel is a common-law (judge-made) crime of criticizing government that the United States adopted from England. One of the most notorious early cases was the seditious libel prosecution of John Peter Zenger in 1735. Zenger printed the *New York Weekly Journal*. Zenger had published an anonymous piece in the *New York Weekly Journal* that called the Crown's New York governor, William Cosby, a tyrant and oppressor. When Zenger refused to name Cosby's anonymous critics, prosecutors went after Zenger. Governor Cosby may have been a tyrant and oppressor. But if what was said was true, it only made the offense that much worse.

The logic behind truth aggravating the crime of seditious libel was this: Start with the assumption that the purpose behind making criticizing the government a crime was to keep the peace. In other words, the reason for forbidding criticism of government was domestic peace and tranquillity. To be more specific, to a large extent the purpose of the seditious libel law was to decrease the number of duels. The reasoning then is that if one were to criticize a government official, and if that criticism were true, it would be more likely to inflame the governmental official than if it were a false criticism, and thus the true criticism would be more likely to provoke revenge or a

Much more controversial than truth as a defense is the American notion of “actual malice.” Under “actual malice,” a plaintiff has to prove that a defendant either knew what was published was false, or entertained serious doubts as to the accuracy of what was published.² In fact, the U.S. Supreme Court did not start adopting the “actual malice” rule until 1964; before then, the United States imposed strict liability on media corporations, meaning that the only question asked was, “Are those your words?”³

In brief, a media defendant facing suit in a country where truth is not an absolute defense or where strict liability prevails will probably lose. A defendant facing suit when actual malice is required stands a good chance of winning. So the question of jurisdiction can make a great deal of difference in terms of exposure to libel damages, which can be quite high (multi-million-dollar equivalents).

Court cases are all over the legal terrain in terms of what jurisdictional doctrines should apply. This paper will not presume to give a definitive answer on jurisdictional doctrines that all the world should follow, but it will explore the possibilities and some of the favorable and unfavorable aspects of those possibilities.

The United States Changes Its Libel Rules

Part of the problem with international jurisdiction questions in libel cases is that the United States has placed itself in such a protective role toward the media.

The First Amendment to the *U.S. Constitution*, passed in 1791, says: “Congress shall make no law ...abridging the freedom of speech, or of the press....” But the First Amendment is not absolute. Speech and press do have limits. Balancing must be done.

In the very first case where the U.S. Supreme Court started its interpretation of the First Amendment, Justice Oliver Wendell Holmes said, “The most stringent protection of free speech would

duel. In short, a true criticism would be more likely to disrupt the peace. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 67-68 (1964).

Another point about the charge of seditious libel is this: The jury could only decide whether the accused had printed the words in question. The far more important question of whether the words constituted seditious libel was left up to the judge. *See, e.g., Jones v. United States*, 526 U.S. 227, 446 (1999); *Rosenblatt v. Baer*, 383 U.S. 75, 96 (1971) (J. Black, concurring and dissenting).

The *Zenger* trial did not change either of these doctrines—that the truth only aggravated seditious libel and that the jury could only decide if the words were printed, not whether they amounted to seditious libel. But the trial had a major impact on early American history when the jury acquitted *Zenger*.

The U.S. Supreme Court later called the *Zenger* case “the earliest and most famous American experience with freedom of the press.” *Zenger’s* acquittal, the Court said, “set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel....” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 361 1995 (J. Thomas, concurring). This fire successfully cooled the ardor of prosecutors.

² “Entertaining serious doubts as to truth” is another formulation of “reckless disregard.” The U.S. Supreme Court opined: “Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” Not doing what the “reasonably prudent man” would have done is negligence, not recklessness. The Court continues, “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968).

³The U.S. Supreme Court said:

Justice Holmes summarized the prevailing view of strict liability in the course of reviewing a libel judgment rendered in a federal diversity of citizenship action:

“There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff’s portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous the defendant took the risk. ...”

Herbert v. Lando, 441 U.S. 153, 159 (1978).

not protect a man in falsely shouting fire in a theater and causing a panic."⁴

In libel cases, protection for the press must be balanced against other considerations such as protection for reputations. The U.S. Supreme Court recognizes that society has a strong interest in protecting peoples' reputations. This protection "reflects no more than our basic concept of the essential dignity and worth of every human being."⁵ Thus the First Amendment right of freedom of speech is limited by society's need to protect people's reputations.

But in 1964, the U.S. Supreme Court created a giant leap forward for the press and broadcasters in terms of protection from libel suits. In the landmark case of *New York Times Co. v. Sullivan*,⁶ the Court ruled that if a public official claims to have been libeled, the public official must show actual malice by clear and convincing proof. The Court defined "actual malice" as: "Knowledge that a statement is false, or reckless disregard of whether it is was true or false."⁷

To put *New York Times Co. v. Sullivan* in context, at common law there was strict liability for libel. That means that if one published or broadcast the libelous words and the words damaged someone's reputation, they were going to pay. Period. Further, damages were presumed; the law assumed that if the plaintiff was libeled, the plaintiff was damaged.⁸ And the defendant had the burden of proof to prove truth.⁹ Thus, from media defendants' vantage point, an unholy triumvirate prevailed in libel law: strict liability, presumed damages and the burden of proof on the defendant. These doctrines still exist in countries such as England that follow the common law.¹⁰ "In Australia, the law views a person's reputation as the paramount concern, and a defendant may be held liable for defamation 'even though no injury to reputation was intended and the defendant acted with reasonable care.'" Richard L. Creech, *Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language*, 22 J. Marshall J. Computer & Info. Law 553, 556 (quoting opinion of Gleeson, C.J., *Dow Jones v. Gutnick*, [2002] HCA 56 at 25). Libel suits were not that difficult for plaintiffs to win in the United States at the time when the *Sullivan* case reached the U.S. Supreme Court, and libel cases are still not that difficult to win in countries adhering to the common law.

The U.S. Supreme Court decided that libel law, as practiced under common law, violated the First Amendment right of freedom of speech and press. Common-law libel, according to the Court, created a chilling effect on the media. Thus the Court revolutionized libel law to unthaw public debate on public issues, making winning libel suits much more difficult for public officials. The Court said, "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹¹ The Court talked about the need for "breathing space," saying that "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that

⁴*Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁵*Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (J. Stewart, concurring).

⁶376 U.S. 254 (1964).

⁷*Id.* at 280.

⁸In English defamation law, the principle of presumed damages still stands. See *Harrods Ltd. v. Dow Jones & Co. Inc.*, EWHC 1162 (Case No. HQ02X01733) (May 22, 2003) at ¶ 39 (available at http://www.hmcourts-service.gov.uk/judgmentsfiles/j1796/harrods_v_dow_jones.htm).

⁹On the need to switch the burden of proof to the plaintiff, see *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

¹⁰In the United Kingdom, libel remains a strict liability tort, plaintiffs need not offer proof of actual damage because damage is presumed, defendants bear the burden of proving the truth of their statements, and courts may assess punitive damages against a defendant that pleads truth but fails to prove it." *Developments in the Law—The Law of Media: V. Internet Jurisdiction: A Comparative Analysis*, 120 Harvard L. Rev. 1031, 1037-38 (Feb. 2007).

¹¹*Id.* at 270.

they need to survive."¹²

Perhaps even more controversial, the Court in 1967 extended the "actual malice" rule to "public figures"¹³ – people who have "pervasive fame or notoriety" or who have "thrust themselves into the vortex of an important public issue" in order to influence the outcome. "In either case," the Court says, "such persons assume special prominence in the resolution of public questions."¹⁴

¹²*Id.* at 271.

As for the facts, the alleged libel occurred in an editorial advertisement, "Heed Their Rising Voices," taken out by a civil liberties group dedicated to the struggle for equality by African-Americans. The plaintiff, Sullivan, was the Commissioner who supervised the Montgomery police. The ad said that the nonviolent demonstrations by civil rights groups were being met with "an unprecedented wave of terror..." *Id.* at 256. The errors in the ad included:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission." *Id.* at 257.

The students sang the National Anthem and police did not "ring" the campus. Not the entire student body protested, the students had not to reregister although they did boycott classes for a day, and the dining hall was not padlocked. *Id.* at 258-59.

The trial was held in Alabama. Sullivan won \$500,000. *Id.* at 256. This was just one of five libel suits brought against the *Times* for this ad by Montgomery City Commissioners and the governor of Alabama. In one of those other suits, the *Times* had been hit with another \$500,000 judgment. Damages sought in the remaining three suits totaled \$200,000. *Id.* at 278 n. 18.

¹³*Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130 (1967).

Justice Warren says, "Many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. [A]lthough they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society." Warren continues, "And surely as a class these 'public figures' have as ready access as 'public officials' to mass media, [both] to influence policy and to counter criticism of their views and activities." Warren makes another point: "Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Id.* at 164.

Four of the justices would have required a somewhat lower standard than "actual malice" for public figures. Justice Harlan wrote the opinion for the four justices. They would have allowed a plaintiff to win if the defendant had demonstrated "highly unreasonable conduct" that was an "extreme departure" from ordinary standards of investigation and reporting: In their words, "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

¹⁴*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.*

Although the Court had said that public figures must prove actual malice in 1967, it was the 1974 *Gertz* decision that addressed more fully how one becomes a public figure.

The concept of drawing lines concerning who is a public official or a public figure has plagued the Court. Justice Douglas, in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), voted with the majority but wrote his own concurring opinion in which out how hard it was to draw lines about who is a public official: He said, "If free discussion of public issues is the guide, I see no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll." *Id.* at 89 (J. Douglas, concurring). According to Douglas, "The question is whether a public *issue*, not a public official, is involved." Even more troublesome is the question of who is a "public figure." *Id.* at 91.

In 1971, the Supreme Court reached its highwater mark for media protection. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of Supreme Court justices voted to extend the actual malice requirement to cases involving a "matter of public interest." Here the Court was focusing on the subject matter of the case instead of focusing on the plaintiff. The Court was looking at whether the subject matter of the case was one of public interest instead of asking whether the plaintiff was a public official or a public figure. This was the

But in 1974, the Court showed its uneasiness about the actual malice standard, saying, "Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."¹⁵ So, the Court says, "the state interest in compensating injury to the reputation of private individuals requires a different rule ... with respect to them." Generally speaking, the Court says that "public figures have thrust themselves to the forefront of particular public controversies ... to influence" the outcome. "They invite attention and comment," the Court says, and, accordingly, the media "are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods." But, the court says, "No such assumption is justified with respect to a private individual. ... He has relinquished no part of his interest in the protection of his own good name."¹⁶ In short, the Court says, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." Therefore, the Court held that states could "define for themselves the appropriate standard of liability for a publisher or broadcaster" who defames a private individual, "so long as the states do not impose liability without fault."¹⁷

This complicated libel law, which the Supreme Court admits makes some intentionally defamed plaintiffs walk away without compensation, has raised the bar of protection quite high—incurably high, in fact, in many cases. Libel plaintiffs who have the option should rationally choose a jurisdiction with less onerous requirements.

approach that Justice Douglas had wanted. Under this approach, the actual malice standard was applied to private persons caught up in events of public interest. But this approach was short-lived, and a majority never approved of this position. In just three years, in *Gertz v. Robert Welch, Inc.*, the Court returned to focusing on whether the plaintiff was a public official or a public figure. 418 U.S. at 345. This period shows that the Court was struggling, trying to determine how far to go in applying the *Sullivan* actual malice standard.

The most often litigated libel question in the 1970s was "Who is a public figure?" The Supreme Court visited the issue in 1974, 1976, and twice in 1979. The upshot was that the Court narrowed the concept of who is a public figure. In *Gertz*, the Court held that an attorney who was well known in legal circles but not by the general public was not a public figure. In *Firestone v. Time, Inc.*, 424 U.S. 448 (1976), the Court said that a wealthy woman engaged in a messy, public divorce who even gave press conferences was not a public figure. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court held that a researcher receiving public money was not a public person, and in *Wolston v. Reader's Digest*, 443 U.S. 157 (1979), the Court held that criminal activity by itself does not make one a public figure.

¹⁵*Gertz v. Robert Welch, Inc.*, 418 U.S. at 342.

¹⁶*Id.* at 344-45.

¹⁷*Id.* at . At the low end of "fault," a state can require mere "negligence." Generally speaking, negligence is not using the degree of care that a reasonable person in similar circumstances would use. This is the standard that most states use. New York uses a higher standard. The plaintiff must show that the defendant acted in a "grossly irresponsible manner." See, e.g., *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 538; 416 N.E.2d 557, 559 (1980). A handful of states insist on proof of actual malice for both private and public people in some circumstances. A few, such as Missouri, merely require "fault" without defining the term. In short, there is no uniformity among the states on what level of fault private individuals must prove to receive actual or compensatory damages.

Also under *Gertz*, if plaintiffs are to receive punitive damages, they must prove actual malice. The Supreme Court defines punitive damages as "private fines ... to punish reprehensible conduct and to deter its future occurrence." 418 U.S. at 349-350.

Besides requiring that plaintiffs show fault, *Gertz* also says that, at least in cases where actual malice is not proved, actual damages cannot be presumed. They must be proved. Under common law, damages for libel were presumed. But the Court says, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.* at 349.

Jurisdiction and the Internet in Civil Cases

Generally, to assert jurisdiction over a case, a court must have two sorts of jurisdiction: (1) over the subject matter and (2) over the person (*in personam* or personal jurisdiction).

As for subject matter jurisdiction, courts do not feel competent to decide some controversies. For example, most courts do not claim the power to decide purely religious controversies or cases involving aesthetics. For instance, one actress cannot sue another actress, saying that she was unfairly deprived of an award at the Cannes Film Festival because she was obviously the superior performer. A court is simply not going to get involved in such tiffs.

In Internet cases, generally the problem is personal jurisdiction. Jurisdiction over the person may be either "specific jurisdiction" or "general jurisdiction." Specific jurisdiction only gives a court the power to try a specific case against a defendant under the circumstances. General jurisdiction gives a court the power to try all cases brought against the defendant, so long as the cases are otherwise actionable.

Jurisdiction and the United States

According to the U.S. Supreme Court, "specific jurisdiction" requires "minimum contacts" while "general jurisdiction" requires "presence."

Specific jurisdiction

As for "specific jurisdiction," the Supreme Court requires both that defendants have "minimum contacts" with a forum state (the state hearing the case) and that the exercise of jurisdiction not offend "traditional notions of fair play and substantial justice."¹⁸ The Court has used the "due process" clause of the Fourteenth Amendment¹⁹ to limit courts' exercise of personal jurisdiction since 1877.²⁰

The Supreme Court has concluded that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. ...The foreseeability that is critical to due process analysis is ... that the defendant's conduct and connections with the forum State are such that he [or she] should reasonably anticipate being haled into court there."²¹

Exercising of jurisdiction should not be like lightning striking. "In applying the minimum contacts standard," the Supreme Court says, "it is clear that a 'defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts.'"²² Rather, the plaintiff must establish that the defendant "'purposefully availed itself' of the privilege of conducting activities within the forum."²³ But "purposeful availment" is always tempered by the notion of fairness. As a lower court explains:

Nevertheless, even if "purposeful availment" is established, the Court must consider whether the exercise of personal jurisdiction would comport with the notion of "fair play and substantial justice." ... In making this determination, the Court considers (1) the burden on the defendant; (2) the plaintiff's interests in obtaining convenient and effective relief; (3) the forum state's interest in adjudicating the dispute; (4) the interstate judicial system's interest in obtaining the

¹⁸International Shoe Co. v. Washington, 326 U.S. 310,316 (1945).

¹⁹The Fourteenth Amendment (1868) says, in part, "No State shall ... deprive any person of life, liberty, or property, without due process of law." The Fifth Amendment had said that the *federal* government could not deprive a person of "life, liberty, or property, without due process of law." The Fourteenth Amendment made clear that *states* also could not deprive persons of life, liberty, or property without due process. So the Fourteenth Amendment makes due process applicable to the states.

²⁰Pennoyer v. Neff, 95 U.S. 714 (1877).

²¹World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 295-97 (1980) (quoted in IMO Industries Inc. v. Kiekert, 155 F.3d 254, 260 (3rd Cir. 1998).

²²Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

²³Hanson v. Denckla, 357 U.S. 235, 253 (1958).

most efficient resolution of the controversies; and (5) the shared interests of the states in furthering fundamental substantive social policies.²⁴

Two Supreme Court cases involving libel and specific jurisdiction

In 1984, in *Keeton v. Hustler Magazine*,²⁵ the U.S. Supreme Court unanimously upheld jurisdiction. A New York resident, Keeton, sued Hustler, an Ohio corporation--in New Hampshire. Why? Because New Hampshire had an unusually long (in fact, the longest) statute of limitations for libel in the United States--six years. New Hampshire accepted the case. The Supreme Court said that Hustler's "regular circulation of magazines in the forum state (New Hampshire)" was sufficient to satisfy the "minimum contacts" with the state of New Hampshire for New Hampshire to be able to hear the case. The Court said, "Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner."

So, conceivably, any plaintiff suing a magazine or newspaper with a national circulation could sue in any state. Forum shopping, say, for a long statute of limitations could be a result.

In another unanimous Supreme Court case, *Calder v. Jones* (1984),²⁶ the Supreme Court permitted suit in California brought by a plaintiff who lived in California. An entertainer, Shirley Jones, the mother in the TV series "The Partridge Family," said she was libeled by the *National Enquirer*, which is published in Florida. The article said she drank so heavily that she couldn't meet her professional obligations. But the *National Enquirer* has its greatest circulation in California--almost twice the circulation it has in any other state. The Supreme Court said:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of [Jones'] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the **focal point** both of the story and of the harm suffered. Jurisdiction over the *National Enquirer* is therefore proper in California based on the "effects" of their Florida conduct in California. (Emphasis added.)

The *Calder* case has had a major impact on international libel cases involving U.S. defendants, such as in the *Yahoo!* case covered below.

General jurisdiction and the Internet: the Zippo case

Merely because a person or corporation has an Internet presence virtually everywhere does not mean that the person or corporation with the Web site may be sued everywhere. A leading U. S. case on when defendants have subjected themselves to general jurisdiction in forums outside of their own (foreign forums) is the *Zippo* case.

An influential federal trial court case from Pennsylvania discussed the nature of jurisdiction based on the type of Web site an individual or business runs. *Zippo Mfg. Co. v. Zippo Dot Com Inc.*,²⁷ is an Internet domain name dispute. The *Zippo* court formulated the *Zippo* test for jurisdiction. After noting that "[t]he Internet makes it possible to conduct business throughout the world entirely from a desktop," the court said it has reviewed cases on Internet jurisdiction, which were rather scant at that

²⁴Westcode, Inc. v. RBE Electronics, Inc., 2000 U.S. Dist. LEXIS 815, *5 (E.D. Pa. Feb. 1, 2000).

²⁵465 U.S. 770 (1984).

²⁶465 U.S. 783 (1984).

²⁷"This is a 'doing business over the Internet' case.... We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does. Dot Com has contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania. The intended objects of these transactions has been the downloading of the electronic messages that form the basis of this suit in Pennsylvania." *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997).

point in time. The court concluded that its "review of the available cases and materials ... reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." So, based on commercial activity, the court devised what it called a "*sliding scale*" for asserting jurisdiction:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.²⁸ ... The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

In sum, according to the *Zippo* test:

1. If the defendant clearly *does business* over the Internet, then the foreign court may assert jurisdiction.
2. If the defendant operates an interactive Web site, then jurisdiction is not clear: This is a gray zone.
3. If the defendant merely *posts information* on a passive Web site, then the foreign court may not assert jurisdiction.

So, according to *Zippo*, if the defendant clearly *does business* over the Internet, then a court from another state may assert jurisdiction over the defendant. For example, if a defendant operating a Web site in New Mexico sells products over the Web to a buyer in Vermont, then the defendant may be sued in Vermont. On the other hand, if that defendant merely *posts information* on a passive Web site, then a court in another state such as Vermont may not assert jurisdiction over the defendant; the defendant may only be sued in the state where he or she operates the Web site, New Mexico. This is harsh on defendants. And then there is murky middle ground where the defendant operates an *interactive* Web site; the person is not doing business over the Web site, but the person is not just operating a totally passive Web site. Then the judge must carefully weigh the facts. Whether the person may then be sued in a foreign forum is problematic; however, as the number of Internet suits increase, U.S. courts may be tightening up on their requirements and may not be allowing suits in foreign jurisdictions quite as readily as they had been.

An example of a case where a court allowed jurisdiction in the gray zone in the past but might not under similar circumstances in the future is *Blumenthal v. Drudge*.²⁹ Matt Drudge operates "drudgereport.com," a Web site that includes his own breaking news stories and a host of links to other news Web sites.

Drudge posted a story that said that Sidney Blumenthal, who was working for the Clinton Administration, beat his wife. Blumenthal filed suit in federal court in Washington, D.C. The first question was whether the District of Columbia court could assert jurisdiction over Drudge, who was based in Los Angeles at the time. In 1998, citing *Zippo*, the District of Columbia court allowed

²⁸*Zippo* was not the first case to draw this conclusion. For example, "The Blue Note" jazz club in New York City could not sue in a New York federal court "The Blue Note," a small club for live music in Columbia, Missouri. The court reasoned that merely having a World Wide Web site on the Internet that could be accessed in New York was insufficient contact. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

²⁹992 F. Supp. 44 (D.D.C. 1998).

jurisdiction over then-California resident Drudge on the ground that Drudge's Web site was not "passive" because it allowed an exchange of information via e-mail.³⁰ This level of interactivity (e-mail with people in the District of Columbia) might not be enough for a court to want to assert jurisdiction.³¹ But, again, a Web site coupled with some interactivity does pose an unclear situation for jurisdiction.

In the gray zone, jurisdiction was denied, for example, in the case of *Ty, Inc. v. Max Clark*.³² The plaintiff, Ty, is the creator of "Beanie Babies." Its principal place of business is in Illinois. The defendant is an English corporation with its principal place of business in Cheshire. Its Web site, "www.beaniebabiesuk.com," solicited orders for Beanie Babies. The Illinois court declined to hear the case, saying:

The present case falls in the 'middle ground' of the sliding scale model of *Zippo*. The defendants in the present case do not run a completely passive web site, for it is possible for consumers to e-mail the defendants questions about products and to receive information about placing orders, etc. However, at the same time, the defendants do not clearly do business over their web site, for they do not take orders nor enter into contracts over the web site. In fact, the defendants make it extremely clear on their web site that they do not conduct on-line transactions. ... Instead, the defendants have consumers print out an order form and either fax, telephone, or send their orders through traditional mail to the defendant's offices in Great Britain.³³

The Hague Conference on Private International Law Commission II: Jurisdiction and Foreign Judgments in Civil and Commercial Matters³⁴

The proposed Hague Convention incorporates many of the principles already discussed.

Article 3, under the heading of "Defendants forum," in effect discusses general jurisdiction, saying that "Subject to the provisions of the Convention, a defendant may be sued in the courts of [a][the] State [in which] [where] that defendant is [habitually] resident."³⁵ Article 4.1, mentions subject matter jurisdiction.³⁶ Article 5 gives defendant's the "right to contest jurisdiction."

³⁰Blumenthal's suit against Drudge had a rather odd ending. Blumenthal's attorney cancelled depositions scheduled in the District of Columbia but failed to inform Drudge's attorney, who flew to the District of Columbia. Blumenthal ended up paying Drudge \$2,500 for the attorney's expenses associated with the cross-country flight, and then Blumenthal dropped the suit. See Howard Kurtz, *Clinton Aide Settles Libel Suit against Matt Drudge—at a Cost*, *The Washington Post*, May 2, 2001, at C01.

³¹See, for example, *Advanced Software, Inc. v. Datapharm, Inc.*, 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 9, 1998). "...the interactivity issue is relevant to determine whether the defendant's contacts with the forum state are substantial enough to warrant jurisdiction. If, however, there is no showing or assertion that anyone in the forum state ever utilized the web-site, the fact that it has interactive potential is irrelevant. As with the tango, it takes two to interact." *Id.* at *10.

For recent cases that "witness a move closer to the *Zippo* test," see Robert S. Friedman and Mark E. McGrath, *E-Contacts and New York's Long-Arm Statute*, *N.Y. Law Journal* (April 7, 2008) (available at http://www.law.com/jsp/nylj/PubArticleNY.jsp?_a=1207305784603).

³²2000 U.S. Dist. LEXIS 383 (N.D. Ill. Jan. 14, 2000).

³³*Id.* at *9-*10.

³⁴Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Interim Text, Prepared by the Permanent Bureau and the Co-reporters.

³⁵Article 3.1. Corporations fall under Article 3.3:

... an entity or person other than a natural person shall be considered to be [habitually] resident in the State where it has its statutory seat;
under whose law it was incorporated or formed;
where it has its central administration; or
where it has its principal place of business.

³⁶Choice of court. If the parties have agreed that [a court or] [the] courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that

But it is Article 10 on “Torts [or delicts]” that is most pertinent. Article 10.1 says: “A plaintiff may bring an action in tort [or delict] in the courts of the State – a) in which the act or omission that caused injury occurred, or b) in which the injury arose....” This incorporates the “effects” test already discussed. Specific jurisdiction may lie where the effects of the tort are felt. Part “b” continues, however, saying, “unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.” The “could not reasonably foresee” language is reminiscent of the U.S. Supreme Court language concerning the importance of fair play.

Article 10.2 says: “A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.” Again, the Hague Convention language is echoing effects and fair play language.

Article 10.3 says: “The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.” In an Internet context, this language would seem to apply if the Web site’s creator takes “reasonable steps” to restrict or block the Web site’s viewing in a particular jurisdiction. This question of whether a Web site creator can indeed achieve selective blocking would appear to be a question of technology. Does such a blocking mechanism exist?

Jurisdiction under the Hague Convention comes in three levels, somewhat reminiscent of *Zippo*. Article 10 on Torts provides the intermediate level—the “may” assert jurisdiction. Article 12 provides for “Exclusive jurisdiction” in areas unrelated to libel—real estate, dissolution of marriage, validity of public registers, patents and trademark³⁷—where courts shall assert jurisdiction. At the other extreme, Article 18 lists “Prohibited grounds of jurisdiction,” including under Article 18.1: “Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and [either] the dispute [or the defendant].” Again, the Hague Convention is incorporating notions of fair play and substantial justice.³⁸

court or those] [the] courts [of that Contracting State] shall have jurisdiction[, provided the court has subject matter jurisdiction]....”

³⁷Article 13, Alternative A, under the heading of “Provisional and protective measures,” makes clear that even a court without jurisdiction to decide a claim’s merits may “order a provisional and protective measure.” In short, courts can enjoin activity in that jurisdiction’s territory. Article 13.2. But the Hague Convention language continues, saying that “Nothing in this Convention shall prevent a court in a Contracting State from ordering a provisional and protective measure for the purpose of protecting on an interim basis a claim on the merits which is pending or to brought (sic) by the requesting party in another State.” Article 13.3. “Provisional and protective measure includes “a measure to restrain conduct by a defendant to prevent current or imminent future harm.” Article 13.3 (c). In the libel context, an injunction to prohibit dissemination of allegedly libelous material could be a possibility under the Hague Convention. However, trying to limit injunctions concerning the Internet to a certain geographic location, of course, could pose some technological difficulties.

³⁸Under Article 18.2:

[In particular,] [Where the defendant is habitually resident in a Contracting State,] jurisdiction shall not be exercised by the courts of a Contracting State on the basis [solely of one or more] of the following –

...

b) the nationality of the plaintiff;

c) the nationality of the defendant;

d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State....

[l) the existence of a related criminal action in that State].

[3. Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming damages in respect of conduct which constitutes –

[a) genocide, a crime against humanity or a war crime]; or]

Article 22, titled “Exceptional circumstances for declining jurisdiction,” provides that in some “exceptional circumstances,” when asked to do so by a party, “the court may ... suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute.”³⁹ However, Article 22.7 says that courts having jurisdiction under some articles, including Article 10 on Torts, “shall not apply the doctrine of *forum non conveniens* or any similar rule for declining jurisdiction.”]

Also of interest in the area of libel is Article 28, titled “Grounds for refusal of recognition or enforcement.” The grounds for refusal include under Article 28.1 (c) “the [judgment results from] proceedings [in the State of origin were] incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court]” and under (f) “recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.” This would cover those circumstances where a libel judgment was gained, say, against a U.S. citizen or corporation through a so-called “kangaroo court” or where the result would be “manifestly incompatible” with First Amendment protections.

Finally, Article 33, titled “Damages,” guards against excessive damages. Under Article 33.2 (a): “Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.”

Gutnick (a “badnick” case for the media) and other Wall Street Journal cases

Because of the international reach of the Internet, Web site operators need to be concerned about the international reach of jurisdiction. For example, Australia asserted jurisdiction over Dow Jones & Co. Inc., which is the parent company of *The Wall Street Journal*, in the case of *Gutnick v. Dow Jones & Co. Inc.*⁴⁰ An article titled “Unholy Gains” appeared on *The Wall Street Journal's* Web site, criticizing an Australian businessman, Joseph Gutnick, and arguably depicting him as a tax-evading money launderer. Approximately 300 subscribers to the Web site lived in Victoria. Australia’s Supreme Court ruled that the article had been “published” in Australia, reasoning that “publication” occurs where the reader receives the content, in this case, at the point of downloading.⁴¹ Then Dow Jones reached an

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- b)* a serious crime under international law, provided that this State has exercised its criminal jurisdiction over that crime in accordance with an international treaty to which it is a Party and that claim is for civil compensatory damages for death or serious bodily injuries arising from that crime.

Sub-paragraph *b)* only applies if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]]

³⁹Under Article 22.2, the Hague Convention says, “The court shall take into account, in particular –

- a)* any inconvenience to the parties in view of their habitual residence;
b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence....”

⁴⁰HCA 56 (2002) (available at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html). A transcript of trial proceedings, *Gutnick v. Dow Jones & Co. Inc.*, Melbourne No. M3/2002 (May 28, 2002), is available at <http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>.)

⁴¹“The principle issue...was where was the material of which Mr. Gutnick complained available?” HCA 56 at ¶ 4. The high court answered its question in this manner:

... [O]rdinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form.... In the case of material in the World Wide Web, it is not available in comprehensible form until downloaded....

It is where that person downloads the material that the damage to reputation may be done.

HCA 56 at ¶ 44.

out-of-court settlement with Gutnick, paying him \$580,000.⁴²

In 2003, Harrods, the famous British department store, sued Dow Jones in England over a story comparing Harrods to Enron.⁴³ Ten subscriptions to *The Wall Street Journal* and some online access was enough, Justice Eady thought, for jurisdiction.⁴⁴ The London High Court jury, however, ruled in favor of defendant *The Wall Street Journal* in 2004. In addition to losing, Harrods was ordered to pay roughly \$60,000 worth of Dow Jones's legal fees.⁴⁵

The case began with a 2002 April Fool's Day joke by Harrods, which first issued a mock press release about a plan to "float" the company and then, in a later press release, saying Mohammed Al-Fayed planned to "float" the company through a boat version of Harrods moored on the Thames River. Unfortunately, the editors at the *Journal* did not immediately get the joke. They read the first press release as a real announcement that Harrods would "float shares," meaning Harrods would make a public offering of its shares. But on realizing the joke, the *Journal* printed both a correction and a story, "The Enron of Britain?," that admitted the *Journal* had been fooled. The story also questioned the use of false press releases.

In yet another Dow Jones case, in 2005 wealthy Yousef Jameel of Saudi Arabia failed in his attempt to sue Dow Jones for libel in England.⁴⁶ Once again the suit was based on an online article

⁴²*See, e.g., Publish and be damned (or at least sued)*, Lawyers Weekly Magazine (Nov. 26, 2004) (available at www.lawyersweekly.com.au/topic/defamation). On *Gutnick generally*, see, e.g., Kurt Wimmer, *International Processes: Toward a World Rule of Law: Freedom of Expression*, 603 *Annals Am. Acad. Pol. & Soc. Sci.* 202 (Jan. 2006); Michael Cameron, *Libel law danger to free press*, *The Australian*, Aug. 5, 2004, at 22; Martin Soames, *The threat of libel tourism: A book about the intriguing links between the Saudi ruling family and the Bush political dynasty has been published in the US but not in the UK*, *The Guardian* (London), March 29, 2004, at 10; Brian Fitzgerald, *Dow Jones & Co. Inc. v. Gutnick, negotiating 'American legal hegemony' in the transnational world of cyberspace*, 27 *Melbourne U. Law Rev.* 590 (August 1, 2003); *Litigants can take action anywhere*, *The Times* (London), Feb. 17, 2004, *Home News*, at 4; Karlan Lillington, *Australian Net libel case highlights need for harmonising laws*, *The Irish Times*, Nov. 8, 2002, at 56; and *All the world's a forum*, *The National Law Journal*, Feb. 11, 2002, at B13.

⁴³*Harrods Ltd. v. Dow Jones & Co. Inc.*, [2003] EWHC 1162 (QB) (available at http://www.hmcourts-service.gov.uk/judgmentsfiles/j1796/harrods_v_dow_jones.htm).

In 2002, Dow Jones had attempted unsuccessfully to stop the suit by asking a federal trial judge in New York to use the Declaratory Judgments Act, 28 U.S.C. § 2201(a), and declare the rights of the parties. But the judge did not find that an actual controversy existed and did not want to use the law to stifle a foreign lawsuit. *Dow Jones & Co. Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N. Y. 2002).

⁴⁴The allegedly libelous words did not appear in *The Wall Street Journal's* European edition, and evidence showed only "a very small number of 'hits'" on the Web. In contrast, *The Wall Street Journal* has a U.S. distribution of approximately 1.8 million. *Harrods Ltd. v. Dow Jones & Co. Inc.*, EWHC 1162 at ¶ 4.

Justice Eady said:

No proceedings have been launched in respect of circulation within the United States, ... and this would hardly be surprising in view of the impact of the First Amendment to the United States Constitution.... It is well known that this also has a significant effect upon the approach of the American courts to the enforcement of judgments arising from English defamation claims.

Harrods Ltd. v. Dow Jones & Co. Inc., EWHC 1162 at ¶ 6.

⁴⁵*See, e.g., Reporters Committee for Freedom of the Press, British court throws out libel suit against Dow Jones Co.*, Feb. 19, 2004 (available at www.rcfp.org/news/2004/0219harrod.html). "It was unfortunate that an article published in the U.S. and seen by millions there, but only 22, at most, in England, was hauled into the English legal system to be defended at a cost of tens of thousands of pounds," Brigitte Trafford, vice president of communications at Dow Jones, reportedly said. *Id.*

Although Justice Eady had agreed to asserting jurisdiction, he had encouraged the parties to settle before incurring further costs. "My words may fall on stony ground," he said, "but that is no reason for not making an attempt." *Id.* at ¶ 45

⁴⁶*Jameel v. Dow Jones & Co. Inc.*, [2005] EWCA (Civ.) 75 (available at www.hmcourts-service.gov.uk/cms/files/Index_of_2004-05_Cases.pdf).

from *The Wall Street Journal*. The appellate court in London overruled Justice Eady, saying that Internet publishers could only face suit in England if there were a substantial publication there. Only five people in England had read the article that purportedly portrayed Jameel as an early provider of funds for Osama bin Laden.⁴⁷

Also in 2005, Ontario, Canada, rejected jurisdiction in *Bangoura v. Washington Post*.⁴⁸ Prior to that, in 2004, an Ontario judge had accepted jurisdiction. He reasoned that the *Post* was a “major newspaper” and that “the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided.”⁴⁹ But the appellate court rejected this notion of roving jurisdiction. As for the facts, a United Nations official, Checkh Bangoura, had been stationed at various posts around the world. He was stationed in Kenya in 1997 when the *Washington Post* accused him of financial mismanagement, nepotism and sexual harassment at an earlier post in the Ivory Coast. Four days later, the United Nations suspended him from his position, and *The Washington Post* wrote a follow-up story the next day. Bangoura moved to Montreal, and then he moved to Ontario three years later, where he tried to sue.⁵⁰ But the Court of Appeal for Ontario rejected the notion that Bangoura’s harm occurred in Ontario, saying, “Only Mr. Bangoura’s lawyer accessed the two articles on the *Washington Post* database. Whatever damages were suffered by Mr. Bangoura’s losing his job with the UN, more than three years before he took up residence in Ontario, are not damages suffered in Ontario.”⁵¹ The appellate court also pointed out a practical matter: Canada rejected the *New York Times v. Sullivan* decision,⁵² so “the reality is that American courts will not enforce libel judgments that are based on the application of principles that are contrary to the actual malice rule.”⁵³

Boxing promoter Don King, however, fared better with his English lawsuit than did Bangoura. King won a round against Lennox Lewis on February 6, 2004, when the High Court of Justice in London refused to dismiss a libel case that stemmed from two online publications that portrayed King as anti-Semitic. Both King and Lewis resided in the United States, but Justice Eady made clear that King had a lot of connection with Great Britain as well as a reputation there to protect.⁵⁴

⁴⁷Id. at ¶¶ 8 & 43.

⁴⁸C41379 (Ont. Ct. App. Sept. 16, 2005) (available at <http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm>).

⁴⁹Id. at ¶ 24. The judge also apparently viewed *Gutnick v. Dow Jones & Co. Inc.* as supporting the position that Ontario should grant jurisdiction. *Id.* at ¶ 43.

⁵⁰Id. at ¶¶ 5-8.

⁵¹Id. at ¶ 23.

⁵²Id. at ¶ 37.

⁵³Id. at ¶ 39. On the 2005 decision, *see, e.g., Washington Post cannot be sued in Ontario over stories*, *Out-Law News*, Sep. 21, 2005 (available at www.out-law.com/page-6142); on the overturned 2004 ruling, *see, e.g., Michael Geist, Web decision extends long arm of Ontario law*, *The Toronto Star*, Feb. 16, 2004, at C02.

⁵⁴Justice Eady said, in part:

The evidence discloses that Mr King has a substantial reputation in England, and indeed has made frequent appearances on television, radio and through the other media. I need not rehearse that evidence in detail at this stage. Particular reliance was placed upon the fact that he had participated in advertisements on BBC television for their broadcast coverage of the FA Cup. This would hardly have happened, it was argued, if he were not extremely well known to sports fans in this country. Indeed, there was evidence to the effect that Mr King may be the best known person in the world of boxing and "certainly one of the best known people in the world of boxing".

There is no doubt also that Mr King has a considerable financial and business connection here, as the result of having promoted a number of fights either in this country or involving British boxers. The precise figure may be in dispute and for present purposes it does not matter, but it is reasonably clear that Mr King through his relevant corporate vehicle has earned revenue from this jurisdiction running into tens of millions of dollars. There is also evidence that he has many business associates and friends in this country.

A matter of particular concern is that Mr King has friends and acquaintances within the Jewish community in England - not least because many of the well known people in the boxing world are themselves Jewish.

The appellate court this time affirmed Justice Eady and flatly rejected the defendant's argument concerning "targeting":

[I]t makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has "targeted," when in truth he has "targeted" every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to "target," it would in our judgment be liable to manipulation and uncertainty and much more likely to diminish than enhance the interests of justice.⁵⁵

And Oscar-winning film maker Roman Polanski, who was living in France, won his libel suit against Conde Nast, the parent company of *Vanity Fair* magazine, in Great Britain in 2005. For the first time, Great Britain allowed a plaintiff to sue *in absentia*. Britain's highest court, the House of Lords, agreed to let Polanski "appear" via a video linkup.⁵⁶ Lord Carswell explained the predicament in which Polanski found himself:

The appellant Roman Polanski is unwilling to come to this country lest he be arrested and extradited to the United States of America to receive punishment for an offence of unlawful sexual intercourse with a 13-year-old girl which he committed in California in 1977. He fled that jurisdiction in 1978 after pleading guilty to the offence and spending some six weeks in prison undergoing pre-sentence tests, but before sentence was pronounced by the court. He has resided since then in France, from which country he cannot be extradited to the United States, as he has French citizenship and the French Republic will not extradite its citizens. If he were to come to this country he would be liable to be extradited under the terms of the extradition treaty with the United States.⁵⁷

Vanity Fair had said that Polanski propositioned a woman in a restaurant while he was on his way to the funeral of his murdered first wife, Sharon Tate, in 1969.⁵⁸ Polanski won £50,000 in libel damages.⁵⁹ Lord Nicholls opined that "Mr. Polanski's reputation is international," which makes him "entitled to bring this action in this country."⁶⁰

From these cases on jurisdiction, one point is clear—that the law is not clear. Court cases are all over the legal terrain in terms of what jurisdictional doctrines should apply. For example, if the site of publication is the site of downloading, then a media defendant can be forced to defend in any country where the publication is downloaded, as in *Gutnick*.

King v. Lewis, [2004] EWHC 168 (QB) at ¶¶ 23-25 (available at <http://www.hmcourts-service.gov.uk/judgementsfiles/j2261/king-v-lewis.htm>).

⁵⁵Lewis v. King, [2004] EWCA (Civ.) 1329 at ¶ 34 (available at <http://www.hmcourts-service.gov.uk/judgementsfiles/j2844/lewis-v-king.htm>).

⁵⁶Polanski v. Conde Nast Publications Ltd., [2005] UKHL 10, statement by Lord Carswell, ¶ 87, Feb. 10, 2005 (available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050210/polan-3.htm>).

Great Britain has a procedure rule 32.3 that says, "The court may allow a witness to give evidence through a video link or by other means." *Id.* at ¶ 63.

⁵⁷*Id.* at ¶ 61.

⁵⁸*See, e.g.*, Mike Collett-White, *Polanski can sue by long distance*, Sydney Morning Herald, Feb. 12, 2005, at 24. For the text of the article, *see* Polanski v. Conde Nast Publications Ltd., [2005] UKHL 10, statement by Lord Nicholls, ¶ 3, Feb. 10, 2005 (available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050210/polan-1.htm>).

⁵⁹*See, e.g.*, Claire Cozens, *Polanski wins libel case against Vanity Fair*, MediaGuardian, July 22, 2005 (available at <http://www.guardian.co.uk/media/2005/jul/22/pressandpublishing.generalelection2005>). Polanski's films include "Rosemary's Baby" and "The Pianist." *Id.* The estimated costs in the case totalled £ 1.5 million, with the judge granting Polanski an interim award for costs of £175,000. *Id.*

⁶⁰Polanski v. Conde Nast Publications Ltd., [2005] UKHL10, statement by Lord Nicholls, ¶ 12, Feb. 10, 2005 (available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050210/polan-1.htm>).

Or perhaps the court will say the number of downloads is insufficient, as in *Jameel*. However, as a doctrine for jurisdiction, this notion of counting the downloads is arguably deficient because the media defendant is faced with uncertainty. Whether the media defendant can be sued in a foreign country is dependent on the activities of others in that country. The media defendant could only hope for poor readership in order to avoid jurisdiction in that foreign country: Failure of readership portends success in a jurisdiction fight.

Or perhaps the court will ask whether the media defendant was “targeting” that foreign jurisdiction. The notion of targeting, however, is rather vague. If a story mentions a foreign leader, is that story “targeting” that leader’s country?

What about people who move around a lot? Should there be a form of “roving” jurisdiction for them if they sue? This roving doctrine does not appear to be a major contender.

Or what about the notion in the *Zippo* case that a passive Web site does not expose one to suit in a foreign jurisdiction? Would this notion of no foreign jurisdiction over passive Web sites give too much power to avoid suits to media corporations? Protection of reputation is certainly a value that sometimes offsets the value of expression. Respect for the dignity of individuals includes respect for individuals’ reputations.

Suharto and Libel in Indonesia

On February 21, 2008, *Time* magazine appealed a \$100 million damage award in a libel suit brought by the former Indonesian president Suharto. The Indonesian court hearing the case ruled in August that Suharto was libeled by *Time*’s report that he and his family accumulated a \$15 billion fortune by stealing from the Indonesian people during the course of Suharto’s 32-year rule that ended in 1998. In May 1999, *Time*’s Asia edition ran the story, under the headline of “Suharto, Inc.,” that much of Suharto and his six children’s wealth lay in Indonesian real estate, mining, banking and toll roads.

Two Jakarta courts had ruled against Suharto, but a panel of three Supreme Court judges ruled in Suharto’s favor. Reportedly, one of those judges was a retired general who has said he owes his career to Suharto.⁶¹

Suharto died in January 2008—after being awarded but before collecting the \$100 million libel judgment.

The *New York Times* quoted *Time* magazine as saying of the Suharto libel decision: “If it stands, the decision will threaten press freedom and erode the strength of democratic institutions in Indonesia.”⁶² *Time*’s appeal requests that a new panel of judges overturn the Supreme Court ruling and affirm the two lower courts’ rulings.

In June 2007, a United Nations report had quoted a global countercorruption organization called “Transparency International” that ranked national leaders who had stolen from those they ruled. Suharto’s name appeared at the top of the list. Transparency International estimated Suharto’s ill-gotten fortune at between \$15 billion to \$35 billion.

Yahoo!

In 2006, the Ninth Circuit Court of Appeals said it had personal jurisdiction in a case involving Yahoo! and French courts, and the U.S. Supreme Court let the decision stand. The case is *Yahoo! Inc. v. LaLigue Contre Le Racism et L’Antisemitisme*.⁶³ As for the facts, Yahoo! provides

⁶¹See, e.g., Seth Mydans, *Time Appeals Libel Ruling Over Suharto in Indonesia*, *The New York Times*, Feb. 22, 2008 (available at <http://www.nytimes.com/2008/02/22/business/media/22mag.html?ei=5088&en=a244le3bb>).

⁶²*Id.*

⁶³433 F.3d 1199 (9th Cir. 2006) (en banc) (per curiam), *cert. denied*, 547 U.S. 1163 (2006).

Internet services, including its search engine, through yahoo.com in the United States, with its principal place of business in California. Yahoo! also has foreign subsidiaries, including fr.yahoo.com for France and uk.yahoo.com for the United Kingdom. However, it is very easy to click onto www.yahoo.com in France and reach the U.S. version of Yahoo!⁶⁴

In 2000, LaLigue Contre Le Racism et L'Antisemitisme (LICRA) mailed and faxed a cease and desist letter to Yahoo! in California, objecting to Yahoo's "presenting every day hundreds of nazi symbols or objects for sale on the Web." The letter also stated, "This practice is illegal according to French legislation and it is incumbent upon you to stop it, at least on the French Territory." The upshot was that LICRA sued Yahoo! in France, and the L'Union Des Etudiants Juifs De France (UEJF) joined the suit. The French court handed down an "interim" order that Yahoo! "take all necessary measures to dissuade and render impossible any access [from French territory] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes." Also, the court ordered Yahoo! to cease, among other things, availability in France to "Web pages displaying text, extracts, or quotes from '*Mein Kampf*.'"⁶⁵ If Yahoo! failed to comply, it would be subject to a per diem penalty of \$100,000 Euros.⁶⁶

Six months later, the French court entered a second order but also found that Yahoo! had "complied in large measure" with the earlier order. The French court imposed no penalty on Yahoo!, and Yahoo! did not appeal.⁶⁷ But a month after the second interim order came down, Yahoo! sued the plaintiffs in a California federal court, seeking a declaratory judgment that the French court's orders were not enforceable in the United States. The California court accepted jurisdiction and decided that "the First Amendment precludes enforcement within the United States."⁶⁸ The defendants, LICRA and UEJF, appealed.⁶⁹

The appellate court hearing the case, the Ninth Circuit, pointed out that California's long-arm jurisdiction statute is "coextensive with federal due process requirements," permitting jurisdiction in any case where federal law permits jurisdiction. In the Yahoo! case, the acid question was whether the French defendants had met the "purposeful availment" requirement of federal law.⁷⁰ The court explained that usually, in torts cases, it could answer that question by using the "effects" test. Were the effects of a defendant's activities felt primarily in that jurisdiction? Or in contract cases, the court could focus on activities in the jurisdiction such as delivery of goods. But the Yahoo! case was neither tort nor

⁶⁴*Id.* at 1201-02.

⁶⁵*Id.* at 1202-03. In addition, the court ordered that a warning be posted on fr.yahoo.com that if a user accessed forbidden material on Yahoo.com, then the user must "desist from viewing the site concerned[,] subject to imposition of the penalties provided in French legislation or the bringing of legal action against him." *Id.* at 1203.

⁶⁶*Id.* at 1203. In any event, the court ordered Yahoo! to pay a total of 30,000 Francs for expenses. *Id.* Yahoo!, according to the French court, was violating the French Penal Code, Section R645-1, which declares it a 'crime' to exhibit or display Nazi emblems, and which prescribes a set of 'criminal penalties,' including fines." *Id.* at 1219.

⁶⁷*Id.* at 1204. Although the plaintiffs said they would not ask the French court to impose penalties if Yahoo! continued its compliance, the plaintiffs did say during oral argument, "My clients will not give up the right to go to France and enforce the French judgment against Yahoo! in France if they revert to their old ways and violate French law. *Id.*

⁶⁸*Id.* at 1204. In the interim between Yahoo!'s filing of the suit and the California court's decision, Yahoo! changed its policy, prohibiting auctions or ads that "offer or trade in items that are associated with or could be used to promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors." Yahoo!, however, told the California court that it changed the policy independently and not as a response to the French court's orders. Still, the California court found, Yahoo! was not in total compliance with the French court's order, permitting, among other things, the selling of Nazi stamps and coins and a copy of *Mein Kampf*. *Id.* at 1205.

⁶⁹*Id.* at 1205.

⁷⁰*Id.* at 1205-06.

contract but instead a case where Yahoo! was arguing that the French order was unenforceable because of the First Amendment.⁷¹

The defendants asked the Ninth Circuit to use the *Calder v. Jones* “effects” test.⁷² The court did so. The defendants argued that “*Calder* requires that the actions expressly aimed at and causing harm in California be tortuous or otherwise wrongful” and they had only tried to “vindicate their rights under French law....”⁷³ But the court disagreed:

...[W]e do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts. We do not see how we could do so, for if an allegedly wrongful act were the basis for jurisdiction, a holding on the merits that the act was not wrongful would deprive the court of jurisdiction.⁷⁴

The bottom line is that the Ninth Circuit affirmed the trial court’s decision to assert jurisdiction. The Ninth Circuit’s reasoning was based on the assertion that three California contacts had occurred. First, the defendants sent a cease-and-desist letter to California. Second, the defendants effected service of process in California both of notice of the suit and of the French court’s two orders. Third and most significant, the defendants had gotten orders from the French court for Yahoo! to perform actions in California or else face stiff penalties.⁷⁵ The Ninth Circuit concluded: “The first two contacts, taken by themselves, do not provide a sufficient basis for jurisdiction. However, the third contact, considered in conjunction with the first two, does provide such a basis.”⁷⁶

Focusing on the *Calder* effects test, the Ninth Circuit said that the defendants must first meet two requirements: that they ““(1) committed an intentional act, [which was] (2) expressly aimed at the forum state.”⁷⁷ Those requirements had been met, the Ninth Circuit opined:

It is of course true that the effect desired by the French court would be felt in France, but that does not change the fact that significant acts were to be performed in California. The servers that support yahoo.com are located in California, and compliance with the French court’s orders necessarily would require Yahoo! to make some changes to those servers. Further, to the extent that any financial penalty might be imposed pursuant to the French court’s orders, the impact of that penalty would be felt by Yahoo! at its corporate headquarters in California.⁷⁸

Although the Ninth Circuit said that it was “extremely unlikely” that an American court would enforce penalties from the French court “because of the general principle of comity under which American courts do not enforce monetary fines or penalties awarded by foreign courts,”⁷⁹ Yahoo! nevertheless expressed concern that the fact that the French court’s orders existed “cast a shadow on the legality of Yahoo!’s current policy.”⁸⁰

Yahoo! and the First Amendment

⁷¹*Id.* at 1206.

⁷²*Id.*

⁷³*Id.* at 1207.

⁷⁴*Id.* at 1208.

⁷⁵*Id.* at 1208-09.

⁷⁶*Id.* at 1208.

⁷⁷*Id.* at 1209 (citations omitted).

⁷⁸*Id.* at 1209.

⁷⁹*Id.* at 1211. “California courts follow the generally-observed rule that, “[unless required to do so by treaty, no state [*i.e.*, country] enforces the penal judgments of other states [*i.e.*, countries].” *Id.* at 1218-19 (citations omitted).

⁸⁰*Id.* at 1211.

While the Ninth Circuit had held that California could assert personal jurisdiction in the Yahoo! case, still the court dismissed the case without prejudice, finding that there were too many unanswered factual questions for the case to be ripe for adjudication. The court said, in part:

First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. ...

...

... Until we know whether further restrictions on access by French, and possibly American, users are required, we cannot decide whether or to what degree the First Amendment might be violated by enforcement of the French court's orders, and whether such enforcement would be repugnant to California public policy. We do not know whether further restrictions are required, and what the might be, because Yahoo! has chosen not to ask the French court. Instead, it has chosen to come home to ask for a declaratory judgment that the French court's orders—whatever they may or may not require, and whatever First Amendment questions they may or may not present—are unenforceable in the United States.⁸¹

The Ninth Circuit did take some care in trying to address in general First Amendment issues in an international context. It said, in part:

The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult, and, to some degree, unresolved issue. *Compare e.g., Desi v. Hersh*, 719 F. Supp. 670, 676 (N.D. Ill. 1989) (“[F]or purposes of suits brought in the United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution.”), and *Laker Airways Ltd. V. Pan American Airways, Inc.*, 604 F. Supp. 280, 287 (D.D.C. 1984) (“It is less clear, however, whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad[.]”), with *Bullfrog Films, Inc. V. Wick*, 646 F. Supp. 492, 502 (C.D. Cal. 1986) (“[There can be no question that, in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders.”), *aff'd*, 847 F.2d 502 (9th Cir. 1988).⁸²

Ehrenfeld v. Bin Mahfouz

Not all U.S. forums would accept jurisdiction in a Yahoo!-type case, as the following case demonstrates.

Dr. Rachel Ehrenfeld wrote a book titled *Funding Evil: How Terrorism is Financed—and How to Stop it*. Bonus Books published the book in 2003 in the United States. The author claims that Khalid Salim a Bin Mahfouz, a citizen of Saudi Arabia and the former general manager of The National Commerce Bank of Saudi Arabia, helped finance terrorism both directly and through use of charities that were terrorist fronts. This was not the first time that claim had been made against Bin Mahfouz. On at least 29 earlier occasions, Bin Mahfouz either threatened or actually did sue for defamation in Great

⁸¹*Id.* at 1223-24.

⁸²*Id.* at 1217.

Regardless of whether persons outside the United States receive First Amendment protection, persons within the United States were not restricted by the French court's orders. The Ninth Circuit said.

We emphasize that the French court's interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States. They only require it to restrict access by users located in France. That is, with respect to the *Mein Kampf* example, the French court's orders—even if further compliance is required—would by their terms only prohibit Yahoo! From allowing auctions of copies of *Mein Kampf* to users in France. *Id.* at 1221.

Britain.⁸³ Then on June 30, 2004, Bin Mahfouz and his sons sued Ehrenfeld and Bonus Books in the High Court of Justice in London and won a default judgment against them.⁸⁴

Prior to suit, Bin Mahfouz's attorneys had sent a cease-and-desist letter by e-mail and by mail to Ehrenfeld's home in New York. The letter demanded that she:

- (1) make "an undertaking to the High Court in England not to repeat the same (or similar) offending allegations";
- (2) withdraw from circulation and destroy and/or "deliver up" all unsold copies of the Book immediately;
- (3) issue a letter of apology to Bin Mahfouz and his sons to be published at Ehrenfeld's cost;
- (4) donate an unstated amount of money to a charity;
- and (5) pay Bin Mahfouz's legal costs.⁸⁵

At least half a dozen times, Bin Mahfouz's attorneys sent letters and e-mails about the English case to Ehrenfeld's home, including a letter to inform her that the English court had assessed damages and costs against her and had issued an injunction restraining her and Bonus Books from publishing or authorizing publication in the U.K. of the allegedly defamatory parts of the book. Also, the letter said she could be held in contempt of court if she did not take "every measure" to keep the defamatory material from "leaking into the jurisdiction" through retail Web sites in the United States.⁸⁶

The final judgment in the English court came down on May 3, 2005, and awarded Bin Mahfouz and his two sons £10,000 apiece, plus attorneys fees and costs. The court also issued a "declaration of falsity" that said all claims that Mahfouz and his sons supported terrorism were false, ordered a correction and an apology, and kept in effect the injunction discussed in the letter above.⁸⁷

But before the final judgment came down, Ehrenfeld filed her action in New York seeking a declaratory judgment that *Funding Evil* was not defamatory under U.S. law and that the English default judgment was not enforceable in the United States. She also averred that the English court's decision had damaged her reputation and created a chilling effect on her writing and that a couple of publishers of her works in the past had refused to publish her "well-researched" article about a Saudi company. She also averred that other writers had removed references to Bin Mahfouz from their works out of fear of being sued in England.⁸⁸ For his part, Bin Mahfouz countered that she showed no chill based on her publicizing her book's revised paperback edition after the English court's decision. But the New York court issued a long footnote in support of Ehrenfeld's position:

Amazon.com, American Society of Newspaper Editors, Article 19, Association of Alternative Newsweeklies, Association of American Publishers, Inc., Authors Guild, Inc., Electronic Frontier Foundation, European Publishers Council, John Fairfax Holdings, Ltd., Newspaper Association of America, Online News Association, NYP Holdings, Inc., Radio Television News Directors Association, Reporters Committee for Freedom of the Press, Times Newspaper Limited, and World Press Freedom Committee (collectively "Amici") also argue that the chill reaches U.S. (and other) publishers, based on the fact that liability can attach in courts all over the world based on *de minimis* availability of the works abroad. They argue that a "chill" on the First Amendment in this case is particularly damaging

⁸³“When it comes to libel tourism, bin Mahfouz is something of a frequent flyer....” Rachel Donado, *Libel Without Borders*, New York Times, Oct. 7, 2007, at 43.

⁸⁴In an affidavit to the United States District Court for the Southern District of New York, Ehrenfeld stated that she did not appear in the English court because she “lacked the financial resources to defend [herself] in the English Courts far from [her] home, because of the formidable procedural burdens a libel defendant faces in the U.K., and because [she] disagreed in principle with [Bin Mahfouz’s] tactic.” *Ehrenfeld v. Bin Mahfouz*, 2006 U.S. Dist. LEXIS 23423 (S.D.N.Y. April 26, 2006) *3 (quoting *Ehrenfeld Aff.* p. 7).

⁸⁵*Id.* at *3-*4 (quoting *Ehrenfeld Aff. Ex. A* at 5).

⁸⁶*Id.* at *4-*5.

⁸⁷*Id.* at *5-*6. The New York court said that the English judgment was available at Bin Mahfouz’s web site, http://www.binmahfouz.info/news_20050503.html. *Id.* at *6.

⁸⁸*Id.* at *6-*7.

because our national security relies in part on the “efforts, courage, and credibility of journalists investigating the causes, participants and funding of international terrorism.”⁸⁹

Despite all the support Ehrenfeld received from journalism organizations, the New York court ruled against her, saying it found “no basis for jurisdiction under New York’s long-arm provisions,” and thus did not address “due process.”⁹⁰ Ehrenfeld had contended that Bin Mahfouz was subject to jurisdiction under a New York law that grants jurisdiction over a defendant who “in person or through an agent ... transacts any business within the state” where the cause of action arises from those transactions.⁹¹ But the New York court stated that New York courts have been consistent in refusing personal jurisdiction “solely on the basis of a defendant’s communication, by telephone or letter, from outside New York into the jurisdiction.”⁹² As the court noted, “Bin Mahfouz’s communications (the cease-and-desist letter, other letters and judgment), however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective.”⁹³

Ehrenfeld turned to the Ninth Circuit’s *Yahoo!* decision. The New York court did note that the facts in *Yahoo!* were similar to the instant case.⁹⁴ But, unfortunately for Ehrenfeld, the California long-arm law was significantly different than the New York long-arm law. According to the New York court, “the New York legislature did not seek to exercise all of the jurisdictional power constitutionally available under the Supreme Court’s due process jurisprudence..., whereas the *Yahoo!* Court expressly notes that California long-arm jurisdiction is coextensive with Federal Due Process.”⁹⁵ The bottom line is that California law allows broader jurisdiction than does New York law because California considers “*all contacts* that cause harm within the jurisdiction.” New York law, however, requires either business transactions or “conduct that is *actually tortious*.”⁹⁶ “These differences are fatal to Ehrenfeld’s claim,” the New York trial court concluded.⁹⁷

On June 8, 2007, the U.S. Court of Appeals for the Second Circuit certified the question of how to interpret New York’s long-arm statute to the highest state court in New York.⁹⁸ Under U.S. law, federal courts are bound by the decisions of states’ highest courts on how to interpret state law. New York’s highest court, the New York Court of Appeals, issued its decision on December 20, 2007.⁹⁹ The

⁸⁹*Id.* at *8, n.1 (quoting Amici Mem. at 1).

⁹⁰*Id.* at *11.

⁹¹*Id.* at *12 (citing N.Y. C.P.L.R. Section 302(a)(1)).

⁹²*Id.* at *13.

⁹³*Id.* at *14. Ehrenfeld also argued that Bin Mahfouz should be subject to jurisdiction under a section of New York law that permits personal jurisdiction over a defendant who commits a tortious act outside of New York that causes injury in New York. But, as the court pointed out, Ehrenfeld cited no authority that the conduct of Bin Mahfouz was tortious. *Id.* at *16-17.

⁹⁴See the preceding coverage of the *Yahoo!* case for the *Yahoo!* facts. The argument that Ehrenfeld made was the following:

Just as Yahoo! would have to make changes to its servers in California if it wished to comply with the French orders, so too Ehrenfeld claims she would have to take actions in New York to satisfy the English Judgment, which was sent into New York. She would have to make payments to Bin Mahfouz and his sons from New York, issue a correction and apology from New York, and take actions to prevent *Funding Evil* from be (sic) published or otherwise entering the United Kingdom. In addition, Ehrenfeld claims the English Judgment (and its advertisement on Bin Mahfouz’s website) had a real and continuing impact on Ehrenfeld in New York, even if she chose not to obey the judgment on its terms. *Id.* at *18-19.

⁹⁵*Id.* at *19.

⁹⁶*Id.* at *19-20 (emphasis added).

⁹⁷*Id.* at *20-21.

⁹⁸*Ehrenfeld v. Bin Mahfouz*, 489 F.3d 542 (2d Cir. 2007).

⁹⁹*Ehrenfeld v. Bin Mahfouz*, No. 174, 2007 NY Int. 173 (2007 NY slip op. 09961) (Dec. 20, 2007) (available at http://www.law.cornell.edu/nyctap/107_0173.htm).

certified question was whether New York law¹⁰⁰ “confers personal jurisdiction over a person who ‘(1) sued a New York resident in a non-U.S. jurisdiction; and (2) whose contacts with New York stemmed from the foreign lawsuit and whose success in the foreign suit resulted in acts that must be performed by the subject of the suit in New York.’”¹⁰¹ The New York Court of Appeals unanimously answered in the negative.

Before addressing the jurisdictional law, the New York Court of Appeals stated some interesting facts—that 23 copies of *Funding Evil* were purchased over the Internet in the UK and that one chapter of the book was accessible in the UK through the ABCNews.com Web site.¹⁰² The court also emphasized how circumscribed its job was:

At the outset, it is important to emphasize that we are called upon to decide a narrow issue. The Second Circuit has not asked us to opine upon the propriety of English libel law or its differences from its United States and, particularly, New York State counterparts. And we decline to do so. Plaintiff and her amici argue that this case is about “libel tourism,” a phenomenon that they variously describe as the use of libel judgments procured in jurisdictions with claimant-friendly libel laws—and little or no connection to the author or purported libelous material—to chill free speech in the United States. However pernicious the effect of this practice may be, our duty here is to determine whether defendant’s New York contacts establish a proper basis for jurisdiction....¹⁰³

The law at issue involved jurisdiction based on business transactions. The New York court sided with the defendant, saying that “none of the contacts here establish that defendant purposefully availed himself of the privileges of and benefits of New York’s laws...”¹⁰⁴ The court adopted the defendant’s view: “As defendant points out—and plaintiff does not dispute—his pre-filing demand letter and his service of documents were required under English procedural rules governing the prosecution of defamation actions. And in none of his letters to plaintiff did defendant seek to consummate a New York transaction or to invoke our State’s laws.”¹⁰⁵

Ehrenfeld, however, argued that she would have to take action in New York if the English decision were enforced and that the chilling effect on her and others occurred in New York. The New York Court of Appeals flatly rejected that argument as well, saying that “the alleged effects of threatened enforcement of the English judgment may benefit defendant by chilling plaintiff’s speech, but those effects do not arise from his invocation of the privileges and benefits of our state’s laws. Rather, they arise from an English remedy and plaintiff’s unilateral activities in New York.”¹⁰⁶ Ehrenfeld also put forth the *Yahoo!* argument, but the New York Court of Appeals rejected that as well, echoing the words of the New York federal trial court that New York’s long-arm statute is narrower than what is “constitutionally permissible,” and the *Yahoo!* case in effect proves that point, according to the New York Court of Appeals.¹⁰⁷

The court concluded by saying, “Our Legislature, unlike California’s, has seen fit to confer jurisdiction in a limited subset of cases concerning non-domiciliaries. And, as we have in the past, we continue to adhere to that express mandate here.”¹⁰⁸

But New York’s legislature was also considering broadening New York’s long-arm statute.

¹⁰⁰N.Y. Civ. Prac. L. & R. § 302(a)(1).

¹⁰¹Ehrenfeld v. Bin Mahfouz, No. 174, 2007 NY Int. 173 (2007 NY slip op. 09961) (Dec. 20, 2007) (available at http://www.law.cornell.edu/nyctap/107_0173.htm) at ¶ 1.

¹⁰²*Id.* at part I ¶ 1.

¹⁰³*Id.* at part II ¶ 1.

¹⁰⁴*Id.* at part II ¶ 2.

¹⁰⁵*Id.* at part II ¶ 4.

¹⁰⁶*Id.* at part II ¶ 8.

¹⁰⁷*Id.* at part III ¶ 2.

¹⁰⁸*Id.* at Part III ¶ 3.

The U.S. Court of Appeals for the Second Circuit noted this fact in its decision on March 3, 2008,¹⁰⁹ that affirmed the New York trial court's refusal of jurisdiction over Bin Mahfouz. The Second Circuit said that "plaintiff invites us to postpone issuing a final decision until the end of the current New York state legislative session, in deference to the state legislature's current consideration of a bill that would provide for jurisdiction over Mahfouz." However, the court declined, saying that whether the bill would pass and what its provisions would be were entirely speculative.¹¹⁰

And what about a First Amendment argument for jurisdiction in this case? Ehrenfeld simply failed to make one. As the Second Circuit said: "Plaintiff ... has not made the argument that the First Amendment would compel us to assert jurisdiction over defendant in any case, regardless of the reading by the Court of Appeals of the state long-arm statute. Plaintiff had the opportunity to make the argument to Judge Casey in the district court and in this Court." But she failed to "mount a First Amendment attack," and so she waived that argument.¹¹¹

Ehrenfeld's missed opportunity to litigate the First Amendment issue is not just a loss for her. It is a loss for anyone interested in the issue of international jurisdiction in libel cases. A Second Circuit opinion on this First Amendment matter would not have ended the debate, but it almost certainly would have helped frame and elucidate the issue. There will surely be another opportunity, however; litigation in this area will undoubtedly continue.

Ehrenfeld's Legislative Victory

On April 30, New York Governor David Patterson signed into a law the "Libel Terrorism Protection Act," also known as "Rachel's Law," for Dr. Rachel Ehrenfeld. The law codifies not enforcing foreign libel judgments. And on May 7, Senators Arlen Specter and Joseph Lieberman introduced a similar bill in the U.S. Senate, while Representative Peter King introduced a similar bill in the U.S. House of Representatives.¹¹²

Commentary on New York's law published in *The Guardian* said, "...the starkly named Libel Terrorism Presentation Act" is "intended specifically to guard writers and publishers outside British jurisdiction from the terrors of English libel law."¹¹³ This is correct. More specifically, the legislation is the result of the Ehrenfeld case, that apparently activated the gag reflect of a host of legislators.

The New York state assembly's Web site declares the purpose of the Libel Terrorism Protection Act¹¹⁴ in rather harsh language:

PURPOSE OF BILL: This bill would effectively overrule the recent New York Court of Appeals December 2007 decision in *Ehrenfeld v. Mahfouz* and protect New Yorkers and New York based publishers and media outlets from local enforcement of foreign defamation judgments designed to squelch their freedom of expression. Overseas jurisdictions, lacking the free speech and free press protections guaranteed by the New York and United States constitutions, often have libel laws designed to discourage and inhibit free expression, rather than promote it. Despots and terrorist networks whose activities have been exposed by American authors and news organizations have increasingly turned to such jurisdictions to obtain defamation verdicts which they could never obtain in an American court in order

¹⁰⁹*Ehrenfeld v. Mahfouz*, 2008 U.S. App. LEXIS 4481 (2d Cir. March 3, 2008).

¹¹⁰*Id.* at *6.

¹¹¹*Id.* at *7-*8.

¹¹²For news coverage, see, e.g., *Congress Seeks to Extend Free Speech Protections to Libel Cases Overseas*, *The Forward*, May 23, 2008, at 1.

¹¹³Geoffrey Wheatcroft, Comment & Debate: *The worst case scenario: British libel law means our press is vulnerable and the wealthy are shielded from criticism*, *The Guardian* (London), Feb. 28, 2008, at 32.

¹¹⁴Bill No. A09652/S06687C Bill No. AO9652 is available at <http://assembly.State.ny.us/leg/?bn=A09652>, and S06687C is available at <http://assembly.state.ny.us/leg/?bn=S06687C>.

to harass and intimidate American authors and journalists. This bill would prohibit enforcement of such unfair overseas defamation judgments in New York and give New Yorkers and New York based publishers and media outlets the ability to obtain a declaration in a New York Court to that effect.¹¹⁵

Also, the Web site provides a summary of the bill's provisions. One provision prohibits "enforcement in New York of an overseas defamation judgment unless a New York court determines that the overseas defamation law satisfies the freedom of speech and press protections guaranteed by the New York and United States constitution."¹¹⁶ Another provision provides New York courts with "personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person or entity who is a resident of New York or is amenable to jurisdiction in New York, for the purposes of rendering declaratory relief with respect to that resident's liability for the judgment..."¹¹⁷

The bill's "justification" emphasizes the importance of the "robust" debate called for in *New York Times Co. v. Sullivan*—in this context, debate by authors about "terrorism's enablers." In specific, the justification cites the case of Dr. Rachel Ehrenfeld and the English libel judgment against her.¹¹⁸

Proposed federal legislation: Letting the Sued Writer Bite Back

On May 7, 2008, U.S. Senator Joseph Lieberman issued a press release concerning federal legislation that he was helping to sponsor, announcing:

U.S. Senator Arlen Specter (R-PA), Ranking Member of the Senate Judiciary Committee, Senator Joseph Lieberman (I-CT), Chairman of the Senate Homeland Security and Governmental Affairs Committee, and U.S. Representative Peter King (R-NY), Ranking Member of the U.S. House of Representatives Committee on Homeland Security, today announced the introduction of the Free Speech Protection Act of 2008. This bill would

¹¹⁵See "AO9652 Memo" (available at <http://assembly.State.ny.us/leg/?bn=AO9652>).

¹¹⁶Summary of subdivision 2(b) (8) of § 5304 N.Y. Civ. Prac. L. & R. See "Summary of Provisions" (available at <http://assembly.State.ny.us/leg/?bn=AO9652>).

¹¹⁷The law adds this proviso: "provided: (1) the publication at issue was published in New York, and (2) that resident or person/entity is amenable to jurisdiction in New York (a) has assets in New York which might be used to satisfy the foreign defamation judgment, or (b) may have to take actions in New York to comply with the foreign defamation judgment." See Summary of subdivision (d) of § 5304 N.Y. Civ. Prac. L. & R. See "Summary of Provisions" (available at <http://assembly.State.ny.us/leg/?bn=AO9652>). See also S06687C (available at <http://assembly.state.ny.us/leg/?bn=S06687C>).

¹¹⁸The justification uses harsh language:

JUSTIFICATION: American journalists and authors who relentlessly and doggedly pursue the truth about terrorism's enablers—the financiers, frontmen, promoters, apologists and logisticians who made attacks like 9/11, the Madrid railroad explosions and the London bus and subway bombings possible—are being met with a barrage of libel lawsuits designed to stifle their reporting filed in overseas jurisdictions not sharing our belief, famously articulated by the Supreme Court over 40 years ago in *N.Y. Times Co. V. Sullivan*, "that debate on public issues should be uninhibited, robust, and wide-open." Having been routed in numerous defamation cases against journalists, authors and advocacy groups brought here in the United States, the subjects of these exposes are filing defamation claims in foreign courts—England, primarily with lopsided defamation laws that make it virtually impossible, both logistically and substantively, for authors to defend their work on the merits. The case of Dr. Rachel Ehrenfeld, a distinguished and prolific New York based researcher and the author of "Funding Evil: How Terrorism is Financed—and How to Stop It," is typical.

The justification continues with a synopsis of the legal wranglings in the *Ehrenfeld* case. See "Justification" (available at <http://assembly.State.ny.us/leg/?bn=AO9652>).

On Ehrenfeld's case and the New York bill, see Floyd Abrams, *Foreign Law and the First Amendment*, *The Wall Street Journal*, April 30, 2008, at A15.

protect American journalists from libel suits brought in foreign courts that do not have the same protections for free speech that are found in the U.S. constitution. It mirrors H.R. 5814, legislation recently introduced in the U.S. House of Representatives by Representative King.

Senator Lieberman bluntly stated: "The freedom of American journalists should not be threatened by foreign courts that do not adhere to America's principles of free speech." His press release also quoted Senator Specter and Representative King, who emphasized the importance of freedom of expression in combatting terrorism.¹¹⁹

The press release left no doubt that the *Ehrenfeld* case was the cause of the proposed federal legislation,¹²⁰ and it attacked the British system of libel law, saying that "The United Kingdom has become a popular venue for defamation plaintiffs from around the world, because under English law it is not necessary for a libel plaintiff to prove falsity or actual malice as is required in the United States."¹²¹

As for the provisions of his proposed legislation, Senator Lieberman provided a concise summary: "This legislation creates a federal cause of action and federal jurisdiction so that federal courts may determine whether there has been defamation under United States law when a U.S. journalist, speaker, or academic is sued in a foreign court for speech or publication in the United States. The bill authorizes a court to issue an order barring enforcement of a foreign judgment *and to award damages.*"¹²² Of note is the threat of retaliatory damages against plaintiffs who sue U.S. writers in the United States. Perhaps this is an example of the viewpoint that the best defense is a good offense.

Should this federal legislation pass, with its *quid pro quo* provision that writers vanquished in other lands may return home to become victorious over their would-be vanquishers and perhaps even collect treasure from them, then potential retaliation by other countries could be in the offing. Biting, biting back, and biting again in international libel cases may leave even more blood in the murk of cyberspace. That tempers are flaring and teeth are being bared is evident from recent U.S. legislative moves.

Conclusion

So long as the Internet continues to proliferate, so will libel suits involving citizens of different countries. This would not pose as severe a problem as it does if libel laws were uniform. But uniformity will not be had until all jurisdictions can agree on the proper balance between the two valuable interests of freedom of the press and the protection of reputations. That agreement is not likely, at least anytime soon. Even with uniformity of law, the sheer inconvenience of traveling to a distant site to wage or defend a lawsuit will create problems. The problems of inconvenience, however, perhaps pale against the problems created for a defendant who is accustomed to publishing under laws favoring freedom of the press but then finds himself or herself defending in a country that tips the scales of justice toward the plaintiff. Forum shopping becomes an activity pursued with some vigor, and for good reason. The site of the suit can be determinative in a lawsuit: A public figure or public official who sues in the United States is pushing a huge boulder uphill, while the same public figure or public official who sues, for example, in Great Britain, will have that boulder rolling downhill, fast, at least according to the

¹¹⁹*Specter, Lieberman, King Introduce Free Speech Protection Act* (available at <http://lieberman.senate.gov/newsroom/release.cfm?id=297383>).

¹²⁰"The impetus for this legislation is litigation involving Dr. Rachel Ehrenfeld, a U.S. citizen and Director of the American Center for Democracy." *Id.*

¹²¹The press release continued to say: "The U.S. journalists or publications who are named as defendants in these suits must deal with the expense, inconvenience and distress of being sued in foreign courts, even though their conduct is protected by the First Amendment in the United States." *Id.*

¹²²*Id.* Emphasis added.

viewpoint of the media defendant who is accustomed to protective libel law. Old concepts such as the site of publication become muddled when the Internet is at issue. Is the site of publication the site of upload, or is it the site of download as the *Gutnick* case maintained? The answer to that question can be determinative in an international libel case, both for jurisdiction and for the outcome of the case, given the differences in countries' libel laws. If the site of download is the site of publication, then how much downloading is necessary to reach a sufficient level for appropriate assertion of jurisdiction? That is a question of degree, not of a bright line. It creates uncertainty. Or even if jurisdictions could settle on some sort of bright-line test for jurisdiction (say, any downloads over X number results in jurisdiction, any downloads under that number results in no jurisdiction), uncertainty would remain because potential defendants could not precisely predict the number of downloads an Internet story would generate.

Looking at the effects of an Internet publication on a jurisdiction to determine if it would be fair to hear a libel suit there has some merit. Potential defendants can determine, to some degree, if a Web site's content could have a negative impact in a foreign jurisdiction. Getting too caught up in determining effects potentially could have a negative impact on aggressive journalism, if one views aggressive journalism in a favorable light. For example, a media corporation might fear criticizing a foreign leader if that criticism, which obviously could have a negative effect on the leader in his or her homeland, could lead to a suit under unfavorable laws in that leader's homeland. On the other hand, this so-called "chilling effect" might be seen as a welcome "cooling effect" in some jurisdictions that consider aggressive journalism to be out of hand. Value judgments and their resulting value disagreements will continue to be a large part of the jurisdiction debate even if countries settle, say, on an "effects" test for determining jurisdiction. Some governments, such as the state of New York with its "Libel Terrorism Protection Act," will doubtlessly feel compelled to act, and their actions may trigger retaliatory acts by other governments. In international cases of libel law, it is a matter of both principle and principal—clashes of principle based on weighing the relative merit of freedom of expression versus protection of reputations and clashes concerning principal, namely, the libel damage awards.

Perhaps technology will advance to the point where indeed the defendants can target what jurisdictions will have the opportunity to download information. That advance would offer the potential libel defendants a little more control over who has access to their Web sites. But so long as cyberspace is ubiquitous, it will create problems in jurisdiction that is geographically bound.

The world of cyberspace with no boundaries has collided with the world of jurisdiction that is defined by boundaries. The fallout is felt sharply in the area of libel law, where views on the appropriate balance between free press and protection of reputations clash, and where these battle lines on libel are drawn more clearly than the jurisdictional lines. Libel plaintiffs and defendants will continue to differ over where their war that begins in cyberspace should continue in geographical space.

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