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UNCERTAINTY FROM ABROAD: ROME II AND THE CHOICE OF LAW FOR DEFAMATION CLAIMS

I. INTRODUCTION

The ease with which communication travels across borders via the Internet has caused defamation law[1] to become an area of great public concern. Under the conventional publishing model, distribution of print copies into a given forum creates a clear and measurable jurisdictional limit for defamation claims.[2] A publisher traditionally has control over extraterritorial jurisdiction by choosing where and where not to distribute print copies.[3] However, when a publisher posts an article on the Internet, it becomes instantly accessible to over a billion readers across

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1. Defamation is an intentional tort that generally arises when a communication harms the reputation of another as to lower her in the estimation of the community or to deter third persons from associating or dealing with her. Restatement (Second) of Torts § 559 (1977). Defamation encompasses both the torts of libel and slander:

> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

Id. § 568. In many jurisdictions, the determination of whether a claim amounts to libel or slander will dictate the evidence of damages, but the Internet has collapsed distinctions between the torts. Dan Jerker B. Svantesson, *The Characteristics Making Internet Communication Challenge Traditional Models of Regulation: What Every International Jurist Should Know About the Internet*, 13 INT'L J.L. & INFO. TECH. 39, 60–61 (2005). For the sake of avoiding confusion, this Note refers broadly to "defamation" rather than the more precise terminology of "libel" or "slander" when discussing claims against publishers and others. Many commentators also treat these terms interchangeably. *See, e.g.*, Judge Robert D. Sack, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.1, n.3 (2004) [hereinafter SACK ON DEFAMATION].

2. From a U.S. perspective, for instance, the key question is whether a publisher has availed itself of a given state's laws. Calder v. Jones, 465 U.S. 783, 785 (1984) (holding that California had jurisdiction over a defamation claim against a Florida corporation that had availed itself of California law by distributing 600,000 copies of a weekly newspaper to California).

3. *See, e.g.*, Chaiken v. VV Pub. Corp. 119 F.3d 1018, 1029 (2d Cir. 1997) (holding that jurisdiction in Massachusetts was improper for a defamation claim against a New York publisher because the publisher had distributed less than 200 copies of a weekly newspaper into Massachusetts).

the world.[4] While print newspapers face increasingly lower circulations, online publishing has become an effective means for publishers to attract readership.[5] Although this shift from print to online publishing might strengthen the long-term viability of the newspaper industry, it also has far-reaching effects. Like many other areas of law,[6] commentators have repeatedly noted that the Internet has wreaked havoc on the jurisdictional and choice-of-law aspects of international defamation claims.[7]

Much of this difficulty stems from substantive differences in national approaches to defamation law and the ease with which plaintiffs can bring their claims in foreign jurisdictions. Central to these differences is

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4. Over sixteen percent of the world's population currently uses the Internet, with developing regions such as Africa, the Middle East, and Latin America experiencing the most rapid growth. World Internet Usage Statistics and Population Stats, http://internetworldstats.com/stats.htm (last visited Sept. 29, 2006).

5. Katharine Q. Seelye, *Newspaper Circulation Falls Sharply*, N.Y. TIMES, Oct. 31, 2006, at C1. *See also* Annys Shin, *Newspaper Circulation Continues to Decline; Internet, Cable Cited as Competition*, WASH. POST, May 3, 2005, at E3 (noting that circulation of print publications has declined over the past twenty years). At least one major news publisher is prepared for Internet publishing to continue to expand and likely one day supplant print publishing. *Murdoch Reaffirms New* [sic] *Corp.'s Internet Policy*, TIMES ONLINE (London), Nov. 24, 2005, *available at* http://business.timesonline.co.uk/article/0,,9071-1889201,00.html.

6. Dean Symeonides notes the following prescient observation by the Illinois Supreme Court about the impact of technological innovation on jurisdictional issues:

> Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.
>
> Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted.

Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961) (*cited in* SYMEON C. SYMEONIDES et. al., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 21 (2d ed. 2003)).

7. *See* James R. Pielemeier, *Choice of Law for Multistate Defamation: The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 55–57 (2003); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 411–12 (2004); Heather Maly, Note & Comment, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL'Y 883 (2006).

the fact that, compared to the United States,[8] many countries "place much greater importance on the protection of personal reputation, dignity, and honor than they do on protecting the freedom of speech."[9] While U.S. defamation law reflects the constitutional guarantees of freedom of speech and press[10] under *New York Times v. Sullivan*[11] and its progeny, *Sullivan*'s impact abroad has been mixed.[12] Instead, every country possesses a different legal standard for resolving defamation claims based on their particular histories, values, and political systems.[13] For instance, while the United States and the United Kingdom share the same tradition of common-law defamation, both countries have devel-

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8. In the United States, modern protection of the press derives from *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) ("To ensure that true speech about matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.").

9. Ronald J. Krotoszynski, Jr., *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty in Resolving Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 343–45 (2005).

10. U.S. CONST. amend. 1.

11. 376 U.S. 254.

12. Kyu Ho Youm, New York Times v. Sullivan*: Impact on Freedom of Press Abroad*, COMMUNICATIONS LAWYER, Fall 2004, at 12.

13. For instance, one publisher argued that British defamation law differs from U.S. law because:

> (1) the burden of proving truth of defamatory statements falls on the defendant; (2) defamation is a strict liability tort and plaintiff need not prove that the defendant acted with any fault, in contrast with the "actual malice" standard that applies under American First Amendment principles; (3) protection for expression of opinion is severely limited; (4) only limited protection is available for statements about public officials or public figures; (5) aggravated damages are permitted for asserting certain defenses, for example, a defendant's seeking to justify the publication; (6) plaintiff's attorneys fees and costs must be paid by the unsuccessful defendant; (7) multiple, repetitive suits are allowed for each individual publication, for example, for different media or various places of publication.

Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 403 n.18 (S.D.N.Y. 2002). *See also* Libel Act, 1843, c. 96, § 6 n.3 (U.K.). For further analysis of English defamation law, see Douglas W. Vick & Linda MacPherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 939–49 (1996). Just prior to this Note's publication, the English House of Lords handed down a stunning decision that should have far-reaching implications for English defamation law, specifically as to whether publications should receive a qualified privilege for reporting on issues of public interest. Jameel v. Wall St. J., [2006] U.K.H.L. 44, *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee.pdf.

oped divergent approaches to balancing free speech and reputation interests.[14] This conflict-of-laws problem is exacerbated by the fact that foreign courts appear keen to adjudicate claims against U.S. publishers without regard for the free-press protections under U.S. law.[15] As a result, publishers are now subject to new and unforeseen liabilities[16] and are likely to begin constructing "virtual borders" around their Internet presence to avoid exposure to restrictive foreign defamation laws.[17]

In assessing the current situation, one British government commentator noted that any substantive solution to the difficulty of international defamation law would come in the realm of international treaty accompanied by greater harmonization of substantive national laws.[18] One such pending treaty that will perhaps[19] encompass the problematic arena of international defamation law is "The law applicable to non-contractual

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14. Russell L. Weaver & David F. Partlett, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Defamation, Free Speech, and Privacy*, 50 N.Y.L. SCH. L. REV. 57, 78–80 (2005).

15. *See* Lewis v. King, [2004] EWCA (Civ.) 1329 (holding that jurisdiction in England was permissible for comments published on two websites even though all relevant events occurred in the United States). *See also* Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575 (Austl.) (holding that a plaintiff could successfully bring a claim under Australian defamation law against a United States publisher whose only contact with Australia was Internet publication); Eric Barendt, *Jurisdiction in Internet Libel Cases*, 110 PENN ST. L. REV. 727, 737 (2006) (arguing that weighing American First Amendment rights in international defamation claims "confers on United States courts a decisive voice on the balancing of reputation and free speech rights").

16. *See* Michael F. Sutton, Note, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 419–28 (2004).

17. Dan Jerker B. Svantesson, *Borders On, or Borders Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 351–52 (2006).

18. THE LAW COMMISSION (U.K.), SCOPING STUDY NO. 2, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION 39 (Dec. 2002), *available at* http://news.baou.com/documents/pdf/defamation2.pdf [hereinafter LAW COMMISSION SCOPING STUDY NO. 2].

> The law [of jurisdiction for Internet-based defamation claims] has always been complex, and attempts within the EU to create greater legal certainty have added new ambiguities. There are no easy answers . . . . Although we have some sympathy with the concerns expressed about "unacceptable levels of global risks," any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation.

Id.

19. In early 2006 the European Commission excised the defamation provision from Rome II, rendering the status of the convention uncertain. *Infra* Part III.

obligations,"[20] known commonly as "Rome II."[21] This agreement among the European Union's Member States will determine the choice of law for cross-border defamation claims[22] as well as a variety of other cross-border claims based in non-contractual relationships.[23] Rome II will determine which law is applicable to all defamation claims brought within a Member State's forum,[24] although jurisdiction will continue to be available in any nation where a publication is read.[25] As such, Rome II presents an opportunity for an international body of lawmakers to adopt a clearer and fairer standard of how to settle defamation claims against foreign publishers in the Internet age.[26]

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20. EUR. PARL. DOC. (COM 2003) 427, European Parliament First Reading Draft (July 6, 2005), *available at* http://www.dianawallismep.org.uk/pages/rome2.html (follow "Read the Rome II report (provisional)" hyperlink) [hereinafter Rome II (European Parliament draft)]. Article 6 of Rome II encompasses the choice of law for defamation claims. EUR. PARL. DOC. (COM 2003) 427, European Commission Draft 17-18 (July 22, 2003), *available at* http://www.dianawallismep.org.uk/pages/rome2.html (follow "Commission's proposal [COM (2003) 0427]" hyperlink) [hereinafter Rome II (European Commission 2003 draft)].

21. The name "Rome II" comes from the fact that the agreement expands upon the 1980 Rome Convention, or Rome I, which created choice-of-law rules for contractual claims. Convention on the law applicable to contractual obligations, June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome I]. In contrast, Rome II applies to non-contractual claims. Rome II (European Parliament draft), *supra* note 20, art. 1. In December 2005, the European Commission put forth a proposal to "modernize" some of Rome I's rules, although the Commission noted that the convention is "widely appreciated by relevant circles" and would not be substantially modified. European Commission, *Rome I Proposal* (Dec. 16, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/483. *See also* Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final (Dec. 15, 2005), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0650en01.pdf.

22. Rome II (European Parliament draft), *supra* note 20, art. 6.

23. Rome II will determine the choice of law for non-contractual claims, including such diverse subject matter as breaches of data-protection rights, *id.* recital 14; unjust enrichment claims, *id.* art. 9(a); automobile accidents, *id.* art. 3; as well as intellectual property claims. *Id.* recital 14. For an analysis of the potential impact of Rome II on intellectual property conflicts, see Annette Kur, *Applicable Law: An Alternative Proposal for International Regulation—The Max-Planck Project on International Jurisdiction and Choice of Law*, 30 BROOK. J. INT'L L. 951, 959–61 (2005).

24. Rome II (European Parliament draft), *supra* note 20, art. 6.

25. However, the border between jurisdiction and choice of law as it relates to Rome II is "nebulous." Christopher J. Kunke, Comment, *Rome II and Defamation: Will the Tail Wag the Dog*?, 19 EMORY INT'L L. REV. 1733, 1743 n.79 (2005). Indeed, once establishing that jurisdiction is proper, many courts do not reach the secondary issue of choice of law. *See infra* Part II.B.

26. Unsurprisingly, publishing groups have lobbied intensely for a clearer rule during the drafting process of Rome II. *See, e.g.*, International Federation of Journalists, *Euro-*

Yet, despite the possibility of creating a clearer choice-of-law standard, Rome II's defamation provision proved to be extremely difficult to resolve. In 2006, after over three years of work, the European Union found itself no closer to creating a rule that all members could agree upon. The European Commission[27] eventually excised the defamation provision from Rome II, effectively forestalling a new framework for the choice of law for defamation claims within the European Union's Member States.[28]

Despite this setback, much can still be learned from Rome II, both in terms of its potential application as well as the issues raised and debated during the drafting process—issues that are emblematic of the broader complexities of defamation law in the Internet age. This Note will argue that the European Commission's parliamentary maneuver is by no means the end of the story, but rather it is one chapter in a slow, difficult struggle to achieve a workable solution that satisfies publishers, national courts, and defamation plaintiffs. Part II of this Note examines the existing choice-of-law and jurisdictional rules for resolving defamation claims in Europe, the United States, and in other nations. Part III traces Rome II's legislative history, focusing on the opposing place-of-harm and place-of-publication approaches to defamation claims. Part IV examines Rome II through the lens of the modern American approach to conflicts of law. This Note concludes that while the drafters of Rome II attempted to create a rule to protect publishers, their inability to successfully adopt such a provision reflects the intractability of balancing publishing and reputational interests. This Note will argue that American conflicts law provides key insights into both the policy behind protecting press interests and also how to create a more workable choice-of-law framework.

II. INTERNATIONAL LAW ADDRESSING CHOICE OF LAW AND JURISDICTION IN DEFAMATION CLAIMS

While Rome II is a choice-of-law provision, the distinction between choice-of-law and jurisdictional rules for defamation claims is notoriously murky. When a court holds that jurisdiction is proper, it usually determines not only the forum where a defamation claim will be heard, but also whether any legal protections a publisher possesses under its

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pean Journalists Call on Brussels to Drop New Legal Threat to Media (June 27, 2005), *available at* http://www.ifj.org/default.asp?Index=3206.

27. The European Commission and European Parliament have equal control over Rome II's drafting through the European Union's co-decision process. *See infra* note 156.

28. *See infra* note 194 and accompanying text.

domestic law are available.[29] Much of this may result from the fact that courts are reluctant to apply foreign laws when the outcome would be outright dismissal of a plaintiff's claim.[30] This scenario is especially common when a plaintiff brings a claim in an English court against a U.S. publisher, since many actions that would be dismissed under U.S. law due to a violation of the First Amendment would nevertheless be proper under English law.[31] Courts regularly impose their domestic laws over foreign publishers even when the publisher's contact with the forum is tenuous at best,[32] a practice which has resulted in a confusing web of jurisdictions and defamation laws.

The difficulty of applying defamation law in the Internet age is due in large part to the slippery definition of "publication."[33] The United States has adopted a "single publication rule," which dictates that publication only occurs when a work is first distributed and also limits a defamation claim to a single action within one jurisdiction.[34] The purpose of the single publication rule is to protect defendants from harassment by multiple actions in separate jurisdictions, since a single action in any one jurisdiction affords the plaintiff his day in court.[35] In determining jurisdiction for cross-border defamation claims, many national courts, as well as the European Union, have rejected the single publication rule.[36] The reason for rejecting such a rule is because it would theoretically deny plaintiffs the ability to seek an injunction in every forum where their reputation has been harmed.[37] But, as a result of this flexibility, jurisdiction for a trans-

29. *See supra* note 25.

30. *See, e.g.*, Lewis v. King, [2004] EWCA (Civ.) 1329. *See also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PENN L. REV. 949, 998–99 (1994) (noting the high burden that litigators face when they argue that choice-of-law principles should overcome a judge's initial conclusion about who should win a lawsuit).

31. *See infra* Part II.C.

32. *See infra* Part II.B.

33. Traditionally, publication to a third party is one element of a successful defamation claim. Hebditch v. MacIlwaine [1894] 2 Q.B. 54, 58; RESTATEMENT (SECOND) OF TORTS § 558(b) (1977).

34. RESTATEMENT (SECOND) OF TORTS § 577A. In a single suit, a claimant may recover for all damages caused by the defamatory statement in all jurisdictions, whether domestic or foreign. *Id.* § 577A cmt. d.

35. *Id.* § 577A cmt. e.

36. *See, e.g.*, Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575, 601–05 (Austl.); Loutchansky v. Times Newspapers Ltd. [2001] Q.B. 1805; Case C-68/93, Fiona Shevill v. Presse Alliance, 1995 E.C.R. I-415.

37. Berezovsky v. Michaels, [2000] E.M.L.R. 643, 653 (H.L.).

> [T]he single cause of action theory, if adopted by judicial decision in England, would disable a plaintiff from seeking an injunction in more than one jurisdiction. In the context of the multiplicity of state jurisdictions in the United States

national defamation claim typically exists simultaneously and concurrently in any and all states where a publication is read.[38] As some have argued, this has amounted to "universal jurisdiction" for any communication posted on the Internet.[39]

As is often the danger in this scenario, the ease with which a plaintiff can bring a claim of defamation against an online publisher in a foreign jurisdiction has given rise to forum shopping.[40] Some have argued that

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> there is no doubt much good sense in the Uniform Single Publication Act. But the theory underpinning it cannot readily be transplanted to the consideration by English courts of trans-national publications.

Id.

38. *See* Rodney A. Smolla, LAW OF DEFAMATION § 12.33 (2006) ("A literal application of the 'place of the wrong' rule leads to the bizarre result that a multistate publication of a defamatory statement gives rise to a separate tort in each state in which publication occurs, and is governed by the law of each such state."). *See also* Edmund L. Andrews, *Germany's Efforts to Police Web Are Upsetting Business*, N.Y. TIMES, June 6, 1997, at A1; Kurt Wimmer, Comments of International Media Companies and Associations on Australian Defamation Law Reform 6 (Oct. 26, 2004), *available at* http://www.cov.com/download/content/brochures/australiandefamationreform.pdf. Rejection of the single publication rule also eviscerates statutes of limitations, since "every download of an article from an archive would start the clock running again." Wimmer, *supra*, at 5.

39. Andrews, *supra* note 38.

> "The Internet created a universal jurisdiction, so that once you are on the Internet you are subject to the laws of every country in the world," said Chris Kuner, an American lawyer in Frankfurt who closely follows German cyberspace issues. "The Internet gives rise to jurisdictional problems that never happened before."

Id.

40. Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 COMM. LAW 24, 24 (2002).

> It is becoming increasingly common for publishers based in the United States to find themselves on the receiving end of a defamation claim filed in Europe. England in particular has been a favorite forum for those aggrieved by an international publication because it historically has offered claimants friendly juries and a favorable burden of proof. Once a claimant has proved publication of a defamatory article in England, damage is assumed and the burden immediately shifts to the publisher, which must demonstrate that the defamatory statement is true or another substantive defense exists.

Id. See also Matthew Fagin, Comment, *Regulating Speech Across Borders: Technology Vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 434 (2003). In contrast, most jurisdictions outside of England place the burden of proof on plaintiffs. *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); Schwabe v. Austria, 242 Eur. Ct. H.R. (ser.A) 23 (1993).

forum shopping is not problematic per se, in that it allows plaintiffs to find forums that are competent to adjudicate their claims and "drives out bad laws."[41] However, even under this view, so-called "parallel litigation" is clearly problematic since it creates a race to the court between plaintiffs and defendants seeking declaratory judgments and adds additional costs and burdens to lawsuits.[42] Plaintiffs are likely to bring multiple lawsuits on the same subject matter in different countries, and actively seek a jurisdiction where they are most assured of success.[43] Another significant danger is that defamation claims are also likely to be brought against U.S. publishers under foreign laws that lack equivalent free-speech guarantees.[44] Adding to the uncertainty, U.S. courts have at times refused to enforce foreign defamation judgments against domestic publishers due to this very lack of First Amendment protection.[45]

A. The Fiona Shevill Case and European Approach to Choice of Law in Defamation Claims

Central to the European Union's[46] movement towards a common market is the harmonization of the laws of Member States in order to reduce the transaction costs of operating in foreign states.[47] In 1968, Europe

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41. Peter Nygh, *The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, *in* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 281–82 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

42. *Id.* at 282.

43. *See, e.g.*, Lewis v. King, [2004] EWCA (Civ.) 1329 (holding for plaintiff in a defamation claim based on publication of comments on a California-based website, even though an identical claim did not survive under U.S. law).

44. *See, e.g.*, Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575, 614 (Austl.) (holding that jurisdiction against U.S. publisher was proper even though Australia does not possess First Amendment protections).

45. *See, e.g.*, Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997). *See also infra* Part II.C.

46. Prior to 1993, with the adoption of the Treaty on European Union, the European Union was titled the European Economic Community. Europa, *The EU at a Glance: Europe in 12 Lessons, Historic Steps,* http://europa.eu.int/abc/12lessons/index2_en.htm (last visited Sept. 29, 2006). To avoid confusion, this Note refers to the European Union to mean both the European Economic Community and the European Union as it stands today.

47. *See* T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, Opening Address as Chairman of the Meeting of Government Experts (Feb. 26, 1969) *excerpted in* Prof. Mario Giuliano & Prof. Paul Lagarde, GIULIANO LAGARDE REPORT, 1980 J.O. (C 282) ("[T]here are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of persons, goods, services and capital among the Member States.") *available at* http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm. The seeds of the European Union were first sown in 1951 with the Treaty of

reached its first choice-of-law agreement, informally titled the Brussels Convention.[48] The Brussels Convention applied to disputes between citizens of Member States based in both contract[49] and tort.[50] Today, jurisdiction in the European Union is governed by the "Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (Brussels I Regulation).[51] As with the Brussels Convention, defamation claims under the Brussels I Regulation can be brought wherever the harmful event occurred—in other words, wherever an allegedly defamatory communication is read.[52] This rule reflects the European preference for bright-line jurisdictional rules as opposed to the American market-driven approach that focuses instead on the parties' contacts with the forum.[53]

In *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA*, the European Court of Justice (ECJ) interpreted the Brussels Convention rule and held that the "place where the harmful event occurred" must be understood to "acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."[54] Under *Bier*, European courts allow plaintiffs considerable freedom to bring a cause of action in any state where they

Paris setting up the European Coal and Steel Community. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. In 1957, the Treaty of Rome established the European Economic Community as a common market for goods and services. Treaty Establishing the European Community, Mar. 25, 1957, O.J. (C 325) 44 (2002). Both the Treaty of Paris and the Treaty of Rome were initially signed by Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. In 1973, Denmark, Ireland, and the United Kingdom joined the European Economic Community, followed by Greece in 1981, and Spain and Portugal in 1986.

48. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention].

49. *Id.* art. 5. Choice of law for contractual claims is now governed by Rome I. Rome I, *supra* note 21.

50. Brussels Convention, *supra* note 48, art. 5.

51. Council Regulation (EC) No 40/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2000 O.J. (L 12) 1 [hereinafter Brussels I Regulation]. Additionally, enforcement of foreign claims within the European Union is governed by treaty. *See* Regulation (EC) creating a European Enforcement Order for uncontested claims, April 21, 2004, 2004 O.J. (L 143) 15.

52. Brussels Convention, *supra* note 48, art. 5(3). *See also* Vick & MacPherson, *supra* note 13, at 972 (noting that the drafters of the Brussels Convention deliberately created an ambiguous choice-of-law rule).

53. Michael L. Rustad & Thomas H. Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13, 25 n.60 (2005).

54. Case 21/76, Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, 1976 E.C.R. I-1735, para. 19. The ECJ's ruling was requested by the Gerechtshof of the Hague. *Id.* para. 1.

claim they were harmed.[55] Rather than interpreting existing choice-of-law conventions in a limited manner by focusing on the place where the act occurred, the ECJ interpreted the harmful "act" to have taken place wherever it is felt or perceived.[56] According to Professors Vick and MacPherson, this approach enlarged the plaintiff's choices and thus gives rise to forum-shopping.[57] Even though European courts only permit a plaintiff to bring a defamation claim in forums where her reputation was actually harmed, under *Bier*'s permissive rule jurisdiction exists over a defamation claim wherever a publication was read.[58]

Perhaps the most important and emblematic European decision relating to the choice of law for defamation claims is *Fiona Shevill v. Presse Alliance SA*, in which the ECJ specifically applied the reasoning of *Bier* to a defamation context.[59] In 1989, the French newspaper *France-Soir* printed an article accusing an English student of money laundering.[60] Although the student was working in Paris at the time the alleged incident took place, she returned to her native England and brought a defamation suit in the British High Court of England and Wales.[61] The French newspaper disputed whether the British court had jurisdiction because, within the meaning of the Brussels Convention, "the place where the harmful event occurred"[62] was France and "no harmful event had occurred in England."[63] The matter was referred to the ECJ,[64] which

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55. *See* Vick & MacPherson, *supra* note 13, at 973.

56. Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, 1976 E.C.R. I-1735, para. 24.

57. Vick & MacPherson, *supra* note 13, at 973.

58. *Id.* at 985. Professors Vick and MacPherson explain:

> The difficulties inherent in the *Bier* approach are exacerbated in the defamation context, though, by the confluence of three factors: the number of potential forums reached by internationally disseminated publications; the related growth in the number of persons with international reputations, at least within their fields of specialty, who can be harmed in multiple localities by a single newspaper article; and the wild variation in defamation policies from member state to member state.

Id.

59. Fiona Shevill v. Presse Alliance, 1995 E.C.R. I-415. *See also* Vick & MacPherson, *supra* note 13, at 975.

60. Fiona Shevill, 1995 E.C.R. I-415, paras. 3–8.

61. *Id.* para. 11.

62. Brussels Convention, *supra* note 48.

63. Fiona Shevill, 1995 E.C.R. I-415, para. 15.

64. *Id.* Both the High Court of England and Wales as well as the Court of Appeal ruled that jurisdiction was available to the plaintiff in England. *Id.* The defendant then

held that, under *Bier*, when a person has been defamed in two or more European Union states, the Brussels Convention allowed the plaintiff to bring a claim wherever her reputation was harmed and the plaintiff was not required to prove damages before bringing suit in a given forum.[65]

Under the ECJ's analysis, if the plaintiff sued in France, she could claim any and all damages caused to her reputation throughout the European Union.[66] However, she could also elect to bring her claim in England,[67] but would be limited to only damages caused within England.[68] Thus, under *Fiona Shevill*, a defamation claim can be brought either in the country of publication or in any country where the plaintiff's reputation was harmed, but the available remedy might be limited if the plaintiff elects the latter.[69] *Fiona Shevill* also impacts the choice of law for defamation claims.[70] The case has been interpreted to mean that if a

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appealed the decision to the House of Lords, which referred the case to the ECJ to determine the proper interpretation of the Brussels Convention. *Id.*

65. *Id.*

66. *Id.* para. 25 ("The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.").

67. *Id.* paras. 29–30.

> In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.
>
> It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim' s reputation.

Id.

68. States in which a publication was distributed and where the victim claims to have suffered injury to her reputation "have jurisdiction to rule solely in respect of the harm caused in the State of the court seised." *Id.* para. 33.

69. *Id.* paras. 49–57.

70. The ECJ noted that the Brussels Convention only governed jurisdiction and that choice of law is a matter to be determined by national conflict-of-laws rules, provided that the effectiveness of the Brussels Convention is not impaired. *Id*. para. 36. This stipulation is misleading, however, because states rarely elect to apply foreign law to defamation claims. Instead, choice of law usually attaches once a court determines that jurisdiction is proper. *See* Vick & MacPherson, *supra* note 13, at 937–38.

> The irony of *Shevill* lies in its insistence that the Brussels Convention was not intended to impose substantive rules of law on the member states of the European Union, even though it is a paradigmatic example of how a matter of procedure can fundamentally shape the substantive direction of the law.

plaintiff brings a suit in a country where her reputation was harmed, then the law of that jurisdiction applies; but, if a plaintiff brings a suit for all damages in the state where the publication is based, then the court will apply foreign laws on a "distributive basis."[71] In practice, *Fiona Shevill* creates a flexible rule whereby courts can exercise jurisdiction and apply domestic law against foreign publishers as long as a citizen was harmed in some way in a given forum.[72] At least compared to the American approach, this permits a plaintiff to have considerable discretion in choosing where to bring a defamation claim.[73]

There are numerous problems that occur when a plaintiff elects to sue in a forum other than the place of publication. Although courts limit damages to only harm caused within that forum,[74] damages caused by defamation are inherently ephemeral.[75] The deduction of damages under

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Id.

71. European Commission 2003 draft, *supra* note 20, at 18.

> [I]f the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages: the [law of the place of publication] will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.

Id. See also Working Document on the proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, European Parliament 6–7 (Jan. 26, 2004), *available at* http://www.dianawallismep.org.uk/resources/index/Rome+II (follow "Download this document" hyperlink under "Working Document on Rome II [Part 1, Articles 1 to 8]" heading) [hereinafter Rome II (Working Document)].

72. *See* Hunter v. Gerald Duckworth & Co., [2000] I.L.Pr. 229 (Ir.) (holding that under *Fiona Shevill* jurisdiction in Ireland was proper for a defamation claim by an Irish citizen against an English publisher given that it "was almost inevitable that [the booklet in question] would be published in Ireland"); Skogvik v. Sveriges Television AB, [2003] I.L.Pr. 24 (Nor.) (holding that under *Fiona Shevill* jurisdiction in Norway was proper for a defamation claim against a Swedish television broadcast that was also received in Norway).

73. Moritz Keller, *Lessons for the Hague: Internet Jurisdiction in the Contract and Tort Cases in the European Community and the United States*, 23 J. MARSHALL J. COMPUTER & INFO. L. 1, 61 (Fall 2004).

74. Hunter v. Gerald Duckworth & Co., [2000] I.L.Pr. 229 (Ir.) ("[T]hese proceedings seek to recover damages only in respect of any loss of reputation suffered by the plaintiffs within the jurisdiction of this court.").

75. *See* Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by* Gutnick v. Dow Jones & Co.*,* 62 WASH. & LEE L. REV. 279, 283 (2005).

Fiona Shevill is often rendered irrelevant because by merely establishing jurisdiction, a plaintiff has raised considerable leverage for a settlement.[76] Thus, *Fiona Shevill*'s limitation does not provide any substantive barrier to recovery for a defamation claim even when the contact between the publisher and a given European forum is minimal. Under the American view, protracted litigation has a chilling effect on First Amendment rights,[77] which is entirely unmitigated by a reduction in damages. In other words, under *Fiona Shevill*, a plaintiff might only be compensated for a portion of her damages, yet she has still "won the war" by vindicating her rights and by putting the public on notice not to make similar statements.[78]

Furthermore, in rejecting the single publication rule, *Fiona Shevill* permits forum shopping and enables plaintiffs to bring harassment suits.[79] One justification for rejecting the single publication rule is that such a rule would prevent a plaintiff from enjoining a defendant in every jurisdiction where she is defamed.[80] However, it is unclear why this is true, because courts regularly issue injunctions that are intended to have extraterritorial reach.[81] This belief also is inconsistent with the way that litigants typically view defamation claims, which is to vindicate one's reputation and to receive compensation for the harm caused.[82] Thus, without

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76. *See* Vick & MacPherson, *supra* note 13, at 977–78.

77. *See* Couch v. San Juan Unified School Dist., 39 Cal.Rptr.2d 848, 853 (Cal. Ct. App. 1995).

78. The following statement about the recent *Jameel v. Wall Street Journal* case, *supra* note 13, shows that plaintiffs are often far more concerned with vindication of their reputation than recovery of damages:

> "Mr. Justice Eady and the Court of Appeal ruled that I was libeled" Jameel said. "The House of Lords ruled that I was not, because it was reasonable for The Wall Street Journal Europe to print something that was false. So be it. *I was only ever interested in proving that the allegations were untrue*."

Clare Dyer, *Law Lords Give Media Shield Against Libel in Landmark Ruling*, GUARDIAN (London), Oct. 12, 2006, at 7 (emphasis added). *See also* Sarah Lyall, *High Court in Britian Loosens Strict Libel Law*, N.Y. TIMES, Oct. 12, 2006, at A10. Furthermore, the *Fiona Shevill* rule also encourages potential litigants to move to countries with pro-plaintiff defamation laws. *See* Dr. Nicolas Quoy, *Enforcement of Copyright and Neighboring Rights in the European Union* 19 (May 6, 2004), *available at* http://www.abgm.adalet.gov.tr/3-1-EN-Quoy.pdf. The facts of the *Fiona Shevill* case itself highlight this problem, in that the plaintiff returned to her native England to bring her defamation claim.

79. Vick & MacPherson, *supra* note 13, at 985–88.

80. *See supra* note 37.

81. Oren Bigos, *Jurisdiction Over Cross-Border Wrongs on the Internet,* 54 INT'L & COMP. L.Q. 585, 616–17 (July 2005).

82. Bone, *supra* note 75, at 311–12.

a single publication rule, plaintiffs are able to bring multiple claims abroad as they actively seek the court with the most favorable substantive defamation law. Despite these strong criticisms,[83] *Fiona Shevill* is the European Union's status quo approach to choice of law for defamation claims and has been defended by one French practitioner as creating a "sensible rule" for dealing with the ephemeral nature of such damages.[84]

B. The Exercise of Domestic Jurisdiction over Foreign Publishers

A number of cases addressing defamation claims highlight the growing trend of national courts exercising jurisdiction over foreign publishers and individuals. In many of these cases, the speaker or publisher is domiciled in the United States and only has contact with the forum state via the Internet. Courts nonetheless routinely adjudicate plaintiff's claims under domestic law when the forum's only interest is protecting the reputation of individuals—some of whom are not even citizens of the given forum—which is minimal compared with the U.S. interest of protecting free speech interests.[85]

Dow Jones & Co. v. Gutnick occurred in Australia and is therefore beyond the scope of Rome II, yet this case has become both symbolic and admonitory in terms of the dangers of universal jurisdiction for defamation claims arising from publication on the Internet.[86] Furthermore, courts in other English common-law countries have found *Gutnick*'s rationale to be persuasive.[87] In *Gutnick*, the High Court of Australia exercised jurisdiction and imposed Australian law over Dow Jones, the United States-based publisher of *Barron's Online*.[88] While acknowledging the defendant's argument that subjecting foreign publishers to defa-

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83. *See* Vick & MacPherson, *supra* note 13, at 997–99.

84. Pierre Véron, *Thirty Years of Experience with the Brussels Convention in Patent Infringement Litigation*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 431, 445 (2002).

85. While it is true that publishers can avoid liability while still retaining their full free-speech interests domestically by limiting access to U.S. websites abroad, this "virtual bordering" of the Internet is problematic. Svantesson, *supra* note 1, at 65–69.

86. Notably, *Gutnick* has been cited with approval by a number of courts within Europe. *See, e.g.*, Lewis v. King, [2004] EWCA (Civ.) 1329, paras. 29–31.

87. John Di Bari, *A Survey of the Internet Jurisdiction Universe*, 18 N.Y. INT'L L. REV. 123, 131 n.46 (2005).

88. Dow Jones & Co. Inc. v. Gutnick, (2002) 210 C.L.R. 575. The court seemed to champion Australian defamation law which, unlike the United States, places a higher value on reputation over free expression and the market-place of ideas. *Id.* at 650–51 (Callinan, J., concurring). The court also seemed concerned with preventing "American legal hegemony" whereby U.S. publishers would obtain unfair economic advantages over those living outside the United States. *Id.* at 653–54.

mation actions "may have substantial consequences," the court nonetheless held that creating certainty does not mean the court was bound to enforce foreign law.[89] Thus, the court was unconcerned with the expectations of the publisher[90] and, furthermore, the court held that publication on the Internet did not create a special circumstance as far as applying Australian law was concerned.[91]

The court also was not persuaded that the fact that the United States provides greater protection to publishers under the First Amendment should be determinative, holding that Australian law "provides an appropriate balance which does justice to both a publisher and the subject of a publication."[92] While *Gutnick* was decided on jurisdictional grounds, the key to the court's analysis was Australia's right to exercise Australian law over a foreign publisher.[93] As one commentator noted, two undercurrents seem to have motivated the court's decision: first, the court was

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89. "[C]ertainty does not necessarily mean singularity. What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their 'home' legal system." *Id.* at 599–600 (majority opinion).

90. *Id.* at 649 (Callinan, J., concurring).

> The appellant argued that the respondent, having set out to make money in the United States, must expect to be subjected to lawful scrutiny in that country. No doubt the fact of lawful scrutiny in that country, if such the publication was, would provide a defence to the appellant to defamation proceedings there. That fact does not however have anything to say about unlawful publication in this country.

Id.

91. *Id.* at 649–50.

> If people wish to do business in, or indeed travel to, or live in, or utilise the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries. The fact that publication might occur everywhere does not mean that it occurs nowhere. Multiple publication in different jurisdictions is certainly no novelty in a federation such as Australia.

Id.

92. *Id.* at 651.

93. *See id.* at 640–42 (Kirby, J., concurring). It should be noted that, instead of challenging the judgment's enforcement in U.S. courts, *see infra* Part II.C, Dow Jones instead brought a suit in front of the United Nations Human Rights Committee ("UNHRC") for violation of Article 19 of the ICCPR. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 549 (Jan. 2005). While the UNHCR suit was likely abandoned when Dow Jones settled the Australian defamation case, this suit does raise an interesting question as to how international courts might become involved in resolving the balance between free speech and reputation in defamation claims. *Id.*

troubled by the entrenchment of U.S. courts in adjudicating defamation claims; and second, the court was not persuaded that the Internet posed unique communication possibilities.[94] Yet, as Justice Kirby noted in his concurrence, the court's decision substantially raised the risk of imposing global liability on publishers.[95] *Gutnick* stands at least symbolically at a troubling extreme of courts imposing domestic defamation law over foreign publishers.[96]

Gutnick is hardly alone, especially in European courts.[97] England has similarly exercised its right to apply domestic law over a foreign publisher in a non-Internet context. In *Berezovsky v. Forbes Inc.*, a Russian tycoon sued the U.S. publication *Forbes* for false allegations of corruption and unscrupulous dealings.[98] Although only 2,000 of the 765,000 total copies were distributed in the United Kingdom, a divided House of Lords nonetheless held that the United Kingdom was a proper forum to hear the plaintiff's claim.[99] The court's analysis focused on the defendant's awareness of where the publication would be received, which some have argued mirrors the U.S. approach.[100] *Berezovsky* reveals a far more flexible approach whereby the dissemination of only 2,000 issues is deemed "significant," with the court instead focusing on the plaintiff's injury rather than the defendant's connection with the forum.[101] This flexibility has also extended to other contexts of English defamation claims, including permitting a plaintiff to amend his claim when he mis-

94. Di Bari, *supra* note 87, at 130–31.

95. Dow Jones v. Gutnick, 210 C.L.R. at 643 (Kirby, J., concurring).

96. Two practitioners asked "Could You Be Gutnicked?," further explaining that "to Gutnick" means "to make an internet publisher liable (for defamation or otherwise) in a foreign jurisdiction." Tina Glover & Helen Padley, *Could You Be Gutnicked? Is Rome II a Fitting Sequel for Publishers?*, Denton Wilde Sapte TransMiT (Oct. 2004), *available at* http://www.dentonwildesapte.com/assets/1/14921.pdf.

97. Italy has also held that, as long as a potentially defamatory statement has been "perceived" in Italy, then "the offence must be deemed to have been perpetrated on the national territory and the Italian state is entitled to jurisdiction." Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis*, 20 CONN. J. INT'L L. 199, 211–12 (2005).

98. Berezovsky v. Michaels, [2000] E.M.L.R. 643 (H.L.).

99. *Id.* at 654–56.

100. Matthew E. Babcock, et. al., *Publishing Without Borders: Internet Jurisdictional Issues, Internet Choice of Law Issue, ISP Immunity, and On-Line Anonymous Speech*, 651 PLI/PAT 9, 43 (May 2, 2001).

101. Berezovsky v. Michaels, [2000] E.M.L.R. at 651–52. In dissent, Lord Hoffman noted that the plaintiff's reputation was based on activities in Russia and that the plaintiff was therefore "forum shopping in the most literal sense." *Id.* at 668 (Hoffman, L.J., dissenting).

takenly referred to the American, rather than English, edition of an allegedly defamatory publication.[102]

Further evidence of the English permissive approach can be seen in *Harrods Ltd. v. Dow Jones & Co.*, where the Queen's Bench exercised jurisdiction against Dow Jones, the United States publisher of the *Wall Street Journal*, in connection with material published about the English department store Harrod's.[103] Citing *Gutnick* and *Fiona Shevill*, the court concluded that the *Wall Street Journal* was circulated in England based on the "small number of copies" of the newspaper received by English subscribers as well as the "limited number of hits emanating from [England] on the relevant page" of *Wall Street Journal*'s website.[104] The English Court also rejected Dow Jones' forum non conveniens[105] argument.[106] Notably, Dow Jones appealed to the United States District Court for the Southern District of New York, which in turn held that the English proceedings would provide a more appropriate remedy and therefore declined to intervene on the jurisdiction of the English Court.[107] The Southern District of New York also rejected Dow Jones' argument that the court should prevent *all* proceedings in foreign courts, noting that it was unlikely that foreign courts would recognize such an injunction.[108] *Harrods* confirms that, under *Fiona Shevill*'s flexible approach, England's pro-plaintiff defamation laws have provided potential litigants with an attractive forum to bring claims against publishers,[109] and that protection from U.S. courts is not always granted.

Outside of the journalism context, English courts have consistently held that merely publishing a statement on the Internet gives rise to a defamation case within domestic jurisdiction.[110] In *Godfrey v. Demon Internet Ltd.*, the English Queen's Bench held that a defamation claim

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102. Reuben v. Time Inc, [2003] E.W.H.C. 1430, paras. 73–89 (Q.B.) (permitting a plaintiff to amend his complaint to refer to the English rather than American publication of Forbes, even though a claim in England based on the American edition would not be proper).

103. Harrods Ltd. v. Dow Jones & Co., [2003] E.W.H.C. 1162 (Q.B.).

104. *Id.* para. 36.

105. "The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought." BLACK'S LAW DICTIONARY 416 (2nd Pocket Ed. 2001).

106. Harrods Ltd. v. Dow Jones & Co., [2003] E.W.H.C. 1162, para 45.

107. Dow Jones & Co. v. Harrods Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

108. *Id.* at 412.

109. *Supra* note 13.

110. *See, e.g.*, Godfrey v. Demon Internet Ltd., [2001] Q.B. 201.

could be brought against an Internet provider based on an Internet newsgroup posting.[111] Because the Internet provider did not respond to the plaintiff's request to remove the offensive content, the court held that the Internet provider played an active role and, like a bookshop, library, or magazine wholesaler, was liable for the content it carried on its server.[112]

Litigation between public figures also reveals that England is an attractive forum for a plaintiff to bring a defamation claim, even when the defendant has little connection with the forum. In *Lewis v. King*, the English Court of Appeal held that U.S. boxing promoter Don King had permission to bring a defamation suit in England against another U.S. defendant.[113] Even though both parties were domiciled in the United States, the court held that jurisdiction in England was proper because the allegedly defamatory statement had been downloaded in England and the plaintiff claimed an interest in protecting his reputation in England.[114] *Lewis v. King* highlights the problem of forum shopping in England, in that the court acknowledged that if the plaintiff's claim been brought in the United States, it would not have survived.[115] Here, it is notable that the court made no reference to *Fiona Shevill*.

More recently, actor and the Governor of California Arnold Schwarzenegger was sued by a U.K. television presenter for making allegedly defamatory remarks in response to accusations about past infidelities.[116] Citing *Gutnick*, *Lewis*, and *Fionna Shevill*, Justice Eady of the Queen's Bench easily found that England was a proper forum to hear the plaintiff's claim, since "internet publication takes place in any jurisdiction where the relevant words are read or downloaded," "[t]here is no 'single publication rule'" in multi-state defamation claims, and the plaintiff had

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111. *Id.* In the United States, internet providers are protected under the Communications Decency Act of 1996 § 230(c)(1), which states that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Further, courts have held that under the Act, an Internet provider is not liable for any defamatory content even when a plaintiff contacts the provider to remove the content. *See, e.g.*, Zeran v. America Online, 958 F.Supp. 1124 (E.D.Va 1997). One commentator has noted that if *Zeran* were heard in England, the issue would instead be whether the provider had "acted expeditiously to remove material following complaints." LAW COMMISSION SCOPING STUDY NO. 2, *supra* note 18, at 17.

112. Godfrey v. Demon Internet Ltd., [2001] Q.B. 201.

113. Lewis v. King, [2004] EWCA (Civ.) 1329 (pertaining to comments by the lawyer of boxer Lennox Lewis about boxing promoter Don King published on two websites).

114. *Id.*

115. *Id.*

116. Richardson v. Schwarzengger, [2004] EWHC 2422 (Q.B.).

proved that she "has suffered at least some damage" within the forum.[117] The court also dismissed the defendant's forum non conveniens argument since, under *Berezovsky* and *Lewis*, "the scales come down positively in favour of the English Court."[118] Schwarzenegger ultimately chose to settle the lawsuit rather than contest it in the English courts.[119]

Courts only decline to exercise jurisdiction when a publisher limits access via the Internet. In *Bangoura v. Washington Post*, the Court of Appeals of Ontario held that a defamation claim against the *Washington Post* by a citizen of Guinea who had moved to Ontario could not be heard by a Canadian court.[120] The court noted that the *Washington Post* had only seven subscribers in all of Ontario.[121] Further, while the article was available over the Internet free of charge for only fourteen days after publication, thereafter readers had to pay to view the article.[122] Only one person had paid for the article after the fourteen-day window, and that

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117. *Id.* (citations omitted).

118. *Id.* The court noted the following factors:

> (i) The Claimant is a United Kingdom citizen;
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> (ii) She is resident here;
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> (iii) She works here;
>
> (iv) She is widely known through work here and has an established reputation in this country;
>
> (v) She has no comparable connection with any other jurisdiction, including the United States;
>
> (vi) In the light of the presumption, to which I have referred, damage to her reputation has been suffered here;
>
> (vii) The underlying events, if there is ever to be a plea of justification, took place here at the Dorchester Hotel in December 2000;
>
> (viii) English law is applicable to the publication in this country.

Id. paras. 28-29.

119. Michael R. Blood, *Schwarzenegger Settles Groping Lawsuit*, THE GUARDIAN (U.K.), Aug. 26, 2006 ("The agreement spares the governor from what could have been a potentially embarrassing trial as he campaigns for a second term.").

120. Bangoura v. Wash. Post, [2005] O.J. 3849 (Ont. C.A. Sept. 16, 2005), *available at* http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm (holding that an Ontario citizen could not bring libel claim against U.S. newspaper given the tenuous connection between the publication and Ontario). Notably, the lower court had ruled in favor of the plaintiff in a decision that relied heavily on *Gutnick*. Bangoura v. Wash. Post, 235 D.L.R. (4th) 564, 573.

121. Bangoura v. Wash. Post, [2005] O.J. 3849.

122. *Id.*

was the plaintiff's counsel.[123] *Bangoura* is rare in that a domestic court declined to exercise jurisdiction over a defamation claim against a foreign publisher, but this might be due solely to the case's unique facts and circumstances. It is particularly notable that a Canadian court rendered this decision, and that English courts have rejected similar arguments.[124] Further, the decision shows that restricting access to online publications is one method for publishers to avoid defamation claims in foreign jurisdictions. Given that journalism reaches its public function through free access,[125] *Bangoura* highlights the growing danger that publishers might start limiting online access in order to cope with defamation claims from abroad. In other words, at best only a *de minimus* contact with the forum will permit a court to dismiss a defamation claim, meaning that publishers have a strong incentive to limit access abroad.

C. Enforcement of Foreign Defamation Judgments in U.S. Courts

U.S. publishers have one additional remedy available: convincing a domestic court to refuse to enforce a foreign judgment. In the European Union, judgments made in other Member States are enforceable through multilateral treaty.[126] However, there is no such reciprocity in the United States, and American courts have, at times, refused to enforce foreign judgments. In the U.S., enforcement of foreign judgments is generally recognized under the principle of international comity,[127] but foreign

123. *Id*.

124. The *Bangoura* court stated it did not find *Gutnick* to be "helpful in determining the issue before [the] court." *Id.* The English Queen's Bench rejected a similar argument by a publisher whose article was downloaded only five times within the given forum. Jameel v. Dow Jones & Co. [2005] Q.B. 946, 951.

125. For instance, the First Amendment right of access is based upon "the common understanding that a 'major purpose of that Amendment was to protect the free discussion of governmental affairs.' By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (citation omitted). U.S. courts apply heightened scrutiny to prior restraints of the press out of a recognition that access to communication is vital to free expression under the First Amendment. *See, e.g.*, DeBoer v. Village of Oak Park, 267 F.3d 558, 573–74 (7th Cir. 2001).

126. Regulation (EC) creating a European Enforcement Order for uncontested claims, *supra* note 51. However, courts can refuse to recognize foreign judgments "if such recognition is manifestly contrary to public policy of the Member State in which recognition is sought." Brussels I Regulation, *supra* note 51, art. 34(1).

127. "The international comity principle counsels for recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to the nation's interests." 45 AM. JUR. 2D *Int'l Law* § 7 (2005).

defamation judgments present an exception where the U.S. court could refuse if the judgment cannot be sustained under the First Amendment.[128]

Notably, in *Bachchan v. India Abroad Publications Inc.* a New York court held that a defamation judgment in the High Court of Justice in London against a New York wire service was unenforceable.[129] The court stated that enforcing the judgment would violate the First Amendment given that, in England, the burden of proof in a libel action rests with the defendant.[130] *Telnikoff v. Matusevitch* is an even more extreme and famous example of a U.S. court refusing to enforce a foreign defamation verdict.[131] The Maryland Court of Appeals refused to enforce an English judgment against an English citizen who, prior to moving to the United States, had written a letter to the editor that was published by an English newspaper.[132] The court upheld the trial court's decision that English law was antithetical to the United States and Maryland free speech guarantees, and therefore "repugnant to the public policy" of Maryland and unenforceable.[133]

These cases show the uncertainty wrought when courts impose their domestic law on foreign publishers, especially when those nations have vastly divergent standards of protecting free expression. U.S. courts have indeed acted to protect the free-speech interests of American publishers.[134] One commentator has argued that the "non-enforceability of foreign judgments that contravene the First Amendment may alleviate United States defendants' fears of violating the libel laws of other countries."[135] This protection, however, only occurs after proceedings in foreign jurisdictions, amounting to a notable waste of judicial resources.[136] This protection also does not curtail the chilling effect imposed on publishers, who must now decide whether continued publication on the

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128. SACK ON DEFAMATION § 15.4. A number of states have adopted the Uniform Foreign Money-Judgments Act (UFMJA), 13 U.L.A. 419 (1980), which seeks to increase the likelihood that foreign judgments will be recognized in the United States and restates the common law rules. SYMEONIDES, *supra* note 6, at 820–21.

129. 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992).

130. *Id.* at 664–65.

131. 702 A.2d 230 (Md. 1997).

132. *Id.* at 251.

133. *Id.* at 236. Notably, Maryland has adopted the UFMJA, but the court held that non-enforcement in this instance was proper under the UFMJA's public policy exception. *Id.* at 238.

134. Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661 (1992). *See also* Desai v. Hersh, 719 F.Supp. 670 (N.D. Ill. 1989).

135. Barendt, *supra* note 15, at 737.

136. Vick & MacPherson, *supra* note 13, at 986.

Internet is worth the likelihood of protracted litigation abroad.[137] Furthermore, liability in foreign jurisdictions still presents a major point of concern to publishers with assets in a given forum.[138] When one considers that today, almost all major newspapers have bureaus, foreign editions, and personnel spread across the globe, the non-enforcement route seems even less viable.

III. ROME II WASN'T BUILT IN A DAY

Even though Rome II can be seen as part of the European Union's attempt to harmonize the laws of Member States,[139] the backdrop of foreign liability for defamation claims has colored the convention's drafting process. Given publishing groups' unease with the status quo approach, they saw Rome II as an opportunity to create a more stable rule for defamation claims that would, hopefully, protect their interests.

The first European Union treaty governing choice of law was the Brussels Convention,[140] which was interpreted by the ECJ in *Bier* and *Fiona Shevill*.[141] However, the Brussels Convention created a number of methods for claimants to opt out of one jurisdiction in favor of another,[142] rendering the treaty ineffective.[143] Throughout the 1970s, the European Union worked towards creating a more stable choice-of-law agreement for disputes, beginning with claims based in contractual relationships.[144] Eventually the European Community produced Rome I, which states that the choice of law for contractual claims is "the law of the country with which it is most closely connected."[145] Rome I is applicable to parties

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137. *See* Wimmer, *supra* note 38, at 6.

138. Blake Cooper, Note, *The U.S. Libel Law Conundrum and the Necessity of Defensive Corporate Measures in Lessening International Internet Liability*, 21 CONN. J. INT'L L. 127, 138 (2005).

139. *See* Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 5.

140. Brussels Convention, *supra* note 48.

141. *Supra* Part II.A.

142. Brussels Convention, *supra* note 48, arts. 2–6.

143. The Brussels Convention's flexible rules allowed litigants to actively and easily choose the jurisdiction with laws most favorable to their claim. Rome II (European Commission 2003 draft), *supra* note 20, at 3.

144. Giuliano & Lagarde, *supra* note 47.

145. Rome I, *supra* note 21, art. 4(1). In comparison:

> [T]he country which is "most closely connected" with the contract usually means the country where the performer of the contract, if it is a business, has its central administration or, in the case of a trade or a profession, the location of its principal place of business. This alternative most closely resembles choice of law principles applied by United States courts.

residing in any state in the world, not just European Union Member States.[146] In turn, Rome II will be the "natural extension" of unification rules relating to private international law in the European Union.[147]

Two provisions of the Treaty on European Union[148] affect the drafting and scope of Rome II. Article 2 of the Treaty on European Union requires that "litigants can assert their rights in the courts and before the authorities of all the Member States, enjoying facilities equivalent to those they enjoy in their own country."[149] Declaration 20, which the European Union amended to the Treaty on European Union in 1997, states that choice-of-law measures "shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media."[150] Member States drafted Declaration 20 due to concerns that, under Article 2, they would be required to enforce judgments antithetical to their domestic free-speech protections.[151] Although neither the European Parliament nor the European Commission made any explicit reference to Declaration 20 while drafting Rome II,[152] it paved the way for the drafters of Rome II to carve out

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James E. Meadows, *International Electronic Commerce with the European Union*, 590 PRAC. LAW INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 343, 349 (Feb. 2000).

146. Rome I, *supra* note 21, art. 1.

147. Rome II (European Commission 2003 draft), *supra* note 20, at 3.

148. [2002] O.J. (C 325). In addition to changing the title of the "European Economic Community" to simply the "European Community" or "European Union," the Treaty on European Union established a European governing body and called for a common monetary system. *Id.*

149. Rome II (European Commission 2003 draft), *supra* note 20, at 2.

150. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340).

151. Declaration 20 was drafted by Sweden due to worries about enforcing defamation judgments that are in violation of Swedish constitutional protections of freedom of speech and expression. European Group for Private International Law (EGPIL), *Working Sessions of the Fourteenth Annual Meeting* (Sept. 17–19, 2004), *available at* http://www.drt.ucl.ac.be/gedip/reunionstravail/gedip-reunions-14t-en.html [hereinafter EGPIL Working Sessions]. These concerns mirror the refusal of U.S. courts to enforce foreign defamation claims. *Supra* Part II.C.

152. The European Parliament did, however, note that one other European Parliament directive, the so called "e-commerce directive," colors the application of Rome II. European Parliament and Council Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 1 (EC). This directive enshrines a country-of-origin rule to e-commerce claims, but also provides that the directive "does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts." *Id.* Thus, the drafters of Rome II created a rule in the field of e-commerce that if the application of Rome II's choice-of-law provisions "result in an unjustified barrier to

an exception to the general rule[153] for the choice of law relating to defamation claims.[154] Rome II's drafters also noted that the divergent defamation laws of Member States would raise "difficult issues" requiring special consideration.[155]

Rome II's drafting process has been slow and deliberate, owing to the fact that consensus must be achieved among not only all Member States, but also between the European Parliament (the European Union's legislative branch) and the European Commission (the European Union's executive branch) as part of the treaty's co-decision process.[156] The European Union began drafting Rome II in 2002.[157] In addition to public hearings, the European Commission sought and received over eighty written commentaries from interested parties.[158] The position of newspaper and broadcasting groups reflected the growing concern with foreign defamation liability, in that publishers must comply with foreign press laws under a flexible rule.[159] These groups suggested that courts instead apply publishers' national defamation laws, since they reflect each country's particular tradition and values regarding freedom of the press.[160] Aca-

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trade, the national court would be obliged . . . not to apply that law." Rome II (Working Document), *supra* note 71, at 2–3.

153. Rome II (European Parliament draft), *supra* note 20, art. 3.

154. "Article 6 in the proposed Rome II Regulation has something to do with this declaration. It probably made it easier to introduce the exception to Article [6] for the protection of freedom of the press." EGPIL Working Sessions, *supra* note 145.

155. Rome II (Working Document), *supra* note 71, at 3.

156. Rome II (European Commission 2003 draft), *supra* note 20, at 5–6.

157. Drafting of Rome II was triggered in 1998 by the Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. 1999 O.J. (C 19) 1 *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0123(01):EN:HTML. All European Union nations participated in the drafting as well as the adoption of Rome II except for Denmark. Rome II (Working Document), *supra* note 71, at 2 n.1. Thus, once the European Union adopts Rome II, Member States will apply the Rome II conflict-of-laws rules as regards the application of Danish law, but Denmark will continue to apply existing rules of international law. *Id.*

158. Symeon C. Symeonides, *Tort Conflicts and Rome II: A View from Across* (2004), *available at* http://www.dianawallismep.org.uk/pages/rome2.html (follow "'Tort Conflicts and Rome II: a view from accross' [sic], by S.C. Symeonides." hyperlink).

159. European Commission, Justice and Foreign Affairs, *Summary and contributions of the consultation "Rome II"* (Oct. 31, 2002), http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm [hereinafter Summary and contributions].

160. European Newspaper Publishers' Association (ENPA), *ENPA position on the draft proposal for a Council Regulation on the law applicable to non-contractual obligations* (Sept. 15, 2002), *available at* http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/euro_newsp_enpa_en.pdf.

demic commentators, in turn, noted that the status quo choice-of-law approach permitted plaintiffs to bring a defamation claim in any forum where their reputation was harmed.[161] These commentators suggested that Rome II should continue to permit plaintiffs to choose where to bring a defamation suit while adopting certain exceptions to address publishing groups' expectations.[162]

From these discussions, the European Commission[163] advanced the first draft of Rome II on July 22, 2003.[164] Unlike some choice-of-law rules that attempt to create a standard black-letter rule applicable to all types of claims,[165] Rome II adopted the academic commentators' approach of creating a general rule[166] and then carving out exceptions based on the content of certain claims.[167] The first draft of Rome II, however, created a place-of-harm approach for defamation claims that reads:

> As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publica-

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> Each Member State has its own traditional approach to press freedom in their press law. It is a right which evolves nationally in harmony with their moral, legal historical, religious and political values and traditions. Newspapers are usually addressed to and bought by their national, regional or local readers as their articles reflect the values which characterise their readership. It is therefore natural and logical that publishers first respect and apply their national press law, which is based on these values.

Id.

161. Summary and contributions, *supra* note 159.

162. *Id.*

163. The European Commission is the executive branch of the European Union and currently consists of 25 Commissioners, one from each member of the European Union. The European Parliament, on the other hand, is the EU's parliamentary body and consists of MPs directly elected by each member nation.

164. Rome II (European Commission 2003 draft), *supra* note 20.

165. *See, e.g.*, European Group for Private International Law (EGPIL), Proposal for a European Convention on the law applicable to non-contractual obligations (Sept. 25–27, 1998) *available at* http://www.drt.ucl.ac.be/gedip/documents/gedip-documents-7pe.html. The EGPIL choice-of-law proposal was drafted by a private organization free from political pressure or compromises, and has been described as being "as close to perfection as humanly possible." Symeonides, *supra* note 158. Funding for the EGPIL proposal derived from the European Commission, and the text became the basis for the early drafts of Rome II. Rome II (European Commission 2003 draft), *supra* note 20, at 4.

166. Rome II (European Parliament Draft), *supra* note 20, art. 3.

167. *See* Symeonides, *supra* note 158, at 2.

> tion or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication.[168]

The "manifestly closer" exception was intended to address publishers' concerns, but publishing groups viewed this as too vague to be effective and the rule was greatly criticized.[169]

In particular, publishing groups noted that a place-of-harm rule would make it necessary to employ legal advisors with expertise in each foreign jurisdiction, which would create practical and financial burdens in addition to a chilling effect caused by self-censorship out of fear of suit under foreign defamation laws.[170] Even in the United Kingdom, which has pro-plaintiff defamation laws,[171] British publishing groups opposed the place-of-harm rule, noting that they were at least knowledgeable about their domestic defamation law and would be guaranteed the opportunity to defend their actions.[172] Given the myriad of overlapping forums capable

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168. EUR. PARL. DOC. (COM 2003) 427 (2005), Legal Affairs Committee Draft, art. 6(1), amend. 27 (emphasis omitted), *available at* http://www.dianawallismep.org.uk/pages/rome2.html (follow "Commission's proposal [COM (2003) 0427]" hyperlink) [hereinafter Rome II (Legal Affairs Committee draft)].

169. *See* ICRT Comments on the Wallis Report on the Rome II Regulation (June 21, 2004), www.icrt.org/pos_papers/2004/040621_EE_Rome%20II.pdf [hereinafter ICRT Comments]. The International Communications Round Table, which includes such corporations as Amazon.com, Google, Microsoft, News Corp., Sony, and the Walt Disney Corporation, noted:

> Cross-border cases in the field of defamation and privacy occur very infrequently. Moreover, when they do occur, the applicable law is *de facto* the law of the country where the media provider is established. Figures clearly demonstrate the exceptional character of cross-border cases applying a law other than the law of the forum in this area. Freedom of expression in the media is not, and should not be, within the sphere of the proper functioning of [the European market].

Id.

170. European Federation of Journalists, *Opinion of the EFJ Regulation on the law applicable to non contractual obligations* (Jan. 24, 2005), *available at* http://ifj-europe.org/default.asp?index=2916. Publishing groups also noted that a place-of-harm rule could lead to "farcical" situations where, for example, the editor of a British newspaper aimed at a British audience could nonetheless be sued in a Belgian court for breaching Belgian defamation law for writing about a Belgian criminal. Gordon Darroch, *When Talk Is No Longer Cheap*, THE SCOTSMAN, Mar. 16, 2004.

171. *See* Vick & MacPherson, *supra* note 13, at 937–49.

172. "If you have a country which doesn't recognise truth as a defence against libel, who's to say we wouldn't have to apply those rules here?" Darroch, *supra* note 174, (quoting Clare Hoban, Head of Legal Affairs for the Periodical Publishers' Association).

of hearing a given defamation claim,[173] the place-of-harm rule would allow courts to apply domestic law to publications whose only contact was via the Internet and would thus only add to publishers' uncertainty.

The policy behind the place-of-harm approach was crystallized in the draft of Rome II produced by Legal Affairs Committee of the European Parliament: "Whereas to select the *lex loci delicti commissi*[174] as the basic solution has its attractions, more flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases. Moreover, it is important to respect party autonomy."[175] Academic commentators also noted that "very few legal systems appl[y] the law of the place of publication" and that the draft did in fact take steps to protect publishing interests.[176]

However, in 2005, the European Parliament responded to intense lobbying by publishing groups and produced a substantially different approach to Rome II.[177] Specifically, the new draft adopted a place-of-

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173. *See supra* Part II.B.

174. "The law of the place where the offense was committed." BLACK'S LAW DICTIONARY 416 (2nd Pocket Ed. 2001). In other words, the law of the place of harm.

175. Rome II (Legal Affairs Committee draft), *supra* note 172, recital 7, amend. 3 justification.

176. Summary and contributions, *supra* note 163.

177. In 2003, the first Rome II draft was transmitted by the European Council to the European Parliament as part of the co-decision process between the two bodies. From 2003 through 2005, Rome II was substantially edited by the European Parliament's Legal Affairs Committee under the leadership Rome II's rappourter and Member of the European Parliament (MEP) Diana Wallis. Rome II (Legal Affairs Committee draft), *supra* note 168. On June 27, 2005, the Legal Affairs Committee produced a new draft that kept intact the place-of-harm approach with minor modifications. *Id.* The European Federation of Journalists and other groups representing journalists and media lobbied the MEPs to reject the place-of-harm rule. David S. Korzenik & Aaron Warshaw, *EU Parliament's Last Minute Surprise Changes to "Rome II" Rescue Press Rights*, MLRC MEDIALAWLETTER (Media Law Resource Center, New York, N.Y.), July 2005, at 50. This lobbying was particularly aimed at an ad hoc committee of MEPs who shared an interest in matters pertaining to freedom of expression and the press. *Id.* The ad hoc committee was persuaded to modify the draft of Rome II to create a place-of-publication approach to defamation claims at a plenary session in Strasbourg on July 6, 2005. Rome II (European Parliament draft), *supra* note 20. The European Parliament transmitted its working place-of-publication draft to the European Council which, on September 29, 2005 in Brussels, began considering the defamation provision of Rome II. General Secretariat, Council of the European Union, *Notice of Meeting and Provisional Agenda* (July 28, 2005), *available at* http://register.consilium.eu.int/pdf/en/05/cm02/cm02802.en05.pdf. By the time of the European Council's meeting, the only provision of Rome II not settled was Article 6 relating to defamation claims because, over the prior three years, all other issues relating to Rome II had been substantially resolved.

publication rule for the choice of law for defamation claims in lieu of the first draft's place-of-harm rule:

> As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.
>
> Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be *the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable*. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.[178]

Under this approach, Member States would apply the defamation law of the publisher's country of origin as determined by where the publication is directed and where editorial control is exercised.[179] The European Parliament drafters noted that the place-of-publication rule was necessary to safeguard European Union "press traditions," and would create a more stable and predictable result for publishers.[180] Publishing groups hailed the new draft as a "victory for press freedom and a testament to the efforts" of media lobbyists who had communicated the potential damage of the place-of-harm rule.[181] Under the place-of-publication rule, publishers would therefore only be judged under their domestic defamation law,

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178. Rome II (European Parliament draft), *supra* note 20, art. 6(1), amend. 57 (emphasis added).

179. *Id.* art. 6(1), amend. 57.

180. *Id.* art. 26a, amend. 54(3).

> In a communications environment operating increasingly on a continent-wide basis, the various forms of law relating to the personality and historically established press traditions in the European Union point to the need for more uniform prerequisites and rules for dispute resolution. The very nature, which merits safeguarding, of press freedom and it role in society would suggest, however, that in the process priority should be given to media which deal responsibly with rights relating to the personality . . . .

Id.

181. *Justice and Home Affairs: Parliament Gives Judges More Leeway on Rome II Choice-of-Law Regulation*, EUROPEAN REPORT (July 9, 2005) (comments of European Publishers Council Director Angela Mills Wade).

while litigants would continue to have the ability to bring their claim in any forum where they were harmed.

Arguably, a more restrictive choice-of-law provision would allow publishers to know in advance which defamation law is applicable when an article is posted online.[182] However, balanced against this need for greater certainty is the claimants' right to bring suit in the country where their reputation was damaged under the law of that jurisdiction.[183] These two policy concerns led to the contrasting approaches to the drafting of Rome II, reflecting flexibility in the place-of-harm rule[184] and certainty in the place-of-publication rule.[185] As such, the place-of-harm rule embodies the status quo approach to choice of law for defamation claims,[186] while the latter place-of-publication rule was drafted in response to lobbying efforts by publishing groups and reflects a departure from the

182. European Federation of Journalists, *Opinion of the EFJ on the 'Rome II' Regulation on the law applicable to non-contractual obligations* (Jan. 24, 2005), *available at* http://ifj-europe.org/default.asp?index=2916.

183. *See* LAW COMMISSION SCOPING STUDY NO. 2, *supra* note 18, at 39.

184. Rome II (Legal Affairs Committee draft)], *supra* note 168, art. 6(1), amend. 30. The Legal Affairs Committee draft also created an exception to the place-of-harm rule when "a manifestly closer connection with a particular country may be deemed to exist." *Id.* This was intended to address publishers' concern for certainty:

> As far as violations of privacy and rights relating to the personality are concerned, the rapporteur takes the view that . . . the court should be able to consider that a manifestly closer connection exists with the country of publication . . . having regard to sales per Member State, audience figures and so on . . . . [T]he court may also take account of the audience to which the publication or broadcast is principally directed. Given that Internet publications are also covered, it will be possible to avoid a situation in which different rules apply to the same publication, depending on whether it is made off- or on-line. Your rapporteur considers that this should conduce to greater legal certainty.

Id. at 39. However, publishers argued that a "manifestly closer connection" is too vague to afford publishers any protection, especially because publications written in English are routinely accessed and understood in nations all over the world. Periodical Publishers Assoc., *European 'Defamation and Privacy' Proposals Still a Threat to UK Publishers* (Mar. 17, 2004), *available at* http://www.ppa.co.uk/cgi-bin/go.pl/news/article.html?uid=1232.

185. Rome II (European Parliament draft), *supra* note 20, art. 6, amend. 57. Indeed, every system of private international law reflects a tension between the opposing needs for both certainty and flexibility. Symeonides, *supra* note 158, at 2.

186. Rome II (Legal Affairs Committee draft), *supra* note 172, art. 6, justification. The Legal Affairs Committee draft made explicit reference to preserving the flexible approach utilized by the Court of Justice of the European Communities in *Fiona Shevill*. *Id.*

growing trend of applying domestic defamation law to foreign publications.[187]

By the winter of 2005, France, Belgium, and Hungary were most supportive of the place-of-publication approach, but it appeared uncertain whether they could muster enough support for its adoption.[188] Newer members of the European Union, in contrast, were most in favor of the place-of-harm rule.[189] Ireland and Sweden seemed to support excluding defamation claims from Rome II altogether and instead relying on national choice-of-law provisions, and the United Kingdom sought a consensus position.[190] Germany supported adoption of a rule based on *Fiona Shevill*,[191] which would limit the choice of law to only the nation of publication and the nation of harm.[192] European publishing rights groups pressed for adoption of the place-of-publication rule.[193]

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187. Remarks of Franco Frattini, 2005 O.J. (030) 1 (July 5, 2005) (European Parliament debates). Mr. Frattini stated that:

> The measure provides for a certain degree of flexibility for judges, in order to allow them to take account of exceptional circumstances. Such flexibility, however, has to be limited, in order to avoid compromising the general objective, or rather legal certainty. In that regard, it is clear that allowing judges to exercise full discretion would make it difficult to predetermine the legal certainty that is one of the main objectives of this initiative, since economic operators and citizens wish to know in advance which law will apply to their situation . . . . I fully agree with the solution reached . . . on sensitive issues, such as press defamation and the link between international private law and the internal market. They are two extremely delicate sectors and I believe that the compromise reached is satisfactory.

Id. See also EU Proposal Adopted with Publisher-Friendly Amends, MAGAZINE WORLD, *available at* http://www.fipp.com/1053 (last visited Dec. 26, 2005) ("Successful lobbying from the European Magazine Publishers Association (FAEP) resulted in the Commission refining the proposal. The law applicable to defamation will now be consistent with the law applicable to all other non contractual obligations and will ensure greater clarity for publishers.").

188. E-mail from Pamela Morinière, Authors' Rights Campaigner, International Federation of Journalists (Oct. 14, 2005) (on file with *Brooklyn Journal of International Law*).

189. *Id.*

190. *Id*.

191. *Supra* Part II.A.

192. Non-Paper of the German Delegation, Article 6 of the Draft Regulation of Rome II (Sept. 29, 2005) (on file with *Brooklyn Journal of International Law*). This compromise amounted to, in practice, support for the place-of-harm rule.

193. Letter from the Association of Commercial Television in Europe, Association of European Radios, European Broadcasting Union, European Federation of Journalists, European Newspaper Publishers' Association, European Publishers Council, European Federation of Magazine Publishing, and Federation of European Publishers to Members

Rather than resolving this internal conflict among Member States, in early 2006, the European Commission submitted a new draft that altogether removed the defamation provision from the agreement.[194] On one level, this maneuver reflected some Member States' uneasiness with the place-of-publication rule, since it would favor the press too greatly over the reputational interests of litigants.[195] As a parliamentary maneuver, this step—while appearing to merely postpone a substantive solution to the issue—essentially preserved the place-of-harm rule, which is the status quo approach to defamation claims, and prevented further debate on the issue. Thus, one representative of the European Parliament described the European Commission's action as "incredibly disappointing."[196]

At least for the short term, it appears doubtful that the European Union will adopt a blanket place-of-publication rule for publication claims, because Member States have to approve such a provision unanimously[197] and, as per the view of the European Commission, such a rule would fa-

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of the Council Committee on Civil Law Matters (Sept. 26, 2005) (on file with *Brooklyn Journal of International Law*).

194. EUR. PARL. DOC. (COM 2003) 427, Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") (Feb. 21, 2006), *available at* http://europa.eu.int/comm/justice_home/doc_centre/civil/doc/com_2006_83_en.pdf [hereinafter Rome II (European Commission Draft)].

195. The European Commission noted that:

> [The place-of-publication rule] would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council's text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal.

Id.

196. Rome II (Diana Wallis MEP), http://www.dianawallismep.org.uk/pages/rome2.html (last visited Nov. 15, 2006). Ms. Wallis noted that:

> It is incredibly disappointing that the Commission has decided to withdraw the provision relating to defamation from Rome II. Clearly this has pre-empted Member States from having detailed discussions in the Council. For the Council to re-include defamation into the scope of the Regulation, Member States will have to unanimously agree on a common rule which at this stage proves to be impossible.

Id.

197. *Id.*

vor publishers' interests too greatly when compared to victims' rights.[198] The current draft of Rome II is left with a "gaping hole" where the rule for defamation claims should be.[199] While publishing groups only managed what some have called a "magnificent gesture" in pressing for the place-of-publication rule,[200] their efforts have brought forth their concerns without bringing the European Union any closer to a workable solution. Yet this impasse should not come as a surprise when looking at conflicts of law generally. As will be discussed in the next section, the modern American approach might, in some ways, be preferable to one

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198. Viviane Reding, Member of the European Commission responsible for Information Society and Media Reinforcing the competitiveness of Europe's publishing industry, Address to the European Publishers Forum (Dec. 6, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/764.

> I must acknowledge that you publishers—and the broadcasters—have undertaken a rather brilliant campaign in support of the "country of origin" principle. Because of you, the European Parliament has rejected "country of destination" in favour of "country of origin," ignoring the advice of its own legal affairs committee. This puts the Commission in a difficult position. In spite of our strong belief in the country of origin principle, we know well that Member States will never accept the full "country of origin" principle in Rome II. It favours, in their view, publishers too much compared with victims. And Member States point out that the right to privacy is as much a fundamental right as freedom of expression.

Id.

199. Press Release, Diana Wallis (Jan. 31, 2006) http://www.dianawallismep.org.uk/news/315.html?PHPSESSID=801ceb21. Ms. Wallis wrote that:

> We know only too well that this issue has been politically sensitive with the media, but why give up in the search for a solution now? The Parliament indicated a starting point which the media agreed to at first reading; this should have been built on not disregarded.
>
> The failure to deal with this aspect of applicable law will leave a gaping hole in the legislation in a world where media is increasingly global and editors need certainty about which law will apply to their publications. Leaving it out just perpetuates the uncertainty about which of 25 or more legal regimes might apply and helps no-one, least of all the media.

Id. (internal quotation marks omitted).

200. Reding, *supra* note 198.

> Commenting on a spectacular, but very bloody British cavalry charge against Russian artillery during the Crimean war, a French General said "C'est magnifique, mais ce n'est pas la guerre." If I translate freely, "What a magnificent gesture, but how impractical." This is my view of your insistence on the "country of origin" principle in this context.

Id.

that instead focuses on a given place (i.e., either the place of harm or the place of publication).

IV. A WAY OUT OF THE MAZE? THE INTERESTS ANALYSIS APPROACH TO CHOICE OF LAW

In addition to Rome II's place-of-harm and place-of-publication rules, a number of other approaches have been proposed to create a workable solution to conflicts in defamation law.[201] Even within contemporary choice-of-law approaches, there is a great deal of variety of rules and analyses.[202] Despite the volume of suggested rules available to Rome II's drafters, international defamation law is no closer to a solution—let alone a compromise among interested parties—as shown by the failure of the European Union to adopt a choice-of-law rule applicable to defamation claims. We should not be surprised by this difficulty. As Dean Prosser wrote over fifty years ago:

> The realm of the conflict of laws [in defamation cases] is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.[203]

The Internet has caused this swamp to become even more dismal. It has also caused a head-on collision between American defamation jurisprudence under the First Amendment and the laws of other nations.[204] Rather than adding another layer to the quagmire, this Note argues that the solution lies not in formulating rules, but in re-approaching the problem with an eye toward the underlying substantive defamation laws.[205] The American experience with conflicts of laws provides some insight.

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201. *See, e.g.*, Svantesson, *supra* note 17, at 195 (proposing a rule whereby courts would never have jurisdiction for defamation claims arising from the Internet).

202. *See* O'Connor v. O'Connor, 519 A.2d 13 (Conn. 1986) (*reproduced in* SYMEONIDES, *supra* note 6, at 145–50) (noting that modern approaches include the Restatement (Second) of Conflicts of Laws, the "governmental interest" analysis of Professor Brainerd Currie, and Professor Robert A. Leflar's "choice-influencing considerations" analysis); SACK ON DEFAMATION § 12.33 (noting that "about a dozen different approaches have been suggested to the problem of choice of law in multistate defamation cases") (citation omitted).

203. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) (*cited by* SACK ON DEFAMATION § 15.3).

204. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 901–02, n.78 (2006) (noting that no other country in the world has adopted the "actual malice" standard endorsed under *New York Times v. Sullivan*).

205. Christopher J. Kunke recently made a similar argument about incorporating state interests analysis into Rome II, Kunke, *supra* note 25, at 1762–70, although his analysis

U.S. courts have grappled with choice-of-law rules for defamation claims in ways that mirror the struggles of the European Union.[206] Thus, it should be no surprise that Rome II's drafters studied the U.S. approach to choice of law for defamation claims, including the Restatement (Second) of Torts, when weighing which approach to adopt.[207] Yet, as is true of the European approach in general, Rome II's drafters focused on territoriality—i.e., creating a rule based on certain contacts between the publisher, the victim, and the forum—in attempting to promulgate a uniform rule applicable to all cases.[208] Rome II's drafters would have been well-advised to consider adopting one key attribute of the modern American approach, namely a choice-of-law system that includes an examination of the policies that underlie competing laws.[209]

Just as nations possess varying defamation laws based on their particular standards and traditions,[210] U.S. jurisdictions also resolve defamation claims under differing standards.[211] Under the Restatement (Second) of Conflict of Laws, courts should weigh, *inter alia*, "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" when determining the choice of law.[212] For defamation claims arising from "aggregate communications" such as the multi-state publication of a newspaper, the Restatement (Second) creates a presumptive rule in favor of a plaintiff's domicile.[213] Professor Pielemeier has argued that, as applied, this rule is weak and ambivalent; therefore, the Restatement (Second) has failed to accomplish the kind of policy analysis that was envisioned under the modern interests analysis approach developed by Professor Brainerd Currie.[214] It should also be noted that a number of U.S. states continue to apply the

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does not consider whether application of foreign defamation law undermines First Amendment jurisprudence. *See supra* Part II.C. Kunke suggests that "Rome II should favor the place of injury but allow for an adequate state interests analysis" and proposes an alternate rule for defamation claims. Kunke, *supra* note 25, at 1770.

206. *See* Pielemeier, *supra* note 7, at 56–57.

207. Rome II (Legal Affairs Committee Draft), *supra* note 168, at 40.

208. Kunke, *supra* note 25, at 1753–54.

209. *See* Pielemeier, *supra* note 7, at 68–69 (describing Professor Currie's interests analysis as applied to multistate defamation claims).

210. Vick & MacPherson, *supra* note 13, at 938–62.

211. Pielemeier, *supra* note 7, at 56–57.

212. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1977).

213. *Id.* § 150.

214. Pielemeier, *supra* note 7, at 64–65, 68.

traditional *lex loci delicti* rule,[215] which essentially mirrors Rome II's place-of-harm rule.[216]

Therefore, in resolving conflicts of laws, some U.S. states have moved one step beyond the Restatement (Second) rule because, like the traditional *lex loci delicti* rule, it does not adequately reflect important policy considerations in defamation cases.[217] Among these considerations is that permitting a plaintiff to bring a suit in any forum where she has been harmed leads to forum shopping.[218] Some U.S. courts instead apply a more flexible choice-of-law analysis that respects the underlying policies of each forum's law, as well as the reasonable expectations of the litigants.[219] While this approach is not without criticism[220] and also has been applied imperfectly,[221] it does reflect a decision by some U.S. judges to give substantial weight to the policy implications that occur when local law is applied to publishers located outside of a given forum.[222] Furthermore, the American approach places greater emphasis on the relationship between the publisher and the forum, whereas the prevailing approach of foreign courts focuses more heavily on the rights of the party affected by a defamatory statement.[223]

Professor Pielemeier has also described a "floor effect" in U.S. choice of law for defamation claims, whereby "courts should not apply to the entire claim any state's law that is more speech-inhibiting than that of a

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215. SYMEONIDES, *supra* note 6, at 117–18.

216. *See* Kunke, *supra* note 25, 1752–53.

217. Pielemeier, *supra* note 7, at 67–68. However, like most foreign courts, U.S. courts tend to automatically apply the law of the plaintiff's domicile without regard to the underlying policies involved in the choice-of-law determination. *Id*. at 116.

218. *Id*. at 67–68.

219. *Id*. at 68–69.

> Unlike [the territorialist] approach, Professor Currie argued that courts should explicitly consider the content and underlying policies of the arguably applicable laws, and inquire "into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."
>
> Stripped to its basics, Professor Currie's approach provides that if, after such an inquiry, the court finds that only one state has an interest in the application of its laws (characterized today as a "false conflict"), the court should apply the law of that state. If the court determines that more than one state has such an interest (characterized today as a "true conflict"), the court should reconsider.

Id. U.S. state courts that have adopted this approach include New York, California, and Pennsylvania. *Id.* at 69–84.

220. *Id*. at 69.

221. *Id.* at 103.

222. *Id.* at 77–78.

223. Di Bari, *supra* note 87, at 131.

state with a relatively significant interest in compensating the plaintiff."[224] As has been shown, one of the strongest critiques of international defamation case law is that the imposition of foreign law against American publishers undermines the First Amendment.[225] While it is not surprising that courts outside of the United States are unconstrained by U.S. constitutional law in rendering verdicts, the fact that American courts at least weigh such constitutional interests stands in stark contrast to the prevailing approach among foreign jurisdictions.

A strict application of Brainerd Currie's interests analysis, however, would usually lead to results that mirror the status quo, in that the court would apply the law of the forum.[226] The typical scenario in an international defamation case amounts to a "true conflict": the two states each have a competing and legitimate policy interest, with forum law seeking to protect the plaintiff's reputation and U.S. law seeking to protect publishers' free speech interest.[227] Under Currie's rule-selecting process, true conflicts should be resolved by applying the law of the forum,[228] which is an identical outcome in most international defamation cases. However, this reflects Currie's belief that true conflicts are best resolved through legislative means,[229] and has been greatly criticized.[230] This should not lead us to reject Currie's analysis. Instead, we should focus on the fundamental and revolutionary principle that Professor Currie espoused, namely that choice-of-law systems should reflect the *substantive* policy considerations in a given conflict.

In terms of an objective approach to Rome II's defamation provision, the most important analysis is to fully appreciate the way in which national interests are furthered or undermined by the application of domestic law to foreign publishers. In particular, the cases in Part II.B show that foreign courts routinely undermine U.S. policy interests by applying overly permissive choice-of-law rules to modern defamation claims. From an American perspective, the greatest harm is that applying foreign

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224. Pielemeier, *supra* note 7, at 109.

225. Sutton, *supra* note 16, at 419–20.

226. *See* Gary Chan Kok Yew, *Internet Defamation and Choice of Law in* Dow Jones & Company Inc. v. Gutnick, 2003 SING. J. LEGAL STUD. 483, 496–98 (2003) (arguing that, as applied to the *Gutnick* scenario, Currie's rule of applying the law of the forum to true conflicts does not provide a more workable framework than the status quo).

227. *Id.*

228. SYMEONIDES, *supra* note 6, at 116 (citing Brainerd Currie's interests analysis).

229. *Id.* at 182–83 (noting that "in Currie's view, a judge is neither constitutionally empowered nor otherwise qualified to weigh conflicting state interests").

230. *Id.* at 183. *See also* Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975) (noting that "legal order" is an overriding concern in conflicts scenarios).

law to U.S. publishers undermines the well-established First Amendment guarantees that protect our marketplace of ideas.[231] While American courts have long held that the press should be shielded from onerous defamation laws,[232] that protection is severely weakened when a plaintiff can merely choose to bring a defamation claim in a forum where the likelihood of success is far greater.

That is not to suggest that foreign courts currently ignore policy implications altogether when exercising jurisdiction over a foreign publisher. Rather, the cases in Part II.B show that courts consider foremost the right of a plaintiff to bring a claim against a publisher wherever her reputation was harmed. But courts do not fully appreciate the broader effects of that decision, which includes forum shopping, nuisance suits, and uncertainty.[233] Also, publishers must now become knowledgeable about every defamation law from abroad, which will in time become unduly prohibitive.[234]

If publishers continue to incur costly lawsuits under a place-of-harm rule—either under *Fiona Shevill*'s status quo framework or under Rome II—this trend will lead to a chilling effect on Internet publishing as publishers are continually exposed to defamation claims from foreign courts under foreign laws.[235] The very real danger is that publishers will limit online access in jurisdictions perceived as lacking free-speech guarantees or that regularly impose undue liability.[236] Cases such as *Bangoura* show that a publisher's only recourse, assuming that it wishes to avoid universal liability, is to limit access via the Internet.[237] While this remedy appears to satisfy both the publisher's and the forum state's interests, "virtual borders" around a publisher's online presence threaten to destroy the

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231. *Compare* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market") *with* Dow Jones & Co. Inc. v. Gutnick, (2002) 210 C.L.R. 575, 650–51 (Callinan, J., concurring) (noting that the "marketplace of ideas" concept has not "escaped criticism in the United States" and that "Australian law places real value on reputation, and views with skepticism claims that it unduly inhibits freedom of discourse").

232. *See* Gertz v. Robert Welch, 418 U.S. 323, 347–48 (1974).

233. Vick & MacPherson, *supra* note 13, at 962–68.

234. With decreased sales of print publications, *supra* note 4, the publishing industry can likely ill-afford such litigation.

235. "[I]f adopted, the [place-of-harm rule] will create judicial insecurity, promote judicial forum-shopping, and, in the end, lead to self-censorship by the media. This chilling effect would be extended to any publication, especially on the Internet." European Digital Rights, *Rome II: Applicable Law and Freedom of Expression* (June 29, 2005), *available at* http://www.edri.org/edrigram/number3.13/RomeII.

236. Wimmer, *supra* note 38, at 6.

237. *Supra* Part II.B.

functioning of the Internet.[238] Additionally, jurisdictional avoidance will impact those citizens who most greatly need access to online publications from abroad, because repressive regimes also tend to restrict free expression by the press.[239]

On a fundamental level, limiting access and self-censorship are "repugnant" to the profoundly American principles of disseminating information and ideas.[240] While newspapers certainly have a duty to refrain from publishing defamatory statements, the access that citizens now enjoy will likely be curtailed if courts continue to impose national defamation laws on publications operating on the Internet without restraint. This should give policymakers great pause, since access to the press is vital to the health of global democracy.[241] Indeed, the United States has long held that "liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[242] These aspirations are in danger when international courts refuse to acknowledge the harm caused by exercising jurisdiction over foreign publishers.

It is for these reasons that Rome II's drafters should consider including a policy-analysis approach to the choice-of-law rule for defamation

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238. *Supra* note 17 and accompanying text.

239. Wimmer, *supra* note 38, at 6 (citing Michael Geist, *Cyberlaw 2.0*, 44 B.C. L.REV. 323, 333–35 (2005)). *See also* Simon Montlake, *China Reins in Reach of Foreign News*, THE CHRISTIAN SCI. MONITOR, Sept. 13, 2006, at 6 ("China's official news agency Xinhua issued a new set of directives [limiting distribution of foreign news reports that] 'undermine national unity' or disrupt 'economic and social order,' among other catch-all categories . . . .").

240. Wendy Tannenbaum, *Questions of Internet Jurisdiction Spin Web of Confusion for Online Publishers*, THE NEWS MEDIA AND THE LAW at 33 (The Reporters Committee for Freedom of the Press, Winter 2003) *available at* http://www.rcfp.org/news/mag/27-1/lib-interjur.html (citing *Editorial*, WASH. POST, Dec. 16, 2002, at A24).

241. As Justice Brennan held:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Richmond Newspapers v. Virginia, 448 U.S. 555, 587–87. (1980) (Brennan, J., concurring) (citations and emphasis omitted).

242. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

claims. The European Parliament's proposed place-of-publication rule reflected such considerations due to the intense lobbying of the press, but this amounted to an *a priori* preference for publishers over plaintiffs. This approach is contrasted with the more flexible conflict resolution mechanism that requires judges to examine whether imposing domestic defamation law would undermine the policy and national interests of another nation. A more flexible approach would be more assured of passage by the European Commission and European Parliament, since the interests of both publishers and plaintiffs would be considered in each particular case.

While such an approach might be antithetical to the European preference for black-letter laws, Brainerd Currie's revolutionary interests analysis has steadily gained acceptance in the United States and abroad. Given that foreign courts are routinely adjudicating defamation claims in ways that undermine U.S. constitutional free speech concerns—and what greater and clearer policy interest could a state possibly have that a constitutional interest?—Rome II's choice-of-law rule should consider conflicting policy interests, either at either the *a priori* stage or in the adjudication of individual claims.

V. CONCLUSION

This Note has explored Rome II's place within the broader scope of transnational defamation law. As demonstrated by the European Union's difficulty in formulating a rule that would satisfy both defamation plaintiffs and the press, international defamation law is facing a large-scale conflict between reputational and free-press interests. One possible solution is for the European Union to adopt a rule that includes an American-style interests analysis as well as the adoption of the single publication rule. Such an approach provides a framework to weigh the governmental interests of other states, seeks to minimize forum shopping, and is more honest about whether applying domestic law might undermine the laws of another nation.

From the perspective of the American press and practitioners, the status quo is troubling. Unless there is a meaningful effort to reform jurisdictional rules, we can expect to see publishers adopt jurisdictional avoidance as a means to avoid liability abroad. The failure of Rome II's defamation provision shows that reform requires a concerted effort by American academics, policymakers, and the press to show the profound harm that occurs when foreign courts apply domestic laws to U.S. publishers. On a broader level, we can hope that our American experiment with free speech gains further traction abroad. Some of this movement

has already occurred through reforms by national courts.[243] As the world continues to realize the wisdom of limiting defamation laws in order to protect the free press, the conflict between national laws will likely diminish. As a result, choice-of-law agreements like Rome II will become achievable. Until then, the landscape continues to be "a dismal swamp."[244]

Aaron Warshaw[*]

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243. *See* Jameel v. Wall St. J., [2006] U.K.H.L. 44; Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.); Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 BROOK. J. INT'L L. 1 (2006).

244. *Supra* note 207 and accompanying text.

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