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Now Playing at a YouTube Near You: "Innocence of [Internet Service Providers]"

Brian A. Oliver

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NOW PLAYING AT A YOUTUBE NEAR YOU: “INNOCENCE OF
[INTERNET SERVICE PROVIDERS]”

*Brian A. Oliver**

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I. INTRODUCTION

In September 2012, violent protests began in the Middle East in reaction to the anti-Islamic video, *Innocence of Muslims*.¹ The video,

* J.D. and M.M. in Music Business and Entertainment Industries, anticipated May 2015, University of Miami; B.A., University of Wisconsin-Madison. First and foremost, I would like to dedicate this article to my parents, Larry and Linda Oliver, who have supported me throughout my life in every way imaginable. Special thanks

made available on Google's video-sharing subsidiary,² YouTube,³ depicted the Islamic Prophet Mohammed as a womanizer, a child molester, and a bloodthirsty killer.⁴ The video is perhaps most well-known for the role it did or did not play in the September 11, 2012 attack on the United States Embassy in Benghazi that resulted in the death of four Americans, including the United States Ambassador to Libya, Christopher Stevens.⁵ Although it was later discovered that the Benghazi attack was a pre-meditated terrorist act,⁶ the video undoubtedly generated numerous violent and non-violent protests throughout the world.⁷

also to Professor Stephen J. Schnably for his patience, assistance, and guidance in bringing this article to fruition. Also, I am greatly indebted to Professor Lili Levi, Troy Kessler, and Sajani Desai for their valuable mentorship. Finally, I would like to extend my gratitude to Dan Maher, Brian Stewart, and the staff members of the University of Miami International and Comparative Law Review for their efforts in preparing this article for publication.

¹ David D. Kirkpatrick & Steven Lee Myers, *Libya Attack Brings Challenges for U.S.*, N.Y. TIMES (Sept. 12, 2012), <http://www.nytimes.com/2012/09/13/world/middleeast/us-envoy-to-libya-is-reported-killed.html>.

² Andrew Ross Sorkin, *Dot-Com Boom Echoed in Deal to Buy YouTube*, N.Y. TIMES (Oct. 10, 2006), <http://www.nytimes.com/2006/10/10/technology/10deal.html?pagewanted=all&r=0>.

³ YouTube describes itself as a "forum for people to connect . . . [that] acts as a distribution platform for . . . content creators and advertisers." See *About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Sept. 9, 2012).

⁴ StandUpAmericaNow, *Innocence of Muslims Movie Trailer*, YOUTUBE <http://www.youtube.com/watch?v=mjoa3QazVy8&bpctr=1378748176> (last visited Sept. 9, 2013).

⁵ Hadeel Al Shalchi, *In Libya, Deadly Fury Took U.S. Envoys by Surprise*, REUTERS (Sept. 12, 2012), <http://www.reuters.com/article/2012/09/13/libya-ambassador-assault-idUSL5E8KCLHR20120913>.

⁶ Eric Schmitt, *After Benghazi Attack, Talk Lagged Behind Intelligence*, N.Y. TIMES (Oct. 21, 2012), <http://www.nytimes.com/2012/10/22/us/politics/explanation-for-benghazi-attack-under-scrutiny.html>.

⁷ See Andrew Roche, *Fury over Mohammad Video Simmers on in Muslim World*, REUTERS (Sept. 16, 2012), <http://www.reuters.com/article/2012/09/16/us-film-protests-idUSBRE88D0O320120916> (inciting protests in Sudan, Tunisia, Australia, and France); Serge F. Kovaleski, *From Man Who Insulted Muhammad, No Regret*, N.Y. TIMES (Nov. 25, 2012), <http://www.nytimes.com/2012/11/26/us/from-the-man-who-insulted-islam-no-retreat.html> (fueling protests in Yemen, Morocco, Iran, Tunisia, Sudan, Iraq, Pakistan, Lebanon, Indonesia, and Malaysia); see also David D. Kirkpatrick, *Anger Over a Film Fuels Anti-American Attacks in Libya and Egypt*, N.Y. TIMES (Sept. 11, 2012), <http://www.nytimes.com/2012/09/12/world/middleeast/anger>.

Due to the violence and unrest directly attributed to the film, Google received a plethora of requests to remove *Innocence of Muslims* from YouTube altogether. Google rebuffed these requests, citing YouTube's internal Community Guidelines in justifying its decision.⁸ According to YouTube's Community Guidelines, Google's regulatory policy is to remove content from YouTube, *inter alia*, when uploaded video content is deemed to be "hate speech,"⁹ when the video content violates its terms of service,¹⁰ or when Google responds to a court order or government request to remove the video.¹¹ In Google's judgment, the inflammatory video did not fall within any of its causes for removal, and issued a statement explaining "the video . . . is clearly within our guidelines and so it will stay on YouTube."¹² Nevertheless, Google eventually restricted access to the video in a few specific countries. It blocked access to the video in Egypt and Libya because of the violence and exceptional circumstances that were occurring in these two countries and it also blocked access to the video in at least five other countries because it violated the countries' local laws.¹³

Google's decision to restrict access to the *Innocence of Muslims* video in certain foreign countries raises many legal issues inherent in

over-film-fuels-anti-american-attacks-in-libya-and-egypt.html?pagewanted=all (provoking protests in Cairo, where Egyptian demonstrators scaled the walls of the United States Embassy, and replaced an American flag with an Islamic banner).

⁸ Gerry Shih, *White House 'Innocence of Muslims' Request Denied: Google Will Not Remove Film From YouTube*, HUFFINGTON POST (Sept. 14, 2012), http://www.huffingtonpost.com/2012/09/14/white-house-innocence-of-_n_1885684.html.

⁹ *Community Guidelines*, YOUTUBE, http://www.youtube.com/t/community_guidelines (last visited Jan. 18, 2013) [hereinafter *YouTube Community Guidelines*] (defining "hate speech" as content "that promotes hatred against members of a protected group").

¹⁰ *Id.*

¹¹ *Id.*

¹² See Claire Cain Miller, *As Violence Spreads in Arab World, Google Blocks Access to Inflammatory Video*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html?_r=0 (concluding "[b]ecause the video mocks Islam but not Muslim people," the video did not fall within Google's definition of "hate speech"); accord *YouTube Community Guidelines*, *supra* note 9.

¹³ Somni Sengupta, *Free Speech in the Age of YouTube*, N.Y. TIMES (Sep. 22, 2012), <http://www.nytimes.com/2012/09/23/sunday-review/free-speech-in-the-age-of-youtube.html?ref=technology>; see also Roche, *supra* note 7.

the operation of Internet service providers (ISPs)¹⁴ in today's interconnected digital age.¹⁵ This article examines the different forms that ISPs can take and how those forms affect freedom of expression, from liability for transmitting or transiently storing copyright infringing content on their networks to protection of fundamental rights when acting across state borders.

Part II of this article begins by tracing the substantive right of online free speech both domestically and internationally. Part III then explores the various forms that ISPs, such as Google and its subsidiaries, can take: that of a corporation, regulator, bystander, and publisher. Part IV then examines how international human rights law is applied to non-state actors and the difficulty of reconciling international human rights laws to large Internet companies that provide information to a global community. Finally, part V concludes by attempting to reconcile Google's various forms under an international human rights regime that seeks to protect individuals bound by often irreconcilable national laws.

¹⁴ For the purpose of this article, the term "ISP" shall refer to Internet intermediaries, namely, web hosting companies, search engines, and online auction sites. By way of contrast, consider the definition of the term "service provider" provided for in the Digital Millennium Copyright Act. See 17 U.S.C. § 512(k)(1)(A) (2012) (defining the term "service provider" in connection with liability arising out of transitory communications as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received"); 17 U.S.C. § 512(k)(1)(B) (2012) (establishing the definition of a "service provider" in connection with liability arising out of system caching; storage of information on systems or networks at the direction of users; and information location tolls as "a provider of online services or network access, or the operator of facilities therefor").

¹⁵ See Arielle Joy Albert, *Good for the Bottom Line: Incentivizing Private Companies to Join the Global Network Initiative*, 11 J. INT'L BUS. & L. 379, 382 (2012) ("Human rights, specifically rights of expression and privacy, are continually implicated when [ISP] companies . . . restrict access to the Internet . . .").

II. THE SUBSTANTIVE RIGHT OF FREEDOM OF SPEECH ON THE INTERNET UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. *Freedom of Speech under Domestic and International Human Rights Law*

Freedom of speech is a touchstone individual liberty both in the United States and in other countries across the globe.¹⁶ Here in the United States, the safeguards against government infringement of expression are enshrined in the First Amendment to the United States Constitution.¹⁷ In addition to the First Amendment's constitutional guarantees of the right to free speech, Congress has taken other legislative actions to provide further protections to such a right.¹⁸

Beyond the United States, the right to free speech is also recognized in most parts of the world through various international human rights mechanisms.¹⁹ After the establishment and promulgation of the United Nations Charter, which inaugurated the process of codifying international human rights and "established human rights as an international concern,"²⁰ the United Nations Commission on

¹⁶ Jessica E. Baumi, *It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship*, 63 FED. COMM. L.J. 697, 706 (2011); *see, e.g.*, U.S. CONST. amend. I (United States); S. AFR. CONST. § 16 (South Africa); INDIA CONST. art. 19(1)(a) (India); CONSTITUTION OF NIGERIA (1999) § 38(1) (Nigeria); Human Rights Act, 1998, c. 42, art. 10 (United Kingdom); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 2, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (Canada); *see also* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE ANALYSIS OF THE FREEDOM OF SPEECH xiv (2006) ("Virtually all constitutional democracies purport to respect the freedom of speech . . .").

¹⁷ *See generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

¹⁸ For example, Congress enacted the Free Speech Protections Act in 2009. *See* 155 CONG. REC. S23, 42–43 (daily ed. Feb. 13, 2009) (statement of Sen. Arlen Specter), *available at* <http://www.fas.org/sgp/congress/2009/s449.html> (proclaiming that the First Amendment is "one of the most basic protections in our Constitution").

¹⁹ *See* Baumi, *supra* note 16, at 706 (recognizing "[f]reedom of speech is also internationally recognized as a fundamental human right"); *see also* sources cited *supra* note 16. Note that the substantive free speech rights may vary from country to country.

²⁰ DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 12 (4th ed. 2009).

Human Rights (Commission) was created.²¹ The Commission's first task "was to draft the Universal Declaration of Human Rights (UDHR) and thus to provide an authoritative definition of the broad human rights obligations of the member states under" the United Nations Charter.²² Subsequently, in 1948, the United Nations General Assembly adopted the Commission's draft²³ of the UDHR, which recognized the international right to freedom of expression.²⁴ Although the UDHR is itself not binding on any nation, its provisions have been widely accepted, and therefore the inclusion of the right to free speech in the UDHR exemplifies that such right is a vital part of the fabric of international human rights law and the greater international community.²⁵

Besides its incorporation into the UDHR, the right to freedom of expression is also provided for in other international and regional human rights instruments, in regional and national court decisions, and in some countries' domestic laws themselves. For example, the International Covenant on Civil and Political Rights (ICCPR), one of the most widely-ratified international human rights treaties,²⁶ specifically protects freedom of expression.²⁷ Moreover, the right to

²¹ *See id.* at 13.

²² *See id.*

²³ Among other things, the draft articulated the importance and fundamental nature of rights that were placed at risk during World War II. *Id.*

²⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 19 (Dec. 10, 1948) [hereinafter UDHR]. The right to free speech is memorialized in Article 19 of the UDHR, providing that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to *seek, receive and impart* information and ideas through any media and regardless of frontiers." *Id.* (emphasis added).

²⁵ *See* INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 541-43 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010) (emphasizing that the liberties set forth in the UDHR have achieved the status of binding customary international law).

²⁶ *See* WEISSBRODT ET AL., *supra* note 20, at 137 (indicating, as of September 2008, there are 164 states parties to the ICCPR).

²⁷ *See* International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The right to free expression is guaranteed under Article 19 of the ICCPR, which largely mimics the language of Article 19 of the UDHR. *Id.* (providing that freedom of expression "include[s] [the] freedom to *seek, receive and impart* information and ideas of all kinds, regardless of frontiers, either

freedom of expression is enumerated in other international human rights treaties, such as the European Convention of Human Rights,²⁸ the American Convention on Human Rights,²⁹ the American Declaration of the Rights and Duties of Man,³⁰ and the African Charter on Human and Peoples' Rights.³¹ Indeed, the broad, substantive right of freedom of speech provided for in these instruments has been echoed by the European Court of Human Rights,³² the Inter-American Court of Human Rights,³³ and the United States Supreme Court.³⁴

The right to free speech, however, is not absolute. A number of international human rights treaties allow a state confronted with an imminent public crisis to unilaterally suspend some of the liberties that the state promised to uphold, including the right to free speech.³⁵ The ICCPR,³⁶ American Convention on Human Rights,³⁷ and European

orally, in writing or in print, in the form of art, or through any other media of his choice") (emphasis added).

²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

²⁹ American Convention on Human Rights art. 13, July 18, 1978, 1144 U.N.T.S. 123 [hereinafter ACHR].

³⁰ American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, at art. IV.

³¹ See, e.g., African Charter on Human and Peoples' Rights art. 9, Oct. 21, 1986, 21 I.L.M. 38 [hereinafter OAU Charter].

³² See Emily C. Miletello, *The Page You Are Attempting To Access Has Been Blocked in Accordance with National Laws: Applying a Corporate Responsibility Framework to Human Rights Issues Facing Internet Companies*, 11 U. PITT J. TECH. L. & POL'Y 5, 11 (2011); see, e.g., *Sunday Times v. United Kingdom* (No. 1), 30 Eur. Ct. H.R. (ser. A) (1979).

³³ Miletello, *supra* note 32, at 11; see, e.g., *Claude Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, (Oct. 10, 2003)*, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

³⁴ Miletello, *supra* note 32, at 11.

³⁵ These legitimate suspensions are provided for within so-called derogation provisions, which define the "circumstances under which a state can deviate from specific treaty provisions." See Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L L. & POL. 535, 581–82 (1999).

³⁶ ICCPR, *supra* note 27, at art. 4.

³⁷ ACHR, *supra* note 29, at art. 27.

Convention on Human Rights³⁸ all allow for states parties to legitimately derogate from the right to free speech in times of emergency.³⁹

Along with these treaty-based limitations on the right to free speech, there are also other circumstances where states have permissibly placed restrictions on the right to free speech. Slanderous, libelous, or defamatory speech, for instance, is punishable in most jurisdictions.⁴⁰ Other states may lawfully regulate speech on the basis of public morality,⁴¹ obscene speech,⁴² speech likely to incite violence,⁴³ or speech likely to produce imminent lawless action.⁴⁴ Even more, a few states punish individuals who use purposefully false or misleading commercial speech.⁴⁵

³⁸ ECHR, *supra* note 28, at art. 15.

³⁹ Interestingly, the OAU Charter does not enable its state parties to derogate from any of its international human rights obligations therein. *Compare* sources cited *supra* notes 36–38 and accompanying text (allowing states parties to temporarily derogate from their free speech treaty obligations), *with* OAU Charter, *supra* note 31 (prohibiting states parties from deviating from their treaty obligations, including, without limitation, the right to free speech).

⁴⁰ David Goldberg, *To Dream the Impossible Dream? Towards a Simple, Cheap (and Expression-Friendly) British Libel Law*, 4 J. INT'L MEDIA & ENT. L. 31, 32 (2012) (“Whatever it is called, (variously, defamation, libel, slander, calumny, desecato, lese-majeste, insult, etc.), it does seem there is no jurisdiction in the world that does not allow some such cause of action.”); *see also* Miletello, *supra* note 32, at 12; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

⁴¹ *E.g.*, ECHR, *supra* note 28, at art. 10 (“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”); *see also* Miletello, *supra* note 32, at 12.

⁴² *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1957).

⁴³ *See* Miletello, *supra* note 33, at 12; *see, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942) (determining the First Amendment does not protect “fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

⁴⁴ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴⁵ Miletello, *supra* note 33, at 12; 15 U.S.C. § 1125(a) (2012) (providing, as part of the Lanham Act, a civil cause of action against those who advertise with false or misleading claims).

B. The Internet and Free Speech

The Internet has had a substantial impact on how the world has stayed connected by establishing a pervasive communication medium for “improving communication in an increasingly global and interconnected world.”⁴⁶ It “has brought global attention to what used to be isolated, local issues in developing countries, and has allowed interest groups and other [non-governmental organizations] to quickly, cheaply[,] and effectively mobilize public opinion.”⁴⁷ Whether it is via message boards, collaborative projects, virtual worlds, weblogs, podcasts and vlogs, social media websites, or content-sharing platforms—such as YouTube—there are a myriad of media for nearly all of the 1.9 billion Internet-users worldwide to express themselves to an enormous, global audience.⁴⁸

The number of Internet-users has dramatically increased over the last decade, and the number of Internet-users is likely to continue to rise in the future.⁴⁹ In fact, the Internet has become such a widely-used resource that some countries have even deemed the Internet be a quasi-public service.⁵⁰ Consequently, ISPs such as Google and Yahoo! are elemental to the dissemination of opinions on the Internet and freedom of speech in general, as these companies “supply the forums for email exchanges, power blogs, and message boards, and allow for quick and easy searches on any topic imaginable.”⁵¹ Without such entities, Internet-users would be inhibited from sharing their opinions with others across the world. Put another way, ISPs are “major enablers of global communication,”⁵² because anyone with access to the Internet can effortlessly publish information on these sites and transmit information worldwide.

As the Internet has changed communication in contemporary society, the principles of free speech have been applied to online

⁴⁶ See Baumi, *supra* note 16, at 703.

⁴⁷ See Miletello, *supra* note 32, at 6.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.* at 7.

⁵² *Id.*

speech.⁵³ The seminal case for extending these principles to online speech is *Reno v. American Civil Liberties Union*, where the United States Supreme Court determined that a statute intended to protect minors from obscene or indecent material on the Internet was unconstitutional⁵⁴ because the statute placed too great of a burden on protected online speech, in violation of the First Amendment.⁵⁵ In doing so, the *Reno* court conducted a medium-specific analysis of the Internet,⁵⁶ and determined that speech found on the Internet is more similar to speech found in traditional media, such as books, newspapers, or magazines, than to speech found in broadcast communications, and ultimately provided the most exacting level of judicial review, strict scrutiny, to online speech.⁵⁷

⁵³ *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

⁵⁴ *Id.* at 885 (“[G]overnmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”).

⁵⁵ *Id.* at 869–70.

⁵⁶ It is well-established that the First Amendment may be applied differently to each communication medium. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 367, 377 (1984) (“[W]e have recognized that ‘differences in the characteristics of new media justify differences in the First Amendment standards applied to them.’”) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969)); *Reno*, 521 U.S. at 868 (“[E]ach medium of expression . . . may present its own problems.”) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (“Different communications media are treated differently for First Amendment purposes.”).

⁵⁷ *Reno*, 521 U.S. at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”). *Compare Red Lion Broad. Co.*, 395 U.S. 367 at 378–91 (finding that content regulation of broadcasting communications warrants a less rigorous standard of review), *with Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636–41 (1994) (concluding that cable communications deserve a higher standard of protection than that afforded to broadcast communications), *and Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (according print communications the highest level of First Amendment protection), *and Reno*, 521

Freedom of speech on the Internet is not only protected domestically, it is also protected internationally via human rights instruments. In 2003, the United Nations sponsored a summit, the World Summit on the Information Society (WSIS).⁵⁸ The main objective of the first phase of the WSIS, the Geneva Phase,⁵⁹ was to “develop and foster a clear statement of political will and take concrete steps to establish the foundations for an [i]nformation [s]ociety for all, reflecting all the different interests at stake.”⁶⁰ Thousands of individuals, hailing from various countries attended the Geneva Phase of the WSIS.⁶¹ It was reported that “[m]ore than 11,000 participants from 175 countries” attended the WSIS, including about fifty heads of states/governments and Vice Presidents, as well numerous other high level representatives.⁶² At the WSIS, the Geneva Declaration of Principles was adopted, which, *inter alia*, reaffirmed the sentiment that freedom of expression extends to online speech.⁶³ Paragraph 4 of the Geneva Declaration of Principles explicitly refers to Article 19 of the UDHR,⁶⁴ clarifying that the right to freedom of expression enumerated in Article 19 of the UDHR includes online speech.⁶⁵

U.S at 881–83 (rejecting a lower standard of review and applying strict scrutiny to the regulation of online speech).

⁵⁸ World Summit on the Information Society, *Basic Information About WSIS: Overview*, INT’L TELECOMM. UNION, <http://www.itu.int/wsis/basic/about.html> (last visited Sept. 1, 2013) [hereinafter *WSIS Overview*].

⁵⁹ It bears mentioning that the WSIS was conducted in two phases, the first phase occurred in 2003, and the second phase occurred in 2005.

⁶⁰ See *WSIS Overview*, *supra* note 58; see also Roy Balleste, *The Internet Governance Forum & Technology: A Matter of Human Development*, 7 LOY. L. & TECH. ANN. 37, 54 (2007).

⁶¹ See *WSIS Overview*, *supra* note 58.

⁶² See *id.* (specifying that 82 Ministers, 26 Vice Ministers, and various high representatives from international organizations, private sector, and civil society also attended the Geneva Phase of WSIS to give political support to the Geneva Declaration of Principles).

⁶³ See *id.*

⁶⁴ See UDHR, *supra* note 24, at art. 19.

⁶⁵ World Summit on the Information Society, *Declaration of Principles Building the Information Society: A Global Challenge in the New Millennium*, at para. 4 INT’L TELECOMM. UNION, <http://www.itu.int/wsis/docs/geneva/official/dop.html> (Dec. 12, 2003) (“We reaffirm, as an essential foundation of the Information Society, and as outlined in Article 19 of the Universal Declaration of Human Rights, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold

Relatedly, ISPs such as Google and Yahoo! have recognized the role they play in promoting free speech throughout the globe. According to Google's policies,

Google acts every day to promote and expand free expression online and increase global access to information. As new technology dissolves borders and empowers individuals with more robust free expression tools and greater access to information, we believe that governments, companies, and individuals must work together to protect the right to online free expression.⁶⁶

Abbi Tatton, Manager of Global Communications for YouTube, has stated that

what we're trying to balance is a platform for free expression, which necessarily has to have rules. And what those rules should be. And how we strike the balance between being this place where everyone has a voice, a place for the free exchange of ideas, and a platform that's safe for users as well.⁶⁷

Yahoo!, for its part, has established the Yahoo! Business and Human Rights Program "in order to lead [Yahoo!'s] efforts to make responsible decisions in the areas of free expression and privacy."⁶⁸

opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers*. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.") (emphasis added); *see also* Miletello, *supra* note 32, at 7.

⁶⁶ Freedom of Expression, GOOGLE, <http://www.google.com/publicpolicy/issues/freedom-of-expression.html>.

⁶⁷ Rachel Davis et al., *Yahoo! And YouTube: Balancing Human Rights and Business*, CARNEGIE COUNCIL FOR ETHICS IN INT'L AFFAIRS (Sept. 20, 2011), <http://www.carnegiecouncil.org/studio/multimedia/20110920/index.html>.

⁶⁸ About Us, YAHOO! BUSINESS & HUMAN RIGHTS PROGRAM, <http://www.yhumanrightsblog.com/blog/our-initiatives/business-human-rights-program> (last visited Nov. 17, 2013).

III. GOOGLE'S MANY FORMS

One of the main benefactors from the economy's globalization and the ubiquity of the Internet has been ISPs, such as Google.⁶⁹ Presently, Google is the world's largest media company, "dwarfing" traditional media heavy-hitters such as Time Warner, The Associated Press, and Disney.⁷⁰ Especially, "[t]hrough its search engine and through its YouTube, Blogger, and Orkut services, Google has become the world's most important platform for disseminating information, earning more than half its income from outside the United States."⁷¹ Yet, it is often unclear how companies like Google fit into the international human rights regime because of the many different forms that such companies can take with regard to the freedom of expression.

A. *Google the Corporation*

The first form that ISPs can take is that of a corporation. The majority of ISPs, such as Google, are organized as corporations, so there is no need to analyze Google's actions consistent with its corporate form. However, it is useful to examine Google's human rights obligations under international human rights law.

As a threshold matter, corporations are "generally excluded from direct responsibility under international human rights law"⁷² because international human rights laws are generally thought to be the province of the nation-state.⁷³ Accordingly, the prevailing view is that the categorical exclusion of non-state actors—including ISPs—

⁶⁹ Google, YouTube, and Yahoo! were, respectively, the first, third, and fourth most-trafficked websites in the world as of August 2012. See Britney Fitzgerald, *Most Popular Sites 2012: Alexa Ranks the 500 Most-Visited Websites*, HUFFINGTON POST (Aug. 09, 2012), http://www.huffingtonpost.com/2012/08/09/most-popular-sites-2012-alexa_n_1761365.html.

⁷⁰ Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 5 (2011).

⁷¹ *Id.* at 5–6.

⁷² See Rachel J. Anderson, *Reimagining Human Rights Law Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 183 (2010).

⁷³ See Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (defining a treaty as an "international agreement . . . between [s]tates") (emphasis added); see also Anderson, *supra* note 72, at 193 (defining an international agreement as an agreement between nation-states).

from the human rights framework, “puts the burden on states to enact and enforce laws that protect human rights.”⁷⁴

However, globalization has increased the size, strength, and influence of corporations around the world.⁷⁵ Transnational and international corporations enjoy substantial political, legal, and economic influence not only in their home countries and in their countries of incorporation, but also in their host countries or in the countries where the corporations are located.⁷⁶ The state-centered human rights regime—“[p]rotecting human rights solely through obligations on governments”—can only effectively safeguard human rights if states presented the only threat to human rights abuses, or if states could be counted on to “restrain conduct within their borders effectively.”⁷⁷ These two assumption are not always true, which has prompted international scholars and courts to conclude that the present human rights system, in which “the state is the sole target of international legal obligations[,] may not be sufficient to protect human rights.”⁷⁸ Nevertheless, under the current system, corporations have no international human rights obligations.

B. *Google the Regulator*

The second form that ISPs can take is the form of a regulator. As noted above, videos are being taken down from YouTube “not on the order of courts, but on the order of Google executives, who exercise far more power over speech than does the Supreme Court.”⁷⁹ Google

⁷⁴ See Anderson, *supra* note 72, at 194.

⁷⁵ See *id.* at 204 (“Transnational corporations have achieved vast wealth and immense influence.”).

⁷⁶ *Id.*

⁷⁷ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001).

⁷⁸ *Id.* at 460.

⁷⁹ Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1526, 1529 (2012). The scope of Google’s regulatory authority sweeps more broadly than the United States Supreme Court’s. *Id.* Compare *YouTube Community Guidelines*, *supra* note 9 (empowering Google to regulate content in connection with “promoting terrorism”), with *Brandenburg*, 395 U.S. at 447 (empowering the government to regulate content in connection with “inciting or producing imminent lawless action and is likely to incite or produce such action”).

polices content posted on YouTube's website through its own internal Community Guidelines.⁸⁰ When Google executives, in their discretion, conclude that a video uploaded on YouTube violates one of YouTube's Community Guidelines, Google has the right to remove that video from YouTube's website.⁸¹ Pursuant to YouTube's Community Guidelines, Google can remove or restrict access to videos that contain sexually explicit content, videos that infringe upon a copyright owner's bundle of rights, or videos that promote "hate speech."⁸² Each of these enumerated reasons for removing a YouTube video from its website are further delineated within YouTube's Community Guidelines.⁸³ For one thing, under YouTube's Community Guidelines, the term "hate speech" refers to content that "promotes hatred against members of a protected group."⁸⁴

Google can be characterized as a regulator – or, in other words, a pseudo-legislative body – because YouTube's Community Guidelines resemble legislation promulgated by other government bodies. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits states parties from, among other things, encouraging propaganda that promotes racial discrimination.⁸⁵ Similar to how YouTube's Community Guidelines explain that it can remove a video when its content contains "hate speech" under YouTube's own definition of the term,⁸⁶ under CERD, the term "racial discrimination" also has its own definition specific to the international treaty.⁸⁷ Because YouTube's Community Guidelines

⁸⁰ See *YouTube Community Guidelines*, *supra* note 9. Other ISPs, such as Facebook, have also crafted content removal policies. See, e.g., *Statement of Rights and Responsibilities*, FACEBOOK (prohibiting users from posting content that, among other things, "contains nudity") (last visited Oct. 12, 2012).

⁸¹ *YouTube Community Guidelines*, *supra* note 9.

⁸² See *id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter CERD].

⁸⁶ See *YouTube Community Guidelines*, *supra* note 9.

⁸⁷ See CERD, *supra* note 85, at art. 1 ("[T]he term 'racial discrimination' . . . means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and

are similar to legislation created by governments or to treaties binding nation-states, Google may be characterized as a regulator similar to a nation-state; as such, Google and its subsidiary YouTube, could possibly be governed by international human rights instruments in a similar manner.

C. *Google the "Fly on the Wall"*

Another form that Google can take is merely being a "fly on the wall." This is the form YouTube has asserted in the copyright context, when copyright owners have alleged that video content uploaded by third parties on YouTube's website violates one or more of the owners' exclusive rights conferred to them under the 1976 Copyright Act.⁸⁸

In an effort to facilitate the emergence of new technologies and innovation on the Internet,⁸⁹ Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA).⁹⁰ For one thing, the DMCA established so-called "safe harbors," which provide limitations on copyright infringement for certain conduct⁹¹ by statutorily-defined "service providers."⁹² Under these statutory safe harbors, qualifying ISPs cannot be held liable for monetary damages⁹³ if the ISP: (1) "does not

fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

⁸⁸ See 17 U.S.C. § 106 (2012) (dictating the copyright owner's exclusive rights "to do and to authorize" the reproduction, distribution, adaptation, performance, and display of the copyrighted work).

⁸⁹ S. Rep. No. 105-190, at 1-2 (1998).

⁹⁰ Digital Millennium Copyright Act (DMCA) of 1998, Pub. L. 105-304, 112 Stat. 2860 (codified as amended in various sections of Title 5, 17, 28, and 35 of the United States Code).

⁹¹ See generally 17 U.S.C. §§ 512(a)-(d) (2012). The scope of this article is only concerned with an ISP's liability for copyright infringement arising out of the "the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." *Id.* at § 512 (c).

⁹² The most applicable DMCA definition of a "service provider" for analyzing YouTube within the context of this article is "a provider of online services or network access, or the operator of facilities therefor." See *id.* at § 512(k)(1)(B); see also Patry on Copyright § 21:85 Digital Millennium Copyright Act.

⁹³ Under the safe harbor provisions, qualifying companies are shielded from monetary damages and limited injunctive relief. 17 U.S.C. § 512(j)(1)(A) (2012) (outlining the scope of injunctive relief under the DCMA).

have actual knowledge” of the infringing activity or is not “aware of facts or circumstances from which infringing activity is apparent”; (2) does not receive a financial benefit from the infringing activity; and (3) “upon obtaining such knowledge or awareness,” the company “acts expeditiously to remove, or disable access to, the [infringing] material.”⁹⁴

An example of where YouTube sought refuge under the DMCA’s safe harbors is in *Viacom International Inc. v. YouTube, Inc.*⁹⁵ and its progeny. In *Viacom International Inc.*, Viacom, a global multimedia conglomerate, filed a copyright infringement action against Google and YouTube, seeking over one billion dollars in damages.⁹⁶ Viacom claimed that YouTube’s video sharing platform constituted copyright infringement because its website hosted tens of thousands of videos to which Viacom owned the copyrights.⁹⁷ YouTube, in its defense, sought to avail itself of the DMCA’s safe harbor provisions. The district court found that YouTube was immune from copyright infringement liability under the applicable safe harbor provision.⁹⁸ However, the United States Court of Appeals for the Second Circuit vacated the district court’s order and remanded the case for further factual findings to determine whether YouTube satisfied the statute’s threshold standards for asserting such defense.⁹⁹ On remand, the district court again held that YouTube was entirely protected under the DMCA.¹⁰⁰

International bodies have also carved out exceptions for the liability of ISPs hosting third-party content at the direction of their users.¹⁰¹ For instance, the European Union’s European Community’s

⁹⁴ *Id.* at §§ 512(c)(1)(A)–(C).

⁹⁵ 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

⁹⁶ *Viacom Int’l Inc.*, F. Supp. 2d at 516.

⁹⁷ *Id.* at 518–19.

⁹⁸ *Id.* at 529.

⁹⁹ *Viacom Int’l Inc. v. YouTube, Inc.*, 679 F.3d 19, 40 (2d Cir. 2012).

¹⁰⁰ *See Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 123. In brief, the district court held that YouTube lacked knowledge of specific infringements, was not willfully blind to infringements, did not have the “right and ability to control” infringing activity, and did not syndicate clips to a third party. *See generally id.* at 113–23.

¹⁰¹ For an excellent article discussing the exceptions for ISPs in the international context, see Hannibal Travis, *Opting Out of the Internet in the United States and the*

Electronic Commerce Directive (ECD),¹⁰² which was adopted to harmonize the “divergences in legislation and . . . the legal uncertainty as to which national rules apply” in connection with ISPs,¹⁰³ established limitations on copyright infringement that are analogous to the safe harbors provided for under the DMCA.¹⁰⁴ Under the ECD, similar to the DMCA’s safe harbors, no copyright infringement action for monetary damages may lie when the ISP (1) “does not have actual knowledge” of infringing activity and “is not aware of facts or circumstances from which illegal activity . . . is apparent,”¹⁰⁵ or (2) if it does have actual knowledge, it “acts expeditiously to remove or disable access to” the infringing material.¹⁰⁶ In addition to any ISP exceptions to copyright infringement under the ECD, some of the highest courts in the European Union have construed Article 10 of the ECHR to “create an exception to copyright needed to protect freedom of expression.”¹⁰⁷

D. *Google the Publisher*

In addition to the three forms outlined above, a fourth form that ISPs can take is that of publisher.¹⁰⁸ Similar to Yahoo! Search, Microsoft’s Bing, and other ISPs,¹⁰⁹ Google operates a search engine, a

European Union: Copyright, Safe Harbors, and International Law, 84 NOTRE DAME L. REV. 331, 364–83 (2008).

¹⁰² European Community Directive on Electronic Commerce, No. 2000/31 of 8 June 2000, 2000 O.J. (L 178) 1 [hereinafter ECD].

¹⁰³ *Id.* pmbl. at para. 5.

¹⁰⁴ *See, e.g., id.* at art. 14; *see also* Travis, *supra* note 101, at 364–65.

¹⁰⁵ *See* ECD, *supra* note 102, at art. 14(1)(a); *see also* Travis, *supra* note 101, at 364–65.

¹⁰⁶ *See* ECD, *supra* note 102, at art. 14(1)(b).

¹⁰⁷ *See* Travis, *supra* note 101, at 366.

¹⁰⁸ *See also* Noam Cohen, *Professor Makes the Case That Google Is a Publisher*, N.Y. TIMES (May 20, 2012), <http://www.nytimes.com/2012/05/21/business/media/eugene-volokh-ucla-professor-makes-a-case-for-google-as-publisher.html?pagewanted=all> (offering a brief overview of Professor Volokh’s legal theory).

¹⁰⁹ *See* Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 1, 3 (2012), VOLOKH CONSPIRACY, available at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf> [hereinafter Volokh & Falk, *Google White Paper*] (asserting that anti-trust law is limited by the First Amendment “and may not be used to control what speakers say or how they say it”).

software program that assists its end-users in “locat[ing] content on the Internet.”¹¹⁰ Recently, Google has been accused by its competitors of violating anti-trust laws for prioritizing “its own thematic search results over results originating from other competitors.”¹¹¹

Anti-trust law is limited by the First Amendment,¹¹² and to defend against these anti-competition claims, Google has taken the position that it is a publisher, and thus its ranking of websites in its search results do not violate anti-trust laws because its search results are protected speech under the First Amendment.¹¹³ In other words, Google believes that when it creates its search results, it is “speaking” to its end-users, and making editorial decisions about what to communicate and what not to communicate.¹¹⁴ This is akin to a print newspaper that chooses what news to prioritize on its front page, which receives First Amendment protection.¹¹⁵

Google’s search engine speech position is equally applicable to YouTube. Similar to the search results that are returned from conducting a Google search, when an individual searches for videos on YouTube, different links are returned from such a search. These links direct end-users to material authored by others, which in the YouTube context is in the form of user-generated videos, such as *Innocence of Muslims*. Therefore, if Google is arguing that it is a publisher in the anti-competition context, there is no reason why Google cannot argue that it is a publisher in the context of international human rights law and potential violations of the right of free speech. While this search engine speech position has been accepted by federal courts within the

¹¹⁰James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 6 (2007) (defining the term “search engine”).

¹¹¹Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 885 (2012).

¹¹²See Volokh & Falk, *Google White Paper*, *supra* note 109, at 3.

¹¹³*Id.*

¹¹⁴See *Miami Herald Publ’g Co.*, 418 U.S. at 243 (determining the editorial decisions of a newspaper in deciding what to publish and what not to publish are protected free speech under the First Amendment); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

¹¹⁵See *Miami Herald Publ’g Co.*, 418 U.S. at 243.

United States,¹¹⁶ it is unclear how receptive foreign jurisdictions will be to this legal theory.¹¹⁷

IV. RECONCILIATION: IS THERE ANY WAY TO HARMONIZE THESE FOUR FORMS THAT ISPs CAN TAKE?

Is there any way to reconcile these different forms that ISPs can take? It seems inconsistent for an entity to assert that different things posted on its website are free speech and thus are protected by the First Amendment, but that it can also promulgate its own rules for regulating user-generated content posted on its website. Regulation of free speech on the Internet raises legal issues that traditional forms of media, such as newspapers, do not have to confront. For instance, unlike traditional forms of media, the Internet reduces the costs of copying and distributing new or manipulated content.¹¹⁸ Furthermore, the Internet, by its very nature, is borderless—short of any access barriers.¹¹⁹ Indeed, the Internet has facilitated the exchange of content across geographical borders more so than any other traditional form of communication.¹²⁰

International human rights law must find a way to regulate ISPs—entities that are malleable in form and are capable of conducting their activities beyond the regulatory scope of many states. The international community must recognize that current human rights

¹¹⁶ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. 5:02-CV-01457, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003). *But see* Tim Wu, *Machine Speech* 161 U. PA. L. REV. 1495, 1528 (2013) (“Volokh and Falk’s paper, however, misapplies the relevant law.”).

¹¹⁷ Mark Scott, *Google Back in Europe’s Antitrust Sights*, N.Y. TIMES (Dec. 20, 2013), http://www.nytimes.com/2013/12/21/technology/europe-official-is-dissatisfied-with-google-proposal.html?_r=0; Steve Lohr, *Antitrust Cry from Microsoft*, N.Y. TIMES (Mar. 31, 2011), <http://www.nytimes.com/2011/03/31/technology/companies/31google.html> (providing background of some of the anti-trust claims filed against Google in foreign jurisdictions).

¹¹⁸ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004).

¹¹⁹ *Id.*

¹²⁰ See Baumi, *supra* note 16, at 703 (“[C]ontent on the Internet cannot be tailored for individual markets but instead is globally accessible in an infinite number of locations and is stored in ‘cyberspace,’ effectively elud[ing] the control of any single business, individual or when multiple nations attempt to regulate such a borderless medium, which results in conflict as the laws of different countries collide.”).

law is incapable of regulating such entities. Understanding the true form of ISPs will help to address those shortcomings and hopefully help to create multilateral legislation properly balancing the interests of all involved.

The best way to reconcile the different forms that ISPs can take with the differences in domestic laws, public policy, and other international instruments is to characterize ISPs as what they really are: corporations. It is time for international law to encompass corporations and ISPs in its scope. The growing impact that corporations have on everyday life, coupled with today's perpetual economic and social online interaction between states, establishes that corporations should have a duty to abide by international human rights law, rather than only a responsibility.¹²¹

A. *Non-State Actor Liability Under International Human Rights Law*

Prominent international human rights scholar, Professor Steven Ratner, argues that the traditional state-centered approach to international human rights law is an inadequate system for protecting human rights.¹²² Recent trends in modern international affairs confirm that corporations can have as much power over individuals as states do.¹²³ Ratner especially emphasizes "the need to conceptualize power beyond political power to include economic power," and sets forth three arguments as to why the state-centered human rights regime is ill-equipped for addressing human rights violations in the contemporary globalization era.¹²⁴ As an initial matter, Ratner contends that when less developed states want foreign investment, it means that these governments cannot monitor corporate behavior and, further, these countries' "views on investment might lead them to assist companies in violations."¹²⁵ Second, Ratner maintains that even if the government is not interested in foreign investment, a government may use the

¹²¹ See WEISSBRODT ET AL., *supra* note 20, at 53–55.

¹²² See Ratner, *supra* note 77, at 461–73.

¹²³ See *id.* at 461.

¹²⁴ See *id.* at 461–73 (explaining "corporations clearly exercise significant power over individuals in the most direct sense of controlling their well-being" because they have control over their employees).

¹²⁵ *Id.* at 462.

corporation's resources to commit international human rights abuses.¹²⁶ Third, Ratner argues that as corporations have begun to increase their international footprint, they have also become more independent of governmental control.¹²⁷ Yet, despite Ratner's and other scholars' arguments in favor of finding corporate responsibility for human rights violations,¹²⁸ the Commission recently released a report that sided with the traditional state-centered approach to international human rights law.

In 2005, the Human Rights Council mandated that John Ruggie, the appointed Special Representative of the U.N. Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SSRG), publish a report, "identifying and clarifying standards of corporate responsibility and accountability with regard to human rights."¹²⁹ On March 21, 2011, the SSRG's final report was published.¹³⁰ The proposed framework is based on three inter-linked pillars: (1) the further development of the state duty to protect "individuals and communities from human rights abuses committed by others, including corporations";¹³¹ (2) the clarification of the moral responsibility of corporations to respect human rights; (3) and the

¹²⁶ *Id.* at 462–63.

¹²⁷ *Id.* at 463.

¹²⁸ Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate Over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?*, 20 *CARDOZO J. INT'L & COMP. L.* 437, 445–50 (2012). See generally Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 *LEWIS & CLARK L. REV.* 135 (2007) (focusing on the protection of indigenous peoples' land rights); Ratner, *supra* note 77.

¹²⁹ Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), available at <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>; see also Kamatali, *supra* note 128, at 437–38.

¹³⁰ See Special Rep. of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles: Final Report*].

¹³¹ Jena Martin Amerson, "The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from A Bystander Perspective, 17 *FORDHAM J. CORP. & FIN. L.* 871, 911 (2012).

development of remedies, both judicial and non-judicial, to victims of corporate international human rights obligations.¹³² Ultimately, the SSRG concluded that existing international human rights instruments do not impose direct legal obligations on corporations, and “that it is not even worth considering adopting new human rights instruments binding on corporations.”¹³³

Contemporary means, including those outlined in the SSRG’s final report, to providing corporate human rights obligations have focused on three approaches: the state duty to protect; individual accountability under international criminal law and domestic law; and soft law sources and self-regulation.¹³⁴

1. The State Duty to Protect

States carry a legal duty to take reasonable steps to prevent human rights violations from all sources, including third parties.¹³⁵ To be clear, the duty to protect extends not only to state actors or other agents of the state, but also to private entities.¹³⁶ Recently, the United Nations treaty bodies have elaborated on the state duty to protect. Notably, the Human Rights Committee¹³⁷ in its General Comment Number 31, declared that under the ICCPR, “the positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities”¹³⁸

¹³² *Guiding Principles: Final Report*, *supra* note 130, at para. 9.

¹³³ *Id.*

¹³⁴ *See Kamatali*, *supra* note 128, at 442.

¹³⁵ *See id.* (“The state duty to protect is one of the primary responsibilities a state has to its citizens.”).

¹³⁶ *Id.*

¹³⁷ The United Nations Human Rights Committee, a quasi-judicial body, is tasked with interpreting the human rights provisions in the ICCPR. *See* FRANCISCO FORREST MARTIN, STEPHEN J. SCHNABLY, RICHARD WILSON, JONATHAN SIMON & MARK TUSHNET, *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATISES, CASES & ANALYSIS* 8 (2005).

¹³⁸ U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at art. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *see also* Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), Dec. 18, 1978, 1249 U.N.T.S.

At the same time, the state duty to protect is inadequate for providing corporate human rights liability.¹³⁹ Today, corporations and governments are working closer with one another than they have been in the past.¹⁴⁰ These new working relationships “reveal that a system in which the state is the sole bearer of international legal obligations may be insufficient to protect human rights for at least three reasons.”¹⁴¹ First, some countries, such as the United States, believe that the state has a limited obligation to protect its citizens from private entities’ human rights violations, and will only protect its citizens (or in some cases non-citizens) when a private entity commits gross human rights violations or in other exceptional circumstances.¹⁴²

A second reason, introduced above, is that corporations, including ISPs, are extremely powerful today, even more powerful than some states, which may place them beyond the control of smaller states.¹⁴³ One way to illustrate the economic significance of corporations is to compare the gross domestic product (GDP) of entire countries with the annual gross revenue of ISPs.¹⁴⁴ For instance, Yahoo!’s gross revenue for the year 2010 was \$6.32 billion.¹⁴⁵ If Yahoo! were a country, it would have been ranked as the 138th largest economy in the world.¹⁴⁶ This pales in comparison to Google, whose revenues in 2012 topped \$50 billion.¹⁴⁷ Under the same analysis,

13, U.N. Doc. A/34/180 (requiring states to take appropriate measures to eliminate gender-based discrimination against women by any “enterprise”).

¹³⁹ See Kamatali, *supra* note 128, at 445–46; see also Ratner, *supra* note 77, at 465–73.

¹⁴⁰ See Kamatali, *supra* note 128, at 446 (explaining that there have been “recent developments in the relationship between corporations and governments”).

¹⁴¹ *Id.*

¹⁴² See *id.* See generally Tania Schriwer, *Establishing an Affirmative Governmental Duty to Protect Children’s Rights: The European Court of Human Rights As A Model for the United States Supreme Court*, 34 U.S.F. L. REV. 379, 402 (2000).

¹⁴³ *Id.*; see also Ratner, *supra* note 77, at 461 (“Corporations are powerful global actors that some states lack the resources or will to control.”).

¹⁴⁴ Vincent Trivett, *25 US Mega Corporations: Where They Would Rank as Corporations*, BUSINESS INSIDER (Jul. 27, 2011), <http://www.businessinsider.com/25-corporations-bigger-than-countries-2011-6?op=1>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Google Investor Relations, *Google Inc. Announces Fourth Quarter and Fiscal Year 2012 Results*, GOOGLE (Jan. 22, 2013) http://investor.google.com/earnings/2012/Q4_google_earnings.html.

Google would rank as the world's 78th largest economy, bounded between Guatemala and Uruguay.¹⁴⁸

Another shortcoming of the state duty to protect approach is that some countries do not have a strong democracy or enforcement system in place for protecting its citizens.¹⁴⁹ How are these countries supposed to effectively protect their citizens? Even worse, the local remedies available in some countries weaken the argument for a state duty to protect. International remedies should be available to victims of corporate human rights violations because local remedies are insufficient in many of these countries.¹⁵⁰ If international law protects individuals from human rights abuses perpetrated by nations, it should also help to protect individuals from human rights abuses perpetrated by corporations as big and powerful as nations.

2. Individual Liability Under International Criminal and Domestic Laws

A second source of corporate accountability is in the "expansion . . . of corporate responsibility by international and domestic criminal law,"¹⁵¹ and at a national level in countries' legislation and court decisions. Individual criminal liability is a well-settled principle in international human rights law, and has been codified in various international human rights treaties. Not only was individual criminal liability found in the Principles of the Nuremberg Tribunals,¹⁵² but it was also recognized in some of the statutes governing *ad hoc* tribunals set up by the United Nations Security Council. In particular, both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda held individuals

¹⁴⁸ The World Bank, *Gross Domestic Product 2012*, DATABANK, available at <http://databank.worldbank.org/data/download/GDP.pdf> (last visited Nov. 12, 2012).

¹⁴⁹ See Kamatali, *supra* note 128, at 446.

¹⁵⁰ See *id.* at 448.

¹⁵¹ *Id.* at 442.

¹⁵² Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf

("Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."); see also Kamatali, *supra* note 128, at 442-43.

responsible for their egregious human rights violations.¹⁵³ Additionally, the Rome Statute of the International Criminal Court, the statute for the treaty-based International Criminal Court (ICC), also provides for individual criminal liability,¹⁵⁴ and, relatedly, “the number of jurisdictions in which charges for international crimes can be brought against corporations is increasing, as countries ratify the ICC statute and incorporate its definitions into domestic law.”¹⁵⁵ Furthermore, apart from individual liability under international mechanisms, certain countries are beginning to recognize corporate criminal and civil human rights liability under domestic laws.¹⁵⁶ Federal courts in the United States have been willing to find corporate liability for human rights violations under the Alien Tort Claims Act (ATCA)¹⁵⁷ and the Torture Victim Protection Act (TVPA).¹⁵⁸

¹⁵³ See, e.g., Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 7, U.N. Doc. S/25704 (May 3, 1993) (establishing culpability for those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of an enumerated crime); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994) (same); see also Kamatali, *supra* note 128, at 443.

¹⁵⁴ See, e.g., Rome Statute of the International Criminal Court, art. 25, U.N. Doc. A/CONF.183/9 (July 17, 1998).

¹⁵⁵ See Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, para. 24, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) [hereinafter *Business and Human Rights: Mapping International Standards*].

¹⁵⁶ *Id.* at para. 25.

¹⁵⁷ 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); see, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). *But see Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007).

¹⁵⁸ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350); see, e.g., *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358–69 (S.D. Fla. 2003); *Estate of Rodriguez v. Drummond Corp.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003). *But see Beaneal v. Freeport-McMoRan*, 969 F.

One reason for the inadequacy of international criminal law to justify corporate human rights accountability is that “in practice” international criminal law applies to individuals, not corporations,¹⁵⁹ for violations of *jus cogens* norms¹⁶⁰ and other egregious international human rights violations.¹⁶¹ Thus, “[s]uch limitations make it difficult to use international criminal law to hold corporations accountable for most of their international human rights law violations.”¹⁶² And while there may be a trend for finding corporate liability under domestic statutes, such as the ATCA¹⁶³ or TVPA,¹⁶⁴ these remedies are also wholly inadequate for addressing corporate human rights violations on a global scale.¹⁶⁵ Most countries have not enacted statutes like the ATCA or the TVPA, and in these countries that have not enacted universal civil liability statutes, “victims have no recourse to hold corporations accountable.”¹⁶⁶

3. Soft Law Sources Affecting Corporate Liability

A third source of corporate liability under international human rights law lies in soft law sources, “voluntary, informal guidelines that carry no legal obligations.”¹⁶⁷ In effect, there only a few types of soft

Supp. 363, 381–82 (E.D. La. 1997), *aff’d on other grounds*, 197 F.3d 161, 169 (5th Cir. 1999).

¹⁵⁹ See Kamatali, *supra* note 128, at 448.

¹⁶⁰ Simply put, a *jus cogens* norm is a “widely accepted international legal norm.” See Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT’L L. ONLINE 27, 35 (2011).

¹⁶¹ See Kamatali, *supra* note 128, at 448–49 (explaining that that international criminal law only applies to “international crimes,” such as “genocide, crimes against humanity, and war crimes”).

¹⁶² Kamatali, *supra* note 128, at 448.

¹⁶³ See sources cited *supra* note 157.

¹⁶⁴ See sources cited *supra* note 158.

¹⁶⁵ See Bahareh Mostajeleian, *Foreign Alternatives to the Alien Tort Claims Act: The Success (Or Is it Failure?) Of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations*, 40 GEO. WASH. INT’L L. REV. 497, 497 (2008) (explaining that there are certain procedural limitations to bringing a claim under these statutes, making them an inappropriate global solution for providing corporate human rights accountability).

¹⁶⁶ See Kamatali, *supra* note 128, at 449; see also Mostajeleian, *supra* note 167, at 497.

¹⁶⁷ Joshua A. Lance, *Equator Principles III: A Hard Look at Soft Law*, 17 N.C. BANKING INST. 175, 175 (2013).

law arrangements that address corporate human rights accountability:¹⁶⁸ (1) voluntary regulations that individual corporations place on themselves to observe international human rights obligations,¹⁶⁹ (2) “an emerging multi-stakeholder form that involves corporations directly,”¹⁷⁰ (3) “declarations of principles by intergovernmental organizations setting their normative role,”¹⁷¹ and (4) standards created by intergovernmental organizations to enhance accountability measures for companies.¹⁷² In particular, two widely-referenced sources of soft law that concern corporate human rights responsibility are the International Labour Organization’s (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹⁷³ and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.¹⁷⁴

One of the major developments in promoting ISP international free speech has been the Global Network Initiative (GNI).¹⁷⁵ Founded

¹⁶⁸ See *Business and Human Rights: Mapping International Standards*, *supra* note 155, at paras. 45–88.

¹⁶⁹ *Id.* at para. 63.

¹⁷⁰ *Id.* at para. 46.

¹⁷¹ Kamatali, *supra* note 128, at 444; see, e.g., Int’l Fin. Corp., Performance Standards on Social & Environmental Sustainability (2006), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf).

¹⁷² Kamatali, *supra* note 128, at 444; see, e.g., International Labour Organization’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), 17 I.L.M. 422 (1978), available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> [hereinafter ILO Declaration of Principles].

¹⁷³ See ILO Declaration of Principles, *supra* note 172 (proclaiming that multinational corporations “should respect the Universal Declaration of Human Rights and the corresponding international Covenants”).

¹⁷⁴ Organization for Economic Cooperation and Development (OECD), Guidelines for Multinational Enterprises, 15 I.L.M. 967 (1976). These guidelines were most recently revised by the OECD in 2011. See *OECD Guidelines for Multinational Enterprises*, art. IV para. 42, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, available at <http://www.ilo.org/public/english/employment/multi/index.htm> [hereinafter OECD Guidelines] (directing that multinational corporations should “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur”).

¹⁷⁵ See generally *Principles*, GLOBAL NETWORK INITIATIVE, available at <http://globalnetworkinitiative.org/principles/index.php#18> (last visited Nov. 17, 2013) [hereinafter *GNI Principles*].

by groups including Google, Yahoo!, and Microsoft,¹⁷⁶ the GNI seeks to set up a framework for ISP companies¹⁷⁷ to “protect[] and advance[] the enjoyment of human rights globally.”¹⁷⁸ Although the GNI is a step towards creating a culture of respect for human rights among the ISPs, it falls short of providing effective corporate human rights accountability, because, namely, its participation is voluntary and there are no legal ramifications for failure to abide by the GNI’s principles; implementation guidelines; or governance, accountability, and learning framework.¹⁷⁹

Soft law and self-regulation measures are ill-equipped to hold corporations accountable for human rights violations, because these sources, by their very nature, are non-binding.¹⁸⁰ For its part, soft law sources are most beneficial to states when such sources complement hard law mechanisms, but these sources are neither practical nor effective as the primary sources for providing international human rights obligations.¹⁸¹ Further, notwithstanding the fact that some companies may not even abide by their own self-regulation policies, the practical effect of relying on self-regulation for ensuring corporations respect international human rights is that various companies “adopt[] stronger or weaker codes, each of which observed with varying degrees of seriousness.”¹⁸²

In the end, none of these approaches truly suffice to protect citizens from the broad reach of powerful multinational companies

¹⁷⁶ Not all ISPs, however, have joined the GNI. Facebook, for one, has refused to join the GNI. See Rosen, *supra* note 79, at 1537.

¹⁷⁷ The framework emphasizes the GNI’s commitment to freedom of speech, and defines “freedom of speech” in the same way that the UDHR defines the term. See UDHR, *supra* note 24, at art. 19.

¹⁷⁸ *GNI Principles*, *supra* note 175.

¹⁷⁹ See *Implementation Guidelines*, GLOBAL NETWORK INITIATIVE, available at <http://globalnetworkinitiative.org/implementationguidelines/index.php> (last visited Nov. 17, 2013) (prescribing how participating companies are to conduct their operations, particularly, that participating companies “should” use “human rights impact assessments”).

¹⁸⁰ See Kamatali, *supra* note 128, at 449; see, e.g., OECD Guidelines, *supra* note 174, at pmbl. para. 1 (establishing “voluntary principles and standards for responsible business conduct consistent with applicable law”).

¹⁸¹ See Kamatali, *supra* note 128, at 449 (“[S]oft laws are unlikely to offer effective enforcement solutions to victims unless complemented by hard law.”).

¹⁸² Ratner, *supra* note 77, at 532.

that control the landscape of modern communication. As more and more of the world's population becomes connected and dependent on ISPs such as Google and forums such as YouTube, simply allowing such entities to decide for themselves how to regulate speech may be insufficient to protect the individual freedoms considered paramount to a just society. For that reason, establishing how to protect speech made through such forums will be critical to ensuring the right to free speech for everyone on the planet.

B. Balancing Corporate Rights vs. Human Rights

Imposing international human rights obligations upon ISPs would also provide a practical solution to the "jurisdictional dilemmas posed by the Internet as countries try to enforce their laws"¹⁸³ when an international conflict arises out of content that is uploaded to the Internet,¹⁸⁴ particularly, when the transmitted content is legal in one country, but illegal in another.¹⁸⁵ The procedural posture of a recent decision, *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*,¹⁸⁶ strikingly exemplifies the interrelated issues, such as choice of law, jurisdiction, and cultural protection, that are raised when a court in a foreign jurisdiction attempts to exert jurisdiction over content that originated on the Internet in the United States.¹⁸⁷ In April of 2000, La Ligue Contre Le Racisme Et L'Antisemitisme (LICRA) sent a cease and desist letter to Yahoo!, Inc. (Yahoo!) at its headquarters in Santa Clara, California¹⁸⁸ in which LICRA asked Yahoo! to refrain from selling Nazi and Third Reich Propaganda on its "web-based auction site."¹⁸⁹ However, when Yahoo! refused to comply with the order, LICRA filed

¹⁸³ Adria Allen, *Internet Jurisdiction Today*, 22 NW. J. INT'L L. & BUS. 69, 70 (2001).

¹⁸⁴ Kevin A. Meehan, *The Continuing Conundrum of International Internet Jurisdiction*, 31 B.C. INT'L & COMP. L. REV. 345, 352-68 (2008).

¹⁸⁵ Amy Shyu, *Speak No Evil: Circumventing Chinese Censorship*, 45 SAN DIEGO L. REV. 211, 222 (2008).

¹⁸⁶ 145 F. Supp. 2d 1168 (N.D. Cal. 2001), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006).

¹⁸⁷ Travis, *supra* note 101, at 406; Baumi, *supra* note 16, at 700; *see, e.g., Yahoo!, Inc.*, 433 F.3d at 1217 ("The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue.").

¹⁸⁸ *Yahoo!, Inc.*, 433 F.3d at 1202.

¹⁸⁹ *See Baumi, supra* note 16, at 698.

a complaint against Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris.¹⁹⁰ The French court ultimately held that Yahoo! had violated French criminal laws, which prohibited the sale of Nazi goods.¹⁹¹ Because Yahoo!'s website, Yahoo.com, was both directly and indirectly accessible to France's citizens, the French court ordered Yahoo! to block access to the illegal memorabilia.¹⁹² Specifically, the order required Yahoo! to "take all necessary measures to dissuade and render impossible any access [from French territory] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."¹⁹³ Yahoo! attempted to comply with the order, but claimed that it could not fully adhere to the order because it was not technologically possible to block only French citizens from accessing Yahoo.com, and its alternative action was to block the material altogether, an action that would have violated Yahoo!'s First Amendment rights in the United States.¹⁹⁴

Yahoo!, in response, filed suit in California federal district court, where the court found, among other things, that compliance with the French order would violate Yahoo!'s First Amendment rights; accordingly, the court refused to enforce the French order in the United States.¹⁹⁵ LICRA appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, which completely avoided the legal question altogether, reversed the decision on procedural grounds, and remanded the case to the district court with an order to dismiss the case without prejudice.¹⁹⁶

This unintentional trans-border dissemination of free speech to alien audiences never would have occurred through traditional communication means, such as through sending a letter or a package, but the transnational nature of Internet companies operating in numerous jurisdictions at once requires a different approach to the regulation of content. Searching for a solution, legal scholars have

¹⁹⁰ *Yahoo!, Inc.*, 433 F.3d at 1202.

¹⁹¹ *Id.* at 1219.

¹⁹² *Yahoo!, Inc.*, 145 F. Supp. 2d at 1182.

¹⁹³ *Id.* (second emphasis added).

¹⁹⁴ *Id.* at 1185-86.

¹⁹⁵ *Id.*

¹⁹⁶ *Yahoo!, Inc.*, 433 F.3d at 1224.

proposed various ideas, namely treaty-based resolutions, for establishing a global Internet regulation standard.¹⁹⁷ However, as the *Yahoo!* decision and the international response to the *Innocence of Muslim* video¹⁹⁸ have illustrated, the differences between countries' cultural values and domestic laws work against the creation and execution of a uniform regulatory scheme. Rather than taking on the daunting task of coaxing states to ratify a comprehensive regulatory framework treaty, a more feasible solution for regulating the Internet on a global scale is to modify a system already in place, international human rights law, by holding ISPs accountable for violating the international human right of free speech, and other human rights laws.

V. CONCLUSION

Numerous international instruments recognize the international human right of the right to free of speech, and as Frank La Rue, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, most recently exclaimed, "facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all [s]tates."¹⁹⁹ Currently, it is unclear whether international human rights law can apply to an ISP entity because of the different forms ISPs can take. But malleability of form should not excuse ISPs from engaging in activity that would otherwise constitute human rights violations. Nor should ISPs be able to seek refuge under one form while using another form to restrict those same rights in others. Accordingly, the best way to harmonize these different forms is to find for corporate accountability for what would otherwise be considered human rights violations. Such an approach ensures the most consistent way for courts to

¹⁹⁷ See, e.g., Meehan, *supra* note 184, at 367 (contending that the *universal ratification* of a convention on international Internet jurisdiction could achieve a worldwide consensus on the issue); Michelle Love, *International Jurisdiction over the Internet: A Case Analysis of Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme*, 17 TEMP. INT'L & COMP. L.J. 261, 273 (2003) (maintaining that a solution to the Internet is through the ratification of "the common heritage of mankind treaty").

¹⁹⁸ See *supra* part I.

¹⁹⁹ Frank La Rue, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 2, U.N. Doc. A/HRC/17/27 (May 16, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

analyze liability under international human rights law, and international efforts to promote free speech and free expression will not become helplessly entangled in the World Wide Web.