ICE PATCH ON THE INFORMATION SUPERHIGHWAY: FOREIGN LIABILITY FOR DOMESTICALLY CREATED CONTENT

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INTRODUCTION

Until recently, the Internet was a legal backwater. Functioning primarily as a network of governmental, university and other "institutional" computers, it was for the most part the preserve of researchers, computer sophisticates, and like users.[1] Except for occasional destructive pranks by perverse hackers, little of any legal significance occurred on the Internet.[2]

So-called browser programs like Netscape and Mosaic, which have rapidly gained popularity in the last few years, now promise to change everything. Using formats familiar to the most casual computer user, these browsers provide an easy-to-use graphical interface with the Internet.[3] Today, anyone can mine the Internet's riches from office or home. This ready accessibility is a two-way street: those same offices and homes now are targets for vendors, advertisers, and purveyors of all kinds of Internet content. Even more enticing for those seeking new markets or audiences is the fact that the Internet circumnavigates the globe.[4] An Internet

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[1] Ann Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1646-47 (1995).

[2] *See* John Markoff, *A Most Wanted Thief is Caught in His Own Web*, N.Y. TIMES, Feb. 16, 1995, at A1, and Tsutomu Shimomura with John Markoff, *Catching Kevin*, WIRED, Feb. 1996, at 119 (discussing the case of cyberpunk Kevin D. Mitnick). *See* Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, *in* INTELLECTUAL PROPERTY LAW INSTITUTE 1995, at 9, 33-34 (PLI Patents, Copyrights, Trademarks and Literary Prop. Course Handbook Series No. G-416, 1995) (discussing the case of Robert T. Morris, the Cornell student who sent a destructive "worm" coursing through the Internet).

[3] Internet sites accessible via a browser are sometimes described as forming the "World Wide Web." However, browsers also provide access to non-Web services on the Internet, such as gopher and telnet. ACLU v. Reno, 929 F. Supp. 824, 836 (E.D.Pa. 1996), *appeal docketed*, 65 U.S.L.W. 3295 (No. 96-511) (decision of three-judge panel). Thus, while the Internet and the Web are not the same thing, for the average user browsing with a Windows-based graphical interface, it all appears to be the same. For the sake of consistency, this article will refer to the "Internet" or the "Net" interchangeably in discussing the wide variety of on-line services now available, such as Web sites, Gopher, Archie, ftp, and telnet. *See* Amy Cortese et al., *The Software Revolution: The Internet Changes Everything*, BUS. WK., Dec. 4, 1995, at 78.

[4] By the beginning of 1995, the Internet linked 75 countries, with another 77 con-

server located in Boston can communicate as easily with Rio de Janeiro or Hong Kong as with New York City.

Ironically, the Internet's facile crossing of national borders both enhances and threatens its potential. As use of the Internet shifts more toward commercial pursuits, it will see its share of the abuses typical in other areas of human activity.[5] Although national governments have until now maintained a benign attitude toward the Net's unregulated flow of information across their borders, it is naive to believe that a government will refrain from interceding where the Internet harms its citizens or national interests. Moreover, even in situations that do not concern governments, the private civil law of a particular country might invite forum shopping by private litigants.[6]

Because current technology does not permit construction of impermeable walls to control the flow of Internet communication from country to country (walls being inimical to the concept of the Internet in any event), legal action—whether civil, criminal, or regulatory—affecting the Internet in any country will have Internet-wide, and consequently international implications.[7] A recent ex-

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nected by e-mail. John Verity & Rob Hof, *The Internet: How It Will Change The Way You Do Business*, BUS. WK., Nov. 14, 1994, at 82.

5 *See* B. de Schutter, *Trends in Coping With Telecom-related Delinquency*, *in* LEGAL AND ECONOMIC ASPECTS OF TELECOMMUNICATIONS 711 (S. Schaff ed., 1990).

6 Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1.

7 The U.S. federal system has already provided an analogy with the federal government's successful obscenity prosecutions in Tennessee of the operators of an "adult" computer billboard in San Jose, California. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). San Jose law-enforcement officials had previously determined that the billboard was not obscene under their local community standards, but the government prosecuted the defendants under the community standards of Memphis, where the billboard download occurred. Pamela A. Huelster, *Cybersex and Community Standards*, 73 B.U. L. Rev. 865, 866 (1995). In affirming the convictions, the Court of Appeals found that the defendants could control the destination of downloads through passwords and therefore knowingly sent the offensive materials into Tennessee by giving out passwords to Tennessee residents. *Thomas*, 74 F.3d 701. The affirmance in the *Thomas* cases thus did not decide whether all providers of "adult" material on the Internet—including those who cannot control the destinations of downloaded materials—must conform to obscenity standards everywhere to be safe from prosecution. *See A.C.L.U. v. Reno*, 929 F. Supp. at 852-53, 862-63 (determining that the Communications Decency Act of 1996 is void for vagueness in part because of lack of national standard of obscenity).

However, several recent civil decisions suggest that Internet jurisdiction is national. In both Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996), and Maritz, Inc. v. Cybergold, Inc., No. 4:96CV01340 ERW, 1996 U.S. Dist. LEXIS 14978 (E.D. Mo. Aug. 19, 1996), the court held that an Internet transmission was sufficient basis to exercise personal jurisdiction under the applicable state long-arm statute and the Due Process Clause. *See also* Playboy Enters., Inc. v. Chuckleberry Publishing, Inc., No. 79 Civ. 3525, 1996 WL 396128 (S.D.N.Y. July 16, 1996), holding magazine images downloadable without a password from an Italian magazine's Internet site violated 15-year-old trademark injunction against distribution of the magazine in U.S. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), holding *contra*, is distinguishable by the fact that there (in contrast with *Inset Systems* and *Maritz*) the Net surfer visiting the defendant's site could not access the defendant's services or otherwise transact business with the defendant. *But*

ample of this phenomenon is CompuServe's decision to deny its subscribers worldwide access to certain sex-related discussion groups because of potential liability under German anti-pornography laws.[8] The CompuServe case is the tip of the iceberg.[9]

Using the laws of the United Kingdom, France, and Italy as representative examples, this article will first describe how domestically created Internet content raising no legal concerns in the United States could conflict with foreign law in four areas important for Net-disseminated information: defamation, so-called moral rights (*droit moral*), comparative advertising, and right of privacy.[10] Proceeding on the assumption that the risk of liability under the laws of other countries will retard Internet innovation and exploitation,[11] this article then will propose an international solution to permit continued Internet development and evolution.[12]

PART I: FOUR AREAS OF POTENTIAL CONFLICT

A. *Defamation*

A "defamation" is an expression, usually by words, "that tends to injure "reputation" in the popular sense; to diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions

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see Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So.2d 1251 (Fla. Dist. Ct. App. 1994) (holding due process bars exercise of long-arm jurisdiction over defendant whose only contact with state was via on-line access to computer database).

8 *See* John Markoff, *On-Line Service Blocks Access to Topics Called Pornographic*, N.Y. TIMES, Dec. 29, 1995, at A1. CompuServe subsequently announced that it was reinstating all but five of the discussion groups and supplying screening software to users requesting that option. Peter H. Lewis, *An Online Service Halts Restriction on Sex Material*, N.Y. TIMES, Feb. 14, 1996, at A4. Even when CompuServe's ban was in effect, German Net users could circumvent their government's restriction by accessing the sites directly through the Internet. *Mitterrand Cyberbook Spins Tangled Legal Web*, AGENCE FRANCE PRESSE INTERNATIONAL FRENCH WIRE, Jan. 24, 1996; *see also Compuserve Caves In*, NETGUIDE, Mar. 1996, at 80.

9 *See* Nathaniel C. Nash, *Germans Again Bar Internet Access, This Time to Neo-Nazism*, N.Y. TIMES, Jan. 29, 1996, at D6 (reporting that after receiving warnings from the German state prosecutor, Deutsche Telekom blocked Internet access to a Toronto-based neo-Nazi site); *cf.* Alan Cowell, *German Court Begins Hearing Case of American Neo-Nazi*, N.Y. TIMES, May 10, 1996, at A3 (reporting on Germany's criminal prosecution of an American neo-Nazi for mailing prohibited Nazi paraphernalia into Germany from the U.S.). The U.S. had refused extradition on the ground that the defendant's activities in the United States were protected by the First Amendment, but Germany successfully extradited him from Denmark when he visited that country.

10 *See* Michael D. Scott, *Advertising in Cyberspace: Business and Legal Considerations*, 12 COMPUTER LAW. 1 (1995).

11 Branscomb, *supra* note 1, at 1649; Huelster, *supra* note 7, at 887.

12 *See* Branscomb, *supra* note 1, at 1647 ("[T]ransferring legal norms from the real world may result in the application of rigid rules inappropriate to the cybercommunities and may jeopardize the full development of the information agora that the technology promises.").

against him."[13] A defamation committed to writing is libel, whereas an oral defamation is slander.[14]

In a defamation suit at common law, the plaintiff needs to show only the publication of a defamatory statement to a third party, some fault of the defendant (usually no more than negligence) and damages. Moreover, in the case of libel the plaintiff is not required to prove actual damages on the rationale that the written word leaves a greater blot on reputation because of its permanence and its susceptibility to wider circulation than an oral statement.[15] However, in the United States today, First Amendment considerations have significantly altered these common-law rules.[16] "The requirements for a [defamation] cause of action may now differ dramatically from case to case, depending upon . . . the identity of the plaintiff, the identity of the defendant, [and] the character of the allegedly defamatory statement . . . ."[17] In particular, to recover for defamation, a public official or public figure must prove that the defendant knew or recklessly disregarded the falsity of the defamatory statement *and* that the plaintiff suffered actual damages.[18] Even private plaintiffs suing media defendants generally cannot rely on a presumption of injury as they may sometimes do at common law and must prove actual damages.[19]

Defamation in the United Kingdom

In contrast with the United States, British law does not place any restrictions on defamation claims by public officials and public

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[13] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984); *see* ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 2.4.1, at 69-75 (2d ed. 1994); 1 SLADE R. METCALF & LEONARD M. NIEHOFF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS, AND REPORTERS § 1.01 (1995).

[14] SACK & BARON, *supra* note 13, § 2.3, at 67-9; METCALF & NIEHOFF, *supra* note 13.

[15] SACK & BARON, *supra* note 13, § 2.3, at 69; METCALF & NIEHOFF, *supra* note 13. Although text appearing on the Internet, written in a type of word-processing code known as Hypertext Mark-Up Language ("HTML"), sometimes exists only in computer form, anyone browsing the Internet can read an HTML document as if it were written on paper, and can download and print the document. Moreover, the Internet allows for even greater circulation than the written word. A defamation in HTML therefore should be treated as libel. *See* Michael Smyth & Nick Braithwaite, *First U.K. Bulletin Board Defamation Suit Brought: English Courts May Be The Better Forum For Plaintiffs Charging Defamation in Cyberspace,* NAT'L L.J., Sept. 19, 1994, at C10.

[16] SACK & BARON, *supra* note 13, §§ 1.1-1.12, 2.1, at 63; METCALF & NIEHOFF, *supra* note 13, § 1.19.

[17] SACK & BARON, *supra* note 13, § 2.1, at 63; *see also* METCALF & NIEHOFF, *supra* note 13, § 1.01, at 1-5 to 1-6.

[18] SACK & BARON, *supra* note 13, §§ 1.1-.5. The definition of what is defamatory also may change where the statement concerns a public official or public figure. *Id.* § 2.4.19, at 119-21; *see also* METCALF & NIEHOFF, *supra* note 13, §§ 1.67-.69.

[19] SACK & BARON, *supra* note 13, § 2.1.4, at 66.

figures, or accord special treatment to media defendants.[20] Irrespective of the identity of either the plaintiff or the defendant, United Kingdom law applies the same common-law standard, requiring the plaintiff to prove no more than that the defendant negligently published a defamatory statement to a third party.[21] In the context of libel, while American law requires the plaintiff to prove the falsity of the defendant's statements, British law presumes falsity.[22] "[T]he entire burden of proving that the matter complained of is true or that it has not caused the plaintiff damage is generally on the defendant."[23]

In addition, British courts may still allow private litigants to prosecute claims for criminal libel, with the leave of the court, where the court finds that the defamation is "sufficiently serious to require the intervention of the Crown in the public interest."[24] In order to escape liability in a criminal libel case, the defendant must show not only that the allegedly defamatory statement is true, but also that the publication of the statement served the public interest.[25] Although criminal libel is not much favored in the U.K. today,[26] a determined plaintiff still can use the threat of criminal prosecution to inflict economic punishment on a defendant.[27]

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20 The Newspaper Libel and Registration Act 1881, 44 & 45 Vict., ch. 60, § 4 (Eng.), makes a slight concession to newspapers by providing that in a libel suit against any person responsible for a newspaper's publication, the court may hold a summary hearing and, "if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case." *Id.*

21 PETER F. CARTER-RUCK & RICHARD WALKER, CARTER-RUCK ON LIBEL AND SLANDER 31 (3d ed. 1985). Thus, defamation suits by major political leaders—virtually unknown in the United States today—still occur in the United Kingdom. For example, in 1993 Prime Minister John Major sued *New Statesman and Society* for libel over an article accusing him of committing adultery. Steve Platt, *The Curious Case of John Major's Libel Action*, NEW STATESMAN & SOC., July 16, 1993, at 16. Although Major settled with the magazine for only nominal damages, the publisher ultimately paid out more than £250,000 indemnifying news vendors and distributors who also had settled with Major and his alleged female companion. *Id.*

22 CARTER-RUCK & WALKER, *supra* note 21, at 31. As in the United States (*see supra* text accompanying notes 13-15), United Kingdom law recognizes that libel has a greater tendency to injure reputation. *Id.* at 30. Thus, a United Kingdom court almost certainly would treat an Internet defamation as libel. *See supra* note 15 and accompanying text. *See* The Defamation Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 1 (Eng.) (providing that "wireless telegraphy shall be treated as publication in permanent form").

23 CARTER-RUCK & WALKER, *supra* note 21, at 31.

24 Gleaves v. Deakin, 1980 App. Cas. 477, 494, [1979] 2 All E.R. 497, 508 (H.L.); *see also* Goldsmith v. Presdram Ltd., [1977] 2 All E.R. 557 (Q.B.). On criminal libel in the United Kingdom generally, see CARTER-RUCK & WALKER, *supra* note 21, at 167-70; DAVID HOOPER, PUBLIC SCANDAL, ODIUM AND CONTEMPT 155-59 (1984).

25 *Gleaves v. Deakin*, 1980 App. Cas. at 483, [1979] 2 All E.R. at 498-99 (H.L.). *See* CARTER-RUCK & WALKER, *supra* note 21, at 169-70; HOOPER, *supra* note 24, at 176.

26 HOOPER, *supra* note 24, at 159, 176-78.

27 For an entertaining discussion of how the international financier Sir James Goldsmith used his limitless resources and a criminal libel prosecution to attempt to destroy *Private Eye*, a notorious scandal sheet, see HOOPER, *supra* note 24, at 159-76; *see also* Gold-

A plaintiff with a transatlantic reputation in both the United States and the United Kingdom will find obvious advantages in bringing a defamation suit in the United Kingdom.[28] Where the defendant is an American-based international media company with assets in the United Kingdom vulnerable to a judgment, a defamation suit there can chill the American company's journalistic activities without regard to the protections of the First Amendment.[29] The notorious international tycoon Robert Maxwell used that tactic to suppress his American critics and divert attention from the financial manipulations that eventually destroyed his media empire.[30]

With more American newspapers, magazines, and other media going onto the Internet, content created in this country in harmony with the liberal standards of the First Amendment will conflict ever more frequently with restrictive United Kingdom defamation law.[31] It is just a matter of time before another "Maxwell" uses the pro-plaintiff British law to try to suppress American content.[32] "[M]ore U.S. residents may soon select from a number of favorable forums, such as England, and choose to file defamation suits abroad."[33]

To be sure, it is unlikely that defamation plaintiffs will rush *en*

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smith v. Sperrings Ltd., [1977] 2 All E.R. 566 (C.A.) (describing some of Goldsmith's tactics, including forcing settling distributors to agree not to sell *Private Eye* in the future).

28 *See* Eric J. McCarthy, *Networking in Cyberspace: Electronic Defamation and the Potential For International Forum Shopping*, 16:3 U. PA. J. INT'L BUS. L. 527, 531, 552-53 (1995); Robert Rice, *Business and the Law: Boundaries of Libel Law Mapped Out*, FIN. TIMES, Mar. 14, 1995, at 18.

29 *See* Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235, 260-61 (1994); Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments In U.S. Courts*, 94 COLUM. L. REV. 1978, 2007-08 (1994) ("The danger of foreign libel laws . . . lies in their potential to induce U.S. media sources to tailor their publications to the most restrictive laws. . . . In that market [of international transmissions], there would be a pronounced tendency to create a single, safe product."); Smyth & Braithwaite, *supra* note 15; *see also* Desai v. Hersh, 719 F. Supp. 670, 677 (N.D. Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir.), *cert. denied*, 506 U.S. 865 (1992).

30 *See, e.g.*, *Private Lives*, ECONOMIST, Sept. 19, 1992, at 18; D. D. Guttenplan, *"Miracle Max" and the Marveling Media*, COLUM. JOURNALISM REV., May-June 1992, at 47; Piers Brendon, *Amendment Envy*, COLUM. JOURNALISM REV., Nov.-Dec. 1992, at 68.

31 *See* Youm, *supra* note 29, at 255-56; Maltby, *supra* note 29, at 1979-80; Amy Dockser, *Media: Plaintiffs Take Libel Suits Abroad to Favorable Laws*, W.S.J., June 6, 1989 (reporting on increasing susceptibility of U.S. broadcasters to libel suits abroad because "advances . . . in telecommunications . . . now make it possible for U.S. signals to be picked up around the world without the authorization of the broadcasting station"); *see also* John Cooper, *Defamation by Satellite*, 132 SOLIC. J. 1021 (1988).

32 Former Greek Prime Minister Andreas Papandreou was another public figure who chose the United Kingdom venue for a libel suit against an American publisher. *Out of Office, Into the Dock? Papandreou is accused in the Koskotas Scandal*, TIME, Sept. 25, 1989, at 38.

33 McCarthy, *supra* note 28, at 531. "[D]efamation charges generated in cyberspace will 'catch a lot of people napping, as more and more suits will wind up in English courts'." *Id.* (quoting Robert D. Sack, Esq.).

masse to British courts. Various obstacles will discourage some plaintiffs from forum shopping in the United Kingdom. For example, in the case of a plaintiff qualifying as a "public figure" under American law, a U.S. court will not enforce a defamation judgment recovered in the United Kingdom for First Amendment reasons.[34] Where the American defendant has no presence in the United Kingdom and must be served with process in the United States, the prospective U.K. plaintiff must obtain the U.K. court's leave to serve the writ initiating suit.[35] On-line services and Internet gateway providers will likely be able to avoid liability for transmitting defamatory material on the theory that they are innocent disseminators analogous to news vendors and booksellers.[36] However, as

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[34] *See, e.g.*, Matusevitch v. Telnikoff, 877 F. Supp. 1, 3-4 (D.D.C. 1995); Abdullah v. Sheridan Square Press, Inc., 154 F.R.D. 591 (S.D.N.Y. 1994); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 663-65 (N.Y. Sup. Ct. 1992); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994) (criticizing *Bachchan* for misapplying public-policy exception in refusing to enforce U.K. libel judgment); Rice, *supra* note 28 (discussing refusal of U.S. courts to enforce U.K. libel judgments in *Telnikoff* and other cases); *see also Desai v. Hersh*, 719 F. Supp. at 676, 679-81 (suggesting that First Amendment would not shield U.S. defendant from enforcement of foreign libel judgment arising from intentional publication abroad).

[35] Supreme Court Rules, Order 11, Rule 1.-(1)(f), which authorizes issuance of the writ where "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction." *See* 1 SWEET & MAXWELL, THE SUPREME COURT PRACTICE §§ 11/1/1-11/1/7, 11/1/19 (1995). In fact, in April 1996 the Queens Bench sitting in London used Rule 1.-(1)(f) to exercise personal jurisdiction over the defendant in a case involving defamatory e-mail transmissions into the U. K. from somewhere in Europe. Paul Lambeth & Jonathan Coad, *Serving the Internet: Nowhere to Hide in Cyberspace*, CYBERSPACE LAWYER, Sept. 1996, at 6. (Further details about the case are not available because the U.K. court sealed the record. E-mail message to author from Jonathan Coad, dated Oct. 22, 1996).

The Queens Bench's application of Rule 1.-(1)(f) to cyberspace is novel, but consistent with prior appellate decisions delineating the rule's reach. For example, a libelous letter written outside of the U.K., but received by an addressee in the U.K., is a tort committed "within the jurisdiction." Bata v. Bata, [1948] 1 W.N. 366 (C.A.). On authority of *Bata v. Bata*, it was held that a fraudulent misrepresentation emanating abroad is a tort in the U.K. within the meaning of the rule, because "the tort is committed at the place where the message is received—wherever it is heard on the telephone by the receiver or tapped out by the telex machine in the receiver's office." Diamond v. Bank of London & Montreal Ltd., [1979] Q.B. 333, 346, [1979] 1 All E.R. 561, 564 (C.A.). *See also* Cordoba Shipping Co. Ltd. v. National State Bank, [1984] 2 Lloyd's Rep. 91 (C.A.) (writ issued against New Jersey bank in suit alleging negligent misrepresentation by telex). Furthermore, irrespective of where the tort is deemed committed, because U.K. law presumes damages in a libel case (*see supra* note 23), if the plaintiff can show a reputation in the U.K. susceptible to injury, "the damage was sustained" in the U.K. within the meaning of Rule 1.-(1)(f). *See* Shevill v. Presse Alliance SA, [1992] 1 All E.R. 409, [1992] 2 W.L.R. 1 (C.A.) (discussing presumption of injury in sustaining U.K. jurisdiction in libel suit against French newspaper with limited U.K. circulation), *holding aff'd on reference from the House of Lords*, [1995] E.C.R. I-415, Case No. 68/93. *See also* Jenner v. Sun Oil Co. Ltd., [1952] 2 D.L.R. 526 (Ont. HC) (allowing service of writ abroad where Canadian plaintiff was defamed by U.S. radio transmission heard in Canada). One renowned British commentator opines that "[i]n the modern age of international mass communications, it is likely that the Canadian case of *Jenner v. Sun Oil Co. Ltd.* would be preferred" by British courts. Carter-Ruck & Walker, *supra* note 21, at 229; *accord*, Cooper, *supra* note 31.

[36] *See* CARTER-RUCK & WALKER, *supra* note 21, at 197-201. *But see* Sun Life Assurance Co.

noted above, in certain cases, an international defendant with assets in the United Kingdom will be at risk because of the vulnerability of those assets to a U.K. defamation judgment.[37] Also, a "private" plaintiff—that is, a plaintiff whose activities do not implicate First Amendment considerations—might be able to enforce a defamation judgment obtained in the United Kingdom against a U.S.-based defendant.[38] Thus, while the volume of forum shopping might be relatively small, the risk of suit would be sufficient to affect the behavior of Americans launching content on the Internet that finds its way to the United Kingdom.[39]

B. *Moral Rights*

The doctrine of moral rights, or *droit moral,* confers on the creator of an intellectual or artistic work certain personal rights independent of the economic elements of the copyright in the work.[40] American law recognizes some concepts found in *droit*

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of Canada v. W.H. Smith & Son, Ltd., [1933] All E.R. 432, [1934] 150 L.T.R. 211 (C.A.) (sustaining on appeal jury verdict that news vendor was independently culpable for newspaper's libel because vendor negligently failed to apprise itself of defamatory character of newspaper's advertising poster displayed at vendor's stalls). *Compare* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that CompuServe was an innocent disseminator of defamation posted to bulletin board, as it had no opportunity to review material), *with* Stratton Oakmont Inc. v. Prodigy Services Co., 1995 WL 323710, 23 MEDIA L. REP. 1794, 63 U.S.L.W. 2765 (N.Y. Sup. Ct. 1995) (holding that Prodigy was liable as a publisher of defamation because it exercised editorial control over bulletin boards). *See* Smyth & Braithwaite, *supra* note 15, postulating that even a "disinterested" provider functioning like CompuServe in the *Cubby* case would, under U.K. law, have the burden of proving "that it had taken all reasonable care to ensure that its systems were not carrying defamatory material"; *cf.* 47 U.S.C. § 223(e) (1994), *as amended by* the Communications Decency Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56 (1996) (shielding on-line services and gateways from criminal liability for the dissemination of obscene materials where the only activity is providing Internet access to a site not under the service's or gateway's control).

37 Under Title III of the Brussels Convention On Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, *reprinted in* 29 I.L.M. 1417 [hereinafter 1968 Brussels Convention], 1262 U.N.T.S. 153, a U.K. judgment also would be enforceable against the judgment-debtor's assets in any of the European Contracting States, provided that recognition of the judgment is not "contrary to public policy in the State in which recognition is sought." *Id.* art. 37[1].

38 *See* Maltby, *supra* note 29, at 2016 n.198; *cf.* Dyotherm Corp. v. Turbo Machine Co., 233 F.Supp. 119, 121-23 (E.D.Pa. 1964); *Bachchan,* 585 N.Y.S.2d at 664. A foreign plaintiff seeking to enforce such a judgment in the United States would have to show that the defendant's connection with the foreign forum satisfied the "minimum contacts" test of U.S. due process. *See, e.g.,* Ackermann v. Levine, 788 F.2d 830, 838 (2d Cir. 1986); Somportex v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 444 (3d Cir. 1971), *cert. denied,* 405 U.S. 1017 (1972); Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1252-53 (S.D.N.Y. 1995); Lugot v. Harris, 499 F. Supp. 1118, 1120 (D. Nev. 1980).

39 Maltby, *supra* note 29, at 1979-80.

40 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01, at 8D-4 to 8D-5 (1995).

moral, although not necessarily under that rubric.[41] However, the doctrine has achieved its fullest development in France.[42]

The Moral Right of Integrity in France

One aspect of moral rights marks a sharp difference between American and French law. Under French law, every creator has a personal, perpetual, and inalienable right to respect for his or her name and for the artistic integrity of the creative work.[43] Because this right is personal, it remains with the creator even after a transfer of the copyright in the work.[44] The creator cannot validly waive the right in advance, but rather must have full knowledge of any derogation of the right before giving consent.[45] On the death of the creator, the right passes to the deceased's heirs, or, in the case of a testamentary disposition, to the legatee.[46]

Thus, French law gives the creator who has parted with the copyright a continuing, perpetual right to safeguard the *intégrité* of the work under the theory that it represents an extension of the creator's personal reputation.[47] In contrast, American law generally does not allow a creator divested of copyright to object to the

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41 Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995). For a comprehensive discussion of moral rights under state and federal law in the United States, see 2 NIMMER & NIMMER, *supra* note 40, §§ 8D.03, 8D.04, at 8D-32 to 8D-57.

42 NIMMER & NIMMER, *supra* note 40, § 8D.01, at 8D-4. As used in the term *droit moral*, "*moral*" does not mean "ethical," but rather "intellectual" or "spiritual." *Id*; *see also* LE PETIT ROBERT 1: DICTIONNAIRE DE LA LANGUE FRANÇAISE (1987).

43 *See* La Loi N°. 57-298 du 11 mars 1957 [Law No. 57-298 of Mar. 11, 1957], J.O., Mar. 14, 1957, p. 2723, arts. 1(2), 6 (codified as L.111-1, L.121-1 by Law No. 92-597 of July 1, 1992, J.O., July 3, 1992, p. 8801 [IPC]) (Fr.) [hereinafter 1957 Act]; *see Carter*, 71 F.3d at 81.

44 *See* Judgment of Mar. 12, 1936, Cour d'appel, Paris, 1936 Rec. Somm. Jur., No. 882, 1936 D. Jur. (Hébdo.) 257 (Fr.).

45 *See* Judgment of May 27, 1959, Trib. gr. inst., 24 REVUE INTERNATIONALE DU DROIT D'AUTEUR [hereinafter R.I.D.A.] 149 (July 1959) (finding that contract made by the famed entertainer Mistinguett to film her life story was a nullity because it purported to prospectively grant the producer discretion regarding the film's portrayal of Mistinguett and her family); *see also* HENRI DESBOIS, LE DROIT D'AUTEUR EN FRANCE 542 (3d ed. 1978); ROBERT PLAISANT, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 61 (1st ed. 1985).

46 *See* DESBOIS, *supra* note 45, at 582-83. The *droit moral* is perpetual, "existing for so long as the work survives in human memory and is an object of exploitation." CLAUDE COLOMBET, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 151 (4th ed. 1988). Where, for any reason, there is no heir or legatee competent to enforce the *droit moral* of the deceased creator, any interested person (for example, a relative not qualifying as an heir, an editor or publisher, or a government official) may enforce the right with the assistance of the courts. 1957 Act, ARTS. 19, 20 (IPC L.121-2, L.121-3); *see* DESBOIS, *supra* note 45, at 582-83; GASTON BONNEFOY, LA NOUVELLE LÉGISLATION SUR LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 101 (1959); *see also* Judgment of Feb. 19, 1964, Cour d'appel, Paris, 1 G.P. 247 (1964) (although holding that article 20 did not give writers' association standing to challenge Roger Vadim's film adaptation of the 18th-century novel *Les Liaisons Dangereuses*, the judgment underscores *droit moral*'s *perpétuité* in suggesting that the Minister of Culture, representing the national patrimony, would have standing).

47 DESBOIS, *supra* note 45, at 539 ("à travers la création, c'est la personnalité du créateur qui reçoit aide et protection"). Another commentator poetically describes the *droit moral* as being attached to the author of a creative work like the glow is to phosphorus.

manner in which the work is thereafter adapted or modified.[48] Indeed, in ratifying U.S. accession to the Berne Convention on Copyright, Congress disclaimed that accession meant U.S. acceptance of the moral right of integrity, expressed in the Berne treaty:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.[49]

Two cases involving several giants of Russian classical music, among them Shostakovich and Prokofiev, illustrate the divergent approaches of American and French law in this area.[50] In 1948, the composers sued Twentieth Century-Fox in New York State court after the motion-picture company released an anti-Soviet film entitled *The Iron Curtain* using their public-domain music.[51] Living under Stalin, the composers were understandably sensitive about

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COLOMBET, *supra* note 46, at 149 ("le droit moral s'attache à l'auteur comme la lueur au phosphore").

48 NIMMER & NIMMER, *supra* note 40, § 8D.02[D], at 8D-17 to 8D-22. The one exception to this general rule concerns works of visual and graphic art, where creators have acquired by statute certain rights regarding integrity. *See* Visual Artists Rights Act of 1990, *codified at* 17 U.S.C. § 106a (1994); California Art Preservation Act, CAL. CIV. CODE. § 987 *et seq.* (West 1982 & Supp. 1995); New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. § 14.03 (McKinney's Supp. 1995); *see also Carter*, 71 F.3d at 77.

49 Berne Convention for the Protection of Literary and Artistic Works, *as last revised* July 24, 1971, 828 U.N.T.S. 221, art. 6*bis*(1). Section 3(b) of the Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, paraphrasing the language of art. 6*bis*(1), provides in pertinent part:

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—
>
> . . . .
>
> (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Section 3(b) of the Berne Implementation Act, Congress' response to "an avalanche of opposition to moral rights . . . " rests on the premise that the Berne Convention does not obligate signatories to enact moral rights legislation. NIMMER & NIMMER, *supra* note 40, § 8D.02[C], at 8D-15 to 8D-16. In the United Kingdom, ironically, Parliament added guarantees of moral rights to the Copyright, Designs and Patents Act of 1988, in the belief that such provisions were necessary to bring British law into compliance with the Convention. *See infra* note 56; STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 18.76 (2d ed. 1989).

50 Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949) (citations omitted); Judgment of Jan. 13, 1953, Cour d'appel, Paris, 1 G.P. 191 (1953), 1953 J.C.P. II, No. 7667.

51 The compositions apparently fell into the public domain because at the relevant times the United States and the Soviet Union did not have an agreement concerning copyrights. ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT 557 n.324 (1993).

having their works and personal reputations associated with the film. However, the court rejected their application for an injunction enjoining use of their music and names in the film, finding none of their claims for relief viable under New York law. With regard to the composers' moral right to control use of their public-domain works, the court held that

> [w]ith reference to that which is within the public domain there arises a conflict between the moral right and the well established rights of others to use such works. . . . In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.[52]

At the same time in France, the composers filed a complaint with the police, resulting in the seizure of copies of the film intended for distribution there.[53] On appeal, Twentieth Century-Fox argued—as it had argued successfully in New York—that the composers had no rights in their compositions because they had failed to register the copyrights. In rejecting Twentieth Century-Fox's appeal and sustaining the seizure of the film, the appellate court ruled that under French law copyright vested in the composers independent of registration and irrespective of the fact that the Soviet Union did not accord reciprocal protection to French authors and artists.[54] The court awarded the composers monetary damages for the *préjudice moral* (that is, spiritual or intellectual injury) suffered on account of Fox's actions.[55]

French law's solicitude for the integrity of creative works could have a major impact on the development of the Internet as an entertainment medium.[56] With the advent of new technologies like

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[52] *Shostakovich*, 80 N.Y.S.2d at 578-79 (citations omitted).

[53] Judgment of Jan. 13, 1953, 1 G.P. 191 (1953), 1953 J.C.P. II, No. 7667.

[54] *Id.*

[55] *Id.* The judgment of the French court thus did not turn expressly on the moral rights of the composers, which as already noted exist independently of copyright (*see supra* text accompanying notes 40-49), because the court found that the composers in fact had enforceable copyrights infringed by Fox's use of their music in the film. Nonetheless, while acknowledging that Fox's infringement inflicted only "minimal" pecuniary injury, the court awarded damages for the *préjudice moral*, showing how a French court will distinguish between—and separately protect—the economic and spiritual (i.e., "*moral*") elements of intellectual property. *See also supra* note 42.

[56] French law merely serves as an example in this discussion. By extension, the same concerns would apply in the many other countries recognizing similar moral rights. *See, e.g.*, 1 MELVILLE B. NIMMER & PAUL GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7[1][c], at *F.R.G.* 93; 2 *id.* § 7[1][b], at *Italy* 59 (1988). In the United Kingdom, the Copyright, Designs and Patents Act of 1988, Chap. IV, §§ 77-89, brings into British law for the first time many *droit moral* concepts long established elsewhere. *See* 9 HALSBURY'S LAWS OF ENGLAND ¶ 961A (4th ed. Supp. 1995).

Java[57] and Shockwave,[58] the long-promised interactive and multimedia cyberworld approaches reality.[59] To cite but one example, American motion picture companies, holding vast archives of films and their component music, still photographs, and screenplays, are mother lodes of content for interactive and multimedia projects.[60] Modern technology allows the interactive/multimedia producer to colorize, digitize, "morph," rearrange, and otherwise manipulate a film and its components to create something never envisioned by the creators of the original work.[61] American law permits such manipulation of an underlying work by the copyright owner (the motion-picture company in the current discussion), or the owner's licensee, without regard to the underlying work's "integrity."[62] However, a problem arises when the U.S. copyright owner (or its licensee) attempts to display the new creation in a moral rights jurisdiction like France, as Ted Turner and the French television channel "La Cinq" learned when a court there held them liable for damages flowing from the broadcast of Turner's colorization of the originally black-and-white film *The Asphalt Jungle*.[63]

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57 *See Java: Programming for the Internet* <http://java.sun.com>.

58 *See* Macromedia Home Page <http://www.macromedia.com>.

59 MICHAEL D. SCOTT, MULTIMEDIA: LAW & PRACTICE § 1.02, at 1-16, § 1.03[B], at 1-35 to 1-36 (1995).

60 *Id.* at 1-17; Verity & Hof, *supra* note 4. *See* Ron Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM. & ENT L.J. 391, 395-96 (1989) ("Turner Broadcasting Company, which owns the MGM film library, controls over 3,600 movies, 2,500 of which command little, if any, attention in their original black-and-white form") (citations omitted).

61 SCOTT, *supra* note 59, at 1-8 to 1-9. Regarding "morphing" of old film images (as in the Diet Coke commercials in which Jimmy Cagney, Humphrey Bogart, and Groucho Marx all made "appearances"), see, e.g., Tim Stevens, *How'd They Do That? Digital Technology, Information in the Form of Computer Data, Is Impacting All Forms of Communication*, INDUSTRY WK., June 21, 1993, at 30; James R. Norman, *Lights, Camera, Chips! Movie Makers Such as Boss Film Studios Use the Latest Digital Film Processing Techniques for Special Effects*, FORBES, Oct. 26, 1992, at 260; *see also* Craig A. Wagner, *Motion Picture Colorization, Authenticity and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628 (1989).

62 SCOTT, *supra* note 59, § 9.23. Elise K. Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ARTS & ENT. L.J. 497, 530-34 (1986).

63 Judgment of May 28, 1991, Cass. civ. 1re, 1991 Bull. Civ. I 113, No. 172, 1993 D. Jur. 197, *on remand*, Judgment of Dec. 19, 1994, Cour d'appel, Versailles, 1995 D.S. Jur. (IR) 65. The Cour de Cassation (France's highest court for private civil cases) acted on the application of the heirs (including actress Anjelica Huston) of the film's director, John Huston. A lower court had refused to grant them relief on the ground that Huston had signed a contract with the film's original producer, valid under American law, in which he forfeited all authorship rights in the film. The Cour de Cassation characterized the lower court's refusal as a violation of French law, "which protects the integrity of a literary or artistic work irrespective of the jurisdiction in which it was first published, and recognizes that the author is invested with the *droit moral* in that regard by virtue of the sole fact of his creative effort." 1991 Bull. Civ. I 113, No. 172, 1993 D. Jur. 197. On remand, the Cour d'appel, having been presented with unequivocal evidence of Huston's opposition to colorization during his lifetime, awarded his heirs F600,000 in damages for the injury to the film's integrity. 1995 D.S. Jur. (IR) 65. *See also* Judgment of Apr. 29, 1959, Cour d'appel, Paris, 1959 D. Jur. 402, which sustained Charlie Chaplin's objection on *droit moral* grounds to

American-created Internet content entailing material alterations in artistic works would, when projected into France, raise the same *droit moral* issues.[64] A French court would have jurisdiction over the American Internet producer[65] on the complaint of the creator or other person asserting the moral right of integrity.[66] An international company, with assets vulnerable to a French judgment, obviously would have the greatest exposure.[67] However, even a U.S. bound producer would be at risk, because unlike a public-figure libel judgment rendered abroad, a French (or, for that matter, any foreign) judgment based on *droit moral* should not encounter public-policy or constitutional obstacles to enforcement in the United States.[68] Thus, current ambitious projects to tap the

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distribution of his silent film *The Kid* with added musical accompaniment. The original, unadulterated silent version of *The Kid*, featuring child star Jackie Coogan, has been described as "peerless." RICHARD GRIFFITH ET AL., THE MOVIES 223 (1981). The court noted that by operation of international copyright treaties to which both France and the United States are signatories, American films enjoy the same treatment as French films under French law. *See also* Judgment of Apr. 6, 7, 1949, Trib. civ. Seine, 1950 J.C.P. I, No. 5462, *aff'd*, Judgment of June 14, 1950, Cour d'appel, Paris, 1950 J.C.P. II, No. 5927, ruling that film distributor's unauthorized cuts in film violated the moral right of integrity belonging to both the director and the screenwriter.

64 Arne, *supra* note 2, at 39-40; Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y 318, 329 (1995). *See* NIMMER & GELLER, *supra* note 56, §7[1][c][ii], at *France* 109. "The Huston case thus reminds us that moral rights remain a wild card in international copyright commerce." Paul Edward Geller, *French High Court Remands Huston Colorization Case*, 39 J. COPYRIGHT SOC'Y 252, 256 (1992) (discussing the May 28, 1991 decision of the Cour de Cassation, *supra* note 63). *See also* Bernard Edelman, *L'oeuvre Multimédia, Un Essai de Qualification*, 1995 D.S. Jur. (Chronique) 109 (regarding multimedia's implications for traditional copyright law and *droit moral*); Christophe Caron, *Droit Moral et Multimédia*, 8 LÉGICOM: REVUE DU DROIT DE LA COMMUNICATION D'ENTREPRISE [hereinafter LÉGICOM] 44, 46 (1995) ("It is most probable that the development of multimedia is going to increase the number of conflicts [with *droit moral*].").

65 Nouveau Code de Procédure Civile, arts. 683-88. *See* HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 534-38 (7th ed. 1983). *See* Judgment of Feb. 1, 1989, Cour d'appel, Paris, 1990 D.S. Jur. 48 note E. Agostini, *aff'd*, Judgment of Oct. 23, 1990, Cass. civ. 1re, 1990 Bull. Civ. I 158, No. 222 (observing that in light of the John Huston case, *supra* note 63, there is no longer any question that a foreigner may sue another foreigner in a French court to vindicate a right granted by French law).

66 *See* 1957 Act, *supra* note 43, art. 64 (IPC L.331-1); ROLAND DUMAS, LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 333 (1st ed. 1987). A French court would have jurisdiction even if neither the plaintiff nor the defendant was a French national. BATIFFOL & LAGARDE, *supra* note 65, at 453-55; PAUL LEREBOURS-PIGEONNIÈRE & YVON LOUSSOUARN, DROIT INTERNATIONAL PRIVÉ 539-41 (9th ed. 1970). *See* Judgment of Oct. 30, 1962, Cass. civ. 1re, 1963 D. Jur. 109; Judgment of June 21, 1948, Cass. civ., 1948 J.C.P. II, No. 4422.

67 For a discussion regarding enforceability of a French monetary judgment outside of France under the 1968 Brussels Convention, see *supra* note 37. Moreover, even a judgment granting only injunctive relief could have grave economic consequences if it blocked Internet distribution of a multimedia project representing a substantial investment.

68 *See* Pariente v. Scott Meredith Literary Agency, Inc., 771 F. Supp. 609, 614-18 (S.D.N.Y. 1991) (enforcing French judgment holding U.S. literary agent liable for his client's misrepresentations, notwithstanding alleged conflict with American law); Milhoux v. Linder, 902 P.2d 856, 860 (Colo. Ct. App. 1995) ("the increasing internationalization of commerce requires that United States courts recognize and respect the judgments entered

reservoir of American intellectual property to create new multimedia and interactive content for the Internet could suffer constraints imposed by French courts at the behest of directors, writers, and other contributing artists (and their heirs) unhappy with (unremunerated) Philistine cyber-adaptations of their artistic contributions.

C. *Comparative Advertising*

Since the early 1970's, the American marketplace has accepted comparative advertising as a legitimate and beneficial form of competition.[69] In the United States, an advertiser may identify its competitor by name, trademark, or other distinctive feature.[70] The American advertiser enjoys great latitude, provided that the comparative advertisement does not convey a *material* misstatement about the advertiser's or competitor's product.[71]

Comparative Advertising in Italy

For several decades, Italy has regulated comparative advertising through parallel public and private systems.[72] The Italian courts adjudicate the propriety of comparative advertising under

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by foreign courts to the greatest extent consistent with our own ideals of justice."). Regarding due process requirements for enforcement of foreign judgments, see *supra* note 38.

69 3 GEORGE E. ROSDEN & PETER E. ROSDEN, THE LAW OF ADVERTISING § 31.01 (1995); Felix H. Kent, *Comparative Advertising, in* LEGAL AND BUSINESS ASPECTS OF THE ADVERTISING INDUSTRY 1989, at 113, 115 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G-217, 1989); Jenna D. Beller, *The Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients*, 29 INT'L LAW. 917, 919-20 (1995). By the 1990's, 80% of all television commercials in the United States used some form of comparative advertising. Roslyn S. Harrison, *The Law of Comparative Advertising in the United States and Abroad, in* GLOBAL TRADEMARK AND COPYRIGHT 1995: MANAGEMENT AND PROTECTION at 215, 218 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G-417, 1995).

70 ROSDEN & ROSDEN, *supra* note 69, § 31.03[3][a].

71 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 5.09[2][b] (1995 ed.). In the case of a *material* misstatement, the competitor would have a claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), if it could also show that the misstatement affects a significant segment of the audience, materially influences purchasing decisions, and causes or is likely to cause injury. ROSDEN & ROSDEN, *supra* note 69, § 31.03[3][a]; Kent, *supra* note 69, at 117-20; Harrison, *supra* note 69, at 223-26. *See also* CHARLES E. MCKENNEY & GEORGE F. LONG III, FEDERAL UNFAIR COMPETITION: LANHAM ACT § 43(a), § 6.03[3] (1995 ed.).

72 Italy serves here as an example of the civil-law attitude toward comparative advertising, which tends to be less favorable than in the so-called Anglo-Saxon countries. ROSDEN & ROSDEN, *supra* note 69, § 31.04; Harrison, *supra* note 69, at 235, 243-44; Beller, *supra* note 69, at 927-36; Winfried Tilmann, *Cross-Border Comparative Advertising*, 25 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. [hereinafter I.I.C.] 333 (1994); Randolph W. Tritell, *Regulation of Misleading and Comparative Advertising by the European Community*, 4 J. PROPRIETARY RTS. 14 (1992); *see also* Judgment of Oct. 27, 1994, Trib., 1995 Foro It. I 2596 note Scrivano, regarding the EU's difficulties in formulating a comparative-advertising policy acceptable to all Member States.

article 2598 of the Codice Civile,[73] which classifies as unfair competition the dissemination of "information and opinions about a competitor's products and activities, tending to bring them into discredit . . . ."[74] Alternatively, the Giurì—an arbitral panel established by the advertising industry's code of self-regulation[75]—decides comparative advertising disputes where the parties have bound themselves to abide by the Codice di Autodisciplina Pubblicitaria ("CAP").[76] In recent years the Giurì's decisions have gained increasing importance and the courts now look to the Giurì's jurisprudence for guidance, which, "[a]s a consequence, . . . possess decisive significance as to elements of proof or factors for evaluation . . . ."[77]

The Italian courts and the Giurì share a generally unfavorable opinion of American-style comparative advertising,[78] which, in the

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73 *Atti di concorrenza sleale.* . . . compie atti di concorrenza sleale chiunque:

. . . .

2) diffonde notizie e apprezzamenti sui prodotti e sull'attività di un concorrente, idonei a determinarne il discredito . . . ;

3) si vale direttamente o indirettamente di ogni altro mezzo non conforme ai principi della correttezza professionale e idoneo a dannegiare l'altrui azienda.

CODICE CIVILE [C.C] art. 2598 (It.).

74 *Id.* Italy has never had a statute expressly governing comparative advertising. *See* Felix Hofer et al., *Italy* § 2.a., *in* ADVERTISING LAW IN EUROPE AND NORTH AMERICA (J. Maxeiner & P. Schotthöffer eds. 1992); Gerhard Schricker, *Law and Practice Relating to Misleading Advertising in the Member States of the EC*, 21 I.I.C. 620, 631-36 (1990). In 1990, to implement an EU directive regarding deceptive advertising, the Italian Parliament authorized the government to issue a legislative decree establishing, among other things, permissible limits for comparative advertising. Art. 41 of the Law of Dec. 29, 1990, no. 428, Gaz. Uff. (supp.) no. 10, Jan. 12, 1991, 77 Lex (Utet) I 166 (1991). However, because of advertising industry opposition, the decree was promulgated without any comparative-advertising provisions. Decree-Law of Jan. 25, 1992, No. 74, Gaz. Uff. (supp.), no. 36, Feb. 13, 1992, 78 Lex (Utet) I 754 (1992). *See* Paola Crugnola, *Note Minime in Materia di Pubblicità Comparativa*, 42 RIVISTA DI DIRITTO INDUSTRIALE [hereinafter R.D.I.] I 75, 77-8 (1993), regarding industry opposition to a comparative-advertising provision in the decree.

75 Codice di Autodisciplina Pubblicitaria (hereinafter "CAP"), *in* AUTODISCIPLINA PUBBLICITARIA ANNUARIO 1995, available from Istituto Dell'Autodisciplina Pubblicitaria, Via Larga 15, 20122 Milan, Italy. *See also* ROSDEN & ROSDEN, *supra* note 69, § 31.02, and GILSON, *supra* note 71, § 5.09[2][a] (discussing the U.S. advertising industry's self-regulation of comparative advertising).

76 The Giurì's influence has grown through widespread use of contract clauses obligating the parties to adhere to the CAP and abide by the Giurì's decisions. Hofer et al., *supra* note 74, §§ 2.b., 23.b.; 6 Appendice, Novissimo Digesto Italiano 188-90 (1987) [hereinafter "6 NDI-App."]. The Giurì can issue cease-and-desist orders (CAP art. 38) and in cases of manifest abuse, the equivalent of a temporary restraining order (CAP art. 39). The sanction for non-compliance with the Giurì's orders is public notice of the recalcitrant party's disobedience (CAP art. 42).

77 Hofer et al., *supra* note 74, § 2.b., at 211; *see also* Pedriali, *Profili Soggettivi dell'Autodisciplina Pubblicitaria*, 41 R.D.I. I 136, 153 (1992).

78 "[O]ur tradition is rather against acceptance of comparative advertising through mass communication . . . ." 5 COMMENTARIO AL CODICE CIVILE 1547 (P. Cendon ed. 1991) [hereinafter COMMENTARIO]. *See also* Judgments of Apr. 3, 1982 and Mar. 30, 1982, 1983 Foro It. I 1475 (Giurì) note Troiano; ROSDEN & ROSDEN, *supra* note 69, § 74.09[1][b][ii].

Italian view, promotes more discord than benefit.[79] Thus, although the courts pay lip service to the principle that Article 2598 of the Codice Civile does not prevent advertisers, consistent with standards of "professional correctness,"[80] from making truthful comparative references to competitors,[81] in practice, legal challenges to comparative advertising are frequently successful.[82] In marked contrast with American law, Italian courts will often strike down a concededly truthful comparative advertisement on the ground that it is "tendentious."[83]

With regard to the Giurì, the CAP itself (articles 13 and 15) generally prohibits direct comparative advertising, that is, advertising that identifies a competitor by name or mark.[84] Moreover, the CAP permits indirect comparative advertising—in which the advertiser compares its product or service with a generic competitive product or service[85]—only "when useful to illustrate from a techni-

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79 Crugnola, *supra* note 74, at 78. The "comparison . . . [must] avoid all excessive aggressiveness . . . ." Arnoaldi, *Sulla Pubblicità Comparativa*, 43 R.D.I. II 44, 45 (1994).

80 C.C. art. 2598(3) (It.), (*see supra* note 73), a catch-all provision that states that it is also unfair competition to use "directly or indirectly every other means not conforming to principles of professional correctness and tending to injure another's business." As well as being a separate measure of unfair competition, "professional correctness" additionally applies to conduct governed by art. 2598(2), i.e., the provision used in comparative-advertising cases. Paulo Auteri, *La Concorrenza Sleale, in* 18 TRATTATO DI DIRITTO PRIVATO 357-60 (P. Rescigno ed. 1983). "Professional correctness" means competitive behavior deemed appropriate according to the general economic and social interests of the community. *Id.* at 360-67.

81 *See, e.g.*, Fusi, *Sul Problema della Pubblicità Comparativa*, 29 R.D.I. I 105, 111-12 (1980); 6 NDI-App., *supra* note 76, at 187-88; COMMENTARIO, *supra* note 78, at 1547.

82 *See* Judgment of Sept. 29, 1993, Trib., 42 R.D.I. II 382 (1993) note Gambino (It.); Theo Bodewig, *The Regulation of Comparative Advertising in the European Union*, 9 TUL. EUR. & CIV. L. FORUM 179, 196 (1994). For a comprehensive survey of the Italian jurisprudence of comparative advertising, see Judgment of Oct. 27, 1994, Trib., 1995 Foro It. I 2596 note Scrivano (It.).

83 A "tendentious" statement is one that is truthful but used selectively or with a particular emphasis to convey a misleading or "suggestive" impression. 6 NDI-App., *supra* note 76, at 188; COMMENTARIO, *supra* note 78, at 1544. Italian courts interpret "tendentious" broadly. Fusi, *supra* note 81, at 108, 111-12.

> The practical result of the judiciary's approach is that opinion expressed in an advertising message (comparative advertising, etc.) is almost always considered unlawful, because an advertising message normally would have a character of partiality and suggestiveness that would render it intrinsically tendentious.

COMMENTARIO, *supra* note 78; *see, e.g.*, Judgment of Apr. 2, 1982, Cass. Sez. I, 1982 Mass. Foro It. no. 2020, col. 422; Judgment of May 29, 1978, Cass. Sez. I, 1978 Giur. It. I no. 2692, col. 2297; Judgment of June 27, 1975, Cass. Sez. I, 1975 Mass. Foro It. no. 2518, col. 603; Judgment of Feb. 8, 1986, Corte d'appello, Turin, 1988 Rep. Foro It. 507, ¶151 (C.C. art. 2598[2] bars comparative advertisement tending to discredit competitor notwithstanding the fact that the advertisement is true).

84 "The attitude of the trade associations, the traditional orientations of scholarly opinion and jurisprudence and the restrictive rules of self-regulation have inevitably influenced Italian advertising practice, where direct comparison in the Anglo-Saxon style, which cites a competitor's name or mark, is still practically unknown." Fusi, *supra* note 81, at 122. *See also* ROSDEN & ROSDEN, *supra* note 69, § 74.09[1][b][ii].

85 For example, a comparison of the advertiser's new synthetic container with glass con-

cal and economic point of view the objectively relevant and verifiable characteristics and advantages of the goods and services advertised."[86]

This antagonism toward aggressive comparative advertising leads to the suppression of advertisements and television commercials that would be regarded as innocuous fair-play in the United States. For example, on the complaint of the glass manufacturers' association, the Tribunale (Italy's court of general jurisdiction) ordered cessation of a trade magazine advertisement for a polyethylene container that touted the synthetic product as a "light, unbreakable and noiseless organic glass."[87] The Court held that in describing its product as "organic glass," the advertiser provoked an unjust comparison with real glass containers by "tendentiously" underscoring that real glass was breakable and neither light nor noiseless.

The worldwide cola wars between Coca Cola and Pepsi Cola have prompted two noteworthy Giurì decisions regarding the limits of comparative advertising. In 1991, Coke's Italian subsidiary challenged the Pepsi subsidiary's television commercial—aired in many other countries—featuring rap star M.C. Hammer at a mock concert.[88] In the commercial, Hammer loses his energy when he mistakenly drinks an unnamed "other" cola and lapses into a Perry Como style of singing. Only an infusion of Pepsi jolts Hammer back into rapping again.

Pepsi argued that the commercial dealt only with subjective taste, not a comparison of objectively measurable qualities, and was obviously hyperbolic and surreal. The Giurì was not amused and ordered Pepsi to withdraw the advertisement. In the Giurì's view, the commercial conveyed an irrational message because it was not objectively relevant and verifiable that Hammer needed Pepsi to sing rap. The Giurì also found the commercial impermissibly "suggestive" in depicting Pepsi as more suitable for young, energetic consumers.

In 1993, Coke and Pepsi were again before the Giurì.[89] Pepsi's Italian subsidiary had aired a commercial, also shown in the United States, in which a young, muscular motorcyclist stops at a run-down gas station in the middle of the desert operated by two scruffy char-

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tainers generally. *See* Judgment of Sept. 17, 1992, Trib., 1992 Giurisprudenza Annotata di Diritto Industriale [hereinafter G.A.D.I.], No. 2853, p. 824.

86 CAP art. 15.

87 *See* Judgment of Sept. 17, 1992, Trib., 1992 G.A.D.I., No. 2853, p. 824.

88 Judgment of May 7, 1991, 40 R.D.I. II 266 (1991) (Giurì).

89 Judgment of May 18, 1993, 43 R.D.I. II 39 (1994) (Giurì).

acters. Upon being told that only Coke was available and that it was 50 miles to the next store selling Pepsi, the biker hesitates for a moment, but then continues on his way across the desert. The commercial ends with the biker happily drinking Pepsi in a clean, modern gas station and the message "Farther ahead, there's Pepsi."

The Giurì again sustained the Coca Cola complaint. In the Giurì's view, the advertisement drew an unfair comparison between the young, modern lifestyle of the Pepsi-drinking motorcyclist and the backwardness of the Coke-drinking desert denizens. The Giurì also held that the advertisement denigrated Coke by suggesting that it was better to drive 50 miles under the desert sun than quench an overwhelming thirst with Coca Cola.

U.S.-style comparative advertising on the Internet[90]—which identifies a competitor by name or "suggests" the superiority of the advertiser's product—would clash with this restrictive Italian attitude.[91] Whether the American advertiser accepts the Giurì's jurisdiction or chooses to litigate in the Italian courts, it could face a cease-and-desist order that would force its advertisement off the Net.[92] In a judicial proceeding, the court also could award damages to the competitor.[93]

With the growing influence of the Giurì, litigation over comparative advertising is not commonplace in Italy,[94] and American Internet advertisers are unlikely to face an onslaught of suits in

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90 Many observers predict that the Internet's economic viability will depend on the same kind of advertising common in other sectors of mass communication. *See, e.g.*, Lawrie Mifflin, *Advertisers Chase Young People in Cyberspace*, N.Y. TIMES, Mar. 29, 1996, at A16; Marc Gunther, *Web + Sports = Profit. Right?*, FORTUNE, Mar. 4, 1996, at 197; Jill H. Ellsworth, *Staking a Claim on the Internet*, NATION'S BUS., Jan. 1996, at 29; Andy Cohen, *At the Top of His Game. (Advertising Executive Jerry Della Femina)*, SALES & MKTG. MGMT., Jan. 1996, at 31; Don L. Boroughs, *New Age Advertising*, U.S. NEWS & WORLD REP., July 10, 1995, at 38; *Net Profits - Conducting Business on the Internet*, ECONOMIST, July 1, 1995, at S12; John H. Teague, *Marketing on the World Wide Web*, TECH. COMMUN., May 1995, at 236.

91 *See* Schricker, *supra* note 74, at 624 (discussing some potential and actual conflicts when one country receives advertisements transmitted from another country by satellite, cable, or over-the-air broadcast); Beller, *supra* note 69, at 943; *see also*, Liuzzo, *Pubblicità Transfrontaliera e Concorrenza Sleale*, 41 R.D.I. I 78 (1992) (discussing problems with enforcement of national advertising laws—including those applicable to comparative advertising—now that EU policy mandates unrestricted transborder flow of television signals).

92 C.C. art. 2599, and CODICE DI PROCEDURA CIVILE [hereinafter C.P.C] art. 700 (It.); CAP arts. 38, 39.

93 C.C. arts. 2600 and 2403, which provide for damages for both intentional and negligent violations of art. 2598 (under art. 2600, if the court determines that the defendant has violated Art. 2598, negligence is presumed). Moreover, in addition to the advertiser, the gateway provider or on-line service might incur liability if it carried an Internet advertisement that it knew violated C.C. art. 2598. *See* Judgment of Sept. 17, 1992, Trib., 1992 G.A.D.I., No. 2853, p. 824 (suggesting that editor of print publication would be liable under such circumstances).

94 Schricker, *supra* note 74, at 632. "In a typical year, about 200 cases are resolved by self-regulation and only a handful by court proceedings." Hofer et al., *supra* note 74, § 23.b., at 224.

Italian courts.[95] Nonetheless, a court there could exercise jurisdiction in an appropriate case on the complaint of an Italian citizen,[96] which would include Italian subsidiaries and affiliates of U.S. competitors. Thus, an American company acting through such a subsidiary or affiliate could use Italy's more conservative law to stop Internet—and, hence, worldwide—comparative advertising originating from the United States, where it is lawful.[97]

D. *The Right of Privacy*

In the United States, the law of privacy varies from state to state.[98] Some states, like New York, afford limited statutory protection[99] against unauthorized commercial use of a person's name or image.[100] Other states extend broader protection, recognizing as an actionable invasion of privacy an unauthorized disclosure of so-called "private facts"[101] or an untrue statement tending to place an individual in a "false light."[102] Most importantly for the current

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95 EU proposals regarding comparative advertising, if and when implemented, also would require a more permissive Italian attitude, although still not to the same extent as in the United States. *See* Alpa, *La Pubblicità Comparativa*, 1995 Giur. It. IV, col. 162.

96 C.P.C. art. 4 gives an Italian court personal jurisdiction over a foreigner where the defendant has connections with Italy not dissimilar to the "contacts" requirement of U.S. due process, or where an Italian citizen would be "reciprocally" subject to suit in the foreigner's courts under the same circumstances. *See* Judgment of July 2, 1969, Cass. Sez. U., 1970 Foro It. I 574.

97 *Id.* *See* Bodewig, *supra* note 82, at 203 (writing about the disparate comparative-advertising rules among EU Members). "In these situations, the only way for a company to be safe is to follow the strictest rule and to bring its advertising in line with the law of the most restrictive member state. Thus, for all practical purposes, comparative advertising can hardly be practiced by international companies." *Id.*

98 SACK & BARON, *supra* note 13, § 10.2.2.

99 N.Y. CIV. RIGHTS. § 51 (McKinney 1995). In New York the statute is the exclusive remedy for invasions of privacy. In other words, New York does not recognize a common-law right of privacy or publicity supplementing that expressed in the statute. *See, e.g.*, Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 583 (N.Y. 1984); Wojtowicz v. Delacorte Press, 374 N.E.2d 129, 130 (N.Y. 1978).

100 Even this limited protection is unavailable if the unauthorized use is in connection with the report of a matter of public interest. "Public interest" is broadly defined to encompass all newsworthy matters pertaining to social trends and human relations. *Stephano*, 474 N.E.2d at 584-85; Arrington v. New York Times Co., 434 N.E.2d 1319, 1321-22 (N.Y. 1982), *cert. denied*, 459 U.S. 1146 (1983). Thus, for example, the use of a private person's photograph, though taken without consent in a public place, does not violate the statute if reasonably related to the newsworthy subject matter of the report. *Id.* at 1322.

101 A plaintiff suing for disclosure of "private facts" must show that the defendant publicized to the community at large truthful but highly offensive information embarrassing to the plaintiff that was kept "private" before disclosure by the defendant. Information is not "private" if known in the community, previously disclosed by the plaintiff, or if it relates to events occurring in a public place. The disclosure of private but "newsworthy" facts is not actionable. The cause of action does not survive the plaintiff's death. Family members cannot assert a vicarious claim; only the person identified in the offending statement may claim a private-facts invasion of privacy. *See generally* SACK & BARON, *supra* note 13, § 10.4 *et seq.*; METCALF & NIEHOFF, *supra* note 13, §§ 2.17-2.23; 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.9 (1996 ed.).

102 "False light" means a false, non-defamatory statement that is nevertheless highly of-

discussion, whatever the scope of a particular state's privacy right, the Supreme Court has held that when the complainant is a public official or public figure, the First Amendment permits recovery for invasion of privacy only upon a showing of knowing or reckless disregard of the truth, which is the same standard applicable to defamation cases involving plaintiffs in the public arena.[103] As a practical matter, then, in the United States a "public figure . . . has virtually no right of privacy insofar as the facts may relate, even remotely, to the plaintiff's public life."[104]

The French Right of Privacy

French law has recognized a right of privacy for at least 150 years.[105] In 1970, France gave the right statutory expression[106] in article 9 of the Code Civil,[107] which, in its one-sentence first paragraph, states simply that "each person has the right to the respect of his private life."[108] Judicial and scholarly analysis both before and after the 1970 Act has enunciated a definition of privacy much

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fensive to a reasonable person and injurious to the plaintiff's feelings. The plaintiff has the burden of proving falsity. As with "private facts" invasion of privacy, a "false light" cause of action does not survive the plaintiff's death and family members cannot assert a vicarious claim. *See generally,* SACK & BARON, *supra* note 13, § 10.3 *et seq.*; METCALF & NIEHOFF, *supra* note 13, §§ 2.35-2.36, 2.43; MCCARTHY, *supra* note 101, § 5.12.

103 Time, Inc. v. Hill, 385 U.S. 374 (1967). *See* SACK & BARON, *supra* note 13, § 10.1.2; METCALF & NIEHOFF, *supra* note 13, §§ 2.44-2.45; MCCARTHY, *supra* note 101, §§ 5.9[B], 5.12[E]. For further discussion of evidentiary burdens in defamation cases, see *supra* text accompanying notes 13-19.

104 SACK & BARON, *supra* note 13, § 10.4.5.1, at 590-91.

105 *See* JEAN MARIE AUBY & ROBERT DUCOS-ADER, DROIT DE L'INFORMATION 604-10 (2d ed. 1982); For a comprehensive discussion of French privacy law, see Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris,* 68 TUL. L. REV. 1219 (1994).

106 La Loi N° 70-643 du 17 juillet 1970 [Law No. 70-643 of July 117, 1970], J.O., July 19, 1970, p. 6751 [hereinafter 1970 Act].

107 1970 Act art. 22. Article 9 of the Civil Code did not alter the right of privacy, but rather reflected the preexisting jurisprudence. *E.g.,* AUBY & DUCOS-ADER, *supra* note 105; Raymond Lindon, *Les Dispositions de la Loi du 17 Juillet 1970 Relatives à la Protection de la Vie Privée,* 1970 J.C.P. I, No. 2357; Raymond Pradel, *Les Dispositions de la Loi N° 70-643 du 17 Juillet 1970 sur la Protection de la Vie Privée,* 1971 D.S. Jur. (Chronique) 111.

108 "Chacun a droit au respect de sa vie privée." C. CIV. art. 9, ¶1. The second paragraph of article 9 and article 1382 of the Code Civil together authorize the courts to grant both monetary damages and equitable relief, the latter including restraining orders, impoundments, seizures, and such other measures "appropriate to prevent or stop an invasion of the intimacy of the private life . . . ." C. CIV. art. 9, ¶2. Article 23 of the 1970 Act also added articles 368-72 to the Code Pénal [hereinafter C. PÉN.], which criminalize certain intentional invasions of privacy, including: eavesdropping and unauthorized recording or transmission, by whatever means, of a person's image, provided, however, that participation in a public assembly is deemed consent to a *non-clandestine* recording or transmission (C. PÉN. art. 368); disclosure of private information (whether accomplished, received, or perceived in France), to the public or any unauthorized third party (C. PÉN. art. 369); publication, by whatever means, of an unauthorized montage using a person's words or image, where it is neither evident nor disclosed that it is a montage (C. PÉN. art. 370).

more sweeping than the American version.[109] In France, the right of privacy extends to all aspects of an individual's spiritual and physical being,[110] including such matters as one's image, and personal health, and the health of close family members, as well as parental and marital status, relations with children, romantic attachments, political and religious beliefs, true names, and residences.[111] Each person has the exclusive power to define the boundaries of his or her private life and the circumstances under which private information may be divulged publicly.[112] Unlike in the United States, in France the right survives death and family members may assert a privacy claim on behalf of the deceased.[113] Under French law, a person also enjoys a vicarious right where a disclosure relates to a close family member.[114]

In further contrast with American privacy law, French law does not circumscribe the privacy right of public officials and public

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109 In addition to the various judgments cited in footnotes 110-136, *infra, see, e.g.*, Judgment of Nov. 14 1975, Cass. civ. 2e, 1975 Bull. Civ. II 236, No. 294, 1976 D.S. Jur. 421 note B. Edelman, *aff'g*, Judgment of Dec. 17, 1973, Cour d'appel, Paris, 1976 D.S. Jur. 120; Geoffroy, *Le Secret Privé dans la Vie et la Mort*, 1974 J.C.P. I, No. 2604; Pradel, *supra* note 107; Lindon, *supra* note 107; Judgment of Jan. 6, 1971, Cass. civ. 2e, 1971 D.S. Jur. 263 note Edelman; Raymond Lindon, *Vie Privée: Un Triple "Dérapage"*, 1970 J.C.P. I, No. 2336; Robert Badinter, *Le Droit au Respect de la Vie Privée*, 1968 J.C.P. I, No. 2136; Judgment of Feb. 27, 1967, Cour d'appel, Paris, 1967 D.S. Jur. 450 note J. Foulon-Piganiol; Raymond Sarraute, *Le Respect de la Vie Privée et les Servitudes de la Gloire*, 1966 1 G.P., Doctr. 12; Lindon, *La Presse et la Vie Privée*, 1965 J.C.P. I, No. 1887.

110 Pradel, *supra* note 107. *See* Judgment of Mar. 17, 1966, Cour d'appel, Paris, 1966 D.S. Jur. 749.

111 Judgment of May 15, 1970, Cour d'appel, Paris, 1970 D.S. Jur. 466; Judgment of Mar. 17, 1966, Cour d'appel, Paris, 1966 D.S. Jur. 749 (magazine invaded privacy of actor Jean-Louis Trintignant when it published authorized photographs of Trintignant and family in conjunction with an unauthorized article about his past romance with Brigitte Bardot); Pradel, *supra* note 107.

112 Judgment of Dec. 17, 1973, 1976 D.S. Jur. 120 (stating that publication of Charlie Chaplin's autobiography did not place Chaplin's private life in the public domain and Chaplin accordingly could object to subsequent, unauthorized disclosure of same facts in magazine), *aff'd*, Judgment of Nov. 14, 1975, 1975 Bull. Civ. II 236, No. 294, 1976 D.S. Jur. 421; Judgment of Feb. 13, 1971, Cour d'appel, Paris, 1971 D.S. Jur. (Somm.) 120; Judgment of May 15, 1970, Cour d'appel, Paris, 1970 D.S. Jur. 466.

113 Judgment of June 7, 1983, Cour d'appel, Paris, 1984 G.P. II 528; Judgment of Dec. 21, 1977, Cour d'appel, Paris, 99 R.I.D.A. 161 (1979) ("death does not have the effect of causing the deceased's private life to fall into the public domain"); Judgment of Nov. 3, 1982, Cour d'appel, Paris, 1983 D.S. Jur. 248 note Lindon; Geoffrey, *supra* note 109, ¶ 14.

114 *See, e.g.*, Judgment of Jan. 18, 1996, Trib. gr. inst., *reprinted in* LE MONDE, Jan. 20, 1996, at 6 (stating that book's revelations about former President Mitterrand's health invaded privacy of Mitterrand's wife and children); Judgment of Feb. 1, 1989, Cour d'appel, Paris, 1990 D.S. Jur. 48 note E. Agostini, *aff'd*, Judgment of Oct. 23, 1990, Cass. civ. 1re, 1990 Bull. Civ. I 158, No. 222 (holding that newspaper article about minor son of Aga Khan invaded father's privacy); Judgments of June 2 and May 26, 1976, Trib. gr. inst., 1977 D.S. Jur. 364 (1re & 2e Espèces) (articles about Princess Caroline of Monaco also invaded privacy of Prince Rainier and Princess Grace); Judgment of Dec. 17, 1973, Cour d'appel, Paris, 1976 D.S. Jur. 120 ("whoever the person, information about his ancestors, descendants and those close to him concerns his private life"), *aff'd*, Judgment of Nov. 14, 1975, Cass. civ. 2e, 1975 Bull. Civ. II 236, No. 294, 1976 D.S. Jur. 421.

figures.[115] While the public activities of such persons necessarily subject more of their lives to legitimate public scrutiny,[116] a public official or figure may shield from inquiry and intrusion those aspects of private life not related to the conduct of the public activities.[117] Moreover, public officials and figures—no differently than private persons—may withdraw from the public arena and return to the private domain personal information previously divulged.[118] This right to bring publicly disclosed information back under the privacy umbrella (*à l'oubli*) exists even where the public official or figure was responsible for the prior disclosure.[119]

In yet another distinction from American law, truth is not an issue where a public figure or official claims invasion of privacy in France. Indeed, the truth of the invasive publication often is indisputable, because the claimant has disclosed the same facts previ-

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115 "[E]very person, whatever his station in life, birth, fortune, or present or future functions, has the right to the respect of his private life . . . ." Judgment of Feb. 1, 1989, 1990 D.S. Jur. at 48 (involving Princess Caroline of Monaco). *See also* Judgment of Jan. 18, 1996 (involving Mitterand), *reprinted in* LE MONDE, Jan. 20, 1996, at 6.

116 "An individual's public activities and participation in public life fall outside the boundaries of private life and the protection to which it is entitled." Judgment of Dec. 20, 1976, Cour d'appel, Paris, 1978 D.S. Jur. 373.

117 *See, e.g.*, Judgment of Apr. 13, 1988, Cass. civ. 1re, 1988 Bull. Civ. I 67, No. 98 (involving former Empress of Iran); Judgment of Jan. 10, 1985, Cour d'appel, Paris, 1985 D.S. Jur. (IR) 321 (photographs taken of actress Isabelle Huppert in public place, disclosure of her companion's name and age and revelation that the companion was the father of her child, all constituted invasions of Huppert's privacy); Judgment of Feb. 27, 1967, Cour d'appel, Paris, 1967 D.S. Jur. 450 (photographs of Brigitte Bardot in slip and bra on private property taken with telephoto lens were an invasion of Bardot's privacy, notwithstanding Bardot's long prior tolerance of "more lascivious" photographs); *see* Note of Pierre Mimin to Judgments of July 12, 1966, Cass. civ. 2e, and Nov. 15, 1966, Cour d'appel Paris, 1967 D.S. Jur. 182, regarding the difficulty in determining the dividing line between the public and private lives of public figures. *Compare* SACK & BARON, *supra* note 13, § 10.4.5.2.2, showing that in the U.S. little protection exists against disclosures about most aspects of the private lives of "newsworthy" persons. "The lives of public officials and public figures are invariably matters of general interest." *Id.* § 10.4.5.1, at 591.

118 Judgment of May 15, 1970, Cour d'appel, Paris, 1970 D.S. Jur. 466. A person involved in an event of historical significance may not use the right of privacy to block the disclosure or discussion of the historical events. *E.g.*, Judgment of May 22, 1974, Trib. gr. inst., 1974 D.S. Jur. 571 (rejecting privacy challenge to Belmondo/Resnais film about Alexandre Stavisky's financial chicanery); Judgment of Feb. 27, 1970, Trib. gr. inst., 1970 J.C.P. II, No. 16293 (dismissing suit of "Papillon," famed Devil's Island escapee). *See generally* Pradel, *supra* note 107; Judgment of Jan. 6, 1971, Cass. civ. 2e, 1971 D.S. Jur. 263 note Edelman; Judgment of Oct. 4, 1965, Trib. gr. inst., 1966 J.C.P. II, No. 14482 note G. Lyon-Caen.

119 Judgment of Jan. 27, 1989, Cour d'appel, Paris, 1989 J.C.P. II, No. 21325; Judgment of Jan. 6, 1971, Cass. civ. 2e, 1971 D.S. Jur. 263; Judgment of May 15, 1970, 1970 D.S. Jur. 466. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (1977) (lapse of time alone not sufficient to take facts out of the public arena); SACK & BARON, *supra* note 13, § 10.4.5.6; METCALF & NIEHOFF, *supra* note 13, §§2.23-2.26; Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (holding that plaintiff's life is still a matter of public interest 27 years after original public exposure, despite his deliberate efforts to live in obscurity during that period).

ously.[120] Under French law, the critical issue is the defendant's violation of the claimant's right to control the timing, circumstances, and context of the disclosure of any facts about the claimant's private life.[121]

This broad right of privacy for public officials and figures means that French courts will intervene in matters that American privacy law would treat as issues of legitimate public interest constitutionally immune from judicial interference.[122] Thus, for example, on the complaint of former French President Valéry Giscard d'Estaing, the Court ordered the seizure of a deposed African dictator's autobiography deemed invasive of Giscard's privacy.[123] The Court's judgment in that case illustrates the extent to which French privacy law—in contrast with the U.S.—limits the scope of debate even in the political arena:

> [P]olitical combat . . . to be exercised within the context of freedom of the press and freedom of information, must leave outside the field of battle any fact or event directly related to the intimacy of personal or family life; the fact that the person targeted engages in an activity of a public figure cannot authorize or justify an intrusion into what constitutes the "private life" that "each person has the right" to have respected (art. 9 C. civ.) . . . .[124]

As American media increasingly use the Internet, content originating from the U.S., whether multimedia entertainment, tabloid celebrity exposés, or serious political reporting, will clash with the more restrictive French law of privacy. Recent events surrounding the death of former French President François Mitterrand are a portent. A short time after Mitterrand died in early January 1996, his private physician released a book claiming, among other things, that Mitterrand's long battle with prostate cancer had distracted him from his governmental duties for much of the 14 years that he served as President.[125] On the complaint of Mitterrand's widow

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120 *See, e.g.*, Judgment of Dec. 17, 1973, Cour d'appel, Paris, 1976 D.S. Jur. 120, *aff'd*, Judgment of Nov. 14, 1975, Cass. civ. 2e, 1975 Bull. Civ. II 236, No. 294, 1976 D.S. Jur. 421; Judgment of May 15, 1970, Cour d'appel, Paris, 1970 D.S. Jur. 466.

121 Geoffroy, *supra* note 109, ¶ 17; Judgment of Dec. 17, 1973, Cour d'appel, Paris, 1976 D.S. Jur. 120, *aff'd*, Judgement of Nov. 14, 1975, Cass. civ. 2e, 1975 Bull. Civ. II 236, No. 294, 1976 D.S. Jur. 421.

122 Judgment of Apr. 13, 1988, Cass. civ. 2e, 1988 Bull. Civ. I 67, No. 98 (on complaint of former Empress of Iran, Court issued order suppressing publication of a magazine containing unauthorized photographs, stating that "a monarch has the same right of privacy as any other person as to matters not related to her public functions.").

123 Judgment of May 14, 1985, Trib. gr. inst., 2 G.P. 608 (1985).

124 *Id.*

125 CLAUDE GUBLER, LE GRAND SECRET (1996).

and children, a court ruled in mid-January 1996 that the book was a grave intrusion into the family's privacy and issued a restraining order prohibiting further sales and levying a $200 per copy fine for sales made in violation of the injunction.[126] Just weeks after issuance of the court order, a French server put the book on the Internet[127] and defiantly threatened to transmit the book into France from the United States if the government shut down the French site.[128] Enterprising American servers also took up the challenge and by March 1996, the book was available at several Internet sites in the United States accessible to French Net surfers.[129] With the disappearance of the French site,[130] the American servers are now the source for French citizens to read materials banned in France by its privacy law.[131]

A French court would likely apply French law to invasions of privacy projected into France via the Internet.[132] As already noted

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126 Judgment of Jan. 18, 1996, *reprinted in* LE MONDE, Jan. 20, 1996, at 6. The court cited the physician's breach of his patient's confidences and the release of the book immediately after Mitterand's burial as aggravating factors, but based its decision on the fact that "the exercise of the freedom of expression can find restriction . . . in the texts on the right of respect of one's private life . . . ." *Id.* On March 12, 1996, the Court of Appeals of Paris, "relying primarily on the principle of respect for a medical confidence," extended the injunction another month to allow the Mitterrand family time to pursue its claim on the merits in the lower court. *Le Livre Sur le Cancer de Francois Mitterand Reste Provisoirement Interdit*, AGENCE FRANCE PRESSE INTERNATIONAL FRENCH WIRE, Mar. 13, 1996; *cf.* Madden v. Creative Services, Inc., 646 N.E.2d 780, 785 (N.Y. 1995) (treating theft of information protected by attorney/client privilege as invasion of privacy "is neither necessary to protect the private interest at issue nor prudent as a matter of public policy"); Doe v. Roe, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977) (disclosure of confidential medical information not invasion of privacy under New York statute, but breach of implied contract of confidentiality).

127 The site was at <http://www.le-web.fr/secr/>, but in early February 1996, a creditor seized the server's computer equipment. Giussani, *Le Matériel Informatique du Cybercafé <Le Web> Sequestré par la Police*, Feb. 5, 1996 (no longer available online).

128 *Banned Mitterand Book Put on Net*, PUBLISHERS W'KLY, Feb. 5, 1996, at 21. The case has exposed the tension inherent in French law's generous protection of the private life of a public official and his family, on the one hand, and, on the other, the freedom of the press to report "private" facts that may affect the public's judgment about the official's performance and capacity to govern. *Id.;* LE MONDE, Jan. 20, 1996, at 6. Reportedly, 60% of France's 200,000 Net users tried to access the French site. *Banned Mitterand Book on Net, supra. See* Philippe DeBeusscher, *La Controverse Sur la Vie Privée des Hommes Publics Relancée*, AGENCE FRANCE PRESSE INTERNATIONAL FRENCH WIRE, Jan. 20, 1996 (describing the different press treatment accorded political leaders in France in comparison with the United States and United Kingdom, as exemplified by the fact that the French press first reported only in 1994 that Mitterand had fathered an illegitimate daughter 20 years earlier).

129 *See* <http://www.replay.com/mirror/le-secret/index.html>; and, <http://www.well.com/conf/liberty/le-secret/>.

130 *See* sources cited *supra* note 127.

131 Doreen Carvajal, *Book Publishers Worry About Threat of Internet*, N.Y. TIMES, Mar. 18, 1996, at A1. Agence France Presse described the affair as "an additional illustration of the legal conundrum posed by the information superhighways and the difficulty in regulating them." Philippe DeBeusscher, *Le Respect de la Loi Sur les Autoroutes de l'Information un Vrai Casse-tête*, AGENCE FRANCE PRESSE INTERNATIONAL FRENCH WIRE, Jan. 24, 1996.

132 Judgment of Apr. 13, 1988, Cass. civ. 1re, 1988 Bull. Civ. I 67, No. 98 (stating that French court must apply French privacy law to acts committed in France); C. PÉN. art. 369

in the preceding discussions of defamation and *droit moral*, international defendants with assets vulnerable to a French judgment would run the greatest risk.[133] Nonetheless, the risk is real and would not be limited to suits by French citizens, because a French court also would entertain an invasion of privacy claim brought by a U.S. (or other non-French) citizen against an American defendant.[134] Besides claims arising from news reporting about celebrities and political figures, multimedia exploitation of the Internet might generate suits over uses of photographs and films of famous persons that would be lawful in the United States.[135] Also, on-line services and Internet gateway providers could be held liable for allowing their systems to be used to transmit into France materials found to invade a complainant's privacy under French law.[136]

(Fr.), classifying as crimes certain invasions of privacy accomplished, *received or perceived* in France. *See* AGENCE FRANCE PRESSE INTERNATIONAL ENGLISH WIRE, Jan. 24, 1996 (reporting the legal opinion that the Mitterand family could institute criminal invasion of privacy actions against Internet servers transmitting copies of the banned book).

133 A monetary judgment would not be enforceable in the United States for the same constitutional and public-policy reasons applicable to foreign defamation judgments. *See supra* note 34 and accompanying text.

134 *See* Judgment of Feb. 1, 1989, 1990 D.S. Jur. 48, where the court upheld an invasion of privacy claim asserted under French law by the Aga Khan, a U.K. subject, against *The Mail on Sunday*, a British newspaper with some circulation in France. The commentator noted that in light of the John Huston case (*see supra* note 63), there no longer is any question that a foreigner may sue another foreigner in a French court to vindicate a right granted by French law. According to the commentator, the Aga Khan availed himself of France's privacy law because the United Kingdom does not recognize a right of privacy and a United Kingdom defamation suit would have been fruitless, given the truth of the newspaper article in question. *See* Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398 (1990) (regarding weakness of U.K. privacy law); *see also* Judgment of Dec. 20, 1976, 1978 D.S. Jur. 373 (allowing foreigner to sue French citizen in French court for invasion of privacy under French law).

135 For example, multimedia can create a montage of images drawn from a variety of other sources. *See* sources cited *supra* note 61. Projected into France via the Internet, these multimedia montages might violate C. PÉN. art. 370, which prohibits certain types of montage as invasions of privacy. Even absent any falsification or manipulation, a montage can violate the statute if it uses the complainant's photograph or image in a context or design, or with text, that modifies its artistic value, scope, or meaning. Judgment of Feb. 26, 1974, Cour d'appel, Toulouse, 1974 D.S. Jur. 736. Such modifications are inherent in multimedia creations. Also, digitized "morphed" images of long-dead personalities, one of the most spectacular multimedia effects (like the "Humphrey Bogart" and "Jimmy Cagney" Diet Coke commercials aired several years ago (*see supra* note 61), could violate the privacy right of the deceased. *See supra* note 113. *But see* Judgment of Nov. 3, 1982, Cour d'appel, Paris, 1983 D.S. Jur. 248 note Lindon (television broadcast discussing Matisse's health in last years of his life did not invade artist's privacy, given truthfulness of the account and fact that 25 years after his death, Matisse was a legitimate subject of historical inquiry).

136 Judgment of May 5, 1987, Cour d'appel, Paris, 1987 D.S. Jur. (IR) 143 (holding Spanish magazine publisher liable for invasion of Brigitte Bardot's privacy occasioned by distribution in France of copies of the magazine with unauthorized photographs of the actress). The Court stated that because the publisher failed to take steps to ensure that its distributors did not distribute the magazine in France, the offending distribution was "thus accomplished with [the publisher's] implicit agreement." *Id.*

PART II: AN INTERNATIONAL LAW OF THE INTERNET

Exasperated by the Internet's easy circumvention of French law in the Mitterrand case, the French government in late January 1996 proposed adoption of an international law of the Internet.[137] The French proposal reflects belated recognition at the governmental level of the Internet's challenge to traditional notions of national sovereignty:

> [O]nly a computer network allows routine control of activity across national boundaries. . . . Laws are generally territorial, extending no further than the borders of the jurisdiction of the enacting government. Cyberspace transcends those borders, however, creating new incentives regarding information transfer.[138]

> The very technology which has linked computers by telecommunications renders laws, framed in terms of power over a particular territory, inconvenient or irrelevant in many ways. The subject matter to be regulated is pervasive, ubiquitous, instantaneous.[139]

> Internet is beyond all borders and government regulation. Whatever the country affected, a State can only impose a very partial framework and protection concerning the problems posed by the development of the Internet. Existing laws can only have an impact on behavior in a given territory.[140]

Regulating the Internet through national legislation will produce a legal Tower of Babel, with each nation attempting to apply laws based on territorial sovereignty to ephemeral extraterritorial transmissions crossing its frontiers from all points on the globe.[141] As shown in Part I above, such an approach could require prospec-

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137 François Fillon, Minister of the Post Office, Telecommunications and Space, announced that France is going to propose to the European countries an initiative on the international law of communication with respect to the Internet. For Mr. Fillon, the problem to be addressed is the "extra-territoriality of [computer] networks" . . . . [The French] initiative would permit development of an international law of the Internet, analogous to maritime law. Mr. Fillon declared that such an initiative "constitutes the sole response possible to the international character of these networks."

AGENCE FRANCE PRESSE INTERNATIONAL FRENCH WIRE, Jan. 31, 1996.

138 Dan L. Burk, *Transborder Intellectual Property Issues on the Electronic Frontier*, 6 STAN. L. & POL'Y REV. 9, 10 (1994) (footnote omitted).

139 M. D. Kirby, *Legal Aspects of Information Technology*, *in* AN EXPLORATION OF LEGAL ISSUES IN INFORMATION AND COMMUNICATION TECHNOLOGIES 8, REPORT OF THE COMMITTEE FOR INFORMATION, COMPUTER AND COMMUNICATIONS POLICY, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (1983) [hereinafter OECD REPORT].

140 Astrid Baumgartner et al., *INTERNET est-il hors-la-loi?*, 8 LÉGICOM 118, 124 (1995).

141 Kirby, *supra* note 139, at 40; JÉRÔME HUET & HERBERT MAISL, DROIT DE L'INFORMATIQUE ET DES TÉLÉCOMMUNICATIONS 28-32, 718-19 (1989); *cf.* Henry Perritt, *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 352-53 (1993).

tive Internet users to comply with many differing laws,[142] a burden that would frustrate Internet development and innovation.[143] The French proposal correctly perceives that an international legal regime is essential to ensure the Internet's orderly evolution into a true transborder information and entertainment network.[144]

A. *Some Guidelines for an International Law of the Internet*

In suggesting maritime law as a point of reference,[145] the French proposal seems to analogize packets of Internet-transmitted information to ships on the high seas. Trading nations have long recognized that international commerce could not function effectively if a ship plying the seas had to comply with the laws of every nation purporting to assert jurisdiction over a patch of the ocean. International maritime law therefore prescribes that the law of the ship's State of registration governs, regardless of where the ship finds itself on the high seas.[146]

This metaphor goes only so far, however. The law of the high seas ends when a ship crosses into a country's territorial waters.[147] Moreover, a ship in port stops at the State's littoral border, where customs rules, quarantine, and other regulatory measures control what part of the ship's cargo may enter the country's domestic economy and society. Among those nations allowing the free interchange of information by telephone and other means, such border controls on Internet-borne cargo do not exist and would not be desirable.[148]

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142 Although Part I focuses primarily on Internet content originating in the United States, similar problems could arise even between two EU Members. *See, e.g.*, Shevill v. Presse Alliance SA, [1992] 1 All E.R. 409, [1992] 2 W.L.R. 1 (C.A.) (French newspaper subject to suit for libel in the United Kingdom despite *de minimis* U.K. circulation); Judgment of Feb. 1, 1989, 1990 D.S. Jur. 48 (British newspaper subject to suit in France for invasion of privacy); Schricker, *supra* note 74, at 624 (discussing enforcement of national laws against advertising originating abroad, including in one instance via satellite); *cf. Playboy Enters.*, 1996 WL 396128 (holding that Italian magazine publisher's Internet solicitation of U.S. subscribers violated 15-year-old injunction prohibiting sales in the United States).

143 Kirby, *supra* note 139, at 39. "Inevitably, lawyers from different traditions will approach the issues of transborder data flows (TBDF) in ways dictated by their training. Concepts will differ, institutions will differ, categories of legal reference will be different . . . ." *Id.* at 12.

144 HUET & MAISL, *supra* note 141, at 648-49; *see also* Richard Falk, *Vers Une Domination Politique Mondiale de Nouveau Type*, LE MONDE DIPLOMATIQUE, May 1996, at 16 (calling for "the establishment of new institutions and procedures of international law allowing the regulation of cyberspace in the same manner that the modern State has governed territorially delimited societies").

145 *See supra* note 137.

146 U.N. Convention on the Law of the Sea, Part VII, Dec. 10, 1982, 21 I.L.M. 1261.

147 *Id.*

148 *See* J. Bing et al., *Legal Problems Related to Transborder Data Flows, in* OECD REPORT, *supra* note 139, at 96-7; *cf.* Council Decision, 87/499, 1987 O.J. (L 285) 35; OECD Declaration on Transborder Data Flows, Apr. 11, 1985, reproduced as Appendix B in ELECTRONIC

A closer analogy for the Internet exists with recent European efforts to promote the free flow of transborder satellite television broadcasts. In 1989, the Council of Europe[149] adopted the European Convention on Transfrontier Television,[150] which confers exclusive regulatory jurisdiction on the country from which the transborder broadcast is transmitted via satellite up-link.[151] The EU, itself a party to the Television Convention,[152] has issued two directives to further implementation of the Convention among EU Members. The first directive, issued in 1989, declares that it is "sufficient that all broadcasts comply with the law of [the] Member State from which they emanate" "to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States . . . ."[153] In 1993, the EU issued a second directive to deal with continued uncertainty about copyright requirements applicable to transborder T.V. broadcasts, declaring that, it being

> necessary to avoid the cumulative application of several national laws to one single act of broadcasting . . . communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth . . . .[154]

Subjecting transborder broadcasts exclusively to the law of the emitting country assures legal certainty by establishing a single, ascertainable set of rules for a broadcaster's operations.[155] The ra-

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HIGHWAYS FOR WORLD TRADE (Peter Robinson et al. eds. 1989); Debra B. Rosler, *The European Union's Proposed Directive for the Legal Protection of Databases: A New Threat to the Free Flow of Information*, 10 HIGH TECH. L.J. 105, 111 (1995).

149 Membership in the Council of Europe—formed in 1949 to advance common economic, social and cultural interests—includes both EU and non-EU countries. *See, e.g.*, JOHN A. USHER, PLENDER AND USHER'S CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES 1-2 (3d ed. 1993).

150 May 5, 1989, Europ. T.S. No. 132 [hereinafter Television Convention].

151 *Id.* art. 5(2)(b). A party to the Television Convention may adopt more stringent or detailed rules for domestic application, but "is not entitled to rely on such . . . rules in order to restrict the retransmission on its territory of programme services which are transmitted by entities or a technical means within the jurisdiction of another Party and which comply with the terms of the Convention . . . ." COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON TRANSFRONTIER TELEVISION 22, ¶ 88 (1990). *See also id.* at 11, ¶ 30.

152 Television Convention, *supra* note 150, art. 29(1).

153 Council Directive 89/552, 1989 O.J. (L 298) 23, 24 [hereinafter 1989 EU Directive].

154 Council Directive 93/83, 1993 O.J. (L 248) 15 [hereinafter 1993 EU Directive].

155 *See* MARIE HELEN PICHLER, COPYRIGHT PROBLEMS OF SATELLITE AND CABLE TELEVISION IN EUROPE 34-5 (1987); *see also* AUTODISCIPLINA PUBBLICITARIA ANNUARIO 1995, *supra* note 75, at 40, describing agreement among European national advertising associations to apply country of origin's self-regulation code in cases of transborder advertising. *See also* John

tionale for a uniform legal regime based on the emitting-country principle applies with equal force to the Internet, which is an intrinsically transborder "uninterrupted chain of communication." The primary criticism of this approach is that some Internet servers may relocate to emitting countries with weak domestic regulations to avoid compliance with, for example, intellectual property laws.[156] However, in the short run at least, most Internet communication will emanate from and be conducted between nations that are already parties to an array of international agreements granting reciprocal protection of intellectual property rights and the like. As for "cyberpirates" who might seek out locations in countries that do not protect these rights (either legally or in practice), the Television Convention and the 1989 and 1993 EU Directives contain provisions—adaptable to the Internet—that address "renegade" operations.[157]

Politico-cultural concerns will present a more serious obstacle to an international law of the Internet based on the emitting-country principle. The United States still accounts for about 80% of worldwide Internet use,[158] making the United States the dominant emitting country.[159] An emitting-country rule therefore would mean that most Internet content would be governed by and reflect the more liberal laws of the United States. Both the Television Convention and the 1989 EU Directive, which mandate that broadcasters reserve a majority of transmission time for "European" works,[160] manifest Europe's sensitivity about the growing domination of American culture and values through means of mass communication. To succeed, an international agreement for the Internet must make allowance for European concerns in this sphere.

Browning, *Television by Any Other Name*, SCI. AM., Oct. 1996, at 40 (reporting that the EU recently classified the World Wide Web as a "broadcast medium" subject to rules mandating a minimum European content). *See infra* note 160 and accompanying text.

156 Ginsburg, *supra* note 64, at 335-36.

157 Specifically, if a broadcast emanates from a State not bound by the Television Convention or a Member of the EU, depending on the circumstances, the broadcaster must comply with the law of the State in which the satellite up-link occurs, or which provides the satellite frequency, or in which the broadcaster has its principal place of business. Television Convention, *supra* note 150, art. 5(2)(ii) and (iii); 1993 EU Directive, *supra* note 154, art. 1(2)(d); 1989 EU Directive, *supra* note 153, art. 2(1).

158 Patricia Sabosik, *Internet Pricing and Practice: Part One*, remarks before Internet Home & Office Expo '96 (Feb. 3, 1996).

159 *See* Bernard Cassen, *Le Tout-Anglais N'est Pas Une Fatalité*, LE MONDE DIPLOMATIQUE, May 1996, at 18 (reporting that 77% of all Internet sites are in English-speaking countries and characterizing the English language's dominance on the Net as "cultural imperialism").

160 Television Convention, *supra* note 150, art. 20; 1989 EU Directive, *supra* note 153, art. 4.

B. *A Proposed International Agreement*

The proposed treaty set forth below attempts to meet these objectives. By prescribing an emitting-country rule, it provides legal certainty as to the applicable law for Internet transmissions. With regard to the different cultural values of the contracting parties, the proposal adopts concepts found in the European programs governing transborder television broadcasts. Perhaps, most importantly, the proposed treaty leaves the door open to the development of a system of self-regulation for the Internet.[161]

161 The Internet's extraterritoriality may well prove it to be uncontrollable through traditional international procedures. Thus, any Internet treaty should allow for the evolution of a normative structure based on custom and practice that Net users find through experience to be best adapted to the Internet's unique characteristics. *See, e.g.*, Branscomb, *supra* note 1, at 1656-70.

CONVENTION ON TRANSFRONTIER COMPUTER-NETWORK COMMUNICATIONS

PREAMBLE

WHEREAS, the continued development of transfrontier computer networks will advance the exchange and dissemination of information and ideas, promote knowledge and artistic creation and encourage international communication;

WHEREAS, the laws and regulations of the States signatory to this Convention differ in their treatment of private rights and obligations that concern the use and dissemination of materials and content on such computer networks;

WHEREAS, these differences in laws and regulations create legal uncertainty that may impede the development of such computer networks;

WHEREAS, the States signatory to this Convention have determined that it is necessary to remove such legal uncertainty by assuring uniform legal treatment and avoiding the cumulative application of differing national laws to a single, uninterrupted chain of computer-network communication; and

WHEREAS, such legal uniformity must make allowance for the different social and cultural values of the States signatory to this Convention;

The States signatory to this Convention have agreed as follows:

CHAPTER I
GENERAL PROVISIONS

Article 1

Object and Purpose

The object and purpose of this Convention is to facilitate the development of transfrontier computer-networks by assuring uniform, non-conflicting legal treatment for communications on such networks.

Article 2

Terms Employed

For the purposes of this Convention:

A. "Cyberspace" means (1) all technical means and devices now known or hereafter devised by which two or more computers are connected to form a network, including, without limitation, wire,

cable, radio, television, microwave, fiber optics and laser, and (2) the random-access or other ephemeral memory of each computer connected to such network;

B. "Content" means signs, signals, data, writing, images, graphics, motion pictures, photographs, sound, intelligence, or other representation of information of whatsoever nature;

C. "Communication" means any transmission, emission, retrieval, reception or accessing of, or interaction with content in cyberspace, including, without limitation, by hypertext link, dynamic routing and caching, provided, however, that e-mail is not a communication;[162]

D. "E-mail" means a transmission in cyberspace sent to one or more recipients at specified domain addresses;

E. "Person" means any natural or legal person, including, without limitation, any corporation, partnership or other form of business organization or entity recognized by the laws of any Party;

F. "Recommunication" means a (1) a mirror, and (2) a retransmission or re-emission of a communication after the communication has been fixed in a permanent form, whether by saving in permanent computer memory, printing in hard copy or otherwise, provided that recommunication in no event means a hypertext link or dynamic routing;

G. "Server" means (1) any computer making, generating, or sending a communication, and (2) any person responsible for the operation of such a computer;

H. "Gateway" means (1) any computer providing a connection to a computer network, and (2) any person responsible for the operation of such a computer;

I. "Dynamic routing" means enabling a communication to take any one of several routes in a computer network;[163]

J. "Mirror" means a server that provides the same communications as another server;

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[162] Unlike with other kinds of cyberspace transmissions, the sender of an international e-mail message knows beforehand the message's destination and hence the foreign law that will apply to determine any legal obligations that might arise from the message. In this respect, e-mail is not different from ordinary mail, telephone, telex, or other means of international communication. *ACLU v. Reno*, 929 F. Supp. at 833. Accordingly, e-mail should not enjoy the exemption from foreign law that the Convention grants to other "non-addressable" cyberspace transmissions.

[163] "Dynamic routing means that the path that a particular message takes—and sometimes different parts of the same message—is not predetermined. Rather, at the time the computer establishes the path for a particular message it simultaneously determines what path would be most efficient." Perritt, *supra* note 141, at 352 n.7.

K. "Hypertext link" means a link or connection from one communication to another enabled by hypertext mark-up language or other system of writing or network protocol now known or hereafter devised;

L. "Caching" means temporarily storing a communication on a computer other than the server from which the communication originates;[164]

M. "Party" and "Parties" mean, respectively, a State and States ratifying, accepting, approving, or acceding to this Convention in accordance with the provisions of Article 16.

Article 3

Field of Application

This Convention shall apply to all communications in cyberspace. Notwithstanding the preceding sentence, if a communication involves exclusively Parties that are all signatories to another agreement, convention, or treaty applicable to such communication, such other agreement, convention, or treaty shall have precedence.[165]

Further, this Convention shall not apply to a publication, distribution, transmission, broadcast, or other dissemination in, into or from a Party's territory, in any form or medium outside of cyberspace, of content acquired, obtained, or derived from a communication or recommunication in cyberspace.

Article 4

Freedom of Cyberspace Expression

Each Party shall guarantee to all persons residing on its territory, irrespective of nationality, (1) freedom of expression and information in cyberspace and (2) freedom of communication and e-mail. A Party shall not regulate or restrict communications and e-mail originating from outside the Party's territory and passing or routed through any part of a computer network situated on the Party's territory.

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164 *ACLU v. Reno*, 929 F. Supp. at 848. Caching "eliminates most of the distance for both the request and the information and, hence, most of the delay. . . . Caching therefore advances core Internet values: the cheap and speedy retrieval of information." *Id.*

165 The purpose of this clause is to save other agreements covering transfrontier computer transmissions. For example, the EU is already formulating rules to govern the transmission between Member States of personal financial data on individuals. *See* 1 EC TELECOMMUNICATIONS LAW ¶¶ 9.1-9.27 (N. Higham et al. eds. 1993); Rosler, *supra* note 148.

CHAPTER II
REGULATORY PROVISIONS

Article 5

Applicable Law

1. The civil law of the Originating Party shall exclusively govern to determine private rights and obligations arising from or concerning a communication or recommunication.

2. For the purposes of this Convention, the "Originating Party" shall be

A. the Party in which a communication or recommunication is first placed on or sent to the computer network; or

B. where a communication or recommunication is first placed on or sent to the computer network in a State not a Party, the Party in which the gateway used to place the communication or recommunication on the computer network or send the communication or recommunication to the computer network is situated; or

C. where the Originating Party cannot be determined under either subparagraph A. or B., the Party in which is situated the principal place of business of the server responsible for the communication or recommunication; or

D. where the Originating Party cannot be determined under either subparagraphs A., B., or C., the Party in which the principal place of business of the gateway used to place the communication or recommunication on the computer network or send the communication or recommunication to the computer network is situated.

Article 6

Internal Law of the Parties

Nothing in this Convention shall prevent or prohibit a Party from

1. applying more stringent or detailed rules than stated in this Convention to communications and recommunications as to which such Party is the Originating Party within the meaning of Article 5, provided that such rules are consistent with Article 4 of this Convention, or

2. enforcing its domestic criminal laws with regard to a communication or recommunication, except that no Party shall impose criminal liability

A. solely because a communication or recommunication

causes injury to or affronts the reputation, honor, or dignity of a person or invades or intrudes upon a natural person's privacy or private life,[166] or

B. because a communication or recommunication is obscene or pornographic, without first giving the persons responsible for the communication or recommunication at least 30 days notice that the communication or recommunication violates the Party's criminal law.[167]

Article 7

Right of Reply

1. Each Originating Party, to the extent permitted by its national laws, shall ensure that every person, regardless of nationality or residence, shall have a right of reasonable reply where a communication or recommunication

A. causes grave injury or affront to a person's reputation, honor, or dignity, or

B. involves a grave invasion of or intrusion into a natural person's privacy or private life.[168]

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166 Traditional choice-of-law rules dictate that criminal law is local. *See, e.g.*, The Antelope, 23 U.S. 66, 123 (1825) (Marshall, Ch. J.); ROBERT A. LEFLAR ET AL., CASES AND MATERIALS ON AMERICAN CONFLICTS LAW 291 (1982). From a practical standpoint, States are unlikely to surrender their power to impose criminal liability for abuses of the Internet causing harm to their nationals. *See First Internet Wiretap Leads to a Suspect*, N.Y. TIMES, Mar. 31, 1996, at 20 (reporting federal government's indictment (on a non-extraditable offense) of an Argentine citizen who used the Internet to hack into U.S. military computers); *see also supra* note 9, regarding Germany's prosecutorial actions to block the dissemination of neo-Nazi propaganda via the mails and the Internet.

167 The recent debate over the new U.S. telecommunications law (*see A.C.L.U. v. Reno*, 929 F. Supp. 824) and CompuServe's experience in Germany (*see supra* text accompanying notes 8-9) show that obscenity and pornography on the Internet will be a sensitive area. On the one hand, it is a free-speech and censorship issue. On the other, it affects a nation's sovereign power to protect its citizens—and particularly children—from materials deemed undesirable by its societal standards. The proposed compromise would allow enforcement of criminal obscenity laws after prior warning to give the responsible persons an opportunity to remove the materials from the Net.

168 In Europe, such a right of reply exists in some form in both civil and common-law countries. *See, e.g.*, La Loi de 29 juillet 1881, art. 13 (France); Defamation Act of 1952, 15 & 16 Geo. & 1 Eliz. 2, ch. 66, § 4 (1952) (England). The Television Convention, *supra* note 150, art. 8, and the 1989 EU Directive, *supra* note 153, art. 23, likewise afford a right of reply. However, because a mandatory right of reply would violate the First Amendment in the United States, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), art. 7(1) of the proposed treaty provides that each Party should accord a right of reply "to the extent permitted by its national laws." *See* Branscomb, *supra* note 1, at 1671-72 (suggesting that an on-line service might voluntarily offer a right of reply to mollify a prospective plaintiff contemplating suit against the service as the "publisher" of a third-party defamation).

Cf. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386-92 (1969), which held that because over-the-air broadcasters enjoy a government-sanctioned monopoly of a scarce medium, the FCC could, consistent with the First Amendment, require the broadcasters to afford a right of reply. *Red Lion* appears inapposite to the Internet, where access

2. Each Originating Party shall make available judicial or administrative procedures appropriate and necessary for the effective and timely exercise of the right of reply.

3. In adjudicating an application by any person under this Article and the reasonableness of any requested right of reply, a judicial or administrative tribunal may consider, in addition to any other factors deemed relevant, the duration and scope of the communication or recommunication, the public interest, if any, served by its dissemination, the applicant's ability to reply through access to other media, the nature and scope of any prior dissemination of information contained in such communication or recommunication, the nature and propriety of the applicant's proposed reply, the usual custom and practice of users on the network, and the extent to which such communication or recommunication is a response to a prior statement made by the applicant.[169]

4. Any person seeking a right of reply must make application hereunder within fifteen days of the first dissemination of the communication or recommunication.

Article 8

Cybertribunal

The Parties hereby establish a Cybertribunal.

1. Each Party shall designate from one to five of its citizens to serve as judges of the Cybertribunal. The judges of the Cybertribunal shall elect one of their members President of the tribunal, to serve for a one-year term. Citizens of the same Party may not hold the office of President in two consecutive years.

2. The President may designate up to three Vice-Presidents to assist in the discharge of the President's functions.

3. The judges of the Cybertribunal may meet, confer, and deliberate in cyberspace by communication or e-mail.

4. A majority of the judges shall constitute a quorum. The Cybertribunal shall adopt its own rules of procedure by a majority of two-thirds of the judges present.

5. Any person seeking a right of reply in accordance with Article 7 and the server or gateway concerned may jointly make applica-

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is not limited as is the case with over-the-air bandwidths. *See ACLU v. Reno*, 929 F. Supp. 872-79 (Dalzell, D.J. concurring). *See also infra* note 169.

169 *See* Mike Godwin, *Libel Law: Let It Die*, WIRED, Mar. 1996, at 116 (arguing that easy access to the Internet affords everyone a right of reply, obviating the need for applying defamation law to Internet transmissions).

tion to the President of the Cybertribunal instead of pursuing any judicial or administrative remedy afforded by a Party.

For the purposes of such a joint application:

A. The application shall be in writing or by e-mail;

B. The provisions of Article 7(3) and 7(4) shall apply to any such application to the Cybertribunal;

C. Within 72 hours of receipt of the application, the President shall appoint five judges to hear and determine the application, no two of the judges being citizens of the same Party and none of the judges being a citizen of the Originating Party or the Party of which the applicant is a citizen or in which the applicant resides;

D. Within 72 hours after their appointment, the judges shall receive such evidence as may be submitted by the applicant and server or gateway;

E. The judges may receive such evidence in writing, or in cyberspace by communication or e-mail;

F. Within 48 hours after the judges receive such evidence, they shall issue, in writing, or in cyberspace by communication or e-mail, a decision determining the applicant's right of reply, if any, and the scope and nature thereof;

G. The decision of the Cybertribunal shall be final and binding on the applicant and server or gateway and shall not be subject to judicial, administrative, or other collateral review.

6. The Cybertribunal shall have competence and authority to hear and determine any other dispute arising from or concerning cyberspace with the mutual agreement of the persons concerned.

CHAPTER III
MUTUAL ASSISTANCE

Article 9

Cooperation Among Parties

1. The Parties shall render each other mutual assistance in order to implement this Convention.

2. For the purpose of rendering such assistance, each Party shall designate a representative authority by communicating the name and address of such authority at the time that the Party deposits with the Secretary General of the United Nations its instrument of ratification, acceptance, approval, or accession.

3. An authority designated by a Party shall:

A. at the request of another Party's representative authority, furnish information on the domestic law and practices of the furnishing Party in the fields covered by this Convention;

B. cooperate with the representative authorities of other Parties whenever useful to enhance the effectiveness of measures undertaken to implement this Convention; and

C. consider any difficulty arising from application of this Convention brought to its attention by another Party's representative authority.

CHAPTER IV
STANDING COMMITTEE

Article 10

Establishment of the Standing Committee

1. The Parties hereby establish a Standing Committee.

2. Each Party may be represented on the Standing Committee by one or more delegates, provided that each Party's delegation shall have one vote.

3. The Standing Committee may seek the advice of experts and other international bodies to discharge its functions.

4. A majority of the Parties shall constitute a quorum of the Standing Committee.

5. The decisions of the Standing Committee shall require a majority of three-quarters of the members present.

6. The Standing Committee shall meet no less frequently than twice each year.

7. Each year, the Standing Committee shall designate one Party to act as President of the Committee.

8. The Standing Committee shall adopt its own rules of procedure, consistent with the provisions of this Convention.

Article 11

Functions of the Standing Committee

The Standing Committee shall be responsible for monitoring the application of this Convention and for that purpose may:

1. make recommendations to the Parties concerning the application and enforcement of the Convention;

2. propose modifications and amendments of the Convention and report to the Parties concerning such proposals in accordance with article 12;

3. on the request of a Party, examine and report on questions concerning the interpretation of the Convention;

4. on reference by the Parties involved in a dispute concerning the application, enforcement, or interpretation of the Convention, endeavor to secure the friendly settlement of such dispute.

Article 12

Reports of the Standing Committee

Within 30 days after each meeting, the Standing Committee shall issue to each Party's representative authority a report on the Committee's discussions and any decisions taken.

CHAPTER V
AMENDMENTS

Article 13

Amendments and Modifications

1. Any Party may propose amendments and modifications to this Convention.

2. A Party shall submit a proposed amendment or modification to the President of the Standing Committee. The President of the Standing Committee shall convene a meeting of the Committee within 60 days following submission of the proposal.

3. The Standing Committee shall examine the proposal and shall submit to each Party's representative authority the text of any amendment or modification adopted by a majority of three-quarters of the Committee to implement the proposal.

4. An amendment or modification shall become effective on approval or acceptance by three-quarters of the Parties.

5. The President of the Standing Committee shall notify the Secretary General of the United Nations of any amendment or modification to this Convention that becomes effective in accordance with this Article.

CHAPTER VI
ENFORCEMENT

Article 14

Alleged Violations of this Convention

In the event that a Party believes that there is or has been a violation of this Convention, it shall notify the representative au-

thorities of the Parties allegedly in violation. The Parties concerned shall endeavor to resolve their dispute amicably or may, by unanimous consent, refer the dispute to the Standing Committee for its recommendation.

Article 15

Arbitration

In the event that the Parties have not resolved their dispute amicably in accordance with Article 14 within 90 days after first notification of the alleged violation, any Party concerned may refer the dispute to arbitration pursuant to the procedures hereafter adopted by the Parties to this Convention.

CHAPTER VII
FINAL PROVISIONS

Article 16

Entry Into Force

1. The States signatory hereto shall deposit this Convention with the Secretary General of the United Nations and it shall be open for signature by any State.

2. A State becoming a Party shall deposit with the Secretary General of the United Nations its instrument of ratification, acceptance, approval, or accession.

3. This Convention shall enter into force the first day of the calendar month following 90 days after at least seven States have expressed their consent to be bound by the Convention in accordance with the preceding paragraph.

Article 17

Denunciation

Any Party may at any time renounce this Convention by notification to the Secretary General of the United Nations. Such renunciation shall be effective on the first day of the calendar month following six months after the Secretary General receives such notification.