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DOW JONES & CO. v. GUTNICK: WILL AUSTRALIA'S LONG JURISDICTIONAL REACH CHILL INTERNET SPEECH WORLD-WIDE?

Nathan W. Garnett[†]

Abstract: In December of 2002, the High Court of Australia issued its decision in *Dow Jones & Co. v. Gutnick*, holding that Dow Jones could be haled into court in Australia for the publication of defamatory material on the Internet. This decision was surprising because the material in question was published in the United States on Dow Jones's New Jersey web servers. This decision makes Australia the only country that allows an action against a foreign defendant based solely on an Internet download in that country. However, the structure of the *Gutnick* opinion may open the door for other countries to follow the High Court's example.

The *Gutnick* decision raises concerns that the territorial borders of speech protection could break down in the Internet Age. Laws regarding the balance between free speech and the protection of reputation vary widely among nations. However, the Australian court ignored the implications that the breakdown of the borders between jurisdictions could have on this balance, and instead mechanically applied historical precedent to the Internet. This strict application to the Internet of precedent created for off-line publication may produce a chilling effect on Internet speech worldwide by reducing the level of speech protection on the Internet to the lowest common denominator. The *Gutnick* decision's narrow focus on precedent does not offer sufficient protection to international free speech, and the Australian Parliament should adopt a jurisdictional rule to protect Internet speakers that do not aim their speech at Australia.

I. INTRODUCTION

In December of 2002, the High Court of Australia issued a landmark decision regarding jurisdiction for cases arising out of information published on the Internet.¹ In *Dow Jones & Co. v. Gutnick*, the High Court held that Australian courts have jurisdiction over a claim of defamation based on material that was placed on the Internet outside of Australian borders.² This decision is unique because no other country has allowed jurisdiction over

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¹ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56. Please note that, as the Bluebook has not been updated to reflect the Australian High Court's new medium-neutral citation format, citations to recent Australian cases will use a modified version of the citation format suggested by the High Court. This format is (*parties*) [*year of decision*] (*Court abbreviation*) (*sequential judgment number*), (*pinpoint cite to paragraph number*). See The High Court of Australia, Paragraph Numbers in High Court of Australia Judgments and the use of Medium-neutral Citations, at http://www.austlii.edu.au/au/cases/cth/high_ct/medium.html (last visited Nov. 10, 2003).

² See *Gutnick*, [2002] H.C.A. 56, 48.

extra-territorial parties based solely on content downloaded from the Internet.³

The *Gutnick* decision raised a great deal of concern around the world.⁴ The decision was of great interest to many in the global legal community, both because the decision is contrary to traditional notions of sovereignty and jurisdiction, and also because the reasoning of the Australian High Court is based on precedent that many other countries follow.⁵ The courts of other common law countries may find that their shared precedents leave them no choice but to reach similar holdings in similar cases.⁶ As a result, Internet publishers who operate strictly within their own territory could be subject to lawsuits all over the world. There is concern that such publishers would face great difficulty defending these suits, and given the differing levels of free speech throughout the world, that this could result in a chilling effect on Internet speech.⁷

This Comment discusses the background of the *Gutnick* case, the High Court's reasoning, and the possible consequences for international Internet publishers. This Comment argues that the ruling is overbroad and does not take sufficient consideration of international Internet policy considerations. This Comment also suggests a potential solution to the problems raised by this lack of consideration. Part II provides some factual background and examines the *Gutnick* opinion. Part III compares free speech laws in different nations and discusses the potential problems that differences in such laws could raise if suits under *Gutnick* become widespread. Part IV compares the old common law rule regarding the place

³ *A Blow to Online Freedom*, N.Y. TIMES, Dec. 11, 2002, at A34.

⁴ A search on the ALLNEWS database of WestNews showed 151 articles worldwide mentioning the *Gutnick* case during December of 2002. The case also gathered a lot of attention before the decision was issued. The following eighteen international media companies intervened with the High Court on behalf of Dow Jones: Amazon.com, Associated Press, Association of Alternative Newsweeklies, Bloomberg, CNN, Guardian Newspapers, Knight Ridder, Media/Professional Insurance, The New York Times, News Corp. (Fox), Online News Association, Reuters Group, Time Inc., Tribune Company, The Washington Post, Yahoo! Inc., Internet Industry Association, and John Fairfax Holdings Ltd. Transcript of Oral Argument in *Dow Jones & Co. v. Gutnick*, at <http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html> (last visited Nov. 10, 2003) [hereinafter Transcript of the Oral Argument]; see also Darrin Farrant, *Media Giants To Log Into Gutnick Net Case*, THE AGE, May 29, 2002, 2002 WL 19622592; Katherine Towers, *Media's Big Guns Try To Intervene In Gutnick Case*, AUSTRALIAN FIN. REV., May 15, 2002, 2002 WL 21078355.

⁵ *A Blow to Online Freedom*, supra note 3, at A34; Clare Dyer, *Ruling Could be Adopted by English Courts*, GUARDIAN, December 11, 2002, 2002 WL 103803815. One English lawyer was quoted as saying, "I would certainly expect the same result here." *Id.* See also *Long Arm of the Internet*, GUARDIAN, Dec. 16, 2002, 2002 WL 104291615.

⁶ Dyer, supra note 5.

⁷ Matthew Rose, *Leading the News: Australia to Hear Web Libel Suit in Landmark Case*, WALL ST. J., Dec. 11, 2002, 2002 WL-WSJ 103128470; Michael Santoli, *Down, Under: Ruling on Barron's Article Worries Internet Publishers*, BARRONS, Dec. 16, 2002, 2002 WL-BARRONS 102498006.

of publication and the newer American rule. The adoption of the American rule in other common law countries has been suggested as a fix for the potential free speech problems. Part V compares U.S. and Australian jurisdictional rules and suggests that these differences may present another solution. Part VI calls for Australia to adopt an “effects test” requirement for jurisdiction in cases that arise out of Internet contact with the forum. This Comment concludes with a call for respect for the jurisdictional and speech laws of other countries when haling foreign citizens into court.

II. DISCUSSION OF *DOW JONES & CO. v. GUTNICK*

The High Court of Australia’s decision in *Dow Jones & Co. v. Gutnick* attracted a great deal of commentary around the world because it created a unique rule that surprised many observers.⁸ However, much of this commentary has failed to adequately examine the complexities of the decision and the facts and law behind it. In the weeks after the ruling, magazines and newspapers around the world printed hundreds of articles, columns, and editorials on the decision.⁹ Opinions on the decision ranged from approval of the High Court’s “obvious” rule¹⁰ to derision for the shortsighted protectionism of the Australian “Kangaroo Court.”¹¹ However, these commentaries give short shrift to a decision that, while troubling on a policy level, is a logical – if perhaps overly mechanical – extension of existing precedent. Close examination of the facts and opinion in *Gutnick* reveals that this is a more complex and interesting decision than this commentary would suggest.

A. *Factual Background of Dow Jones v. Gutnick*

The factual background of the *Gutnick* case explains how the heretofore unaddressed issue of extraterritorial jurisdiction over a defendant based on Internet contact arose, and suggests how the issue might arise in the future. The defendant in *Gutnick* did not aim its allegedly defamatory statements at Australia, the forum in which it was sued. However, the reach

⁸ Please note that the High Court’s decision is merely a ruling on Dow Jones’s attempt to stay or dismiss the case. As of the writing of this Comment, the case has not yet gone to trial on the merits.

⁹ See *supra* note 4 and accompanying text.

¹⁰ Graham Young, *Dow Jones v Gutnick: the Internet honeymoon is over. What's next?*, at <http://www.onlineopinion.com.au/2003/Jan03/Young.htm> (last visited Nov. 10, 2003); see also Victor Keegan, *The Web Needs Its Own Police*, Dec. 19, 2002, THE GUARDIAN, 2002 WL 104293165.

¹¹ See, e.g., *Letters to the Editor: Free Speech Will Survive Kangaroo Court*, WALL ST. J., Dec. 18, 2002 at A19.

of the Internet makes a statement made in one country available around the world. Because the statement was available in the plaintiff's home forum, the Court held that the plaintiff has a tenable claim that his reputation was damaged in that forum.¹²

The plaintiff in this case is Joseph "Diamond Joe" Gutnick, a controversial and well-known Australian businessman and philanthropist.¹³ In October of 2000, Mr. Gutnick was the subject of an article in *Barron's* magazine entitled "Unholy Gains: When Stock Promoters Cross Paths With Religious Charities, Investors Had Best Be on Guard."¹⁴ The article alleged that Mr. Gutnick was using charities to artificially inflate the value of low-priced stocks in the United States, resulting in profit for Mr. Gutnick and the charities and loss for other investors.¹⁵ The article also asserted that Mr. Gutnick had ties to other businessmen who had been convicted or charged with fraud.¹⁶ Mr. Gutnick, upset that he stood accused of fraud and consorting with criminals, filed suit for defamation in his home state of Victoria against Dow Jones & Co., the publisher of *Barron's*.¹⁷

Dow Jones is a large media corporation based in New York that specializes in business and financial reporting.¹⁸ Its media holdings include *Barron's* and *The Wall Street Journal*.¹⁹ Dow Jones places the content of many of its publications on the Internet on the *Journal's* website (www.wsj.com), where the article at issue appeared on October 28, 2000.²⁰ Like many of Dow Jones's media outlets, *Barron's* magazine is published in the United States and is intended primarily for readers in the United States.²¹ *Barron's* published an article in the United States about Mr. Gutnick, an Australian citizen, because he stated that he intended to do more business in the United States.²² Dow Jones uploaded the article to the website from New York, and the digital information for the article was stored on the

¹² Dow Jones & Co. v. Gutnick, [2002] H.C.A. 56, 44.

¹³ David Fickling & Stuart Millar, *How Diamond Joe's Libel Case Could Change the Future of the Internet*, THE GUARDIAN, Dec. 11, 2002, 2002 WL 103803955.

¹⁴ Bill Alpert, *Unholy Gains: When Stock Promoters Cross Paths With Religious Charities, Investors had Best be on Guard*, BARRONS, Oct. 30, 2000, 2000 WL-BARRONS 28967054.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Gutnick v. Dow Jones, [2001] V.S.C. 305, 1-3 (Victorian S. Ct. 2001).

¹⁸ See Dow Jones's homepage at http://www.dowjones.com/index_aboutdow.htm (last visited Nov. 10, 2003).

¹⁹ *Id.*

²⁰ Dow Jones & Co. v. Gutnick, [2002] H.C.A. 56, 2.

²¹ The fact that only five copies of the edition of *Barron's* in which "Unholy Gains" appeared were sold in Victoria is evidence that Victoria is not a major market for *Barron's*. *Id.* para. 97.

²² Alpert, *supra* note 14.

company's web servers in New Jersey.²³ Viewers of www.wsj.com must pay a subscriber fee to view the site's material and while the site has a few paying subscribers in Australia, it is not aimed at that market.²⁴

After Mr. Gutnick sued, Dow Jones made a conditional appearance in the Supreme Court of Victoria²⁵ to contest jurisdiction or to transfer venue to New Jersey.²⁶ Dow Jones argued that the case should be heard in New Jersey, and New Jersey law applied, because that was the place of publication.²⁷ Mr. Gutnick responded that Victoria was the appropriate forum and source of law.²⁸ The basis for Gutnick's argument was common law precedent that every observation of a defamatory statement creates a separate publication, and thus a separate tort occurs in each place that the statement is observed.²⁹ Agreeing with Mr. Gutnick, the Supreme Court of Victoria reasoned that the publication of the allegedly defamatory article had occurred in Victoria when it was downloaded there.³⁰ The court further held that, because the alleged injury had occurred upon publication in Victoria, Victoria was not an inconvenient forum.³¹ Dow Jones then appealed the case to the High Court of Australia after the Court of Appeal of Victoria refused to hear an appeal.³²

B. *The Australian High Court's Ruling*

The High Court of Australia unanimously upheld the lower court's decision and issued a majority opinion signed by four of the seven justices.³³ The majority focused its discussion on the issue of where the allegedly

²³ *Gutnick*, [2002] H.C.A. 56, 17.

²⁴ There are approximately 1,700 Australian subscribers to www.wsj.com, 300 of whom are from the State of Victoria, out of a total subscription base of 550,000. *Id.* para. 169; *see also* Transcript of the Oral Argument, *supra* note 4.

²⁵ The Supreme Court of Victoria is the trial court in Joseph Gutnick's home state.

²⁶ *Gutnick*, [2002] H.C.A. 56, 7.

²⁷ *Id.* para. 20.

²⁸ *Id.* para. 6.

²⁹ *Id.* para. 27.

³⁰ *See Gutnick v. Dow Jones*, [2001] V.S.C. 305.

³¹ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56, 7.

³² *Id.* para. 8. The Court of Appeal is the highest court in Victoria, and the High Court of Australia is the highest legal authority in Australia.

³³ The High Court of Australia has seven members. High Court of Australia, *History of the High Court*, at www.hcourt.gov.au/about_02.html (last visited Nov. 10, 2003). Although the Court was formerly below the privy counsel in England, it has been the highest authority in Australian law since the passage of the Australia Acts in the 1980s. *Id.* *See also Gutnick*, [2002] H.C.A. 56, 142. It should be noted that cases from England, and other common law countries, are still given weight by the Australian courts. *See Dyer*, *supra* note 5. The majority opinion was signed by Chief Justice Gleeson and Justices McHugh, Gummow, and Hayne. *Gutnick*, [2002] H.C.A. 56, 1. Separate concurrences were written by Justice Gaudron, *id.* para. 56; Justice Kirby, *id.* para. 66; and Justice Callinan, *id.* para. 168.

defamatory material had been published.³⁴ This issue is important under common law because the place of the tort is often the most appropriate place to hear the case.³⁵ Historically, the place of “publication” is the place where the statement is read or heard.³⁶ The Court mechanically applied this precedent to the facts of this case, and found that publication occurred where the material was read, even though it was downloaded from servers on the other side of the world.³⁷ In coming to this decision, the Court considered the precedent relating to print and broadcast publishing and, while it examined the inherent differences between these methods of publication and the Internet, it declined to change the common law rule based on these differences.³⁸

These inherent differences between the Internet and older forms of media formed the basis of Dow Jones’s unsuccessful argument.³⁹ Dow Jones argued that the Internet is a unique, international medium, and that it is necessary for a single rule to apply, regardless of location.⁴⁰ Dow Jones further claimed that publishers need certainty as to the applicable law, and therefore, the Court should apply the law of the home forum, unless the publisher had located there for purely “adventitious or opportunistic” reasons.⁴¹ The Court dismissed this argument as unconvincing.⁴² It stated that the proposed “adventitious or opportunistic” standard was too vague to be practical.⁴³ The court also found that the policy concerns of a publisher needing certainty about the law to be applied do not outweigh the concerns of the potential plaintiff needing a convenient forum.⁴⁴

Although many commentators have chastised the Court for its perfunctory dismissal of Dow Jones’s policy argument, these commentators have often missed some of the underlying reasons behind this decision. Americans are accustomed to the United States Supreme Court “making” new law, often based on policy or sociological arguments.⁴⁵ However, Australian courts, like some of the other common-law countries, seem far

³⁴ *Gutnick*, [2002] H.C.A. 56, 4.

³⁵ *Id.* para. 44.

³⁶ *Id.*

³⁷ *See id.* para. 71.

³⁸ *Id.*

³⁹ *Id.* para. 18-24.

⁴⁰ *Id.* para. 19.

⁴¹ *Id.* para. 20.

⁴² *Id.*

⁴³ *Id.* para. 21.

⁴⁴ *Id.* para. 22.

⁴⁵ This has long been the case in American jurisprudence and can be seen in such notable examples as *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973).

less likely to be swayed by purely policy-based arguments.⁴⁶ Therefore, Dow Jones's policy argument may have been doomed from the start. Similarly, the Australian High Court seems to have less power than its American counterpart to radically change the law.⁴⁷ In his concurrence, Justice Kirby concluded that the outcome of the case was a "result contrary to intuition,"⁴⁸ and stated that he felt called to reform the rule.⁴⁹ However, Justice Kirby found that because of the High Court's traditional deference to the legislature, he lacked the authority to make a new rule for the Internet.⁵⁰ Also not to be overlooked is the fact that Dow Jones was an American defendant arguing for the application of American law in an Australian Court. Justice Callinan noted that fact, and in his concurrence called Dow Jones's argument an attempt to impose American "legal hegemony" on the rest of the world.⁵¹

After considering and rejecting Dow Jones's policy argument, the High Court addressed precedent relating to the "place of publication" in defamation suits.⁵² Australian precedent states that the place where defamatory material is "comprehended" is the place of the tort.⁵³ Applying this rule to the new facts present on the Internet, the Court articulated the following rule:

In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.⁵⁴

⁴⁶ For an interesting look at how the methods used by Australian courts are changing, including the use of policy considerations in decision-making, see Justice Kirby's speech, *Judging: Reflections On The Moment Of Decision*, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_charles.htm (last visited Nov. 10, 2003). Despite Justice Kirby's adherence to "new" methods of decision-making, including the use of policy considerations, in the *Gutnick* decision even he was unwilling to change the law to reflect the technological and societal changes that have occurred since the *Duke of Brunswick* precedent was created in Dickensian England. See *Gutnick*, [2002] H.C.A. 56, 66 (Kirby, J., concurring).

⁴⁷ *Gutnick*, [2002] H.C.A. 56, 166 & 76.

⁴⁸ *Id.* para. 164.

⁴⁹ *Id.* para. 91.

⁵⁰ *Id.* para. 166.

⁵¹ *Id.* para. 200.

⁵² *Id.* para. 44.

⁵³ *Id.*

⁵⁴ *Id.*

Under this rule, the tort occurred in Victoria, where the material was downloaded and thus viewed. Accordingly, Victoria was the place of the damages claimed by Mr. Gutnick and the Court thus found that Victorian law should apply.⁵⁵ Having found that Victoria was the place of the tort and the proper source of law, the Court found that there was no reason to find that Victoria is a “clearly inappropriate forum,” such that it should stay or dismiss the proceedings.⁵⁶

III. POSSIBLE EFFECT OF THE *GUTNICK* DECISION ON INTERNET SPEECH WORLDWIDE

Much of the High Court’s opinion in *Gutnick* is based on concerns for Australian citizens who could be exposed to foreign speech, but the Court failed to fully consider the negative effects that this decision could have beyond Australia’s borders. Nations place different premiums on free speech, and as a result, have differing levels of protection for speech. Until now, there has been little reason for concern about these differences because speech and defamation laws, and their application, have been restricted to their respective countries. The Internet, however, and decisions like *Gutnick*, threaten to change this by extending these laws across borders in an unpredictable way. Decisions like *Gutnick* could reduce the level of speech protection to the lowest common denominator; the law of the country with the lowest level of speech protection would become the *de facto* law of the Internet.

A. *The Rule Established in Gutnick Could Be Adopted Elsewhere*

One of the biggest problems with the *Gutnick* decision is that it is not likely to be restricted to Australia; the common law rule is that publication of defamatory material occurs where it is read, a rule that is followed in many common law countries. The *Gutnick* ruling is based on a logical, though somewhat mechanical, application of this precedent to the new facts of the Internet. A court in another common law country that follows the same rule may reach the same conclusion. This rule originated in England, where it is still followed, as it is in some other former English colonies.⁵⁷

⁵⁵ *Id.* para. 48. The international choice of law questions in this case also raise interesting issues which, due to space constraints, will not be discussed in this Comment.

⁵⁶ *Id.*

⁵⁷ See *Loutchansky v. Times Newspapers Ltd*, [2002] Q.B. 783, 813. In *Loutchansky*, the English court reaffirmed the multiple publication rule established in *Duke of Brunswick v. Harmer*, 14 QB 185 (1849), which is the rule at issue in this case. English law is precedent in many former colonies, including

This similarity in law may result in a similar ruling in the courts of these countries if they are faced with a case like *Gutnick*.⁵⁸ Evidence that this may already be occurring can be seen in another defamation lawsuit against Dow Jones, this one brought by Harrods Department Store in England.⁵⁹ Not only is the Harrods case similar to *Gutnick* in that Dow Jones is a defendant, but the case also involves a small number of hits at www.wsj.com.⁶⁰ This case has also not yet come to trial, but the English court has ruled against Dow Jones in its application for a stay on the ground of *forum non conveniens*.⁶¹

A country need not follow the English common law tradition to adopt a rule that a country has jurisdiction over material downloaded within its borders. One of the factors considered by the High Court in *Gutnick* was the concern that Australian citizens harmed by material on the Internet must have a forum in which their complaints can be heard.⁶² This concern will be present for any court, which may make this ruling attractive to other nations, independent of common law precedent. In addition, many countries censor the material that citizens may view on the Internet.⁶³ These countries punish those who view prohibited material, and it would be a small step to then rule that the provider of the material is as culpable as the viewer. *Gutnick* has legitimized this view, which will only be further strengthened if other common law countries follow Australia's lead.

B. *The Laws of Defamation and Free of Speech in Australia and the United States Illustrate Significant and Potentially Problematic Differences in Speech Protection Laws*

There are substantial substantive differences between the law of free speech and defamation in the United States and Australia, such that a

Australia, New Zealand, Canada, South Africa, Hong Kong, and Singapore, the courts of which have not overturned the holding in *Duke of Brunswick*.

⁵⁸ English commentators have stated that the *Gutnick* decision would be "highly persuasive" in the English courts because English courts regularly adopt "rulings from the courts of other common law countries where no similar English case has reached the courts." Dyer, *supra* note 5. One English lawyer was quoted as saying, "I would certainly expect the same result here." *Id.* See also *Long Arm of the Internet*, *supra* note 5.

⁵⁹ See *Harrods Limited v. Dow Jones & Co.*, [2003] EWHC 1162 (Engl. 2003).

⁶⁰ *Id.* para. 4.

⁶¹ *Id.* para. 36. For more background on this dispute, see *Dow Jones & Co. v. Harrods Ltd*, 237 F. Supp. 2d 394 (S.D.N.Y. 2003), *aff'd*, 346 F.3d 357 (2nd Cir. 2003) (dismissing Dow Jones's suit for declaratory judgment in New York).

⁶² *Gutnick*, [2002] H.C.A. 56, 23.

⁶³ See Peter J. Breckheimer II, *A Haven For Hate: The Foreign And Domestic Implications Of Protecting Internet Hate Speech Under The First Amendment*, 75 S. CAL. L. REV. 1493, 1508-09 (2002) (describing the censorship of the Internet by China, Singapore, Vietnam, Brunei, Malaysia, Indonesia, Philippines, Thailand, and many Middle Eastern countries).

publisher should be very concerned about which law is applied.⁶⁴ Australian defamation law is considerably more favorable to the plaintiff than that of the United States.⁶⁵ It is easier to win an action for defamation in Australia because of the narrower privilege for statements made about “public figures” and because the burden of proof is on the defendant instead of the plaintiff.⁶⁶ This difference in laws illustrates the difficulties faced by publishers who are caught unaware by international conflicts of law. In the case of *Gutnick*, Dow Jones published the article with defendant-friendly U.S. law in mind, but must defend the article under plaintiff-friendly Australian law.⁶⁷

Part of the reason for the differences in speech laws between the United States and Australia is the First Amendment to the U.S. Constitution.⁶⁸ The First Amendment prohibits restrictions on freedom of speech and U.S. courts have interpreted this prohibition very broadly.⁶⁹ The other common law countries do not have an equivalent to the U.S. First Amendment, and as a result, the common law relating to speech has developed differently between those countries and the United States.⁷⁰

The U.S. law of defamation significantly diverged from the common law in 1964, when the U.S. Supreme Court ruled that the constitutional prohibition on laws abridging freedom of speech applies to the law of defamation.⁷¹ This decision was necessary to protect the right of the press to

⁶⁴ This is a fact about which the Justices of The High Court of Australia were quite aware. As Justice Callinan stated during the oral argument, “the application of Australian law in New Jersey would be quite repugnant to the freedom of speech rules in the United States.” Transcript of the Oral Argument, *supra* note 4.

⁶⁵ Matt Collins, *Defamation and the Internet after Dow Jones & Co. v. Gutnick*, at <http://www.mattcollins.com.au/Defamation%20and%20the%20Internet%20after%20Dow%20Jones%20%20Company%20Inc%20v%20Gutnick.pdf> (last visited Nov. 10, 2003). “Dow Jones was more likely to win the substantive case if it proceeded in, or was determined in accordance with the law of, New York or New Jersey.” *Id.*

⁶⁶ Sally Walker, *Defamation Law Reform: The New South Wales Defamation Bill 1996 and the Australian Capital Territory's Defamation Report*, 5 TORTS L. J. (Austl.) 1, 3-4 (1997). See also, Matthew Rose, *Dow Jones Employee Appeals to U.N. in Libel Case*, WALL ST. J., Apr. 16, 2003, 2003 WL-WSJ 3964985. See also, RESTATEMENT (SECOND) OF TORTS §613 (1977).

⁶⁷ As of the writing of this Comment, this case has not yet come to trial. For an examination of some of the defenses that Dow Jones may assert, see the trial court's ruling on motions to strike in *Gutnick v. Dow Jones* [2003] V.S.C. 79, 32-44 (Victorian S.Ct. 2003).

⁶⁸ U.S. CONST. amend. I. This Amendment pertains to the freedom of religion, speech and press. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

⁶⁹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷⁰ See, e.g., *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1187 (Can. 1995), in which the Supreme Court of Canada found that the rule of *Sullivan* was a uniquely American rule, and was not followed by the other common law countries.

⁷¹ See generally *Sullivan*, 376 U.S. 254. See also RESTATEMENT (SECOND) OF TORTS, Division 5, Special Note On The Impact Of The First Amendment Of The Constitution On The Law Of Defamation (1977).

criticize public officials.⁷² During the civil rights struggle, there was a concerted effort to curb criticism of public officials in the American South through defamation suits.⁷³ In the case of *New York Times v. Sullivan*, the Court ruled that such suits unconstitutionally restrict freedom of speech.⁷⁴ The Court held that it is fundamental to the American democratic system “that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁷⁵ As a result, when a plaintiff who is a public official files a defamation suit in the United States, he or she must meet a higher standard to prevail.⁷⁶ In further rulings, the Court has clarified that this privilege extends to cover any person who is a “public figure,” including politicians, celebrities, business persons, or anyone else who is in the public eye.⁷⁷ These are persons who “have assumed roles of especial prominence in the affairs of society . . . [that] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”⁷⁸

No other common law countries have followed *Sullivan*, though most are starting to recognize some sort of public official privilege.⁷⁹ The courts of these nations often see *Sullivan* as a purely American rule that was the result of an American law, and only required to fix an American problem.⁸⁰ However, the common law courts have begun to recognize that defamation suits can stifle legitimate criticism of government officials and have responded with various levels of protection for this criticism.⁸¹ This protection originated with a privilege for those who have criticized

⁷² See generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

⁷³ *Id.* at 35.

⁷⁴ *Sullivan*, 376 U.S. at 283.

⁷⁵ *Id.* at 270. The Court held that a public official suing for defamation must show that an allegedly defamatory remark relating to his official conduct was made with “actual malice”, defined as “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280. This requirement was subsequently extended to defamation suits brought by “public figures.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); see *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

⁷⁶ See *Sullivan*, 376 U.S. at 283.

⁷⁷ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

⁷⁸ *Id.*

⁷⁹ See generally Andrew T. Kenyon, *Defamation and Critique: Political Speech and New York Times v. Sullivan in Australia and England*, 25 MELB. U. L. REV. 522 (2001).

⁸⁰ See *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1180 (Can. 1995). On the other hand, at least one U.S. court has found that the defamation rules of England, which are the basis for the rules of the other common law countries, are “repugnant” to U.S. public policy. *Matusевич v. Telnikoff*, 877 F.Supp. 1, 4 (D.C. 1995).

⁸¹ See generally Kenyon, *supra* note 79.

government officials.⁸² The defendant may only claim this privilege where the statement is about a politician performing official duties.⁸³ The courts in England and New Zealand have recently recognized increased public figure exceptions that extend past mere public officials.⁸⁴ Australia has thus far refused to follow England and New Zealand, and as of this time the privilege only applies to criticism of government officials.⁸⁵

Another important distinction between the law of defamation in the United States and Australia is the burden of proof. In the United States, the burden of proof is on the plaintiff to show that the statement was defamatory and false.⁸⁶ In addition, where the plaintiff is a public figure, he or she must show that there was malice by a standard of "clear and convincing" evidence.⁸⁷ In contrast, Australian law requires that the defendant prove that the material was true.⁸⁸ Because the burden is shifted to the defendant in Australian law, it will be much easier for the plaintiff to prevail.⁸⁹

⁸² See generally *Theophanous v. Herald & Weekly Times*, 182 C.L.R. 104 (Austl. 1994). See also Kenyon, *supra* note 79, at 538-540.

⁸³ See Kenyon, *supra* note 79, at 538-40; see also Transcript of the Oral Argument, *supra* note 4.

⁸⁴ John Burrows, *Review: Media Law*, 2002 N.Z. LAW. REV. 217; see also *Lange v. Atkinson* [2000] 3 N.Z.L.R. 385; see also *Reynolds v. Times Newspapers Ltd.* [1999] 4 All ER 609 (Eng.). "In England, however, the same defenses are available to publishers whether the claimant is a public or private figure, although it may be easier for publishers to satisfy the 'public interest' criterion required to make out a defense of qualified privilege or fair comment when the subject is a public figure. When public figures are claimants, however, they need cross no higher threshold than do private people to make out their case." Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, COMM. LAW., Winter 2002, at 24. See also, Michael Gillooly, *Lange v. Atkinson: An Australian Perspective*, 2000 N.Z. L. REV. 401 (2000).

⁸⁵ *Lange v. Australian Broad. Corp.*, [1997] 145 A.L.R. 96 (Austl. 1997); see generally Kenyon, *supra* note 79. See also the Supreme Court of Victoria's ruling on motions in *Gutnick v. Dow Jones* [2003] V.S.C. 79, 32-44 (Victorian S.Ct. 2003).

⁸⁶ Restatement of Torts §613 reads as follows:

- (1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,
 - (a) the defamatory character of the communication,
 - (b) its publication by the defendant,
 - (c) its application to the plaintiff,
 - (d) the recipient's understanding of its defamatory meaning,
 - (e) the recipient's understanding of it as intended to be applied to the plaintiff,
 - (f) special harm resulting to the plaintiff from its publication,
 - (g) the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and
 - (h) the abuse of a conditional privilege.

RESTATEMENT (SECOND) OF TORTS §613 (1977).

⁸⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

⁸⁸ See Walker, *supra* note 66, at 3-4. See also Rose, *supra* note 66.

⁸⁹ See Rose, *supra* note 66. See also, Victorian Wrongs Act of 1958, No. 3807 § 11. Trial for Defamatory Libel (updated through 2003), available at http://www.dms.dpc.vic.gov.au/l2d/W/ACT01282/8_0.html (last visited Nov. 10, 2003).

The result of these differences is that in the United States, where Dow Jones placed “Unholy Gains” on its web servers, Dow Jones would be almost certain to prevail in a defamation suit, but in Australia it may well lose. In the United States, Joseph Gutnick would be considered a public figure subject to the privilege, while in Australia he is not. In the United States, Gutnick would have the burden of showing that the material was false, and because he is a public figure, he would also have the burden of showing that Dow Jones had “actual malice” in publishing the false information.⁹⁰ However, when *Gutnick v. Dow Jones & Co.* comes to trial in Victoria, Dow Jones will have the burden of proving that the material was true.⁹¹ Dow Jones was free to criticize this famous businessman in the location where the article was uploaded but not in the place where it was downloaded. If a publisher must consider the law in all the places where its material can be downloaded, the ability of nations to provide added protection for speech is negated. Given that Australia lags behind many of the other common law countries in speech protection, this should be a concern for Internet publishers all over the world.⁹²

C. *There Is No International Consensus on the Proper Balance Between Protecting and Regulating Speech*

The international differences in free speech protection are certainly not limited to the differences between U.S. and Australian law. As Justice Kirby noted in his concurrence in *Gutnick*, the rest of the world “does not share the American, as others see it, obsession with free speech.”⁹³ This disparity in views leads to varying levels of protection of speech and varying methods of dealing with speech that is deemed unacceptable. Some countries have very low protection for speech, and many make certain speech a criminal matter. In addition, many repressive governments

⁹⁰ See *Anderson*, 477 U.S. at 255.

⁹¹ See *Rose*, *supra* note 66. “[U]nder Australian libel law, defendants have to prove the truth of the allegations in question, whereas in the U.S., plaintiffs have to prove that the allegations are both untrue and a result of some falsehood or error.”

⁹² This case also raises interesting questions about how U.S. courts would rule on attempts to enforce judgments under *Gutnick* in collateral actions in the United States. For reasons of space, this issue is not addressed in this paper. For some examples of how U.S. courts have treated the judgments of other countries when those judgments do not meet U.S. standards for speech protection, see *Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001); *Matusевич v. Telnikoff*, 877 F.Supp. 1 (D.C. 1995); and *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (N.Y. 1992). See also, Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 670 PLI/Lit 429 (2002).

⁹³ Transcript of Oral Argument, *supra* note 4.

aggressively prosecute anyone making statements critical of the government.⁹⁴

The varying level of speech protection among nations is evidenced by the vague language of the article protecting free speech in the International Covenant on Civil and Political Rights.⁹⁵ Although Article 19 states that speech should be protected, it also allows exceptions for “respect of the rights or reputations of others,” and “for the protection of national security or of public order, or of public health or morals.”⁹⁶ As one might expect, the lack of specificity in the language results in many different interpretations of what restrictions are allowed.⁹⁷ For example, Canada allows prosecution

⁹⁴ The repressive government of Zimbabwe recently illustrated the dangers of combining low speech protection with jurisdiction over the Internet. Geoffrey Robertson, *Mugabe Versus the Internet*, THE GUARDIAN, June 17, 2002, <http://www.guardian.co.uk/Print/0,3858,4435071,00.html> (last visited Nov. 10, 2003). The government of President Mugabe arrested Andrew Meldrum, an American journalist working as the Zimbabwe correspondent for the British newspaper *The Guardian*. *Id.* Mr. Meldrum's reports were critical of President Mugabe and the ruling ZANU-PF party. *Id.* Under new media laws propounded in January of 2002, Mr. Meldrum was charged with publishing falsehoods. *Id.* This case would not be extraordinary in a repressive country like Zimbabwe, except for the fact that *The Guardian* is not available in print in Zimbabwe. The offending article was published on *The Guardian's* website and downloaded by a Zimbabwean intelligence officer in Harare. *Id.* The material was posted on the internet in London, and aside from the fact that it was written by a correspondent based in Zimbabwe, the article had no contact with the forum. *Id.* The prosecution of Mr. Meldrum was widely criticized. *Id.* Mr. Meldrum was eventually acquitted when it was shown to the court's satisfaction that Internet material is “pulled” from the publishing source rather than being “pushed” like radio or television. *Id.*

⁹⁵ The text of Article 19 is as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

International Covenant on Civil and Political Rights, art. 19, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Nov. 10, 2003). Jonathan Zittrain, an assistant law professor at Harvard Law School, said it is unlikely that Australian libel law “would fall below the floor” set by the U.N. Commission. Rose, *supra* note 7.

⁹⁶ International Covenant on Civil and Political Rights, *supra* note 95.

⁹⁷ The author of the article at issue, Bill Alpert, has “filed a plea with the United Nations High Commissioner for Human Rights, in Geneva, alleging Australia's violation of Mr. Alpert's right to free speech under Article 19 of the International Covenant on Civil and Political Rights.” Press Release, William Alpert and Dow Jones & Co., *Alpert vs Australia: Barron's writer challenges the decision of the High Court of Australia over Gutnick case* (April 15, 2003), available at http://www.dowjones.com/news_aboutDJ/AlpertvsAus.pdf (last visited Nov. 10, 2003). Mr. Alpert said: “I am filing this action with the Human Rights Commission in Geneva because I fear restrictions on the ability of financial journalists such as myself to report truthfully to United States investors on the activities of foreigners who are actively engaged in the U.S. markets. I even fear for our ability to report on U.S. corporations and business people, who might see the High Court's decision as an invitation to attack the U.S. press in a remote forum. Given the differences between the laws of Australia and those of other

for, and censorship of, statements that it deems “hate speech.”⁹⁸ Many civil code countries have even lower standards of speech protection, and often treat defamation as a criminal matter.⁹⁹ In France, defamation is “any allegation or imputation of a fact that bears upon or attacks the honor or standing of a person” and bad faith on the part of the publisher is presumed.¹⁰⁰ The low level of speech protection is not limited to defamation; France also has criminal penalties for insulting the French president.¹⁰¹

D. *Free Speech Could be Chilled If Speakers are Uncertain About Which Legal Standard Will Apply to Their Speech*

The combination of rules that allow application of laws to extraterritorial defendants with varying levels of international speech protection can lower the bar for speech protection for the citizens of all other countries. If an American writer must consider the laws of Australia when publishing, his or her level of speech protection is reduced to that of Australia. This restricts the ability of the American government to encourage frank public speech. As Dow Jones’s general counsel stated, “[i]t

countries in the Commonwealth and beyond, the impact of Australia’s law -- as laid out by the High Court - - could harm journalists throughout the world. Powerful and sophisticated plaintiffs could search out overseas jurisdictions willing to help stifle news coverage that was only directed at local readers in those journalists’ home markets.” *Id.* Though sections 1 and 2 of Article 19 might seem to favor Mr. Alpert, the limitations in section 3 probably preclude a favorable outcome. See International Covenant on Civil and Political Rights, *supra* note 95; see also Anita Ramasastry, *Should the U.N. Intervene in a Transnational Internet Defamation Case?: An American Journalist Sued in Australia Files a Petition Seeking Help*, FINDLAW, May 7, 2003, <http://writ.findlaw.com/ramasastry/20030507.html> (last visited Nov. 10, 2003).

⁹⁸ Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can. 1990). See also, *Rights Tribunal Says it Can Shut Down Web Sites*, KITCHENER-WATERLOO RECORD, Jan. 19, 2002, available at WL 10721119.

⁹⁹ Report of the Law Commission on Defamation and the Internet (Eng.), Dec. 2002, at <http://www.lawcom.gov.uk/files/defamation2.pdf> (last visited Nov. 10, 2003). See also Anita Ramasastry, *Can Europe Block Racist Websites from its Borders? And If So, Will Hatemongers Seek the U.S.’s Technological Asylum?*, FINDLAW, Feb. 05, 2003, at <http://writ.findlaw.com/ramasastry/20030205.html> (last visited Nov. 10, 2003).

¹⁰⁰ “Defamation claims in France are governed by the criminal law and by the law of 29 July 1881, which is an annex to the French Criminal Code. Libel is defined by Article 29 of the law of 1881 as ‘any allegation or imputation of a fact that bears upon or attacks the honor or standing of a person.’ Bad faith by the publisher is presumed. This definition applies to all defamation offenses.” McMahon, *supra* note 84, at 29-30.

¹⁰¹ See Jo Johnson, *British Tabloid Risks Fine For Attack on Chirac*, FIN. TIMES, Feb. 21, 2003, 2003 WL 14177599. The British tabloid *The Sun* published a special edition in Paris insulting French President Jacques Chirac. There was concern that the French government might press charges against *The Sun* for defaming the president. *The Sun* purposely entered into French territory to pique the French leader and perhaps hoped to provoke such a response from French authorities. However, if French courts were to adopt a *Gutnick*-style rule, those who similarly insulted the French leader on the Internet could face prosecution if they were ever to fall into the grasp of French courts.

creates a kind of tyranny of the lowest common denominator and . . . inhibit[s] free speech.”¹⁰²

The chilling effect on speech could result both from the threat of being haled into court across the globe, with the resultant burdens, as well as the actual lower standards for speech protection. Dow Jones has the ability to defend a suit in Australia, but a smaller publisher may not. A publisher will be forced to think twice about publishing a statement that might result in the burden and expense of defending a suit on the other side of the world, or in losing a default judgment there. As a result, *Gutnick* places the Internet’s utility as a form of mass communication at risk.¹⁰³

The High Court’s response to this argument is that “in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which the person may resort.”¹⁰⁴ However, this is not a satisfactory answer to this problem. Dow Jones reports on financial matters of publicly traded companies, and as such it fills an important role in American public life. Even if the information about Joseph Gutnick were mere speculation, Dow Jones felt that it was important enough to the American public that the information should be disseminated. Under the High Court’s reasoning, the American public’s need to know information about business taking place in the United States is subservient to Australia’s speech laws. Justice Callinan called Dow Jones’s argument an attempt to impose “American legal hegemony”¹⁰⁵ on Australia, but he failed to recognize that his opinion imposes Australian legal hegemony on the publishers of the rest of the world.

IV. ONE POSSIBLE SOLUTION TO THE PROBLEMS THAT *GUTNICK* RAISES IS TO CHANGE THE OLD COMMON LAW PRECEDENT ON DEFAMATION “PUBLICATION” TO THE NEWER AMERICAN RULE

Given that the Australian High Court was aware of the implications that its decision could have outside its borders, it at first seems surprising that the Court ruled as it did. The issue in this case, however, was not only

¹⁰² Rose, *supra* note 7.

¹⁰³ “The really disturbing aspect of the decision is that if upheld and widely followed, it could render the Internet useless as a form of mass communication,” said David Schulz, a partner in the New York office of Clifford Chance. “Publishers will inevitably tend toward censorship, and people will be unwilling to use the Internet because of civil and criminal liability.” Brenda Sandburg, *Australian Court Ruling Could Extend Reach of Libel Law*, THE RECORDER, Dec. 2002, available at <http://www.law.com/jsp/article.jsp?id=1039054429946> (last visited Nov. 10, 2003).

¹⁰⁴ Dow Jones & Co. v. Gutnick, [2002] H.C.A. 56, 54; see also Rose *supra* note 7.

¹⁰⁵ *Gutnick*, [2002] H.C.A. 56, 200.

one of policy; the Court based the *Gutnick* decision on well-established common law precedent regarding where “publication” occurs in a defamation case.¹⁰⁶ Dow Jones and many commentators have suggested changing this rule to the more recent American rule.¹⁰⁷ However, courts in the common law countries have been very reluctant to make this change. The following sections explain the different rules for determining the place of publication, how the American rule avoids the problems of *Gutnick*, and why changing the common law rule may not be a viable solution.

A. *The Common Law Multiple Publication (Duke of Brunswick) Rule*

At the heart of the holding in *Gutnick* is an extension to the Internet of an old English common law defamation rule on “publication.”¹⁰⁸ This rule, established in the 1849 English case of *Duke of Brunswick v. Harmer*, is called the multiple publication rule.¹⁰⁹ The English common law of defamation has been based on this rule for the past 150 years and most of the other common law countries, including Australia, continue to follow it.¹¹⁰ The multiple publication rule in Australia is as follows:

[T]here is a separate publication (and thus a separate cause of action) in relation to each copy delivered to a reader. If a newspaper circulates 100,000 copies of the one edition (defamatory of the plaintiff), he has available to him at least 100,000 causes of action. The “single publication” rule adopted in the United States, whereby a plaintiff is given only one cause of action for each entire edition of the newspaper, has not been adopted in this country.¹¹¹

¹⁰⁶ *Id.* at 27; see also *Loutchansky v. Times Newspapers Ltd.*, [2002] Q.B. 783, 813 (Eng. 2002).

¹⁰⁷ See Transcript of Oral Argument, *supra* note 4.

¹⁰⁸ *Gutnick*, [2002] H.C.A. 56, 128, citing *Duke of Brunswick v. Harmer*, 14 QB 185 (Eng. 1849).

¹⁰⁹ See, generally, *Duke of Brunswick*, 14 QB 185. In this case, the Duke of Brunswick purposely sent one of his employees to read the allegedly defamatory material in the archives of a newspaper, knowing that it was there. He thus was able to restart the tolling of the statute of limitations, which had long ago run on the seventeen year-old article. The Queen’s Court ruled that each new reading of defamatory material creates a new “publication” and thus a new cause of action. It is this ruling that forms the basis for the defamation law of most of the common law countries. See *Loutchansky*, [2002] Q.B. 783, 813, citing *Duke of Brunswick*, 14 Q.B. 185. (“It is a well established principle of English law of defamation that each individual publication of a libel gives rise to a separate cause of action . . .”). See also Kenyon, *supra* note 79.

¹¹⁰ *Glouchkov v. Michaels*, [2001] I.L.Pr. 21, 288 (Eng. 2001), at 2000 WL 544123.

¹¹¹ *Harris v Perkins*, [2001] NSWSC 258 (New South Wales S.Ct. 2001). See also *David Syme & Co. LTD v. Grey*, (1992) 115 A.L.R. 247(Austl. 1992).

Under the multiple publication rule, each observation of a statement creates a separate cause of action. The result is that every observation of a statement resets the clock on a statute of limitations, and creates a new location in which an action may be brought. The original *Duke of Brunswick* case arose from the observation in a newspaper archive of an article that was almost two decades old.¹¹² The English court held that the original statute of limitations had run, but that a new cause of action was created when the article was read again.¹¹³ This rule has been expanded as new media have emerged, and has been held to apply to books, movies, radio, television, and now, the Internet.¹¹⁴

B. *The American Single Publication Rule*

Courts in the United States long ago diverged from the other common law countries and have universally rejected the multiple publication rule.¹¹⁵ Instead, the United States follows the single publication rule, which states that any edition of a book, newspaper, radio, or television broadcast is a “single publication” for which only one action for damages can be maintained.¹¹⁶ Courts began adopting the single publication rule in the nineteenth century because of the problems that the multiple publication rule caused when applied to statutes of limitations.¹¹⁷ It has been expanded to deal with determination of the place of publication as well as the time. As stated in the Restatement of Torts § 577A, the rule is as follows:

¹¹² *Duke of Brunswick*, 14 QB 185.

¹¹³ *Id.*

¹¹⁴ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56, 38.

¹¹⁵ For a full examination of the single publication rule see Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 BROOK. L. REV. 921 (1996).

¹¹⁶ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 577A (1977). This rule has been long established in U.S. common law. See, e.g., *Bigelow v. Sprague*, 5 N.E. 144, 145 (Mass. 1886); *Julian v. Kansas City Star Co.* 107 S.W. 496, 500 (Mo. 1907). The Uniform Single Publication Act was first published in 1952 and quickly adopted in many states. One example of a statute based on the Uniform Single Publication Act can be found at CAL. CIV. CODE § 3425.3, which reads:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

¹¹⁷ Because every comprehension of a defamatory statement creates a new cause of action under the multiple publication rule, there is essentially no statute of limitations for defamation. Every time someone new reads the material, the statute of limitations begins to toll again, with the practical effect that there is no time limit on a suit for defamation. Courts in the United States did not think that this was practical or fair and invented the single publication rule in response. See *supra* note 116, and accompanying text.

- (3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.
- (4) As to any single publication,
 - (a) only one action for damages can be maintained;
 - (b) all damages suffered in all jurisdictions can be recovered in the one action; and
 - (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.¹¹⁸

As a consequence, in the United States, if defamatory material is only published once, an injured party may only bring one suit. The proper venue for the suit will be the place of the tort, which can be the location where the material was printed or the place of sale.¹¹⁹ Whether the publisher has intentionally disseminated the statement at the place of publication will be the key factor when deciding if venue is proper in a U.S. defamation suit.¹²⁰

As types of media and methods of publication have expanded and increased, American courts have expanded the single publication rule to cover them.¹²¹ It is therefore likely that U.S. courts will extend the rule to the Internet. Indeed, several courts have already held so. The first such decision was in *Firth v. New York*,¹²² in which a New York state court stated that there is no “rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means . . .”¹²³

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 577A.

¹¹⁹ The question of where a “single publication rule” case could be brought was settled by the U.S. Supreme Court in the case of *Keeton v. Hustler*, 465 U.S. 770 (1984). In *Keeton*, the plaintiff sued Hustler Magazine in New Hampshire because the New Hampshire statute of limitations for defamation was longer than any other state, and had not yet run. Hustler Magazine, Inc. is an Ohio company, which does not print in New Hampshire. Its only contact with the state was the shipment of between 10,000 to 15,000 copies of its magazine into the state. The Supreme Court held that this was sufficient contact with the forum state to allow jurisdiction. The number of magazines and the intentional nature of Hustler’s distribution in the state meant that allowing jurisdiction would not violate “traditional notions of fair play and substantial justice.” *Id.* at 780-81 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹²⁰ *Keeton*, 465 U.S. at 781.

¹²¹ See *Firth v. New York*, 706 N.Y.S.2d 835 (NY Ct. Cl. 2000), *aff’d.*, 731 N.Y.S.2d 244 (App. Div. 2001), *aff’d.*, 747 N.Y.S.2d 69 (2002).

¹²² *Id.*

¹²³ *Id.* at 843. In *Firth*, the court rejected the ruling in an unpublished decision by the Court of Appeals of Tennessee in *Swofford v. Memphis Individual Practice Assn.*, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn.Ct.App. June 2, 1998). *Swofford* held that every time a database was accessed, a

C. *Courts in Common Law Countries are Unlikely to Adopt the Single Publication Rule "Fix"*

The adoption of the single publication rule would solve the problems raised by *Gutnick*, but courts in common law countries have been very reluctant to do so.¹²⁴ If the single publication rule is applied, the place of publication is generally the location where the publisher writes or uploads the material.¹²⁵ The single publication rule gives publishers certainty about the law that will govern their material because, unlike the old common law rule, it does not emphasize the place of comprehension. However, Australia's High Court has specifically rejected the single publication rule in *Gutnick* and earlier cases, and seems unlikely to reconsider this decision.¹²⁶ In addition, the multiple publication rule seems appropriate in a society where the balance between protection of speech and reputation has been decided in favor of protection of reputation. Also, other common law countries, whose rulings have some persuasive authority in Australia, have repeatedly decided against adoption of the single publication rule.¹²⁷ Because the multiple publication rule is so entrenched in Australian law, the answer to maintaining adequate protection of Internet speech may lie elsewhere.

V. DIFFERENCES IN THE RULES OF JURISDICTION AND VENUE BETWEEN AUSTRALIA AND THE UNITED STATES SUGGEST ANOTHER POSSIBLE SOLUTION TO THE *GUTNICK* PROBLEM

Although media analysis of the *Gutnick* opinion focused on the multiple publication rule, divergent jurisdictional rules may have had an equally important impact on *Gutnick's* outcome, and may hold the key to solving the problems raised by the ruling. The laws governing jurisdiction and venue in Australia and the United States at first seem very similar, but

new publication occurred. While not technically a rejection of the single publication rule in the Internet context, it had essentially the same effect. The *Firth* court held that the publication was the placement of the information online, and specifically stated that the single publication rule applies to information on the Internet. *Firth*, 706 N.Y.S.2d at 841. *Firth* has since been endorsed by the District of Kentucky in *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky. 2003), and cited favorably by the Southern District of New York in *Van Buskirk v. The New York Times*, No. 99 Civ. 4265(MBM), 2000 WL 1206732 (S.D.N.Y. Aug. 24, 2000), and *Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH & Co.*, 150 F. Supp. 2d 566 (S.D.N.Y. 2001).

¹²⁴ See, e.g., *Glouchkov v. Michaels*, [2001] I.L.Pr. 21, 288 (Engl. 2001), at 2000 WL 544123.

¹²⁵ See, e.g., *Firth*, 706 N.Y.S.2d 835.

¹²⁶ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56, 44.

¹²⁷ See, e.g., *Glouchkov*, [2001] I.L.Pr. 21, 288.

are actually quite different. If a lawsuit arising out of Internet contact with the forum is brought under U.S. law, the court is likely to find a lack of jurisdiction and dismiss the case immediately. However, Australia has a different set of rules, and this difference in approach to jurisdiction over a defendant helps explain why this case seems so outrageous to most Americans, but also suggests a possible solution.

A. *Jurisdiction and Venue in Australia*

Under Australian law, a court may only exercise jurisdiction in a case if the legislature has provided a statutory grant of authority to the court.¹²⁸ In the State of Victoria, where Mr. Gutnick brought his action, the law giving the court power over an extraterritorial defendant is found in Rule 7 of the Victorian Supreme Court's rules of civil procedure.¹²⁹ More specifically, jurisdiction was based on Rule 7.01, which allows service on a defendant outside of Australia where, under subsection (i), "the proceeding is founded on a tort committed within Victoria" or under subsection (j), "the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring."¹³⁰ The fact that a defendant does not have assets in the forum and has very minimal contacts with the forum¹³¹ is "irrelevant once the propounded long arm rule is found valid and applicable."¹³² This is a substantial distinction from the American rule.¹³³

The more important consideration when ruling on a motion to dismiss in Australia is lack of proper venue, a difficult standard for the defendant to meet under recent changes to Australian law.¹³⁴ Venue is defined as the

¹²⁸ See, e.g., Supreme Court (General Civil Procedure) Rules 1996 (Vic), 6 (Service) and 7 (Service out of Australia), http://www.dms.dpc.vic.gov.au/12d/S/STAT00687/3_4.html (last visited Nov. 10, 2003).

¹²⁹ Victorian Rules of Civil Procedure, supra note 128, r 7.01(1)(i), 7.01(1)(j) and 7.05(2)(b), http://www.dms.dpc.vic.gov.au/12d/S/STAT00687/3_4.html (last visited Nov. 10, 2003).

¹³⁰ *Id.*

¹³¹ In his concurrence, Justice Kirby "infers" that Dow Jones has no assets in Australia, but that inference is probably erroneous. *Gutnick*, [2002] H.C.A. 56, 103. The Dow Jones website shows multiple offices in Australia, including one in Melbourne, which is in the State of Victoria. See Dow Jones website, <http://www.newstoprofitby.com/showpage.cfm?pid=84> (last visited Nov. 10, 2003). As Justice Kirby notes, however, this is not a relevant factor in Australia, and thus has no effect one way or the other on the ruling of the case. *Gutnick*, [2002] H.C.A. 56, 103.

¹³² *Gutnick*, [2002] H.C.A. 56, 101. Justice Kirby notes that even the United States allows for long arm jurisdiction. *Id.* The point that he misses is that a court in the United States may only use its long arm jurisdiction if there are sufficient minimum contacts. *International Shoe*, 326 U.S. at 316.

¹³³ The American rule requires minimum contacts with the forum in addition to a valid statute. *International Shoe*, 326 U.S. at 316.

¹³⁴ See generally Richard Garnett, *Stay Of Proceedings In Australia: A 'Clearly Inappropriate' Test?*, 23 MELB. U. L. REV. 30 (1999).

proper place to bring an action.¹³⁵ The standard for dismissal for lack of venue in Australia requires a finding of a “clearly inappropriate forum,”¹³⁶ which is a departure from the prior common law rule of *forum non conveniens*¹³⁷ which is still followed in England and many other common law countries.¹³⁸ The Australian standard is very high, and will only be satisfied if it can be shown that the forum is “clearly inappropriate” “for the determination of the dispute between the parties.”¹³⁹ This standard contains a balance of multiple factors: the law to be applied, the place of the acts, and the residences of the parties are all considered. The defendant can also prevail if it shows that the forum would be “oppressive and vexatious.”¹⁴⁰ This test is also a departure from common law precedent in that the availability of another more appropriate forum will not be dispositive.¹⁴¹ However, the defendant’s lack of contacts with the forum will not be dispositive either.¹⁴²

B. *Jurisdiction and Venue in the United States*

One of the primary requirements for bringing a suit in a U.S. court is that the court must have jurisdiction, or “power” over the defendant.¹⁴³ This power usually comes from a statute in the state in which the court sits.¹⁴⁴ Typically, a state will have a “long arm statute” that allows jurisdiction over an out-of-state defendant.¹⁴⁵ When asked to assert such jurisdiction, courts

¹³⁵ See BLACK’S LAW DICTIONARY 1553 (7th ed. 1999).

¹³⁶ See generally Garnett, *supra* note 134.

¹³⁷ See *Spiliada Maritime Corp. v. Consulex Ltd* [1987] 1 A.C. 460 (Austl. 1987). This rule requires that, “in the case of service outside the jurisdiction, . . . before the court would agree to hear the case, it had to be persuaded . . . that the action or the defendant had some territorial or other connection with the forum.” Garnett, *supra* note 134, at 31-32. It is important for U.S. readers to note that the concept of *forum non conveniens* differs between the U.S. and other common law countries. The Doctrine of Personal Jurisdiction established in *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), and refined by *International Shoe* and its predecessors is based on the Fifth Amendment. It is thus a creature somewhat unique to the United States. The English common law doctrine of *forum non conveniens* includes factors that would fall under both personal jurisdiction and venue considerations in the United States. Thus, the U.S. concept of *forum non conveniens* is much more limited than the concept as it exists in other common law countries.

¹³⁸ *Spiliada Maritime*, [1987] 1 AC 460; see Garnett, *supra* note 134.

¹³⁹ Garnett, *supra* note 134, at 33, 136 (quoting *Oceanic Sun Lines*, [1988] 165 C.L.R. 197, 243 (Austl. 1988)).

¹⁴⁰ *Id.* See also, David Rolph, *The Message, Not the Medium: Defamation, Publication and the Internet in Dow Jones & Co Inc v. Gutnick*, 24 SYDNEY L. REV. 263, 278 (2002) (citing *Voth v. Manildra Flour Mills*, 171 CLR 538, 554 (Austl. 1990)).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See also, BLACK’S LAW DICTIONARY 855 (7th ed. 1999).

¹⁴⁴ See, e.g., WASH. REV. CODE § 4.28.020 (2003).

¹⁴⁵ See, e.g., WASH. REV. CODE § 4.28.185 (2003).

in the United States have long required that the defendant in a case have actual contacts with the forum.¹⁴⁶ The old standard required actual physical presence by the defendant in the jurisdiction for exercise of jurisdiction.¹⁴⁷ The standard has evolved, and the requirement is now that the defendant must have “minimum contacts” with the forum, “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁴⁸ These minimum contacts are required by the due process clause of the Fifth Amendment to the U.S. Constitution.¹⁴⁹

Courts in the United States have been considering how to apply these traditional rules to Internet contact for several years, but have yet to articulate a standard rule. In a 1996 ruling similar to *Gutnick*, a federal court in Connecticut found that an advertisement on the Internet that was viewed in Connecticut was sufficient to confer jurisdiction in that state.¹⁵⁰ No other court has gone this far, and since that time, courts have been less likely to find jurisdiction over Internet-based extrajurisdictional defendants.¹⁵¹ In *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,¹⁵² the Western District of Pennsylvania created a test that linked the likelihood of jurisdiction for Internet contact to “the level of interactivity and commercial nature of the exchange of information that occurs on the web site.”¹⁵³ Since *Zippo*, courts have often broadened this test to include an inquiry into the defendant’s activity, especially if the activity has an effect in the forum, or “constitutes ‘availment’ of opportunities in the forum state.”¹⁵⁴ One of the broadest readings has been in the Sixth Circuit case of *Neogen v. Neo Gen Screening*,¹⁵⁵ in which the court allowed jurisdiction based solely on commercial Internet transactions between the plaintiff and the out-of-state defendant.¹⁵⁶ Many courts have begun to follow the *Calder v. Jones* “effects test,” which allows jurisdiction if the defendant purposely aimed the speech at the forum and knew that the speech would have a significant impact in the forum.¹⁵⁷ Courts in the United States are still far from articulating a rule that

¹⁴⁶ See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

¹⁴⁷ *Id.*

¹⁴⁸ *International Shoe*, 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁴⁹ *Id.*; U.S. CONST. amend. V.

¹⁵⁰ *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

¹⁵¹ See *Digital Control Inc. v. Boretronics Inc.*, 161 F.Supp.2d 1183, 1186 (W.D. Wash. 2001).

¹⁵² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹⁵³ *Id.* (citing *Mellon Bank (East) PSFS, N.A. v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992)).

¹⁵⁴ RONALD J. MANN & JANE K. WINN, *ELECTRONIC COMMERCE* 591 (2002).

¹⁵⁵ *Neogen v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002).

¹⁵⁶ It is worth noting that *Neo Gen* might be distinguished from the *Gutnick* case because in *Neo Gen* the defendant was shipping physical items to the forum after the Internet transactions, which might create more “contact” in the mind of a U.S. court.

¹⁵⁷ *Calder v. Jones*, 465 U.S. 783 (1984).

covers all the possible permutations jurisdiction for online activity, but all of the decisions have required some affirmative contact with the forum by the defendant.¹⁵⁸

A plaintiff in the United States must also satisfy the requirements for proper venue, but this standard is less important under U.S. law.¹⁵⁹ Venue is governed by statute, and because a case involving an extraterritorial defendant would likely be brought in federal court,¹⁶⁰ a plaintiff would have to meet the standards of 28 U.S.C. § 1391.¹⁶¹ Section 1391 states that proper venue lies where the defendant resides, where a substantial portion of the case occurred, or if the case can be brought in no other district, where jurisdiction is proper.¹⁶² Because venue is usually proper at some location in the United States, a foreign defendant is unlikely to win a motion to dismiss for lack of venue if a court has found that jurisdiction is proper.¹⁶³

C. *Australia's Lack of a Minimum Contacts Requirement Makes the Gutnick Ruling Overbroad*

The *Gutnick* ruling is overbroad because it fails to consider its effect on publishers that have no contacts or connection with the forum. Although the reasoning of the *Gutnick* decision is troubling, it is not particularly unreasonable that Dow Jones would be haled into court in Australia, because it does have offices in Australia and it did sell subscriptions there.¹⁶⁴ However, because the Court did not actually consider contacts with the forum, it failed to distinguish between those defendants that have availed themselves of Australia, and hence may be able to defend in Australia, and those that have never benefited in any way from contact with Australia.

¹⁵⁸ For more information on Internet Jurisdiction see JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* § 3 (4th ed. 2003).

¹⁵⁹ "The distinction must be clearly understood between jurisdiction, which is the power to adjudicate, and venue, which relates to the place where judicial authority may be exercised and is intended for the convenience of the litigants. It is possible for jurisdiction to exist though venue in a particular district is improper, and it is possible for a suit to be brought in the appropriate venue though it must be dismissed for lack of jurisdiction." CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 42, 257 (5th ed. 1994).

¹⁶⁰ 28 U.S.C. § 1332 (2003) states that U.S. federal courts have original jurisdiction in a case involving "citizens of a State and citizens or subjects of a foreign state."

¹⁶¹ 28 U.S.C. § 1391 (2003).

¹⁶² At the federal level, venue is governed by 28 U.S.C. § 1391. Jurisdiction is governed by the long-arm statute of the state in which the federal court sits. *Arrowsmith v. United Press Intern.*, 320 F.2d 219, 223-224 (C.A.Vt. 1963); see also 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1075 (3rd ed. 2003).

¹⁶³ 28 U.S.C. § 1391 (2003).

¹⁶⁴ See discussion in footnote 131.

Thus, it is possible that a much more sympathetic defendant than Dow Jones may soon find itself sued in Australia.

Although, as the discussion in Part V(B) demonstrates, it is difficult to know how a U.S. court would rule in a situation involving an Internet defendant that did not have physical or economic contacts with a forum, it is certain that the court would closely examine the defendant's relationship with that forum. This examination would include inspection of the extent to which the defendant had contacts with the forum, and whether such contacts were of such nature that it would be fair to force the defendant to defend in that forum.¹⁶⁵ It is this analysis that is missing in *Gutnick*. If this hypothetical defendant were sued in Australia, the court would need only find that the material was observed in Australia, and that observation would be sufficient to permit the suit to proceed.

The most troubling potential application of the *Gutnick* ruling is the effect it could have on a free Internet service lacking physical contacts with the forum. In such a case, a publisher might offer material on the Internet for free, with no physical presence in Australia, and without targeting the Australian market. Although such a publisher would have no contacts with Australia, it could still be sued for a statement made about someone with a reputation in Australia. Thus far, no country other than Australia has law that would allow jurisdiction in such a case. This case would be dismissed in the United States because the assertion of jurisdiction over a party with no contacts would violate due process.¹⁶⁶

An Australian court that follows *Gutnick* would allow such a defendant to be sued in Australia. It is this hypothetical scenario that truly illustrates the over-breadth of the *Gutnick* ruling. The High Court held that the mere viewing of information on the Internet created an instance of publication at the time and place of that viewing.¹⁶⁷ It does not matter whether that information was purchased or if the publisher targeted the forum. Thus, the publisher of free material would be just as susceptible to be haled into court as the publisher who, like Dow Jones, collected money from residents of the forum, and benefited from contacts with that forum.¹⁶⁸ That this publisher would be haled into Australian court despite having no reason to foresee such an action is the most serious problem with the *Gutnick* decision.

¹⁶⁵ See discussion in section V(B).

¹⁶⁶ See *International Shoe*, 326 U.S. at 316 (holding that the due process clause of the Fourth Amendment to the U.S. Constitution requires "minimum contacts" with the forum).

¹⁶⁷ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56, 44.

¹⁶⁸ See discussion in footnote 24.

VI. AUSTRALIA'S PARLIAMENT SHOULD ADOPT A JURISDICTIONAL "EFFECTS TEST" REQUIREMENT FOR INTERNET CASES

The problems raised by *Gutnick* are not likely to go away. The Internet is obviously here to stay, and as more and more people use it, the risk of more decisions like *Gutnick* grows. This risk will soon be more than theoretical, and may already be dampening speech. Given the issues raised by the defendant, and recognized by Justice Kirby, the predominantly negative world-wide reaction, and the fact that this ruling is out of step with the rest of the world, it seems likely that Australia will need to revisit this issue.

Because the High Court has already issued its decision, it is likely that any solution to this problem will have to come from Australia's Parliament.¹⁶⁹ Because this issue involves a balance between protecting the individual rights of an extraterritorial defendant and the right to redress in the courts for a domestic plaintiff, any solution will have to diminish one right to satisfy the other. Australia's current solution gives all the weight to the latter concern at the expense of the former; a better solution might be to create a rule that addresses both concerns.

The question then becomes, "what should the rule be?" One potential solution would be to adopt the single publication rule wholesale. This option has already been rejected by Australian courts,¹⁷⁰ and given the long entrenchment of the multiple publication rule in Australian law, this seems unlikely. Another option would be to adopt the single publication rule only for information on the Internet. This is an option being considered by the English Law Commission.¹⁷¹ However, this option is probably also politically unsatisfactory in Australia, both because it fails to protect Australian citizens' right to reputation and because it is intellectually inconsistent to have one rule for one form of media and another for all others.¹⁷² Another alternative would be to adopt the rule proposed by Dow Jones, that "the publisher of material on the World Wide Web be able to govern its conduct according only to the law of the place where it maintained its web servers, unless that place was merely adventitious or

¹⁶⁹ See *Gutnick*, [2002] H.C.A. 56, 76 (discussing the High Court's traditional deference to the Parliament in making new rules).

¹⁷⁰ *Id.* at para. 27, citing *Duke of Brunswick* 14 QB 185. See also *McLean v. David Syme & Co Ltd* 72 SR (NSW) 513 at 519-20, 528 (Austl. 1970).

¹⁷¹ Report of the Law Commission on Defamation and the Internet, *supra* note 99.

¹⁷² See *Firth v. New York*, 706 N.Y.S 2d 835 (N.Y. 2000).

opportunistic.”¹⁷³ As the Australian High Court noted, this is a vague rule that presents problems of interpretation.¹⁷⁴

Adoption of an American style “minimum contacts” requirement for jurisdiction over international Internet defendants may be the solution that would best address this issue. This is not a solution that can be found in Australian precedents, but because any further action in this area will need to be taken by Parliament, this should not be a barrier. This rule could be based on the “effects test” created by the U.S. Supreme Court in *Calder v. Jones*.¹⁷⁵

In *Calder v. Jones, The National Enquirer*, a Florida corporation, its publisher, and a reporter were sued in California. *The National Enquirer* is a tabloid newspaper circulated nationwide, but California is its largest market, accounting for about twelve percent of the copies sold.¹⁷⁶ The publisher and reporter were not California residents and had limited contacts with that state. The U.S. Supreme Court found that these defendants knew that the story could have damaging impact on the plaintiff in the forum and the defendants knew that the story would be widely distributed there.¹⁷⁷ The Court thus held that purposely performing an action that the defendants knew would have a large impact in the forum was sufficient contact with the forum to assert jurisdiction.¹⁷⁸ This line of reasoning has been followed by several U.S. courts when dealing with Internet jurisdiction, and it provides a balance between fairness in jurisdiction to the defendant and fairness in redress to the plaintiff.¹⁷⁹

An Australian rule based on the effects test might read as follows: an action based on material placed on the Internet outside of Australian borders may only be commenced where the publisher has sufficient contacts with the forum or has taken affirmative steps to target the forum. This compromise solution would provide redress for Australian plaintiffs in instances where the publisher clearly intended to speak to an Australian audience and would prevent publishers from relocating outside of Australia’s borders to avoid

¹⁷³ *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56, 20.

¹⁷⁴ *Id.* para. 21.

¹⁷⁵ *Calder v. Jones*, 465 U.S. 783 (1984).

¹⁷⁶ *Id.* at 785.

¹⁷⁷ *Id.* at 789-90.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *Wagner v. Miskin*, 2003 N.D. 69 (finding that there was jurisdiction over Internet statements because the defendant’s website, www.undnews.com, was directed at the University of North Dakota); see also *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002), *cert denied*, 123 S.Ct. 2092 (2003) (holding that *Calder* was an appropriate standard for an Internet libel case, but finding that there was not jurisdiction over defendant because its Internet activity was not “expressly targeted at or directed to the forum state”).

jurisdiction. This solution also allows Australia to keep the multiple publication rule, and merely requires that Australia acknowledge that it is not reasonable to hale a party into court when that party has no actual contact with the forum. This idea is not foreign to Australian law, as it is a consideration that already exists in the factors considered in the “clearly inappropriate forum” test.¹⁸⁰

This proposed rule does not have the ambiguity that exists in Dow Jones’s proposed “adventitious or opportunistic” test.¹⁸¹ An “effects test” rule would still allow an Australian plaintiff to bring a suit if the defendant intended Australia as an audience, but purposely operated offshore to avoid liability. It would continue to allow a plaintiff to bring suit against defendants, like Dow Jones, that have sufficient contacts with Australia such that a publication could cause damage, but it would also prevent the most egregious assertions of jurisdiction over defendants who have absolutely no contact with the forum.

VII. CONCLUSION

The ruling in *Gutnick* is overbroad and presents a danger to international free speech. *Gutnick* is based on precedent from a time when international concerns were far less relevant, and as a result, it has the potential to impose Australia’s speech standards on the rest of the world. Even more troubling is the possibility that other countries with even lower free speech standards might follow Australia’s lead. The fact that the Australian High Court relied on long-established precedent does not obviate the responsibility of the Australian government to act in response to the problems that this ruling raises. Though chilling of speech may not yet have occurred, and a publisher without physical or economic contacts with the forum has not yet been haled into court, the potential for these problems should not be ignored.

Australia is of course free to adopt whatever rules it feels are necessary for the protection of the reputation of its people. However, in the way that it has done so, Australia has expanded its jurisdictional boundaries such that its rules infringe on the ability of other countries to protect their own citizens. There is no problem if Australia wants to apply the multiple publication rule when considering jurisdiction within its own borders, but when it attempts to control the speech in other countries, we all should be concerned.

¹⁸⁰ See generally Garnett, *supra* note 134.

¹⁸¹ Dow Jones & Co. v. Gutnick, [2002] H.C.A. 56, 20.

It is important to respect the laws of other sovereign nations. The U.S. Supreme Court has stated that it must “consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the . . . courts,”¹⁸² and “great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”¹⁸³ Australia should heed these notions of respect for the democratically chosen laws of other nations. Speakers should have the right to rely on the laws of the forum in which they speak. As Dow Jones’s counsel argued, the law should “respect the fact that the substantive law by which the publishers work is *prima facie* appropriate to judge whether their work is at fault.”¹⁸⁴

The Internet has been called the “most participatory form of mass speech yet developed.”¹⁸⁵ It is a unique forum with which people may bypass the traditional gatekeepers of mass communication. While it has been said that “the First Amendment is a local ordinance in cyberspace,”¹⁸⁶ this should not mean that that online speech is less protected. Because Internet speech is every bit as valid and important as older forms of speech, nations must ensure that it remains free and protected.

¹⁸² *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 155 (1987).

¹⁸³ *Id.* (quoting *U.S. v. First National Bank*, 379 U.S. 378, 404 (1965)).

¹⁸⁴ Transcript of the Oral Argument, *supra* note 4.

¹⁸⁵ *Reno v. ACLU*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

¹⁸⁶ This statement is often attributed to John Perry Barlow, former lyricist for the Grateful Dead, and co-founder of the Electronic Frontier Foundation. See, e.g., *The Seybold Report on Desktop Publishing*, July 17, 1995, 1995 WL 12561256.

