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DOW JONES AND THE DEFAMATORY DEFENDANT DOWN UNDER: A COMPARISON OF AUSTRALIAN AND AMERICAN APPROACHES TO LIBELOUS LANGUAGE IN CYBERSPACE

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Among the numerous dramatic phenomena wrought by the advent of the Internet is the marked increase in communication across political borders. Cyberspace, of course, is not easily constrained by national boundaries, and material posted on the World Wide Web in one jurisdiction can easily be accessed, as the medium's name indicates, by readers around the globe, raising the question of where suits arising from such communications should be adjudicated and whose substantive law should govern them. Australia's highest court recently grappled with this issue and concluded that an American publisher which allegedly defamed an Australian businessman when it uploaded statements onto the Web from its server in the United States could be subject to suit in the Australian state where that businessman lived. This opinion, the first of its kind from a national court of last resort, is at odds with the views adopted by some American courts which have recently considered similar cases. The explanation for the discrepancy between the Australian and American approaches is to be found through an examination of the different views that their respective societies take of the nature of communication and the relative value of the interests of the parties involved.

Differences between Australia and the United States regarding the juridical analysis of language are particularly noteworthy because the two countries share significant linguistic and legal features. English is

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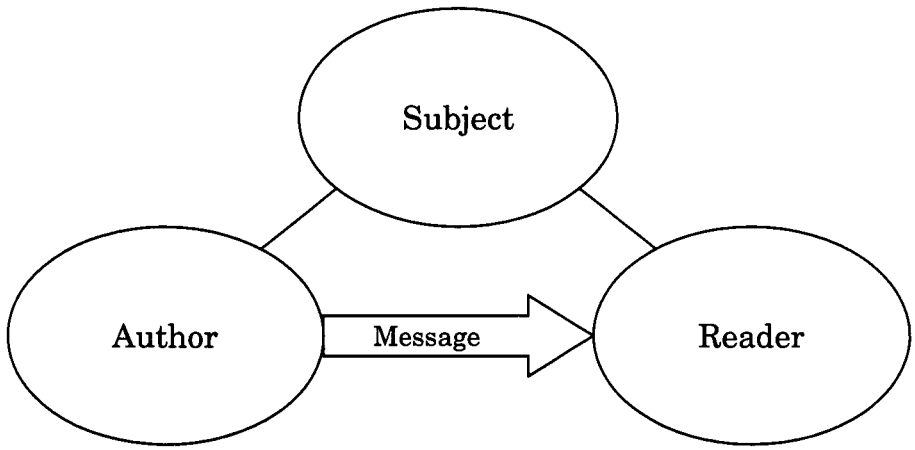
the dominant language in both countries (setting the occurrence of some quaint Aussie-isms aside), and the two countries are both constitutional democracies with common-law legal systems inherited from England. Furthermore, both countries have federal arrangements in which political and judicial power is shared, sometimes uneasily, between a superior national government and numerous constituent states, each of which has its own unique set of laws and courts. Within each country, as a result, separate legal systems are often in conflict with one another, and judges are well accustomed to disputes as to which entity's law is to be applied to lawsuits that have connections to more than one jurisdiction.

While the English concept of defamation has been formulated somewhat differently in the various jurisdictions which have been based on Anglo-Saxon legal norms, in general one may say that person X defames person Y when X makes, or "publishes," to use the legal term of art, a false statement about Y to a third person, and Y's reputation is damaged as a result.[1] The tripartite relationship among the author, reader and subject person of a libelous communication may be conceptualized as follows:



Each party has a relationship with the other two. An author writes about a subject (that is to say, he allegedly defames him) and makes a statement to a reader. The reader receives the statement from the author and that statement, if it is indeed defamatory, will have a negative influence on the reader's opinion of the subject. The subject is not a party to the communication as such, but he nonetheless has a relationship with both parties; he is the subject of the author's comments and he

1. *See Black's Law Dictionary* 417 (6th ed., West 1990).

has a reputation that may be damaged in the mind of the reader. The schism between the Australian and American understandings of defamation is rooted in a difference as to which party to a communication is paid more attention, with American courts focusing on the author of the statement, and Australian courts on the recipient. This divergence, I will argue, reflects some basic differences in the legal and societal values of the two countries.

I. THE AUSTRALIAN HIGH COURT'S *DOW JONES* DECISION

The location of the reader, which is where the subject's reputation may be said to be located as well, was of paramount concern to the High Court of Australia when it decided *Dow Jones & Co. v. Gutnick* in December 2002.[2] This case pitted Joseph Gutnick, who is a Melbourne mining magnate, against Dow Jones, the American publisher of the *Wall Street Journal* and *Barron's* magazine. Gutnick claimed that Dow Jones defamed him in an article which it posted on a subscription-based Web site that accused him of "money laundering" and other financial improprieties.[3] The Web site was accessed by subscribers from all over the world, including at least several hundred in the state of Victoria, where Gutnick lived and where he claimed his business activities and reputation were centered.[4] After Gutnick filed suit against Dow Jones in the Supreme Court of Victoria, Dow Jones moved to dismiss the action, arguing that Victoria lacked jurisdiction, was an inappropriate forum, and was not the jurisdiction whose law should govern the case.[5] The trial judge ruled against Dow Jones on each point,[6] and Dow Jones was granted special leave to appeal to the High Court of Australia, where it was joined by several media companies which intervened to support its position.

The High Court stated that the principal issue in the case, which was relevant to all three challenges mounted by Dow Jones, was where the allegedly defamatory statement had been "published."[7] This inquiry stemmed from the fact that the law to be applied to the case was the law where the tort was committed – the *lex loci delicti*. If it were deemed to

2. *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56. This case was on appeal from the decision of Judge Hedigan of the Supreme Court of Victoria in *Gutnick v. Dow Jones & Co., Inc.*, [2001] VSC 305.

3. *Gutnick v. Dow Jones & Co., Inc.*, [2001] VSC 305 at ¶ 3.

4. Dow Jones admitted that several hundred subscribers were from Victoria and that among them were "significant persons from finance, business and stockbroking," some of whom might be presumed to have downloaded the article. The evidence also indicated that there were 1,700 subscribers from Australia as a whole. [2001] VSC 305 at ¶ 2.

5. *Id.* at ¶¶ 6-8.

6. *Id.* at ¶¶ 127-31.

7. [2002] HCA 56 at ¶ 4 (opinion of Gleeson, CJ); *id.* at ¶ 70 (opinion of Kirby, J.).

have been committed in Victoria, Victorian law would govern the case and there would accordingly be a basis for jurisdiction in Victoria and a compelling reason to dismiss Dow Jones' inconvenient forum claim. Gutnick claimed that the article was "published" in Victoria when it was downloaded from the Web and read by readers in Victoria. The article may have been published in other places as well (arguably everywhere in the world where it was downloaded), but Gutnick was only concerned about publication in Victoria, and was only seeking damages based on the injury to his reputation in Victoria.[8] Dow Jones argued that it was the law of New Jersey, not Victoria, that should apply to this case, as it was in that state where Dow Jones maintained the server which had uploaded the offending article onto the World Wide Web.[9]

Determining the place of publication was of crucial importance, as the law of defamation in Victoria is substantially different from that of New Jersey. In both Australia and the United States, the law of defamation is controlled by state law, and within each country the law varies from state to state in many, sometimes significant, ways. Putting domestic variation aside, however, even more pronounced differences are evident when Australian defamation law is compared to American law. Chief Justice Gleeson, in an opinion which was joined by three other justices, explained that

> [T]he law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas . . . and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage. The way in which those interests are balanced differs from society to society.[10]

In Australia, the law views a person's reputation as the paramount concern, and a defendant may be held liable for defamation "even though no injury to reputation was intended and the defendant acted with reasonable care."[11] By contrast, in the United States the promotion of free speech, which is enshrined in the First Amendment to the Constitution,[12] is seen as a more important societal value. The U.S. Supreme Court has accordingly held that in order to protect the First Amendment

8. As Justice Callinan stated, "[t]he fact that publication might occur everywhere does not mean that it occurs nowhere." [2002] HCA 56 at ¶ 86 (opinion of Callinan, J.).

9. There was no relevant connection to New Jersey apart from the presence of the server. Dow Jones was neither incorporated in nor maintained its principal offices in New Jersey; Dow Jones is incorporated under the laws of the State of Delaware and has its main offices in New York. In fact, Dow Jones at times suggested, but not without equivocation, that New York law might be applied to the case. [2002] HCA 56 at ¶ 5 (opinion of Gleeson, J.).

10. *Id.* at ¶ 23 (opinion of Gleeson, C.J.). *See also id.* at ¶ 117 (opinion of Kirby, J.).

11. *Id.* at ¶ 25 (opinion of Gleeson, C.J.).

12. U.S. Const. amend. I.

right to comment on matters affecting the public interest, a publisher may not be held liable for defamation unless the plaintiff can establish that he is somehow at fault in making a defamatory statement.[13] In other words, a simple honest mistake will not result in liability. Instead, a plaintiff must show that a publisher was at least negligent in its reporting, or, if the subject about whom he is writing is considered a "public figure," an even higher standard is applied – the plaintiff must show that the publisher knew the statement was false, or demonstrated reckless disregard as to its truth or falsity.[14] Because of this scienter requirement, the United States is typically viewed, relative to other countries such as Australia, as being "defendant-friendly" in defamation actions.[15]

As harm to reputation is the gravamen of Australian defamation law, the High Court in *Dow Jones* opined that the damage "is done when a defamatory publication is comprehended by the reader, the listener, or the observer." As a result, Chief Justice Gleeson explained:

> [O]rdinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.[16]

The Court therefore dismissed Dow Jones' appeal and allowed the case to proceed to trial in Victoria.[17]

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13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

14. *Id.*; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Several cases have examined what it means to be a "public figure" for purposes of defamation law. *See e.g. Wolston v. Reader's Digest Assn.*, 443 U.S. 157 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

15. There are other ways in which the U.S. is seen to favor the rights of defamation defendants over plaintiffs. For example, as noted by the court of first instance in the *Gutnick* case, under American defamation law a plaintiff must prove that a statement was false, while in Australia, a defamatory statement is presumed to be false, and the defendant has the burden of proving otherwise [2001] VSC 305 ¶ 127.

16. [2002] HCA 56 at ¶ 44 (opinion of Gleeson, C.J.). *See also id.* at ¶ 84 (opinion of Kirby, J.).

17. An interesting postscript to this case is that the reporter who wrote the article at issue took the highly unusual, if not unprecedented, step of challenging the High Court's ruling by filing a petition with the United Nations' Human Rights Commission in which he

Dow Jones' argument that New Jersey should be deemed the place of publication, to the exclusion of all other places, was driven heavily by the so-called "single publication rule," which is a peculiar rule of American defamation jurisprudence which arose to deal with widely disseminated publications such as books and newspapers, and later radio and television broadcasts. Conceptually, and originally under common law, one could say that if one thousand copies of a defamatory article were made and distributed to one thousand different people, there have been one thousand different publications, and a plaintiff would have one thousand different claims against the defendant.[18] This could make the litigation of defamation claims rather complicated, however, particularly when publication had occurred in multiple jurisdictions. To simplify matters, American courts developed the single publication rule, which provides that any single edition of a book, newspaper, or so forth, is deemed to constitute a "single publication," and a plaintiff is allowed only one action to recover damages for that publication.[19] In that single action, however, he may recover all damages suffered in all jurisdictions.[20] The single publication rule is followed in at least 27 U.S. states, including New Jersey,[21] and it has recently been held applicable to defamatory publications on the Internet.[22]

The single publication rule does not provide that any particular jurisdiction is the place where the single action must be heard, but does nonetheless reinforce the notion that publication is the result of a singular action on the part of the publisher. On the basis of this rule, Dow Jones argued that what was determinative in this case was its own act of placing the article on a server in New Jersey, which constituted a single act of publication, and not the reading of the article in multiple jurisdictions around the world. Under the single publication rule Gutnick could only bring one action against Dow Jones to recover all damages for injury to his reputation and, Dow Jones contended, Victoria was an inappropriate place to litigate all such claims, especially when, in its view, it was the law of New Jersey which was to apply to the case.

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has alleged that the Court's ruling constitutes a breach of Australia's obligation to protect free speech under Article 19 of the International Covenant on Civil and Political Rights. *See* Sydney Morning Herald, *Australian Laws Challenged at U.N.*, <http://www.smh.com.au/articles/2003/04/18/1050172745955.html> (Apr. 18, 2003).

18. In the mid-nineteenth century, an English court upheld an action for libel on the basis of the re-sale in 1847 of a single copy of a newspaper which had originally been printed in 1830. *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

19. *Restatement (Second) of Torts* § 577A(3)-(4) (1977).

20. *Id.* at § 577A(4)(b).

21. *See generally Barnes v. Holt, Rinehart & Winston, Inc.*, 330 A.2d 38 (N.J. Super. L. Div. 1974), *aff'd*, 359 A.2d 501 (N.J. Super. App. Div. 1976).

22. *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky. 2003); *Firth v. New York*, 775 N.E.2d 463 (N.Y. 2002).

Gutnick was not seeking to recover for damage sustained outside of Victoria, however, and undertook not to do so.[23] An even bigger problem for Dow Jones, though, was the fact that the single publication rule is not a legal doctrine followed in Australia. Instead, the publication of a defamatory statement in each Australian state or territory is deemed to constitute a separately actionable wrong, a principle which stems from Australia's concern with an individual's right to his reputation and his interest in vindicating it wherever it is assailed.[24]

Dow Jones argued strenuously that the High Court should reformulate Australian defamation law so as to incorporate the single publication rule, and to designate the location of the server as the place of single publication, and contended that the advent of the Internet was a sufficiently revolutionary technological advancement so as to warrant a dramatic re-adjustment of the law. Dow Jones argued that the Web had resulted in an information explosion that transcended national boundaries and reached into every country in the world, and that publishers on the Web needed to have certainty as to which law governed their use of the Web, lest they be forced to consider the laws of every country from Afghanistan to Zimbabwe and then comply with the most restrictive defamation laws that could apply. This would have the effect of chilling speech on the Internet, Dow Jones maintained, and such an undesirable result could be avoided by establishing a hard and fast rule that deemed the place of uploading to be the place of publication and the place whose law would govern defamation disputes. Moreover, Dow Jones contended that American law was appropriately applicable to this case, as the article was written "in America for Americans" concerned about the American financial markets, and accordingly had "an indelibly American complexion."[25]

The Court found numerous problems with this submission. As Justice Kirby stated, "[w]here a person or corporation publishes material which is potentially defamatory to another, to ask the publisher to be cognisant of the defamation laws of the place where the person resides and has a reputation is not to impose on the publisher an excessive burden."[26] Justice Callinan was even more blunt, noting that "[p]ublishers

23. [2002] HCA 56 at ¶ 6 (opinion of Gleeson, C.J.).

24. *See e.g. Australian Broad. Corp. v. Waterhouse*, [1991] 25 NSWLR 519. In that case, the court explained that several other legal mechanisms in Australia provided protection against an unwieldy number of cases arising from multiple publications. These consisted of rules providing for relief against abuse of process, the aggregation of damages, the consolidation of proceedings, and the application of statutory provisions against double compensation. This observation was cited by Justice Kirby in *Dow Jones*, who also added the principle of estoppel to the list. [2002] HCA 56 at ¶ 127 n. 155 (opinion of Gaudron, J.).

25. [2001] VSC 305 at ¶ 20.

26. [2002] HCA 56 at ¶ 151 (opinion of Kirby, J.).

are not obliged to publish on the Internet," and pointing out that "[i]f the potential reach [of jurisdiction] is uncontrollable then the greater the need to exercise care in publication."[27]

Interestingly, the U.S. District Court in New Jersey ruled, two years before the *Dow Jones* case, that it was unreasonable to subject a defendant to jurisdiction in New Jersey merely because the defendant's Web server was located in that state.[28] While this ruling was not delivered in the context of a defamation case (rather it involved claims of trademark infringement), the opinion would have provided precedent for Dow Jones to resist jurisdiction in New Jersey, had it been so inclined (and had it not undertaken to submit to it in the current proceedings).[29] This decision, which the Australian High Court did not appear to be aware of, reveals that courts on both sides of the Pacific view the location of a server to be a rather flimsy basis for asserting jurisdiction.

And rightly so. As Justice Kirby noted in *Dow Jones*, "the place of uploading of materials onto the Internet might bear little or no relationship to the place where the communication was composed, edited, or had its major impact."[30] The Court also expressed concern that if the location of a server determined the law to be applied in a case "[p]ublishers would be free to manipulate the uploading and location of data so as to insulate themselves from liability in Australia or elsewhere, for example, by using a Web server in a 'defamation free jurisdiction' or one in which the defamation laws are tilted decidedly towards defendants."[31] Indeed, as discussed above, the United States is viewed as such a place, and the Court was concerned that in light of the fact that a "vastly disproportionate" share of all of the Web servers in the world are in the United States, a rule focusing on the location of the Web server would greatly extend the reach of American law.[32] Justice Callinan went so far as to decry Dow Jones' attempt to impose "an American legal hegemony" where the consequence:

> would be to confer upon one country, and one notably more benevolent to the commercial and other media than [Australia is], an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States.[33]

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27. *Id.* at ¶ 182 (opinion of Callinan, J.).

28. *Amberson Holdings LLC v. Westside Story Newsp.*, 110 F. Supp. 2d 332 (D.N.J. 2000).

29. [2002] HCA 56 at ¶ 176 (opinion of Callinan, J.).

30. *Id.* at ¶ 130 (opinion of Kirby, J.).

31. *Id.* at ¶ 199 (opinion of Callinan, J.) (internal punctuation modified).

32. *Id.* at ¶ 133 (opinion of Kirby, J.).

33. *Id.* at ¶ 200 (opinion of Callinan, J.). Justice Callinan's concerns about the overextension of American power were echoed by members of Australia's legislature who heck-

The Court was unmoved by the assertion that a new rule of defamation was justified by the advent of the Internet. While recognizing that "the Internet does indeed present many novel technological features," the Court stressed that "it also shares many characteristics with earlier technologies that have rapidly expanded the speed and quantity of information throughout the world."[34] Moreover, the Court appeared to be of the view that the imposition of a single publication rule of the sort desired by Dow Jones should only be done through legislation.[35]

II. AMERICAN CASE LAW

Three days after the High Court decided *Dow Jones*, a federal appellate court in the United States issued an opinion that reached a totally different result in a case whose facts were quite similar, although it did not involve international Internet communication, but rather communication between different states.[36] This case, *Young v. New Haven Advocate*, was initiated by the warden of a Virginia prison against two Connecticut newspapers which had written articles that discussed the treatment of prisoners which Connecticut had shipped to Virginia correctional facilities as a result of overcrowding at Connecticut's prisons.[37] Most of the prisoners that Connecticut sent to Virginia were black or Hispanic, and the newspapers published articles that implied that the plaintiff was a racist and that alleged harsh treatment of prisoners in Virginia.[38] These articles were posted on the newspapers' Web sites, which were accessible to Virginia residents and which, the plaintiff alleged, defamed his reputation in Virginia.[39] The warden commenced suit in a federal court in Virginia, and the defendants moved to dismiss the case for lack of jurisdiction.[40] The district court denied the motion and the defendants were granted leave to pursue an interlocutory appeal.[41] The Court of Appeals for the Fourth Circuit ruled that the defendants were not subject to suit in Virginia and reversed.[42]

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led President George W. Bush during his address to parliament in the fall of 2003 for undertaking unilateral military action in Iraq.

34. *Id.* at ¶ 125 (opinion of Kirby, J.).

35. As Justice Kirby noted, the Australian Law Reform Commission, which in 1979 made recommendations designed to harmonize the laws of defamation in Australia's various jurisdictions, suggested that the single publication rule be adopted. None of its recommendations has been enacted, however. [2002] HCA 56 at ¶ 128 (opinion of Kirby, J.).

36. *See generally Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied* (May 19, 2003).

37. *Id.* at 259.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Young*, 315 F.3d at 260-61.

42. *Id.* at 264

In reaching its conclusion the appellate court focused on the actions and intent of the defendants. The court applied the long-established *International Shoe* jurisdictional standard under which an out-of-state defendant is deemed amenable to jurisdiction in a particular forum state only where the "defendant purposefully established minimum contacts in the forum state."[43] *Young* considered three factors as relevant to this inquiry: 1) whether the defendant had purposefully availed itself of the privileges of conducting activities in Virginia, 2) whether the plaintiff's claim arises out of the defendant's Virginia-related activities, and 3) whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable.[44] The court stated that:

> a person's act of placing information on the Internet is not sufficient by itself to subject that person to personal jurisdiction in each State in which the information is accessed, otherwise, a person placing information on the Internet would be subject to personal jurisdiction in every State, and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted.[45]

The fact that the defendants' Web site was accessible in Virginia would provide a basis for jurisdiction in Virginia only if they, in the court's words, "manifest an intent to target and focus on Virginia readers."[46] This, the court ruled, they did not do. Instead, the court concluded that

> these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets, and to provide their local markets with a place for classified ads. . . . The focus of the articles. . . was the Connecticut prisoner transfer policy and its impact on the transferred prisoners and their families back home in Connecticut. The articles reported on and encouraged a public debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens. Connecticut, not Virginia, was the focal point of the articles.[47]

The court's opinion was consistent with a decision which had recently been issued by the Minnesota Supreme Court. In *Griffis v. Luban*,[48] the court held that a Minnesota woman could not properly be sued in Alabama for posting comments on a Web site which allegedly damaged the reputation of an Alabama plaintiff.[49] The plaintiff in that

43. *Intl. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

44. *Young*, 315 F.3d at 261 (applying *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 712 (4th Cir. 2002), *cert. denied* (Jan. 13, 2003)).

45. *Id.* at 263 (quoting *ALS Scan*, 293 F.3d at 712).

46. *Id.* at 263.

47. *Id.*

48. 646 N.W.2d 527 (Minn. 2002), *cert. denied*, 155 L. Ed. 2d 225 (2003).

49. *Id.* at 536-37.

case was an instructor of Egyptology at the University of Alabama. Both the plaintiff and the defendant participated in an Online bulletin board about archaeology. The defendant posted messages on the Web site that challenged the plaintiff's Egyptology credentials, and the plaintiff sued her in an Alabama court. The defendant did not respond to the complaint and a default judgment was taken. The plaintiff thereafter sought to have the default judgment enforced by a court in Minnesota, and the defendant then moved to vacate the judgment on the grounds that the Alabama court had lacked jurisdiction over her. The trial judge ruled that jurisdiction in Alabama had been proper, and this ruling was affirmed by the Minnesota court of appeals, the intermediate court in Minnesota's three-level court system.

The defendant appealed this ruling further to the Minnesota Supreme Court, which reversed the earlier rulings. The supreme court stated that the critical question in the case was "whether the defendant expressly aimed the allegedly tortious conduct at the forum such that the forum was the focal point of the tortious activity."[50] The plaintiff argued that this question could be answered in the affirmative, as the defendant knew that the plaintiff lived in Alabama and that the messages could be read there. She alleged in addition that the defendant's statements had had "deleterious effects" on her professional reputation in Alabama, as well as a consulting business she engaged in. The court disagreed, concluding that "the evidence does not demonstrate that [the defendant's] statements were 'expressly aimed' at the state of Alabama."[51] The court explained that

> even if we assume [the defendant's] statements were widely read by followers of the [archaeology] newsgroup, the readers most likely would be spread all around the country – maybe even around the world – and not necessarily in the Alabama forum. The fact that messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant's conduct.[52]

The plaintiff unsuccessfully sought review of this decision from the U.S. Supreme Court.[53]

Young and *Griffis* followed some recent American cases which had held, outside of the defamation context, that the mere accessibility of a Web site within a particular geographic location did not provide a basis

50. *Id.* at 535.

51. *Id.*

52. *Id.* at 536 (emphasis original). In addition, there was no evidence in this case that anyone in Alabama besides the plaintiff had actually read the messages at issue.

53. *See generally Griffis v. Luban*, 155 L. Ed. 2d 225 (2003).

for jurisdiction in that location.[54] These cases, which concerned such issues as trademark infringement and antitrust claims, did not involve the same dynamics of communication that underlie a defamation action, where a defendant intentionally makes a statement concerning the plaintiff and communicates that statement to a place where the plaintiff's reputation suffers. These cases should therefore only provide weak authority for the proposition that jurisdiction in a defamation case can not lie in the place where defamatory communication is received and where the plaintiff's reputation is maligned. Moreover, *Young* and *Griffis* seemed to mark a departure from the approach established by the U.S. Supreme Court for multi-jurisdictional claims of defamation involving printed periodicals. In 1984, the Supreme Court held in *Calder v. Jones* that a California actress could sue the tabloid *National Enquirer*, which is published in Florida and sold throughout the United States, for libel in a California court.[55] The Court considered whether the defendants had sufficient minimum contacts with California so as to reasonably subject them to jurisdiction in that state, and concluded that jurisdiction was proper in light of defendants' "intentional, and allegedly tortious actions [that] were expressly aimed at California."[56] The Court explained:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of [plaintiff's] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.[57]

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54. *See generally ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (copyright infringement); *GTE New Media Servs., Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) (antitrust case); *Soma Med. Intl. v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999) (breach of contract and negligence claims); *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999) (copyright and patent infringement claims); *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (trademark infringement and unfair competition claims); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (trademark infringement). *But see Panavision Intl., LP v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (jurisdiction proper in case dealing with "cyber squatting"); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (jurisdiction proper in light of contractual connection with forum); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (finding jurisdiction in trademark case and adopting a "sliding scale" approach to determining the existence of jurisdiction based on Internet contacts).

55. 465 U.S. 783 (1984).

56. *Id.* at 789.

57. *Id.* at 788-89. The defendants had argued against jurisdiction in California, contending that subjecting newspapers to defamation actions in distant states would potentially chill their free speech rights. The Court rejected this argument, noting that the free speech rights of defendants were already protected by the substantive law of defamation in

In the *Dow Jones* case, the Supreme Court of Victoria believed that *Calder* supported the assertion of Internet-based jurisdiction in Victoria. The American courts that recently decided *Young* and *Griffis* read *Calder* rather narrowly, however, and refused to see it as precedent for holding out-of-state defamers whose comments enter a state through cyberspace accountable in that state. The *Young* court rather summarily stated that it would not read *Calder* broadly and expressed concern that publishers might be called to answer for their comments in every state simply by posting them on the Web. The Minnesota supreme court made more of an effort to distinguish *Calder* and suggested that that case was driven by the special relationship between the State of California and the entertainment industry, and that there was not a similar relationship between the State of Alabama and the field of Egyptology.[58]

Curiously, neither *Young* nor *Griffis* discussed another U.S. Supreme Court case which had been decided the same day as *Calder* and indicated that, in the context of paper publications, the sale of a relatively small number of magazines in a state could subject the publisher to jurisdiction there, even if the plaintiff had no connection whatsoever to that state. In *Keeton v. Hustler Magazine, Inc.*,[59] the editor of *Penthouse* magazine claimed that she had been defamed by *Hustler*, a magazine that has often been the subject of major free speech cases in the United States,[60] but by the time she decided to sue, the statute of limitations, which in defamation actions is very short in many American states (often one year), had expired in every state except New Hampshire. Neither *Hustler* nor the plaintiff was based in New Hampshire. The plaintiff lived in New York; *Hustler* was incorporated in Ohio and had its principal offices in California. Nonetheless, the plaintiff commenced a federal suit in New Hampshire, basing jurisdiction on the fact that *Hustler* sold magazines in the state, as it did throughout the country. Sales in New Hampshire amounted to less than one per cent of *Hustler*'s total circulation, however.[61] The district court dismissed the case for lack of jurisdiction, and the First Circuit affirmed the dismissal, ruling that "the New Hampshire tail is too small to wag so large an out-of-state dog."[62] The Supreme Court reversed, holding that the action could proceed in New Hampshire, as the sale of magazines in that state (on the order of

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the United States, and that to consider this concern at the jurisdictional stage would be "a form of double counting." *Id.* at 790.

58. *Griffis*, 646 N.W.2d at 536. *Calder* also appears to have been driven by the fact that more copies of the *Enquirer* were sold in California than in any other state. *Calder*, 465 U.S. at 785.

59. 465 U.S. 770 (1984).

60. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

61. *Keeton v. Hustler Mag., Inc.*, 682 F.2d 33, 34 (1st Cir. 1982).

62. *Id.* at 36.

10-15,000 copies per month), provided a sufficient basis for jurisdiction there. The Court acknowledged that the bulk of the harm done to the plaintiff occurred outside New Hampshire, but stated that "[t]he victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts.'"[63] The Court found it reasonable to hold *Hustler* accountable in New Hampshire, as it chose to enter the New Hampshire market and could therefore be charged with knowledge of its laws.[64] Interestingly, the Court indicated that since New Hampshire had a single publication rule, it was appropriate, and *Hustler* could have expected, to litigate all of the plaintiff's defamation claims in a state where only a small portion of all the offending copies had been distributed.[65] This contrasts with the position taken by Dow Jones, which was of the view that the single publication rule required that its case be litigated in a state where it had a presence and not in a state where only a small percentage of the subscribers to its Web site resided.

While neither *Young* nor *Griffis* said so explicitly, these courts seemed to be of the view that the Internet itself was such a unique medium of communication that the print-based analysis of *Calder* could not properly be extended. This view is of course in contrast with the High Court in Canberra, which expressly rejected Dow Jones' argument that Australia's established common law should be reconfigured in light of the novelty of the Internet's features.

III. CONCLUSION

In the end, the American and Australian approaches to the analysis of defamatory language appear to be irreconcilable, as each is the product of a different societal judgment regarding the relative worth of free speech compared to a person's reputational interest. The international community is undertaking efforts to address this clash of legal norms by treaty, and a Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters has been prepared by the Hague Conference on Private International law, under which a plaintiff would be able to recover damages for defamatory publication on the Internet by suing either in the state in which the plaintiff is habitually resident or in the state where the defendant is habitually resident.[66] The treaty process is a slow one, however, and we can accordingly expect many more cases to arise in which people complain about speech on the Internet which violates the cultural norms of the country where the information

63. *Keeton*, 465 U.S. at 780.

64. *Id.* at 779.

65. *Id.* at 777.

66. As noted by the Supreme Court of Victoria in *Dow Jones*. [2001] VSC 305 at ¶ 74.

is received but which is protected under the law of the country where it originates.[67] Such disputes can arise not only in defamation cases, but can extend to all laws which seek to govern communication in some manner. The nations of the world have starkly different laws regarding such issues as the right to engage in open political discourse, to criticize the government, to promote notions of racial superiority, to blaspheme religion, to advertise certain products, and to produce or consume sexually explicit speech.[68] For those of us who are intrigued by the Internet, with its endless possibilities for communication, finding information, planning vacations, checking movie listings, and generally wasting time, it will be interesting to watch as technology and the law continues to evolve and influence each other's development.

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67. The U.S. and Australia are not the only countries where courts have been called on to decide whether they have jurisdiction over Internet-based defamation claims. A Canadian court ruled that it had jurisdiction over a defamation action arising from an article which had been published in Uganda, posted on the Internet, and then downloaded in Ontario. *Kitakufe v. Oloya*, Ontario Ct. of Justice. The High Court of Malaysia concluded that a defamatory article which had been posted on the Internet by news media in Singapore had not been published in Malaysia in a case where there was no evidence that the offending articles had been accessed by anyone in that country. *Lee Teck Chee & Anor v. Merrill Lynch Intl. Bank Ltd.*, [1998] C.L.J. 188. In addition, in *Godfrey v. Demon Internet, Ltd.*, [1999] 4 All E.R. 343, an English judge remarked that publication on the usenet (the Internet's close cousin) occurred whenever someone accesses a posting and "sees" it. The Supreme Court of Victoria made reference to all three of these cases. [2001] VSC 305 at ¶¶ 44-56.

68. The U.S. Supreme Court has observed that once a provider posts sexually explicit content on the Internet it cannot prevent that content from entering any community in the world. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844 (1997) (declaring Internet censorship statute unconstitutional). *See also* the Court's recent opinion upholding the constitutionality of a federal statute designed to limit access to sexually-themed speech at public libraries. *U.S. v. Am. Lib. Assn.*, 539 U.S. 194 (Jun. 23, 2003). American and French courts have dueled over Yahoo's right to facilitate the sale of Nazi memorabilia on the Internet. *Compare Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) *with* Order of the Tribunal de Grande Instance de Paris of 22 May 2000.