

# Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas

Michael F. Sutton\*

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\* B.A., Indiana University–Bloomington, 1997; M.S., Counseling and Counselor Education, Indiana University–Bloomington, 1999; J.D. candidate, Indiana University School of Law – Bloomington, 2004. The author would like to thank his fiancée, Laura Scheuer, for her support and assistance during the editing process. The author would also like to thank his parents for their constant encouragement.

## I. INTRODUCTION

New technologies that transform the way people communicate worldwide perpetually create new challenges for the protection of free speech in America. The First Amendment was written during a time in which the printing press, the quill pen, and word of mouth were the only viable methods of spreading information. In spite of that, judges, lawyers, and politicians have reinterpreted and reenvisioned the First Amendment as applied to new media, including technological advances of the twentieth century, such as radio and television. This flexibility of the First Amendment's application has been one of its greatest strengths.<sup>1</sup> The Amendment's adaptability may derive from the simplicity of its message: citizens should be free to produce and share political speech and social views without fear of government interference.<sup>2</sup> So long as this principle can be applied to new technologies, the First Amendment thrives.

However, the modern innovation of communication via the Internet strains that fundamental idea. Unlike prior advances in communications technologies, the Internet allows individual users to reach an international audience virtually instantaneously. Posting information online allows its users to transmit content from country to country just as effectively as distributing that content within the confines of one's own neighborhood. The First Amendment may prohibit federal and state governments from unduly hindering civic debate, but it can do nothing to similarly prohibit foreign governments from taking even more extreme measures, such as placing an outright ban on Internet speech when that content is distributed within foreign borders. Thus, the benefit of the Internet's broad reach is paradoxically also a disadvantage in terms of First Amendment protection.

The limitations to the First Amendment's application to the Internet are especially ironic, given that the Internet is perhaps the most democratic medium of speech to date.<sup>3</sup> To spread information via the Internet, one

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1. The Supreme Court has pointed out that technological and societal progress demands that First Amendment jurisprudence evolve. "The history of this Court's First Amendment jurisprudence . . . is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) (plurality opinion).

2. *See, e.g., Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1976) ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

3. *See Eugene Volokh, Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805, 1833 (1995) (suggesting that the Internet can "both democratize the information marketplace—

does not need any significant financial capital, a workforce of employees, skilled knowledge, or special equipment beyond access to a computer and some rudimentary skills to operate it. The Internet thus has the potential of enabling individuals to voice their ideas regarding any issue—a power traditionally held by only those who had the money and resources to print publications or to broadcast over the airwaves.

It remains to be seen how, if at all, the First Amendment will shield American online content from foreign legal restrictions on speech. This Note details several international threats to American-originated Internet content. After analyzing these potential hazards to American content providers, this Note suggests some possible solutions or approaches to dealing with the problem, whether through international law and diplomatic measures, domestic strategies, or a combination of both.

## II. FOREIGN THREATS TO FIRST AMENDMENT PROTECTION OF ONLINE AMERICAN NEWS CONTENT

Domestic news agencies are progressively using the Internet to increase readership and viewership, presenting alternative formats of news presentation, and supplementing news content that is already available in print or via broadcast. However, information posted online has an international reach, making it subject to the domestic laws of each nation where Internet users can access the material.<sup>4</sup> The consequences for American news content providers are serious, since the Internet disseminates content to countless foreign jurisdictions. While domestic news agencies enjoy the high standards of protection of speech the First Amendment grants when content remains within U.S. jurisdictions, this protection is undermined when that speech travels beyond the borders of the United States via the Internet.<sup>5</sup>

Moreover, the international community does not share any common method for dealing with conflicts of laws problems.<sup>6</sup> Thus, the methods

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make it more accessible to comparatively poor speakers as well as rich ones—and diversify it.”).

4. For example, the High Court of Australia has held that American publishers can be held liable in Australia for posting information online that defames Australian citizens under standards of Australian laws. *See Dow Jones v. Gutnick*, (2000) 210 C.L.R. 575.

5. *See, e.g., Pierre Trudel, Jurisdiction over the Internet: A Canadian Perspective*, 32 INT’L LAW. 1027, 1028 (1998) (noting that the Internet has caused increased interaction across national borders, and this has made it difficult for courts to establish jurisdiction).

6. This has led some commentators to argue that there should be a transnational approach to Internet jurisdictional issues. *See, e.g., Matthew R. Burnstein, Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT’L L. 75, 81-82 (1996).

utilized by any given foreign jurisdiction to resolve international legal conflicts related to Internet speech may differ greatly from another country's means for resolving the same type of conflict.<sup>7</sup>

Without any assured protection from liability, the online distribution of news originating from American news organizations can expose those news providers to potential litigation in nations that offer far less protection of speech than does the First Amendment. Thus, American content providers who are accustomed to making prepublication editorial decisions based on known First Amendment protections may unwittingly run afoul of the libel and defamation laws, or even criminal laws, of any country whose citizens have the capability of accessing the information.

In light of the unique capability of the Internet to allow news to be disseminated freely without regard to national boundaries or foreign laws, news organizations that have traditionally operated domestically must now adapt in order to face potential international challenges to content. For example, providers may choose to alter their editorial decisions, change their selection of content, and increase their understanding of what might cause them to incur liability. Yet these very changes in content that might allow American news agencies to avoid foreign liability might also render futile the First Amendment's core purpose of encouraging spirited, open debate.

Since the First Amendment cannot effectively protect news providers when their content reaches audiences beyond American borders, some measure of extraterritorial protection is necessary to maintain the freedom news providers enjoy in choosing content when they distribute news domestically. Therefore, the United States should seek to promote international agreement in order to allow American news organizations to operate internationally without being hindered by the heightened liability imposed by countries that offer the least protection to news providers.

Of course, the First Amendment does not require the government to actively do anything to *promote* speech; it only proscribes the government from unduly *interfering* with speech.<sup>8</sup> Although this would seem to suggest that there is no constitutional imperative that the government promote or

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7. See Brian E. Daughdrill, *Poking Along in the Fast Lane on the Information Super Highway: Territorial-Based Jurisprudence in a Technological World*, 52 MERCER L. REV. 1217, 1235-39 (2001) (discussing different approaches to dealing with conflicts of laws in cyberspace).

8. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that the "First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.") (citation omitted). However, this does not mean that the government must, conversely, do anything to encourage speech—whether it agrees with it or not.

even participate in an international agreement on Internet content protection, governmental *inaction* would effectively subvert the intent of the First Amendment by allowing other countries' governments to prohibit American speech that the American government itself cannot. In order to preserve the integrity of the First Amendment's goals, the United States should be at the forefront of advocating the adoption of an international agreement for the protection of online content.

A. *Differing Standards of Speech Protection*

Perhaps the greatest problem posed by liability for online content is the uncertainty content providers face about international standards of speech protection. Most content providers have at least a general awareness of what constitutes protected speech in their own countries and the potential consequences for publishing unprotected content. However, foreign legal standards of speech protection are likely to be entirely unknown to any given publisher. This problem is amplified by the fact that content on the Internet may reach not merely one or two other countries, but potentially every nation in the world. The contrast between the countries that provide the most and least protection for certain types of content may vary widely.

1. Defamation

As an example of one such difference, the First Amendment affords media defendants in the United States a greater level of protection from public figures' libel claims than many foreign laws would grant media defendants in other countries. In particular, plaintiffs who are public figures and bring claims of libel in U.S. courts must overcome the actual malice barrier to recovery established in *New York Times Co. v. Sullivan*.<sup>9</sup> Under *New York Times Co.*, in order to pursue a defamation claim in the United States, a plaintiff who is a public figure must prove "actual malice" on the part of the defendant.<sup>10</sup> The actual malice standard demands that the plaintiff prove the defendant published the disputed statement with knowledge of falsity or in reckless disregard of whether the statement was false or not.<sup>11</sup> In addition, the plaintiff must prove the existence of actual malice with convincing clarity.<sup>12</sup> Because of this heightened standard of fault, the defendant often prevails in U.S. cases that involve the issue of

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9. 376 U.S. 254 (1964).

10. *Id.* at 283-84; *see also* *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

11. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986).

12. *See New York Times Co.*, 376 U.S. at 285-86.

actual malice.

Outside of the United States, defamation is often a strict liability tort in which plaintiffs who are public figures need not prove actual malice.<sup>13</sup> 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. For example, a plaintiff could file a claim in England in order to avoid the requirements of the First Amendment, as many plaintiffs already have:

It is becoming increasingly common for publishers based in the United States to find themselves on the receiving end of a defamation claim filed in Europe. England in particular has been a favorite forum for those aggrieved by an international publication because it historically has offered claimants friendly juries and a favorable burden of proof. Once a claimant has proved publication of a defamatory article in England, damage is assumed and the burden immediately shifts to the publisher, which must demonstrate that the defamatory statement is true or another substantive defense exists.<sup>14</sup>

The ability of plaintiffs to use such tactics could have a considerable impact on the editorial decisions of Internet publishers. American publishers who rely on the actual malice standard of protection afforded by the First Amendment in making editorial decisions about news content must now decide whether the same material that is fully protected by the U.S. Constitution would be defamatory under other nations' laws. Unless content providers are aware of the laws of those countries in which a plaintiff could bring a claim, it would be nearly impossible to determine the standards of liability for defamation throughout the entire international community each time the content provider makes such an editorial decision.

## 2. Liability of Internet Service Providers

American laws regarding content liability also differ from many foreign laws in not only what types of speech may create liability but also in terms of who may be held responsible for that speech. For example, the Communications Decency Act (“CDA”) contains a provision that protects Internet service providers (“ISPs”) from third-party liability due to the acts of their customers posting libelous or obscene materials online, and it additionally protects ISPs from being held liable merely for screening

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13. The issue of differing international standards for libel arises in a couple of recent cases. *See Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 402-03 (S.D.N.Y. 2002); *Ellis v. Time Inc.*, 26 Media L. Rep. 1225, 1234-35 (D.D.C. 1997).

14. Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 COMM. LAW 24, 24 (Winter 2002).

customers' online content for such material. Section 230(c) of the CDA, in particular, states that a provider of an interactive computer service should not be considered to be the publisher of any information or content that was posted by another user.<sup>15</sup> In fact, after the Fourth Circuit's 1997 decision in *Zeran v. America Online*, this protection may even include instances in which the ISP is fully aware of the content and still declines to remove the information.<sup>16</sup>

Although the CDA protects ISPs in the United States, other countries often provide no such protection. For instance, in England, a service provider was liable for hosting a news group that happened to contain a posted message that defamed the plaintiff.<sup>17</sup> It did not matter that the ISP had not been the author of the defamatory message, because the court found that the ISP could be liable for having knowledge of the message and not removing it from its server.<sup>18</sup>

This difference between the laws of the United States and the legal standard in countries such as England has the potential of creating situations in which plaintiffs can succeed in avoiding American law twice. Whereas a plaintiff in the United States could not sue the ISP under the protection of the CDA, a plaintiff in a foreign jurisdiction could not only successfully include the ISP as a defendant, but could also prevail with a defamation claim that would not even be available against the author of the material if it did not meet the actual malice standard required under the First Amendment.<sup>19</sup>

### 3. International Effects on State Law Protection of Speech

Although foreign laws often create liability for Internet content in conflict with the First Amendment and federal laws, it is important to recognize that that distribution of online content also removes content

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15. 47 U.S.C. § 230(c)(1) (2000) ("No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider."); *see also* *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (interpreting Section 230 as establishing a categorical rule protecting ISPs from tort liability originating from content posted by users).

16. 129 F.3d 327. *Zeran* had sued AOL for failing to remove defamatory comments about him that had been posted on an AOL message board. The court held that, because of the protection granted by Section 230, AOL could not be held liable even though it had notice of the postings and still did not remove the content from the message board. *Id.*

17. *See* *Godfrey v. Demon Internet Ltd.*, 2001 Q.B. 201 (Eng. 1999).

18. *See id.*

19. *See, e.g.*, Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235, 239-44 (1994) (comparing American and English libel laws and describing how plaintiffs can more successfully sue American media defendants in England).

providers from the safety of state laws. One such example, as a means of illustrating this problem, is the difference between international and domestic approaches to the application of the “single publication rule” to the Internet.<sup>20</sup>

As the Supreme Court noted in *Keeton v. Hustler Magazine, Inc.*,<sup>21</sup> the single publication rule is an exception to the general rule that each communication of a defamatory content is a separate and distinct publication. Many states have adopted the single publication rule, and some state courts have extended its application to information posted online.<sup>22</sup> Thus, in those states, the “publication” of defamatory content online gives rise to only one cause of action, regardless of how many times the content is accessed.<sup>23</sup>

However, this may not hold true in foreign jurisdictions, where a defendant may be liable for damages each time the information is accessed.<sup>24</sup> As a result, if the material is repeatedly accessed, an American publisher could face considerably higher damages in a foreign country than that publisher would face in the United States. This is contrary to the policies promoted by the single publication rule—namely, to reduce publishers’ exposure to multiple lawsuits, excessive damages, and potential harassment.<sup>25</sup> Moreover, the plaintiff may be able to recover such damages by bringing a claim that could not survive the demands of the First

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20. The single publication rule is described in *Restatement (Second) of Torts*, which states:

- (1) Except as stated in Subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.
- (2) A single communication heard at the same time by two or more third persons is a single publication.
- (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.

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

21. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 n.3 (1984).

22. *See, e.g., Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 88-89 (2nd Cir. 2003) (applying the single publication rule to a letter published on the Internet).

23. *Id.* at 89.

24. *See Loutchansky v. The Times Newspapers, Ltd.*, 2002 Q.B. 783 para. 76 (Eng. & Wales C.A. 2001) (holding that defamatory material that is posted online will be considered to be republished each time users access the material).

25. *See Van Buskirk*, 325 F.3d at 89.

Amendment in American courts.

*B. Foreign Criminal Liability for Speech*

In some foreign countries, American news organizations and content providers may also face criminal penalties for violating speech regulations that they would not face in the United States.<sup>26</sup> Such laws have faced harsh criticism, since criminal penalties could create an even greater “chilling effect” on speech than civil damages.<sup>27</sup> Certainly, the threat of foreign liability alone can be a deterrent for a content provider making an editorial decision about which content to include. Yet the added threat of imprisonment in another country for placing information online could freeze out some speech altogether. American content providers are not likely to make overly critical comments of a foreign government’s leadership, for example, if it is probable that such commentary would result in a prison sentence if the content provider traveled to that country or another jurisdiction that allows extradition for the so-called crime.<sup>28</sup>

Of course, although criminal penalties are a more serious threat, they are also less likely to be a frequent problem.<sup>29</sup> American courts are obviously highly averse to the idea of allowing extradition of American citizens to be imprisoned for speech that is protected at home, so the only content providers likely to be truly affected by criminal penalties are those

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26. For example, consider the following case from Turkey:

*Turkey v. Ersoz* (Istanbul 6/2/98): A Turkish court gave an 18-year-old boy a ten-month suspended jail sentence for “publicly insulting state security forces” after he used the Internet to criticize police treatment of protesters in Ankara, Turkey. Defendant Ersoz signed his comments with his name and email address. Another user reported the information to authorities who then located Ersoz through Turknet.

Nicole A. Wong et. al, *Online Content Liability Issues*, in *SIXTH ANN. INTERNET L. INST.* 2002, at 813, 843 (PLI Intellectual Prop. Practice Course, Handbook Series No. G-711, 2002). *See also id.* at 842 (stating that the possibility that an American citizen might also be subjected to such a law for making similar comments underscores the seriousness of criminal liability for Internet content when the speaker must do without the protection of the First Amendment).

27. *See, e.g.*, Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 361-62 (2002) (arguing that political commentary and complaints of government officials “should not be dissuaded by potential prosecution for libel. If such prosecutions become commonplace, as they have in Chile, Brazil, Panama, and Paraguay, among others, the chilling effect may cause the media to abstain from reporting on matters of general concern particularly on political affairs.”).

28. *See id.* at 356-58 (explaining that press laws in many South American countries include jail time in addition to fines).

29. *See id.* at 361 (noting that “criminal libel is not typically enforced against media defendants in common law countries such as the United States.”).

who are traveling or living abroad when they post the information.<sup>30</sup> Those publishers would also be more apt to have an awareness or understanding of the laws of the nations in which they travel.

Nevertheless, it is important to note this problem, since the potential penalties for an American content provider who violates such foreign criminal laws are much more serious. Even if the threat of foreign criminal liability alone would not often deter most American content providers from criticizing foreign parties online, those providers who expect to travel abroad in the near future might have second thoughts about just what they should and should not say.

### *C. Disproportionate Impact on Small Publishers and Individual Content Providers*

Foreign liability for online content harms smaller, independent news organizations that have traditionally operated domestically and unwary average American Internet users who post information online more than it harms large, international news organizations like CNN. First, the use of the Internet allows virtually anyone to post news that reaches a global audience with little regard to the costs of publishing or broadcasting. A smaller, domestic news organization is thus able to “publish” in foreign countries whose laws and standards of liability are less likely to be known to the news organization. As a result, smaller news agencies may face more risk of foreign liability, because they do not have the legal resources of a large, corporate-owned news agency. Since small news organizations are rarely armed with a legal department that has the specific knowledge of foreign laws that regulate news content, the impact of those laws falls disproportionately upon them.

Further, the high costs associated with adverse judgments in multiple countries are more likely to cause smaller publishers either to be unduly cautious about their news content or to avoid an online forum altogether. The threat of such costs may effectively limit small news agencies to forms of publishing and broadcasting that do not cross national borders, since they cannot effectively limit the jurisdictions in which Internet content may be read.<sup>31</sup>

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30. As described, *infra*, Part III.B, American courts have not even allowed foreign judgments in *civil* suits to be enforced against American citizens if the judgments are contrary to First Amendment standards.

31. As Justice Kennedy noted in his concurrence in *Ashcroft v. American Civil Liberties Union*, the Internet, unlike traditional media, makes it “easy and cheap to reach a worldwide audience . . . but expensive if not impossible to reach a geographic subset.” 535 U.S. 564, 595 (2002).

From an international perspective, this may seem like a perfectly acceptable result, since the First Amendment should not function as an international trump card that allows Americans to disseminate speech abroad with the same rights they have at home, regardless of other countries' more restrictive laws. However, the threat of foreign liability arising from online news content does not simply limit the First Amendment from being applied internationally; it also curtails its effectiveness within the United States. That is, if news publishers, reporters, and commentators—whether they are small or large organizations or even individual writers—elect not to post information online due to fear of foreign liability, the American public is robbed of speech that would otherwise have been available for citizens of the United States to access. Even if such content providers choose to disseminate the content but limit themselves to using only traditional media and printed publications, the American audience will likely be much smaller than if the recipients of the content had included all American readers who could have accessed the material online.

As an example of how this could cause a loss of valuable speech, consider a hypothetical situation in which an independent American news publisher wishes to write a critical article about a prominent European businessman. Under First Amendment doctrine, there may be no question that the article contains no libelous or defamatory content. If the independent publisher does not have the financial resources or necessary technology to broadcast the information either nationally or regionally or to distribute printed copies to a large population of people, then the Internet would provide a highly effective, relatively inexpensive alternative means for transmitting the commentary to a mass audience.

For this publisher, however, the Internet's ability to target a large population is also very problematic if the publisher is uncertain about whether the article's content would be acceptable under foreign libel and defamation laws. Moreover, the subject of the article might be more likely to encounter and read the article online and bring a suit in a foreign court, regardless of the likelihood of whether the claim would ultimately be successful in any jurisdiction.

Factoring in these potential consequences could make the risks of publishing online too high and the costs too prohibitive for the publisher. If the publisher then chooses to use media that do not reach foreign readers rather than using the Internet as a medium for publication, the publisher can no longer reach a broad American audience. Thus, despite the First Amendment's protection in this instance, the publisher's voice would effectively be lost to the national marketplace of ideas. In cases such as this

one, the foreign libel and defamation laws play a restrictive role on what American readers see, even though the article may embody the very spirit of promoting the diversity of viewpoints the First Amendment is intended to encourage.

*D. Additional Problems*

The legal landscape is in the formative stages of change as the Internet redefines our traditional notions of what publishing and news distribution entail. In addition to problems of increased and uncertain liability, threats to diversity of speech, and forum shopping, the proliferation of Internet use creates other concerns about international media vulnerability. In an analysis of various legal issues that may threaten American media, David S. Korzenik points out several of these problems, including the fact that Internet publications not only face increased liability, but that they also may be subject to prior restraints—a restriction on speech that the First Amendment does not often tolerate.<sup>32</sup>

Yet First Amendment concerns are just the beginning of media defendants' potential woes. Although limitations on speech harm the marketplace of ideas (and deprive the public at large of that content), from the standpoint of the content providers themselves, the greatest peril to the media is not just speech restrictions or even foreign liability, but rather the increasing costs of that liability. As Korzenik notes, media clients have also become more international in their operations, allowing foreign courts to more easily reach their assets.<sup>33</sup> Furthermore, globalization has changed the way foreign courts approach awards of damages, and the size of monetary awards to prevailing plaintiffs has been increasing—ironically, it is the Americanization of foreign legal systems that has caused this problem for defendants.<sup>34</sup>

The prospective financial burdens of multiple costly, adverse international judgments, combined with the worrisome uncertainty of what would constitute foreign liability, will only increase the likelihood that content providers will self-regulate their speech in a manner that unduly constrains the transmission and expression of ideas. In order to maintain and encourage both a diversity of expression as well as diversity in the types of people and organizations who publish online, international and

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32. See David S. Korzenik, *Libel and Privacy Suits Against U.S. Media in Foreign Courts*, in PRINT & ELECTRONIC PUBLISHING: UNDERSTANDING THE LEGAL AND BUSINESS ISSUES FOR BOOKS AND MAGAZINES 955, 957 (PLI Patent, Copyrights, Trademark & Literary Prop. Practice Course, Handbook Series No. G-516, 1998).

33. *Id.*

34. *Id.*

domestic measures must be taken to ensure Internet content providers have a structured legal framework that offers clear standards for liability and jurisdictional issues.

### III. THE NEED FOR INTERNATIONAL AGREEMENT ON PROTECTION OF SPEECH

Some degree of international agreement about the regulation of Internet content is necessary, so that domestic news organizations and other content providers at least have adequate notice and understanding of the broad array of various national laws that regulate content online. In the absence of such agreement, American companies and individuals posting information online have little notice of what types of content may expose them to liability that they would not face domestically under the protection of the First Amendment. Moreover, this is not merely a First Amendment problem that concerns Americans alone; Internet content providers in other countries are equally vulnerable to being held accountable to varying standards of speech protection.

#### A. *The Threat of “Watered-Down” Speech*

In the absence of clear international agreement on protections afforded to speech, news organizations and online companies may tailor their content to meet the standards of countries that offer the least protection of speech. This would effectively suffocate lively debate and contrasting views. In addition, this would create a strange situation in which the more the Internet is used to transmit news and commentary to and from foreign countries, the less diversity in viewpoints will be represented. As one author has noted, “The danger of foreign libel laws to democratic self-government . . . lies in their potential to induce U.S. media sources to tailor their publications to the most restrictive laws.”<sup>35</sup>

This has already begun to occur. When a British court determined that a book defamed L. Ron Hubbard and issued an injunction against its distribution, Amazon.com pulled the book from its online catalog and thereby made it unavailable to Amazon.com users in all countries.<sup>36</sup> Thus, in Amazon.com’s move to protect itself, the British court’s determination

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35. Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2007-08 (1994).

36. Kurt A. Wimmer & Joshua A. Berman, *United States Jurisdiction to Enforce Foreign Internet Libel Judgments*, in 18TH ANN. INST. ON TELECOMM. POL’Y & REG. 493, 518-19 (PLI Patent, Copyrights, Trademark & Literary Prop. Practice Course, Handbook Series No. G-630, 2000).

effectively became the law of all jurisdictions, since no Amazon.com purchaser could obtain the book in any country.

If news reporters, newsgroup users, and other providers of social and political speech content make the same type of decisions as Amazon.com did, many controversial viewpoints will be erased from the Internet, even if the content would unquestionably withstand any legal challenges in the content providers' home countries. This outcome conflicts with the ideals of the First Amendment in promoting free expression, and it is antithetical to every democratic society's interest in maintaining spirited, informed public debate.<sup>37</sup>

### B. Enforcement of Foreign Judgments

At least until such time as an international consensus can be reached, American courts will have to decide whether to enforce foreign judgments that are inconsistent with First Amendment protections. Thus far, American courts have understandably been unwilling to do so.<sup>38</sup> For example, when a French court entered an order that restricted Yahoo!, Inc. from posting information or auctions dealing with Nazi memorabilia, the U.S. District Court for the Northern District of California refused to enforce the order.<sup>39</sup> The court in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, noted that the French order would violate the First Amendment protection of speech, and due to the nature of the Internet, that it would also result in chilling such speech when it occurs simultaneously within the United States.<sup>40</sup>

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37. Justice Brandeis stressed the importance of how the First Amendment promotes open public debate, noting:

[The Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis J., concurring).

38. See, e.g., *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (holding that a British libel judgment would not be enforced because British libel standards deprived the U.S. speaker of First Amendment protection and were also repugnant to public policies of the State of Maryland and the United States.); see also *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. App. Div. 1992) (refusing to recognize a British libel judgment against a New York operator of a news service because the judgment was imposed without the protection of the First Amendment and the comparable provision of the New York Constitution).

39. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

40. *Id.* at 1194.

Thus, there seems to be little concern for American content providers that adverse foreign judgments will be enforced domestically, if those judgments do not correspond with the constitutional standards that would have to be met in American courts.<sup>41</sup> Nonetheless, this does not protect potential defendants' assets that may lie outside of the United States.

Additionally, by the time a plaintiff could seek to have a foreign judgment enforced in the United States, it necessarily means that the defendant had previously lost that suit in another jurisdiction. As such, unless the original judgment in the foreign court was a default judgment, the defendant has already spent what may amount to a great deal of legal fees and court costs to defend against the claim before it ever reaches a court in the United States.

Of course, American defendants in such cases might elect not to appear in foreign courts and instead merely wait for a default judgment that would be unenforceable in American courts. Yet even this strategy would expose defendants to the costs associated with defending the suit in the United States, and it would not prevent foreign plaintiffs from being able to harass defendants by bringing lawsuits in any countries that assert jurisdiction over the matter. Furthermore, many defendants may be too proud, too afraid, or too ignorant of the state of the law to choose to lose a foreign lawsuit by simply not appearing. Thus, the agreement among American courts that they cannot be called upon to enforce foreign judgments that conflict with the First Amendment is therefore only minor consolation to Internet content providers who have already incurred liability or may be wary of facing liability in the future.

#### IV. A PROPOSAL FOR SPEECH LAW HARMONIZATION

Despite the need for clear notice to Internet content providers about such liability, even a very generalized international agreement may be difficult to achieve. Every country has a strong interest in protecting its own citizens from harmful or libelous speech, regardless of whether those standards comport with the U.S. Constitution and American views on what constitutes protected speech. Likewise, compromise would not be easily obtained from the United States, since any international agreement that weakens the strength of First Amendment safeguards for American content providers would be a failure in terms of American interests.

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41. In fact, free speech interests sometimes may eventually prevail even in foreign matters. For example, a French court later rejected a subsequent lawsuit against Yahoo!, Inc. in which the plaintiffs claimed that the company had condoned war crimes by allowing the auctions for Nazi memorabilia to be posted on the site. See Kerry Shaw, *French Court Rejects Suit Against Yahoo*, N.Y. TIMES, Feb. 12, 2003, at C9.

In addition, each country's basis for granting greater or lesser protection from liability may be grounded in traditions, philosophies, and political views that conflict with American views on the dimensions of free speech. As such, the laws that regulate content in other countries may be so entwined with the country's history and culture that bringing about change could be an extremely difficult and contentious process.

For that matter, it may not even be desirable to attempt to create a uniform Internet content liability law that each country would implement internally insofar as it might threaten cultural diversity and create a perception that the law would limit the sovereignty of each nation. Instead, an international agreement would have to focus not on changing each country's internal laws to better fit with the First Amendment, but rather on addressing how countries would handle incoming foreign content as a matter of custom or treaty. That is, an international agreement along these lines would simply state that no country will subject content providers who are not nationals or citizens of that country to more stringent liability than the content providers would face under their own country's laws.

Beyond this basic agreement, each country could then decide for itself how to deal with incoming foreign content. For example, a country could choose to require ISPs to install software for blocking objectionable material that originates in foreign countries, or it could even decide to regulate whether certain foreign content reaches its citizens in the first place. Although these options would certainly not be in the interests of promoting democratic debate and free expression, it is not the concern of the First Amendment which courses other countries chart for their own internal regulation of speech.<sup>42</sup> So long as it would assure each country that its own content providers have ample notice of foreign liability and the equivalent legal protection for their speech when it is accessed abroad, this type of agreement would help temper the international landscape that content providers currently face: a nearly incoherent maze of varying levels of speech protection.

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42. Nonetheless, a complete ban on certain forms of speech within the confines of a foreign country itself may have some effect on American content providers. As suggested by one author, "[B]road application of a territorial approach to jurisdiction would preclude Internet users from accessing offending websites from hardware operating within the forum territory. The net result is likely to be an extraterritorial chilling effect on website content." Christopher Paul Boam, *The Internet, Information, and the Culture of Regulatory Change: A Modern Renaissance*, 9 *COMMLAW CONSPECTUS* 175, 196 (2001). Faced with the alternative of having a diluted version of one's content available online in a certain country versus not having any of the content available in that country at all, authors may opt to edit out certain portions to ensure the potential audience includes all possible Internet users. *See also infra* Part III.B.

Approaching an international agreement from this standpoint would also avoid putting the United States in the undesirable position of trying to persuade foreign governments to change their speech laws and enforcement procedures to match American laws.<sup>43</sup> Any attempt to do that would likely serve only to add to the growing unfavorable perception that many people worldwide hold about Americans as arrogant, self-interested people who want to hold the rest of the world subservient to the laws of the United States.<sup>44</sup>

Instead, a flexible approach that allows each country to decide for itself how to guarantee that foreign content online would not be subject to heightened liability would also reframe the problem as one that confronts all nations in the information age, not one which only plagues American citizens and the First Amendment. Obviously, each country has an interest in ensuring that its own content providers will be subjected to no more liability in foreign jurisdictions than they would face at home. Implementing such a flexible solution would make it apparent that achieving international agreement on the subject would be in the interests of all governments.

The arrangement, then, would be clear: No signatory to the agreement will subject a foreign content provider to more stringent speech laws than the provider would face in the provider's—or, perhaps more accurately, the content's—country of origin. This furthers the First Amendment's proscriptive goal of keeping the government out of the business of abridging speech, while also extending its concept of restraint on government power to *all* countries that are parties to the agreement.

Although this simplifies the proposal into a more workable goal, two problems remain: (1) how to actually implement such an agreement, and (2) how to ensure that most, if not all, countries become members to the agreement. Traditionally, international law is recognized as being formed

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43. See Michael Geist, *U.S. Extends Its Hegemony over the Net*, TORONTO STAR, June 9, 2003, available at [http://www.torontostar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article\\_Type1&c=Article&cid=1052251778146&call\\_pageid=968350072197&col=969048863851](http://www.torontostar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1052251778146&call_pageid=968350072197&col=969048863851) (noting that “the world has begun to grapple with Internet policies that are established in one jurisdiction (typically, though not solely, the U.S.), but applied worldwide” and that the resulting “policy imbalance has left many countries resentful of foreign dominance of the Internet.”).

44. A number of news reports have indicated that anti-American sentiment is growing. See, e.g., Moisés Naím, *Anti-Americanisms: A Guide to Hating Uncle Sam*, FOREIGN POL'Y, Jan./Feb. 2002, at 104; William Pfaff, *The U.S. Misreads the Causes of Anti-Americanism*, INT'L HERALD TRIB., Mar. 31, 2001, available at [http://www.iht.com/ihtsearch.php?id=15298&owner=\(International%20Herald%20Tribune\)&date=20021224074103](http://www.iht.com/ihtsearch.php?id=15298&owner=(International%20Herald%20Tribune)&date=20021224074103).

through either custom or treaties.<sup>45</sup> Given the complexity of the problem, relying on customs would be a poor choice; an international custom of not enforcing national speech laws against Internet content of foreign origin would likely never be established.<sup>46</sup> Furthermore, clarity would be better achieved through a written document, making a treaty the better option between the two standard forms of international law.

Of course, in order for such a treaty to be effective, it would have to include as many nations as possible and have a working enforcement mechanism or measures designed to encourage nations to comply with its provisions. The World Trade Organization ("WTO") would be an attractive forum for presenting such a treaty proposal because it includes an ever-growing number of nations as members and it already has necessary enforcement mechanisms in place. In fact, a treaty dealing with online content liability could be a logical extension of the Trade Related Intellectual Property Rights Agreement ("TRIPS"), which the WTO already oversees. TRIPS, a highly comprehensive instrument that offers international minimum standards of protection for intellectual property to its signatories,<sup>47</sup> could be modified to include additional speech protections.<sup>48</sup> Since intellectual property laws already safeguard most Internet content in terms of copyright protection, additional terms added to TRIPS could extend its protections to shield the authors from foreign content liability as well.

Even if nations ultimately elect to execute a speech protection agreement in a wholly different format, the WTO would still be a

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45. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1879 (2002). Although treaties and customary international law are what most scholars view as being "hard" international law, there are also some who stress that this understates the importance of so-called "soft law," such as memoranda of understanding and joint declarations. *Id.* at 1879-81. This Note does not address the possibility of "soft law" approaches to content liability, since such laws would be both largely unmanageable and difficult to enforce when applied to such a broad problem.

46. For that matter, many scholars have questioned whether customary international law actually is a relevant force in international law at all. *Id.* at 1875.

47. Many people have commended the effectiveness of TRIPS as a binding agreement. See, e.g., David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1391-92 (1995) (describing TRIPS as "the highest expression to date of binding intellectual property law in the international arena.").

48. This would not be the first time that the WTO's role would be recast to include a new area of enforcement, and several authors have argued that the WTO could be used to resolve other types of international problems. See, e.g., Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 364-65 (1995) (suggesting that the WTO's enforcement and dispute procedures could be used to combat child labor violations); see also Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305 (1997) (proposing the WTO could be used to deter bribery).

convenient body to implement the agreement because it is already an established organization designed to ensure compliance. Indeed, enforcing a “freedom of speech” treaty would be compatible with the current role of the WTO, since one of its main functions is to verify that its member nations implement and comply with the TRIPS provisions.<sup>49</sup> Regardless of the form ultimately chosen for bringing about an agreement, Internet content providers need protection that can only be offered through a uniform understanding among nations.<sup>50</sup>

## V. THE FCC AND DOMESTIC MEASURES

In lieu of such international agreement, First Amendment protection of news content is threatened. Because the Internet presents novel challenges, traditionally domestic agencies may need to try to alleviate the problem for American content providers. Although there is no specific regulatory body that exclusively oversees the Internet within the United States, the Federal Communications Commission (“FCC”) is at least logically related. The FCC, in order to encourage continued online dissemination of news by domestic publishers and broadcasters, should take proactive steps to help avert potential foreign liability by issuing national guidelines to ISPs and providing notice to news agencies.

This may require a change in the FCC’s hands-off approach to Internet content regulation, which it has traditionally not considered to be part of its jurisdiction.<sup>51</sup> Despite this, the FCC has taken some steps toward

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49. See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U.J. INT’L L. & POL’Y 769, 783 (1997).

50. John F. McGuire argues for an alternate solution that deals with individuals and market-based regulations rather than focusing on governments. He argues “that a decentralized system of flexible ratings and a market for screening software can address the legal constraints that [countries] face regarding viable content regulation,” adding that “[s]uch a system would keep as much content control as possible in the hands of Internet users, rather than governments.” See John F. McGuire, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 752, 780-791 (1999).

However, McGuire’s concerns regard the problems presented when one country unilaterally removes content and thereby “imposes one country’s domestic laws on a borderless medium.” *Id.* at 780. Yet unilateral moves become less of a concern when countries work in unison through an international body such as the WTO or the United Nations. Realistically, legislative bodies will inevitably attempt to regulate the Internet regardless of whatever other means are used to monitor content. For this reason, this Note emphasizes the importance of keeping governments and legislative bodies involved.

51. The FCC’s current status in connection to the Internet is comparable to its reluctance to assert jurisdiction over cable television during its boom of growth in the 1950s. As was the case with cable television in its early days, the FCC’s relationship to the Internet is still somewhat unclear and likely to evolve. See Elizabeth Nau Smith, *Children’s*

asserting its authority over the Internet:

One of the ongoing Internet-related issues is the jurisdictional status of Internet traffic. The FCC consistently has ruled that transport services—be they dial-up, DSL or cable modem services—used in connection with the Internet are jurisdictionally interstate services. Because the agency is deemed to have exclusive jurisdiction over the regulation of interstate services, these determinations generally are viewed as establishing that the Commission, and not state or local regulators, has sole authority to regulate certain aspects of the Internet.<sup>52</sup>

Although this only covers the transport services themselves, the FCC should take affirmative steps toward alerting users of those services to the risks they face. For example, the FCC could attempt to ameliorate the problem of foreign liability for individual content providers by issuing requirements or guidelines for ISPs to provide notice and warnings to their customers who post information in an online forum that has a global reach. Required warnings would include an explanation to the ISP's users that creating content online could subject them to foreign speech regulations.<sup>53</sup> Furthermore, the warning should also include a generalized description of what types of content might expose the ISP's customers to liability. Then, if individuals were concerned about their own online speech, the warning could include a link to a Web site featuring a more detailed breakdown of various countries' regulations.

Such FCC warnings would help individual content providers and smaller news agencies determine for themselves whether they would be likely to face liability in a foreign jurisdiction. For example, in the previous hypothetical situation in which a news provider wanted to write a critical article about a European businessman, such a warning and Web site with particularized legal information would allow the news provider to make an

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*Exposure to Indecent Material on Cable: Denver Area Educational Telecommunications Consortium, Inc. v. FCC, An Interpretation of the Cable Television Consumer Protection and Competition Act of 1992*, 47 DEPAUL L. REV. 1041, 1045-46 (1998) (noting that although the FCC did not originally consider cable television to be under its jurisdiction when it first appeared in the 1950s, it eventually began to regulate it).

Since no other federal agency has any more logical association with the Internet than the FCC, the Commission thus has another opportunity to assert increased jurisdiction over a new medium. This would allow the FCC to take a leadership role in addressing the international speech protection problems that threaten American content providers.

52. Richard E. Wiley & Rosemary C. Harold, *Changes on the Horizon*, in COMM. LAW 2002, at 7, 73 (PLI Patent, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G0-00UG, 2002).

53. An FCC-mandated warning that ISPs alert content providers would be similar to the FCC's required warnings in other contexts. For example, the FCC already requires that cordless phone manufacturers include a warning that "[p]rivacy of communications may not be ensured when using this phone." See 47 C.F.R. § 15.214(c) (2003).

informed decision about the likelihood of the article leading to litigation. The news provider would also have a convenient reference to the laws of the relevant European countries in which such a lawsuit might be brought. This would help even the playing field between large, corporate news organizations and independent or individual news providers by reducing, albeit slightly, the disparity in the amount of legal knowledge and resources.

Unfortunately, this strategy would be less effective than an international arrangement addressing the problem, because it would only give notice to American content providers. Additionally, a domestic “warning system” would not necessarily have much effect on the problem of diluted speech. Potential content providers would know what types of speech would be most likely to create foreign liability (and this would help shield them from lawsuits), but the tradeoff would be a decrease in controversial content as those providers make efforts to avoid such suits. Thus, the warnings would not necessarily reduce the problem of “chilled speech.”

Essentially, domestic measures are similar to placing a small bandage on a gaping wound—they would do nothing to eliminate the threat of foreign liability and can only create a limited amount of protection and increased awareness for content providers. Therefore, international solutions remain the preferable approach to the problem but, ideally, domestic approaches should be implemented in addition to such international methods.<sup>54</sup> Even the best planned international agreement would be likely to have its flaws, and moreover, it also would be important to alert users to jurisdictional issues the Internet creates *within* the United States. Standards of Internet liability vary from state to state, and although the differences may not be as great as the differences with foreign laws, domestic agencies such as the FCC can help by offering adequate notice to American content providers about these issues as well. In essence, the spread of American news content abroad will require the FCC to take an increasingly global perspective.

## VI. CONCLUSION

The United States should take affirmative steps to propose a treaty to combat the problem of differing international standards of Internet content liability. The WTO is a fitting organization for introducing a treaty of this

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54. Other authors have also advocated combining domestic and international strategies to resolve Internet jurisdiction issues. *See, e.g.,* Trudel, *supra* note 5, at 1028 (advocating that “on the national level states must rework their legislative policies, while on the international level they must establish cooperation mechanisms.”).

nature, since it already offers a broad membership of nations and an enforcement procedure. Although other countries would likely initially protest the idea of changing their established domestic approaches to Internet content liability, the United States should make it clear that a treaty that would address this issue would benefit every nation because it limits the liability each country's own citizens would face.

Once a treaty is in place, the WTO's preexisting enforcement mechanisms can be used to ensure compliance with the treaty's provisions. For example, if a country breached the agreement by allowing a suit against a foreign content provider to proceed with a greater level of liability, that country could be subjected to civil penalties in the same ways that a country may face penalties for breaching other requirements of membership in the WTO. This would be more effective than using a treaty or other form of multinational agreement in the absence of an organization that could enforce the treaty's requirements.

In the meantime, domestic agencies within the United States should inform American content providers of the risks they assume when they post information online. A two-pronged approach that first informs content providers before they transmit the information and also seeks to ensure that protections of American speech are not lessened by other countries' laws would be a prophylactic method of dealing with burgeoning international threats to Internet content and the marketplace of ideas.

The nature of the Internet itself requires inventive thinking about how to approach issues of liability. The idea of the Internet as a borderless medium can and should be preserved, but we can only do so through concerted efforts at both the international and domestic levels. As the situation is now, with no clarity or certainty as to what may expose one to liability, the prospect of putting controversial viewpoints or political criticism online is a risky venture. For the sake of content providers, we cannot afford to have the international legal structure be a virtual Tower of Babel.