

**LOOKING FOR *SULLIVAN* IN CYBERSPACE**

American Publishers and Liability for Online Defamation after  
*Dow Jones v. Gutnick*

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## I. INTRODUCTION

A specter of liability looms over American publishers as they move further and further into the physically borderless world of Internet publication.<sup>1</sup> While the American press has long enjoyed heightened First Amendment protection from defamation<sup>2</sup> lawsuits domestically, the First Amendment abroad is "nothing more than a local statute"<sup>3</sup> and free speech norms are substantially less robust internationally than in the United States. Most significantly, foreign defamation standards do not require that a defamatory statement be accompanied by "actual malice"—knowledge that the statement was false or with reckless disregard of whether it was false or not—for recovery, as required in the United States pursuant to the watershed Supreme Court case of *New York Times v. Sullivan*.<sup>4</sup>

This substantive conflict of laws would be of little practical significance were foreign courts unable to reach the merits of an Internet defamation case for lack of jurisdiction. Indeed, American courts have been disinclined to assert personal jurisdiction over Internet defamation defendants unless their allegedly defamatory statements were posted to websites whose content was *intentionally* directed toward

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<sup>1</sup> See *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) (The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there," the "there" is everywhere where there is Internet access.) (citations omitted).

<sup>2</sup> Defamation is defined as any communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," RESTATEMENT (SECOND) OF TORTS 559 (1977), but truth is a defense to liability, see *id.* 581A. Defamation may occur as either libel and slander. Libel generally covers written or printed defamation, while slander generally covers oral defamation, but the distinction is not always easy to make. See *id.* 568 cmt. b. The modern practice has been to combine libel and slander under the common tort of defamation. However, commentators have suggested that defamation on the Internet is best classified as libel, principally because an electronic message can always be printed. See, e.g., Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 *Computer/L.J.* 555, 562 (1992)

<sup>3</sup> Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Who May Regulate the Internet?*, 50 *FED. COMM. L.J.* 117, 177 (1997).

<sup>4</sup> 376 U.S. 254 (1964).

individuals and/or locations within the forum state.<sup>5</sup> Moreover, in the U.S., the fact that a newspaper's website can be accessed in a forum state "does not by itself demonstrate that a newspaper [is] intentionally directing website content . . . to a [particular] audience."<sup>6</sup>

A less constrained approach to jurisdiction in the Internet defamation context, however, one that places many American publishers squarely in the crosshairs, is developing internationally. Two recent cases, both involving the American media giant Dow Jones,<sup>7</sup> embody this approach: In *Dow Jones & Company, Inc. v. Gutnick*,<sup>8</sup> the Australian High Court asserted jurisdiction over a defamation claim based on material that was placed on the Internet by Dow Jones & Co. outside of Australian borders but viewed within. Similarly, in *Harrods, Ltd. v. Dow Jones & Co.*,<sup>9</sup> the High Court of Justice in London, citing *Gutnick* as persuasive authority, found that "the apparently limited number of hits emanating from this jurisdiction on the relevant page of [Dow Jones's] web site" was sufficient to create jurisdiction.

Together, these cases represent a lowering of the jurisdictional barrier that might otherwise shield American Internet publishers from exposure to legal standards of defamation less sensitive to free press interests than the American standard. They suggest an unbounded rule of jurisdiction for Internet defamation, one that subjects an individual or entity that publishes on the Internet to the laws of any locale where content

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<sup>5</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction."); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (characterizing a journal website as passive in nature and holding that it did not give rise to personal jurisdiction where an individual posted an allegedly defamatory article to it). See also discussion *infra* Part II for a comparison of the three major approaches to jurisdiction taken by U.S. courts.

<sup>6</sup> *Young v. New Haven Advocate*, 315 F.3d 256, 258 (4th Cir. 2002) (emphasis added).

<sup>7</sup> The flagship publication of Dow Jones is the *Wall Street Journal*, founded in 1889, with a current international circulation of approximately 2.1 million. See generally <http://www.dowjones.com/TheCompany/AboutDowJones.htm> (last visited Jan. 2, 2005).

<sup>8</sup> [2002] HCA 56 (10 December 2002) (Austl. High Court).

<sup>9</sup> [2003] EWHC 1162 (QB) (22 May 2003).

can be viewed, which is, by virtue of the Internet's pervasive reach, nearly anywhere and everywhere in the world.<sup>10</sup>

This Article will examine the difficult jurisdictional issues which arise in the course of all Internet defamation claims as well as the substantive conflicts of law thrown into relief by international Internet defamation claims such as the *Dow Jones* cases. Part II will describe analyses used by American courts to address the question of jurisdiction generally and in the Internet context specifically. Part III will describe the Victorian Supreme Court and Australian High Court opinions in *Dow Jones & Co., Inc. v. Gutnick* and argue that the approach to internet defamation jurisdiction taken by those courts is irreconcilable with the American approach. In addition, it will outline the substantive conflicts that have arisen between U.S. and Australian/English laws of defamation as a result of *Sullivan* and its progeny. Part IV will address a question that inevitably arises when foreign courts render judgments incompatible with American constitutional standards of free speech: When may an American court refuse to enforce a foreign judgment counter to public policy? Absent a political solution, this Article will argue, American courts may be increasingly called upon to exercise this discretionary power to counter international threats to American free press protections. More generally, this Article will conclude that American courts, the Supreme Court in particular, will need to unequivocally reaffirm the values embodied by *New York Times v. Sullivan* and transpose

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<sup>10</sup> See *ACLU v. Reno*, 217 F.3d 162, 169 (3rd Cir. 2000), vacated by *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (“[T]he Internet has an “international, geographically-borderless nature,” and “with the proper software every Website is accessible to all other Internet users worldwide.”). See also Christopher W. Meyer, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH & LEE L. REV. 1269 (1997).

those values to the Internet context in order to prevent the further erosion of American free speech norms in cyberspace.

## II. U.S. APPROACHES TO INTERNET JURISDICTION

### A. Traditional Bases for Jurisdiction

In order for a U.S. court to exercise jurisdiction over a civil dispute, there must be a nexus between the *persons* or *property* involved and the forum. That is, a court generally must have either *in personam* jurisdiction or *in rem* jurisdiction.<sup>11</sup> Controversies involving Internet publishers generally revolve around questions of *in personam* jurisdiction, as plaintiffs ask courts to exercise personal jurisdiction over defendants physically located outside state or national boundaries.

In addition, most difficult questions of Internet jurisdiction are concerned with the application of specific jurisdiction, as opposed to general jurisdiction.<sup>12</sup> General jurisdiction is conferred where a defendant has maintained “continuous and systematic contacts”<sup>13</sup> with the forum, and the standard is high, requiring “contacts with the state that approximate physical presence.”<sup>14</sup> Courts have rarely found general jurisdiction based *solely* on Internet conduct.<sup>15</sup> Specific jurisdiction, on the other hand, permits a court to exercise personal jurisdiction over a non-resident defendant where the activity of a defendant in the forum falls within the “minimum contacts” framework articulated by

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<sup>11</sup> REDISH ET AL., CIVIL PROCEDURE 145 (2003).

<sup>12</sup> See Nathan A. Olin, *The A-B-CS of Targeting: A Formula for Resolving Personal Jurisdiction-Internet Issues* (“Courts have almost universally rejected the argument that merely entering cyberspace by putting up a web-site permits general jurisdiction over the site creator.”).

<sup>13</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984).

<sup>14</sup> *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

<sup>15</sup> *But see Gator.com Corp. v. L.L. Bean, Inc.*, 34 F.3d 1072, 1075 (9th Cir. 2003) (finding that general jurisdiction existed over L.L. Bean based on its “extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that . . . its website is clearly and deliberately structured to operate as a sophisticated virtual store in California.”).

the Supreme Court in *International Shoe Co. v. Washington*,<sup>16</sup> described below. The overwhelming majority of disputes raising questions of jurisdiction based on Internet websites involve analyses of specific jurisdiction.<sup>17</sup>

U.S. courts exercise specific jurisdiction over conduct occurring outside the forum state only where jurisdiction is proper under the applicable “long-arm” statute<sup>18</sup> and consistent with constitutional due process. The long-arm statutes of most American States, however, typically permit jurisdiction to the extent permitted by due process, so that “the statutory inquiry . . . merges with the constitutional inquiry, and the two inquiries essentially become one.”<sup>19</sup> Courts employ a two-prong specific jurisdiction analysis. Under the first prong, the courts must examine the quality and quantity of the defendant’s contacts with the forum.<sup>20</sup> That is, courts must first evaluate “how numerous and deliberate the defendant’s contacts with the forum state were.”<sup>21</sup> The second prong of the test requires the courts to determine the reasonableness of asserting jurisdiction over the foreign defendant.<sup>22</sup> The court must ask whether the exercise of jurisdiction by the forum would offend “traditional conceptions of fair play and substantial justice.”<sup>23</sup> A defendant’s contacts must rise to the level “that he should reasonably anticipate being haled into court there.”<sup>24</sup>

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<sup>16</sup> 326 U.S. 310 (1945).

<sup>17</sup> See COMPUTER LAW §3D.03 (2)(b) (2004) (“The vast majority of Internet jurisdiction cases deal with specific jurisdiction.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Stover v O’Connell Associates, Inc.*, 84 F 3d 132, 135–6 (4th Cir., 1996).

<sup>20</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78 (1985) (explaining first prong of analysis)

<sup>21</sup> *Id.* at 475–76 nn. 17–18.

<sup>22</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

<sup>23</sup> *Int’l Shoe.*, 326 U.S. at 320 (1945).

<sup>24</sup> *World-Wide Volkswagen*, 444 U.S. at 297 (describing “gestalt factors” that must be analyzed when evaluating fairness of asserting personal jurisdiction).

## B. The Modern Test for Personal Jurisdiction: “Minimum Contacts”

The contemporary standard for evaluating a defendant’s contacts with the forum state was announced in the landmark decision *International Shoe Co. v. Washington*.<sup>25</sup> In *International Shoe*, the Supreme Court created an exception to the requirement of physical presence within a specific forum<sup>26</sup> in order for personal jurisdiction to attach, requiring instead that a defendant have “certain *minimum contacts* with . . . [a forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>27</sup> “Minimum contacts” have been defined as “conduct and connection with the forum . . . such that [the defendant] should reasonably anticipate being haled into court there.”<sup>28</sup> In determining whether minimum contacts exist, courts look for “some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>29</sup> Courts continue to rely on the minimum contacts analysis of *International Shoe* and its progeny<sup>30</sup> as they analyze the question of whether certain Internet activities, including Internet publishing, form a basis for personal jurisdiction.<sup>31</sup>

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<sup>25</sup> 326 U.S. 310 (1945).

<sup>26</sup> *Pennoyer v. Neff*, 95 U.S. 614 (1877) (requiring physical presence in a forum state as a predicate for the exercise of personal jurisdiction).

<sup>27</sup> *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (emphasis added).

<sup>28</sup> *World-Wide Volkswagen*, 444 U.S. at 291 (1980).

<sup>29</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>30</sup> *See, e.g., id.* (holding “general” jurisdiction exists when a nonresident defendant’s contact with the forum state are “continuous and systematic”); *Burger King Corp.*, 471 U.S. 462 at 475 (1985) (holding “specific jurisdiction” exists when a nonresident defendant has “purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”).

<sup>31</sup> *See, e.g., Hinsch v. Outrigger Hotels Haw.*, 153 F. Supp. 2d 209, 213–14 (E.D.N.Y. 2001) (“[T]he court addresses and dismisses Plaintiff’s argument that all cases from 1958 to 1990 are irrelevant in light of changing times. In the absence of a change in the law, the cases cited by the court remain the law to apply here. This is true even if changes in technology, such as the use of the internet instead of a telephone, have altered the way in which business is conducted.”)

### C. Approaches to Jurisdiction in Internet Defamation Cases

As of 2005, the U.S. Supreme Court has yet to specifically address the issue of personal jurisdiction with respect to Internet activities.<sup>32</sup> However, a number of U.S. district and circuit courts have. Three closely related approaches to the jurisdictional question, sometimes in tension, but often used in conjunction, can be identified and are outlined below.

#### 1. *The Zippo Sliding-Scale Approach*

Although not a case involving Internet defamation, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>33</sup> is a cornerstone in the jurisprudence to date involving jurisdiction based on an Internet website.<sup>34</sup> In *Zippo*, the defendant owned and operated a website containing information about defendant, ads and an application for a news service. To access the news service, viewers of the website were required to complete an online application and pay a fee by credit card.<sup>35</sup> Although the defendant's employees, offices, and servers were outside the forum state, two percent of the subscribers to its website were residents of the state and the defendant entered into agreements with seven Internet access providers in the state so that subscribers there could access the news service.<sup>36</sup> In addition, the

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<sup>32</sup> See Brian E. Daughdrill, *Personal Jurisdiction and the Internet: Waiting for the Other Shoe to Drop on First Amendment Concerns*, 51 MERCER L. REV. 919, 919-20 (2000) (Courts attempting to impose traditional personal jurisdiction analysis on Internet-related contacts have no guidance from the Supreme Court and continue to reach inconsistent results as they attempt to force territorial-based analysis onto a one-dimensional universe lacking any concept of boundaries, territories, or other physical properties.”).

<sup>33</sup> 952 F. Supp. 1119 (1997).

<sup>34</sup> Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3rd Cir. 2003) (“The opinion in *Zippo* . . . has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site.”); Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Based Approach to Personal Jurisdiction*, 98 NW. U.L. REV. 473, 478 (“The opinion in *Zippo* “has earned a place in history as one of the most-cited district court opinions ever. As of October 2, 2003, *Zippo* had been cited an astonishing 570 times, including 67 opinions that are described as following it and 320 times by law review articles.”).

<sup>35</sup> *Zippo*, 952 F. Supp. at 1123.

<sup>36</sup> *Id.*

defendant owned domain names incorporating plaintiff's trademark. Plaintiff sued for trademark infringement and related causes.<sup>37</sup>

Citing the traditional rule that the exercise of specific jurisdiction is proper “when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents,”<sup>38</sup> the federal district court in *Zippo* concluded that the propriety of exercising jurisdiction over a website depends on where on a “sliding scale” of commercial interactivity a website falls.<sup>39</sup> The sliding scale encompasses the broad spectrum of contacts with a forum state that might be created by an Internet website. At one end of this spectrum, there are commercial websites characterized as “active” by the *Zippo* court, through which a defendant “clearly does business over the Internet.”<sup>40</sup> At the other end of the spectrum lie websites characterized as “passive”, on which the defendant merely posts information or advertising. According to *Zippo*, the contacts created by websites of this nature are never enough to establish jurisdiction.<sup>41</sup> In between these two poles lie “interactive websites” that permit Internet users to exchange information with the site’s host computer.<sup>42</sup> In these cases, the jurisdictional question should be resolved by analyzing “the level of interactivity and commercial nature” of the information exchange.<sup>43</sup>

Ironically, having articulated this framework for analyzing Internet jurisdiction, in which so much rides on the characterization of a website, the *Zippo* opinion does not clearly identify the website in question as “active”, “passive”, or “interactive”. However,

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1124.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (“[A] passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.”).

<sup>42</sup> *Id.* at 1124.

<sup>43</sup> *Id.* at 1126.

the *Zippo* court found substantial the “repeated[] and conscious[]” processing of subscription orders (approximately 3,000) from Pennsylvania residents as well as purposeful transmission of electronic messages into the state.<sup>44</sup> These actions, along with the fact that the defendant had established contracts with Internet service providers within the forum state, were deemed commercial contacts sufficient to confer jurisdiction.<sup>45</sup>

a. Application of *Zippo* to Internet Defamation: *Revell v. Lidov*<sup>46</sup>

The *Zippo* test, commonly referred to as a “sliding scale” or, alternatively, “passive versus active” test, has been applied in the Internet defamation context by numerous federal courts<sup>47</sup> as well as at least one Canadian court.<sup>48</sup> The Fifth Circuit case of *Revell v. Lidov*<sup>49</sup> is a particularly instructive example of the *Zippo* analysis as applied to Internet defamation jurisdiction analysis. The plaintiff in *Revell* filed a suit for defamation in Texas based on an article posted on the Columbia Journalism Review website, operated and maintained in New York.<sup>50</sup> The article alleged, among other things, that the plaintiff, as part of the Reagan Administration, had willfully failed to prevent the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 317 F.3d 467 (5th Cir. 2002).

<sup>47</sup> *See, e.g., id.* (finding no jurisdiction where defendant had placed defamatory remarks on its website accessible in forum state); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999) (same); *but see Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998) (finding jurisdiction over columnist who composed defamatory statements in California, yet made statements available on website accessible in forum state).

<sup>48</sup> *Braintech Inc. v. Kostiuk*, 1999 ACWSJ Lexis 1924 (British Columbia Court of Appeals 1999) (applying the *Zippo* sliding scale analysis and refusing to exercise jurisdiction because bulletin board on which plaintiff had posted allegedly defamatory material was a “*Zippo*-passive” website).

<sup>49</sup> 317 F.3d 467.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 468.

Summarily dismissing any argument that it could exercise general jurisdiction over the defendant,<sup>52</sup> the court turned to the more difficult question of specific jurisdiction. Working within the *Zippo* framework (over objections by the plaintiff),<sup>53</sup> the court focused solely on the maintenance of the Internet bulletin board where the allegedly defamatory article was published. Applying the sliding scale, the court determined that the Columbia University website could not be characterized as entirely passive because it included a bulletin board with interactive elements.<sup>54</sup> The board allowed users to post information and receive information that others had posted. Given this level of interactivity, the court concluded, the website fell within the middle ground of the *Zippo* continuum.<sup>55</sup>

In evaluating the quality and extent of the website's interactivity with Texas, the *Revell* court emphasized that neither Columbia University nor the author of the allegedly defamatory article knew that the subject of the article was living in Texas, and Texas was not the "geographic focus" of the article.<sup>56</sup> The court observed no evidence that the article published on Columbia's website was intended to cause harm in Texas.<sup>57</sup> Furthermore, Texans were not the principal users of the bulletin board at issue and the article was not something that would be of special interest to persons living in Texas,

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<sup>52</sup> *Id.* at 471 n. 20 ("Irrespective of the sliding scale, the question of general jurisdiction is not difficult here. Though the maintenance of a website is, in a sense, a continuous presence everywhere in the world, the cited contacts of Columbia with Texas are not in any way 'substantial.'). See also text accompanying notes 22–26 for a discussion of general versus specific jurisdiction in the Internet context.

<sup>53</sup> 317 F.3d at 471 ("Revell urges that, given the uniqueness of defamation claims and their inherent ability to inflict injury in far-flung jurisdictions, we should abandon the imagery of *Zippo*. It is a bold but ultimately unpersuasive argument. Defamation has its unique features, but shares relevant characteristics with various business torts.").

<sup>54</sup> *Id.* at 472.

<sup>55</sup> *Id.*

<sup>56</sup> This part of the court's analysis overlaps substantially with another approach, discussed *infra* Part II.C (1)(c), sometimes referred to as "targeting" analysis, which seeks to identify the geographic "focal point" of a defamatory article. See generally *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

<sup>57</sup> *Revell*, 317 F.3d at 476.

*i.e.*, it did not address events that took place in Texas.<sup>58</sup> Consequently, the court held that the website interactivity did not create sufficient minimum contacts with Texas to subject the defendants to specific jurisdiction in that state under the *Zippo* test.<sup>59</sup>

## 2. *Calder v. Jones*<sup>60</sup> and the “Effects” Test

Though the *Revell* court specifically cited *Zippo* as the test used by the Fifth Circuit in analyzing Internet jurisdiction, it was also careful to acknowledge the potential applicability of an “effects” analysis, sometimes thought of as distinct from *Zippo* analysis,<sup>61</sup> but regarded as “but one facet of the ordinary minimum contacts analysis” in *Revell*.<sup>62</sup> Under an effects test, jurisdiction is created when a non-resident defendant is engaged in intentional conduct, aimed at the forum state, causing harm that the defendant knows is likely to be felt in the forum.<sup>63</sup> Effects-based analysis can be traced to the Supreme Court non-Internet defamation case of *Calder v. Jones*.<sup>64</sup>

In *Calder*, the actress Shirley Jones, a resident of California, brought an action for defamation there against the National Enquirer tabloid, which is headquartered in Florida. The Supreme Court held that California’s assertion of jurisdiction was proper. In coming to this conclusion, it observed that the allegedly defamatory story concerned a California resident whose television career was centered in California.<sup>65</sup> Moreover, the Court noted,

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 477.

<sup>60</sup> 465 U.S. 783 (1983).

<sup>61</sup> *See generally* 2-3D COMPUTER LAW § 3D.03 (breaking down Internet jurisdictional analyses into three distinct approaches).

<sup>62</sup> *Revell*, 317 F.3d at 473.

<sup>63</sup> *Id.* at 475.

<sup>64</sup> 465 U.S. 783 (1983).

<sup>65</sup> *Id.* at 784.

the article was largely drawn from California sources, most of its harm was suffered in California, and the publication had its largest circulation in California.<sup>66</sup>

Thus, because California was the “focal point both of the story and the harm suffered” and the tabloid’s story was “aimed at California”, the Court concluded that the defendant could “reasonably foresee being haled into California court.”<sup>67</sup> Jurisdiction in California was considered appropriate based in part on the effects of defendants’ conduct in that state.<sup>68</sup> Despite this focus on the effects of a defamatory statement, it should be emphasized that the intentional conduct of the defendant is still critical in an effects-based analysis. As the Supreme Court in *Calder* observed: “Petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.”<sup>69</sup> Thus, the *Calder* effects tests should not be misconstrued as a test that looks *solely* to the effects of a defendant’s conduct in determining whether an exercise of jurisdiction is appropriate. Rather, the effects of an injury may be regarded as evidence that a defendant aimed its tortious conduct at a specific jurisdiction and this could “reasonably anticipate being haled into court there.”<sup>70</sup>

a. Application of the Effects Test to Internet Defamation: *Revell* Revisited

The *Revell* court, restating some of the factors it cited in its *Zippo* analysis, concluded its case was distinguishable from *Calder*. It observed that the article written

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<sup>66</sup> *Id.* at 785.

<sup>67</sup> *Id.* at 789.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 789–90 (“Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must ‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article.”)(citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297).

and posted by the defendants in its case contained no reference to Texas, did not refer to any of the Texas activities of the plaintiff, and was in no way directed at Texas readers.<sup>71</sup> By contrast, the defamatory article in *Calder* “contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California”.<sup>72</sup> Thus, the *Revell* court concluded that *Calder* did not control.<sup>73</sup> Nevertheless, as *Revell* clearly acknowledges, *Calder* is binding authority and any court faced with the vexing question of jurisdiction in an Internet defamation case must either distinguish it or employ its “effects” test.

### 3. *Young v. New Haven Advocate*<sup>74</sup> and the “Targeting Inquiry”

A number of commentators have advocated an approach that more specifically focuses on the question of whether or not a defamation defendant specifically “targeted” an individual or individuals within the forum state.<sup>75</sup> Such an approach would “seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction.”<sup>76</sup> As of 2005, the Third,<sup>77</sup> Fourth,<sup>78</sup> and Ninth<sup>79</sup> federal circuits

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<sup>71</sup> 317 F.3d at 476 (“In short, this was not about Texas. If the article had a geographic focus it was Washington, D.C.”).

<sup>72</sup> 465 U.S. at 788–89.

<sup>73</sup> 317 F.3d at 473.

<sup>74</sup> 315 F.3d 256 (2002).

<sup>75</sup> See Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J., 1345, 1345–46 (2001) (“Targeting would [] lessen the reliance on effects-based analysis, the source of considerable uncertainty since Internet activity can ordinarily be said to create some effects in most jurisdictions.”); Henry H. Perrit, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. OF INT’L ECON. L. 563, 573 (2000) (“The concept of targeting is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.”).

<sup>76</sup> Geist, *supra* note 75, at 1345.

<sup>77</sup> See *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3rd Cir. 2003) (holding jurisdiction can be found where it can be shown that a defendant “purposely availed” itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient related contacts”).

<sup>78</sup> See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (finding jurisdiction is proper when a defendant “(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts”).

have incorporated a targeting inquiry into their Internet jurisdiction analyses. One Fourth Circuit opinion, *Young v. New Haven Advocate*,<sup>80</sup> best illustrates the operation of such an approach in the Internet defamation context.

In *Young*, a Virginia prison warden brought a suit in Virginia against two Connecticut newspapers for a series of allegedly defamatory articles regarding the transfer of Connecticut prisoners to a Virginia facility.<sup>81</sup> These articles described allegations made by prisoners of abusive guards and reported a class action suit that had been filed regarding abject conditions at the prison.<sup>82</sup> In one column, the Virginia prison in question was characterized as a “cut-rate gulag”.<sup>83</sup> In addition, one column reported a Connecticut senator’s consternation over the presence of Confederate Civil War memorabilia in the warden’s office.<sup>84</sup> All of these articles appeared on the newspapers’ Internet websites and were easily accessible to residents of Virginia via the website.

The *Young* court rejected the plaintiff’s suggestion that his case fit under the effects-test rubric of *Calder* and his argument that jurisdiction existed in Virginia “simply because the newspapers posted articles on their Internet websites . . . and he could feel the effects of any libel in Virginia.”<sup>85</sup> The court asserted that “*Calder* does not sweep that broadly” and instead seized on the language in *Calder* that stresses the importance of

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<sup>79</sup> See *Bancroft & Masters Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082 (9th Cir. 2000) (stating jurisdiction is created “when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state”).

<sup>80</sup> 315 F.3d 256 (2002).

<sup>81</sup> *Id.* at 259.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 261.

“look[ing] at whether the defendant has expressly aimed or directed its conduct toward the forum state.”<sup>86</sup>

In concluding that the defendant newspapers did not, in fact, aim or direct their conduct toward Virginia, the *Young* court underscored facts indicating that Connecticut, rather than Virginia readers, were the presumptive audience for its articles. It pointed out that most of the advertising in both the physical and Internet versions of the newspapers was clearly aimed at Connecticut residents.<sup>87</sup> Also, the vast majority of all physical copies of both newspapers were distributed in Connecticut: One newspaper was a free newspaper distributed only in Connecticut and the other reported only eight Virginia subscribers.<sup>88</sup> Finally, the websites of both newspapers offered features only of interest to Connecticut viewers such as local weather and traffic links, links to the University of Connecticut, and reviews of local establishments and events (e.g., “The Best of New Haven”).<sup>89</sup> Based on a consideration of these facts, the *Young* court found that the defendant newspapers “did not post materials on the Internet with the manifest intent of targeting Virginia readers.”<sup>90</sup> Accordingly, jurisdiction was not created.

#### *4. Intention, Purpose, Directedness: Unifying Themes in the U.S. Approach to Internet Defamation Jurisdiction*

Though sometimes regarded as inconsistent,<sup>91</sup> all three American approaches to

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 260.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 263.

<sup>91</sup> See Patrick J. Borchers, *The Consequences of a Non-Rule Approach to Internet Jurisdiction*, 98 N.W. U. L. Rev. 473, 473 (“One might think that by now there would have emerged a clear rule on whether the target can sue at home or not. However, there is no clear rule; in fact, there is not even really a clear majority position.”).

the question of jurisdiction in Internet defamation cases adhere to a minimum contacts standard of constitutional due process. That standard, so elaborately articulated by the Supreme Court in the sixty or so years since *International Shoe*, remains tied to a deceptively simple question: When is it reasonable and fair to hale a defendant into a court in a forum state?<sup>92</sup> At a bare minimum, the Supreme Court's jurisprudence suggests that a defendant has "fair warning" that he could be subject to jurisdiction in a forum state when he or she engages in *purposeful* activities directed at the forum state.<sup>93</sup> The various approaches to Internet jurisprudence represent variations on this theme of purpose or intentionality. *Zippo*: "When an entity *intentionally reaches* beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper."<sup>94</sup> *Calder*: "[J]urisdiction over petitioners in California is proper because of their *intentional conduct* in Florida calculated to cause injury to respondent in California."<sup>95</sup> *Young*: "Because the newspapers did not *intentionally* direct Internet activity to Virginia, jurisdiction fails on that ground."

Admittedly, the question of intentionality is a difficult one, but the view that *mere presence* on the Internet does not rise to the level of intentional, purposeful behavior is coalescing in American Internet jurisdiction jurisprudence.<sup>96</sup> Indeed, if a defendant's mere presence on the Internet "were sufficient to establish personal jurisdiction, "a defendant would be subjected to jurisdiction on a worldwide basis and the personal

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<sup>92</sup> See Michael L. Russell, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157, 177 (1999) (discussing reasonableness and fairness of asserting jurisdiction in the Internet context).

<sup>93</sup> *Burger King*, 471 U.S. at 473 (Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum.) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

<sup>94</sup> *Zippo*, 952 F. Supp. at 1124 (quoting *Burger King*, 471 U.S. at 475) (emphasis added).

<sup>95</sup> *Calder*, 465 U.S. at 491 (emphasis added).

<sup>96</sup> *Young*, 315 F.3d at 264 \* (emphasis added).

jurisdiction requirements as they currently exist would be eviscerated.”<sup>97</sup> As the next section will argue, there is an approach to personal jurisdiction developing internationally that would do just that.

### III. THE *DOW JONES* APPROACH TO INTERNET DEFAMATION

#### A. *Dow Jones & Company, Inc. v. Gutnick*<sup>98</sup>

In 2000, prominent Australian businessman Joseph “Diamond Joe” Gutnick became aware of an article, published on *Barrons Online* that alleged he was using charities to artificially inflate the value of low-priced stocks in the United States.<sup>99</sup> The article also alleged Gutnick had ties to other businessmen who had been convicted or charged with fraud.<sup>100</sup> Gutnick promptly filed a suit for defamation against Dow Jones, the owner of *Barrons Online* in Australia, where he was resident and where he claimed the injury to his reputation had occurred.<sup>101</sup> By the time the case worked its way up to the Australian High Court, U.S. publishers had recognized its significance as the first case raising the issue of international defamation liability for Internet publications. Several of them, including *The New York Times*, *The Washington Post*, The Associated Press, Reuters, and Cable News Network (CNN), intervened on behalf of Dow Jones, arguing that a ruling in favor of Gutnick would allow publishers to be sued anywhere in the world.<sup>102</sup> Their efforts would be unsuccessful. In 2002, the Australian High Court ruled against Dow Jones, sparking off an international controversy.<sup>103</sup>

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<sup>97</sup> *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 114 (D. Conn. 1998).

<sup>98</sup> [2002] HCA 56 (10 December 2002) (Australian High Court).

<sup>99</sup> This summary of facts is taken from the opinion of the court below. [2001] VSC 305 at para. 3.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Andrew Dodd, *Internet Defamation Case has Global Impact*, THE AUSTRALIAN, June 6, 2002, at M03.

<sup>103</sup> See Nathan W. Garnett, *Dow Jones & Co. v. Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech Worldwide?*, 13 PAC. RIM L. & POL'Y 61, 62 (“Opinions on the decision ranged from

## 1. *The Procedural Conflict*

### a. Place of Publication and the Australian Jurisdictional Analysis

The threshold question of jurisdiction was obviously one of great significance. How would the Australian High Court determine whether it could exercise jurisdiction over a large foreign media enterprise headquartered in the United States, doing most of its business in the U.S., and responsible for publications primarily directed at U.S. audiences? Under international law, a domestic court is subject to limitations on its authority to adjudicate in cases that involve foreign interests or activities.<sup>104</sup> There are no bright-line rules of international law, however, circumscribing spheres of national jurisdiction.<sup>105</sup> Rather, international law leaves States wide discretion to decide when an exercise of jurisdiction is appropriate based on generally accepted principles.<sup>106</sup> Nevertheless, courts generally exercise moderation and restraint in invoking jurisdiction

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approval of the High Court's 'obvious' rule to derision for the shortsighted protectionism of the Australian 'Kangaroo Court.'").

<sup>104</sup> Traditionally, three kinds of jurisdiction are distinguished as a matter of international law: jurisdiction to prescribe, or legislative jurisdiction; jurisdiction to adjudicate, or judicial jurisdiction; and jurisdiction to enforce, or executive jurisdiction. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 726 (2D ED. 1995); Australia's jurisdiction to prescribe defamatory publication and enforce its defamation law was not disputed in this case. Rather, the jurisdictional analysis centered on the question of the High Court's jurisdiction to adjudicate. Jurisdiction to adjudicate is defined as "a State's authority to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the State is a party to the proceedings." *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S.* 401(B) (1987)

<sup>105</sup> *See id.* at 401 cmt. a. ("This section and the chapters that follow do not divide exercises of authority by a state into discrete conceptual categories. Rather, they identify different aspects of the exercise of authority that, because they employ different means and have different consequences, have led to different rules of international law.").

<sup>106</sup> Four traditional bases for jurisdiction are generally recognized in international law. These are (1) the *territoriality principle*, according to which the place where an offense is committed-in whole or in part-determines jurisdiction; (2) the *nationality principle*, which looks to the nationality or national character of the person committing the offense to establish jurisdiction; (3) the *effects principle*, focusing on the direct and foreseeable effects of conduct within the territory of the forum and (4) the *protective principle*, which applies when a national or international interest of the forum is injured by the offender. *See* CARTER & TRIMBLE, *supra* note 101, at 755. The Australian High Court's analysis implicitly invokes the "effects principle" as a basis for jurisdiction: "Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place." [2002] HCA 56, at para. 24.

over cases that have a foreign element in order to avoid undue encroachment on the jurisdiction of other States.<sup>107</sup>

In both the Australian High Court's opinion, as well as in the opinion below, the jurisdictional analysis focused on the question of where the allegedly defamatory statement had been "published."<sup>108</sup> Dow Jones argued that the article in question had been "published" when it was uploaded to Dow Jones servers, located in the United States.<sup>109</sup> In making this argument, it urged the court to adopt a "single publication rule", the rule employed in the U.S., which states that any edition of a book, newspaper, radio, or television broadcast is a single publication for which only one action for damages can be maintained.<sup>110</sup> Under the Australian common law "multiple publication" rule, by contrast, each observation of a defamatory statement creates a separate cause of action and creates a new location in which the action may be brought.<sup>111</sup> Under a single publication rule, Dow Jones argued, the place of publication was New Jersey and *only* New Jersey, where Dow Jones' servers were located and where material was uploaded to

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<sup>107</sup> See Wilske & Schiller, *International Jurisdiction in Cyberspace: Who May Regulate the Internet?*, 50 FED. COMM. L.J. 117, 127 ("A State that exercises jurisdiction in an overly self-centered way not only contravenes international law, but it can also disturb the international order and produce political, legal, and economic reprisals.")

<sup>108</sup> [2001] VSC 305 at para. 13 ("[C]onsideration of the jurisdiction issue . . . means the question of the place of Internet publication."). [2002] HCA 56 *passim*.

<sup>109</sup> [2002] HCA 56 at para. 18 ("The principal burden of the argument advanced by Dow Jones on the hearing of the appeal in this Court was that articles published on *Barron's Online* were published in South Brunswick, New Jersey, when they became available on the servers which it maintained at that place.")

<sup>110</sup> As stated in the Restatement of Torts 577A, the rule is as follows:

- (3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.
- (4) As to any single publication,
  - (a) only one action for damages can be maintained;
  - (b) all damages suffered in all jurisdictions can be recovered in the one action; and
  - (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

<sup>111</sup> There is a separate publication (and thus a separate cause of action) in relation to each copy delivered to a reader. If a newspaper circulates 100,000 copies of the one edition (defamatory of the plaintiff), he has available to him at least 100,000 causes of action. The "single publication" rule adopted in the United States, whereby a plaintiff is given only one cause of action for each entire edition of the newspaper, has not been adopted in this country.

its website.<sup>112</sup> To the contrary, Gutnick argued that publication of the article only occurred “when it [was] made intelligible or manifest to a third party by showing it or making it comprehensible,”<sup>113</sup> *i.e.*, whenever and wherever it was received and read. In conjunction with the multiple publication rule, this would mean that a publisher would be potentially liable for separate torts each time a defamatory article was viewed on its website, which, of course, could occur virtually anywhere in the world.<sup>114</sup>

b. The Victorian Supreme Court Opinion<sup>115</sup>

Dow Jones urged the Victorian Supreme Court to adopt the single publication rule as a matter of fairness and public policy. It argued that a rule determining that publication on the Internet occurs whenever and wherever it was read would not only be unfair to publishers—forcing them to litigate in a “multitude of jurisdictions”<sup>116</sup>—but would also have a chilling effect on Internet speech. Claiming that adoption of such a rule would inevitably lead to an increase in litigation, it reasoned that information providers “would become more cautious . . . reducing the uninhibited communication and circulation of information to an exceptionally low level.”<sup>117</sup> The court dismissed this claim as speculative—“asserted but not established by evidence . . . .”<sup>118</sup>

As to the unfairness of subjecting publishers to litigation in multiple jurisdictions, the court responded in a passage that amounts to an outright challenge to a perceived U.S. legal hegemony:

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<sup>112</sup> [2001] VSC 305 at para. 14.

<sup>113</sup> *Id.* at para. 23.

<sup>114</sup> See generally Robert M. Harkins, Jr., *The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button*, 25 PEP. L. REV. 451 (1997)

<sup>115</sup> [2001] VSC 305.

<sup>116</sup> *Id.* at para. 73.

<sup>117</sup> *Id.* at para. 16.

<sup>118</sup> *Id.*

The applicant's argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read, must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo, frequently not of notable means, who would at enormous expense and inconvenience have to embark upon the formidable task of suing in the USA, with its different fee and costs structures and where the libel laws are, in many respects, tilted in favour of defendants, or, if you will, in favour of the constitutional free speech concepts and rights developed in the USA which originated in the liberal construction by the courts of the First Amendment.<sup>119</sup>

This passage is emblematic of the lower court's resistance to the notion that U.S. free speech norms merited any special consideration in its decision to exercise jurisdiction or not. In fact, the Victorian Supreme Court clearly saw merit in counterbalancing the presumed legal hegemony of the United States and its laws "tilted" in favor of free speech. This inclination can be detected even more clearly in the court's rejection of Dow Jones argument that a rule which places jurisdiction for Internet defamation in the forum in which the article is accessed would create an insularity in the law contrary to Australian interests.<sup>120</sup> Blanching at any suggestion that such a claim was anything more than a "self-indulgent" submission, "reeking of overstatement,"<sup>121</sup> the court dismissed it completely. It countered: "The point simply is that if you do publish a libel justiciable in another country with its own laws (not mere copies of the U.S. law as the defendant's submissions appear to favour, perhaps because they are tilted in favour of the defendant), then you may be liable . . . ." <sup>122</sup> Consequently, the Victorian Supreme Court found no reason to refrain from exercising jurisdiction.

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<sup>119</sup> *Id.* at para. 73.

<sup>120</sup> *Id.* at para. 74.

<sup>121</sup> *Id.* at para. 75.

<sup>122</sup> *Id.*

c. The Australian High Court Opinion<sup>123</sup>

Dow Jones appealed the decision and the Australian High Court affirmed the decision of the Victorian Supreme Court. The High Court, like the court below, focused its jurisdictional analysis on the question of where the allegedly defamatory statements had been published.<sup>124</sup> The High Court, however, unlike the lower court, clearly recognized the interrelatedness of the jurisdictional and choice of law questions in this case.<sup>125</sup> According to the High Court, where the parties or events have some connection with a jurisdiction outside Australia, the law of the place of the wrong controls.<sup>126</sup> Thus, the jurisdiction in which the defamation was “published” would control the law to be applied.<sup>127</sup> Conversely, if the defamation was “published” outside of Australia, then foreign law would be applied. Australia would thus become an inconvenient forum and the case would be dismissed.<sup>128</sup>

Dow Jones again urged the court to consider the merits of adopting a single publication rule, arguing that an Internet publisher should be governed by the law of the place where it maintains its servers.<sup>129</sup> The alternative, it claimed,

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<sup>123</sup> [2002] HCA 56 (10 December 2002).

<sup>124</sup> *Id.* at paras. 25–44.

<sup>125</sup> *Id.* at para. 70 (Although these issues are separate and distinct, they are closely related.); *id.* at para. 110 (“The interrelationship of the three issues in the appeal can be seen immediately. Each of the foregoing submissions would be relevant to the jurisdiction issue (if jurisdiction were determined only by whether a tort had been committed within Victoria.”).

<sup>126</sup> *Id.* at para. 107 (“The rule for the ascertainment of the applicable law is therefore that it is the law where the tort was committed (*lex loci delicti*)”).

<sup>127</sup> *Id.* at para. 108.

<sup>128</sup> *Id.* at para. 9.

<sup>129</sup> *Id.* at para. 72 ([T]he thrust of the appellant's argument was that this Court should re-examine the common law of defamation in Australia so as to reformulate its elements, either generally or specifically, for the law as it applies to publication on the Internet.).

would force a publisher to “take account of the law of every country on earth, for there were no boundaries which a publisher could effectively draw to prevent anyone, anywhere, downloading the information it put on its web server.”<sup>130</sup>

The High Court, like the lower court, rejected this argument as speculative, calling it a claim with “a greater appearance of certainty than it would have in fact.”<sup>131</sup> Furthermore, it reaffirmed the conclusions of the lower court, holding that the true concern of defamation is damage to the plaintiff’s reputation, and that there is no damage until the defamatory information is in comprehensible form in a place where the plaintiff’s reputation may be damaged.<sup>132</sup> Thus, the court held that information on the Internet is published where the information is downloaded.<sup>133</sup>

#### d. Comparative Application of the U.S. Approach to Jurisdiction to *Gutnick*

Noticeably absent from either opinion of the Australian courts was any consideration of Dow Jones’ intentions in the matter at hand. As outlined above, a U.S. court would be required to make that determination through an analysis of minimum contacts, focusing on the extent to which Dow Jones engaged in purposeful, intentional conduct directed toward Australia. The lower court does acknowledge this fact, citing *Calder* for the proposition that U.S. Courts “would generally exercise jurisdiction in defamation actions over defendants domiciled outside the jurisdiction of the court only where the defendant’s conduct targeted the forum.”<sup>134</sup> The court makes no commentary on this point, perhaps indicating by its silence that it considered the apparent conflict of

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<sup>130</sup> *Id.* at para. 20.

<sup>131</sup> *Id.* at para. 21.

<sup>132</sup> *Id.* at para. 44.

<sup>133</sup> *Id.*

<sup>134</sup> [2001] VSC 305 at para. 77.

laws to be an irreconcilable one. Curiously, however, the High Court also cites *Calder* for an inapposite proposition in favor of a determination that jurisdiction in Australia was appropriate. It asserts that in *Calder* “personal jurisdiction over a defendant was exercised based on the defendant’s operation of a Website accessible in the forum where harm was caused to the plaintiff in the forum.”<sup>135</sup>

This odd juxtaposition of propositions amounts to a misuse of *Calder*. While *Calder* *does* stand for both propositions, they are conjunctive rather than disjunctive. While the placement of the effects of a defamatory statement may be a valid factor in considering jurisdiction, the *Calder* opinion never suggests that it is a *substitute* for or *alternative* to the basic due process analysis of purposeful availment. In fact, in coming to its conclusion that California’s exercise of jurisdiction was valid, *Calder* emphasized the deliberate actions of the defendants: “The writers’ actions were expressly aimed at California,” the Court observed, “and they knew that the brunt of the injury would be felt by [the actress] in the State in which she lives and works and in which the National Enquirer has its largest circulation.”<sup>136</sup> By contrast, Dow Jones insisted that Barrons Online was “indelibly American, written by Americans for Americans interested in the stock market and its affairs” and in no way directed toward Australians.<sup>137</sup> Rather than engage in any analysis of this apparent lack of intent or purpose to , the High Court simply countered with the observation that “Mr. Gutnick is indelibly Victorian, connected with no other place and that any documentation or evidence concerning the matter will all be found in Victoria.”<sup>138</sup>

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<sup>135</sup> *Id.* at para. 57.

<sup>136</sup> *Calder*, 465 U.S. at 491.

<sup>137</sup> [2001] VSC 305 at para. 129.

<sup>138</sup> *Id.*

The fact that the number of Australian subscribers to Barrons Online was negligible would also be significant under a U.S. approach to Internet jurisdiction. Out of 550, 000 subscribers, only 1,700 (less than one-half of one percent) were located within Australia and a mere couple hundred were sold in the forum state of Victoria.<sup>139</sup> Under *Zippo*, the fact that Dow Jones actually earned revenue from these subscriptions and assigned subscribers passwords to access their sites would mean that the Barrons Online could not be described as entirely passive.<sup>140</sup> In addition, the fact that the number of Victorian subscribers was small would not alone be dispositive.<sup>141</sup> However, *Revell* suggests that the fact that Australians were not the “principal users” of the website should be regarded as a highly relevant factor for purposes of a *Zippo* analysis.<sup>142</sup>

Finally, Dow Jones contact with Australia would clearly fall short of the minimum contacts standard put forth for Internet defamation cases in *Young*. *Young* looked to the overall configuration and content of the website rather than the subject matter of the allegedly defamatory article to determine whether jurisdiction existed.<sup>143</sup> In *Gutnick*, as in *Young*, there was no evidence that the defendant’s website was configured in such a way that its content could reasonably be construed as *targeted* toward an audience in the forum state.<sup>144</sup> Indeed, it wouldn’t make sense commercially for Barrons to tailor content on its website for the tiny percentage of its customer base represented by Australians.

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<sup>139</sup> *Id.* at para. 1.

<sup>140</sup> *See Zippo*, 952 F. Supp. at 1123.

<sup>141</sup> *Id.*

<sup>142</sup> *Revell*, 317 F.3d at 475–76.

<sup>143</sup> *Young*, 315 F.3d at 260.

<sup>144</sup> *Id.*

Counsel for Dow Jones emphasized the “American-ness” of Barrons Online website content: Its subject matter was the American stock market, its readers were presumably investors interested in the American stock market, and Gutnick’s activities were very much relevant to the American stock market insofar as his alleged misconduct would affect investor conduct in publicly held enterprises with which he might be associated.<sup>145</sup> Similarly, the *Young* court recognized that the “Connecticut-ness” of the defendants’ websites.<sup>146</sup> The fact that the defendants’ website was accessible in Virginia would provide a basis for jurisdiction in Virginia only if they, in the court’s words, “manifest an intent to target and focus on Virginia readers.”<sup>147</sup> Dow Jones clearly did not manifest an intent to target Australian readers. Thus, under *Young*, a U.S. court would be compelled to decline to assert jurisdiction.

## 2. *The Substantive Conflict*

The fact that the High Court in *Gutnick* elected to exercise jurisdiction over Dow Jones brought the substantive issue of free speech norms to the fore. The Australian High Court might be commended for recognizing that the case before at its core reflected a substantive conflict of free speech values. At the outset of its opinion, the court acknowledged

the obvious point that the law of defamation seeks to strike a balance between, on the one hand, society’s interest in freedom of speech and the free exchange of information and ideas and . . . an individual’s interest in maintaining his or her reputation. The way in which those interests are balanced differs from society to society.<sup>148</sup>

The conclusion that the High Court came to, however, regarding the appropriate

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<sup>145</sup> [2001] VSC 305 at para. 129.

<sup>146</sup> *Young*, 315 F.3d at 260 (noting various characteristics of the website catering to Connecticut readers).

<sup>147</sup> *Id.* at 258.

<sup>148</sup> *Id.* at para. 23.

balance of these values, however, is one incompatible with American First Amendment values. U.S. courts have interpreted the First Amendment's prohibitions on restrictions of freedom of speech very broadly. This broad reading reflects the "profound commitment" stridently 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."<sup>149</sup> This firm commitment to liberal free speech norms has resulted in substantive differences between the law of defamation in the United States and common law jurisdictions such as Australia and England.<sup>150</sup> Most notably, in these latter jurisdictions there is no special protection for statements made about "public figures" such as Mr. Gutnick.<sup>151</sup> This critical difference between U.S. and English/Australian law is the result of the landmark Supreme Court opinion *New York Times v. Sullivan*.<sup>152</sup>

*Sullivan* protects the right of the press to criticize public officials, by requiring that public officials suing for defamation meet a higher standard of "actual malice" to prevail.<sup>153</sup> Actual malice refers to "knowledge that a statement was false or with reckless disregard of whether it was false or not."<sup>154</sup> In further rulings, the Court has clarified that the standard of actual malice applies very broadly to any person who is a "public figure," including politicians, celebrities, business persons, or anyone else who is

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<sup>149</sup> *New York Times Co.*, 376 U.S. at 270.

<sup>150</sup> See Eric P. Enson, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 *Loy. L.A. Int'l & Comp. L.J.* 159, 162–163 (outlining the differences between the English common law of defamation and American law of defamation).

<sup>151</sup> *Id.* at 163.

<sup>152</sup> 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

<sup>153</sup> *Id.* at 279.

<sup>154</sup> *Id.* at 283.

in the public eye.<sup>155</sup> These are persons who “have assumed roles of special prominence in the affairs of society . . . [that] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>156</sup> The “actual malice” standard makes U.S. law decidedly “tilted” in favor of defendants and free speech in general, as the Victorian Supreme Court clearly recognized.<sup>157</sup>

In addition, in the United States, the burden of proof is on the plaintiff to show that a statement was defamatory and false.<sup>158</sup> Furthermore, the burden of proof is on a public figure plaintiff to prove actual malice by a standard of “clear and convincing” evidence.<sup>159</sup> By contrast, the common law rule still followed by Australian and English courts presumes the falsity of an allegedly defamatory statement and requires that the defendant prove that the material was true.<sup>160</sup>

Because of First Amendment-derived protections, Dow Jones would likely prevail in a defamation suit in the United States. Based on his widespread notoriety, Mr. Gutnick would clearly be considered a public figure in the United States<sup>161</sup> and would be subject

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<sup>155</sup> See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (extending the actual malice privilege beyond public officials to cover persons of public interest); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

<sup>156</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>157</sup> [2001] VSC 305 at para. 73.

<sup>158</sup> See RESTATEMENT (SECOND) OF TORTS 613 (1977):

(1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,

- (a) the defamatory character of the communication,
- (b) its publication by the defendant,
- (c) its application to the plaintiff,
- (d) the recipient's understanding of its defamatory meaning,
- (e) the recipient's understanding of it as intended to be applied to the plaintiff,
- (f) special harm resulting to the plaintiff from its publication,
- (g) the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and
- (h) the abuse of a conditional privilege.

<sup>159</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

<sup>160</sup> See *Enson*, *supra* note 149, at 162 (“Under English common law, however, a plaintiff is not required to prove the falsity of a challenged statement, because that falsity is presumed by all English courts.”).

<sup>161</sup> See *Gertz*, 418 U.S. at 345 (stating public figures are those who have “assumed roles of special prominence in the affairs of society”); see also generally Erik Walker, *Public Figures: Who are They?*, 45 BAYLOR L. REV. 955 (1993).

to a heavy burden of showing that the statements made concerning him were false and accompanied by “actual malice”. In Australia, Dow Jones did not have this critical free speech protection, nor will any other publisher sued for defamation, a fact that accounts for the great dismay felt by American publishers<sup>162</sup> as well as legal commentators<sup>163</sup> committed to strong free protection for the American press. In November of 2004, Dow Jones threw in the towel and settled its suit with Mr. Gutnick out of court, agreeing to pay him \$180,000 and an additional \$400,000 in costs.<sup>164</sup> The outcome in *Gutnick* as well as Dow Jones’ settlement may have set a dangerous precedent, one that will unfold as more and more courts struggle with the issue of international Internet defamation actions.<sup>165</sup>

#### B. Potential Extension of *Gutnick*: *Harrods Limited v. Dow Jones & Co., Inc.*<sup>166</sup>

This dismay can only have increased with evidence, presented in the form of a procedural ruling in the English case of *Harrods Limited v. Dow Jones & Co., Inc.* That case bears similarities to *Dow Jones v. Gutnick* that go beyond the obvious fact that Dow Jones is the defendant in both. *Harrods*, like *Gutnick*, involves a suit for Internet defamation. Dow Jones published an article on April 1, 2001 in both the print and online versions of its subsidiary newspaper, *The Wall Street Journal*.<sup>167</sup> This article was written and published as a result of its inability to recognize that a phony press release issued by

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<sup>162</sup> See Dodd, *supra* note 101 (noting the intervention of various American media groups in *Gutnick*).

<sup>163</sup> See Garnett, *supra* note 102 (describing the criticism of the outcome in *Gutnick* voiced by a number of legal commentators).

<sup>164</sup> See ABC News Online, *Dow Jones Settles Gutnick Action*, at <http://www.abc.net.au/news/newsitems/200411/s1242115.htm> (last visited Jan. 2, 2005);

<sup>165</sup> See Australian IT, *Gutnick May Set Web Precedent*, at <http://australianit.news.com.au/articles/0,7204,11401297%5E15319%5E%5Enbv%5E15306,00.html> (“Scholars sa[y] the decision—the first by a nation’s top court to deal with alleged cross-border internet defamation—create[s] a global precedent that could subject internet publishers to lawsuits regardless of their geographical location”)(last visited Jan. 2, 2005).

<sup>166</sup> [2003] EWHC 1162 (QB), *available at* [http://www.courtservice.gov.uk/judgmentsfiles/j1769/harrods\\_v\\_dow\\_jones.htm](http://www.courtservice.gov.uk/judgmentsfiles/j1769/harrods_v_dow_jones.htm) (last visited Jan. 2, 2005).

<sup>167</sup> *Id.* at para 1.

Harrods Department Store the day before was, in fact, an April Fool's joke.<sup>168</sup> The press release announced that Mohamed Al Fayed, owner of Harrods, planned to "float" Harrods.<sup>169</sup>

The word "float" was a play on words, intended to suggest that Al Fayed was going to take the company public, i.e. "float" its stock. In fact, it referred to Al Fayed's plans to build a ship version of Harrods, which would be moored on the Thames River. Get it?—A "floating" Harrods? The Wall Street Journal did *not* get it and initially reported the story quite literally.<sup>170</sup> It eventually caught on, however, and perhaps still burning from having been duped, it published another more caustic story about Harrods a few days later. This story, entitled "The Enron of Britain?", revealed the joke and added "If Harrods . . . ever goes public, investors would be wise to question its every disclosure."<sup>171</sup> Piqued by this unflattering comparison to Enron, the notorious emblem of corporate misconduct and mismanagement, Fayed and Harrods sued for defamation in England.

Dow Jones responded by asking a U.S. district court in New York to issue a declaratory judgment protecting it from any UK judgment against and an injunction barring Harrods from pursuing its defamation action—not only in the UK, but in any other foreign jurisdiction.<sup>172</sup> Dow Jones argued that an action for defamation based on the news article would not survive constitutional scrutiny in the United States because the publication represented only "non-actionable expression of opinion based on true

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<sup>168</sup> *Id.* at para. 2.

<sup>169</sup> *Id.* at para 1.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at para. 3.

<sup>172</sup> *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd* 2003 U.S. App. LEXIS 20743 (2d Cir., Oct. 10, 2003).

statements.”<sup>173</sup> British defamation law, Dow Jones argued, offered far less protection to publishers, and was thus “plainly antithetical to historic rules, traditions and policies established to protect free speech and freedom of the press in the United States.”<sup>174</sup>

The court refused Dow Jones’ request, however, explaining that as a matter of international comity, it would be inappropriate for a U.S. court to attempt to *preempt*<sup>175</sup> the UK defamation claim—let alone any future claims that Harrods might elect to pursue in other jurisdictions around the world.<sup>176</sup> On the other hand, the court stated that it would have “little hesitation” in issuing a declaration of non-recognition of an *existing* UK court judgment against Dow Jones.<sup>177</sup> In doing so, the court reaffirmed a commitment to U.S. free speech norms, stating “the United States has a profound interest in fostering its broad concept of First Amendment freedoms, and safeguarding the freest exercise of those fundamental rights within the United States by all persons accorded the protection of American law.”<sup>178</sup>

After the U.S. District Court refused to issue a declaratory judgment, the matter reached the High Court of Justice in London. The High Court noted that the allegedly defamatory article did not appear in the European edition of the Wall Street Journal, the edition that reached most British readers.<sup>179</sup> It cited evidence that only ten copies were

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<sup>173</sup> *Id.* at 402.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 418. (“What Dow Jones asks this Court to do, in general terms distills to this: to apply the DJA as a defensive shield, a preemptive means to immunize a litigant from the inevitable costs and inconveniences attendant to any form of potential litigation arising from the party’s alleged wrongful acts.”).

<sup>176</sup> *Id.* at 410–12 \* 9 (“Under Dow Jones’ hypothesis, the Declaratory Judgment Act would confer upon an American court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere on Earth. Intriguing as such universal power might appear to any federal judge, this Court must take a more modest view of the limits of its jurisdiction.”).

<sup>177</sup> *Id.* (noting that it would be willing to declare that a foreign judicial order “actually rendered and sought to be executed in the United States would not be cognizable under American jurisprudence governing freedom of expression.”).

<sup>178</sup> *Id.* at \*19.

<sup>179</sup> [2003] EWHC 1162 at para. 4.

sent to subscribers in the U.K. from the U.S..<sup>180</sup> As for the online edition, the court conceded that the evidence “discloses a very small number of ‘hits’ on the article as published on the web” and contrasted this evidence with the fact that The Wall Street Journal has a national distribution within the United States of approximately 1.8 million copies.<sup>181</sup>

One might expect these factors to weigh heavily in favor of declining jurisdiction, as they would under an American minimum contacts analysis. However, the London High Court, citing *Gutnick* as one authority, concluded that “the publications . . . have taken place within this jurisdiction. That applies both to the small number of copies of The Wall Street Journal received by subscribers here and also to the apparently limited number of hits emanating from this jurisdiction on the relevant page of the web site.”<sup>182</sup> Though the case has yet to go to trial, this procedural ruling means that Dow Jones will be subject to the English law of defamation, which like Australian defamation law, lacks the protections outlined above for speech about public figures.<sup>183</sup>

### C. Implications of the *Dow Jones* Decisions

Defense counsel for Dow Jones in *Gutnick* argued strenuously for a narrow, speech-protecting rule in the “age of globalization,”<sup>184</sup> an argument that the Victorian Supreme Court dismissed as merely self-serving<sup>185</sup> and the Australian High Court found ultimately unpersuasive.<sup>186</sup> While clearly self-serving, this argument was still a valid

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at para. 36.

<sup>183</sup> See *supra* text accompanying footnotes 160–64.

<sup>184</sup> [2001] VSC 305 at para 74.

<sup>185</sup> *Id.* at para. 75 (dismissing the policy arguments of Dow Jones as “self-indulgent submissions”).

<sup>186</sup> [2002] HCA 56 at para. 164–66. The High Court took a more nuanced approach in its response to the proposition that the nature of Internet communication called for a rethinking of old doctrines, noting that

one, and arguably prescient. The Internet truly is a revolutionary tool for dissemination of information, one that allows content to be received anywhere and everywhere that an Internet connection is available.<sup>187</sup> As a result, individuals nearly anywhere in the world could access the material placed by Dow Jones on its web servers.<sup>188</sup> Standing on its own, *Gutnick* is flawed in its failure to recognize that old jurisdictional rules are ill-suited for addressing the unique challenge posed by a radical new physically-unconstrained medium for communication. As the U.S. Supreme Court has recognized, the Internet is “a unique and wholly new medium of worldwide human communication.”<sup>189</sup>

If the basic ruling of *Gutnick*—that publication of a defamatory communication occurs where it is received—is followed to its logical end, then Internet publishers could be held liable, again, anywhere and everywhere.<sup>190</sup> It is true that the risk of publishers having to defend defamation actions around the world is somewhat mitigated by significant practical obstacles to such a development. For example, as discussed *infra* Part IV, plaintiffs are unlikely to go to the expense of suing for defamation unless any judgment they obtain is capable of being enforced in a place where the defendant has assets. Nevertheless, it is entirely plausible to conclude that Internet publishers, facing the prospect of increased liability, will make adjustments to reduce their exposure. Self-

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[i]ntuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply another medium of human communication” and acknowledging that its conclusion was an “outcome contrary to intuition.” *Id.* at 164.

<sup>187</sup> See Titi Nguyen, 19 BERKELEY TECH. L.J. 519, 519 (2004) (noting that “any person connected to the Internet can access it and is limited in her activity only by the current state of technology”).

<sup>188</sup> See Larry Press, *The State of the Internet: Growths and Gaps*, at [http://www.isoc.org/inet2000/cdproceedings/8e/8e\\_4.htm](http://www.isoc.org/inet2000/cdproceedings/8e/8e_4.htm) (last visited Jan. 2, 2005), for evidence of the global diffusion of the Internet; *see also*

<sup>189</sup> *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

<sup>190</sup> See *Digital Equip. Corp.*, 960 F. Supp. at 462 (“To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ ‘there’ is everywhere where there is Internet access.”).

ensorship is one of the surest, most practical means of accomplishing this objective and American media outlets have responded to the threat of liability in such a manner in the past.<sup>191</sup> Thus, the notion that a chill on free speech could occur as a result of *Gutnick* is not just a “high-minded concept” or “self-indulgent submission”<sup>192</sup> but a very real possibility. Long before *Gutnick*, one commentator noted that “perhaps the most complex threat to the new communications technology may come from governmental entities that are not subject to the First Amendment.”<sup>193</sup> To the extent countries outside the United States take the position that they have jurisdiction over any communication that is downloaded within their borders, Internet content providers may find that they cannot rely upon the relatively high level of protection they enjoy in the United States.

#### **IV. REFUSING ENFORCEMENT OF FOREIGN JUDGMENTS ADVERSE TO U.S. PUBLIC POLICY: A POSSIBLE ANTIDOTE TO THE DOW JONES PRECEDENT?**

As suggested by the U.S. District Court’s opinion in *Dow Jones v. Harrods*, American courts may still have a role to play in the unfolding conflict of transnational free speech norms.<sup>194</sup> American publishers generally have the majority of their assets in the U.S. and victorious defamation plaintiffs abroad can only access these assets through

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<sup>191</sup> In late 1995, for example, CompuServe, Inc. blocked access to more than 200 sexually explicit computer discussion groups after a federal prosecutor in Germany stated that the material violated German pornography laws. See John Markoff, *The Media Business: On-Line Service Blocks Access to Topics Called Pornographic*, N.Y. Times, Dec. 29, 1995, at A1.

<sup>192</sup> [2001] VSC 305 at para. 74.

<sup>193</sup> E. Walter Van Valkenburg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 329 (1996).

<sup>194</sup> *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d at 411:

American law contains among the most extensive mantle of rights and safeguards to guarantee and protect individual freedoms and fundamental fairness. Gauged by the rigorous standards constituting the American conception of civil liberties and due process, the legal systems of many foreign states are bound to fall short as to any given basic precept our law encompasses. Accordingly, countless occasions inevitably arise when Americans are sued in foreign tribunals by parties invoking laws that in some aspect or other may not measure up to our constitutional mark or may even do violence to public policies and principles Americans hold dear—not only those valued under the First Amendment, but under other vital protections of our jurisprudence.

a ruling by an American court agreeing to enforce the judgment.<sup>195</sup> Enforceability is treated as a question of state law, and over thirty states have adopted versions of the Uniform Foreign Money-Judgments Act, which provides that a foreign money judgment “that is final and conclusive and enforceable where rendered . . . is conclusive between the parties . . . .”<sup>196</sup> This general rule of enforceability is subject to limitations, however, and one exception, the “public policy” exception represents a sort of rear guard action against the erosion of U.S. free speech protections by foreign defamation judgments.<sup>197</sup> This exception allows courts to refuse enforcement when the cause of action or claim for relief on which the judgment rests is “repugnant to the public policy of [the enforcing] state.”<sup>198</sup>

*A. Bachchan v. India Abroad Publications, Inc and Telnikoff v. Matusevich*

U.S. courts have refused to enforce foreign defamation judgments determined to be inconsistent with the constitutional protections of *New York Times v. Sullivan* and its progeny. Two leading cases—*Bachchan v. India Abroad Publications, Inc.*<sup>199</sup> and *Telnikoff v. Matusevich*<sup>200</sup>—suggest possible responses to an adverse ruling in either Dow Jones defamation cases by American courts. In *Bachchan*, a New York state court refused to enforce an English defamation judgment against the operator of a New York news wire service, declaring that “the protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered

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<sup>195</sup> See generally Molly Shafer Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. Licra*, 24 MICH. J. INT'L L. 697 (2003).

<sup>196</sup> Unif. Foreign Money-Judgments Recognition Act, 13 U.L.A. 263, at 2 (1962).

<sup>197</sup> *Id.* at 4.

<sup>198</sup> *Id.*

<sup>199</sup> 585 N.Y.S.2d 661 (N.Y. S. Ct. 1992).

<sup>200</sup> *Id.* at 235.

antithetical to the protections afforded the press by the U.S. Constitution.”<sup>201</sup> Likewise, in *Matusevich*, the Court of Appeals of Maryland declared that an English defamation judgment could not be enforced in Maryland because “the principles governing defamation actions under English law . . . are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law.”<sup>202</sup>

#### B. *Yahoo! Inc. v. LICRA*

In addition, *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme (LICRA)*,<sup>203</sup> represents strong authority at the federal level for refusing to enforce a foreign judgment inconsistent with American free speech norms. In that case, a U.S. district court in California refused to declare enforceable a French ruling against the popular website Yahoo! for allowing the display of Nazi memorabilia on its website in violation of French law. In doing so, it recognized that “the French order’s content and viewpoint-based regulation of the web pages and auction site on Yahoo.com . . . clearly would be inconsistent with the First Amendment if mandated by a court in the United States.”<sup>204</sup> Further, the court rejected any notion that principles of comity between nations obliged it to recognize the French judgment: “Absent a body of law that establishes international standards with respect to speech on the Internet . . . the principle of comity is outweighed by the Court’s obligation to uphold the First Amendment.”<sup>205</sup>

Collectively, these cases provide a powerful rationale for refusing to enforce adverse judgments on the merits (should they be adverse) against Dow Jones. The

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<sup>201</sup> 702 A.2d 230 (Md. 1997), *answer conformed to* 1998 U.S. App. LEXIS 10628 (D.C. Cir. May 5, 1998).

<sup>202</sup> *Id.* at 249.

<sup>203</sup> 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

<sup>204</sup> *Id.* at 1191.

<sup>205</sup> *Id.* at 1194.

various differences in the substantive law of defamation between America on the one hand and Australia and England on the other, are not insignificant. The absence of a requirement of an “actual malice” showing alone is enough to make the common law of defamation embraced in Australia and England fundamentally incompatible with the First Amendment as modified by *Sullivan*. Thus, *Dow Jones* or a similarly situated defendant may ultimately find relief in a domestic court from an adverse ruling abroad.

### C. U.S. Courts May Prevent the Further Erosion of Internet Free Speech Norms

Likewise, proponents of robust free speech/free press protections may take solace in the possibility that their interests will be vindicated by a court following the mandates of the First Amendment. The need for judicial protection of First Amendment values internationally is underscored by the apparent lack of a viable political solution. Though international conventions addressing free speech norms on the Internet exist, these conventions are restrictive from a U.S. perspective<sup>206</sup> and no such agreement has been made concerning free speech norms as applied to defamation. Moreover, such an international political solution is arguably unrealistic and undesirable from an American free speech perspective. Even assuming any consensus could be created internationally concerning general standards of free speech, these standards are unlikely to guarantee the exceptionally high level of free press protection that exists in the United States.<sup>207</sup> As the two *Dow Jones* and *Yahoo!* cases make clear, even the most liberal of Western democracies do not share ideals of free speech as expansive as those espoused in the United States. Furthermore, a significant number of non-Western, non-democratic

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<sup>206</sup> See, e.g., Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Jan. 28, 2003, Europ. T.S. No. 189 (providing criminal sanctions for “hate speech”).

<sup>207</sup> See *Dow Jones & Co., Inc. v. Harrods*

nations embrace state censorship of free speech on the Internet<sup>208</sup> and are unlikely to find American arguments to the contrary persuasive, at least in the short term.

In the absence of a political solution, legal scholars have begun to more aggressively call upon national courts to provide a solution.<sup>209</sup> As *Matusevich*, *Bachnan*, and *Yahoo!* indicate, at least a few American courts have been willing to “step[] into the gap, using judicial interpretations of jurisdiction and judicial comity to champion [the American] approach to balancing competing norms on transnational speech.” Of course, no U.S. court enjoys more prestige or commands more respect internationally than the U.S. Supreme Court. Although the Supreme Court has not yet had an opportunity to champion American free speech / free press norms in the context of international Internet defamation, remarks by Justice Scalia and Breyer suggest that perhaps they are sharpening their swords for just such an occasion. In the course of an informal discussion held at American University on the use of foreign law precedent in Supreme Court jurisprudence,<sup>210</sup> the following exchange occurred:

*Questioner* (Referring to *Dow Jones v. Gutnick*): Do U.S. courts cooperate with illiberal policies by enforcing foreign judgments against Americans for speech that would definitely be protected here in the U.S?

*Justice Scalia* That’s a very interesting question, uh . . . (pause, laughter). What do you think the answer is? (smirking, more laughter)

*Questioner*: The answer is yes. I’ll send you one of my law students as a clerk.

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<sup>208</sup> See, e.g., Alfred Hermida, *Behind China's Internet Red Firewall*, BBC NEWS WORLD EDITION , Sept. 3, 2002, available at <http://news.bbc.co.Uk/2/hi/technology/2234154.stm> (“[China] has worked hard to muzzle the web as a forum for free information and discussion. One of the ways it does this is by blocking access to foreign websites such as Google by what has been called the Great Red Firewall.”); Lewis S. Malakoff, *Are You My Mommy, or My Big Brother? Comparing Internet Censorship in Singapore and the United States*, 8 PAC. RIM. L. & POL’Y J. 423 (1999);

<sup>209</sup> See, e.g., Johnson D & Post D, *And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law*, in Brian Fitzgerald et al, CYBERLAW 124 (2002)

<sup>210</sup> CNN Broadcast, Foreign Courts and U.S. Constitutional Law, Jan. 13, 2005 (on file with author).

*Justice Scalia:* It really is a great problem. We haven't been confronted with a case involving it yet, but when the case comes up we will indeed . . .

*Justice Breyer* (interrupting): We will give it our serious consideration (laughter).

*Justice Scalia:* The one thing you can be sure is we will get it *right* (more laughter).

The impression one is left with upon viewing this exchange is that the “right answer”, at least as Justices Scalia and Breyer are concerned, is to refuse to recognize any foreign judgment deemed incompatible with U.S. free speech norms. It may only be a matter of time before the U.S. Supreme Court has an opportunity to give more substance to this impression.

## V. CONCLUSION

*Dow Jones v. Gutnick* has thrown into relief the difficult procedural and substantive issues the U.S. will need to resolve as Internet publishing becomes more and more important as a medium for mass, global communication. The consequences of failing to address these challenges could be considerable. The mere prospect of expensive litigation in multiple, far flung jurisdictions and exposure to inconsistent regulation is likely to have a substantial “chilling effect” on what may well be “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”<sup>211</sup> Risk-averse Internet publishers will need to adhere to the most restrictive international standards of free speech to avoid liability. Furthermore, if a publisher has to consider the laws of Australia (or Singapore, China, Saudi Arabia, etc . . .) when publishing, his or her level of speech protection is reduced to that of the potential forum

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<sup>211</sup> *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

state. As Dow Jones's general counsel observed, "it creates a kind of tyranny of the lowest common denominator and . . . inhibits free speech."<sup>212</sup>

Finally, perhaps the most damning observation regarding defamation lawsuits in foreign courts is that they often represent an "end run" around the First Amendment and *New York Times v. Sullivan*, as few foreign jurisdictions recognize the heightened protections against charges of defamation guaranteed by that case in the United States.<sup>213</sup> These protections will be greatly diminished in value unless they are transplanted from the printed to electronic medium, which soon could be a dominant mode of news distribution. Thus, as American publishers push into the frontiers of Internet publishing, U.S. courts should wield *New York Times v. Sullivan* as both sword and shield to protect them against free speech norms antithetical to our own "profound national commitment to the principle debate on public issues should be uninhibited, robust, and wide-open."<sup>214</sup>

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<sup>212</sup> Matthew Rose, *Leading the News: Australia to Hear Web Libel Suit in Landmark Case*, WALL ST. J., Dec. 11, 2002 (quoting Dow Jones' General Counsel).

<sup>213</sup> Michael Sutton, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 422 (2004) (Outside of the United States, defamation is often a strict liability tort in which plaintiffs who are public figures need not prove actual malice. This offers an opportunity for plaintiffs to engage in forum shopping by bringing a suit in another country in order to do an "end run" around the First Amendment.).

<sup>214</sup> *Sullivan*, 376 U.S. at 270.