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CROSSING THE ELECTRONIC BORDER: FREE SPEECH PROTECTION FOR THE INTERNATIONAL INTERNET

INTRODUCTION

Worldwide access to materials published on websites in the United States has created porous national borders in cyberspace. The global scope of the Internet poses challenges to traditional free speech analysis because anyone in any country potentially can access information online. The First Amendment of the United States Constitution protects speech by providing that "Congress shall make no law . . . abridging the freedom of speech."1 Because no international treaty to date ensures this guarantee of freedom of speech on the Internet, the laws of individual countries govern the access to information online within their respective borders. By posting information on the Internet, people subject their speech to the laws of different countries, and conflicts between the laws of multiple jurisdictions are therefore inescapable.

If an American posts information on the Internet that the First Amendment protects in the United States, that information could violate the laws of France, China, or any other country that regulates expression on the Internet when accessed abroad. Therefore, Americans could violate laws abroad without ever setting foot on foreign soil. To solve this problem, this Comment makes two recommendations. First, U.S. courts should apply U.S. defamation law to the Internet to protect the speech of American citizens and Internet Service Providers, such as Yahoo!, AOL, AT&T, and Prodigy (collectively ISPs). Second, the international community should adopt a Global Free Speech Act for the Internet modeled on the standards of the Berne Convention for the Protection of Literary and Artistic Works.2

The intense process of globalization and current advances in technology enable "more and more people, with more and more home computers, modems, cellular phones, cable systems and Internet connections, to reach farther and farther, into more and more countries, faster and faster, deeper and deeper, cheaper and cheaper than ever before in history."3 The Internet is an increasingly influential medium

1. U.S. CONST. amend. I.
3. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 47 (Anchor Books 2000) (examining the new system of globalization that developed in the aftermath of the Cold War and the
of communication because it facilitates unprecedented levels of expression and the exchange of ideas by allowing anyone with computer access to "build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined."\textsuperscript{4} The U.S. Supreme Court has described the Internet as "a unique and wholly new medium of worldwide human communication" with content "as diverse as human thought."\textsuperscript{5}

Rapid developments in the Internet provide for robust conversation and the spread of ideas; however, these advances in technology create numerous issues that the framers of the Constitution never anticipated.\textsuperscript{6} Internet filters, for example, block certain types of information to a particular audience, but also potentially prevent access to information that the First Amendment protects.\textsuperscript{7} In \textit{United States v. American Library Ass'n}, the Supreme Court examined challenges to a federal statute requiring public libraries that receive federal funds to install filtering software on computers that would prevent patrons from viewing pornography or obscene materials that are harmful to children.\textsuperscript{8} In a 6-3 decision, the Court upheld the statute, finding that

\begin{quote}


6. Professor Bollinger notes that there is little evidence as to what the actual intentions of the Framers were, but the evidence in existence "suggests something far different from, and more limited than, what has evolved in this country." \textit{LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA} 5 (1986); \textit{see also} \textit{LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW} \S\ 12-1, at 785 & n.3 (1988) (noting that "[a]ttempts to develop a first amendment jurisprudence based on historical evidence regarding the intent of the framers have proven quite manipulable"). Because "no clear, consistent vision of what the framers meant by freedom of speech" has or is likely to emerge, the Supreme Court has focused less on original intent when dealing with freedom of speech than it has with other constitutional provisions. \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} \S\ 11.1.1, at 924 (3d ed. 2006).

7. \textit{See Mark C. Alexander, The First Amendment and Problems of Political Viability: The Case of Internet Pornography, 25 HARV. J.L. & PUB. POL'Y 977, 1016 (2001) ("[F]iltering software does not necessarily do what it is designed to, and it also is imprecise in what it does. While it may block a majority of pornographic sites, it also blocks legitimate, constitutionally protected sites.").

it did not violate the First Amendment because adults could still access the material if they requested that the library lift the filter. In dissent, Justice Stevens argued that because some library patrons would feel uncomfortable asking for obscene materials to be unblocked, the "interest of the authors of those works in reaching the widest possible audience would be abridged." Justice Stevens reasoned that the law "prohibits reading without official consent" because "[u]ntil a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed." By this view, the statute serves as a prior restraint on speech and thus is suspect under American constitutional law.

More urgently, courts must determine the applicability of First Amendment protection for speech posted on the websites of ISPs when that information is accessible outside of the United States. In Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, Yahoo!—an ISP incorporated in Delaware but with its principal place of business and computer servers in California—operated a U.S. website and several comparable websites in foreign countries, where it offered Internet services that included a search engine, email, auctions, and chat rooms. French citizens were able to access Nazi memorabilia on auction sites and information denying the Holocaust through the U.S. and French versions of Yahoo!'s website, even though French law prohibits this type of information. A French court of first instance issued injunctions against Yahoo! on the grounds that both versions of its website violated French law by providing French citizens access to prohibited hate speech. Yahoo! sought a declaratory judgment from a U.S. district court that the French orders were unenforceable in the United States. The district court held that the First Amendment precluded enforcement of the French order in the United States because the order would limit Yahoo!'s speech.

9. Id. at 209, 214; see infra note 90.
10. Am. Library Ass'n, 539 U.S. at 225 (Stevens, J., dissenting).
11. Id. at 224–25.
12. Id. at 225.
14. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1201–02 (9th Cir. 2006).
15. Id. at 1202–03.
16. Id. at 1202–04.
17. Id. at 1204.
On appeal, the Ninth Circuit stated in dicta that judgments of foreign courts are typically enforceable unless they are contrary to public policy, which includes decisions running afoul of the First Amendment.\(^\text{19}\) Under that logic, the injunctions issued by the French court would be unenforceable if they violated the First Amendment.\(^\text{20}\) The Ninth Circuit did not decide this issue, however, because it held that the suit was not ripe for adjudication.\(^\text{21}\) Accordingly, the Ninth Circuit remanded the case to the district court and instructed it to dismiss the claim without prejudice.\(^\text{22}\) While not ruling on the issue, the Ninth Circuit noted that the extraterritorial application of the First Amendment is a difficult and unresolved issue.\(^\text{23}\)

\(^{19}\) *Yahoo!*, 433 F.3d at 1213–17; accord Matusevitch v. Telnikoff, 877 F. Supp. 1, 3 (D.D.C. 1995); see Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 662 (N.Y. Sup. Ct. 1992) (noting in dicta that refusal to recognize a foreign judgment should be “constitutionally mandatory” if the judgment were repugnant to the policies and principles embodied in the First Amendment of the U.S. Constitution or the free speech guarantee of the New York Constitution).

\(^{20}\) As explained by the district court, “No legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” *Yahoo!*, 169 F. Supp. 2d at 1192. Thus, for foreign judgments to have effect in the United States, U.S. courts must enforce them. Under the principle of comity, “United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interest.” *Id.* (citing Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)); see also Hilton v. Guyot, 159 U.S. 113, 163–67 (1895) (discussing the “comity of nations”). It is not enough, however, that a foreign judgment be inconsistent with American law “to prevent recognition and enforcement . . . in the United States”; U.S. courts would still recognize such judgments. *Yahoo!*, 433 F.3d at 1215. Rather, the foreign judgment “must be . . . repugnant to public policy” for U.S. courts to refuse to enforce the judgment. *Id.* For a thorough discussion of the status of foreign judgments in the United States, see generally Robert B. von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 Vt. J. Int'l L. 401 (1977).

\(^{21}\) *Yahoo!*, 433 F.3d at 1224. An eight-judge majority held that the “district court properly exercised specific personal jurisdiction” over the defendants, but a three-judge plurality held that the suit was unripe for decision. Overall, six of the eleven judges voted to dismiss the suit: three dissenting judges who concluded that there was no personal jurisdiction and the three-judge plurality that held the suit was not ripe for decision. *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.* at 1217–18. Kurt Wimmer reviews the questions left open by the Ninth Circuit: If the United States wishes to protect Nazi speech, the domestic law of France should not be able to undermine the United States's ability to do so. But should those who would be willing to avoid the laws of their country be able to establish virtual web presences within the United States to frustrate the application of their own states' laws against them? And on the other hand, should a court in Australia or Canada be able to try a U.S. publisher for defamation under their own countries' standards when the only connection between that publisher and the forum state is the publication of content that can be downloaded from the Internet in that state? Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, 603 Annals Am. Acad. Pol. & Soc. Sci. 202, 203–04 (2006).

The issues and consequences raised by the Internet are also illustrated by the ability of Germans to order *Mein Kampf*, the infamous political manifesto written by Adolf Hitler,
The ongoing war on terror also raises the stakes of this First Amendment issue. Terrorists can take advantage of the Internet's "ability to link geographically dispersed individuals to changing data without the filtering provided by traditional media." They can communicate valuable information about potential targets for attacks through websites, and they can update the sites as new information becomes available. The Internet's "unmediated nature" allows extremist groups to "attract an audience of persons who already agree with the extreme opinions featured on the site" and to promote "recruitment for violent acts."

If the global community recognizes First Amendment-type speech protection, the United States potentially could protect ISPs from the enforcement of foreign judgments that are part of foreign anti-terrorism policies. However, without a Global Free Speech Act, Americans may be viewed as committing terrorist acts. Suppose that an American citizen posted a disparaging comment about Venezuela's through Amazon.com, despite the prohibition on the sale or publication of the work in Germany. Thomas Friedman notes that books ordered by German citizens came in the mail "in a way that the German government was powerless to stop. Indeed, so many Germans ordered Mein Kampf from Amazon.com that in the summer of 1999 Hitler made Amazon.com's top-ten bestseller list for Germany." Amazon.com initially decided to continue shipping copies of Mein Kampf to Germany, refusing to determine what its customers were allowed to read and arguing that the English translation did not violate the German censorship law. However, Amazon.com received so many angry emails from around the world in response to its policy that it eventually stopped selling the work online.

25. Id. para. 43.
26. Id. para. 42.
27. For example, Turkey might choose to define particular statements regarding Kurdish independence as terrorist speech. If that speech is posted on a U.S. ISP's website and is accessed in Turkey, a Turkish court could enter judgment against the ISP for violating domestic law. That judgment would be enforceable by U.S. courts if no First Amendment protection were recognized for speech accessible abroad. On the other hand, if courts recognized free speech protection and found the judgment unenforceable, the United States would inhibit Turkey's efforts to fight terrorism. For the news story that inspired this hypothetical, see generally James Janega, Iraq Prods PKK to Halt Border Raids, CHI. TRIB., Oct. 24, 2007, at C12.

This issue is complicated further by the elusiveness of a definition of terrorism. Noam Chomsky notes two definitions of "terrorism" that are used by the U.S. and British governments: "the calculated use of violence or threat of violence to attain goals that are political, religious, or ideological in nature... through intimidation, coercion, or instilling fear," or "the use, or threat, of action which is violent, damaging or disrupting, and is intended to influence the government or intimidate the public and is for the purpose of advancing a political, religious, or ideological cause." Noam Chomsky, Hegemony or Survival: America's Quest for Global Domination 188 (2003) (alteration in original). With such fluid and confusing terms, it is possible for actions to be decried as terrorist acts by one country, yet be considered acceptable behavior by another.
antagonistic president, Hugo Chavez, on an Internet message board and thus made that information accessible not only in the United States, but also in Venezuela. Assuming that the statement violated Venezuelan sedition laws, Venezuelan courts could find the American guilty of committing terrorist acts against Venezuela. Absent First Amendment protection for that speech, the judgment would be enforceable in the United States and the American would be labeled a criminal and a terrorist for what he thought was the exercise of his First Amendment rights. In order to prevent such results, the United States should recognize domestic free speech protection for Internet speech accessible abroad and advocate for the adoption of international free speech protection based on the Berne Convention. By taking these complementary steps, the United States will ensure that Americans' First Amendment rights are protected on the Internet.

This Comment argues that U.S. courts should recognize free speech protection for speech on the Internet that is accessible abroad and further argues that the global community should adopt a Global Free Speech Act. Part II examines U.S. defamation law for printed materials and then considers the Supreme Court's approach to the Internet.28 Part III discusses the applicability of defamation law to materials posted on the Internet, the legal implications of free speech on the Internet, Internet filtering as an alternative, and the extent of ISP liability when third parties post material to ISP websites.29 Part IV addresses the foundations of international free speech and identifies the history and principles of the Berne Convention as a roadmap for international free speech protection. It ultimately argues for the institution of a Global Free Speech Act modeled on the standards of the Berne Convention.30

II. BACKGROUND: DEFAMATION LAW AND THE SUPREME COURT'S APPROACH TO THE INTERNET

The First Amendment's general text provides little guidance to courts as they develop free speech principles,31 and the text has left courts "adrift on a sea of possible interpretations of the First Amend-

28. See infra notes 31–93 and accompanying text.
29. See infra notes 94–180 and accompanying text.
30. See infra notes 181–249 and accompanying text.
31. BOLLINGER, supra note 6, at 6. Professor Laurence Tribe recognizes the difficulties posed by First Amendment jurisprudence when he discusses "the central question posed by the Constitution's most majestic guarantee":
[I]s the freedom of speech to be regarded only as a means to some further end—like successful self-government, or social stability, or (somewhat less instrumentally) the discovery and dissemination of truth—or is freedom of speech in part also an end in
For example, the First Amendment does not clarify whether free speech protection applies to speech accessible beyond the territorial borders of the United States. Notwithstanding this lack of textual guidance, the First Amendment remains one of the most cherished constitutional provisions for Americans; it is "one of our foremost cultural symbols" and "an important piece of the American character." As Justice Brandeis wrote:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

In agreement with this principle, the U.S. Supreme Court held in its first major decision of the Internet era, Reno v. ACLU, that there is no basis "for qualifying the level of First Amendment scrutiny that should be applied to this medium." The Internet, therefore, is entitled to the same free speech protection as print mediums.

Before considering how this powerful American free speech right translates abroad, Section A discusses defamation law, which provides the backdrop for analyzing free speech issues in the context of the itself, an expression of the sort of society we wish to become and the sort of persons we wish to be?

TRIBE, supra note 6, § 12-1, at 785.

32. BOLLINGER, supra note 6, at 5–6. The development of First Amendment case law has been more complex than the Amendment's simple text suggests. See CHEMERINSKY, supra note 6, § 11.1.1, at 923–24. While many people believe that the First Amendment confers an absolute right to free speech that allows them to say whatever they want whenever they want, they are mistaken. The First Amendment, for example, does not allow a person to shout "Fire!" in a crowded theater when no such danger is present. Schenck v. United States, 249 U.S. 47, 52 (1919); see also Laker Airways Ltd. v. Pan Am. World Airways, 604 F. Supp. 280, 288 (D.D.C. 1984) (discussing the types of speech that are not protected by the First Amendment and the categories of lower-value speech that receive limited free speech protection). But see Cohen v. California, 403 U.S. 15, 25–26 (1971) (holding that an individual's display of a four-letter expletive on the back of his jacket inside a courtroom is protected by the First Amendment).

33. BOLLINGER, supra note 6, at 7–8.

34. Id. (emphasis omitted).


37. See id.; see also JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE 4 (2006 ed.).
Section B examines the Supreme Court’s approach to Internet issues.

A. Defamation Law

Defamation law protects an individual’s most personal asset: his name and reputation. According to Justice Stewart, protection of one’s reputation “reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.” A defamatory statement, therefore, is one that injures the reputation of another. Under the umbrella of defamation are two common law torts that punish statements that are both defamatory and false: slander and libel.

The Supreme Court has held that recovery for defamation is limited by the First Amendment. In New York Times Co. v. Sullivan, the seminal case on the issue, the police commissioner of Montgomery, Alabama sued the New York Times and four clergymen for an advertisement published in the newspaper, which criticized the way the Montgomery police treated civil rights demonstrators and included several false statements. The Supreme Court held that Alabama’s tort law violated the First Amendment and that in order to succeed on a libel claim, the plaintiff, as a public figure, had to prove actual malice.

Justice Brennan stated that the United States exhibits a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” and that in such a society, erroneous statements are inevitable. Such speech must be protected “if the freedoms of expression are to have the ‘breathing space’ that they
'need . . . to survive.'"48 Under this precedent, even false statements are protected because they further the underlying policies of the First Amendment.49 Because of such countervailing free speech concerns, in order to recover for libel or slander, plaintiffs must establish "not only (1) that the defendant published a defamatory statement; (2) that the statement was made about the plaintiff; and (3) that the statement was demonstrably false; but the plaintiff must also prove that the statement was made with 'fault.'"50

Modern Internet First Amendment law is grounded in defamation cases in which courts were asked to determine the extent of First Amendment protections for speech published outside the United States.51 The primary mode of communication in these cases was print media, including newspaper articles, books, and films.52 In applying the First Amendment to protect speech accessible abroad, courts have taken positions along the spectrum of First Amendment protection, leaving no consistent or unified line of cases.53

On one end of the spectrum is the position that the First Amendment applies to all "extraterritorial publications by [U.S. citizens and] persons under the protections of the Constitution."54 The District Court for Hawaii took this position in DeRoburt v. Gannett Co., where the president of Nauru brought an international defamation suit against newspaper publishers for publishing articles claiming he had committed serious crimes.55 The court held that both the English common law of libel adopted by Nauru and the First Amendment standards established in Sullivan and its progeny were applicable because the English common law by itself did not provide adequate safeguards to protect the newspaper publishers and their speech.56 Because the First Amendment is fundamental to the U.S. "system of

48. Id. at 271–72 (alteration in original) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

49. See id. at 271; St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

50. HART, supra note 37, at 245. For a public official or public figure, the level of fault required is actual malice, whereas for a private figure, the plaintiff need only demonstrate that "the defendant was 'at fault' in publishing the false statement at issue." Id. at 245–46.

51. For a general discussion of the historical background of the First Amendment, see generally RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 1:1–1:12 (2008).


53. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1217–18 (9th Cir. 2006).


55. DeRoburt, 83 F.R.D. at 575–76.

56. Id. at 579–80.
constitutional democracy,” it must be applied to all libel cases brought in U.S. courts. A federal district court in California also took this position in Bullfrog Films, Inc. v. Wick, stating that “in the absence of some overriding governmental interest such as national security, the First Amendment protects the communications with foreign audiences to the same extent as communications within our borders.”

The court's approach in Desai v. Hersh falls in the middle of the spectrum. An Indian official brought a defamation suit in U.S. federal court against the American author of a book on Henry Kissinger that was published in India. In the book, the author alleged that the official sold Indian state secrets to the CIA during his tenure. The district court chose not to follow DeRoburt on the grounds that the imposition of First Amendment safeguards extensively modified foreign laws, rendering them the “functional equivalent of American defamation law.” Unlike the court in DeRoburt or Justice Brandeis in Whitney v. California, the court did not view the centrality of the First Amendment to the American legal system as an overriding concern. Rather, it concluded that “for purposes of suits brought in United States courts, first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution.” The Court thereby adopted a sliding scale approach to the First Amendment:

Had defendant written a book and published it solely in India concerning plaintiff's activities as a public official in the government of India, but minimally related to a matter of public concern in this country, the need for protection of first amendment interests would be greatly lessened, if not entirely absent.

Towards the opposite end of the spectrum, courts take the position that the First Amendment applies minimally or not at all to speech that is accessible abroad. In Laker Airways Ltd. v. Pan American World Airways, the plaintiff airline brought suit against a group of foreign airlines, alleging that “the defendants were involved in a con-

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57. Id. at 579.
60. Id. at 671–72.
61. Id.
62. Id. at 675–76.
64. Desai 719 F. Supp. at 676.
65. Id.
sporcy to destroy Laker’s transatlantic charters and its low-cost ‘Skytrain’ service through a predatory pricing scheme and through interference with Laker’s attempts to obtain necessary financing. The defendants argued that they had First Amendment free speech protection to petition the British government for the redress of their grievances. In response, the District Court for the District of Columbia stated in dicta, “It is well settled that the Constitution restrains not only the power of the federal government to act in this country but in many respects also its power to affect American citizens in foreign countries.” The court noted that “[i]t is less clear . . . whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad.”

B. The Supreme Court’s Approach to the Internet

Over the last two decades, the Internet has become the “newest frontier for the exercise of the freedom of expression,” turning the computer-user into an “explorer, and perhaps even a settler” of the World Wide Web. Justice Stevens described the Internet as an international network of interconnected computers. Email, automatic mailing list services, newsgroups, chat rooms, and the World Wide Web constitute “a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." The number of host computers increased from 300 in 1981 to approximately 9.4 million in 1996, with sixty percent of the hosts located in the United States. Within a mat-

67. Id. at 282.
68. Id. at 287.
69. Id. It is important to note that the courts in DeRoburt and Bullfrog Films might disagree with this statement insofar as they are willing to recognize an extensive extraterritorial application of the First Amendment. See Bullfrog Films, Inc v. Wick, 646 F. Supp. 492, 502 (C.D. Cal. 1986), aff’d, 847 F.2d 502 (9th Cir. 1988); DeRoburt v. Gannett Co., 83 F.R.D. 574, 579-80 (D. Haw. 1979), rev’d on other grounds, 733 F.2d 701 (9th Cir. 1984).
70. Laker Airways, 604 F. Supp. at 287.
73. Id. at 851. The benefits of the Internet actually serve as a thorn in the side of police states, such as China. These countries “can’t afford not to have [the Internet], because they will fall behind economically [without it]. But if they have it . . . they simply can’t control information the way they once did. And what’s really scary about the Internet for regimes such as China’s is that it’s interactive, it’s alive.” FRIEDMAN, supra note 3, at 68. People are “giving and taking, chatting and outreaching, uploading ideologies and downloading ideologies, buying and selling—and doing it all in a way that is virtually impossible to control.” Id.
74. Host computers are computers that “store information and relay communications.” Reno, 521 U.S. at 850.
75. Id.
ter of five years, the number of Internet users was expected to jump
from 40 million to over 200 million. As of 2006, the actual number
of Internet users globally was 972 million. Thus, the Internet has
changed the ways in which a vast number of people live their lives and
communicate.

Because the Internet is extremely important to the American sys-
tem of free expression, courts have been emphatic that "the Internet
is entitled to the highest level of protection and that attempts to cen-
sor its content or silence its speakers are to be viewed with extreme
disfavor." The Supreme Court has held that speech on the Internet
is "entitled to the . . . First Amendment protection afforded to news-
papers and other print publications." In *Reno v. ACLU*, the Su-
preme Court invalidated key provisions of the Communications
Decency Act of 1996 (CDA). The statute made it a federal crime to
transmit "obscene or indecent messages" to anyone under eighteen
years of age. The Court held that, because the First Amendment is
applicable to speech on the Internet, all First Amendment doctrines
govern the analysis of the speech in question. As such, the Court
found that the restriction on speech was content-based and viewed in
that light, the statute was too vague. Writing for the Court, Justice
Stevens explained that "the CDA places an unacceptably heavy bur-
den on protected speech" and that such a restriction casts a "dark[
] shadow over free speech, threaten[ing] to torch a large segment of the
Internet community." Such a result would not be desirable or
constitutional.

After the Supreme Court invalidated key portions of the CDA,
Congress passed the Child Online Protection Act, which required that
"operators of commercial websites restrict access by children to mate-
rial which the average person ‘applying contemporary community
standards’ would find is designed to pander to the minors’ prurient
interest." In *Ashcroft v. ACLU*, a federal district court issued a pre-

76. Id.
78. Brief of Amici Curiae Center for Democracy and Technology et al. in Support of Appellee
Yahoo!, Inc. at 10, Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199
(9th Cir. 2006) (No. 01-17424) [hereinafter Brief of Center for Democracy and Technology]; see
79. HART, supra note 37, at 4; see Reno, 521 U.S. at 870.
80. Reno, 521 U.S. at 882.
81. Id. at 859.
82. Id. at 870.
83. Id. at 870, 874.
84. Id. at 882.
85. CHEMERINSKY, supra note 6, § 11.3.4.6, at 1042 (quoting 47 U.S.C. § 609 (2000)).
liminary injunction against its enforcement, which the Third Circuit Court of Appeals affirmed because the statute "would limit speech on the Internet to that which would be palatable in the most restrictive state." 86

The Supreme Court held that the statute was content-based, as it only applied to sexual content available on the Internet, and therefore the statute must survive strict scrutiny. 87 Justice Kennedy noted in his opinion for the Court that filters would be preferable to the statute insofar as they "impose selective restrictions on speech at the receiving end, not universal restrictions at the source." 88 Under such a system, "adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information." 89 Also, "promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." 90

U.S. courts "have held uniformly that the Internet should receive the highest degree of First Amendment protection." 91 The Supreme Court took this position in Reno by applying First Amendment protections to speech on the Internet equivalent to those for traditional print media, but it is unclear whether this commitment is as strong as it seems in light of the available filtering technology. 92 Despite these concerns, courts have tended to provide high levels of protection for speech posted on the Internet. 93

86. Id. The Supreme Court reversed, holding that the use of "contemporary community standards" was not unduly vague. Id. (citing Ashcroft v. ACLU, 535 U.S. 564, 585 (2002)). The Court allowed the injunction to stand and remanded the case, on which the Third Circuit reaffirmed the preliminary injunction. Id. The case was again appealed to the Supreme Court, and the Court's decision is discussed here.


88. Id. at 667.

89. Id.

90. Id.; see also United States v. Am. Library Ass'n, 539 U.S. 194, 201, 219–20 (2003) (upholding a federal statute that provided assistance for Internet filtering technology that blocked access by all persons to "visual depictions" that constitute "obscenity" or "child pornography," because adults had the option to have such materials unblocked upon making a request to a librarian).


93. See, e.g., supra notes 4–5, 36–37 and accompanying text.
III. Analysis

The defamation and Internet cases discussed above provide the starting point for an analysis of how courts should apply the First Amendment right to speech that is accessible outside the United States. Part A explores the three approaches courts take to defamation regarding printed materials published abroad and whether these approaches are a good fit for the Internet. Part B discusses the viability of Internet filtering as an alternative to recognizing free speech protection abroad. Finally, Part C analyzes the ISP safe harbor provisions of the CDA to determine whether First Amendment protection is necessary to adequately protect ISPs abroad.

A. The Application of Defamation Law to the Internet: A Good Fit?

Although defamation law as applied to print materials provides the main framework for analyzing the Internet, the two mediums of communication are not completely analogous. The Internet differs substantially from traditional print media due to the "sheer volume of information, much of it posted by third parties, and the fact that it is constantly changing." For mass distribution of books or newspapers, publishers need to take specific actions, such as publishing and distributing a book, in order to circulate the material. With the Internet, such intentional action is not always required. Yahoo! can publish something on its American website, intending the material for American audiences, and that material can be accessed virtually anywhere in the world. Significant portions of the materials posted on the websites of ISPs are not even posted per se by the ISP. Individuals can post information on ISP websites through message boards, auction sites, and other forums. Justice Stevens in Reno noted that "[a]ny person or organization with a computer connected to the Internet can

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94. See infra notes 97-150 and accompanying text.  
95. See infra notes 151-157 and accompanying text.  
96. See infra notes 158-180 and accompanying text.  
97. Corn-Revere, supra note 91, at 6. Corn-Revere observes that "[a]ttempting to restrict the availability of information in certain countries on Yahoo!'s auction website is not the same thing as declining to publish a book in England because of its plaintiff-friendly libel laws or refusing to mail an adult video to Tennessee for fear of its Bible-belt obscenity standards." Id.  
98. Id. at 3. Yahoo! is an example of how worldwide communication is made possible by the Internet. Id. Yahoo!'s "home website (http://www.yahoo.com) is accessible globally, even though its services are in English, are oriented toward a U.S. audience, and are hosted entirely on servers located in the United States." Id.  
99. See infra notes 158-175 and accompanying text for a discussion of the liability of ISPs when third parties post materials on their websites.
The spectrum of Internet publishers includes "government agencies, educational institutions, commercial entities, advocacy groups, and individuals." Thomas Friedman refers to the technological advancement of the Internet and the broad access to information it has provided as the "democratization of information." The Internet is truly a unique medium because "[n]o single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." The differences between print materials and the Internet conceal an important underlying issue that is common to both modes of communication: whether speech accessible abroad is protected by the First Amendment. U.S. courts have attempted to answer this question in the context of print materials through defamation law. Accordingly, defamation law will provide the foundation for protecting Internet speech abroad.

As discussed above, defamation case law reveals three main approaches to dealing with the application of free speech protection abroad. First, Laker Airways suggests that there is minimal or no First Amendment free speech protection for the activities of Americans abroad. Second, in Desai the District Court for the Northern District of Illinois advocated a sliding scale approach, under which the level of speech protection abroad depends on whether Americans constitute the intended audience and whether the speech addresses a matter of public concern to Americans. Third, DeRoburt and Bullfrog Films recognize First Amendment protection abroad to the same extent as for speech occurring solely within the United States, absent some overriding governmental concern. These approaches will be examined in turn.

101. Id.
102. See Friedman, supra note 3, at 60–72. "The result [of this process] is that never before in the history of the world have so many people been able to learn about so many other people's lives, products and ideas." Id. at 67. Publishers have a vast array of options for how they publish material online. They can "make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege." Reno, 521 U.S. at 853.
103. Reno, 521 U.S. at 853.
104. See supra notes 51–70 and accompanying text.
1. The Laker Airways Approach

_Laker Airways_ suggests that there is minimal, if any, free speech protection for the activities of Americans abroad. In _Laker Airways_, the plaintiff airline sued foreign airlines for predatory pricing and business interference. In its discussion of whether the defendants had First Amendment free speech protection to petition the British government for the redress of their grievances, the court stated, "It is less clear ... whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad." From the district court's statement, the inference logically follows that the court views the First Amendment as primarily protecting American speakers speaking to an American audience. The court raises the possibility that the First Amendment only provides free speech protection within the territorial borders of the United States.

This understanding of free speech undercuts the importance of the First Amendment and misreads Supreme Court precedent. In _New York Times Co. v. Sullivan_, Justice Brennan wrote for the majority:

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussion is so vast, and the advantages derived are so great, that they more than counterbalance the inconveniences of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.

Justice Stevens echoed this broad understanding of free speech protection in his dissent in _American Library Ass’n_ by suggesting that the First Amendment protects the interest of authors "in reaching the widest possible audience." Many lower courts have followed the Supreme Court and adopted the view of a robust First Amendment freedom of speech by recognizing that American speakers have at least some degree of protection for speech accessible abroad.

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109. Id. at 282.
110. Id. at 287.
111. See id.
112. _N.Y. Times Co. v. Sullivan_, 376 U.S. 254, 281 (1964) (quoting _Coleman v. Maclennan_, 98 P. 281, 286 (Kan. 1908)). The Court recognized that a robust and largely uninhibited First Amendment right often is important enough to override other competing interests. See id.
Therefore, the court’s narrow interpretation of free speech protection in *Laker Airways* seems inconsistent with the general trends in First Amendment case law.

Applying the *Laker Airways* approach to the Internet would impose substantial burdens to individuals who post information to websites accessible abroad and would ultimately chill their speech.\(^{115}\) With no First Amendment protection, the judgment of the French court in *Yahoo!* would be enforceable in the United States.\(^ {116}\) This exposure to liability “would establish a legal framework wherein all websites on the global Internet potentially are subject to the laws of all other nations, regardless of the extent to which such a requirement conflicts with the law of the place where the speakers are located.”\(^ {117}\) Any nation would be able to “enforce its legal and cultural ‘local community standards’ on speakers in all other nations.”\(^ {118}\) Therefore, speech posted online would have to comply with the laws of every country that regulates Internet speech.\(^ {119}\) Rather than comply with such burdens, “[m]any web publishers and service providers likely would cease offering content that could run afoul of such restrictions.”\(^ {120}\)

For example, Chinese law prohibits Internet content “that guides people in the wrong direction, is vulgar or low.”\(^ {121}\) The Chinese government is trying to use this law to stop online protests and pro-democracy messages, most of which appear on U.S. websites that are

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\(^ {115}\) F.R.D. 574, 580 (D. Haw. 1979), rev’d on other grounds, 733 F.2d 701 (9th Cir. 1984); Bachchan v. India Abroad Publ’ns, Inc., 585 N.Y.S.2d 661, 664 (N.Y. Sup. Ct. 1992). Cf. Desai v. Hersh, 719 F. Supp. 670, 676 (N.D. Ill. 1989) (concluding that there can be protection for “extraterritorial publications by persons under the protection of the Constitution,” but that this protection does not necessarily apply to all suits brought in U.S. courts), aff’d, 954 F.2d 1408 (7th Cir. 1992).

\(^ {116}\) For the purpose of applying the different defamation law approaches to the Internet, this Comment focuses on political speech that “is at the core of that protected by the First Amendment.” CHEMERSNISKY, supra note 6, § 11.1.2, at 927. Professor Chemerinsky notes that the “Supreme Court has spoken of the ability to criticize government and government officers as ‘the central meaning of the First Amendment.’” *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)). The Court has declared that “[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.” *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Because courts strongly protect political speech, it serves as a useful tool of analysis for determining whether First Amendment protections exist for speech accessible abroad. Courts would be more likely to extend free speech protection abroad to protect political speech than they would lesser protected speech; thus, political speech can help determine the boundaries of the First Amendment.

\(^ {117}\) *Cf.* *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001), rev’d, 433 F.3d 1199 (9th Cir. 2006).

\(^ {118}\) *Id.*

\(^ {119}\) There are at least fifty-nine countries that limit freedom of expression online. *Id.* at 6.

\(^ {120}\) *Id.* at 8. This is exactly what happened with *Yahoo!*. See *infra* note 157 and accompanying text.

\(^ {121}\) Brief of Center for Democracy and Technology, supra note 78, at 13.
accessible abroad.\textsuperscript{122} Chinese Americans would violate the law if they posted information on Yahoo! or Google message boards supporting a transition to democracy in China or advocating the declaration of independence by Taiwan.\textsuperscript{123} If a Chinese court entered judgment against Google, that judgment would be enforceable in the United States unless American courts recognize First Amendment protection as contrary public policy.\textsuperscript{124} Enforcement of the judgment would directly inhibit the right of American citizens to speak on political issues because the websites would not only be accessible abroad but also in the United States.

In order to comply with the judgment, the ISP would either have to remove that information from its website altogether, or it would have to construct a filter that would block access to that information anywhere in China. If the ISP removed the information, Americans would not be able to access that information, even though they would have had such access if the material was published in a book in the United States.\textsuperscript{125} If a filter is constructed, it may not be narrowly tailored and thus could incidentally block access to American users. Forcing ISPs to comply with foreign judgments would chill speech and limit political debate, as ISPs would be less willing to allow such information on their websites in the future. Therefore, the \textit{Laker Airways} approach does not provide adequate protection for American speakers or audiences.

2. \textit{The Desai Approach}

In \textit{Desai}, an Indian official brought suit against the American author of a book published in India, alleging that certain passages defamed him.\textsuperscript{126} According to the court's analysis, had the defendant published a book only in India on a topic of little concern in the United States, "the need for protection of first amendment interests would be greatly lessened, if not entirely absent."\textsuperscript{127} The converse logically follows: had the materials at issue been published in the United States, only being incidentally accessible abroad, on a topic of public interest to American citizens, the need for First Amendment protection would be at its highest. This approach, then, is best charac-

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 13–14.
\item \textsuperscript{123} \textit{See id.} at 14.
\item \textsuperscript{124} \textit{Cf.} Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001), \textit{rev'd}, 433 F.3d 1199 (9th Cir. 2006).
\item \textsuperscript{125} \textit{See, e.g., infra note 157 and accompanying text.}
\item \textsuperscript{126} Desai v. Hersh, 719 F. Supp. 670, 671–72 (N.D. Ill. 1989), \textit{aff'd}, 954 F.2d 1408 (7th Cir. 1992).
\item \textsuperscript{127} \textit{Id.} at 676.
\end{itemize}
terized as a sliding scale, where First Amendment protection for speech accessible abroad depends on the place of publication or dissemination and whether the content is a matter of public concern in the United States.

Several difficulties arise when applying this approach to the Internet. First, information posted on a website in the United States is potentially accessible anywhere in the world; there is no fixed place of dissemination. Courts could look to the location of ISP servers or the headquarters of the company posting the materials on their websites. However, anyone with computer access can publish on these websites. If a French citizen posts something on www.yahoo.com, under this reasoning, it would be treated as speech of an American speaker because Yahoo!'s servers are located in California.

It is also difficult to determine the speaker's intended audience. One approach is to assume that whenever an American posts information to a website, she directs that information to an American audience, regardless of her location when she posts the information. This argument undercuts the importance and the uniqueness of the Internet as a mode of communication and fails to appreciate that individuals use the Internet to communicate with others on the opposite side of the globe. Another approach would be to consider anything posted on an ISP's U.S. website to be intended for American audiences and anything posted on the French or German websites intended for those respective audiences. This rationale fails to appreciate the advantages of the Internet, as well.

The overarching problem with the Desai analysis, and with trying to apply the same standards to the Internet as applied to print mediums, is that this approach relies on an assumption that is no longer completely true: that people intentionally target specific geographical

128. See Corn-Revere, supra note 91, at 3. Robert Corn-Revere notes that "[c]yberspace has no particular geographical location, has no centralized control point, and is available to anyone, anywhere in the world with access." Id. This "ambient" and unique feature of the Internet has strongly influenced U.S. courts. Id.; see, e.g., ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997).
129. See, e.g., Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1201-02 (9th Cir. 2006).
132. For example, the rationale fails to recognize the ability of individuals to learn foreign languages. If a U.S. citizen had been learning and practicing French in light of an upcoming trip to France, she may go on the Yahoo! France website to further her language skills. Another example is the American academic who goes on foreign websites to research and have access to primary source documents in the language of a particular country. These examples show that, even though Yahoo! France is largely aimed at French citizens and Yahoo.com aimed at Americans, this is not always the case.
audiences when publishing information and that those are the only locations where such intentions will be realized. At the very least, this approach creates several difficulties in application to the Internet that make it unworkable.

Suppose that an Iranian American posts a message on an ISP message board decrying the Iranian government's harsh, and often deadly, treatment of homosexuals within its borders. The information is clearly posted on a website by a person physically located within the United States, but it is difficult to determine the identity of the intended audience. The "author" could have posted the message for multiple purposes: as a form of protest against the Iranian government, as a warning to Iranians of what is happening within their country despite the reassurances of the state-sponsored media, as participation in the discussion of U.S. foreign policy towards Iran, or as a beckoning to the international community and non-governmental organizations to help end human rights violations within Iran. This example highlights the impracticability of the approach outlined in Desai. If an Iranian court were to enter a judgment against the ISP for allowing access to its citizens of "treasonous propaganda" and seek its enforcement in the United States, U.S. courts would have to grapple with these issues. The information posted could be aimed at Iranian audiences but incidentally serve as political speech within the United States. In this scenario, American courts would still likely want to recognize protection for this speech because the First Amendment strongly protects political speech. The Desai approach leaves too many unclear variables to reach this result. Arguably, the speech

133. See Corn-Revere, supra note 91, at 6.
134. As the world undergoes deeper and more intense globalization, the term "matters of public concern" will be defined increasingly broadly. As the Southeast Asian Financial Crisis of 1997 shows, events happening in Thailand effect countries thousands of miles away: South Korea, Malaysia, Indonesia, Russia, Brazil, and the United States. See Friedman, supra note 3, at xi-xv. The world has become so interconnected that not only global events, but also the domestic politics of other countries, may be considered "matters of public concern."
135. For the news story that inspired this hypothetical, see generally Margaret Wente, A Gay Iranian in Exile, Globe & Mail (Can.), Oct. 6, 2007, at A27.
136. Cf. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1217-18 (9th Cir. 2006); Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192-93 (N.D. Cal. 2001), rev'd, 433 F.3d 1199 (9th Cir. 2006).
137. Cf. Chemerinsky, supra note 6, § 11.1.2, at 927. Chemerinsky has noted the wide range of what constitutes political speech: "Virtually everything from comic strips to commercial advertisements to even pornography can have a political dimension." Id. The refusal to "narrowly limit the First Amendment . . . reflects the importance of freedom of speech to other topics ranging from scientific debates to accurate commercial information in the marketplace." Id. The hypothetical about the Iranian American would fall within these broad parameters, regardless of how it is framed.
is aimed at a foreign audience as a means of protest against a foreign government. Under *Desai*, there would be little or no need for First Amendment protection in this situation.\(^{138}\) This result is inconsistent with the robust conversation promised by the First Amendment and envisioned by Justice Brandeis.\(^ {139}\)

3. *The DeRoburt and Bullfrog Films Approach*

The *DeRoburt* approach, modified by *Bullfrog Films*, provides First Amendment protection abroad to the same extent as within the United States, unless there is some overriding governmental concern, such as national security.\(^ {140}\) The district court in *Bullfrog Films* noted that, even though "[n]o Supreme Court case squarely holds that the First Amendment applies abroad," the Court has suggested as much.\(^ {141}\) The Supreme Court itself has stated, "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."\(^ {142}\)

The Supreme Court's approach, as a matter of policy, is sensible in the context of the Internet. Since practically all information posted online is accessible in the United States, whether intended or not, there is a direct interest in applying the First Amendment to speech accessible abroad.\(^ {143}\) Americans should have access to information as long as it does not violate the First Amendment. In this globalizing world, Americans need to have access to as much information as possible in order to stay competitive with other countries, such as China and India.\(^ {144}\) Because information on the Internet is available both

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\(^{142}\) *Bullfrog Films*, 646 F. Supp. at 503 (quoting Reid v. Covert, 354 U.S. 1, 5–6 (1957)). Other courts seem to have adopted this position. See *supra* note 114.

\(^{143}\) One purpose of the First Amendment's protection of speech is to help further self-governance and the functioning of the democratic process. Chemerinsky, *supra* note 6, § 11.1.2, at 926–27. Voters need to be able to acquire "the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." *Id.* at 926. For this reason, "U.S. courts have held uniformly that the Internet should receive the highest degree of First Amendment protection." Corn-Revere, *supra* note 91, at 1. Not recognizing First Amendment protection for speech accessible abroad would permit "the seeds of foreign censorship to be planted on U.S. soil by finding [foreign judgments] enforceable here." *Id.*

\(^{144}\) See Friedman, *supra* note 3, at 70. "Today, no country can ever truly cut itself [or its people] off from the global media or from external sources of information; trends that start in
abroad and in the United States, foreign judgments that affect information to which Americans have access, such as the one entered by the French court in *Yahoo!*, should be subject to First Amendment standards.\textsuperscript{145} This approach does not automatically render foreign judgments unenforceable; rather, it requires that such judgments be subject to standard First Amendment analysis, so that courts treat the speech as if it were purely domestic in its scope. Because the Internet does not recognize geographic borders, neither should the First Amendment.\textsuperscript{146}

The Ninth Circuit noted in *Yahoo!* that after Yahoo! had filed suit in federal district court to determine whether the French judgment was enforceable against it, Yahoo! adopted "a new policy prohibiting use of auctions or classified advertisements on Yahoo.com 'to offer or trade in items that are associated with or could be used to promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors.'"\textsuperscript{147} This new policy has the potential to limit Americans' access to speech that passes First Amendment muster.\textsuperscript{148} Yahoo!'s reaction shows that even the possibility that a foreign judgment against an ISP is enforceable in the United States may have a chilling effect on speech.\textsuperscript{149} If U.S. courts did not apply the First Amendment extraterritorially, but instead regularly recognized foreign judgments against ISPs, Americans would not have access to significant amounts of information on the Internet. For this reason, the District Court for the Northern District of California stated, "Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of

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\item one corner of the world are rapidly replicated thousands of miles away." *Id.* "A country trying to opt out of the global economy by cutting itself off from external trade and capital flows will still have to deal with the fact that the expectations of its population are shaped by their awareness of living standards and cultural products emerging from the outside world." *Id.*
\item \textsuperscript{145} See *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001), rev'd, 433 F.3d 1199 (9th Cir. 2006).
\item \textsuperscript{146} See *Corn-Revere*, *supra* note 91, at 3, 6.
\item \textsuperscript{147} *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).
\item \textsuperscript{148} The Illinois Supreme Court found that a parade through a municipality by Neo-Nazis in uniforms exhibiting the swastika did not violate the First Amendment of the U.S. Constitution, even though the speech might offend nearby listeners, many of whom were Jewish. *Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 26 (Ill. 1978). This case suggests that the U.S. Supreme Court would likely protect speech regarding the Neo-Nazi movement and Holocaust denial as political speech. As such, Americans would be entitled to the materials that Yahoo! prohibited through its policy change coinciding with the *Yahoo!* litigation.
\item \textsuperscript{149} See *Yahoo!* 433 F.3d at 1205.
comity is outweighed by the Court’s obligation to uphold the First Amendment.”

B. Internet Filtering as an Alternative

Internet filters are a potential alternative to U.S. courts’ recognition of First Amendment free speech protection abroad. In American Library Ass’n, the Supreme Court expressed a preference for Internet filtering for harmful materials rather than an outright ban. Some scholars have argued that a balancing approach to Internet issues, similar to that laid out in Desai, requires ISPs to use Internet filtering where access to particular information or speech violates domestic law. However, “the real world is not so amenable to such neat solutions that sound plausible only in academic journals.” If this view were adopted, “an Internet publisher or web host [would have to] create filters to block access to any content that is illegal in the jurisdictions in which its service is available—that is, everywhere.” That would be an extremely daunting task for ISPs. As of now, at least fifty-nine different countries limit freedom of expression on the Internet. If ISPs had to use filtering mechanisms so as not to violate local laws across the globe, “publishers would have to code each item of information they posted (or otherwise made available) to meet each of the national standards, and set their geographic filters to block access to the content in the relevant jurisdictions.”

Even if the filtering technology were available, ISPs should not be required to utilize the technology. Free speech protection should exist for materials accessible abroad regardless of whether filtering technology exists because having to provide different filtering mechanisms in every jurisdiction that limits free expression on the Internet would substantially burden ISPs and most likely limit Americans’ access to

150. Yahoo!, 169 F. Supp. 2d at 1193. For a proposal of an international treaty on Internet speech, see infra notes 230–249 and accompanying text.

151. United States v. Am. Library Ass’n, 539 U.S. 194, 208 (2003). The Court explained, “because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not.” Id. The library has the option of limiting “its Internet collection to just those sites it found worthwhile” but doing so would exclude “an enormous amount of valuable information that it lacks the capacity to review.” Id. Thus, rather than excluding too much information because the library lacks the ability or the resources to comb through it all, the Court thought that utilizing filtering software was a reasonable and preferable alternative.

152. Jack Goldsmith, Yahoo! Brought to Earth, FIN. TIMES, Nov. 27, 2000, at 27.


154. Id.

155. Id.

156. Id. ISPs would also have to adapt as countries change their domestic Internet law to keep up with emerging technologies.
speech. For example, assuming that the relevant filtering technology does exist, or will exist at some point, Yahoo! could have developed filters so that French citizens would not be able to access Nazi propaganda or materials supporting denial of the Holocaust. Yahoo! had this option, but it chose instead to change its policy and limit the type of information posted on its websites regarding these topics altogether.157 When ISPs are confronted with cumbersome and expensive options, ISPs will typically restrict speech across the board to save time and money. By requiring ISPs to use filtering technology, courts will ultimately limit access to speech. As the Yahoo! example highlights, there is not only a risk of this result, but a substantial probability.

C. The Extent of ISP Liability for Materials Posted to Their Websites

U.S. courts should also recognize free speech protection for materials posted on the Internet that are accessible abroad because such protection is necessary to ensure that ISPs enjoy immunity when third parties post information to ISP websites. This immunity exemplifies the high levels of speech protection that United States courts have extended to the Internet and should continue to extend in the future. In order to fully appreciate the role that the First Amendment plays in guaranteeing ISP immunity, a brief discussion of the history of third-party liability and the CDA safe harbor provisions is necessary.

Traditionally, courts have recognized a distinction between publishers, distributors, and common carriers.158 Publishers, "such as newspapers, magazines, and broadcasters, control the content of their publications and are, accordingly, held legally responsible for any libelous material they publish."159 In contrast, distributors, "such as bookstores, libraries, and newsstands, cannot be held liable for a statement contained in the materials they distribute unless 'they knew or had reason to know of the defamatory statement at issue.'"160 Distributors have no duty to read through materials that they are selling in order to detect such defamatory statements.161 Common carriers "such as telephone companies . . . do no more than provide facilities by which third parties may communicate," and they "cannot be held

157. See Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisémitisme, 433 F.3d 1199, 1205 (9th Cir. 2006).
158. See HART, supra note 37, at 250.
159. Id. (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977)).
160. Id. (quoting Auvil v. CBS “60 Minutes,” 800 F. Supp. 928, 931–32 (E.D. Wash. 1992)).
161. Id. at 250–51.
liable for defamatory statements communicated through [their] facili-
ties unless they have participated in preparing the defamatory mate-
rial.\textsuperscript{162} Prior to the enactment of the CDA, courts were faced with
determining whether ISPs were publishers, distributors, or common
 carriers.

\textit{Stratton Oakmont, Inc. v. Prodigy Services Co.}\textsuperscript{163} is illustrative of
the process for determining the extent of ISP liability for speech
posted online. In \textit{Stratton Oakmont}, an unidentified user posted alleg-
edly libelous statements on Prodigy's "Money Talk" computer bulletin
board, claiming that Stratton Oakmont, a securities investment banking
firm, and its president were involved in criminal activities.\textsuperscript{164}
Stratton Oakmont sued Prodigy on ten different counts, including per
se libel.\textsuperscript{165} The main issue in the case was whether Prodigy was a
"publisher" of the statement posted by the unidentified user.\textsuperscript{166} The
New York Superior Court held that Prodigy was a publisher rather
than a distributor for two reasons.\textsuperscript{167} First, Prodigy "held itself out to
the public and its members as controlling the content of its computer
bulletin boards."\textsuperscript{168} Second, Prodigy used an automatic screening pro-
gram and employees to delete notes from its computer bulletin board
that were offensive or in "bad taste."\textsuperscript{169} By taking these actions, Prodi-
gy made decisions about the content posted on its bulletin board and
thus acted as a publisher.\textsuperscript{170} Prodigy "had made a 'conscious choice'
to regulate the content of its bulletin boards and thereby exposed it-
self to greater potential liability than other computer networks that
undertook a less active role."\textsuperscript{171}

In response to \textit{Stratton Oakmont}, Congress enacted "sweeping and
far-reaching protections" for ISPs in order to "encourage continued
private investment in, and free discussion on, the Internet."\textsuperscript{172} Section
230 of the CDA provides that "[n]o provider or user of an interactive
computer service shall be treated as the publisher or speaker of any

\begin{footnotesize}
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\item[162.] Id. at 251 (citing Anderson v. N.Y. Tel. Co., 361 N.Y.S.2d 913, 913 (N.Y. 1974)).
\item[164.] Id. at *1.
\item[165.] Id.
\item[166.] Id.
\item[167.] Id. at *4.
\item[168.] Id.
\item[170.] Id. The court noted, "Indeed, it could be said that Prodigy's current system of automatic
scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communica-
tion in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for
the legal liability that attaches to such censorship." Id. at *5.
\item[171.] HART, supra note 37, at 252.
\item[172.] Id. at 253.
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\end{footnotesize}
information provided by another information content provider." Therefore, Congress effectively overruled *Stratton Oakmont* by providing that ISPs are not publishers and thus are not liable for information posted on their websites by other users. Most courts have applied "[s]ection 230 broadly, ruling that ISPs and those operating websites generally enjoy immunity from liability. As long as the material complained of was written by a third party, rather than an agent or employee of the ISP or website, the ISP or website is immune from liability." The Fourth Circuit has held that an ISP cannot be held liable for failing to remove a libelous statement posted on its website by a third party, even if the ISP was notified that it was distributing such a statement. Accordingly, ISPs enjoy substantial domestic protections from liability for speech posted on their websites by third parties.

ISPs do not enjoy equivalent protection abroad. As seen in *Yahoo!*, foreign judiciaries are willing to hold ISPs liable for speech that violates the laws of the particular country but was posted by a third party. Internet users could post information on Yahoo!'s auction websites regarding the sale of Nazi memorabilia and not be held liable for violating foreign laws. Yahoo!, however, would have to suffer the consequences of its users' actions in foreign jurisdictions, although it would be protected from such consequences in the United States.

Some form of free speech protection is necessary to prevent these results. If the United States government wants to foster the free exchange of ideas and not hold ISPs liable for the actions of third parties, it should adopt the Global Free Speech Act, or at least urge U.S. courts to recognize First Amendment free speech protections abroad. Absent such steps, foreign countries will greatly dilute the value of ISP protection under the CDA when courts enter judgments against ISPs. Foreign courts are already claiming jurisdiction over the Internet, entering judgments against U.S. citizens and entities, and rejecting First Amendment protection. For this reason, U.S. courts

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174. HART, supra note 37, at 253.
175. Zeran v. AOL, Inc., 129 F.3d 327, 332-33 (4th Cir. 1997); see also HART, supra note 37, at 253.
176. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1202-04 (9th Cir. 2006).
178. See HART, supra note 37, at 253.
179. See infra notes 230-249 and accompanying text.
180. See Patti Waldmer, Material Published on the Internet and Thus Accessible Anywhere in the World is Increasingly Being Challenged under the Laws of Individual Nation States, FIN. TIMES, Dec. 16, 2002, at 19 (discussing some of these foreign cases). It is important to note that...
should extend free speech protection to speech that is accessible abroad via the Internet.

IV. SEEKING AN INTERNATIONAL CONSENSUS ON FREE SPEECH PROTECTION

In light of the Internet’s significance in modern society and the lack of uniform international standards to protect speech online, ISPs will have to comply with the laws of potentially every country where materials posted on their websites are accessible. This would force ISPs to take a “lowest common denominator” approach in deciding what information to make accessible. If Yahoo! had to ensure that its home website complied with the laws of every country in which the website could be accessed, Yahoo! would have to restrict the information that it allowed users to post, thereby limiting Americans’ access to such information.

Without the imprimatur of the U.S. Supreme Court, many lower courts may be reluctant to recognize free speech protection beyond the borders of the United States. Americans and ISPs would be exposed to liability all over the world and forced to censor their activities in order to abide by foreign laws. The current state of Internet regulation, where at least fifty-nine different countries regulate expression on the Internet under different standards, can best be characterized as a system of “inconsistent regulation of Internet content” that acts a lot like a “customs duty” when users access Internet speech across different borders. Adoption of the Global Free Speech Act might encourage hesitant courts to take the final leap and fully protect the speech of Americans and ISPs in the Internet Age so that they are not forced to navigate this patchwork of national Internet regulation.

foreign courts are taking these positions against U.S. interests even before American courts have declined to enforce foreign judgments on First Amendment grounds. See, e.g., Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austl.) (holding that Dow Jones was within the jurisdiction of the Australian courts in a defamation suit that was predicated upon material posted on the Internet via servers located in the United States). Applying the First Amendment abroad in the context of the Internet may thus be necessary to protect the rights of American speakers and audiences from the speech-restrictive measures that are being implemented abroad.

181. Brief of Center for Democracy and Technology, supra note 78, at 20; see also Carl S. Kaplan, New Economy: Bracing for a Flood of Efforts to Control Speech Seen as Hateful or Terrorist, N.Y. Times, Feb. 11, 2002, at C3.

182. Corn-Revere, supra note 91, at 4. Yahoo! “epitomizes the type of worldwide communication made possible on the Internet” insofar as Yahoo!’s home website, http://www.yahoo.com, is “accessible globally, even though its services are in English, are oriented toward a U.S. audience, and are hosted entirely on servers located in the United States.” Id. at 3.

183. Id. at 6, 8.
If U.S. courts recognize free speech protection abroad, foreign judgments will be unenforceable in the United States. Adoption of the Global Free Speech Act is necessary, nonetheless, because Americans will still be violating laws abroad. If an American citizen unknowingly violated the Internet speech restrictions in China and then traveled to Beijing, for example, she could potentially be arrested for breaking Chinese law. Free speech protection embodied in an international agreement is important not only to protect the First Amendment rights of Americans in these situations but also to create certain basic free speech standards around the globe, much as the Berne Convention has done for copyright law. This Part explores the Universal Declaration of Human Rights as the foundation for a global free speech right, the history and principles of the Berne Convention, and the possibility of using those principles in crafting a Global Free Speech Act.

A. The Universal Declaration of Human Rights and Its Progeny

In the aftermath of World War II, the United Nations Commission on Human Rights promulgated the Universal Declaration of Human Rights, which was one of the first expressions of international free speech protection. Its goal was to enshrine human dignity and create “an international standard by which to identify the basic rights that every person should enjoy.” According to Article 19 of the Declaration, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This provision recognizes two basic rights: the right of speakers to self-expression and the right of an audience to receive information. The question of whether these rights offer the same level of protection for free expression as the First Amendment has never been explicitly determined, although the fact that practically no other country protects speech to as great an extent as the United States suggests that a broad reading of Article 19 is

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184. Berne Convention, supra note 2.
185. See infra notes 188–202 and accompanying text.
186. See infra notes 203–229 and accompanying text.
187. See infra notes 230–249 and accompanying text.
189. Id. at 16.
unwarranted.\textsuperscript{191} Regardless, the Universal Declaration of Human Rights is not a treaty; thus, it is not legally binding on the member states of the United Nations.\textsuperscript{192} The provisions of the Declaration have been codified, though, in two treaties that are binding: the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.\textsuperscript{193}

Article 19 of the International Covenant on Civil and Political Rights provides that all people have the right to freedom of expression, which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."\textsuperscript{194} This right is subject to restrictions imposed by national governments that are necessary for "respect of the rights or reputations of others" or for "the protection of national security or of public order, or of public health or morals."\textsuperscript{195} The scope of free speech protection in the United States is more expansive than that recognized in this treaty, as some of the treaty's restrictions are not permissible under the First Amendment.\textsuperscript{196} The U.S. Senate recognized the disparity between the treaty and First Amendment protection when it determined that the International Covenant on Civil and Political Rights "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."\textsuperscript{197} Members of the European Union, among other countries, have made similar reservations.\textsuperscript{198} These reservations show that na-

\textsuperscript{191} Robert A. Sedler, \textit{An Essay on Freedom of Speech: The United States Versus the Rest of the World}, 2006 Mich. St. L. Rev. 377, 379 (recognizing that "the constitutional protection afforded to freedom of speech in the United States is seemingly unparalleled anywhere else in the world").

\textsuperscript{192} \textit{Fasulo, supra} note 188, at 16.

\textsuperscript{193} \textit{Id.}


\textsuperscript{195} \textit{Id.} art. 19(3).

\textsuperscript{196} \textit{See, e.g.}, Cohen v. California, 403 U.S. 15, 25-26 (1971) (holding that an allegedly vulgar four-letter expletive on the back of an individual's jacket is protected by the First Amendment).


\textsuperscript{198} For example, France and Germany declared that the Covenant would be implemented in accordance with the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Office of the High Commissioner for Human Rights, \textit{International Covenant on Civil and Political Rights: Declarations and Reservations}, http://www2.ohchr.org/en/English/bodies/ratification/4_1.htm (last visited Jan. 10, 2009). The European Convention for the Protection of Human Rights and Fundamental Freedoms provides a laundry list of possible limitations or restrictions on the freedom of expression. The exercise of the freedoms may be subject to:
tional sovereignty plays an important role in the negotiation of international agreements.\(^9\)

The statements of the U.S. Senate and the members of the European Union suggest that a Global Free Speech Act would be practically impossible to craft, as there is no consensus among the members of the global community as to how much speech, if any, should be protected. This assumption is misguided, and it does not reflect the emerging reality. Professors Mayer-Schönberger and Foster note that "[w]hile speech has never enjoyed—and will never enjoy—absolute protection, the principle of freedom of speech has become part of a minimum standard of freedoms among a majority of nations."\(^200\) Several significant international and regional agreements protect the right of both speakers and audiences to free expression, reflecting an international consensus on what is now considered a human right.\(^201\) Thus, the "[r]apidly growing realities of global interdependence" have led to a situation where "freedom of expression . . . possesses a contingent universality."\(^202\) These observations of the Universal Declaration of Human Rights and its progeny show that the foundations for a Global Free Speech Act are rooted in international law and that such an in-

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.


202. Abdullahi A. An-Na'im, The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts, 11 Emory Int'l L. Rev. 29, 30–31 (1997). Professor An-Na'im explains that the "element of contingency" is dependent on the interplay between domestic and international affairs:

National standards and practice are the bases of international standards and the necessary context of their implementation. Yet national standards and practices are in turn affected by international responses to the poor articulation or persistent violation of human rights at the local level. International recognition of the universality of freedom of expression equally influences, and is affected by, the local national dynamics of articulation, legitimation, and mediation of this and other human rights.

Id. at 30.
ternational agreement is possible. The Berne Convention provides the roadmap to its realization.

B. The History and Principles of the Berne Convention

The circumstances leading to the adoption of the Berne Convention bear striking similarity to the current patchwork of national Internet regulation that exists today. Thus, a discussion of the history and principles of the Berne Convention is instructive for the creation of a Global Free Speech Act. One of the main causes for the development of copyright law was the invention of the printing press by Gutenberg in 1436, which significantly increased the rate at which authors' manuscripts could be copied but also paved the way for piracy of these manuscripts.204 Pirate booksellers would copy books that had already been legitimately published and then would "sell these copied books at lower prices since they could avoid paying for the authors' manuscripts."205 This motivated booksellers to lobby their respective governments for some form of protection, resulting in the enactment of national copyright laws.206 Prior to the end of the eighteenth century, the copyright laws of most European countries extended protection only insofar as they granted privileges or monopolies to publishers and printers, rather than authors, for the printing of particular books.207

The one exception was the copyright law of the United Kingdom, known as the Act of Anne, which initially only provided protection for books when it was enacted in 1709 but was extended piecemeal to cover engravings, sculptures, and dramatic works by the time most other European countries were just enacting their first copyright statutes.208 The concept of authors having rights to their work, especially in the form of exclusive rights to reproduction, was born out of the French Revolution and the fall of the "ancien régime."209 By 1886, almost all European countries had copyright statutes that protected authors' rights to some extent.210 One major problem, however, arose from the enactment of these laws. While "the principal issues ad-

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203. Berne Convention, supra note 2.
205. Id.
206. Id. at 4.
208. Id. at 9.
209. Id. at 10.
210. Id. The United States had enacted its first copyright statute in 1791. Id.
dressed by [the] national laws were the same, the solutions adopted were often quite different,” especially with regard to the rights granted to authors, the subject matter protected, and the duration of that protection.211 Because of the varying protection offered by this patchwork of national laws and the piracy of foreign works, the international community began to focus its attention on international copyright arrangements.212

International copyright protection began in the mid-nineteenth century in the form of bilateral treaties that provided for mutual recognition of copyright rights.213 These treaties were often inadequate to protect the original works of authors, though, because they “were neither comprehensive enough nor of a uniform pattern.”214 The “network of bilateral agreements” made an author’s protection outside his home country unpredictable because there were wide discrepancies regarding formalities, the duration of particular conventions, and the insertion of “most favored nation” clauses, among other issues.215 The inadequacies of the bilateral treaty system eventually led to the adoption of the Berne Convention on September 9, 1866.216

The Berne Convention is the oldest international copyright treaty, and it is open to all countries.217 The goal of the Convention is to “protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”218 Article 1 implements this goal by creating a union “for the protection of the rights of authors in their literary and artistic works” that consists of all the

211. Id. at 11.
212. Id. at 11, 13. The increase in worldwide literary activity intensified the need for international copyright protection. See Burger, supra note 204, at 8 (“Increased numbers of authors' works began to cross national boundaries, and because authors were unprotected in foreign countries, their literary works were easy targets of piracy.”).
213. WORLD INTELLECTUAL PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 262 (2d ed. 2004). Ricketson notes that the basis of these bilateral agreements “came closer to what is called ‘material’ or substantive reciprocity under which there is approximate parity between the level of protection accorded by each state to the works of the other.” Ricketson, supra note 207, at 15. Under these agreements, “country A would grant country B’s authors the same protection as country B would grant country A’s authors.” Burger, supra note 204, at 8–9.
214. WORLD INTELLECTUAL PROP. ORG., supra note 213, at 262.
215. Ricketson, supra note 207, at 15–16; see also supra note 211 and accompanying text.
216. WORLD INTELLECTUAL PROP. ORG., supra note 213, at 262. For a comprehensive discussion of the events leading up to the adoption of the Berne Convention, see generally Ricketson, supra note 207.
218. Berne Convention, supra note 2, pmbl.
countries that have become a party to the Convention. All members of the copyright union are expected to adhere to certain minimum standards of protection, such as allowing protection for "any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression" and granting the author exclusive rights to translate, reproduce, and perform the work for the duration of the author’s life plus fifty years.

The Berne Convention rests on three basic principles. First, under the principle of national treatment, "[a]uthors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals." Thus, an American author who enjoys copyright protection in the United States would be entitled to the same level of copyright protection in Germany as a German citizen would have, and vice versa. Second, the Convention provides for automatic protection that does not require the fulfillment of any formal requirements. This means that "protection is granted automatically and is not subject to the formality of registration, deposit or the like," including notice of copyright protection. Third, according to the principle of independence of protection, "enjoyment and exercise of the rights granted is independent of the existence of protection in the country of origin of the work."

As "one of the most enduring of all international agreements," the Berne Convention has successfully transformed a world characterized by literary piracy, a patchwork of national regulation, and a loss of protection upon crossing borders into one of relative harmony, stability, and predictability. Its "standard of protection is higher than any other international copyright convention," it continues to attract

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219. Id. art. 1.
221. Id.
222. Id.
223. Berne Convention, supra note 2, art. 5. Under a system of national treatment, "country A grants authors from country B the same protection that country A grants its own authors." Burger, supra note 204, at 9.
225. Id.
226. Id.
228. Cf. id. at 50 ("Throughout its . . . history, the Union has developed a resilient character that has allowed it to endure, despite manifold pressures stemming from philosophical and economic differences, new technologies, or the political urge to favor easy access to information over the authors’ right to control their creations.").
new signatories, and is "flexible enough to cope with new technologies and the divesting threats they pose to authors' rights." The Berne Convention has created a workable, uniform system of regulation in the midst of circumstances similar to those facing the global community with the Internet today, and thus the Berne Convention is perhaps the best model for crafting a solution.

C. Solution: The Global Free Speech Act

The purpose of the Global Free Speech Act is to set up a union, similar to that of the Berne Convention, where minimum standards of free speech protection exist for the Internet. As discussed above, the adoption of such an agreement is feasible because the international community already recognizes some level of free expression as a norm of international law. Thus, the bulk of the negotiations will not be focused on the creation of a free speech union itself, but rather on the standard of protection to be guaranteed within that union. This Comment recommends that the international community adopt a Global Free Speech Act in some form and suggests three possible standards of protection: (1) the model adopted by the European Union (EU) under the E-Commerce Directive; (2) the model proposed by the U.S. House of Representatives in the Global Online Freedom Act of 2006; and (3) the international law concept of *jus cogens*. These proposals not only provide solutions to some of the central issues raised by the *Yahoo!* litigation, but they also make the promises of the Universal Declaration of Human Rights a reality.

1. The European Union Model

The EU's approach under the E-Commerce Directive is one possible model for the Global Free Speech Act. The E-Commerce Directive takes the "country of origin" approach and provides that "companies are subjected only to the jurisdiction and the law of the Member State in which they are established." For example, the German magazine *Der Spiegel* would only be subject to the jurisdiction of German courts and the laws of Germany rather than being potentially liable in every country that restricts content on the Internet. If adopted on a global scale, this approach would provide simplicity and predictability because companies would know the extent of

229. Id. at 50-51.
230. See supra notes 200-202 and accompanying text.
231. See supra note 190 and accompanying text.
CROSSING THE ELECTRONIC BORDER

their legal liability and with which domestic laws they would need to comply. There is, however, an important limitation on the legislation: in its current state, it “applies only to electronic commerce activities within the EU.”

Also, courts may struggle to determine the “country of origin” for legal purposes because “reporters, photojournalists, and editors can upload electronic information to a publication from literally anywhere on the globe and the location of servers hosting content can be manipulated easily to locate foreign content in a jurisdiction where it may be safely published.” In this regard, the E-Commerce Directive explains that the focus of the determination as to where a company is established should be on “the source of the activity” and that “it is essential to state clearly where the services originate.” Thus, in an attempt to simplify this determination, the Global Free Speech Act could require companies to register the country in which they are “established” with some type of permanent body. The EU’s approach “is sensible because only the country in which a publisher is ‘established’ can fully regulate its activities”; also, it “is sensitive to general principles of international law, which recognize that one state should not prescribe its laws in a manner that interferes with a sister state’s ability to prescribe its own legal concepts.”

2. The Global Online Freedom Act Model

The Global Free Speech Act could also take the approach of some members of the U.S. House of Representatives, as set out in the Global Online Freedom Act, and require that all countries “promote the ability of all [people] to access and contribute information, ideas, and knowledge via the Internet and to advance the right to receive and impart information and ideas through any media . . . regardless of frontiers.” This provision, if incorporated into the Global Free Speech Act, would turn the promises of the Universal Declaration of Human Rights into binding obligations for all signatories to protect free speech on the Internet. This provision alone would not be a sufficient basis for a Global Free Speech Act, as it would practically replicate the obligations agreed to by the international community in the International Covenant on Civil and Political Rights.

234. ld.
235. ld.
237. ld. at 210–11.
239. See supra text accompanying note 190.
240. See supra notes 194–199 and accompanying text.
Another provision in the Global Online Freedom Act would make the Global Free Speech Act a very effective instrument. The provision, in its current state, provides that “[i]t shall be the policy of the United States to prohibit any United States businesses from cooperating with officials of Internet-restricting countries in effecting the political censorship of online content.”241 If every signatory to the Global Free Speech Act would agree to enact national legislation prohibiting its businesses from cooperating with countries that restrict content on the Internet, companies ultimately would isolate those countries that regulate the Internet and put pressure on them to allow free speech on the Internet. Complying with the judgment of a court in a country that restricts expression on the Internet could arguably be viewed as cooperating with those countries. Thus, a possible corollary to the Global Free Speech Act would be for signatories to agree not to enforce foreign judgments within their borders if the judgment is based on the repression or censorship of speech on the Internet.242 This arrangement would resemble the Berne Union to the degree that it would create an area of the globe where minimum standards of free speech protection would exist and accord different treatment to those countries outside of the Union, a group largely comprised of countries that restrict content on the Internet.

3. The Jus Cogens Model

The Global Free Speech Act could also model the international law principle of jus cogens. As Dutch jurist Huig de Grotius explained, nations do not “conduct[ ] their affairs in chaos, devoid of any underlying universal principles” but instead rely on “binding rules of international conduct—a common law among nations that binds them.”243 Thus, jus cogens recognizes that there are international norms based upon natural law principles that “function[ ] as a set of mutual links tying nations together.”244 Professors Mayer-Schönberger and Foster discuss a system of global Internet regulation based on jus cogens:

242. Any serious consideration of this corollary by the international community should include a discussion of the possible effects the proposal would have on the principle of comity. See supra note 20.
243. Mayer-Schönberger & Foster, supra note 200, at 58.
244. Id. The Vienna Convention on the Law of Treaties defines jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.
[A] method should be devised for defining certain categories of speech that will be subject to regulation, while at the same time staunchly protecting all speech not within these categories. Essentially, regulatory lines should be drawn circumspectly, so that only speech that is encompassed within certain specified and narrow confines can be regulated on the basis of its content. All speech outside these narrow boundaries should be assiduously sheltered from content-based regulation.²⁴⁵

Because there are not many categories of speech that would qualify as international norms, a Global Free Speech Act based on *jus cogens* would provide protection for most areas of speech on the Internet except for those few areas that the international community agrees should be regulated.²⁴⁶ Thus, under this formulation of the Global Free Speech Act, "only speech that advocated clearly reprehensible behavior, e.g., piracy, genocide, apartheid, aggressive warfare, terrorism, and torture, could be constrained."²⁴⁷ A system of global Internet regulation based on this approach would hopefully resemble the Berne Union both in its organization as a union of countries guaranteeing a minimum standard of protection and in its success as a uniform yet flexible system of international regulation.

These approaches resolve many of the critical problems posed by the *Yahoo!* litigation, but they also leave other issues unanswered. The formulations discussed here simply provide a starting point for the international dialogue, but the list is by no means exhaustive. Other frameworks are workable, so long as they maintain the essential character of the Internet as "the one true global medium of communication"²⁴⁸ and protect freedom of expression for Americans and global society at large.²⁴⁹

²⁴⁵ Mayer-Schönberger & Foster, supra note 200, at 57.
²⁴⁶ See id. at 60.
²⁴⁷ Id.
²⁴⁸ Wimmer, supra note 23, at 203.
²⁴⁹ Kurt Wimmer discusses several frameworks that would be unacceptable:

Publishers could adopt strict "in country only" approaches to their works, limiting their availability to individuals outside their borders if the risk of the application of foreign law against them becomes too great. Another option for publishers is to adopt "the least common denominator" approach to publishing, under which the speech standards of the most restrictive country with a nexus to a particular piece of expression would define the standards by which that expression will be published. Governments also can impose barriers, as Singapore and China have, that would limit their own citizens' access to information published outside of their borders (and information published inside their borders with which their governments disagree). But ultimately, the widespread adoption of any of these strategies means that the essential character of the Internet will be altered and its capacity to act as a universal source of information will be lost.

Id. at 204-05 (internal citations omitted).
V. Conclusion

The United States must protect ISPs and American citizens from the enforcement of foreign judgments when they post content online. As Justice Brandeis noted in his Whitney opinion: "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized . . . that it is hazardous to discourage thought, hope and imagination."\textsuperscript{250} This danger materializes when courts do not clearly define the status of the First Amendment’s scope abroad and the ability of Americans to speak and receive information on the Internet. In order for the promises of the Internet and First Amendment free speech protection to be realized, U.S. courts should refuse to enforce foreign judgments against ISPs or American citizens for the violation of foreign statutes that restrict expression on the Internet. Foreign courts are already holding U.S.-based ISPs liable for speech accessible abroad. A robust debate on political issues should not be extinguished because ISPs would rather avoid posting information on the Internet than run the risk of violating the laws of other countries. Because lower courts are reluctant to recognize free speech protection abroad without the guidance of the U.S. Supreme Court, the best alternative for the U.S. government is to push for the adoption of the Global Free Speech Act. The importance "to the state and to society of such discussions is so vast, and the advantages derived are so great"\textsuperscript{251} that it should not be sacrificed in the name of national interests.

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\textsuperscript{250} Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
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