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TRENDS IN INTERNATIONAL INTERNET DEFAMATION SUITS

Targeting a Solution?

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Abstract / Emerging trends in international Internet defamation suits from the US, Canada, Australia and the UK, and international efforts in the European Union, American Law Institute, International Bar Association and the Hague Convention to harmonize the laws in international Internet defamation are evaluated to see emerging areas of commonality that might be useful in harmonizing the laws in the phenomenon of global Internet defamation liability. This study proposes the utilization of existing commonalities in laws, as well as emerging standards from the efforts to harmonize laws by the EU and current international judicial dispositions, as parameters for an international agreement on Internet torts.

Keywords / international online libel / Internet liability / Internet libel / Internet publication / mass communication and law / media law / online defamation

Purpose

In order to foster further growth of the Internet as the great purveyor of information that it is, the rules of engagement must be unambiguous so as to provide a level of certainty and foreseeability to content providers. The goal of this study is to assess recent and ongoing attempts by several national and international bodies such as the Hague Convention, the European Union, the American Law Institute (ALI) and the International Bar Association (IBA) to arrive at an international agreement on the laws of jurisdiction, choice of law and enforcement of judgments in global Internet defamation. The following cases: *Gutnick* v. *Dow Jones & Co.*, *Inc.*, *Dow Jones & Co.*, *Inc.* v. *Gutnick* (hereinafter Gutnick 1 and 2); *Harrods Ltd* v. *Dow Jones Co.*, *Inc.*; *Bangoura* v. *Washington Post* and more recently, *Dow Jones & Co.*, *Inc*. v. *Jameel* are evaluated to see the emerging trends and patterns in this phenomenon of global Internet defamation liability that could be harnessed in the quest for an international agreement.

By examining the central issues of jurisdiction and choice of law in these current international Internet libel cases, this study suggests that an international agreement such as those considered by the Hague Convention, the ALI, Rome II (European

Council) and the proposal recommended by the IBA would have increased the enforcement of foreign media judgments in the US. However, many of the agreements considered by these different organizations were stumped by differences in national values and public policies of the nations involved.

This study proposes the utilization of existing commonalities in laws, as well as emerging standards from the efforts at harmonization of laws by the EU and current international judicial dispositions as parameters for an international agreement on Internet torts. The 'targeting' analyses of the US Courts in *Young* v. *New Haven Advocate* and *Revell* v. *Lidov*, the IBA principles and the provisions in the EU proposed draft (Rome II) all share a resonance that, if annexed, could provide a fair and balanced resolution to issues of international jurisdiction in Internet publications and encourage the enforcement of media judgments in US courts.

Internet Libel

The increased opportunity for communication by all and sundry on the Internet and the World Wide Web has also multiplied, in unimaginable proportions, the opportunities for speech torts to occur. Most media outlets, both electronic and print, now have online components. The opportunity afforded by online publishing, including increased circulation and ready accessibility to information, has also created more opportunities for transnational defamation to occur.

One of the primary requirements for bringing a suit in a US court is that the court must have personal jurisdiction, also known as 'power' over the defendant (*International Shoe Co*. v. *Washington*, 1945). This power usually comes from a statute in the state in which the court is located. Customarily, a state will have a 'long arm statute' that allows personal jurisdiction over an out-of-state defendant (Wash. Rev. Code, 2003). In asserting such power, courts in the US have long required that the defendant in a case have actual contacts with the forum (*Pennoyer* v. *Neff*, 1877: 733). The old standard required actual physical presence by the defendant in the jurisdiction for exercise of jurisdiction. The standard has evolved, and the requirement is now that the defendant must have 'minimum contacts' with the forum, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' (*Milliken* v. *Meyer*, 1940: 463). These minimum contacts are required by the due process clause of the Fifth Amendment to the US Constitution.

Courts in the US have been considering how to apply these traditional rules to Internet relationships for several years but have yet to articulate a standard rule. In a 1996 ruling similar to Gutnick 1, a federal court in Connecticut found that an advertisement on the Internet that was viewed in Connecticut was sufficient to confer jurisdiction in that state (*Inset Systems, Inc*. v. *Instruction Set*, *Inc*., 1996). No other court has gone this far, and since that time, US courts have been less likely to find jurisdiction over Internet-based extra-jurisdictional defendants (*Digital Control Inc.* v. *Boretronics Inc*., 2001). In *Zippo Mfg. Co*. v. *Zippo Dot Com*, *Inc*. (1997), the Western District of Pennsylvania created a test that linked the issue of jurisdiction based on Internet contact to 'the level of interactivity and commercial nature of the exchange of information that occurs on the web site' (Zippo, 1997).

Since Zippo, courts have often broadened this test to include an inquiry into the defendant's activity, especially if the activity has an effect in the forum, or could be considered an 'availment' of opportunities in the forum state (Mann and Winn, 2002). Many courts have begun to follow the *Calder* v. *Jones* effects test, which allows jurisdiction if the defendant purposely aimed the speech at the forum and knew that the speech would have a significant impact in the forum (*Calder* v. *Jones*, 1984). Courts in the US are still far from articulating a rule that covers all the possible permutations of jurisdiction for online activity, but all of the decisions have required some affirmative contact with the forum by the defendant (Winn and Wright, 2003). Like its counterparts in Canada, the UK and Australia, the US legal system is based on common law. However, the US is also distinctive in how states exercise the long-arm jurisdiction. The US Supreme Court requires the defendant's 'contact and connection with the forum state be such that he should reasonably anticipate being haled into court there' (*Worldwide Corporation* v. *Woodson*, 1980: 297). Additionally, the Court required that the 'action of the defendant [be] purposefully directed toward the forum state' (*Asashi Metal Indus. Co.* v. *Super Ct.*, 1987: 112). Canada and Australia, however, will assert personal jurisdiction over a foreign defendant if the wrong was committed within its boundaries or the harm from the wrongs was suffered there. Once jurisdiction is determined, the next question is often which substantive laws should apply to the dispute.

Choice of law presents its own unique issues. In the US, a court may apply the law of the forum, especially when the law in question is procedural. A court may also apply the law of the forum in which the harm occurred; this is generally the case when the law in question is substantive. Traditionally, courts would apply the law of the land where the harm occurred, particularly when the location of the harm coincides with the plaintiff's domicile (Restatement, 1934). However, in Internet-related cases, the 'place where the injury occurred' rule is confusing. This is because the place of injury could be where the information was uploaded (publication) or where it was downloaded and comprehended by the injured party (where the information became published). In the US, courts typically apply the law of the forum with the 'most significant relationship to the occurrence and the parties' (Restatement (Second), 1971).

Due to all the differences in libel law between countries, a libel defendant is at risk of having to defend a libel suit in a foreign country where the laws may not be comparable to the defendant's home country, or favorable to the defendant. Some countries do not have constitutional free speech protections, and even those that do might still have common law libel, as do most European countries.

The uncertainty of torts laws on the Internet may force content providers to build technical barriers to prevent information from flowing to certain countries, which goes against everything the Internet is supposed to do in the realm of information provision. While a world agreement may be unreasonable to expect, the possibility to reduce uncertainty and vulnerability exists through international agreements. Just as most of the world was able to establish agreement through the World Intellectual Property Organization (WIPO) for regulating copyright infringements, such agreement on Internet defamation would ease uncertainties and vulnerability on the part of content providers and enhance the promise of the Internet.

The following cases: *Gutnick* v. *Dow Jones & Co., Inc*. (2001), *Dow Jones & Co., Inc.* v. *Gutnick* (2002) (hereinafter Gutnick 1 and 2), *Harrods Ltd* v. *Dow Jones Co., Inc*. (2003), *Bangoura* v. *Washington Post* (2005) and more recently, *Dow Jones & Co., Inc*. v. *Jameel* (2005) are evaluated to see emerging trends and patterns in this phenomenon of global Internet defamation liability that could be harnessed in the quest for an international agreement.

The Cases

Gutnick 1 and 2

The Gutnick cases arose from an article in *Barron's* magazine, which is published by Dow Jones. The story was posted on the Dow Jones website in New York on a server located in New Jersey. In the article, Joseph Gutnick, a resident of Victoria in Australia, was alleged to have colluded with an American money launderer and tax evader, Nachum Goldberg, to launder large amounts of money. The article, written by William Alpert and titled 'Unholy Gains', was published on the website on Sunday, 29 October 2000. Gutnick claimed the article was defamatory. The paper edition of this particular *Barron's* sold a total of 305,563 copies, with only a handful sold in Australia, and a few of those copies sold in Victoria, the hometown of Joseph Gutnick.

Gutnick sued Dow Jones in the Supreme Court of Victoria and confined his claims to damages incurred from the publication of the article in Victoria. Judge Hedigan of the Supreme Court of Victoria ruled and was upheld by the Victorian Court of Appeal that Gutnick could serve the defendant outside the jurisdiction to establish jurisdiction in the state of Victoria. Gutnick relied on two grounds for establishing this jurisdiction. First, that the action was based on a tort committed in Victoria (Rule 7.01 of Supreme Court Rules), and second, that the damage was suffered in Victoria regardless of where the tort occurred. Dow Jones appealed the decision of Judge Hedigan to the High Court, which unanimously upheld the trial judge's decision.

The principal argument tendered by Dow Jones was that the alleged tort was committed in New Jersey, and therefore, the proper venue for the adjudication of the tort should be New Jersey. Dow Jones chose to focus on the place of commission of the tort, because if the Court found that the tort was committed in Victoria, Australian common law requires that the choice of law be the law of the state in determining liability in the case. Dow Jones argued that because of the special nature of the Internet, the issue of publication should be understood as a single place of publication where the publisher uploaded the materials on its web servers, except in cases where such a place was merely 'adventitious or opportunistic' (Gutnick, 2002).

The Court disagreed with the appellant and found that the location of the tort in defamation is where the damage to reputation occurs, and in this case, the material on the web was made available when it was downloaded by a user. Therefore, the tort of defamation in this case was found to have occurred in Victoria. According to the majority of the court:

> *Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so, it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension. (Gutnick, 2002: 24)*

One of the issues in this case was that Dow Jones was advancing a new understanding of the publication standard in defamation suits by making the argument that the place of the alleged wrong in cases involving Internet publication should be the jurisdiction where the material was posted or uploaded to the server. Otherwise, Internet publishers may be required to defend libel in all and any jurisdiction in the world where their material may have been downloaded. This argument departed sharply from the existing understanding of place of the tort as applied to the older media forms. This fact was noted by the Australian High Court, saying:

> *In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas . . . the specter which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person might resort. (Gutnick, 2002: 38, 54)*

It is important to pay attention to the caveat in the case provided by Judge Kirby, that, using the place of damage to determine jurisdiction may conflict with the principle of public international law that requires a substantial connection between the subject matter of a dispute and the jurisdiction of a national court before a case can be adjudicated.

This view finds support in the constitutional rules of personal jurisdiction in the US. A foreign-based defendant must demonstrably have ‘minimum contacts’ with the forum before it can be dragged in to defend a suit in an American court. In applying this rule of minimum contacts to defamation on the Internet, US courts require proof of a degree of targeting or directing the contents of a website by the defendants to the residents of the state of adjudication before jurisdiction can be asserted (*Revell* v. *Lidov*, 2002; *Young* v. *New Haven Advocate*, 2002).

The Victorian High Court is not unique in its understanding of jurisdiction. Courts in other places have reached a similar conclusion. A court in Malaysia held that a newspaper’s publication on a website in Singapore is considered published in Malaysia if there is evidence that someone within Malaysia read and accessed the information (*Lee Tech Chee* v. *Merill Lynch International Bank Ltd*, 1998). Courts in Canada and Italy have also reached the same conclusions that the place of tort of defamation is the jurisdiction where the material was downloaded by end-users (for example, *Investors Group Inc.* v. *Hudson*, 1999: 185; Re Moshe D. [unreported], 2000).

As noted by Richard Garnett (2003: 202), this jurisdictional factor is significant because ‘under existing Anglo-Australian choice of law rules, the law of the place

where the tort of defamation was committed governs the substantive liability of the defendant'. This is not significantly different from choice of law questions in US jurisdictions where the law of the parties' residence is usually applied by states who have adopted the second edition of the Restatement of Conflict of Laws (1971). The European Commission (EC), in a preliminary draft for regulation on law applicable to non-contractual obligations, also proposed that the law of the plaintiff's country of residence be applied to defamation suits (EC, 2002: Art. 7).

Overall, the Australian High Court held that Victoria was the proper venue to litigate Gutnick's defamation suit against Dow Jones and that the local tort law of Victoria will apply to the case. On 13 November 2004, Dow Jones agreed to pay US$443,500 in damages and legal fees to end the litigation. While the case may have ended for both Gutnick and Dow Jones, the ruling opened the door for other potential plaintiffs in Australia and other parts of the world. A court in Canada cited to the Gutnick case in another Internet libel case.

Harrods Ltd *v.* Dow Jones & Co., Inc

On 31 March 2002, Harrods Limited issued a press release with the heading 'Al-Fayed Reveals Plans to "Float" Harrods'. The release stated that the chairman of the company would issue a statement on the following day. The statement further urged the reader to contact alfayed.com and 'LOOF LIRPA' ('April Fool' spelled backwards) for further information (Harrods, 2003: 2). The following day, another press release was issued to the press confirming the decision to float Harrods. *The Wall Street Journal* (*WSJ*) printed an article on the 'decision' to take Harrods public without realizing that this was an April Fool joke – a common practice by companies in the UK. An article was published in the *WSJ* on 5 April titled 'The Enron of Britain'. The following words appear after the heading: 'If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure' (Harrods, 2003: 2). The article did not appear in the European edition of the *WSJ*. However, it was published in the online edition at www.wsj.com and at www.dinteractive.com. On 29 May 2002, Harrods filed suit in England limiting claims to publications in Wales and England, alleging that being compared to Enron was defamatory.

WSJ defended its actions by arguing that the article was not defamatory but a humorous response to the April Fool's Day joke. *WSJ* also made applications to the court challenging the validity of the service proceedings as well as a stay of proceedings on grounds of *forum non conveniens* (clearly inappropriate forum). The English court ruled for the plaintiff on both applications. The libel suit was later dismissed by the High Court in London on 19 February 2004, rejecting that Harrods was harmed in any way by the story. The court also ordered Harrods to pay a portion of the court costs to Dow Jones within 14 days.

Dow Jones & Co., Inc. *v.* Jameel

Yousef Jameel had sought to bring an action for defamation and get an injunction against Dow Jones regarding an article that was posted on the online edition of the

Wall Street Journal. The action was brought in England because, according to the plaintiff, the online journal was available to several subscribers in England who may, as a result of the article, think less of the plaintiff. The *WSJ* article in question did not mention the plaintiff by name but provided a link to another document that provided a list of former donors to Osama bin Laden in his fight against the Soviet invasion of Afghanistan. Jameel, his company and his brother were included in this list of former donors.

The Human Rights Act of 1998 and Article 10 of the European Convention recommends that public authorities have a duty to act in a manner compatible with the European Convention. It provides that freedom of expression be given regard when bringing actions against the media. In the words of Lord Phillips of the Jameel court:

> *Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged. (Jameel, 2005)*

This is particularly relevant in this case because the Court considered the number of people who had accessed the article online in the UK. The *Wall Street Journal Online* had about 6000 subscribers in the UK, but only five people had accessed the article and may have seen Jameel's name on the list of the Al-Qaeda benefactors. Three of the five people, according to Dow Jones's research, were associated with Jameel and his defamation case. The other two had no connection to Jameel. Therefore, the Court noted, without a substantial publication in England, there was very limited damage to Jameel's reputation, and whatever Jameel may recover from the damages would be highly insubstantial compared to the costs of allowing the litigation to proceed. According to the court:

> *If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick. (Jameel, 2005)*

The absence of widespread readership limited the effects of defamation on the plaintiff and begs the question of whether the action should have been brought in the first place.

Bangoura *v.* Washington Post

In Canada, an Ontario motions court decided in *Bangoura* v. *Washington Post* (2004) that *The Washington Post* and three of its reporters could be sued for defamation in Ontario, Canada despite the fact that the plaintiff, Cheickh Bangoura, a UN official, did not reside in Ontario at the time of publication and only moved to Canada three years later. Judge Pitt of the motions court rejected a personal jurisdiction and *forum*

non conveniens challenge to the Internet-based libel action against *The Washington Post*, and relied heavily on Gutnick for his rulings.

Cheickh Bangoura sued *The Washington Post* and three of its reporters regarding two articles, which he alleged were defamatory. The articles were published by *The Washington Post* in 1997, at which time, Bangoura was employed by the UN in Nairobi, Kenya. The articles addressed Bangoura's conduct in a prior posting with the UN in the Ivory Coast. At the time of publication, there were only seven *Washington Post* subscribers in Ontario. Bangoura was not a resident of Ontario nor a citizen of Canada when the articles were published. The action commenced more than six years after the publication of the articles, when Bangoura had become a resident of Ontario. Bangoura was seeking a total of US$10 million in damages.

Bangoura was born and raised in Guinea. He was employed by the UN in several positions between 1987 and 1997. In January 1997, *The Washington Post* published an article mentioning Bangoura's name and alleging that he had been accused by his colleagues of sexual harassment, financial improprieties and nepotism. The article also alleged that Bangoura had eluded punishment due to his close ties to Boutros-Ghali, the former UN secretary general. At the Superior Court of Justice, the judge held that it was appropriate for Ontario to assume jurisdiction of the case, and Ontario was the most convenient forum. *The Washington Post* appealed. The Court of Appeal, analyzing the law, noted that there was no significant connection between the plaintiff and the forum and even if the connection was significant, 'the case for assuming jurisdiction is proportional to the degree of damage sustained within the jurisdiction. It is difficult to justify assuming jurisdiction against an out-of-province defendant unless the plaintiff has suffered significant damage within the jurisdiction' (Bangoura, 2005). The distribution of the articles was minimal. Only Mr Bangoura's lawyer accessed the two articles on *The Washington Post* Internet database. In ruling that Bangoura could not sue *The Washington Post* for defamation in Ontario, Justice Robert Armstrong, writing the unanimous Appeals Court decision, noted that Gutnick did not apply because in that case, Mr Gutnick was living in Victoria, Australia at the time the article was published. Furthermore, at the time the defamatory article was published, there were 1700 Victoria residents who subscribed to *Barron's* online where the defamatory article was published. This number is substantially greater than the number of Ontario residents who might have seen *The Washington Post* article about Cheickh Bangoura.

Enforcement of Foreign Libel Judgments

Based on international law, the enforceability of a foreign-money judgment based on Internet content is subject to review by the domestic courts under the principles of comity. National courts are not required to enforce foreign-money judgments that conflict with US public policy (e.g. see 'Maryland's Uniform Foreign-Money Judgments . . .', 1962, 1964). The Restatement (Third) of the Foreign Relations Law of the United States (1988: § 482) states that a 'Court in the United States may not recognize a judgment of the court of a foreign state if the judgment was rendered under a judicial system that does not provide . . . procedures compatible with due

process of Law'. Furthermore, the US courts have declared that for determination of jurisdiction, the need for establishing minimum contact is embedded in the Due Process clause of the Constitution. Therefore, courts in the US cannot enforce a foreign judgment rendered without sufficient contact or purposeful availment to justify jurisdiction. As aptly noted by Kurt Wimmer (2002), cases in which US courts have refused to enforce foreign judgments on policy grounds have been relatively rare outside the First Amendment context. Within the First Amendment context, however, courts have consistently refused to enforce foreign libel judgments on policy grounds.

The leading cases in this area are *Bachchan* v. *India Abroad Publications, Inc.* (1992) and *Matusevitch* v. *Telnikoff* (1995). In Bachchan, a New York state court refused to enforce a British libel judgment that an English court had granted to an Indian national against a New York news service that published an article in India and New York. The New York court, applying the public policy exception in New York's statute on Recognition of Foreign Country Money Judgment (NYCPLR, n.d.: § 5304(b)(4)), held that it was repugnant to the First Amendment and the New York state constitution to enforce the judgment because the plaintiff was not required to prove the truth of the libelous allegations and did not have to prove that the defendant was at fault. These standards were all derived from *New York Times, Co*. v. *Sullivan* (1964) and its progenies.

Matusevitch was a situation where the plaintiff brought an action to preclude the enforcement of a British libel judgment. The US District Court for the District of Columbia granted summary judgment for the defendant, holding that recognizing the British judgment would violate both Maryland's Uniform Foreign-Money Judgments Act and the First and 14th Amendments to the US Constitution. Comparing the libel standards in English jurisdiction with the US jurisdiction, the court determined that the speech found libelous under English law would have been protected by the First Amendment in a US action. Due to the drastic distinctions between the two standards, the court refused to enforce the judgment. This same Bachchan/Matusevitch principle was applied in *Yahoo!, Inc.* v. *La Ligue contre le racisme et l'antisemitisme* (2001). A California district court refused to enforce a French judgment against Yahoo! on the basis that the judgment contravened US public policy of protecting free speech.

In an interesting footnote in the Gutnick case, Justice Kirby alluded to the above option when he noted that the difficulty or impossibility of enforcing a judgment in another jurisdiction might amount to a practical reason for providing the type of relief being sought by Dow Jones in the Gutnick case. He further noted that a publisher who has no presence or assets in a particular jurisdiction might ignore the action, choosing instead to defend only against enforcement and raise constitutional arguments.

More recently, an American author, Rachel Ehrenfeld of the American Center for Democracy, wrote a book, *Funding Evil: How Terrorism is Financed, and How to Stop it*, that suggested that Saudi billionaire Khalid Salim A. bin Mahfouz was a supporter of terrorism. Bin Mahfouz sued the New York-based Ehrenfeld in the UK. Bin Mahfouz won his case and Ehrenfeld was ordered to pay a hefty fine (about

US$120,000.00) and destroy her books. The book was never published in the UK but about 22 copies of the book were sold online to people residing in the UK. Ehrenfeld sued in New York to prevent the British decision from being enforced. In suing bin Mahfouz, Ehrenfeld asked the Federal Court to declare the default judgment against her obtained by bin Mahfouz in England's High Court as unenforceable in the US, and contrary to the free speech protections enjoyed by Americans. On 8 June 2007, the US Second Circuit Court of Appeals overturned a district court decision against Ehrenfeld, agreed that US courts could intervene in such cases, and formally asked the New York Court of Appeals to determine if the law gives the state jurisdiction over the case that would allow it to shield Ehrenfeld from the British decision. On 28 June, the New York Court of Appeals agreed to answer the jurisdiction question.

Effort to Harmonize International Internet Laws of Defamation

The Hague Convention

In light of the problems arising from lack of an international convention over choice of law and jurisdiction issues emanating from defamation through Internet speech, several intergovernmental and non-governmental agencies have attempted to negotiate and draft agreements on how these disputes could be resolved in a fair manner. The Hague Conference on Private International Law embarked on negotiating a global convention on jurisdiction and recognition of civil judgments in 1997. A preliminary draft was issued in 1999 and a second draft in 2001 (Brand, 2002). The Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is such agreement. This document is a draft international treaty that aims to address some of the issues involved in the enforcement of judgments, such as Bachchan and Matusevitch.

The proposed treaty provided that recognition and enforcement of judgments by courts of member states and judgments entered in a signatory state would be enforceable in any other signatory state (Clayton, 2002). The major exception of concern to media companies is in Article 28(f), which provides that a signatory state can refuse to recognize a judgment if such judgment 'would be manifestly incompatible with the public policy of the state addressed'. Critics argue that if adopted, the US conceivably could be tempted to enforce foreign judgments even when they run against public policy in order to get US judgments on intellectual property enforced abroad. Initially very active in the negotiations, the US has since forged a path of retreat from the proposed treaty. The fear of US delegates, even while recognizing this as an opportunity to combat international piracy of US digital products, is that US citizens could potentially become liable in other signatory states for Internet content that is protected by the First Amendment at home. Ultimately, the negotiations failed. In 2002, the Hague Convention Commission on General Affairs and Policy decided to focus on developing a treaty on choice of court agreement for business-to-business cases (Hague Conference on Private International Law, 2004).

The American Law Institute Project

According to attorneys Ken Kraus and Dan Polatsek (2003), the ALI's International Jurisdiction and Judgments Project is a proposed federal statute that was conceived as implementing legislation for the Hague proposed convention. As the prospects for the adoption of the Hague project dimmed, the ALI changed its focus to drafting a freestanding federal statute, which will create one law, with concurrent jurisdiction in state and federal courts, governing the recognition and enforcement of foreign judgments. This proposed statute generally follows the Uniform Foreign Country Money-Judgment Act and would be subject to US Supreme Court review.

Key provision of major interest to media organizations in the proposed statute is § 5(a)(vi), which reads:

> ***5. Nonrecognition of Foreign Judgment***
>
> *A foreign judgment shall not be recognized or enforced in a court in the United States if the judgment debtor or other person resisting recognition or enforcement establishes . . . (vi) the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States. (ALI, 2002)*

The text is identical to the public policy exception cited in both Matusevitch and Bachchan. The only difference is that the ALI statute does not recognize a judgment based on a repugnant 'judgment or claim' or a 'repugnant cause of action' (Kraus and Polatsek, 2003: 26). Despite the similar language, the ALI stressed that the public policy exception in the proposed statute would not always bar the recognition of a foreign judgment rendered without First Amendment considerations. In their discussion of the issue in light of Matusevitch and Bachchan, the comments read:

> *. . . the thrust of §5(a)(vi), together with the basic obligation set out in §2, is that, a court presented with a libel judgment from a state with a fundamentally fair legal system (i.e. not a dictatorship that punishes all critique of the government) should balance the public policy in favor of free speech against the public policy in favor of recognition and enforcement of foreign judgment, and not appraise the foreign judgment by the specialized constitutional standards of US libel law as it has developed in recent years. (ALI, 2002)*

Kraus and Polatsek (2003) further noted that one of the interesting things about the ALI was that the drafters included advocates opposed to the viewpoint that any judgment entered without First Amendment protection should not be enforced in the US. The ALI project has not yielded any generally agreed-upon instrument of use in this dynamic area.

The European Union Method

As part of their effort to create a strong European market, efforts to harmonize laws are ongoing within the member states of the EU. The 25 member states have agreed upon a treaty that addresses the question of international jurisdiction. This treaty is known as the 1968 Brussels Convention and was recently updated by the Brussels Regulation. They also have a treaty on choice of law in contractual disputes, known as the 1980 Rome Convention. The EU drafted a new treaty dealing with choice of

law in non-contractual disputes, which would address Internet defamation cases, intellectual property infringement and invasion of privacy. This proposal is known as 'Rome II' (European Parliament, 2004).

The Brussels Regulation which replaced the earlier Brussels Convention was adopted by the EU in 2000. The Brussels Regulation is used to determine jurisdiction on transnational disputes on civil and commercial matters. Except for Denmark, all EU member states now operate under the Brussels Regulation. The Brussels Regulation compels defendants from member states to be sued in their home countries. Article 3 prohibits the plaintiff from invoking national rules of jurisdiction against an EU defendant based on the plaintiff's place of residence. However, there are exceptions to this rule concerning specific jurisdictions when it comes to torts. According to the document, torts, such as defamation or invasion of privacy, occur where the harmful event occurred or may occur. Article 3 does not apply to defendants who reside outside the EU. Article 4 states that when a plaintiff sues someone outside the EU, the national state laws (rather than EU laws) of the plaintiff will apply. Therefore, when an EU citizen sues defendants that are outside of the EU, the plaintiff's country will have jurisdiction, but when non-EU citizens sue EU defendants, the foreign plaintiffs will fall under the jurisdiction of the European Community as a whole rather than the national state laws of the defendant. The Brussels Regulation only controls the issue of jurisdiction but does not address the choice of law questions. In contractual disputes, the 1980 Rome Convention (Rome I; EC, 1980) controls. The Rome II treaty was supposed to address non-contractual disputes.

The attempts to negotiate Rome II has been ongoing for several years. The most controversial has been Article 3, which addresses online publishing. After two drafts addressing the issue of choice of law, the European Commission presented the second draft to the European Parliament. This second draft provided that the law of the country in which the damage occurred shall prevail in a dispute. This version was supposed to be more media friendly than the first draft, which provided that the choice of law in a conflict would be the law of the claimant's habitual residence. Even the second draft was problematic for media providers because they could still be sued using the laws of any country in which their content was downloaded as opposed to the laws of their own country where the content was uploaded. The European Parliament amended the second draft and released a third version in 2005, in which they suggested that the choice of law would be that of the country 'in which the most significant element or elements of the loss or damage occur' (European Parliament, 2005). In the case of torts, such as defamation and invasion of privacy, the European Parliament added that,

> *. . . a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication. (Rome II, 30, Art. 6(1), Jan. 23, 2004; European Parliament, 2005)*

The amendment added by Parliament provided stronger protections for content providers whose primary audience is the local audience but whose content might

be circulated or downloaded in other countries. This provision by Parliament is eerily similar to the provisions for torts in the US:

> *In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles . . . to the occurrence and the parties, in which event the local law of the other state will be applied. (Restatement (Second), 1971: § 146)*

This was the position of the court in the US in Zippo (1997), for example, where a sliding test analysis was used to determine jurisdiction and choice of law based on the quantity and intensity of a defendant's contact with the forum. Generally in the US, issues of Internet jurisdiction and choice of law have developed enough to establish rules. Under current interpretation of minimum contacts as applied to Internet defamation, some degree of targeting or directing of website content by the defendant to another state or forum is required before jurisdiction may be found. Issues of jurisdiction and forum are also not limited to online publications alone. Clearly, the practical nexus between jurisdiction and choice of law cannot be overlooked.

The Durban Principles/'Targeting Principles' of the US/Canada's 'Real and Substantial Connection'

Peter Bartlett (2003) of the Media Committee of the International Bar Association (IBA) stated that a potential model for resolving the jurisdiction and enforcement of foreign judgments issues emerged from the October 2002 International Bar Association conference in Durban, South Africa. This was an international conference that attracted media lawyers from 21 countries discussing the issues of jurisdiction on the Internet.

The media lawyers produced a draft known as the Durban Principles. Important aspects of the Durban Principles include the following points:

1. A court is competent to determine a claim arising from the content of an Internet posting if the court is in any of the following:
   a. a forum that is the domicile of the claimant,
   b. a forum that is the domicile of the defendant, or
   c. a forum to which the claimant and defendant expressly have consented and to which there is a reasonable nexus.
2. For the purposes of determining any claim arising from the content of an Internet site posting, a competent court shall apply the substantive law of the jurisdiction with the most significant connection to the Internet site, without regard to conflict-of-law rules. For a site that does not involve the sale of goods or services apart from content, ordinarily that jurisdiction will be one in which the editorial work on the content is completed (i.e. where the decision to publish is made) whether or not that is the forum in which the content is uploaded or stored.

The first part of the Durban Principles dovetails both the Canadian 'real and substantial connection' and the 'targeting principle' adopted by the US Court of Appeal for the Fourth Circuit in *Young* v. *New Haven Advocate* (2002). A case in which the court was confronted with whether two Connecticut newspapers subjected themselves to personal jurisdiction in Virginia by posting articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. The US District Court of Western Virginia denied the defendants' motion to dismiss for lack of personal jurisdiction. The Fourth Circuit, relying on *ALS Scan, Inc.* v. *Digital Services Consultants, Inc.*, stated the content of the Connecticut newspapers were not targeted at Virginian readers. Therefore, the newspapers did not have sufficient contacts with Virginia to permit the District Court to exercise jurisdiction over them.

A similar position was adopted by the Court of Appeals for the Fifth Circuit in *Revell* v. *Lidov* (2002). In a reasoning reflecting the decision in Young, the Fifth Circuit ruled that an allegedly defamatory article on the bulletin board on the website of the School of Journalism at Columbia University was not targeted at Texas residents although the plaintiff lived in Texas. The court ruled that Texas was not the focal point of the article and, therefore, denied jurisdiction. Both circuits, in rejection of the Gutnick view, established that if content was not directed at residents of another state, jurisdiction could not be established mainly on the basis of Internet content being downloaded at a different state.

This 'targeting' position of the US courts is also similar to the Canadian method of analysis, which they call the 'real and substantial connection' test for determining jurisdictional issues. Developed by the Supreme Court of Canada in *Morguard Investments Ltd* v. *De Savoye* (1990), this test was articulated into eight factors by Judge J.A. Sharpe in *Muscutt* v. *Courcelles* (2002). While Muscutt and Morguard were both interprovincial cases, nonetheless, the Supreme Court of Canada made it clear in *Beals* v. *Saldanha* (2003) that the real and substantial connection test applies to international cases. In assuming jurisdiction over an international defendant, therefore, a Canadian court would consider the following eight factors:

1. The connection between the forum and the plaintiff's case;
2. The connection between the forum and the defendant;
3. Unfairness to the defendant in assuming jurisdiction;
4. Unfairness to the plaintiff in not assuming jurisdiction;
5. Involvement of other parties to the suit;
6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. Whether the case is interprovincial or international in nature; and
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Judge Armstrong for the court of appeal in the Bangoura case considered these eight factors and decided that there was no 'real and substantial connection' between the action and Ontario and, therefore, it was not appropriate for the courts of Ontario to assume jurisdiction.

Item number one in the Durban Principles is similar to both the 'targeting principle' position of both the US Fourth and Fifth Circuits in Young and Revell as well as the 'real and substantial connection' stance of the Canadian courts, and thus, is worthy of consideration by the international community as a possible measure to restructure the jurisdictional questions in Internet libel suits. This is a more palatable solution because it does not require a major overhaul of any nation's libel laws, as insinuated by the ALI project.

Editorial Seat and the Focal Point Doctrine

The second part of the Durban Principles stipulates that jurisdiction in defamation suits based on Internet publication will be based on where the editorial decision to publish was made without regard to where the information was uploaded, stored or downloaded. This position, in addition to the targeting doctrine applied in both Young and Revell, will be a fair solution. It will prevent 'shopping round' for forums with plaintiff-friendly laws on the part of defamation plaintiffs, as well as prevent publishers from relocating their servers in forums with defendant-friendly laws. However, it still does not prevent 'shopping' for forums with defendant-friendly defamation laws for editorial seats. This, however, is not as easy as it may seem at first blush. Press laws and news values vary from country to country and the need of journalists for hands-on connection with their communities may lessen this possibility. It is a lot easier to move servers than to move editorial seats.

After making a determination on where the editorial decision to publish is made, the next step in the analysis will be a determination of the focal point of the article and whether or not it was targeted at the community in which the plaintiff resides. This is easily determined by how many people were able to access the article from each locale and the slant of the defamatory content. A combination of these two principles will help determine both the jurisdiction for the case and applicable choice of law. The courts in both the Jameel and Bangoura cases seemed to adopt this view.

Both the editorial seat and focal point of the article would have been helpful to Dow Jones in the Gutnick case discussed earlier. The editorial decision for the Gutnick article was made in New York and the focal point of the article was residents of the US as indicated by the number of hard copies sold in the US, as well as the number of subscribers from the US who accessed the online article. The slant of the article itself was obviously targeted at US residents and not Victorian residents. The same principles may not easily apply in the Harrods case.

This solution has its drawbacks because it is still not completely fair to the potential defamation plaintiffs, who may have reputation in places not targeted by the article. There is also the issue that, in traditional defamation tort, publication is not the same as publicity. Publication is not measured by the number of people who were able to read or view the defamatory content, but by the act of publishing to a third party. However, new technology calls for new standards of evaluation. This proffered solution will treat the Internet as the equivalent of someone buying a newspaper published in the US that contains defamatory materials and travels to Hong Kong with the newspaper. If a resident of Hong Kong reads the newspaper in

Hong Kong and finds defamatory material, the individual will not be able to sue the newspaper in Hong Kong. He or she would have to sue the newspaper in the US.

Conclusions

This study makes the argument that the Durban Principles in conjunction with the targeting doctrine is one harmonization effort that needs to be strengthened and supported by the media to ensure fairness in Internet speech libel suits. The Durban Principles are not without their shortcomings and would not prevent determined plaintiffs from seeking redress from the law. However, it will go a long way toward resolving the jurisdictional and choice of law factors that are endemic to publishing on the Internet. The Durban Principles already incorporate aspects of the analyses of both the Fourth and Fifth circuits in Young and Revell (US) as well as the 'real and substantial' test of the Canadian courts. This could provide a useful blueprint for establishing commonalities and general principles for adjudicating dignitary torts on the Internet.

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