

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

Volume 2

Number 2

Winter 2009

PUBLISHED BY THE AMERICAN BAR ASSOCIATION FORUMS
ON COMMUNICATIONS LAW AND THE ENTERTAINMENT AND SPORTS
INDUSTRIES AND THE DONALD E. BIEDERMAN ENTERTAINMENT
AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL

Mission Statement: *The Journal of International Media & Entertainment Law* is a semi-annual publication of the Forums on Communications Law and the Entertainment and Sports Industries of the American Bar Association and the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School. The *Journal* provides a forum for exploring the complex and unsettled legal principles that apply to the international distribution of media and entertainment. The legal issues surrounding the creation and distribution of news and entertainment products on a worldwide basis necessarily implicate the laws, customs, and practices of multiple jurisdictions. The *Journal* examines the impact of the Internet and other technologies, the often-conflicting laws affecting media and entertainment issues, and the legal ramifications of widely divergent cultural views of privacy, defamation, intellectual property, and government regulation.

Disclaimer: The opinions expressed in the articles published in the *Journal of International Media & Entertainment Law* are solely those of the authors and do not necessarily reflect those of the American Bar Association, the Forum on Communications Law, the Forum on the Entertainment and Sports Industries, the Donald E. Biederman Entertainment and Media Law Institute, or Southwestern Law School.

Membership: For information about membership in the Forum on Communications Law or the Forum on the Entertainment and Sports Industries, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1.800.285.2211, or send an e-mail to abamembership@abanet.org.

Law School: For information about the Biederman Institute or Southwestern Law School, please contact Prof. David C. Kohler, Southwestern Law School, 3050 Wilshire Boulevard, Los Angeles, California 90010, 1.213.738.6842, or send an e-mail to dkohler@swlaw.edu.

Back Issues: Back issues are available for \$US 50.00 per copy plus \$US 5.95 for shipping and handling. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1.800.285.2221, or send an e-mail to abasvcctr@abanet.org.

Permission to reprint: Requests to reproduce portions of this issue must be in writing and should be addressed to Nicole Maggio, Contracts, Copyrights & Policies, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598, FAX 1.312.988.6030, or send an e-mail to copyright@abanet.org.

Author Guidelines: Author guidelines are printed on the inside back cover of each issue.

© 2009 American Bar Association & Southwestern Law School.

Journal of International Media & Entertainment Law is published twice a year as a membership benefit by the American Bar Association in cooperation with the Southwestern Law School. ISSN: 1556-875X. Subscriptions are available to nonmembers at an annual rate of \$US 75 (domestic) or \$US 90 (foreign).

Postmaster: Send address changes to Member Services Department, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598.

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

VOLUME 2

NUMBER 2

WINTER 2009

SUPERVISING EDITOR

David Kohler
Southwestern Law School

BOARD OF EDITORS

Eric S. Brown
Franklin, Weinrib, Rudell &
Vassallo, P.C.

Jessica Darraby
Attorney at Law

Michael Epstein
Southwestern Law School

Silvia Faerman
Southwestern Law School

Kevin Goering
Sheppard, Mullin,
Richter & Hampton

Jeff Gewirtz
NETS BASKETBALL/Brooklyn
Sports & Entertainment

Michael Scott
Southwestern Law School

Nathan Siegel
Levine, Sullivan, Koch & Schultz

Lon Sobel
Southwestern Law School

Cydney A. Tune
Pillsbury Winthrop Shaw
Pittman, LLP

Kurt Wimmer
Gannett Co., Inc.

STUDENT EDITORS

Maryam Banihashemi
James Bass
Aaron Case
Kristina Chaushyan
Chad Clement
Jennifer L. Cohn
Shaun Cunningham

Mitchell P. Federer
Jonathan Flores
Michael J. Gordon
Leeron Hendizadeh
Suzanne Holden
Justina Hooper
Esther Kim

Jessica Para
Thomas W. Porter
Ruvyn Spivak
Steven J. Winarski
Christine Bomi Yeo

PUBLISHED BY THE AMERICAN BAR ASSOCIATION FORUMS
ON COMMUNICATIONS LAW AND THE ENTERTAINMENT AND SPORTS
INDUSTRIES AND THE DONALD E. BIEDERMAN ENTERTAINMENT
AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL



JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

VOLUME 2

NUMBER 2

WINTER 2009

Contents

vii Foreword

ARTICLES

- 159 Commercial Speech and Free Expression: The United States and Europe Compared
BRUCE E. H. JOHNSON & KYU HO YOUM
- 199 Libel Tourism: A Transatlantic Quandary
YASMINE LAHLOU
- 215 Defamation on the Internet—A New Approach to Libel in Cyberspace
YUVAL KARNIEL
- 241 The Court of Arbitration for Sport: A Subtle Form of International Delegation
ABBAS RAVJANI

PUBLISHED BY THE AMERICAN BAR ASSOCIATION FORUMS
ON COMMUNICATIONS LAW AND THE ENTERTAINMENT AND SPORTS
INDUSTRIES AND THE DONALD E. BIEDERMAN ENTERTAINMENT
AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL



Foreword

This is our fourth issue of the Journal of International Media and Entertainment Law. As a relatively new journal, we are always on the lookout for interesting articles on a broad range of topics relating to all aspects of international media, entertainment, sports, art and intellectual property law. The wide range of subjects we cover is well illustrated by the current issue which includes four articles.

First, Bruce Johnson and Kyu Youm examine the developing law of commercial speech in the European Union as it compares with commercial speech doctrine in the United States. While the United States Supreme Court has treated the constitutional dimension of commercial speech extensively, the law under the European Convention of Human Rights is less well developed. This promises to be an important subject, however, as commercial interests continue to intersect more frequently with the editorial and creative imperatives of European media and entertainment interests.

Yasmine Lahlou then examines New York's new libel tourism statute. This is a subject that is receiving increasing attention both in the United States as well as in England where some leading authorities have tended to chafe under those American decisions which have refused to recognize English libel judgments.

Yuval Karniel then reflects on defamation in the Internet age, a subject that continues to present challenges as ancient legal principles are adapted to twenty first century realities. His article is informed by his personal experience of being attacked by anonymous cyberspace critics.

Finally, Abbas Ravjani considers an increasingly important adjudicative body: The Court of Arbitration for Sport. With hardly a month going by without yet another story of doping, this body and the principles underlying it has become increasingly central to the integrity of modern sporting events, ranging from the Olympic Games to the Tour De France.

If you have suggestions or proposals for future issues of the Journal, we hope you will let us know. We welcome your input and your contributions.

David Kohler, Supervising Editor



SOUTHWESTERN LAW SCHOOL
2008–2009

BOARD OF TRUSTEES

DAPHNE M. ANNEET
STEVEN P. BYRNE
MICHAEL E. CAHILL
DENNIS P.R. CODON
JAMES A. COUFOS
MICHAEL J. DOWNER
THOMAS L. DRISCOLL
DR. FRANK L. ELLSWORTH,
TRUSTEE EMERITUS
DARIN J. FEINSTEIN
HONORABLE MATTHEW K.
FONG
PAMELA B. GANN
SHELDON A. GEBB,
TRUSTEE EMERITUS
GARY G. GEUSS
JANA WARING GREER
RORY M. HERNANDEZ
THOMAS H. HOBERMAN
ED G. HOOKSTRATTEN,
TRUSTEE EMERITUS
PETER D. KELLY, III

LAUREN B. LEICHTMAN
HONORABLE RONALD S.W. LEW
ROGER LOWENSTEIN
KELLY M. MARTIN
SANFORD P. PARIS
HONORABLE JOHN F. PARKER,
TRUSTEE EMERITUS
DANIEL M. PETROCELLI
HONORABLE ROBERT H.
PHILIBOSIAN
JOHN A. SCHULMAN
SHERYL E. STEIN
BRIAN A. SUN
ROBERT G. VAN
SCHOONENBERG
ROBERT E. WILLETT
HONORABLE ARLEIGH M.
WOODS
EDWIN V. WOODSOME, JR.
HONORABLE OTIS D.
WRIGHT, II
JULIE K. XANDERS

ADMINISTRATION

DENNIS P.R. CODON, B.A., J.D. *Chair of the Board of Trustees*
BRYANT G. GARTH, B.A., J.D., Ph.D. *Dean*
AUSTEN L. PARRISH, B.A., J.D. *Vice Dean for Academic Affairs*
MICHAEL B. DORFF, A.B., J.D. *Associate Dean for Research*
GARY J. GREENER, B.A., J.D., LL.M. *Associate Dean for Career Services*
DOREEN E. HEYER, B.S., M.S. *Associate Dean for Academic Administration*
DEBRA L. LEATHERS, B.A. *Assistant Dean for Institutional Advancement*
JANE POWELL, B.S., B.A., M.A., Ph.D. *Associate Dean/Dean of Students*
PATRICK PYLE, B.A., J.D. *Assistant Dean and General Counsel*
LESLIE STEINBERG, B.A. *Assistant Dean for Public Affairs*
LINDA A. WHISMAN, B.A., M.L.S., J.D. *Associate Dean for Library Services*
JANIS K. YOKOYAMA, B.A. ... *Executive Assistant to the Dean and Corporate Secretary*

FACULTY

DREW L. ALEXIS, B.A., J.D., *Adjunct Associate Professor of Law*
RONALD G. ARONOVSKY, A.B., J.D., *Irving D. and Florence Rosenberg Professor
of Law*
NEETU BADHAN, B.A., J.D., *Adjunct Associate Professor of Law*
PAUL A. BATEMAN, B.A., M.A., Ph.D., *Director of Academic Support Program and
Associate Professor of Legal Analysis, Writing and Skills*

MICHAEL J. BERGER, B.A., M.A., J.D., *Associate Professor of Law*
MIRIAM C. BEEZY, B.A., J.D., *Adjunct Associate Professor of Law*
MICHAEL R. BLAHA, B.A., J.D., *Adjunct Associate Professor of Law*
MEGHAN BLANCO, B.A., J.D., *Adjunct Associate Professor of Law*
BERKELEY BLATZ, B.A., M.A., J.D., Ph.D., *Adjunct Professor of Law*
GARY L. BOSTWICK, B.S., J.D., *Adjunct Associate Professor of Law*
HOLLY N. BOYER, B.A., J.D., *Adjunct Associate Professor of Law*
DEBORAH BRAZIL, B.A., J.D., *Adjunct Associate Professor of Law*
ALAN L. CALNAN, B.A., J.D., *Professor of Law*
CHRISTOPHER D. RUIZ CAMERON, B.A., J.D., *Director of International
Entertainment & Media Law Summer Program in London and Professor of Law*
MARK CAMMACK, B.A., J.D., *Professor of Law*
FRANK CANNIZZARO, B.A., J.D., *Adjunct Associate Professor of Law*
CATHERINE L. CARPENTER, B.A., J.D., *Professor of Law*
JACQUELINE A. CARRICART, Abogada (law degree), *Adjunct Associate Professor
of Law*
ARTHUR CHINSKI, B.A., J.D., *Adjunct Professor of Law*
CHRISTINE CHORBA, B.A., J.D., *Director of the Writing Center and Adjunct
Professor of Law*
CRAIG W. CHRISTENSEN, B.S., J.D., *Professor of Law Emeritus*
KIMBERLY H. CLANCY, B.A., J.D., *Adjunct Associate Professor of Law*
LAURENCE R. CLARKE, B.A., M.A., J.D., M.D.R., *Adjunct Professor of Law*
LAURA DYM COHEN, B.A., J.D., *Director of the Street Law Clinic and Community
Outreach and Adjunct Associate Professor of Law*
BRIDGETTE M. DE GYARFAS, B.S., J.D., *Adjunct Associate Professor of Law*
DAVID DIAMOND, B.A., J.D., *Adjunct Associate Professor of Law*
ALEXANDRA D'ITALIA, B.A., J.D., *Adjunct Associate Professor of Law*
HON. GREGORY A. DOHI, A.M., A.B., J.D., *Adjunct Associate Professor of Law*
MICHAEL B. DORFF, A.B., J.D., *Associate Dean for Research and Irwin R.
Buchalter Professor of Law*
PAMELA E. DUNN, B.A., J.D., *Adjunct Professor of Law*
ROBERT N. DURAN, B.A., J.D., LL.M., *Adjunct Associate Professor of Law*
THOMAS EILMANSBERGER, M.A.E.S., J.D., DPh., *Visiting Professor of Law*
MICHAEL M. EPSTEIN, B.A., J.D., M.A., Ph.D., *Professor of Law*
JOSEPH P. ESPOSITO, B.S., J.D., *Adjunct Professor of Law*
SILVIA F. FAERMAN, Abogada (law degree), *Director of Summer Law Program in
Buenos Aires and Associate Professor of Law*
DAVID FAGUNDES, A.B., J.D., *Associate Professor of Law*
ALAN H. FELDSTEIN, B.A., J.D., *Adjunct Associate Professor of Law*
GARY P. FINE, B.A., J.D., *Adjunct Professor of Law*
KEITH A. FINK, B.A., J.D., *Adjunct Associate Professor of Law*
JAMES M. FISCHER, J.D., *Professor of Law*
MICHAEL H. FROST, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing and
Skills*
JOHN V. GALLAGHER, B.A., J.D., *Professor of Law Emeritus in Residence*
NORMAN M. GARLAND, B.S., B.A., J.D., LL.M., *Paul E. Treusch Professor of Law*
BRYANT G. GARTH, B.A., J.D., Ph.D., *Dean and Professor of Law*
ANAHID GHARAKHANIAN, B.A., J.D., *Director of the Externship Program and
Professor of Legal Analysis, Writing and Skills*

BRANDY JENNIFER GLAD, B.S., J.D., *Adjunct Associate Professor of Law*
ANITA L. GLASCO, A.B., J.D., M.C.L., *Professor of Law Emeritus*
FREDRIC H. GOLDSTEIN, B.A., J.D., *Adjunct Associate Professor of Law*
PATRICIA ANN GOLSON, B.A., J.D., *Adjunct Associate Professor of Law*
MAX A. GOODMAN, J.D., *Professor of Law Emeritus in Residence*
HON. SCOTT M. GORDON, B.S., J.D., *Adjunct Professor of Law*
GARY GRADINGER, B.A., J.D., *Adjunct Associate Professor of Law*
KARIN J. GRAVER, B.A., J.D., *Professor of Legal Analysis, Writing and Skills*
H. NYREE GRAY, B.A., J.D., *Director of Diversity Affairs and Associate Professor
of Law*
WARREN S. GRIMES, B.A., J.D., *Professor of Law*
HON. E.M. GUNDERSON, Ret., J.D., LL.M., *Adjunct Professor of Law*
ISABELLE R. GUNNING, B.A., J.D., *Professor of Law*
TAMARA HALL, B.S., J.D., *Adjunct Associate Professor of Law*
MARK HALLORAN, A.B., J.D., *Adjunct Associate Professor of Law*
DANIELLE KIE HART, B.A., J.D., LL.M., *Professor of Law*
HON. J. GARY HASTINGS, Ret., B.S., J.D., *Adjunct Professor of Law*
BARRY H. HINDEN, B.A., J.D., *Adjunct Associate Professor of Law*
NICOLE H. HUSBAND, B.S., J.D., *Adjunct Associate Professor of Law*
JEAN-PAUL JASSY, B.A., J.D., *Adjunct Associate Professor of Law*
VERONICA M. JEFFERS, B.A., J.D., *Adjunct Professor of Law*
HON. MARK A. JUHAS, B.A., J.D., *Adjunct Associate Professor of Law*
KENNETH J. KAHN, B.A., J.D., *Adjunct Associate Professor of Law*
BRIAN R. KELBERG, A.B., J.D., *Adjunct Professor of Law*
SUNG HUI KIM, B.A., M.A., J.D., *Associate Professor of Law*
JOERG W. KNIPPRATH, B.A., J.D., *Professor of Law*
STEFAN J. KIRCHANSKI, B.A., J.D., Ph.D., *Adjunct Associate Professor of Law*
ERIC KIZIRIAN, B.S., J.D., *Adjunct Associate Professor of Law*
A. PATRICIA KLEMIC, B.A., J.D., *Adjunct Associate Professor of Law*
CRISTINA C. KNOLTON, B.A., J.D., *Associate Professor of Legal Analysis, Writing
and Skills*
DANIEL J. KOES, B.A., J.D., *Adjunct Associate Professor of Law*
DAVID C. KOHLER, B.A., J.D., *Director of Donald E. Biederman Entertainment and
Media Law Institute and Professor of Law*
ANTHONY KOUTRIS, B.A., J.D., *Adjunct Associate Professor of Law*
HERBERT T. KRIMMEL, B.S., M.Acc., J.D., *Professor of Law*
SUE YAP KUNG, B.S., J.D., *Adjunct Associate Professor of Law*
JAMES A. KUSHNER, B.B.A., J.D., *Professor of Law*
CYNTHIA JUAREZ LANGE, B.A., J.D., *Adjunct Professor of Law*
LAWRENCE M. LEBOWSKY, B.A., J.D., LL.M., *Adjunct Associate Professor
of Law*
JEFFREY M. LENKOV, B.A., J.D., *Adjunct Professor of Law*
WAYNE LEVIN, B.S., J.D., *Adjunct Professor of Law*
LEE LEVINE, B.A., M.A., J.D., *Adjunct Associate Professor of Law*
JEFFREY LIGHT, B.A., J.D., *Adjunct Professor of Law*
ROBERT C. LIND, B.E.S., J.D., LL.M., *Professor of Law*
JACK P. LIPTON, B.A., M.A., J.D., Ph.D., *Adjunct Associate Professor of Law*
CHRISTINE METTEER LORILLARD, B.A., M.A., Ph.D., *Professor of Legal
Analysis, Writing and Skills*

ROGER LOWENSTEIN, B.A., J.D., *Adjunct Professor of Law*
STEVEN R. LOWY, B.S., J.D., *Adjunct Associate Professor of Law*
DEBORAH L. LUCKY, B.A., J.D., *Adjunct Associate Professor of Law*
HON. L. JACKSON LUCKY, B.A., J.D., *Adjunct Associate Professor of Law*
ROBERT E. LUTZ, B.A., J.D., *Professor of Law*
SUSAN J. MARTIN, B.A., J.D., *Professor of Law*
JEFFREY N. MAUSNER, B.A., J.D., *Adjunct Professor of Law*
HON. DARRELL S. MAVIS, B.S., J.D., *Adjunct Professor of Law*
HON. CHARLES W. MCCOY, JR., B.S., J.D., *Adjunct Professor of Law*
ARTHUR F. MCEVOY, A.B., J.D., M.A., Ph.D., *Professor of Law*
CARRIE J. MENKEL-MEADOW, B.A., J.D., *Visiting Professor of Law*
JULIA M. METZGER, A.B., J.D., *Adjunct Professor of Law*
JONATHAN M. MILLER, B.A., J.D., *Professor of Law*
SUE A. MORAVEC, B.A., J.D., *Adjunct Associate Professor of Law*
HERMEZ MORENO, B.A., J.D., *Adjunct Associate Professor of Law*
RONI G. MUELLER, B.A., J.D., *Adjunct Associate Professor of Law*
ROBERT M. MYMAN, B.A., J.D., *Adjunct Associate Professor of Law*
JANET NALBANDYAN, B.A., J.D., *Adjunct Associate Professor of Law*
CAROLINE B. NEWCOMBE, B.A., J.D., LL.M., *Adjunct Professor of Law*
CHRISTOPHER O'CONNELL, A.B., J.D., *Adjunct Professor of Law*
DAVID OSTROVE, J.D., *Adjunct Professor of Law*
AUSTEN PARRISH, B.A., J.D., *Vice Dean for Academic Affairs, Professor of Law*
and Co-Director of the Summer Law Program in Vancouver
HON. AMY M. PELLMAN, B.A., J.D., *Adjunct Professor of Law*
MICHAEL J. PERLSTEIN, B.A., LL.B., *Adjunct Professor of Law*
EDWARD P. PIERSON, B.A., J.D., *Adjunct Professor of Law*
SANDRA S. POLIN, B.A., M.P.A., J.D., *Adjunct Professor of Law*
ROBIN MCCAFFERY PRENDERGAST, B.A., J.D., *Adjunct Professor of Law*
ROBERT A. PUGSLEY, B.A., J.D., LL.M., *Professor of Law*
BIANCA E. PUTTERS, B.A., M.A., J.D., *Adjunct Professor of Law*
MYRNA S. RAEDER, B.A., J.D., LL.M., *Justice Marshall F. McComb Professor*
of Law
GOWRI RAMACHANDRAN, B.A., M.A., J.D., LL.M., *Co-Director of the Summer*
Law Program in Vancouver and Associate Professor of Law
ANDREA V. RAMOS, B.A., J.D., *Director of the Immigration Law Clinic and*
Associate Clinical Professor of Law
JUAN A. RAMOS, B.A., M.P.P., J.D., *Adjunct Associate Professor of Law*
J. EDWIN RATHBUN, B.A., J.D., *Adjunct Associate Professor of Law*
ANGELA R. RILEY, B.A., J.D., *Professor of Law*
HARRIET M. ROLNICK, B.A., J.D., *Director of SCALE and Associate Professor*
of Law
DAVID S. ROSENBAUM, B.A., J.D., *Adjunct Associate Professor of Law*
GARY A. ROSENBERG, B.A., J.D., *Adjunct Associate Professor of Law*
ALISON POLIN SAROS, B.A., J.D., *Adjunct Associate Professor of Law*
MICHAEL A. SCHMITT, A.B., M.A., J.D., *Professor of Law Emeritus*
MICHAEL D. SCOTT, B.S., J.D., *Director of International Information Technology*
Law Summer Program in London and Professor of Law
ANAHITA SEDAGHATFAR, B.A., J.D., *Adjunct Associate Professor of Law*
BILL H. SEKI, B.A., J.D., *Adjunct Professor of Law*

AMANDA M. SEWARD, B.A., J.D., *Adjunct Professor of Law*
BUTLER D. SHAFFER, B.S., B.A., J.D., *Professor of Law*
IRA L. SHAFIROFF, B.A., J.D., *Professor of Law*
KATHERINE C. SHEEHAN, B.A., M.A., J.D., *Professor of Law*
JEFFREY G. SHELDON, B.S., M.Sc., J.D., *Adjunct Associate Professor of Law*
JACQUELINE SLOAN, B.A., J.D., *Adjunct Professor of Law*
JUDY BECKNER SLOAN, B.A., J.D., *Professor of Law*
GLEN A. SMITH, B.A., J.D., *Adjunct Associate Professor of Law*
KAREN R. SMITH, A.B., J.D., *Professor of Law*
TODD A. SMITH, B.A., J.D., *Adjunct Associate Professor of Law*
LIONEL S. SOBEL, B.A., J.D., *Professor of Law*
JOYCE S. STERLING, B.A., M.A., Ph.D., *Visiting Professor of Law*
BYRON G. STIER, B.A., J.D., LL.M., *Associate Professor of Law*
J. KELLY STRADER, B.A., M.I.A., J.D., *Professor of Law*
PAUL D. SUPNICK, B.S., J.D., *Adjunct Associate Professor of Law*
SAAR SWARTZON, B.S., J.D., *Adjunct Associate Professor of Law*
PATRICK SWEENEY, B.S., J.D., *Adjunct Associate Professor of Law*
LEIGH H. TAYLOR, B.A., J.D., LL.M., *Dean Emeritus and Professor of Law*
N. KEMBA TAYLOR, B.A., J.D., *Associate Professor of Legal Analysis, Writing
and Skills*
ANDREA R. TISCHLER, B.S., J.D., *Adjunct Associate Professor of Law*
DIANA TORRES, A.B., J.D., *Adjunct Associate Professor of Law*
MARIO TRUJILLO, B.A., J.D., *Adjunct Associate Professor of Law*
HARRIS E. TULCHIN, B.S., J.D., *Adjunct Associate Professor of Law*
TRACY L. TURNER, B.A., J.D., *Director of the Legal Analysis, Writing and Skills
Program and Professor of Legal Analysis, Writing and Skills*
HERNAN DIEGO VERA, A.B., J.D., *Adjunct Associate Professor of Law*
DOV A. WAISMAN, A.B., M.S., J.D., *Associate Professor of Legal Analysis, Writing
and Skills*
TARA I. WALTERS, B.A., J.D., *Professor of Legal Analysis, Writing and Skills*
JULIE K. WATERSTONE, B.A., J.D., *Director of the Children's Rights Clinic and
Associate Clinical Professor of Law*
CATHERINE KUNKEL WATSON, B.A., J.D., *Associate Professor of Legal Analysis,
Writing and Skills*
JOSHUA S. WATTLES, B.A., J.D., *Adjunct Associate Professor of Law*
TIMOTHY M. WEINER, B.A., J.D., *Adjunct Associate Professor of Law*
LINDA A. WHISMAN, B.A., M.L.S., J.D., *Associate Dean for Library Services and
Professor of Law*
KENNETH WILLIAMS, B.A., J.D., *Professor of Law*
HON. EDWARD M. WOLKOWITZ, B.A., J.D., LL.M., *Adjunct Professor of Law*
DENNIS T. YOKOYAMA, B.A., M.S., J.D., *Professor of Law*



**AMERICAN BAR ASSOCIATION
FORUM ON COMMUNICATIONS LAW
2008-2009
Leadership Roster**

CHAIR

GUYLYN CUMMINS
Sheppard Mullin Richter & Hampton LLP
19th Floor
501 W. Broadway
San Diego, CA 92101-3598
619.338.6645
Fax: 619.234.3815
gcummins@sheppardmullin.com

CHAIR-ELECT

IMMEDIATE PAST CHAIR

RICHARD M. GOEHLER
Frost Brown Todd LLC
201 E. Fifth Street
Cincinnati, OH 45202
513.651.6711
Fax: 513.651.6981
rgoehler@fbtlaw.com

GOVERNING COMMITTEE MEMBERS

SETH D. BERLIN (2009)
Levine Sullivan Koch & Schulz, L.L.P.
1050 17th St. NW
Washington, DC 20036-5514
202.508.1122
Fax: 202.861.9888
sberlin@lskslaw.com

JAY WARD BROWN (2011)
Hiscox Global Markets
Floor 38
521 5th Ave.
New York, NY 10175-3899
646.452.2369
Fax: 212.922.9652
Jay.brown@hiscox.com

SUSAN BUCKLEY (2011)
Cahill Gordon & Reindel
LLP
80 Pine St.
New York, NY 10005
212.701.3862
Fax: 212.269.5420
sbuckley@cahill.com

THOMAS R. BURKE (2011)
Davis Wright Tremaine
LLP
Suite 800, 505 Montgomery St.
San Francisco, CA 94111-6533
415.276.6500
Fax: 415.276.6599
thomasburke@dwt.com

PILAR JOHNSON (2010)
Turner Entertainment Group, Inc.
Cartoon Network - Adult Swim
1050 Techwood Dr. NW
Atlanta, GA 30318-5604
404.575.6079
Fax: 404.885.2136
pilar.johnson@turner.com

BRYAN TRAMONT (2011)
Wilkinson Barker Knauer LLP
2300 N Street NW, Suite 700
Washington, DC 20037
202.783.4141
Fax: 202.783.5851
btramont@wbklaw.com

NATALIE SPEARS (2009)
Sonnenschein Nath & Rosenthal
7800 Sears Tower
233 S. Wacker Drive
Chicago, IL 60606
312.876.2556
Fax: 312.876.7934
nspears@sonnenschein.com

S. JENELL TRIGG (2009)
Lerman Senter PLLC
Suite 600, 2000 K Street NW
Washington, DC 20006
202.416.1090
Fax: 202.429.4636
strigg@lermansenter.com

KURT WIMMER (2010)
Gannett Company, Inc.
7950 Jones Branch Rd.
McLean, VA 22107
703.854.6961
Fax: 703.854.2031
kwimmer@gannett.com

MAYA WINDHOLZ (2010)
NBC Universal Television Group
NBC Universal, Inc.
Bldg 1320, Suite 3E
100 Universal City Plaza
Universal City, CA 91608-1002
818.777.1104
Fax: 818.866.7597
maya.windholz@nbcuni.com

STEVEN D. ZANSBERG (2009)
Levine Sullivan Koch & Schulz, L.L.P.
Suite 370, 1888 Sherman St.
Denver, CO 80203
303.376.2409
Fax: 303.376.2401
szansberg@lskslaw.com

BUDGET CHAIR

JAMES T. BORELLI
Media/Professional Insurance
Suite 800 - Two Pershing Sq.
2300 Main St.
Kansas City, MO 64108-2404
816.292.7249
Fax 816.471.6119
jim.borelli@mediaprof.com

INTERNET COORDINATOR

CORINNA ULRICH
Expedia, Inc.
Suite 400, 10440 N. Central
Expressway
Dallas, TX 75231
469.335-1175
Fax:
culrich@expedia.com
culrich@hotels.com

MEMBERSHIP CHAIR

CHARLES "CHIP" BABCOCK
Jackson Walker LLP
Suite 6000, 901 Main St.
Dallas, TX 75202
214.953.6030
Fax: 214.953.5822
cbabcock@jw.com

DIVERSITY COMMITTEE CHAIR

JONATHAN AVILA
The Walt Disney Company
500 S. Buena Vista St.
Burbank, CA 91521-0609
818.560.4194
Fax: 818.563.4160
jonathan.avila@disney.com

**MOOT COURT COMPETITION
COMMITTEE CHAIR**

JEANETTE M. BEAD
Levine Sullivan Koch & Schulz LLP
Suite 800, 1050 17th St. NW
Washington, DC 20036-5514
202.508.1134
Fax: 202.861.9888
jbead@lskslaw.com

TEACH MEDIA LAW COMMITTEE CHAIR

DAVID A. GREENE
First Amendment Project
Floor 9, 1736 Franklin St.
Oakland, CA 94612
510.208.7744
Fax: 510.208.4562
dgreene@thefirstamendment.org

**TRAINING & DEVELOPMENT
COMMITTEE CO-CHAIRS**

PETER S. KOZINETS
Steptoe & Johnson LLP
Suite 1600, 201 E. Washington
Phoenix, AZ 85004-2382
602.257.5250
Fax: 602.257.5299
pkozinets@steptoe.com

DEANNA K. SHULLMAN
Thomas & LoCicero PL
Suite 1100, 400 N. Ashley Dr.
Tampa, FL 33602-4324
866.967.2009
Fax: 813.984.3070
dshullman@tlolawfirm.com

**WOMEN IN COMMUNICATIONS LAW
COMMITTEE CO-CHAIRS**

CAROLYN K. FOLEY
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019-6708
212.489.8230
Fax: 212.489.8340
carolynfoley@dwt.com

ASHLEY I. KISSINGER
Levine Sullivan Koch & Schulz,
L.L.P.
Ste. 370, 1888 Sherman St.
Denver, CO 80203
303.376.2407
Fax: 303.376.2401
akissinger@lskslaw.com

**LIAISON, ABA COMM. ON RACIAL &
ETHNIC DIVERSITY IN THE PROF.**

JONATHAN AVILA
The Walt Disney Company
500 S. Buena Vista St.
Burbank, CA 91521-0609
818.560.4194
Fax: 818.563.4160
jonathan.avila@disney.com

**LIAISON, ABA YOUNG LAWYERS
DIVISION**

LINDSAY H. LaVINE (2009)
Mandell Menkes LLC
Suite 300, 333 W. Wacker Dr.
Chicago, IL 60606
312.251.1000 or 312.595.9515
llavine@mandellmenkes.com

LIAISON, ABA LAW STUDENT DIVISION

JAMES D. BARGER
Floor 1, 7918 Ardleigh St.
Philadelphia, PA 19118
215.242.0751
Fax:
jbarger@temple.edu

LIAISON, ABA BOARD OF GOVERNORS

H. RITCHEY HOLLENBAUGH
Carlile Patchen & Murphy LLP
366 E. Broad St.
Columbus, OH 43215-3819
614.228.6135
Fax: 614.221.0216
hrh@cpmlaw.com

**COMMUNICATIONS LAWYER
CO-EDITORS**

STEPHANIE ABRUTYN
Home Box Office, Inc.
1100 Avenue of the Americas
New York, NY 10036
212.512.5610
Fax: 212.512.5789
Stephanie.abrutyn@hbo.com

JONATHAN ANSHELL
CBS Television
Rm. 207, 7800 Beverly Blvd.
Los Angeles, CA 90036
323.575.4781
Fax: 323.575.3950
jonathan.anshell@tvc.cbs.com

STEVEN D. ZANSBERG
Levine Sullivan Koch & Schulz,
L.L.P.
Suite 370, 1888 Sherman St.
Denver, CO 80203
303.376.2409
Fax: 303.376.2401
szansberg@lskslaw.com

**JOURNAL OF INTERNATIONAL MEDIA &
ENTERTAINMENT LAW EDITOR**

DAVID KOHLER
Southwestern Law School
Entertainment & Media Law
Institute
3050 Wilshire Blvd.
Los Angeles, CA 90010-1106
213.738.6842
Fax: 213.738.6614
dkohler@swlaw.edu

DIVISIONS

EASTERN

DALE COHEN
Cox Enterprises, Inc.
6205 Peachtree Dunwoody Rd.
Atlanta, GA 30328
678.645.0848
Fax: 678.645.1848
Dale.cohen@cox.com

JONATHAN DONNELLAN

Hearst Corporation
Office of General Counsel
300 W. 57 St.
New York, NY 10019
212.649.2051
Fax: 212.649.2035
jdonnellan@hearst.com

KEVIN GOERING

Sheppard Mullin Richter & Hampton
LLP
30 Rockefeller Plaza
New York, NY 10112
212.332.3831
Fax: 212.332.3888
kgoering@sheppardmullin.com

CENTRAL

DAVID S. BRALOW
Assistant General Counsel
East Coast Publishing
Tribune Company
220 E. 42nd St.
New York, NY 10017-5806
212.210.2893
Fax: 212.210.2883
dbralow@tribune.com

LAURIE MICHELSON

Butzel Long
Suite 100
150 W. Jefferson
Detroit, MI 48226
313.983.7463
Fax: 313.225.7080
michelso@butzel.com

BARBARA L. MORGENSTERN

Miami University
Rm. 260 Bachelor Hall
Oxford, OH 45056-3414
513.227.4638
morgenbl@muohio.edu

CHUCK TOBIN

Holland & Knight LLP
Suite 100
2099 Pennsylvania Ave., NW
Washington, DC 20006
202.419.2539
Fax: 202.955.5564
ctobin@hkllaw.com

WESTERN

DAVID KOHLER

Donald E. Biederman
Entertainment and
Media Law Institute
Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010-1106
213.738.6842
Fax: 213.738.6614
dkohler@swlaw.edu

ANDREW MAR

MSN Media Network
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052
425.706.2748
Fax: 425.936.7329
andymar@microsoft.com

KELLI L. SAGER

Davis Wright Tremaine LLP
Suite 2400
865 S. Figueroa St.
Los Angeles, CA 90017-2566
213.633.6821
Fax: 213.633.6899
kellisager@dwt.com

NICOLE WONG

Google Inc.
1600 Amphitheatre Parkway
Mountain View, CA 94043
650.253.6048
nicolew@google.com

**COMMUNICATIONS LAWYER
EDITORIAL ADVISORY BOARD**

JERRY S. BIRENZ

Sabin, Bermant & Gould, LLP
Four Times Square
New York, NY 10036
212.381.7057
Fax: 212.381.7233
jbirenz@sbandg.com

DAVID J. BODNEY
Stephoe & Johnson, LLP
Collier Center, Suite 1600
201 E. Washington St.
Phoenix, AZ 85004-2382
602.257.5212
Fax: 602.257.5299
dbodney@stephoe.com

C. THOMAS DIENES
George Washington Univ Law School
2000 H St. NW
Washington, DC 20052
202.994.6366
Fax: 202.994.9446
tdienes@main.nlc.gwu.edu

GEORGE FREEMAN
The New York Times Company
229 W. 43rd St.
New York, NY 10036
212.556.1558
Fax: 212.556.0608
freemang@nytimes.com

RICHARD M. GOEHLER
Frost Brown Todd LLC
201 E. Fifth St.
Cincinnati, OH 45202
513.651.6711
Fax: 513.651.6981
rgoehler@fbtlaw.com

KARLENE GOLLER
Times Mirror Company
Times Mirror Square
Los Angeles, CA 90053
213.237.3760
Fax: 213.237.3810
karlene.goller@latimes.com

THOMAS B. KELLEY
Levine Sullivan Koch & Schulz, L.L.P.
Suite 370
1888 Sherman St.
Denver, CO 80203
303.376.2410
Fax: 303.376.2401
tkelley@lskslaw.com

ELIZABETH C. KOCH
Levine, Sullivan Koch & Schulz, L.L.P.
Suite 800
1050 17th St. NW
Washington, DC 20036
202.508.1128
Fax: 202.861.9888
bkoch@lskslaw.com

THOMAS S. LEATHERBURY
Vinson & Elkins
3700 Trammell Crow
Center
2001 Ross Ave.
Dallas, TX 75201-2975
214.220.7792
Fax 214.220.7716
tleatherbury@velaw.com

LEE LEVINE
Levine Sullivan Koch & Schulz,
L.L.P.
Suite 800
1050 17th St. NW
Washington, DC 20036
202.508.1110
Fax: 202.861.9888
llevine@lskslaw.com

LAURA PRATHER
Sedgwick Detert Moran & Arnold
LLP
Suite 200, 327 Congress Ave.
Austin, TX 78701-3656
512.481.8414
Laura.prather@sdma.com

GEORGE K. RAHDERT
Rahdert, Steele, Bryan, Bole &
Reynolds, P.A.
535 Central Ave.
St. Petersburg, FL 33701
727.823.4191
Fax: 727.823.6189
grahdert@myrapidsys.com

JUDGE ROBERT D. SACK
U.S. Court of Appeals for the 2nd
Circuit
Suite 601
40 Foley Sq.
New York, NY 10007
212.857.2140
Fax: 212.857.2149
robert_sack@ca2.uscourts.gov

KELLI SAGER
Davis Wright Tremaine LLP
Suite 2400
865 S. Figueroa St.
Los Angeles, CA 90017
213.633.6821
Fax: 213.633.6899
kellisager@dwt.com

BRUCE SANFORD
Baker & Hostetler
Suite 1100, Washington Sq.
1050 Connecticut Ave. NW
Washington, DC 20036-5304
202.861.1500
Fax: 202.861.1783
bsanford@bakerlaw.com

RODNEY A. SMOLLA
T.C. Williams School of Law
University of Richmond
Richmond, VA 23173
804.289.8197
Fax: 804.287.1819
rsmolla@richmond.edu

MARK STEPHENS
Stephens Innocent
19 Great Portland St.
London, W1N6LS England
011.44.207.344.7650
Fax: 011.44.207.344.5603
mstephens@fsilaw.co.uk

DANIEL M. WAGGONER
Davis Wright Tremaine
2600 Century Sq., 1501 Fourth Ave.
Seattle, WA 98101-1688
206.628.7789
Fax: 206.628.7699
danwaggoner@dwt.com

BARBARA W. WALL
Gannett Co., Inc.
7950 Jones Branch Dr.
McLean, VA 22107
703.854.6951
Fax: 703.854.2032
bwall@gannett.com

SOLOMON B. WATSON IV
The New York Times Company
229 W. 43rd St.
New York, NY 10036
212.556.7531
Fax: 212.556.4634
watsons@nytimes.com

STEVEN J. WERMIEL
American Univ. Washington College
of Law
4801 Massachusetts Ave. NW
Washington, DC 20016
202.274.4263
Fax: 202.274.4130
swermiel@wcl.american.edu

RICHARD E. WILEY
Wiley Rein & Fielding LLP
1776 K St. NW
Washington, DC 20006
202.719.7010
Fax: 202.719.7049
rwiley@wrf.com

KURT WIMMER
Gannett Co., Inc.
7950 Jones Branch Dr.
McLean, VA 22107-0001
703.854.6961
Fax: 703.854.2031
kwimmer@gannett.com

PAST FORUM CHAIRS

RICHARD M. SCHMIDT, JR.

P. CAMERON DEVORE

RICHARD E. WILEY
Wiley Rein et al
1776 K Street NW
Washington, DC 20006-2304
202.719.7000
Fax: 202.719.7049

R. CLARK WADLOW
Sidley Austin Brown & Wood
1501 K St. NW
Washington, DC 20005
202.736.8215
Fax: 202.736.8711
rwadlow@sidley.com

PATRICIA M. REILLY

DANIEL M. WAGGONER
(1992–1994)
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
206.628.7789
Fax: 206.628.7699
danwaggoner@dwt.com

LEE LEVINE (1994–1996)
Levine Sullivan Koch & Schulz,
L.L.P.
Suite 800
1050 Seventeenth Street NW
Washington, DC 20036
202.508.1110
Fax: 202.861.9888
llevine@lskslaw.com

BARBARA W. WALL (1996–1998)
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
703.854.6951
Fax: 703.854.2032
bwall@gannett.com

KELLI L. SAGER (1998–2000)
Davis Wright Tremaine LLP
Suite 2400
865 S. Figueroa St.
Los Angeles, CA 90017-2566
213.633.6821
Fax: 213.633.6899
kellisager@dwt.com

GEORGE FREEMAN (2000–2002)
The New York Times
Company
620 8th Ave., 18th Floor
New York, NY 10018
212.556.1558
Fax: 212.556.4634
freemang@nytimes.com

THOMAS B. KELLEY (2002–2004)
Levine Sullivan Koch & Schulz, L.L.P.
Suite 370
1888 Sherman St.
Denver, CO 80203
303.376.2410
Fax: 303.376.2401
tkelley@lskslaw.com

JERRY S. BIRENZ (2004–2006)
Sabin, Bermant & Gould, LLP
Four Times Square
New York, NY 10036
212.381.7057
Fax: 212.381.7233
jbirenz@sbandg.com

RICHARD M. GOEHLER
(2006–2008)
Frost Brown Todd LLC
201 E. Fifth Street
Cincinnati, OH 45202
513.651.6711
Fax: 513.651.6981
rgoehler@fbtlaw.com



2008–2009
ABA FORUM on the ENTERTAINMENT
and SPORTS INDUSTRIES

CHAIR

LON SOBEL
Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010-1106
213.738.6756 (office) or 310.829.9335 (home)
lsobel@swlaw.edu

CHAIR-ELECT

KIRK T. SCHRODER
Schroder Fidlow, PLC
Suite 107, 1901 E. Franklin St.
Richmond, VA 23223
804.225.0505
804.225.0507 (f)
kschroder@schroderfidlow.com

VICE-CHAIR

CHRISTINE LEPERA
Mitchell Silberberg & Knupp LLP
Tower 49, 12 E. 49th Street
New York, New York 10017
917.546.7703, 917.546.7673 (f)
ctl@msk.com

IMMEDIATE PAST CHAIR

GARY A. WATSON
Gary A. Watson & Associates
Suite 1000, 1875 Century Park East
Los Angeles, CA 90067-2533
310.203.8022
310.203.8028 (f)
gwatson@garywatsonlaw.com

GOVERNING COMMITTEE MEMBERS

RICHARD J. IDELL (2007–2010)
Idell and Seitel, LLP
Suite 300
465 California St.
San Francisco, CA 94104
415.986.2400
415.392.9259 (f)
Richard.idell@idellseitel.com

PHILIP K. LYON (2006–2009)
Lyon & Phillips, PLLC
Suite 202
11 Music Circle S.
Nashville, TN 37203
615.259.4664
615.259.4668 (f)
pklyon@lyonandphillips.com

ROBERT A. ROSENBLIUM

(2008–2011)
Greenberg Traurig LLP
Suite 400
3290 Northside Pkwy NW
Atlanta, GA 30327-2268
678.553.2250
678.553.2212 (f)
bobby@gtlaw.com

CYNTHIA SANCHEZ (2008–2011)

Univision Communications Inc.
5999 Center Drive
Los Angeles, CA 90045
310.348.3697
310.348.3679 (f)
cynsanchez@univision.net
uclatrojan@msn.com

JANINE S. SMALL (2007–2010)

Carroll, Guido & Groffman
1790 Broadway
20th Floor
New York, NY 10019
212.759.5907
212.759.9556 (f)
jsmall@ccgglaw.com

VICTORIA TRAUBE (2006–2009)

The Rodgers & Hammerstein
Organization
229 West 28th Street, 11th Floor
New York, NY 10001
212.541.6600 ext. 307
212.586.6155 (f)
vtraube@rnh.com

EDITOR-IN-CHIEF

ENTERTAINMENT AND SPORTS LAWYER

VERED N. YAKOVEE
Suite 500
4640 Admiralty Way
Marina del Rey, CA 90292
310.496.5750, 310.496.5751 (f)
vered@yakovee.com

BOOK PUBLISHING CHAIR

ROBERT G. PIMM
Law Office of Robert G. Pimm
Suite 300, 1255 Treat Blvd.
Walnut Creek, CA 94597
925.472.6738, 925.281.2888 (f)
bob@rgpimm.com

BUDGET CHAIR

TODD BRABEC
Executive VP, Membership Group
ASCAP
Suite 300, 7920 Sunset Blvd.
Los Angeles, CA 90046
323.883.1000, ext 269,
323.883.1048 (f)
tbrabec@ascap.com

LIAISONS

LAW STUDENT LIAISON

ERIN JACOBSON (2007–2008)
Townhouse 8G
11260 Overland Ave.
Culver City, CA 90230
310.837.3926 (home) or
310.625.3471 (cell)
Emj.jd.2009@gmail.com

YOUNG LAWYERS LIAISON

TRAVIS LIFE (2007–2009)
Life Law Office
Suite 4700
161 N. Clark St.
Chicago, IL 60601
312.523.2040, 312.523.2001 (f)
tlife@lifelawoffice.com

ABA BOARD OF GOVERNORS LIAISON

H. RITCHEY HOLLENBAUGH
Carlile Patchen & Murphy LLP
366 E. Broad St.
Columbus, OH 43215-3819
614.228.6135, 614.221.0216 (f)
hrh.@cpmlaw.com

DIVISION CHAIRS

ARTS & MUSEUMS

JESSICA DARRABY (2005)
Attorney at Law,
The Art of Counsel – Counsel
to the Arts
Suite 800, 12100 Wilshire Blvd.
Los Angeles, CA 90025
310.806.9450
310.806.9304 (f), 310.966.0554 (cell)
darraby@artlawfirm.com

INTERACTIVE MEDIA AND NEW TECHNOLOGIES

MARCELINO FORD-LIVENE (2006)
General Manager, Consumer Strategy
Digital Home Group, Intel Corp.
2200 Mission College Blvd.,
RNB 4-134
Santa Clara, CA 95052
323.420.7802,
fordlivene@yahoo.com

LITERARY PUBLISHING

ERIC S. BROWN (2007)
Franklin, Weinrib, Rudell &
Vassallo, P.C.
18th Floor
488 Madison Ave.
New York, NY 10022
212.935.5500
212.308.0642
esbrown@fwrvc.com

LITIGATION

LAWRENCE HINKLE (2007)
MERCHANDISING AND LICENSING
CYDNEY A. TUNE (2006)
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
San Francisco, CA 94105
415.983.6443, 415.983.1200 (f)
cydney.tune@pillsburylaw.com

MOTION PICTURES, TELEVISION

CABLE, AND RADIO
LEIGH BRECHEEN (2004)
Bloom, Hergot, Diemer, LaViolette &
Rosenthal
150 South Rodeo Drive , 3rd Floor
Beverly Hills, CA 90212
310.859.6821, 310.860.6821 (f)
lcb@bhdrl.com

MUSIC AND PERSONAL APPEARANCES

HENRY W. ROOT (2008)
Law Offices of Henry W. Root, PC
Suite 200
1541 Ocean Ave.
Santa Monica, CA 90401-2104
310.395.6800
310.393.7777 (f)
Henry@grrllaw.com

SPORTS

JEFF GEWIRTZ (2005)
Senior Vice President & General
Counsel
NETS BASKETBALL/Brooklyn
Sports & Entertainment
390 Murray Hill Parkway
East Rutherford, NJ 07073
551.497.3687,
201.935.1088 (f)
jgewirtz@njnets.com

THEATER AND PERFORMING ARTS

DAVID LAZAR (2004)
Ambassador Theatre Group
Suite 1003
321 W. 44th St.
New York, NY 10036
646.695.4720,
646.695.4722 (f)
davidlazar@theambassadors.com

VOLUNTEER LAWYER FOR THE ARTS

PETER STRAND (2008)
Holland & Knight LLP
Fl 30
131 S. Dearborn St.
Chicago, IL 60603-5517
312.263.3600, 312.578.6666 (f)
peter.strand@hkllaw.com



Commercial Speech and Free Expression: The United States and Europe Compared

Bruce E.H. Johnson*
Kyu Ho Youm**

Table of Contents

Introduction.....	160
I. The European Court of Human Rights: A Brief Overview	163
II. The U.S. Constitution and the ECHR: Text and Theory.....	164
A. Textual Comparison: Absolute Versus Qualified.....	165
1. The First Amendment: Open-Ended and Negative.....	165
2. Article 10: Detailed, Qualified, and Positive	166
B. Theoretical Comparison: A Distinction Without a Difference	167
1. The First Amendment: Why Freedom of Expression?.....	168
2. Article 10: Freedom of Expression as a Democratic Value	170
III. Past and Current Contours of Commercial Speech in the United States	172
A. A Decades-long Trip Coming in from the Cold	172
B. Select Areas of Commercial Speech: American-European Overlaps	177
IV. Commercial Speech Under the European Convention on Human Rights	180
A. Margin of Appreciation in Regulation.....	180
B. Professional Advertising: Variable Protections.....	184

*A partner in the Seattle office of Davis Wright Tremaine LLP and a member of the Washington State and California bars. He is the co-author of *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* (2d ed. 2008). The author would like to thank Devin Smith of the University of Washington Law School.

**Professor and Jonathan Marshall First Amendment Chair, School of Journalism and Communication, University of Oregon. He wishes to thank Dr. Damian Tambini at the London School of Economics, who kindly advised him on his master's thesis at Oxford University, and Dr. Danilo Leonardi at Oxford University and Professor David Feldman at Cambridge University, who thoughtfully examined his thesis, in 2006. His discussion in this Article of the European Court of Human Rights on commercial speech is a substantially expanded revision of his thesis. Also, thanks to his research assistant Jacob Dittmer, at the University of Oregon School of Journalism and Communication, for his fine work.

C. Balancing Test for Injunction on Advertising.....	187
D. Political and Cause Advertising	192
E. Advertising on Electronic Media.....	194
V. Discussion and Analysis.....	195
VI. Conclusion.....	197

Introduction

When freedom of expression is at issue, the United States is widely considered to be in a class by itself. This is especially true of the long history of American courts in grappling with a vast array of free speech issues. American courts have considered freedom of speech questions “for longer than those of any other jurisdiction.”¹ Throughout the years, the free speech jurisprudence of the U.S. Supreme Court has revolved around the detailed line drawing on the First Amendment’s mandate.²

Given the ninety-year experience of American constitutional law with freedom of speech, it would be surprising if the impact of the First Amendment has been confined to Americans or their press within the United States.³ The influence of U.S. free speech jurisprudence abroad can be positive or negative.⁴ The United States has long been viewed as an exception in protecting freedom of expression.⁵ Recently, however, the U.S. Supreme Court has been challenged as the predominant agenda setter in human rights law in general and on freedom of expression in particular.⁶ A comparison of case law of the U.S. Supreme Court and the European Court of Human Rights (ECtHR) in certain areas of free speech illustrates that the term *exceptionalism* does not exclusively apply to America in free speech.⁷

1. ERIC BARENDT, *FREEDOM OF SPEECH* vi (2d ed. 2005).

2. U.S. Const., amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”).

3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988) (stating that “[n]ot only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere, but courts overseas refer frequently to U.S. Supreme Court precedents in constitutional cases”).

4. See, e.g., OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 157-58 (1996) (stating that “[i]n building a free press, the reformers should look to the American experience, but only selectively. They must create for the press a measure of autonomy from the state without delivering the press totally and completely to the vicissitudes of the market”).

5. See generally Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29-56 (Michael Ignatieff ed., 2005).

6. Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1.

7. For an expansive protection of freedom of the press under the European Convention on Human Rights (ECHR) on the reporter’s right to protect confidential sources,

The ECtHR, along with the now abolished European Commission of Human Rights, has emerged as a powerful articulator of freedom of expression in the past thirty years.⁸ In 1985, the number of the ECtHR's freedom of expression cases was only "a handful." Since then, however, that court "has now produced a number of important decisions, particularly to resolve conflicts between freedom of expression and reputation or privacy rights."⁹ The European Convention on Human Rights (ECHR) and its developing case law exert a considerable impact on European countries¹⁰ and beyond. For example, the ECtHR held in 1996 that journalists have a right not to disclose their sources unless a countervailing interest overrides the confidentiality of news sources.¹¹ This ruling has been instrumental to the International Criminal Tribunal for the former Yugoslavia (ICTY) in recognizing the reporter's privilege for war correspondents.¹²

Meanwhile, a 2006 analysis of the U.S. and European approach to freedom of speech concluded:

Given that the United States and Europe share "a common freedom and the rule of law" tradition, their free speech jurisprudence more often converges than diverges. The First Amendment to the U.S. Constitution and Article 10^[13] of the European Convention on Human Rights are similar theoretically and conceptually.¹⁴

From a comparative law perspective, commercial speech¹⁵ is a significant area of freedom of expression in the United States and Europe

see Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, J. INT'L MEDIA & ENT. L. 1, 32-36 (2006).

8. The year 1976 marked the beginning of the ECtHR's serious endeavor to treat freedom of expression as more than abstractions. See *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. (Ser. A) 737 (1979).

9. Barendt, *supra* note 1, at v. See also FREEDOM OF EXPRESSION IN EUROPE: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (2007) (noting that "[t]here is a substantial body of European Court and European Commission of Human Rights... case-law regarding this article [i.e., Article 10]).

10. HERDIS THORGEIRSDOTTIR, JOURNALISM WORTHY OF THE NAME: FREEDOM WITHIN THE PRESS AND THE AFFIRMATIVE SIDE OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (2005).

11. See *Goodwin v. United Kingdom*, 22 Eur. H.R. 123, 136-7 (1996).

12. See *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9 (Dec. 11, 2002). For a discussion of this 2002 ICTY case, see Youm, *supra* note 7, at 36-51.

13. Article 10 of the ECHR is equivalent to the First Amendment to the U.S. Constitution on freedom of expression. For a discussion of Article 10, see *infra* notes 44-47 and accompanying text.

14. Kyu Ho Youm, *American "Exceptionalism" in Free Speech Jurisprudence?: A Comparison of the U.S. Constitution with the European Convention on Human Rights* 99 (July 15, 2006) (unpublished master's thesis in law, Oxford University) (on file with co-author Kyu Ho Youm).

15. "Commercial speech," as a term used by the U.S. Supreme Court and the European Court of Human Rights, can be defined as "communication (such as advertising

in that it illustrates “how courts protecting citizens’ constitutional or fundamental rights apply similar methods of scrutiny when dealing with comparable issues.”¹⁶ In U.S. law, the growing protection of commercial speech is considered “one of the most dramatic and interesting stories of modern First Amendment jurisprudence.”¹⁷ Similarly, the ECtHR has increasingly expanded freedom of expression to commercial speech.¹⁸ Although there is no denying that commercial speech is more protected now than ever, in the United States and Europe the legal status of commercial speech is still evolving.

In light of global commercialization and its concomitant impact on commercial expression across borders, this article examines the judicial interpretations of commercial speech in the U.S. and Europe. It first focuses on the textual and theoretical framework of freedom of expression as a right in the U.S. Constitution and the European Convention on Human Rights. Second, it examines how the U.S. Supreme Court and the European Court of Human Rights have balanced commercial speech with other competing individual and social interests. Third, it discusses the key similarities and differences between the United States and Europe. Finally, this article concludes that whereas commercial speech is less protected than non-commercial speech in both U.S. and European law, the “commercial speech” doctrine informs the U.S. Supreme Court on advertising and the fact-specific application of Article 10 is salient in ECtHR law.

and marketing) that involves only the commercial interests of the speaker and the audience.” BLACK’S LAW DICTIONARY 1435-36 (8th ed. 2004).

16. WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES* 250 (2005).

17. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 20:1 (2008) [hereinafter SMOLLA AND NIMMER].

18. Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUM. RTS L. REV. 53, 54 (2006). It should be emphatically noted that the ECtHR is not the only court in Europe adjudicating commercial speech. The European Court of Justice (ECJ), in the context of ensuring that the European Community’s laws and regulations are observed, has addressed issues relating to commercial speech as part of the EC’s goal of market integration in Europe. So, it differs from the ECtHR, which is concerned with how human rights are reflected in the law and regulations of the ECHR member states. Over the years, however, the ECJ has drawn on the ECHR not necessarily as a direct source of EC law but “as a key source of inspiration for the [fundamental rights] general principles of EC law.” PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 384 (4th ed. 2008). Hence, it is hardly an overstatement that the ECtHR case law, which is the central focus of this paper, benchmarks the ECJ on commercial speech and other free speech issues. More substantively, the ECHR case law is older and more extensive than that of the ECJ. See ROGER A. SHINER, *FREEDOM OF COMMERCIAL SPEECH* 95 (2003); VAN GERVEN, *supra* note 16, at 243-44.

I. The European Court of Human Rights: A Brief Overview

The ECtHR has undergone a transformative period. During the first seventeen years of its existence, its significance was almost nonexistent. The court handed down only seventeen decisions. Few of the decisions have addressed freedom of speech and the press. Indeed, it was not until the 1980s that the ECtHR had adjudicated commercial speech as a free speech issue.¹⁹

Nonetheless, ECtHR has now become “probably the most influential Court in the world” and one of the “most effective organ[s] for the protection of human rights.”²⁰ Dean Harold Hongju Koh of Yale Law School stated in September 2008 that “[t]hese days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty,” adding that “they tend not to look to the rulings of the U.S. Supreme Court.”²¹

The ECtHR currently boasts a large amount of Article 10 case law that has resulted from thirty years of interpretations of the ECtHR, dating back to *Engel v. Netherlands*.²² A total of 153 judgments were rendered and reported by October 2008.²³ Among the major ECtHR cases that have resulted into key free-speech principles are:

- *Engel v. Netherlands* (1976): punishment of Dutch servicemen for publication of articles harmful to military discipline, not a violation of Article 10;²⁴
- *Handyside v. United Kingdom* (1976): British authorities’ ban of *Little Red School Book* under its obscenity law, not a violation of Article 10;²⁵
- *Lingens v. Austria* (1986): finding defamation of a politician under the Austrian criminal libel law, a violation of Article 10;²⁶

19. See *Markt Intern & Beermann v. Gemany*, 12 Eur. Ct. H.R. (Ser. A) 161, 171 (1990). For a discussion of *Markt Intern & Beermann*, see *infra* notes 183-213 and accompanying text.

20. Brian Walsh, “Foreword,” in VINCENT BERGER, *CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* xi (1989).

21. Liptak, *supra* note 6 (quoting Yale Law School dean Harold Hongju Koh).

22. *Engel v. Netherlands* (No. 22), 1 Eur. Ct. H.R. (Ser. A) 647 (1979).

23. By focusing on Article 10 of the European Convention on Human Rights the authors have searched the HUDOC Collection of the European Court of Human Rights at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=14391684&skin=hudoc-en>. (last visited Nov. 6, 2008).

24. 1 Eur. Ct. H.R. (Ser. A) 647, 685 (1979).

25. 1 Eur. Ct. H.R. (Ser. A) 737, 741 (1979).

26. 8 Eur. Ct. H.R. (Ser. A) 407, 421 (1986).

- *Sunday Times v. United Kingdom* (1991): injunction against publication of an unauthorized memoir by a former employee of the British Security Services, a violation of Article 10;²⁷
- *Goodwin v. United Kingdom* (1996): court order to a journalist to reveal confidential sources, a violation of Article 10;²⁸
- *News Verlags GmbH & GoKG v. Austria* (2000): Austria's ban on news magazine's publication of a crime suspect's picture in connection with a trial, a violation of Article 10;²⁹
- *Steel & Morris v. United Kingdom* (McLibel case) (2005): UK denial of legal aid to those sued for defamatory criticism of big corporations, a violation of Article 10.³⁰

To borrow from U.S. media attorney Bruce Sanford on the evolution of American libel law since the 1964 case of *New York Times Co. v. Sullivan*,³¹ European human rights law on free speech has “emerged from an adolescent period of ferment and instability and entered an era of maturation. Fundamental development occurred, and now years of refinement lie ahead.”³² Of course, ECtHR approaches freedom of speech as a human right rather than as a constitutional right. Most important, its decision on freedom of speech, whether commercial or not, has more to do with the “unique systemic context in which the Court operates.”³³

II. The U.S. Constitution and the ECHR: Text and Theory

Noting worldwide consensus that freedom of speech is “a basic human right” (since the mid-twentieth century), American constitutional scholar Rodney A. Smolla stated:

Conceptually...the problems posed by attempting to reconcile freedom of speech with other social values are largely the same for all societies. The policy choices cross cultures. Different societies will, of course, bring different values, traditions, and practical constraints to bear on those choices, but the choices themselves remain essentially uniform.³⁴

27. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sunday%20%20times%20%20v.%20%20united%20%20kingdom&sessionId=14406820&skin=hudoc-en> (last visited Nov. 6, 2008).

28. 22 Eur. Ct. H.R. 123, 137 (1996).

29. 31 Eur. Ct. H.R. 8 (2001).

30. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=steel%20%20morris&sessionId=14406887&skin=hudoc-en> (last visited Nov. 6, 2008).

31. 376 U.S. 254 (1964).

32. BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 1.1 (2d ed. 2008).

33. SHINER, *supra* note 18, at 109.

34. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 351 (1992).

Hence, modern free speech jurisprudence, especially in many Western democracies, has taken on a heightened importance, for “[t]he growth in human rights thinking has been a significantly *legal* phenomenon”³⁵ in the sense of active judicial role in defining and expanding it.³⁶

This section examines the U.S. Constitution and the European Convention on Human Rights on freedom of expression from a textual and theoretical perspective. It first focuses on the language and then surveys various theories invoked by the U.S. Supreme Court and the ECtHR in commercial speech cases.

A. *Textual Comparison: Absolute Versus Qualified*

Textual law rarely matches with experiential law.³⁷ A case in point is the formal guarantee of free expression as a right in nearly every nation. Nonetheless, the nature of the constitutional commitment in a country reflects not only its constitutional history and tradition, but also its political philosophy underlying freedom of expression. This is all the more so in the U.S., given that its “visible” Constitution should involve “nontrivial arguments about what the underlying concept embraces.”³⁸

1. THE FIRST AMENDMENT: OPEN-ENDED AND NEGATIVE

The text of the First Amendment to the U.S. Constitution on freedom of expression is composed of a “few disarmingly simple words.”³⁹ Its normative limitation on freedom of speech and the press is absolutely prohibited, and it is negative in the sense that it forgoes any positive right to speak.⁴⁰ Because of the text’s brevity, almost every word of the

35. Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 500 (2000).

36. For a recent discussion of the important role that judges have played in protecting freedom of expression as a constitutional right in the U.S., see ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007).

37. LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 28 (1991).

38. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 26 (2008).

39. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 8 (1991).

40. Conversely, in their own constitutions many American states provide a positive grant of free expression. In 1776, Pennsylvania became the first state to affirmatively guarantee freedom of speech, writing, and publishing. Article XII of Pennsylvania’s Declaration of Rights, found in Pennsylvania’s Constitution of 1776, asserts that “the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.” In revising its constitution in 1790, Pennsylvania appears to have borrowed heavily from the 1789

First Amendment's free speech clause is less visible than apparent in that "much of what we mean by the Constitution cannot be found in the visible text."⁴¹

Considering that the First Amendment textually offers only a hint of the "ultimate contours of legal protection," the invisible free speech jurisprudence of American law derives more from the gloss provided by the U.S. Supreme Court than from the constitutional text.⁴² Nonetheless, the text of the Amendment is still relevant to the free speech culture of America in that "[t]he fact that there is a provision of the Constitution protecting freedom of speech surely plays a role in the way society as a whole regards free expression."⁴³

2. ARTICLE 10: DETAILED, QUALIFIED, AND POSITIVE

The earlier constitutional commitments of various countries are phrased in "broad and general" language and are "relatively short," in contrast with the "elaborate and specific" constitutional provisions of the twentieth century.⁴⁴ The textual difference between the old and the new constitutions on freedom of expression is illustrated by the distinctive approach of the European Convention on Human Rights on free speech.

The Convention's recognition of freedom of expression is broader and more detailed than the First Amendment. Article 10 stipulates:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as

French Declaration of the Rights of Man and of the Citizen. The language, nearly identical to the French document, states: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on every subject, being responsible for the abuse of that liberty..." Pa. Const. of 1790 art. IX § 7. Many other states adopted Pennsylvania's positive-grant model until Alaska capped the tradition in 1959, when it secured its statehood. *See* Alaska Const. art. 1 § 5 (stating: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). While Hawaii, the 50th state, provides free-speech protections, it mirrors the U.S. Constitution. *See* Haw. Const. art. 1 § 4.

41. Geoffrey R. Stone, "Editor's Note," in *TRIBE*, *supra* note 38, at xiii.

42. DANIEL A. FARBER, *THE FIRST AMENDMENT 1* (2d ed. 2003).

43. David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 59 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

44. Pnina Lahav, *Conclusion: An Outline for a General Theory of Press Law in Democracy*, in *PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY*, at 340 (Pnina Lahav ed. 1985).

are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁵

Article 10(1) recognizes freedom of expression for each person and prohibits the state from denying it. Article 10(1) also defines the “right to freedom of expression” as including “freedom to hold opinions.”

The “right to receive information” under Article 10(1) does not equate with the right to seek and demand information from government agencies,⁴⁶ which is recognized by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

The mode of expression (i.e., written versus spoken) is a nonissue insofar as its protection as a right is concerned. While freedom of the press is not explicitly mentioned in Article 10, its protection is well entrenched. Yet the structural regulation of broadcast media and cinema through licensing is allowed unless it violates their free speech rights under the Convention, that is, it must be prescribed by law and it must be necessary in a democratic society.⁴⁷

B. *Theoretical Comparison: A Distinction Without a Difference*

Theoretical interpretations of freedom of expression differ in the United States and in Europe, but the end result is often an increasingly similar attitude toward free speech. In this context, the U.S. Supreme Court and the ECtHR on commercial speech is illustrative of the “principle of functionality” in comparative law.⁴⁸ An American media law scholar concluded in his 2006 study of the U.S. Supreme Court and the ECtHR on libel law:

45. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 45 Am. J. Int'l L. Supp. 24 1951, 213 U.N.T.S. 211.

46. For a thoughtful discussion of the ECtHR on access to information as a nascent right, see Wouter Hins & Dirk Voorhoof, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, 3 Eur. Const. L. Rev. 114 (2007).

47. ANDREW NICOL ET AL., *MEDIA LAW & HUMAN RIGHTS* 152-53 (2001).

48. The principle of functionality in comparative law rests on its proposition that “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.” KONRAD ZWIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 34-35 (Tony Weir trans., 3d rev. ed. 1998).

[T]he extent to which the [ECtHR's] defamation case law has come to mirror principles of U.S. First Amendment law and common law is striking. . . . The First Amendment is generally recognized to provide the most liberal protection for free speech; the fact that the ECHR parallels many of its defamation principles indicates the importance the ECHR has typically placed on protecting expression in the face of claims of harm to individual reputation.⁴⁹

1. THE FIRST AMENDMENT: WHY FREEDOM OF EXPRESSION?

There is no such thing as one overarching free speech theory in American law. The U.S. Supreme Court's approach to First Amendment freedom of expression is "quite eclectic."⁵⁰ The most famous theory of freedom of speech and the press is the concept of a "marketplace of ideas." It posits that ideas should be allowed to compete against one another in an open process of human interaction in search of truth.⁵¹ The marketplace theory dominates First Amendment jurisprudence.⁵²

For instance, in striking down provisions of the Communications Decency Act, the U.S. Supreme Court noted in 1997 the Internet's role in dramatically expanding the "new marketplace of ideas," and ruled that the federal law would more likely interfere with the "free exchange of ideas" than encourage it.⁵³

The marketplace of ideas should treat commercial speech in no different way from non-commercial speech insofar as it aims "to spread information and promote discussion that are relevant to people's search for truth or their attempts to make wise decisions."⁵⁴ Since the U.S. Supreme Court recognized commercial speech as protected in the mid-1970s, it has used the marketplace of ideas theory as its dominant doctrine. On the other hand, for those who view the marketplace of ideas as

49. Dan Kozlowski, "For the Protection of the Reputation or Rights of Others": *The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM. L. & POL'Y 133, 167 (2006) (citation omitted).

50. MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 1 (2001).

51. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .").

52. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989).

53. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997). The Court struck down the Act's "indecent transmission" and "patently offensive display" provisions, which sought to protect minors from sexually explicit material on the Internet. The Court held the provisions impermissibly abridged the First Amendment by enacting vague and overbroad content-based restrictions on freedom of speech; however, the Court left untouched the remaining portions of the Act. *Id.* at 849.

54. BAKER, *supra* 52, at 194.

something worthy of protection for democratic deliberation, commercial speech is misplaced.⁵⁵

The self-governance theory stands in sharp contrast with the marketplace of ideas because it is based on a premise that freedom of speech is essential to a democracy. Alexander Meiklejohn, the preeminent proponent of the self-governance theory, distinguished the self-governance rationale from the truth-searching marketplace of ideas:

The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizen of a self-governing society must deal.⁵⁶

The crux of the Meiklejohnian theory lies in a distinction between public (i.e., political) speech and private (i.e., nonpolitical) speech. He has defined public speech absolutely protected by the First Amendment as speech that is *related to self-governance*, and thus valuable to the public weal.⁵⁷ On the other hand, private speech that is primarily for private gain is outside the absolute protection of the First Amendment, for it is for private, not communal, good.⁵⁸

Given the centrality of political speech under the Meiklejohnian theory, little protection is accorded to commercial speech as a whole, although the category of “political” speech has been elastically expanded. No Supreme Court decision has protected commercial speech because such speech facilitates democratic governance. The Court merely recognizes the free flow of commercial speech as “indispensable to the formation of intelligent opinions” necessary for enlightened “public decisionmaking in a democracy.”⁵⁹

Meanwhile, the individual autonomy theory holds that “every man—in the development of his own personality—has the right to form his own beliefs and opinions” and “the right to express these beliefs and opinions.”⁶⁰ This theory also derives from the relationship between an

55. SHINER, *supra* note 18, at 299-301.

56. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1965).

57. *Id.* at 88-89.

58. *Id.* See also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88-89 (1948).

59. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

60. THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4, 5 (1966).

individual and society.⁶¹ Society and the state are not ends in themselves but exist to serve the individual.⁶²

In protection of commercial speech, the individual autonomy theory is a most powerful argument. A leading advocate of the self-realization value of commercial speech argued:

When an individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in the light of the goals of personal satisfaction he has set for himself, counter-balance his conclusions with possible price differentials, and in so doing exercises his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment.⁶³

2. ARTICLE 10: FREEDOM OF EXPRESSION AS A DEMOCRATIC VALUE

The ECtHR has developed an influential free speech jurisprudence to which other parts of the international human rights system have turned for their normative development.⁶⁴ The ECtHR cases are striking because they are more about interpreting the European Convention on Human Rights as a legal document than about discussing human rights in the abstract.⁶⁵ The European court, however, has ventured few theoretical efforts to explain the underlying basis of why freedom of expression is protected as a right.

Regardless, as the preamble of the European Convention on Human Rights declares, freedom of expression is related to “an effective political democracy.”⁶⁶ Most of the time, the ECtHR assumes a normative theory of free speech in a democratic society.

In one of its earliest Article 10 cases, the ECtHR addressed whether an English obscenity law was in breach of the freedom of expression of a U.K. citizen, who was ordered to destroy the obscene books he had published.⁶⁷ The European court first noted that its supervisory func-

61. *Id.* at 5.

62. *Id.*

63. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 60-61 (1984) (citation omitted).

64. HENRY J. STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 964 (Henry J. Steiner et al. eds., 3d ed. 2008).

65. C.A. Gearty, *The European Court of Human Rights and the Protection of Civil Liberties: An Overview*, 52 CAMBRIDGE L.J. 89, 95 (1993).

66. European Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, Nov. 4, 1950, 213 U.N.T.S. 211, 45 Am. J. Int'l L. Supp. 24 1951.

67. *Handyside v. United Kingdom*, 8 Eur. H.R. Rep. (Ser. A) 737 (1979).

tions require it to pay the “utmost attention” to the principles that characterize a “democratic society.” It then held:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the *development of every man*. . . . [I]t is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”⁶⁸

The ECtHR’s justification of freedom of expression as an essential condition for the fulfillment of an individual parallels the individual autonomy theory of the First Amendment law. It casts a broad net for protection of freedom of expression not only as a means to a collective (societal) good but also for the private value of speech to the individual.

The marketplace of ideas and self-governance, as they have been recognized as rationales for free speech in American law, have been adopted by the ECtHR.⁶⁹ The European Court emphasized in 1986 the “particular importance” of press freedom as a principle of a democratic society.⁷⁰ “While the press must not overstep the bounds set, *inter alia*, for the ‘protection of the reputation of others,’” the Court stated, “it is nevertheless incumbent on it to impart information and ideas on *political* issues just as on those in other areas of public interest: the public also has a right to receive them.”⁷¹ It highlighted the critical role of the news media in democratic politics:

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of *political* leaders. More generally, freedom of *political* debate is at the very core of the concept of a democratic society which prevails throughout the Convention.⁷²

Closely related to but distinguished from the self-governance theory in the United States is the “checking value” theory.⁷³ This is particularly relevant to freedom of the press because journalists serve as government watchdogs, and the First Amendment must facilitate the press’

68. *Id.* at 754 (emphasis added).

69. *Lingens v. Austria*, 8 Eur. Ct. H.R. (Ser. A) 407, 418 (1986).

70. *Id.*

71. *Id.*

72. *Id.* at 418-19 (emphasis added).

73. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. 521. “Checking value” theory examines the idea that free expression has value to the extent it functions to check abuses of official power. *Id.* at 523.

role in keeping government officials accountable.⁷⁴ The Supreme Court has occasionally alluded to the checking value theory;⁷⁵ however, it has not vigorously enforced the theory's tenets, particularly the journalist's privilege against compelled disclosure of confidential news sources to a grand jury.⁷⁶

Nonetheless, the European court expounded on freedom of expression as an "essential foundation of a democratic society and more specifically on the safeguards that a free press needs in serving its crucial role as a watchdog."⁷⁷ The Court was emphatic about the journalistic privilege as part of freedom of the press:

Without such protection [of journalistic sources], sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.⁷⁸

III. Past and Current Contours of Commercial Speech in the United States

A. *A Decades-long Trip Coming in from the Cold*

By any standard, protections for commercial speech in the United States began ingloriously. In *Valentine v. Chrestensen*,⁷⁹ the Supreme Court upheld the conviction of a roving submarine owner who distributed advertisements (along with a political protest message printed on the back) in violation of New York law. The Court held that while "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion,"⁸⁰ commercial advertising did not qualify for First Amendment protection. "[T]he Constitution imposes no

74. *Id.* at 554-67.

75. *See, e.g.,* *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

76. *See* *Branzburg v. Hayes*, 408 U.S. 665, 703-709 (1972) (holding that journalists do not have a First Amendment privilege to withhold the identity of confidential sources in a grand jury hearing). Some lower courts, though, have interpreted *Branzburg* narrowly, applying it only to the grand jury arena. The following language, excerpted from a Third Circuit case, summarizes that view: "No Supreme Court case since [*Branzburg*] has extended the holding beyond that which was necessary there to vindicate the public interest in law enforcement and in ensuring effective grand jury proceedings." *Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (quotation omitted).

77. *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. 123, 136 (1996) (citation omitted).

78. *Id.* at 143.

79. 316 U.S. 52 (1942).

80. *Id.* at 54.

such restraint on government as respects purely commercial advertising,” wrote Justice Roberts for a unanimous Court.⁸¹ This first stepping stone placed commercial speech among other free expression categories—including obscenity, defamation, and fighting words—considered by the Supreme Court outside First Amendment protections. One scholar has noted, “[I]f one sees freedom of speech primarily as an aid to democratic self-governance, commercial speech is likely to be left out in the cold, for it does not in any obvious or direct way appear to advance the process of democracy.”⁸² In *Valentine*, the Court left commercial speech out in the cold.

The *Valentine* landscape remained unchanged for more than two decades, until *New York Times Co. v. Sullivan*,⁸³ in 1964. Although not strictly a commercial speech case,⁸⁴ *Sullivan* nonetheless gave heft to the notion that the *Valentine* Court may have improvidently lumped commercial speech among categories of expression not covered by the First Amendment. The decision cast doubt on the so-called talismanic immunity from First Amendment protections for virtually all types of expression, not merely libel. After 1964, speech had to be “measured by standards that satisfy the First Amendment.”⁸⁵ Accordingly, the vast majority of speech—including commercial speech—to this day undergoes a scrutiny within the ambit of the First Amendment.

The general concept laid down in *Sullivan* found more precision, first, in *Bigelow v. Virginia*,⁸⁶ then in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁸⁷ In the latter case, the Court invalidated a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs, stating:

[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried in a form that is ‘sold’ for profit, . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.⁸⁸

81. *Id.*

82. RODNEY A. SMOLLA, *THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION* 113 (1999).

83. 376 U.S. 254 (1964).

84. In fact, the Court explicitly noted that the civil rights advertisement published by *The New York Times*, “Heed Their Rising Voices,” was noncommercial. *Id.* at 266.

85. *Id.* at 269.

86. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (stating that “[t]he fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees).

87. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

88. *Id.* at 761.

After *Virginia Pharmacy*, commercial speech in the form of advertising rested comfortably under the First Amendment umbrella.⁸⁹ The Court found value, particularly, in the dollars-and-cents information communicated to would-be purchasers. Advertising, the Court said, “contributed to enlightened public decision-making in a democracy.”⁹⁰ Interestingly, Justice Blackmun also noted that the advertising message was significant not only to the speaker, but also to the recipient. “[T]he protection [of the First Amendment] is to the communication, to its source and to its recipients both,”⁹¹ he wrote. However, while the Court found advertising speech deserving of some First Amendment protections, it did not bring those protections up to par with fully-protected noncommercial speech.

Just four years after *Virginia Pharmacy*, the Supreme Court decided *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,⁹² a landmark case that still resonates throughout the realm of commercial speech. In weighing the constitutionality of commercial speech restrictions, the intermediate-scrutiny framework established in *Central Hudson* remains the applicable standard.⁹³ Under *Central Hudson*'s four-prong test, for commercial speech to enjoy First Amendment protection “it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,”⁹⁴ and whether a “reasonable fit” exists between the state interest and the regulation.⁹⁵ As the first prong makes clear, the Ameri-

89. In a footnote, though, the Court stated that because commercial speech was “durable” and the truth of it could potentially be “easily verifiable,” it could be subject to various forms of government regulation. “In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between [commercial speech] and other varieties.” *Id.* at 771 n.24.

90. *Id.* at 761.

91. *Id.* at 756.

92. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

93. *Id.* at 566.

94. *Id.*

95. In *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), the Court refined the *Central Hudson* test's fourth prong to the “reasonable fit” standard, eliminating *Central Hudson*'s “least restrictive means” requirement. However, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13, the Court further refined the fourth prong to include consideration of “numerous and obvious less-burdensome alternatives to the restrictions on commercial speech.”

can system focuses on protecting lawful commercial speech that is not misleading.

For at least the next decade, the Court applied the *Central Hudson* test inconsistently, often seeming to backpedal from the course it charted. Just six years later, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁹⁶ the Court deferred to a Puerto Rican prohibition on local advertising for gambling (which was legal on the island). The Court concluded that because Puerto Rico *could* ban gambling if it chose, it could, by extension, ban its advertising. The Court noted that “advertising of anything ‘deemed harmful’ enjoys less First Amendment protection than other advertising, even if the product itself is legal.”⁹⁷ This line of reasoning began the Court’s experimentation with a so-called vice exception to the *Central Hudson* test.⁹⁸

In applying *Central Hudson*’s third prong, Justice Rehnquist wrote: “We think the legislature’s belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature’s view.”⁹⁹ The opinion similarly diluted *Central Hudson*’s fourth prong, holding that “it is up to the legislature to decide”¹⁰⁰ whether proposed less-restrictive means than a complete ban on casino advertising would further the state’s interest. The deference given to legislatures in *Posadas* appeared to stop the steady march toward robust protection of commercial speech in its tracks. Appropriately, media commentators have called this timeframe an “era of uncertainty” characterized by “fits and starts.”¹⁰¹

In recent years, the Court has staked out a more protective view of certain commercial speech rights. In *Ibanez v. Florida Department of Business & Professional Regulation*,¹⁰² Justice Ginsburg, writing for the Court, stated that the *Central Hudson* test requires a showing that the government regulation on commercial speech “directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.”¹⁰³ *Rubin v. Coors*¹⁰⁴ built on the *Ibanez*

96. See *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

97. WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 544 (2009 ed. 2009).

98. While the Court toyed with the vice exception in *Posadas*, it ultimately abandoned the concept in subsequent cases.

99. *Posadas*, 478 U.S. at 342.

100. *Id.* at 344.

101. STEVEN G. BRODY & BRUCE E.H. JOHNSON, *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* 5-3 (2d ed. 2008).

102. 512 U.S. 136 (1994).

103. *Id.* at 142.

104. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

foundation by unanimously rejecting certain perceived pigeonhole exceptions to the *Central Hudson* test. The Court made clear that there would be no “vice” or “socially harmful” exceptions to the commercial speech doctrine. The Court further expanded protections for commercial speech, most notably, in *44 Liquormart v. Rhode Island*,¹⁰⁵ *Greater New Orleans Broadcasting v. United States*,¹⁰⁶ and *Lorillard v. Reilly*.¹⁰⁷

As the preceding case chronology illustrates, the Supreme Court’s overarching approach to free-expression questions might best be described as compartmentalization. Each area of expression receives a separate level of protection. First Amendment lawyer John Wirenius calls the status quo a “bizarre mess” of pigeonholes, and complains free expression jurisprudence “allows the suppression of some speech without any but the most cursory judicial review, holds the suppression of other kinds of speech up to mild scrutiny, and exposes a third set of speech categories to very exacting scrutiny indeed.”¹⁰⁸ Obscene speech, for example, falls outside the ambit of First Amendment protections;¹⁰⁹ prior restraints, on the other hand, are presumptively unconstitutional and can be declared valid only in rare circumstances.¹¹⁰ Many other forms of speech—including the modern commercial speech doctrine—fall in the middle.

Through this pigeonhole approach, protections for commercial speech in the United States survived an incremental, if halting, climb to their current perch. Modern commercial speech jurisprudence embraces the view that commercial speech, as a form of expression, is entitled to considerable protections. One noted scholar has written, “The theoretical question should be not what qualifies it for First Amendment coverage, but what, if anything *disqualifies* it.”¹¹¹

105. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (rejecting a Rhode Island regulation that sought to bar liquor retailers and the press from truthfully advertising the price of alcohol).

106. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999) (reversing a lower court decision that upheld a federal law prohibiting advertising of private casino gambling).

107. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating Massachusetts’s regulations banning outdoor advertising for tobacco products).

108. JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH* 72-73 (2000). Wirenius proposes a “verbal act” test, which he says separates the content of speech protected by the First Amendment from the dangers posed by speech, which may form the basis of liability. *See generally id.* at 122-181.

109. DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 462 (2009-2010 ed., 2008).

110. *Id.* at 67; *see also* *Near v. Minnesota*, 283 U.S. 697 (1931).

111. SMOLLA, *supra*, note 82, at 115 (emphasis in original).

B. *Select Areas of Commercial Speech: American-European Overlaps*

The American and ECtHR experiences intersect across many areas of commercial speech. For purposes of this article, U.S. cases regarding professional advertising, corporate political speech, and mixed-content speech are particularly relevant.

U.S. and European court dockets are rich in lawyer advertising cases. At first glance, the U.S. jurisprudence in this area appears particularly scattershot. No clear rule, test, or standard guides lawyer advertising, due in part to the fact-specific application of law. In the first landmark U.S. case, the Supreme Court protected professional advertising. *Bates v. State Bar of Arizona*¹¹² concerned a legal clinic's advertisement for "very reasonable" prices. The *Bates* Court held that across-the-board prohibitions on lawyer advertising violated the Constitution, but in some scenarios states could suppress lawyer ads. The Court stated, "advertising by attorneys may not be subjected to blanket suppression."¹¹³ Although the Court found that state restrictions on commercial speech could not pass constitutional muster on the facts presented, the majority opinion nonetheless explained that in-person solicitation and quality-of-service assurances might be subject to state regulation.

In fact, the *Bates* language foreshadowed the result in *Ohralik v. Ohio State Bar Association*,¹¹⁴ only a year later. There, the Court rejected an overbreadth defense, holding instead that Ohio's moratorium on lawyer advertising could be used to discipline forceful in-person lawyer solicitation. The specific facts of the case persuaded Justice Powell that "the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public" was the appropriate course.¹¹⁵ The Supreme Court distinguished *Ohralik* that same year, however, in the case *In re Primus*.¹¹⁶ The Court determined that a lawyer working in concert with the American Civil Liberties Union, when informing indigent clients of their legal rights and the availability of ACLU legal aid, did not violate South Carolina lawyer advertising rules. The Court noted that due to the political nature of the communication and the importance of informing the clients of their legal rights, "significantly greater

112. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

113. *Id.* at 383.

114. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

115. *Id.* at 468.

116. *In re Primus*, 436 U.S. 412 (1978).

precision” is required in the restriction than “in the case of speech that simply proposes a commercial transaction.”¹¹⁷ In recent cases, the Court has maintained this scattershot, fact-specific approach to professional advertising cases.

Moving from advertising to politics, the Supreme Court has explicitly protected corporate political speech. In *First National Bank of Boston v. Bellotti*,¹¹⁸ the Court struck down a Massachusetts law that forbade businesses from spending money “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.”¹¹⁹ The Court advocated a content-based approach, stating that the focus of the restriction should be on the communication, not the speaker. The Court was persuaded by the argument that corporations should be entitled to participate in public debate. Justice Powell wrote that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹²⁰ The *Bellotti* interpretation blurred the line between commercial and noncommercial speech for political purposes, absorbing political corporate speech into the First Amendment zone of protection for noncommercial speech.

The level of First Amendment protections afforded various forms of commercial speech, including mixed-content speech, remains ambiguous. Defining commercial speech was not always so difficult. In fact, the Court started off solidly, defining commercial speech as that which “does no more than propose a commercial transaction.”¹²¹ However, the Court watered down this approach in subsequent cases.¹²² Unsurprisingly, lower courts apply the law inconsistently.

In *Nike, Inc. v. Kasky*,¹²³ the Supreme Court was asked to decide what degree of protection arguably political, noncommercial messages

117. *Id.* at 437-38.

118. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

119. *Id.* at 768 (quotation and citation omitted).

120. *Id.* at 783.

121. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

122. *See Central Hudson*, 447 U.S. at 561 (noting that “expression related solely to the economic interests of the speaker and its audience” is commercial speech); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (explaining that the Court defined “a somewhat larger category” of speech as commercial in *Central Hudson*); *United States v. United Foods*, 533 U.S. 405, 409 (2001) (commercial speech is “usually defined” by the “no more than” test); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (finding yet another “combination” of factors).

123. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

communicated through the shoemaker's press releases, letters, and promotional materials should receive. The Supreme Court previously held that commercial speech "inextricably intertwined with otherwise fully protected speech" should receive the protections granted other public dialogue.¹²⁴ However, after granting certiorari and hearing arguments, the Court dismissed the case, citing procedural and jurisdictional problems.¹²⁵

Dismissing the case affirmed the California Supreme Court's "highly criticized"¹²⁶ decision,¹²⁷ which established an expansive view of commercial speech. The Supreme Court's dodge opened the door to litigation against corporations in California stemming from "virtually any statement made by a commercial enterprise concerning itself, or its products and services, that likely will be heard by, or repeated to, potential customers."¹²⁸ Furthermore, by leaving California's interpretation of *Kasky* untouched, the Supreme Court let stand a clouded picture of what exactly constitutes commercial speech. For example, California's Supreme Court saw Nike's press releases, which were probably best categorized as policy statements imparting a business point of view, as commercial speech deserving less protection than political communications. Other courts likely would have, and now will continue to, interpret the facts differently. As one commentator noted: "The case law has a schizophrenic quality when it comes to factoring in whether a commercial purpose affects the degree of First Amendment protection given to expression."¹²⁹

Kasky disappointed commercial speakers and First Amendment observers who hoped the Supreme Court would expand—or at least more meticulously define—its interpretation of what constitutes commercial speech. Justice Breyer summed up those feelings in his dissent: "[T]he questions presented [in *Kasky*] directly concern the freedom of Americans to speak about public matters in public debate. . . and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on."¹³⁰

124. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

125. *See Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

126. Bruce E.H. Johnson, *First Amendment Commercial Speech Protections: A Practitioner's Guide*, 41 *LOY. L.A. L. REV.* 297, 297 (2007).

127. *See Kasky v. Nike, Inc.*, 119 Cal. Rptr. 2d 296 (2003).

128. BRODY & JOHNSON, *supra* note 101, at 2-23.

129. David Kohler, *At the Intersection of Comic Books and Third World Working Conditions: Is It Time to Re-Examine the Role of Commercial Interests in the Regulation of Expression?*, 28 *HASTINGS COMM. & ENT. L.J.* 145, 149 (2006).

130. *Nike, Inc. v. Kasky*, 539 U.S. at 667.

IV. Commercial Speech Under the European Convention on Human Rights

It was not the ECtHR that established the commercial speech test or its method of judicial application;¹³¹ rather, Article 10(2) sets the criteria for evaluation of all restrictions on expression, whether commercial or not. To a certain extent, it is true that “[d]ifferent tests are not used for different types of expression”¹³² in Article 10, at least not to the same degree as they are in the First Amendment jurisprudence of the U.S. Supreme Court. Indeed, there is not a distinctive “commercial speech” doctrine in ECtHR case law like the one of the U.S. Supreme Court.¹³³ As in U.S. free speech law, however, commercial speech receives less protection than noncommercial speech in the case law of the ECtHR.

A. Margin of Appreciation in Regulation

For example, the European court is usually more willing to accept the regulation of advertising than it is to accept the regulation of noncommercial speech. In that respect, its doctrinal approach to advertising law is largely similar to that of the U.S. Supreme Court. Furthermore, the different degree of the “margin of appreciation”¹³⁴ under Article 10(2) illustrates a judicial discrimination against commercial speech.

131. Karic Hollerbach, “Expression Here and Abroad: A Comparative Analysis of the U.S. Supreme Court’s and the European Court of Human Rights’ Commercial Speech Doctrines,” presented at the annual meeting of the International Communication Association, Marriott Hotel, San Diego, CA (May 27, 2003), available at http://www.allacademic.com/meta/p111960_index.html.

132. *Id.*

133. ERIC BARENDT, *supra* note 1, at 460.

134. The doctrine of “margin of appreciation” allows the governments of the ECHR member states some discretion, subject to the ECtHR supervision, in balancing freedom under the ECHR with conflicting interests such as reputation, privacy, and the right to a fair trial. This doctrine was first articulated by the ECtHR in *Handyside v. United Kingdom*:

In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. . . . Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed

X and Church of Scientology v. Sweden,¹³⁵ the first commercial speech case under the ECHR, is a good example. This 1979 case involved an injunction against the Swedish Scientology Church's certain misleading statements in advertising a device called the E-meter.¹³⁶ In adjudicating the statements at issue in the E-meter advertisement, the European Commission of Human Rights¹³⁷ made a distinction between informational or descriptive advertisements about a religious faith and commercial advertisements that offer products for sale. Thus, when religious advertisements promote the sale of goods for commercial purposes, they are not for dissemination of religious beliefs.¹³⁸ According to the Commission, because the advertisements challenged aimed to persuade people to buy the E-meter, it was commercial.¹³⁹

On whether the Swedish government had authority to restrict the Scientology Church's freedom of expression, the Commission held that the necessity requirement of Article 10(2) must be interpreted less

by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force...

Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court...

Handyside v. United Kingdom, 1 Eur. Ct. H.R. (Ser. A) 737, 753-54 (1979).

135. *X and Church of Scientology v. Sweden*, App. No. 7805/77, Eur. Comm'n H.R. Dec. & Rep. 511 (1979). For a discussion of the *Scientology* case, see Randall, *supra* note 18, at 60-61.

136. The E-meter was "an electronic instrument for measuring the mental state of an individual" especially after confession to determine "whether or not the confessing person has been relieved of the spiritual impediment of his sins." *Church of Scientology*, at 513.

137. Before the new European Court of Human Rights came into operation in November 1998 as a replacement for the part-time European Court of Human Rights and the European Commission of Human Rights, the ECHR complaints were first examined by the Commission to determine their admissibility. Once the complaint was declared admissible, the Commission left the parties to settle it. If no settlement was forthcoming, it prepared a report on the facts and delivered an opinion on the merits of the case. Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission and/or any Contracting State could bring the case before the Court for a final, binding adjudication. Individuals were not entitled to bring their cases before the Court. See European Court of Human Rights: Historical Background, at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Oct. 5, 2008).

138. *Church of Scientology*, at 527.

139. *Id.*

strictly when commercial speech is restricted. It observed that most of the ECHR state parties have statutes for commercial speech to protect consumers from deceptive advertising.¹⁴⁰ Although commercial speech is not necessarily unprotected under the ECHR, the Commission held, "the level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned."¹⁴¹

The ECtHR's deference to the national authorities' measures against commercial speech was clear-cut in *Jacobowski v. Germany*,¹⁴² a 1994 case. Manfred Jacobowski was ordered by the German courts to desist from sending newspaper articles, along with a circular letter, that criticized a news agency, his former employer, in connection with his dismissal.¹⁴³ According to the German courts, Jacobowski, who had started a public relations agency, violated the 1909 Unfair Competition Act. Rejecting his challenge to the injunctive order, the German Constitutional Court found that the dissemination of his circular was not to discuss public issues but to promote his business interests and to improve his competitive position in the news market.¹⁴⁴

While accepting the German courts' assessment of Jacobowski's circular as an illegal unfair competition, the ECtHR did not consider the court order against him disproportionate. The European court emphasized that he could still continue to criticize his former employer by any other means, although he was prohibited from distributing the circular.¹⁴⁵

In a joint dissenting opinion, Judges Walsh, MacDonald, and Wildhaber rebuked the majority of the ECtHR for relying too deferentially on the German courts' finding of fact. "In so doing," the dissenting judges argued, "it gives an excessive significance to the doctrine of the margin."¹⁴⁶ There was little "competitive element" in Jacobowski's distributing those newspaper clippings already in the public with a note that they were fair. To inject "a preponderance of the competitive element" into Jacobowski's act is essentially to accept unfair competition law as a rule while delegating freedom of expression as an exception.¹⁴⁷

140. *Id.*

141. *Id.*

142. *Jacobowski v. Germany*, 19 Eur. Ct. H.R. 64, (1994).

143. *Id.* at 67-69.

144. *Id.* at 70.

145. *Id.* at 78.

146. *Id.* at 78. (Walsh, MacDonald & Wildhaber, joint dissenting opinion).

147. *Id.*

Meanwhile, the ECtHR addressed whether advertising is protected or unprotected expression. In *Casado Coca v. Spain*,¹⁴⁸ the Court stated unequivocally that Article 10, in guaranteeing freedom of expression to everyone, does not concern whether expression is profit-motivated or not.¹⁴⁹ It found that “Article 10 does not apply solely to certain types of information or ideas or forms of expression, in particular those of a political nature; it also encompasses artistic expression, information of a commercial nature . . . and even light music and commercials transmitted by cable.”¹⁵⁰ However, the ECtHR granted the national authorities a wide margin of appreciation in unfair competition and advertising.¹⁵¹

Meanwhile, the Court indicated its willingness to review the margin of appreciation more strictly when *truthful* advertising is subject to regulation. Advertising may be restricted to prevent unfair competition and misleading advertising. But the Court continued: “In some contexts, the publication of even objective, truthful advertisements might be restricted *Any such restrictions must, however, be closely scrutinized by the Court, which must weigh the requirements of those particular features against the advertising in question.*”¹⁵²

The ECtHR is wary of the chilling effect of the wider margin of appreciation on commercial speech and freedom of expression relating to debates of public concern. In *Hertel v. Switzerland*,¹⁵³ the injunction against a Swiss scientist in connection with a magazine article about his research was held to violate Article 10 of the ECHR. The article concerned Hans U. Hertel’s findings that food prepared in microwave ovens was harmful to health. The Swiss courts proscribed Hertel from speaking about the danger of microwave ovens to health and from using the image of death in publications and speeches on microwave ovens.¹⁵⁴ The Federal Court of Switzerland ruled that any scientist is “wholly free” to present his expertise in the academic community.¹⁵⁵ Where competition is involved and a research discovery is still in dispute, however, a scientist must not misuse his unconfirmed opinion “as

148. *Casado Coca v. Spain*, 18 Eur. Ct. H.R. 1 (1994).

149. *Id.* at 20.

150. *Id.*

151. *Id.* at 23-24.

152. *Id.* at 24. (emphasis added).

153. *Hertel v. Switzerland*, 28 Eur. Ct. H.R. 534, 534 (1998).

154. *Id.*

155. *Id.* at 558.

a disguised form of positive or negative advertising” of his own work or the work of others.¹⁵⁶

In deciding whether they had a “pressing social need” to impose an injunction on Hertel, the ECtHR accorded the Swiss authorities some margin of appreciation.¹⁵⁷ This was especially the case with commercial matters in unfair competition, according to the Court.¹⁵⁸ Nonetheless, the margin of appreciation must be reduced “when what is at stake is not a given individual’s purely ‘commercial’ statements, but his participation in a debate affecting the general interest . . . over public health.”¹⁵⁹ To the Court, Hertel’s publication in a general-interest magazine was not a commercial advertisement but for a debate, which stood in sharp contrast with *Jacobowski*. Thus, the Court more carefully examined whether the Swiss authorities’ enforcement of the 1986 Unfair Competition Act accorded with the intended aim.

In balancing Hertel’s right to free speech with the interests of microwave oven makers, the ECtHR paid close attention to Hertel’s role—or lack thereof—in publishing the journal’s article about his research findings and to the tone of his research paper quoted in the article. Hertel had nothing to do with the editing, illustrating, or headlining of the journal’s article and his comments on microwave ovens were qualified. His only role in the journal’s article was that he sent a copy of his research paper to the journal editor.¹⁶⁰ Meanwhile, the Court could not detect any substantial adverse impact of the journal article on the sale of microwave ovens in Switzerland.¹⁶¹ So, it questioned the proportionality of the Swiss authorities’ measure to its intended objective. The Court held:

The effect of the injunction was thus partly to censor the applicant’s work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.¹⁶²

B. *Professional Advertising: Variable Protections*

In connection with lawyer advertising at issue, the ECHR in *Casado Coca* emphasized that “the rules governing the profession, particularly

156. *Id.* at 558-559.

157. *Id.* at 571.

158. *Id.*

159. *Id.*

160. *Id.* at 573.

161. *Id.*

162. *Id.*

in the sphere of advertising, vary from one country to another according to cultural tradition”¹⁶³ and that they change in most ECHR member states with varying degrees.¹⁶⁴ Hence, the complex nature of the lawyer advertising regulations place the national authorities in a better position than the ECtHR to balance the conflicting interests involved.¹⁶⁵ Significantly, however, the Court implied that restrictions on lawyer advertising would be more strictly reviewed in the post-*Casado Coca* years if the advertisement rules in the ECtHR nations are liberalized and lawyers are given greater freedom in advertising.¹⁶⁶

In an earlier *professional* commercial speech case, *Barthold v. Germany*,¹⁶⁷ the ECtHR found an Article 10 violation in an injunction a German court ordered against a veterinary surgeon for what he said in a newspaper interview that discussed after-hours services. A veterinarians’ association charged the veterinarian with a violation of the Rules of Professional Conduct and the Unfair Competition Act, where in its view, the veterinarian sought publicity for his own clinic.¹⁶⁸

The ECtHR said that the German restrictions on professional publicity and advertising violated the free speech rights of the members of professional veterinarians, and the watchdog role of the news media. Noting the crucial role of the press in a democratic society, the Court stated that “[t]he injunction . . . does not achieve a fair balance between the . . . interests at stake.”¹⁶⁹ The Court further held:

A criterion as strict as this in approaching the matter of advertising and publicity in the liberal profession is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.¹⁷⁰

Similar to *Barthold*, the 2003 case of the ECtHR, *Stambuk v. Germany*,¹⁷¹ arose from the publication of a newspaper article about an

163. 18 Eur. Ct. H.R. (Ser. A) at 24.

164. *Id.* at 25.

165. *Id.*

166. *Id.* Noting the “material time” relevant to its judgment, the ECtHR held that the authorities in Spain did not overstep their boundaries in regulating the lawyer advertising.

167. *Barthold v. Germany*, 7 Eur. Ct. H.R. (Ser. A) 383, 383 (1985).

168. *Id.* at 388.

169. *Id.* at 404.

170. *Id.*

171. *Stambuk v. Germany*, 37 Eur. Ct. H.R. 845, 848 (2003).

ophthalmologist, Dr. Miro Stambuk. The article concerned Stambuk's new laser operation technique, and his success and experience with it.¹⁷² Stambuk was fined for violating a law banning medical doctors from advertising.¹⁷³ The German courts stated that the German law prohibited medical practitioners' cooperation with the news media "to the extent that publications had an advertising character" because news stories could disguise their advertising nature and thus could circumvent the advertising ban.¹⁷⁴

The ECtHR ruled that the punishment against Stambuk for having broken the professional rule on advertising infringed the ECHR.¹⁷⁵ Drawing on *Casado Coca*, the Court noted that advertising enables citizens to learn about the characteristics of services and goods offered to them and that restrictions on truthful advertising "must...be closely scrutinized."¹⁷⁶ Whereas the strict standard of review did not apply to lawyer advertising in *Casado Coca*, it applied to doctor advertising in *Stambuk*. The ECtHR explained that when compared to the legal profession, the medical profession does not lack common ground among Member States relating to the professional principles or a need to consider the diversity of moral conceptions that would warrant a wide margin of appreciation to the national authorities.¹⁷⁷

In weighing the medical profession's rules of conduct against the public's legitimate interest in information, the Court limited the applicability of the rules to the extent they preserve the profession's well-functioning status.¹⁷⁸ The Court warned against interpreting the rules in such a way as to "put[] an excessive burden on medical practitioners to control the content of press publications."¹⁷⁹ The balancing process, the Court held, should factor in the "essential function" of the press, whose duty in a democratic society is "to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest."¹⁸⁰

Applying the balancing test to the facts in the case, the ECtHR found that the news story about Stambuk informed the public on a matter of

172. *Id.*

173. *Id.*

174. *Id.* at 849.

175. *Id.* at 845.

176. 18 Eur. Ct. H.R. (Ser. A) at 24.

177. 37 Eur. Ct. H.R. at 854.

178. *Id.*

179. *Id.* at 845.

180. *Id.*

general medical interest and it was published “in a language and manner of presentation destined to inform a general public.”¹⁸¹ The Court considered the article balanced and Stambuk’s statements in the article accurate. While acknowledging the article’s effect of publicizing his practice as a medical doctor, the Court held it secondary when compared with the article’s principal content.¹⁸²

C. *Balancing Test for Injunction on Advertising*

In its leading but controversial commercial speech case, *Markt Intern & Beermann v. Germany*,¹⁸³ the ECtHR was less than analytical in applying the balancing test in commercial speech. This 1990 case led the Court to rule on an injunction imposed on a publishing firm, Markt Intern, and its editor-in-chief, Klaus Beermann. Markt Intern and Beermann tried to promote the interests of small-and medium-sized retail businesses against competition of large-scale distribution companies. They were sanctioned for publishing an article in their weekly newsletters that was critical of the business practices of an English mail-order firm, Cosmetic Club International. They were ordered not to repeat the statements published in their newsletter.¹⁸⁴ Although Markt Intern was not a competitor against the Club, the German courts held that the publishing firm had violated the 1909 Unfair Competition Act, because its publication disadvantaged the Club while advancing the interests of its competitors.¹⁸⁵ In embracing the interests of the Club’s competitors while attacking the Club’s commercial interests, Markt Intern did not act as an organ of the press.¹⁸⁶

The European Commission of Human Rights ruled 12 to 1 that Germany had violated Markt Intern’s right to free speech under the ECHR.¹⁸⁷ Nonetheless, the ECtHR disagreed with the Commission. In its 10-9 opinion, the Court adopted the German courts’ reasoning in toto: Markt Intern’s newsletter at issue was not directly aimed at the general public but focused on a limited circle of traders conveying information of a commercial nature.¹⁸⁸ Recognizing a wide margin of appreciation for the national authorities in advertising regulation, the Court said:

181. *Id.* at 855.

182. *Id.*

183. *Markt Intern & Beerman v. Germany*, 12 Eur. Ct. H. R. (Ser. A) 161, 161 (1990).

184. *Id.* at 164.

185. *Id.* at 167.

186. *Id.*

187. *Id.* at 171.

188. *Id.*

Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.¹⁸⁹

Interestingly, the European human rights court recognized the important role of the “specialized” press such as Markt Intern in a market economy in which criticism of business practices is inevitable. In order to closely scrutinize a company’s commercial strategy and its consumer commitments, the Court noted, “the specialized press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.”¹⁹⁰

Nonetheless, the Court refused to accept truth as a justification for protecting commercial speech. It observed that the right of privacy and the confidentiality of information sometimes outweigh publication of accurate commercial advertising. Further, the Court emphasized the context of supposedly truthful advertising:

[A] correct statement can be and often is qualified by additional remarks, by value judgements, by suppositions or even insinuations. It must also be recognized that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. All these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.¹⁹¹

It is not entirely clear how privacy and confidentiality were relevant to the central issue in the case. Indeed, the ECtHR rarely applied its stated standard to the facts. Rather, the Court made clear that because of the national authorities’ wider margin of appreciation in advertising regulation, it should respect the national courts’ determination of whether to permit or disallow advertising if based on “reasonable” grounds.¹⁹²

The dissenting opinions, whether joint or individual, were strenuous. The joint dissent, to which eight judges signed on, considered whether the Article 10 standard was satisfied in the case. The dissenting judges found no “convincing” proof that the measures taken against Markt In-

189. *Id.* at 174.

190. *Id.* at 175.

191. *Id.*

192. *Id.* at 176.

tern were necessary.¹⁹³ They considered freedom of expression as important to commercial activities as it is to the conduct of government leaders.

The joint dissenting opinion noted that an economic interest does not deprive a person of his right to free speech. It stressed the value of the free flow of information to commercial transactions:

In order to ensure the openness of business activities, it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. Consumers, who are exposed to highly effective distribution techniques and to advertising which is frequently less than objective, deserve, for their part too, to be protected, as indeed do retailers.¹⁹⁴

In this connection, the eight judges of the ECtHR pointed out that Markt Intern's exercise of its freedom of expression was "entirely normal" because its information was truthful.

The dissenting judges had strong reservations about the Court's unprecedented approach to the margin of appreciation because it will considerably restrict freedom of commercial expression. Also, they chided the Court for not supervising the state parties' conformity with the ECHR when it expressed its reluctance to reexamine the facts and circumstances of the case. Finally, the judges argued that in balancing the competing interests at stake, the Court failed to consider the legitimate interests of Markt Intern.¹⁹⁵

Judge Pettiti added his own individual opinion separate from the joint dissenting opinion. He went further than any other judge in arguing for an expanded freedom of expression for advertising, especially when prior restraint is imposed. Freedom of expression allows "only a slight margin of appreciation for the States," Judge Pettiti wrote, and censorship of the press is permitted in "only in rare cases."¹⁹⁶

To Judge Pettiti, the anti-censorship principle is particularly relevant to freedom of expression for commercial advertising and for challenging commercial and economic policy. For the State cannot claim to protect the "general interest" when it prohibits commercial speech because it simply defends "a specific interest."¹⁹⁷ Judge Pettiti asserted that the

193. *Id.* at 177. (Gölcüklü, J., Pettiti, J., Russo, J., Spielmann, J., De Meyer, J., Carrillo, J., Salcedo, J., & Valticos, J., dissenting, part I).

194. *Id.*

195. *Id.* at 177-78.

196. *Id.* at 178. (Pettiti, J., dissenting). Judge Pettiti noted the First Amendment and mentioned the case law of the United States, Canada, and France Supreme Courts with no case citations. *Id.* n.49.

197. *Id.*

government uses a fair competition or price law as a pretext for discriminating one group against another. He declared that freedom of expression “must be total or almost total” and that censorship should never be allowed even where commercial speech is restricted.¹⁹⁸ Only when advertisements are misleading or affect market competition unfairly, legal actions can be exceptionally used. Yet criminal prosecutions or civil proceedings are acceptable, not prior restraint, according to Judge Pettiti.¹⁹⁹

For Judge Pettiti, expanding the State’s margin of appreciation at the expense of free speech conflicts with the ECtHR case law and diverges from the Council of Europe’s work on the consumers’ access to communication technology. Most troublesome about various anti-competition and anti-trust laws is that the State seeks to limit free speech on the pretext of punishing economic infringements. The State’s legal proceedings are politically motivated or designed to safeguard “‘mixed’ interests (State-industrial).”²⁰⁰ Judge Pettiti has warned not to underestimate the economic pressure from various groups and laboratories.²⁰¹ He credits the freedom of the specialized economic press with protecting the general public from a dangerous medicine or substance.²⁰²

In his individual dissenting opinion, Judge De Meyer agreed with Judge Pettiti that the national authorities had no legitimate aim to justify their prohibition against publication of Markt Intern’s article. Judge De Meyer saw no “rights of others”²⁰³ to be protected by the State’s enforcement of the Unfair Competition Act of Germany because the challenged action defended only commercial interests.²⁰⁴ He also questioned the Court’s “re-examination” of the fact and circumstances of the case since the Court simply adopted the German courts’ disputed assessment.²⁰⁵

In a two-judge dissenting opinion, Judge Martens shared other judges’ rejection of the ECtHR’s ruling as incompatible with the ECHR on freedom of expression guaranteed even to “a partisan press organ.”²⁰⁶ His criticism of the majority opinion stands out from those of other

198. *Id.*

199. *Id.*

200. *Id.* at 179.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* (De Meyer, J., dissenting).

205. *Id.*

206. *Id.* at 180. (Martens, J., dissenting) (approved by MacDonald, J.).

dissenting judges in that it focused on the Court's burden-of-proof assumptions in weighing the conflicting interests under the law on unfair competition and in considering freedom of speech as an interest.

In comparing the German law on unfair competition with the ECHR on freedom of expression, Judge Martens pointed out that the German law is assumed to protect the *private* interests of the competitors and the ban on a company's publication of harmful criticism about its competitor is normal. Here, the person who publishes denigrating comments has to prove that his criticism is sufficiently grounded and falls within the "strictest" limits of the law.²⁰⁷

By contrast, according to Judge Martens, the assumption underlying freedom of expression is diametrically opposed. Freedom of expression is to serve the *general* interest, especially when the news media are involved, and it makes freedom to criticize the norm.²⁰⁸ Here the person who complains about the criticism has to establish that his claim is well-founded. Judge Martens argued that the Court must balance the general interest of the public and the individual interest of the party who claims to have been injured.²⁰⁹

As a result, to ask under the unfair competition law whether a news article is acceptable is to place a news media entity in a position that is "fundamentally different" from what it is entitled to under the ECHR, and it considerably restricts freedom of the press.²¹⁰ Judge Martens suggested that the Court ask whether the national authorities in a democratic society have to restrict the fundamental freedom of the press solely because a news article has promoted the specific economic interests of a particular trade.²¹¹ Applying this analysis to the fact in the case, Judge Martens wrote that there was no room for the margin of appreciation for the State because the assessment of the national authorities violated the ECHR freedom of expression.²¹²

Judge Martens also took issue with the proportionality of Germany's restriction on freedom of the press to the protection of the reputation of others. For proof should be convincing enough to establish that the Club's private interests were more important than the general interest of both the Markt Intern readers and the public to learn about the ongoing

207. *Id.*

208. *Id.*

209. *Id.* at 181.

210. *Id.*

211. *Id.* at 182.

212. *Id.*

struggle between small-and medium-sized retail businesses and large-scale distribution companies.²¹³

Comparative advertising cannot be subject to an injunction unless it is overbroad. The 2003 case of *Krone Verlag GmbH & Co. KG v. Austria (No. 3)*²¹⁴ is illustrative. The Salzburg edition of *Neue Kronenzeitung*, one of the daily newspapers owned by KG in Vienna, published an advertisement for subscriptions for the newspaper in which its monthly subscription rates were compared with those of another regional newspaper. The advertisement called the *Neue Kronenzeitung* the “best” local newspaper.²¹⁵ The Austrian courts issued an injunction against the *Neue Kronenzeitung* under Austria’s Unfair Competition Act.²¹⁶ The Linz Court of Appeal banned the newspaper from comparing its subscription prices with those of its competitor unless its comparison included the differences in their news reporting styles.²¹⁷

The ECtHR rejected the Austrian government’s measure against the *Neue Kronenzeitung* because its consequences would impact future advertising profoundly. Mandating inclusion of information about the differences between the compared newspaper in their news reporting styles, according to the Court, is “far too broad, impairing the very essence of price comparison.”²¹⁸

D. Political and Cause Advertising

“Cause advertising” is given more protection than purely commercial advertising under Article 10. In *Vgt Verein Gegen Tierfabriken v. Switzerland*,²¹⁹ an animal rights association wanted to run an advertisement on television to encourage people to eat less meat. The European Court reiterated a wider margin of appreciation for commercial speech.²²⁰ The Court held, however, that the animal rights film at issue was not commercial because it did not persuade the public to purchase a particular product, but it reflected controversial views relating to modern society.²²¹ Because the advertisement was political, the Swiss government’s discretion in restricting it was reduced.

213. *Id.* at 182-83.

214. *Krone Verlag GmbH & Co KG v. Austria*, 42 Eur. Ct. H.R. 578, 578 (2006).

215. *Id.* at 579.

216. *Id.* at 580.

217. *Id.*

218. *Id.* at 584.

219. *Vgt Verein Gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H.R. 159, 163 (2002).

220. *Id.* at 176.

221. *Id.*

The Court acknowledged a possibility that freedom of the broadcasting media will be curtailed at the expense of the public's right to information if powerful financial groups dominate commercial advertising on radio and television.²²² It considered pluralism in information and ideas essential to freedom of information in a democratic society. In this context, the Court said the audio-visual media should be guided by the principle of pluralism.²²³

The European Court concluded that the statutory prohibition of political advertising in Switzerland was supported by no "relevant and sufficient" reasons.²²⁴ It rejected the Swiss government's assertion that political advertising was prohibited from broadcasting media, but not in print media since "television had a stronger effect on the public on account of its dissemination and immediacy."²²⁵ The Court said the differential treatment of the broadcast and print media for political advertising was not particularly pressing.²²⁶

Further, the Court stated that the animal rights organization was not a financially powerful group that was committed to undermining the independence of the television broadcaster, unduly influencing public opinion, or endangering the equality of opportunity among the different forces of society.²²⁷ Instead of abusing a competitive advantage, the organization merely wanted to participate in an ongoing debate on animal protection.²²⁸

Four years earlier, the ECtHR also protected editorial advertising as political speech. In *Lehideux and Isorni v. France*,²²⁹ the Court, in a 15-6 ruling, found a violation of the ECHR in two Frenchmen's criminal conviction for publishing a newspaper advertisement.²³⁰ The advertisement in *Le Monde* defended the crimes of collaboration with Germany during World War II.²³¹ Without expressly addressing the issue of whether the advertisement was commercial, the Court treated it as the kind of historical debate that deserves strict scrutiny. The Court recalled that the ECHR protects not only information or ideas that are favorably received

222. *Id.*

223. *Id.* at 176-77.

224. *Id.* at 177.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Lehideux & Isorni v. France*, 30 Eur. Ct. H.R. 665, 665 (2000).

230. *Id.*

231. *Id.*

or regarded as a matter of indifference, but also to those that offend, shock or disturb.²³²

E. *Advertising on Electronic Media*

Religious advertisement on electronic media is subject to a wide margin of appreciation by national authorities. In a 2003 case, *Murphy v. Ireland*,²³³ the Irish Radio and Television Act was held compatible with the ECHR when it applied to a blanket ban on a pastor's advertisement for the screening of a religious video.²³⁴ When regulating speech on "intimate personal convictions," the state authorities can operate with more latitude, according to the ECtHR:

[T]here is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever-growing array of faiths and denominations. By reasons of their direct and contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended.²³⁵

In balancing the proportionality of the Irish authorities' measure against Murphy, the Court viewed the medium of his speech as an important factor. The Court stated the "audio-visual media have a more immediate and powerful effect than the print media."²³⁶ This led the Court to frame the central question in the case: Can religious advertising on the *broadcast* media be prohibited under the circumstances involved?²³⁷ The Court answered in the affirmative. To begin with, according to the State, the ECHR states appear to have no "clear consensus" on how to legislate the broadcasting of religious advertisements.²³⁸ Second, various laws of the ECHR nations on the broadcasting of religious advertising appear to have no "uniform conception" of what is required in protecting others against attacks on their religious beliefs.²³⁹

232. *Id.* at 683.

233. *Murphy v. Ireland*, 38 Eur. Ct. H.R. 212, 218 (2004).

234. *Id.* at 238.

235. *Id.* at 234.

236. *Id.* at 235.

237. *Id.*

238. *Id.* at 238.

239. *Id.*

The ECtHR in *Demuth v. Switzerland*²⁴⁰ also took into account the broadcast media's profound impact on society in upholding the Swiss government's denial of a license to Car Tv AG. Noting that Car Tv AG's primary purpose was to promote car sales, the Court observed that "in view of their [audio-visual media] strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programmes on offer."²⁴¹ When issuing broadcasting licenses, the national authorities may weigh pluralism in broadcasting to ensure the quality and balance of broadcasting programs.²⁴² The Court concluded that the licensing requirements of the Swiss Radio and Television Act did not exceed the margin of appreciation given to the Swiss government.²⁴³ The particular political circumstances in Switzerland compelled the authorities to consider sensitive political criteria such as cultural and linguistic pluralism.²⁴⁴

V. Discussion and Analysis

The theoretical underpinnings of the First Amendment to the U.S. Constitution and Article 10 of the European Convention are similar. Despite these similarities, they are textually distinguishable. The textual simplicity of the First Amendment could have contributed to unexpected detours in U.S. free speech jurisprudence, some of which might not dovetail with the ideals envisioned by the Amendment's framers.

Significantly, freedom of speech and freedom of the press in the First Amendment are treated as freedom of expression; for the most part, courts lump them together as one freedom, not two separate freedoms. This stands in sharp contrast to freedom of expression under Article 10 of the European Convention. Article 10 makes no textual reference to the press, as an institutional concept, for protection of its freedom. But the ECtHR reads freedom of the press into freedom of expression as distinct from freedom of speech.

Neither the First Amendment nor the ECtHR recognizes absolutism in freedom of speech. Rights balancing is an unending process for the U.S. Supreme Court and the ECtHR. As the commercial speech case law of the Supreme Court and the ECtHR indicates, it makes little

240. *Demuth v. Switzerland*, 38 Eur. Ct. H.R. 423, 433 (2004).

241. *Id.*

242. *Id.* at 434.

243. *Id.*

244. *Id.*

difference whether the constitutional guarantee of freedom of speech or of the press is textually qualified or unconditional.

Both the U.S. Constitution and the European Convention recognize the classical free speech values—*i.e.*, personal autonomy, discovery of truth, and democracy—as underpinning freedom of expression. Because the First Amendment and Article 10 substantially parallel each other on the recognized values of freedom of expression in a democratic polity, courts have interpreted them similarly. Insofar as commercial speech is concerned, the case law reveals an overall liberal trajectory with constant fine-tuning, depending on what theories sway the fact-specific balancing of interests. This is more pronounced in the U.S. Supreme Court rulings on commercial speech.

Judicial interpretations of commercial speech in Europe and the United States reflect the hierarchical approach to the social, political, cultural, and educational values assigned to various expressive activities. Courts grant commercial speech less protection than noncommercial speech, even if it constitutes truthful speech or advertises legal products and services. Significantly, however, commercial speech has been considered worthy of protection under the European Convention since it was first adjudicated 30 years ago, although the ECtHR allows more margin of appreciation to each country in regulating such speech.

The ECtHR's nondiscriminatory approach differs from the U.S. Supreme Court's categorical approach to commercial speech (leaving some forms of commercial speech out in the cold) and non-commercial speech (largely protected). Contrast the Supreme Court's rather flippant rejection of First Amendment protection of commercial advertising in *Valentine* with the ECtHR's encompassing statement in *Casado Coca* on the ECHR protection of commercial information.

The U.S. Supreme Court's pigeonhole approach to commercial speech has been reexamined in recent years. But the dichotomy underlying the Court's free speech jurisprudence on commercial advertising is still entrenched, albeit far less than before. It is true that protection for commercial speech is not only for the consumer but also the business entity as its source. Yet more often than not, the protection is discussed from the consumer's perspective, not the speaker's. In this regard, the Court's analyses often verge on paternalism.

On the other hand, the ECtHR is far more receptive to commercial speech as belonging to *both* the consumer and the speaker, especially when commercial speech is examined as a matter of freedom of the press. This makes the European Court's commercial speech jurisprudence intriguingly different from that of the U.S. Supreme Court. In

U.S. law on commercial speech, it rarely emerges as an important consideration whether an institutional news media is involved as the communicator of advertising or not. But the ECtHR pays close attention to the news media's watchdog role as a factor in assessing possible impact of the challenged government regulation on press freedom.

Further, when compared with the U.S. Supreme Court, the ECtHR's willingness to give State authorities more discretion to regulate advertising on broadcast media than print media. This is derived from the European countries' institutional commitment to pluralism in the mass media in general and in the electronic media in particular.

Another notable difference between the U.S. Supreme Court and the ECtHR relates to professional advertising. The U.S. makes little distinction between lawyer and doctor advertising as far as regulation of professional advertising is concerned. The European Court treats lawyer advertising differently from medical advertising. That is, lawyer advertising is subject to a wider margin of appreciation and, thus, to more restriction than doctor advising. According to the ECtHR, regulation of law practice varies more from country to country than regulation of medical practice.

Both Europe and the U.S. protect cause, or political, advertising more than purely commercial advertising. Often, in Europe the type of media involved in advertising can be a determining factor. That is, in Europe, religious advertising on television and radio is more likely to be regulated than non-religious advertising in non-electronic media. Religion remains an amorphous issue among the ECHR nations and broadcast media are regulated as a matter of State policy.

Nonetheless, mixed content speech, such as that at issue in *Nike v. Kasky* of the U.S. Supreme Court, will likely be protected by the ECtHR largely because Nike's speech will be viewed as part of an ongoing public debate about labor practices by global conglomerates. In this context, the European Court will apply a heightened scrutiny when examining the proportionality of the California law to its intended objective.

VI. Conclusion

As in other areas of free speech jurisprudence, commercial speech in U.S. law is more protected now than ever before. This is hardly surprising; commercial speech has become part of the free flow of information under the First Amendment, not only for the speaker but also for the consumer. But the U.S. Supreme Court has often acted inconsistently by applying a case-by-case approach, all while setting forth a seemingly

confusing four-prong commercial speech test. By contrast, the European Court of Human Rights has not adjusted its commercial speech judicial framework as often as the Supreme Court.

The common benchmark on commercial speech in the U.S. and the ECHR nations is that commercial speech is protected in varying degrees, but not as much as political speech. To this end, the U.S. Supreme Court's initial categorization of commercial speech as unprotected speech continues to color the nation's still evolving commercial speech doctrine. Meanwhile, the ECtHR's protection of commercial speech, whether more or less than that of the U.S. Supreme Court, largely hinges on how the "margin of appreciation" doctrine applies. The deferential attitude of the ECtHR toward the decisions of the national courts profoundly affects the extent to which commercial speech is protected or not protected.

Libel Tourism: A Transatlantic Quandary

Yasmine Lahlou*

Table of Contents

Introduction.....	199
I. The Origins of the New York Statute	201
A. The Proceedings in the High Court in England.....	201
B. The Proceedings in the U.S.	202
1. The Second Circuit Court of Appeals Certifies a Question to the New York Court of Appeals	202
2. The New York Court of Appeals Holds That New York Courts Lack Personal Jurisdiction Over Bin Mahfouz.....	204
II. Will the Newly Amended New York Long-Arm Statute Pass Constitutional Muster?.....	206
A. The New York State Legislature Amends the State’s Long-Arm Statute	206
B. The Impact of the Due Process Clause on the New York Amendment	207
III. A New Ground for Non-Recognition, Really?	210
A. The New Statute Adds a New Ground For the Non-Recognition of Foreign Judgments	210
B. The New Statute in Light of Past Precedents	211

Introduction

In 2004, three Saudi nationals sued a New York author and her U.S. publisher for defamation in England, which has libel laws that are favorable to plaintiffs, and obtained a default judgment against them. In reaction to this lawsuit, last year, the New York State Legislature adopted the Libel Terrorism Protection Act in order to “protect journalists and authors by declaring foreign defamation judgments unenforceable in New York unless the foreign defamation law provides, in substance and application, the same free speech protections guaranteed under our own Constitution, and by giving New York residents and publishers the

*Associate Clifford Chance US LLP. The author would like to thank Richard Winfield for his precious guidance.

opportunity to have their day in court here in New York.”¹ It was signed into law by Governor Paterson on April 28, 2008.

Libel tourism (or terrorism) has become the new battle ground of free-speech advocates. Libel tourism describes situations where plaintiffs who believe they have been defamed go forum shopping for the courts of a country that is more likely to allow their claims and award them high and dissuasive damages, irrespective of the tenuous nexus between the forum and the substance of the dispute. England has become the focus of the ire of free speech advocates because its courts have shown a willingness to give the benefit of the country's pro-plaintiff libel laws to foreign plaintiffs. Earlier last year, Igor Akhmetov, a Ukrainian businessman, sued a Ukraine-based English speaking newspaper, the *Kyiv Post*, in England for defamation. The plaintiff invoked the paper's 100 subscribers in England to justify the English court's jurisdiction. Fearing potential exposure under English law, the newspaper settled.² This year, Mr. Akhmetov also sued Obozrevatel (Observer), an internet news site that does not even publish in English, in an English court. Judgment was entered against the defendant, who did not appear in the proceedings.³

Plaintiffs have long sought out jurisdictions where defamation laws are favorable to their cases. English laws are particularly attractive in this regard and England has established a reputation as one of the friendliest forums for plaintiffs.⁴ The United States, on the other hand, has enthusiastically protected libel defendants based on the rights afforded under the First Amendment of the Constitution.⁵ A clear conflict arises where defamation judgments obtained in plaintiff friendly jurisdictions, such as England, are sought to be enforced in countries where freedom of speech is heavily protected, such as the United States. The New York Legislature reacted to exactly such a situation by enacting a law that broadens New York courts' authority to issue declaratory judgments that foreign libel judgments will not be enforced in New York if they violate the New York and U.S. constitutional standards of free speech.

This article will discuss New York's new statute, the Libel Terrorism Protection Act, and the dispute between a New York based journalist and a Saudi family that prompted the New York Legislature to

1. S. 6687-C, 2008 (N.Y. 2008).

2. *Hacks v. Beaks*, THE ECONOMIST, May 10, 2008, page 70.

3. *Hacks v. Beaks*, THE ECONOMIST, May 10, 2008, page 70.

4. Raymond W. Beauchamp, *England's Chilling Forecast: the Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3075 (2006).

5. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

adopt it. Part I of this article describes the origins of the act, which amended New York's long-arm jurisdiction statute and the provisions on non-recognition of foreign judgments.⁶ Part II of this article questions whether the new statute complies with the U.S. Constitutional Due Process. Finally, Part III of the article explores whether the act truly affords additional protection for the media industry.

I. The Origins of the New York Statute

In 2003, Bonus Books, a Chicago-based publisher, published a book authored by Rachel Ehrenfeld, *Funding Evil, How Terrorism is Financed—And How to Stop It* ("Funding Evil"), in which it is alleged that three Saudi businessmen, Khalid Salim Bin Mahfouz and his two sons, are amongst the main sponsors of Al Qaeda as well as other terrorist organizations. By December 2003, 23 copies of the book had been purchased in England through online retailers and an excerpt had been published on the ABC News website.

A. *The Proceedings in the High Court in England*

On January 23, 2004, Khalid Salim Bin Mahfouz's English counsel sent a cease-and-desist letter to Ehrenfeld in New York, asking her (i) to promise to the High Court in England that she would refrain from repeating similar allegations; (ii) to destroy or deliver to him all copies of *Funding Evil*; (iii) issue a letter of apology to be published at her expense; (iv) make a charitable donation; and (v) pay Khalid Salim Bin Mahfouz's legal costs in exchange for his agreement not to bring a defamation action against her.⁷ When Ehrenfeld did not accept the offer, the Bin Mahfouz sued both Bonus Books and Ehrenfeld in defamation before the High Court of Justice in England seeking injunctive relief and damages.⁸ Pursuant to an order of the English court, the Bin Mahfouz served papers upon Ehrenfeld at her New York City apartment on four occasions:

6. Legislation had been introduced during the previous Congress both in the United States House of Representatives and the United States Senate that sought to achieve the Libel Terrorism Protection Act's objectives. The legislation introduced in the House (H.R. 6146) sought to prohibit U.S. courts from enforcing foreign defamation judgments unless the court determines that the judgment was consistent with the First Amendment. The legislation introduced in the Senate (S. 2977) would enable a United States author or publisher sued for libel in a foreign court to collect treble damages in the United States if a court determined that the foreign plaintiff "intentionally engaged in a scheme" to suppress the defendant's First Amendment rights. Similar legislation is likely to be introduced by the new Congress. The House's Subcommittee on Commercial and Administrative Law held hearings on libel tourism on February 12, 2009.

7. Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).

8. *Id.*

October 22, 2004, December 30, 2004, March 3, 2005 and May 19, 2005.⁹ These communications all concerned the English action.

No defendant appeared before the English High Court, which, on December 7, 2004, entered a default order against Ehrenfeld and Bonus Books, providing for an award of damages and enjoining the further publication of the defamatory statements in England and Wales.¹⁰ On May 3, 2005, the court entered a second order declaring the allegedly defamatory statements false, setting damages at £10,000 for each of the three claimants, requiring Ehrenfeld and Bonus Books to publish an apology, mandating that the December 7, 2004 injunction remain in force and awarding plaintiffs their costs.¹¹

On December 8, 2004, a day after the English High Court had issued its first ruling, Ehrenfeld filed a lawsuit in the United States District Court for the Southern District of New York against Khalid Salim Bin Mahfouz, seeking a declaratory judgment that (i) Bin Mahfouz could not prevail on a libel claim against her under federal or New York law; and (ii) the English judgment would not be enforceable in the United States.¹² She complained, both in court and in the course of a media campaign, of the chilling effect such actions in England have on investigative journalists' ability to publish works on terrorism.¹³

After the district court dismissed the action for lack of personal jurisdiction against the defendant,¹⁴ Ehrenfeld appealed to the United States Court of Appeals for the Second Circuit.¹⁵

B. *The Proceedings in the U.S.*

1. THE SECOND CIRCUIT COURT OF APPEALS CERTIFIES A QUESTION TO THE NEW YORK COURT OF APPEALS

Ehrenfeld argued that New York courts had personal jurisdiction over Bin Mahfouz because (i) he had served her in New York with a letter stating his claims in the English proceedings; (ii) he had sent her letters and e-mails relating to the English case on at least six occasions; (iii) his representatives had served her in New York with papers pertaining to the English proceedings on four occasions; and (iv) he

9. *Id.*

10. Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB) at para. 21.

11. *Id.* at paras. 74-75.

12. Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641 (RCC), 2006 WL 1096816 at *2 (S.D.N.Y. April 26, 2006).

13. *Id.*

14. *Id.* at *3.

15. Ehrenfeld v. Bin Mahfouz, 489 F.3d 542 (2d Cir. 2007).

had sent her the English court's order by email and mail in New York.¹⁶ Ehrenfeld invoked two specific provisions of the New York long-arm jurisdiction statute to assert that courts in New York had personal jurisdiction against Bin Mahfouz,¹⁷ namely New York Civil Practice Law and Rules ("NY CPLR") sections 302(a)(3) and 302(a)(1).¹⁸

NY CPLR section 302(a)(3) allows the exercise of personal jurisdiction over a non-domiciliary when (i) a defendant commits a tortious act outside of the state of New York; (ii) the plaintiff's cause of action arises from that act; (iii) the act caused injury to a person or property within the state; (iv) the defendant expected or reasonably could have expected the act to have consequences in the state; and (v) the defendant derived substantial revenue from interstate or international commerce.¹⁹ The Second Circuit Court dismissed the application of that provision because Ehrenfeld did not allege that Bin Mahfouz had committed any tort.²⁰

NY CPLR section 302(a)(1) confers jurisdiction over a non-domiciliary defendant who "in person or through an agent ... transacts any business within the state" so long as the cause of action arises out of the defendant's New York transactions. The district court had held it lacked personal jurisdiction under section 302(a)(1) because Bin Mahfouz's communications to Ehrenfeld in New York regarding the English action and the web site postings, "however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective."²¹

The Second Circuit noted that under New York law, a non-domiciliary transacts business in New York "by fully avail[ing] [him or herself] of the privilege of conducting activities within the ... State, thus invoking the benefits and protections of its laws."²² Courts applying section 302(a)(1) have held that (i) a non-commercial activity may qualify as the transaction of business;²³ and (ii) a single transaction may suffice to invoke jurisdiction "even though the defendant never enter[ed] New York, so long

16. *Id.* at 548-49.

17. A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits, pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002).

18. *Ehrenfeld*, 489 F.3d at 545.

19. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210 (NY 2000).

20. *Ehrenfeld v. Bin Mahfouz*, 489 F.3d 542, 551 (2d Cir. 2007).

21. *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 at *4.

22. *Ehrenfeld*, 489 F.3d at 548 (citing *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967) quoting *Hanson v. Deckla*, 357 U.S. 235, 253 (1958)).

23. *Ehrenfeld*, 489 F.3d at 548 (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 709 & n. 19 (2d Cir. 2003)).

as the defendant's activities [in New York] were purposeful and there is substantial relationship between the transaction and the claim asserted."²⁴ However, a single cease-and-desist letter sent to a New York resident in an attempt to settle legal claims was found to be insufficient to justify the New York courts' personal jurisdiction against out-of-state defendants.²⁵

Considering however that (i) no New York court had ever assessed whether Bin Mahfouz's alleged contacts with New York were sufficient under New York law to justify asserting personal jurisdiction against a non-domiciliary,²⁶ and (ii) the issue (a) was significant, (b) implicated the State of New York's public policy and (c) was likely to repeat itself,²⁷ the Second Circuit certified to the New York Court of Appeals, the highest court in New York, the following question: whether section 302(a)(1) of the New York's long-arm statute confers personal jurisdiction over the defendant?²⁸ In the same decision, the Second Circuit Court affirmed the District Court's holding that section 302(a)(3) was not applicable.²⁹

2. THE NEW YORK COURT OF APPEALS HOLDS THAT NEW YORK COURTS LACK PERSONAL JURISDICTION OVER BIN MAHFOUZ

At the outset, the Court of Appeals insisted that it was "called upon to decide a narrow issue"³⁰ and "however pernicious the effect of [libel tourism] may be, our duty here is to determine whether defendant's New York contacts establish a proper basis for jurisdiction under C.P.L.R. 302(a)(1)."³¹

The Court of Appeals first insisted that to assert personal jurisdiction against a non-domiciliary who allegedly transacted business within New York, "[t]he overriding criterion' necessary to establish a transaction of business is "some act by which the defendant purposefully

24. *Ehrenfeld*, 489 F.3d at 548 (citing *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997)).

25. A cease-and-desist letter and subsequent communications used to secure further investments in New York by the recipient may be sufficient to find personal jurisdiction. *Ehrenfeld*, 489 F.3d at 548 (citing *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997)).

26. *Ehrenfeld*, 489 F.3d at 549.

27. *Ehrenfeld*, 489 F.3d at 549.

28. *Ehrenfeld*, 489 F.3d at 551. Under New York law, "whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative question of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals." N.Y. Comp. Codes R. & Regs. Tit. 22, § 500.27(a) (2006).

29. *Ehrenfeld*, 489 F.3d at 551.

30. *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 833 (N.Y. 2007).

31. *Id.* at 834.

avails himself of the privilege of conducting activities within [New York.]”³² The Court of Appeals found that none of Bin Mahfouz’s contacts “invoked the privileges or protections of [New York] laws. Quite to the contrary, his communications in this state were intended to further his assertion of rights under the laws of England. As defendant points out—and plaintiff does not dispute—his prefiling demand letter and his service of documents were required under English procedural rules governing the prosecution of defamation actions. And in none of his letters to plaintiff did defendant seek to consummate a New York transaction or to invoke our State’s laws.”³³

The Court of Appeals dismissed Ehrenfeld’s argument that Bin Mahfouz’s refusal to waive his right to enforce the English judgment constituted a purposeful availment of New York laws.³⁴

Finally, Ehrenfeld sought to invoke the holding of the Ninth Circuit Court of Appeals³⁵ in *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*.³⁶ In that case, the Ninth Circuit found it had personal jurisdiction to issue a declaratory judgment against two French civil rights groups who had obtained French court orders against Yahoo! Inc., a California-based internet service provider, that the French court orders were unenforceable in the U.S.³⁷ The New York Court of Appeals dismissed Ehrenfeld’s argument because California’s long-arm statute is coextensive with federal due process requirements whereas “[the New York Court of Appeals has] repeatedly recognized that New York’s long-arm statute ‘does not confer jurisdiction in every case where it is constitutionally permissible.’”³⁸ The Ninth Circuit had relied on the effects of the French defendants’ conduct in California.³⁹

32. *Id.* at 834 (quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967)).

33. *Ehrenfeld*, 881 N.E.2d at 835.

34. *Id.* at 836. According to Ehrenfeld, the “‘future New York contact’ of potential enforcement is ‘crucial’ to finding jurisdiction over the defendant” because (i) the judgment could only be enforced in New York, where Ehrenfeld resides and has all her assets, (ii) the threat of enforcement allegedly led her to decline to publish certain articles and conform her statements to the English libel law; (iii) certain publishers have declined to publish her work for unspecified reasons; and (iv) the English judgment requires her to take action—issue an apology and prevent leakage of the defamatory statements into England and Wales—in New York.

35. *Id.* at 837.

36. *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199, 1224 (9th Cir. 2006).

37. *Id.* at 1224. In that case, however, the Ninth Circuit dismissed the action for lack of ripeness.

38. *Ehrenfeld*, 881 N.E.2d at 837 (quoting *Kreutter v. McFadden Oil*, 71 N.Y.2d 460, 471 (1988)).

39. *Yahoo! Inc.*, 433 F.3d at 1209

The New York Court of Appeals noted that, in tort actions, NY CPLR section 302(a)(3) specifically subjects out of state domiciliaries to personal jurisdiction in New York where their out of state conduct has had an effect in New York state.⁴⁰ Since the New York statute only permitted reliance on the effects test under section 302(a)(3), the Court of Appeals held that using “such an effects test [under section 302(a)(1)] ‘would be an unwarranted extension of [that provision] and a usurpation of a function more properly belonging to the Legislature.’”⁴¹

The New York Court of Appeals therefore held that section 302(a)(1) did not confer personal jurisdiction against Bin Mahfouz and answered the certified question in the negative.⁴² The Second Circuit subsequently affirmed the District Court’s decision in its entirety and dismissed Ehrenfeld’s action.⁴³

II. Will the Newly Amended New York Long-Arm Statute Pass Constitutional Muster?

While the proceedings were pending in the United States courts, New York Senator Dean Skelos⁴⁴ and Assemblyman Rory I. Lancman sponsored the Libel Terrorism Protection Bill.⁴⁵

The bill was signed into law by New York State Governor Paterson on April 28, 2008.⁴⁶

A. *The New York State Legislature Amends the State’s Long-Arm Statute*

Heeding to the Court of Appeals’ invitation that any expansion of the New York long arm jurisdiction statute be done only through legislative intervention, the New York State Legislature amended the scope of that

40. *Ehrenfeld*, 881 N.E.2d at 838 (quoting *Ferrante Equip. Co. v. Lasker-Goldman Corp.*, 26 NY2d 280, 286 (1970)).

41. *Ehrenfeld*, 881 N.E.2d at 838.

42. *Id.*

43. *Ehrenfeld v. Mahfouz*, 518 F.3d 102, 106 (2d Cir. 2008). In the same decision, the Second Circuit Court dismissed Ehrenfeld’s claim that the Court of Appeals’ interpretation of section 302(a)(1) violated the First Amendment on the ground that her failure to raise this issue in prior proceedings amounted to a waiver of the claim.

44. S. 6687-C, 2008 (N.Y. 2008), <http://public.leginfo.state.ny.us/menugetf.cgi> (Bill Number: S6687, Year: 2008)

45. A. 9652-C (N.Y. 2008), <http://assembly.state.ny.us/leg/?bn=A09652>

46. *Id.* Dr. Ehrenfeld has not re-filed her lawsuit against Mr. bin Mahfouz. Her counsel informed the author that they are waiting to see what, if any, federal legislation is enacted.

statute by adding a new section, N.Y. C.P.L.R. section 302(d), titled “Foreign Defamation Judgment,” which provides:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person’s liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter [providing grounds for non-recognition of foreign country money judgments], to the fullest extent permitted by the United States Constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.⁴⁷

B. *The Impact of the Due Process Clause on the New York Amendment*

The United States Supreme Court held that a court may exercise personal jurisdiction over a defendant consistent with constitutional due process only if that defendant has “certain minimum contacts” with the relevant forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’.”⁴⁸ The “concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”⁴⁹

The new provision gives New York courts jurisdiction over a non-domiciliary for a declaratory action that the foreign libel judgment should not be recognized in New York on the grounds that the party seeking the declaratory judgment has assets in New York that “might be used to satisfy the foreign defamation judgment” or “may have to take actions in New York to comply with the foreign defamation judgment,” provided the publication at issue was made in New York.⁵⁰ The new statute’s almost exclusive reliance on the New York plaintiff’s contacts with New York may prove problematic.

47. N.Y. C.P.L.R. § 302(d) (2008).

48. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

49. *Realuyo v. Villa Abrille*, 32 Med.L.Rptr 1427, 1434 (S.D.N.Y. July 8, 2003) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 426, 477-78 (1985)).

50. N.Y. C.P.L.R. § 302(d) (2008).

Under the new statute, while the plaintiff's contacts with New York are manifest, the defendant's "minimum contacts" with the forum are less discernible. The wording of the new statutory provisions are better understood if read in light of the Ninth Circuit's decision in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*.⁵¹

In *Yahoo!* two French civil rights groups had obtained French court orders that required Yahoo! Inc. to prevent users of its French Web site from accessing certain Web pages that provided access to Nazi propaganda and paraphernalia.⁵² The orders required Yahoo! to alter its servers, located in California, under threat of a substantial monetary penalty.⁵³ In return, Yahoo! sued the French groups in federal court in California, seeking a declaratory judgment that the French orders were not enforceable or recognizable in the U.S. based on the orders' violation of Yahoo!'s First Amendment rights.⁵⁴ The Ninth Circuit found it had personal jurisdiction against the defendants on the basis of the effects in California of the French civil rights group's conduct in France.⁵⁵ Under California law, courts cannot exercise specific jurisdiction⁵⁶ against a non-resident defendant unless (i) the non-resident defendant has purposefully directed his or her activities or consummated some transaction with the forum or resident thereof or performed some act by which he has purposefully availed himself of the privilege of conducting activities in the forum, thereby invoking the benefits and privilege of its laws; (ii) the claim arises out of or relates to the defendant's forum-related activities; and (iii) the exercise of personal jurisdiction comports with fair play and substantial justice, *i.e.*, it must be reasonable.⁵⁷ For the Ninth Circuit, the first prong, which was determinative, could be

51. *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

52. *Id.* at 1202.

53. *Id.* at 1203.

54. *Id.* at 1201.

55. *Id.* at 1211. The Ninth Circuit dismissed the action for lack of ripeness, however. *Id.*

56. A non-resident may be subject to general or specific personal jurisdiction. If subject to general jurisdiction, which is available when the defendant has systematic and continuous contacts with the forum, the resident is amenable in the relevant U.S. forum for any cause of action, whether or not it arises out of the defendant's contacts with the forum. *Perkins v. Benguet*, 342 U.S. 437 (1952). If a nonresident defendant's activities within the forum state are less substantial, then courts may still exercise specific personal jurisdiction where the action arises out of or is related to the defendant's particular activities within the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

57. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

satisfied by purposeful availment of the privilege of doing business in the forum or by purposeful direction of activities at the forum or by a combination of both.⁵⁸ With respect to purposeful direction in tort cases, the Supreme Court in *Calder v. Jones* previously had upheld California courts' personal jurisdiction over defendants domiciled in Florida because "their intentional, and allegedly tortious, actions were expressly aimed at California."⁵⁹ The Ninth Circuit has interpreted *Calder* to impose three requirements: the defendant must have (i) committed an intentional act; (ii) expressly aimed at the forum; and (iii) causing harm that the defendant knows is likely to be suffered in the forum state.⁶⁰ The Ninth Circuit found that the first two requirements had been met in *Yahoo!* because the French plaintiffs' suit was expressly aimed at California since the French court orders required Yahoo! to "perform significant acts" in California.⁶¹ Although it found the third requirement more problematic since Yahoo! did not allege any specific way in which it had altered its behavior as a result of the French decisions, the court nevertheless determined that Yahoo! could potentially suffer harm in California. The court concluded that "considering the direct relationship between [the French groups'] contacts with the forum and the substance of the suit brought by Yahoo!, as well as the impact and potential impact of the French court's orders on Yahoo!, we hold there is personal jurisdiction" over the French defendants.⁶²

The Libel Terrorism Protection Act clearly adopted the *Yahoo!* court's characterization of the initiation of a lawsuit abroad against a United States resident as forum-directed activities. Under the New York statute, provided the publication at issue was made in New York, it is sufficient that the New York party (i) has assets in New York which might be used to satisfy the foreign defamation judgment or (ii) may have to take actions in New York to comply with the foreign defamation judgment, for a court in New York to assert personal jurisdiction against a non-domiciliary.⁶³

The first requirement is simply that the New York-based party have assets in New York. According to the Supreme Court, however, "[t]he unilateral activity of those who claim some relationship with a non-

58. *Yahoo! Inc.*, 433 F.3d at 1206.

59. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

60. *Yahoo! Inc.*, 433 F.3d at 1206 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004)).

61. *Yahoo! Inc.*, 433 F.3d at 1209.

62. *Id.* at 1211.

63. N.Y. C.P.L.R. § 302(d) (2008).

resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁶⁴ Without turning jurisdictional analysis on its head, New York litigants may face an uphill battle arguing that a non-domiciliary's defamation lawsuit abroad seeking monetary compensation for a tort suffered outside of New York would constitute a purposeful availment of the privilege of doing business in New York merely because (i) the alleged libel was published by the New York-based party in New York and (ii) the New York-based party has assets in New York.

The second requirement focuses on non-monetary remedies sought by the foreign plaintiff in the foreign court. The Ninth Circuit in *Yahoo!* held that securing a foreign decision requiring a California based party to perform specific acts in California satisfied the test requiring the existence of an intentional act expressly aimed at California and causing harm there.⁶⁵ It remains to be seen whether New York courts will determine that a lawsuit abroad directed at a US-based party constitutes purposeful availment of the privilege of doing business in New York. Does this mean that any foreign decision imposing some form of specific performance or injunction on a New York based party would constitute purposeful availment? This jurisdictional extension will undeniably raise novel questions for litigants.

In fact, in February, 2008, the chief administrative judge's Advisory Committee on Civil Practice, in a 20-to-2 vote, overwhelmingly urged the New York Legislature to defeat the libel tourism bill because of its potential conflict with the Constitution's due process clause and the defendant's lack of minimum contacts.

III. A New Ground for Non-Recognition, Really?

A. *The New Statute Adds a New Ground For the Non-Recognition of Foreign Judgments*

The Libel Terrorism Protection Act added a new ground for non-recognition of a foreign judgment, contained in N.Y. C.P.L.R. section

64. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

65. *Yahoo! Inc.*, 433 F.3d at 1209.

5304. It allows courts in New York not to recognize foreign money judgments if:

The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.⁶⁶

B. The New Statute in Light of Past Precedents

United States and New York courts generally enforce foreign-money judgments under principles of comity.⁶⁷ New York courts may refuse to recognize foreign judgments contrary to the forum's public policy.⁶⁸ With respect to foreign judgments affecting free speech, a court in New York held that it was required—not merely had the discretion—to refuse recognition of a foreign libel judgment repugnant to the First Amendment or the New York State Constitution: “if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and is deemed to be ‘constitutionally mandatory.’”⁶⁹

In *Bachchan v. India Abroad Publications Inc.*,⁷⁰ a New York state court refused to recognize an English libel judgment issued in favor of an Indian national, Bachchan, against the New York operator of a news service because English libel law did not meet the safeguards for the press enunciated by United States courts. Under English law, any published statement that adversely affects a person's reputation, or the respect in which that person is held, is *prima facie* defamatory; plaintiffs' only burden is to establish that the words complained of refer to them, were published by the defendant, and bear a defamatory meaning.⁷¹ Statements of fact are presumed to be false, placing upon the defendant the burden of proving justification, *i.e.*, that the matter is of public concern and the publication is for the public benefit, for the issue of truth

66. N.Y. C.P.L.R. 5304 (b) (8) (2008).

67. See *Hilton v. Guyot*, 159 U.S. 113 (1895); N.Y. C.P.L.R. 5302 *et seq.*

68. C.P.L.R. § 5304(B)(4).

69. *Bachchan v. India Abroad Publications*, 154 Misc.2d 228, 231 (N.Y. Sup. 1992).

70. 154 Misc. 2d 228 (N.Y. Sup. 1992).

71. *Bachchan*, 154 Misc.2d at 231.

to be brought before the jury.⁷² The court contrasted this with the requirement that for matters of public concern, the United States Supreme Court had held that the Constitution requires plaintiffs to prove (i) the falsity of the statement and (ii) the defendant's fault.⁷³ Further, while the U.S. Supreme Court required that a private figure plaintiff prove only simple negligence on the defendant's part, the New York Court of Appeals went even further and adopted a "gross irresponsibility" standard: "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."⁷⁴ The court in *Bachchan* concluded that the First Amendment protection "would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded by the U.S. Constitution."⁷⁵

In another case, relying on *Bachchan*, a federal court in New York refused to apply English law to a defamation claim brought by a Jordanian national against a New York based publisher because "establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants."⁷⁶

Thus, even before the New York Legislature adopted the new statute, courts in New York had refused to recognize foreign decisions or apply foreign laws deemed incompatible with the First Amendment protection of free speech. In fact, the existing protection was even stronger since the court in *Bachchan* held it had no discretion but had to refuse recognition of a decision violative of the First Amendment, whereas the Libel Terrorism Protection Act merely gives that discretion to the courts.⁷⁷

72. *Id.*

73. See *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986). The Court had reasoned that placing the burden of proving truth upon the media who publish speech on matters of public concern would have a "'chilling' effect ... antithetical to the First Amendment's protection of true speech on matters of public concern[.]" *Id.* at 777.

74. *Bachchan v. India Abroad Publications*, 154 Misc.2d at 234 (quoting *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975)).

75. *Bachchan v. India Abroad Publications*, 154 Misc.2d at 235.

76. *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515 (LLS), 1994 WL 419847 (S.D.N.Y., May 4, 1994).

77. N.Y. C.P.L.R. 5304 (b) (2008).

One author has argued that American protection of free speech is not only stronger in comparison with the rest of the world, it is in fact exceptional⁷⁸ and the Libel Terrorism Protection Act does little to bridge that gap. Interestingly, the United Nations' Human Rights Committee issued a report on the United Kingdom, criticizing the English libel laws for discouraging "critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon of 'libel laws'."⁷⁹ The Committee called on the English government to consider (i) introducing the notion of a 'public figure' exception, requiring plaintiffs who are public officials and prominent public figures to prove the defendant acted with actual malice; and (ii) limiting the requirement that defendants reimburse a plaintiff's fees and costs.⁸⁰

78. Frederick Schauer, *The Exceptional First Amendment*, John F. Kennedy School of Government's Faculty Research Working Paper Series, RWP05-021, February 2005.

79. Human Rights Committee, Concluding Observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland, Ninety third session, CCPR/C/GBR/CO/6, 30 July 2008 at ¶25.

80. *Id.*



Defamation on the Internet—A New Approach to Libel in Cyberspace*

Yuval Karniel**

Table of Contents

Introduction.....	215
I. The Law and the Internet	217
II. Freedom of Expression in the Internet Era	218
III. The Nature of Freedom of Expression on the Internet	220
A. Should All Frivolous Speech on the Internet be Judged the Same?.....	221
IV. Defamation on the Internet: The Current law in Israel and Elsewhere	223
A. Should Present Day Defamation Laws Apply to the Internet?	223
B. Liability of Third Parties for Content Written by Others.....	224
V. The New Reality of Freedom of Information	230
VI. Reliable Information Along with Rumors	230
VII. A Proposal: A Different Law for the Internet	231
VIII. The Principle: Less Credibility Means Less Significance Accorded to Internet Speech.....	232
IX. Special Protection for Defamation on the Internet	234
X. Value and Dangers of the Proposal.....	236
Conclusion	238

Introduction

Over the years, the Internet has evolved into an alternate public arena, such as a street or coffee shop, a place where individuals, who until now lacked an appropriate venue to vent their frustrations and discontentment, can freely express themselves to masses of people simulta-

***Editors' Note:** A number of the sources cited in the article were unavailable in English and/or unpublished. Questions about these sources may be directed to the author at Y.Karniel@shibolet.com.

**Yuval Karniel is a senior lecturer at the Sammy Ofer School of Communications, Interdisciplinary Center (IDC) Herzliya.

neously. This paper posits that the spontaneous, free-for-all interactive nature of the Internet can be compared to conversations overheard on a street corner, bus or café. Just as one dismisses angry offensive speech heard on the street or subway, even though such speech in principle can be defined as defamatory, one should also disregard the publication of certain speech on the Internet.

After demonstrating that courts throughout the world, inclusive of Israel, consider the Internet an unreliable source of information where rumor and speculation abound, this author raises the novel proposition that speech on the Internet cannot, except under specific circumstances involving traditional mediums, be libelous due to the context in which it is written, namely the Internet itself. In the same fashion that name calling and crass remarks made by a street vagrant or spectator at a sports event are discounted by those who hear them as remarks made out of frustration and anger and therefore not taken seriously, so too should much of the speech published on the Internet.

This paper challenges the widely held assumption that all derogatory statements made on the Internet can trigger civil suits for defamation against the person making the statement or third parties such as service providers. Unless such remarks are published in reliable news or other closely monitored sites, this paper contends that they should be exempt from libel laws and either be formally incorporated in law as a defense to defamation or be explicitly removed from the definitions of defamation under law.

Slander and libel are an inescapable part of the Internet. Comprehensive research is unnecessary in order to recognize the tremendous extent of defamatory, offensive and derisive statements that compose a significant part of the discussions and statements made in talkbacks and other various forums on the Internet. This phenomenon exists all over the world and plays a significant and recognized role on leading sites in Israel.¹

Having been the recent target of these types of sentiments, this author began to explore the issue of defamation on the Internet and ended up with the hypothesis presented in this paper.

The statements about the author were made by two surfers² on the Nana News site in response to a news article about criticism leveled

1. The most common example is the discussions that take place on talkbacks on the Walla and YNet Israeli sites.

2. The responses were presented on January 31st and February 1st, 2005. The first was titled "Neither a doctor nor shoes" (deragatory hebrew slang which infers that I am not really a doctor) by Yigal S. The second "The Chairman of 'Keshev' suffers from inattentiveness" ('Keshev' means attentiveness in Hebrew) by Shimrit.

at the Israeli media by the Keshev Association.³ The investigation by Keshev criticized the Israeli media's coverage of the last days and death of Yasser Arafat. Since at one point this author served as Chairman of the Keshev Association, my name appeared in the report. Anonymous authors penned both responses. The statements attributed to me an affinity for Hitler, compared me to a "Kapo" (Jewish police who were reviled during the Holocaust era), and called me a traitor with all sorts of romantic ties to Hanan Ashrawi (a well known female Palestinian activist). They also determined that I did not hold an advanced degree but was a Palestinian in disguise.

I read these responses with a mixture of affront and amusement. While it was slightly insulting and even somewhat disturbing, it never once occurred to me to sue for defamation. Why?

To gain a better understanding of the issue, I began to write this paper.

I. The Law and the Internet

There is no doubt that if the defamatory statements would have appeared in another forum, such as a newspaper, radio or television broadcast or in a widely disseminated letter, my response would have been swift and unrelenting, consisting of a demand for a retraction or apology and even damages. My dispassionate attitude, however, derived from the fact that the statements were made anonymously in a talkback forum on the Internet in a format, where it is acceptable to speak in bitter, derisive and even degrading terms.

The Internet in general and the unfiltered anonymous speech on the Internet in particular, contains special features that demand an adaptation of the norms related to freedom of expression,⁴ defamation and at times the fine line drawn between them.

The Internet is a medium designed for use by individuals and therefore the customary societal norms should apply to it. On the other hand, the Internet is not identical to the traditional modes of medium acceptable in the Israeli media society and therefore a new set of norms should govern it.⁵ The Internet, in this sense, is located in another time and zone, with

3. Harun Athauko, *Report: Yellow Journalism and Instigation*, NANA NEWS (Isr.), Jan. 31, 2005, <http://news.nana10.co.il/Article/?ArticleID=170538&TypeID=1&sid=126&pid=48>.

4. Yuval Karniel, *Freedom of Speech on the Internet*, ALEI MISHPAT L. REV. 163 (1999).

5. YUVAL KARNIEL, LAWS OF THE COMMERCIAL MEDIA 177-186 (2003).

different architecture, and the discussions⁶ and journalism⁷ found on it may also be perceived as a separate culture necessitating other norms.

Should law apply to the Internet? Of course. Hardly anybody today subscribes to the romantic notion that the Internet is the modern Wild West,⁸ where rules and customs of an organized human society and state are inapplicable. There is no dispute that statements made on the Internet are subject to the law.

The more pertinent question is whether the Internet should be subject to existing law or whether existing laws should be modified to accommodate the new medium⁹ and whether new norms should be adopted for speech on the Internet. At least in the area of defamation¹⁰ the answer should be in the negative. Defamation law in its current configuration should not apply to all expression on the Internet especially since it is more suited to those expressions and the specific type of media that were prevalent prior to the Internet age. Applying defamation laws to various expressions on the Internet requires a process of study, adaptation or even a change of the existing law.¹¹

II. Freedom of Expression in the Internet Era

Freedom of expression is naturally dependent on culture, society, time and place.¹² It is also medium reliant and adapts with each type

6. See Yaacov Hecht, *The Struggle for Supremacy in the Online Content Market—the Case of Talkbacks*, ISRAELI INTERNET ASSOCIATION, Nov. 2003, (regarding the special nature of discussions in talkbacks), www.isoc.org.il/magazine/index.html.

7. There is an increasing amount of literature on the subject of the new discourse in online journalism. See, e.g., Amanda Mitra, *Marginal Voices in Cyberspace*, 1 NEW MEDIA AND SOCIETY, 29-48 (2001), <http://nms.sagepub.com/cgi/reprint/3/1/29>; P.J. Boczkowski, *The Processes of Adopting Multimedia and Interactivity in Three Online Newsrooms*, 54 JOURNAL OF COMMUNICATION 197, 197-213 (2004).

8. Yuval Dror, *From the Garden of Eden for Freedom to the Throes of Struggle*, 30 PANIM L. REV. 5, 5-11 (2004) (regarding the history of the Internet as a free place and the existing struggles for control).

9. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, (Basic Books 1999) (regarding the need to adjust the legal norms to the information age and the technology and software).

10. See Yuval Karniel & Ehud Nessimian, *Copyrights in the Information Age: The Need of a new balance between copyright and freedom of information*, ALEI MISHPAT C' L. REV. 191, 191-245 (200) (also in other areas, such as copyrights).

11. This was also done in a decision by the Chairman of the Central Elections Committee, Judge Mishaël Cheshin, of the Supreme Court of Israel, prior to the 2001 elections. Judge Cheshin held that the prohibition on election publicity applied to radio and television but not the Internet. In order to determine the question if the prohibition was applicable also to speech on the Internet, Judge Cheshin was forced to analyze the characteristics of the Internet, the differences between a publication on the Internet and one made in other mediums, as well as on freedom of expression. National Election Petition 16/2001 *Shas et al v. Pines* 55 (iii) PD 159.

12. See *The Yale Law Journal Symposium: Emerging Media Technology and the*

of medium. Freedom of expression in a telephone conversation among friends is not perceived in the same manner as freedom of speech on a television show aired on Israel's channel 2. This distinction is called the uniqueness of the medium, and exists in Israel as well as many other places around the world, led by the United States.¹³

In the past, freedom of expression was viewed in the abstract and as an aspiration. The ability to publicly air one's views was held by a select few. Theory did not reflect reality. Much rhetoric was expended on speaking and writing about the value of free speech but in actuality it was all about freedom of the press covering large media concerns, the rich and those in power. Workers unions, protesters or provocateurs that succeeded in reaching the masses, such as entertainers, actors, and singers, sometimes joined the ranks of the powerful and rich. Freedom of expression did not belong to the man on the street, the individual.

The past decade, the era of the Internet, changed the nature of free expression and the manner in which reality was represented in the media.¹⁴ The concept became tangible. For the first time since the Greek Agora, a town square has been created consisting of the larger public that enables true free speech for the public and individuals alike.¹⁵ Today, the voice of an individual is not necessarily quashed among the noise of the masses, nor is it condemned to remain between the sheets in the bedroom or the kitchen. Any person can easily use the tools made available by popular Internet sites and add their two cents worth to the most widely disseminated and read articles and news reports on leading sites. These messages quickly reach the broader surfer community and affect the entire discourse.¹⁶ Never did an individual citizen have such an accessible and effective tool of expressing himself in public.¹⁷

The true power and dangers inherent in free speech must now be confronted. The idea of free speech is no longer an abstract ideal, a general aspiration or rhetoric shared by philosophers and judges, but has been

First Amendment, 104 YALE L.J. 1611, 1611-1850 (1995) (for a broad and in depth study of the influence of technology on freedom of information).

13. Karniel, *supra* note 5, at 241-249.

14. See Weimann G, *Communicating Unreality: Modern Media and Reconstruction of Reality* (Thousand Oaks, Ca Sage, 2000) (regarding modern technology and the absence of boundaries and censorship on the Internet); Yuval Karniel, *Pornography on the Internet: How much should it be limited?* 5 PATUACH 215, 215-245 (2003).

15. See Shinar D, *Internet: An Anthology of Societal and Cultural Media* 5-38 (Open University 2001) (regarding the development of the Internet and its becoming a network for communications between individuals, along with it being a media for the masses).

16. Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 895 (2000).

17. See generally *Reno v. ACLU*, 521 U.S. 844 (1997).

transformed into a complex, sometimes merciless, daily reality on the Internet.¹⁸

III. The Nature of Freedom of Expression on the Internet

In order to understand the special characteristics of defamation on the Internet it is important to briefly review the factors that make up communication in open forums, chat rooms and at times talkbacks relating to public issues. The following are the main features¹⁹ of a significant number of expressions²⁰ that are prevalent on the Internet:

Immediacy—From a person's keyboard many times without any reviewing, checking, filtering or editing, directly to the personal computer screen and then to the world at large. A spontaneous process in the orientation of now.

International—Without geographical borders. The writer can be situated anywhere as can the audience and reader. The actual sovereignty of the location has very limited significance.

Anonymity—The use of a false name or no name. The level of anonymity is dependent on the technology and effort made by the writer in concealing his identity. Being anonymous is considered legitimate and acceptable on the Internet and is an integral part of the cyber culture.

Freely accessible—Accessible to any person, advertiser and consumer. Accessibility that is also interactive and free.

Intermediary and editor free—Without or with partial and superficial filtering. Lack of press intervention, no network, editor or any central supervising body.

Of course, the Internet also hosts regular online professional news and sites that are part of the traditional media from the previous era.²¹

18. See Anthony G. Wilhelm, *Democracy in the Digital Age* (Routledge 2000) (the influence of the new reality on democracy must still be evaluated over time).

19. See M. Birnhak, *Press Ethics on the Internet: Privacy, Freedom of Press, Power and Competition*, 5 PATUACH 173, 179 (2003) (the author claims that online press should not be governed by the rules of ethics of the Press Council which are relevant to the established and traditional press. His arguments relate mainly to actual online press and not only to anonymous expressions made in forums, chat rooms and talkbacks, which is the main focus of this paper).

20. See Amichai Yaacovi, *Nothing is More Boring than Tomorrow's Newspaper*, 30 PANIM L. REV. 22-27 (2004) (for features of the internet).

21. See generally Nava Cohen et al., *Model Turnover of the Natural Life Span of the Development of New Media: Struggles for Survival Among the Various Media in the Internet Era*, 5 PATUACH 64 (2003) (the development of various media on the Internet).

In actuality the majority of the media found on the Internet originates from traditional corporate media utilizing the new medium. In these cases the issue is not so much free and private expression on the Internet but online journalism, which is really just a new interface and format for established traditional journalism. The online press discloses the full identities of its writers and spokespersons and has mechanisms for intermediaries, filters and editing. This type of Internet journalism does not share many of the features described above and is similar to the established press and other electronic media. Therefore, this type of media should and can be governed by the existing rules applicable to it when it operates on the same grounds as print or broadcast journalism.²²

*A. Should All Frivolous Speech on the Internet
be Judged the Same?*

An argument can be made, and justifiably so, that the anonymous, general, emotional type of expression prevalent on the internet, actually differs from passing remarks made on the street, as it contains a greater propensity to cause harm. In fact, the Internet, and formats such as talk-backs, chat rooms and forums conveniently offer the individual a tremendous stage from which his voice can be heard. The stage acts as an amplifier for the speaker's message and enables the message to linger and be revisited and examined by an endless number of people. In this setting remarks are not simple exchanges of words between the obnoxious writer and the victim, but become part of a network that distributes the harmful material to many consumers who may be influenced by it. This difference causes some victims to feel that they cannot nor should simply ignore the defamatory remarks but must devote time, effort and money into locating the interlocutor and finding a way to sue him for their humiliation as well as damages.

In fact, while recognizing the nature of the relatively innocuousness of the spontaneous and anonymous speech on the Internet, I am also aware that not every statement expressed on every platform or under every circumstance on the Internet deserves the same treatment. This

22. This article does not discuss the differences between independent online press and online press which is really just another arm of traditional media. The two should definitely be distinguished one from the other especially in respect to the applicability of the rules of professional ethics. However this discussion deviates from the topic of this paper.

thesis is to point out that most of the hurtful utterances on the Internet lack any substantive power to harm. The victim, as soon as he views the defamation may be hurt, exactly in the same manner as a person who is cursed or degraded during an argument or an angry exchange of words. Nonetheless, in a large majority of cases, the harmful utterances lack any real punch other than to the victim. The chance reader perceives these utterances as expressions of anger or grudges held against the victim and not as a reliable fact that has the power to shape his perception of the world or of the victim.

My argument is not that these words don't have any impact at all. I believe the opposite to be true—that they do have an impact and may sometimes even constitute a positive contribution to knowledge, information or be construed as an interesting and unique concept. This author's assertion is however, that any resulting injury is generally slight and does not justify intervention by a judicial system.

Certainly, there are times where statements made on the Internet do not contain these features. Sometimes, the expression is not spontaneous or general or unemotional. Sometimes the publication is deliberate and specific with an intention to cause harm and it appears on formats that reach many people over time, for instance, important and influential blogs. These types of statements need to be examined in light of the general laws of defamation.

The protection for statements made on the Internet does not derive from a complete disregard for the devastating power they may contain, but from recognition that if one were to generalize about all these types of statements, their benefits would outweigh the possible injury they can cause. And the fact that today there is a new arena for free expression even if it is crude, critical and slanderous, can at times serve the right of the public to know, to bring additional information to their attention some of which requires further consideration such as a real investigation. The investigation in the long run must be conducted by reliable and identifiable sources such as the professional press, or other expert bodies. The imposition of full liability for defamation on every conjecture, cursing or irresponsible speech by anonymous speakers will obstruct the courts, and will only serve to restrict the new and interesting realm for freedom of speech that has recently been discovered.

The public, legal and technological acceptance of the challenge posed by practical freedom of expression on the Internet may be roughly divided into two separate categories. The first deals with prohibited speech under criminal law, mainly pornography and racism, which is

not discussed in this paper.²³ The second challenge, on which this article is based, is the act of balancing freedom of expression with the harm that may be caused to a person's reputation.²⁴

IV. Defamation on the Internet: The Current Law in Israel and Elsewhere

Discussions of defamation on the Internet can be divided into two categories. The first is whether existing defamation laws can apply to statements made on the Internet. The second, on which most of the discourse in this area is based, is whether third parties may be held liable for the harm. Namely, is a third party, such as an Internet service provider or website owner, liable for the publication of defamatory statements? This paper will briefly review these two issues as they have been resolved in recent years by jurists in Israel and throughout world.

A. *Should Present Day Defamation Laws Apply to the Internet?*

In my opinion, this is the most important question. It focuses on the entire essence of free expression on the Internet and the responsibility of the actual authors themselves. Any discussion of the responsibility of a third party can only be held after a determination is made to hold the original author responsible. For some reason this question has only merited partial response and little debate, and has not received the due attention that should be accorded to it. Discussions of this issue tends to focus on the technical literal parts of the offense of defamation and the interpretation of the various terms of the offense's definition.

In Israeli law, the technical question is whether content on the Internet can be considered a "publication" under the Defamation Law,²⁵ and if so, is it a "verbal" or "written" communication? These questions have not aroused much debate and Israeli courts have basically held that "the nature of publication on the Internet falls within the definition of "publication" under the law."²⁶ This was also the conclusion reached

23. See generally, Yuval Karniel & Haim Wismonsky, *Pornography, Community and the Internet: Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMPUTER & TECH. L.J. 105 (2004).

24. Many times the harmful and defamatory speech infringes privacy as well, and therefore they are interconnected with harm of reputation and privacy. This paper principally focuses on harm to reputation.

25. Article 1 (1) of the Defamation Law defines defamation as follows: "Defamation is a statement of publication of which may—(1) degrade a person in the eyes of another or make him a target of hatred, ridicule or scorn;"

26. Civil File (Petach Tikva) 6161/01 *Naomi Reichman v. Rami Yitzhar* (unpublished, issued on May 19, 2003).

by the professional commission that dealt with this issue at length.²⁷ In fact there is no reason why a statement on the Internet should not be considered a “publication” under the law, since in the present Defamation Law an unlawful statement can also be published by “any other means” (article 2(a) of the Law provides that “publication, for defamation purposes—whether verbal or written or printed including a drawing, likeness, movement, sound or any other means”).

I have not been able to locate any attempt at an analysis of the issue that forms the basis of this paper. Namely, if a statement made over the Internet can be defined as “defamation” does the statement have the requisite power to degrade a person so as to make him an object of hatred, scorn or ridicule in accordance with the definition in the law, or is there room to take into consideration the fact that the statement is made on the Internet when beginning to analyze this fundamental question? I believe that this type of general discussion has not taken place because defamation issues tend to be raised only when a specific incident of defamation takes place. Only when a statement is brought before the system for legal consideration is the question raised whether or not it falls within the definition of “defamation” under the law. The purpose of this article is to present the question on a general level and to create an additional special quasi defense, for spontaneous and anonymous publications made on the Internet, which generally would never qualify as “defamatory” statements.

Other issues that arise in the defamation context from court rulings around the world involve the question of applicable law, conflict of laws, and personal international law.²⁸ These issues for brevity's sake are not addressed in this paper.

B. *Liability of Third Parties for Content Written by Others*

The question of the responsibility of an Internet service provider for material authored by another person has become the central focus of every discussion dealing with defamation on the Internet. This question has become significant due to the anonymity quotient, which prevents in many cases direct access to the original author of the content. Any person

27. The Commission For the Investigation of Legal Issues in Connection with Electronic Commerce, page 49: “The definition of the term “publication” in the Defamation Law can also be applied to libel on the Internet, as can the other elements of the offense, by interpretation without the need to amend the law”. The Committee stated that it believed that publication on the Internet is a “written” publication, even in a chat room.

28. *See generally* Dow Jones v. Gutnick (2002) 210 C.L.R. 575 (Austl.) (comprehensive discussion on these topics).

who wishes to sue for defamation on the Internet finds himself having to pass through the access provider or the owner of the site in which the statements were made.²⁹ In many cases the intermediary (an internet service provider or service provider) refuses to disclose the identity of the original author. In all cases the service provider claims that he has no responsibility for statements made by another. Thus the issue of the liability of the service provider has become the key question. Supporters of freedom of speech on the Internet argue that the service provider should be provided with immunity or be exempt from responsibility. On the other side, advocates protecting the reputation of individuals believe that liability should be imposed on the service provider or at the very least obligate him to disclose the identity and particulars of the person who made the statement.

In Israeli law the question focuses on the interpretation of section 11 of the Defamation Law, 5725—1965. This section imposes liability for defamation, among others, on a person who does not create and publish the statements himself but was responsible for their publication through a “communications medium.” The section distinguishes between a journalist, editor and a person with decision making powers for the publication, all of whom bear full responsibility, and one who is responsible for a medium for whom only civil liability applies. The legal focus on the applicability of section 11 on the Internet revolves around the issue of whether the Internet or any site on it can be considered a “communications medium.” Other than one exception in the Tel Aviv Magistrates Court³⁰ Israeli case law holds that the Internet is not a “medium” and an Internet site is not necessarily a “newspaper.”³¹ The courts distinguish between a communications medium or a newspaper with an editor, guiding

29. An important question which will not be dealt with is whether for certain publications on the internet the owner of the site in which the statements were made could and should be viewed as the person who himself published the harmful statements. Generally there is a clear distinction between the person who created the content and the site that serves as a stage only. Even the courts in Israel tend to distinguish between the two and this is, *inter alia*, due to article 11 of the Defamation Law which clearly distinguishes between the creator of the content and one who makes the statement available for the public and causes its publication. Civil File (Tel-Aviv) 37692/03 Sudri v. Stelrid (from 1.8.05) page 6 of the printed copy.

30. Criminal File (Tel Aviv) 145/00 Weissman v. Golan (unpublished, 16.10.01).

31. Civil File (Kfar Saba) 7830/00 Borochoy Arnon v. Poran Elishi (unpublished issued on 14.7.02) and *Sudri*, at 7 where Judge Ruth Ronen stated that “the question whether an internet site is a “newspaper” is not free of doubts, when the internet has the features of a “newspaper”. Thus when discussing a site that has an editor, who selects and filters the content which is published in it.”

hand, with a purpose, objective and framework and an internet site which is more similar to a town square “in which passersby can express themselves freely.”³²

It is very interesting to examine the reasoning behind the courts finding that the Internet is not a “communications medium.” The court hangs the distinction on the question of the reliability of the publication and the faith of the public. In its opinion the public gives “serious consideration” to statements made in a newspaper, radio or television but does not give similar consideration to statements made over the Internet. On the Internet there is anarchy, everyone writes as they wish and therefore “there is no public resonance and tremendous apparent trustworthiness to what is said there.”³³

I would take this finding one step further and ask whether if the statements which appear on the Internet are not attributed any real significance, should a service provider be held liable for them, and there is room to reconsider the responsibility of the person who actually makes the statements? It is quite possible that the statements themselves are not serious enough to even constitute “defamation.” No court in Israel, or to my knowledge any other court or legislator in the world at large, has ever taken this extra step in logic. Nevertheless, in some countries, especially in the United States, full or partial immunity is granted to Internet service providers for defamatory statements made by third parties. This immunity reflects the way that freedom of speech can be preserved on the Internet, particularly the broad freedom of expression enjoyed by the anonymous speaker on the web.

England’s defamation law³⁴ provides that an Internet service provider is exempt from liability for defamation published by a third party under certain conditions. The conditions are cumulative and their purpose is to ensure that the service provider only plays a technical role and is not directly responsible for the problematic content. These conditions are:

1. The provider is not the author, editor or publisher of the statement;
2. He has taken reasonable caution in respect to the statements;
3. He did not know nor did he have any reason to know that he was contributing to defamation.

32. *Id.* at 8.

33. See CA 7830/00 *Borochoy Arnon*.

34. Defamation Act, 1996, c. 31, § 1, (Eng.).

The law emphasizes that a supplier whose role is merely technical is not responsible for content. However it was held that a provider of a hosting service whose roles is really only technical, cannot invoke the defense nor claim that it took reasonable caution after receiving notice that the publication was defamatory.³⁵ Thus, the defense in England is relatively narrow and does not grant the anonymous speaker on the Internet any real breadth of space at all. But even here there is a mechanism that provides both the access provider and the court some room for consideration that can expand the freedom of expression on the Internet. For example, one can argue that anonymous and general libel which does not really cause harm, and for which no explicit demand to desist has been made from the victim, does not require censoring or removal by the access provider.

The defense is much broader in the United States. The Communication Decency Act³⁶ provides a clear exemption for an Internet access provider by stating that he is not to be considered a publisher or advertiser of content provided by a third party. In the case of *Zeran*³⁷ issued in 1997, the defense was expanded by a federal court, which held that the exemption from liability for defamation was a broad exemption and applied also to the liability of an access provider as a distributor. This interpretation by the U.S. courts transformed the exemption into an almost absolute. Moreover, it was held that even when an access provider is given explicit notice that the content is libelous, it still does not establish his liability for the statements.³⁸ This broad protection demonstrates the desire to enable free discourse over the Internet, even at the price of reckless and unrestrained speech in such places that allow such anonymous speech. This broad protection for the access provider together with the anonymity accepted in these sites, places the plaintiff victim in an inferior position without any real legal recourse. The law in the United States protects the anonymity of the surfer and requires a court order and advance notice to the surfer before the access provider will be entitled to disclose the identity of the anonymous surfer to a third party.³⁹ This policy in reality invites the victim to ignore the statements. In my opinion this approach

35. *See* *Godfrey v. Demon Internet, Ltd.* [1999] Q.B.D. (U.K.).

36. 47 U.S.C. § 230(c) (2000); Telecommunications Act of 1996 § 509(c).

37. *Zeran v. America Online*, 129 F.3d 327, 332-34 (4th Cir. 1997).

38. *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

39. 47 U.S.C. § 551(c) (2000); *see* *Doe v. Cahill*, 884 A.2d 451, 457 (Del. Sup. Ct. 2005) (holding that a defamation plaintiff may not obtain the identity of an anonymous defendant unless plaintiff satisfies the standard for summary judgment).

of U.S. case law indirectly assumes what is being asserted in this paper. Namely, that anonymous statements on the Internet are generally insufficient to constitute grounds for an offense of defamation.⁴⁰

In Europe, the Electronic Commerce Directive⁴¹ provides a uniform policy for all types of statements on the Internet and does not confer special status on the issue of defamation or anonymous free speech. According to this policy there is a distinction between various types of providers supplying services on the Internet: technical access, interim storage services or hosting abilities. Under the European directive a host provider benefits from an exemption of the defamation of a third party as long as he does not have any actual knowledge of the defamatory content. The access provider must promptly act to remove the defamatory statement upon receiving notice of the unlawful content. It is still not completely clear what exactly constitutes a notice of unlawful content that binds the access provider to remove the content. Is it sufficient that the content constitute an alleged defamation, or does the provider require a notice that the publisher of the statements does not have a defense for defamation,⁴² namely that the publication is not true or is not of public interest. In any event, the European defense is slightly broader than its English counterpart and significantly narrower than the broad defense offered by the United States.

In Israel, after long deliberation, the Commission for the Investigation of Legal Issues involving E-commerce reached the conclusion that there should be a statute granting a partial exemption from liability for service providers on the Internet. The Commission stated that it was not proper,⁴³ even if lawfully possible,⁴⁴ to impose full responsibility on the service provider for harmful content published by a third party. The Commission recommended an integrated model adopting the principles

40. *Id.* at 467. The court stated in a footnote that: "We do not hold as a matter of law that a statement made on a blog or in a chat room can never be defamatory. We hold only that in order to recover, a plaintiff having a defamation claim based on a statement made in an internet chat room or on a blog must prove that a statement is factually based and thus capable of a defamatory meaning. *Id.* at 467 n. 78.

41. Directive 200/31/Ec on Electronic Commerce.

42. See Law Commission, *Defamation and the Internet: A Preliminary Investigation*, ¶ 2.20-2.23 (December 2002), available at <http://www.lawcom.gov.uk/docs/defamation2.pdf> (last visited Nov. 9, 2008) [hereinafter *Commission Report*] (On this topic the English commission that dealt with it took a clear position that it is sufficient that the access provider was made aware that the publication could ridicule or degrade the complainant).

43. *Ministry of Justice*, Report of the Commission for the Investigation of Legal Issues Involving E-Commerce at 47-49 (2004).

44. The legal manner to impose liability on a service provider or site owners is not through articles 11 and 12 of the Defamation Law, which do not apply to the Internet,

of the European arrangement, which is also influenced by the American model. The Commission's proposal deserves consideration in my opinion, not only because it is a commission of the Ministry of Justice that will eventually lead to substantive legislation, but also due to its ability to influence the interpretation of existing law by the courts.

According to the proposed model, providers will enjoy an exemption if they comply with the following principles: (1) they do not initiate the transmission of the content; (2) its transmission is to anyone who wants it; (3) there is no prior awareness that the content infringes on any rights; and (4) there is no involvement in the content.⁴⁵ The Commission also recommended the establishment of a procedure that would require the removal of the material by a host service provider as soon as it is informed that the content is infringing on any rights, as part of a process of "notice and removal".⁴⁶ This process enables a victim to demand the removal of the material but also enables the advertiser of the material to declare that the publication is lawful and take sole responsibility for the publication. The service provider who operates by this process will benefit from full exemption from liability for the content but will bear the financial and administrative costs involved in establishing such a mechanism and complying with the process.

In summary, there is a worldwide recognition, including by Israel, of the complexity and uniqueness of the imposition of liability for the publication of defamation on the Internet. The focus of the debate and the legal innovations revolve around the subject of the liability of the service providers. On this point there are different models of exemption. This exemption attempts to protect freedom of expression on the Internet and therefore confers a unique status to anonymous expression on the web.

V. The New Reality of Freedom of Information

The Internet created a new reality of freedom of expression. For example, today everyone is aware⁴⁷ that the high school teacher who had inti-

but through article 12 of the Torts Law. The position of the State Attorney General, as seen in the commission's report is that articles 11 and 12 do not constitute a negative arrangement and do not prevent the imposition of liability on those responsible even if they are not editors or responsible for "media devices" and are not in the framework of a "printer" or "distributor". On the fact that articles 11 and 12 do not constitute a negative arrangement; *See* CC (Jer) 1014/99 Dan Avi Yitzchak v. The News Company Takdin 48 99 (2) 3824.

45. *Commission Report*, *supra* note 42, at 75 (details of the Commission's proposal).

46. *Id.* at 76 (on the process in the United States).

47. The examples mentioned in the paper are from the media in the Winter of 2005, at the time of the Conference in the Democratic Institute. Examples of publications on

mate relations with his students is the teacher who taught in a high school in Herzelyia, and the famous singer who was caught with drugs in her house is named Riki Gal. This information is public despite the fact that the traditional press, under a court order forbidding public reporting, was prevented from publishing these details.⁴⁸ In the new reality, one must distinguish between two completely different streams on the Internet. The first is intertwined and connected to traditional media, which to a large extent adopts its rules. The second stream is the open, wild, interactive, spontaneous, instant playing field, which requires us to adopt new rules.

An important question is whether people will continue to obtain their information from institutionalized media networks, who are considered professional with high standards, or will they turn their backs on the established media tools and start to receive information through other channels, such as forums, chat rooms or by exchanging instant messages or emails and SMS's with friends and complete strangers.

I believe that it can be cautiously stated that both systems may continue to exist side by side, at least in the near future, and most of us will continue to draw information from both sources.

VI. Reliable Information Along with Rumors

Recognition should be made that in the current age of fast flowing information, reliable and verified facts are being replaced, at a far quicker pace than ever before, by rumor, incomplete information, fabrications and stories. These rumors, fabrications, and incomplete information enter quickly into the mainstream from the margins and find their way to the public at large.⁴⁹

Everyone can recall the battles in Jenin, during which rumors were circulated of the death of the Deputy Chief of Staff of the Israel Defense Forces, a helicopter that fell and exaggerated numbers of those fallen in battle.⁵⁰ These rumors went from the Internet to the street and workplace and reached almost every home in Israel.

the internet that violate the prohibitions on publications can be found weekly. These publications appear in marginal sites and independent forums, and not the leading sites which filter their content, also in talkbacks.

48. But they were not successful in preventing the revealing title "Coke girls" which hints at the famous song by Riki Gal "Rock girl".

49. Haim Shibi, *The New Medium and the Print Journalist: Aids, Challenges, Pressures*, 5 PATUACH 259 (2003) (on the dilemma of a journalist facing the new information arena).

50. See Michael Birnhark, *Press Ethics on the Web: Individual Procedure, Freedom of the Press, Power and Competition*, 5 PATUACH 173 (2003) (regarding the rumors surrounding the battle in Jenin as an example of press operating outside of ethics).

The rumors that take the place of solid information are in many cases an alleged infringement of the law: breach of the prohibition of publication, infringement of privacy, defamation, incitement, violation of the Censor's orders, and more. However, a rumor on the Internet, despite its wide dissemination, remains only a rumor. Its status is still inferior and the reliability attributed to it is restrained and incomplete. Most of us don't believe any of the rumors on the Internet, and rightly so. A large part of the information disseminated in this manner is piecemeal and misleading in the best scenario and false and tendentious in the worst cases. We neither relate seriously to this type of substance nor attribute it much weight.

VII. A Proposal: A Different Law for the Internet

The principle question is: should we be expending all of our energies to try and prohibit these types of statements and punish the offenders, or should there be a special, more lenient law that could apply to these pronouncements?

In light of the special nature of speech on the Internet, there is a place for a different and more lenient law governing information on the Internet, especially in respect to content distributed by an anonymous third party, without a source, that does not fall within the framework of media journalism. The different law must be expressed on a number of levels. Some would deal with substantial law regarding the prohibition of defamation and the permissible and prohibited boundaries of publication, and some would deal with the issue of the liability of a third party and the legal procedure for disclosing the identity of the speaker.

The first level, which is the focus of this article, examines the possibility for a new defense or a special interpretation of existing defamation laws so that speech on the Internet would not constitute a legal cause of action. This is the level of the substantial law, in which I propose a separate law for the freedom of expression on the Internet.

It is interesting that all the legal and public discourse on this subject focuses only on the second level dealing with the liability of access providers or site owners. This is a separate and comprehensive debate which does not have to be fully presented here since there are no new insights to the current discussions. However, I will briefly state that my opinion is that service providers and other middlemen should not be held fully liable for content published by third parties, and they should not be expected to routinely expose the identities of the anonymous speakers, except in rare instances.

Thus, as was examined in the chapter pertaining to existing law, in many countries and to some extent also in Israel, there are statutes or case law that are designated to clarify the boundaries of liability of a third party for defamatory statements of anonymous speakers on the Internet.⁵¹ However, nowhere have new or different rules been established that change the definition of the offense itself.

Recently, even in Israel, the Commission for the Investigation of Legal Issues involving E-commerce⁵² came to the conclusion that, "the offense of defamation may be applied also to libel published on the Internet."⁵³ However, the Commission also noted that, "Internet service providers can be exempted from liability in tort for content that was authored by a third party, the proper way to do this would be expressly, by statute."⁵⁴

As discussed in the comparative law chapter and despite the fact that this was not said specifically, part of the justification for the position not to impose liability on a third party such as a service provider or owner of a website, is due to the lack of desire to interfere in the new and free discourse that was born on the Internet, out of recognition of the importance of such liberty, and the recognition of its limited power to harm and cause damage.

VIII. The Principle: Less Credibility Means Less Significance Accorded to Internet Speech

I propose that the Internet is a new playing field for the freedom of expression and therefore there is room to adopt new rules for the game. Thus, for example, it should be taken into consideration that the Internet is a place for spontaneous, anonymous expression with very little significance. In general, statements made on the Internet are not attributed anything reliable or significant and therefore they cannot, in actuality, harm a person's reputation, privacy or even the security of the state.

Consideration should be given not only to the actual content of a statement but also to the totality of circumstances under which such statement is made. This is a familiar method of deliberation to Israeli courts, similar to the considerations made for the offense of incitement to vio-

51. Civil File (Kfar Saba) 7380/00 Borochoy v. Poran (14.7.02). See also Alkali R. "Civil Liability of a Internet Service Provider for Transferring Harmful Information" 6 Hamishpat L. REV. 151-171; Civil File (Tel Aviv) 376292/03 Sudri v. Stelrid (1.8.05).

52. Report for the Commission for the Investigation of Legal Issues Involving E-Commerce, Ministry of Justice-Jerusalem, 47-79 (2004) [hereinafter Investigation of Legal Issues].

53. *Id.* at 50.

54. *Id.* at 62.

lence. The question of the identity of the speaker, the circumstances in which the statement is made and the level of certainty of ensuing violence is taken into consideration when considering the offense of incitement.⁵⁵ Obviously an anonymous speaker in a talkback on the Internet cannot pass the threshold for the offense. The test is not the content but the weight given to the totality of the circumstances. The significance of anonymous speech on the Internet is low, and so too is its ability to cause violence or even to destroy a person's reputation.

Another familiar example is pornography. It is common knowledge that pornography is a matter of geography. It is also a matter of medium and community. A woman cannot bare her breasts on commercials shown on Channel 2 in Israel but she can freely do so in a television drama program. Full nudity is prohibited on Channel 2 but not on cable. Before 10 o'clock at night pornography cannot be viewed but on the Internet one can find pornography during all hours of the day. This leads to a chaotic system.

A closer example to our case is the continued existence of a military censor for the traditional media, which is published in Israel. The censor justifies its existence and the fact that it interferes and disqualifies publications, even when the content of the publications already appeared on the Internet, by stating that the Israeli media is established and respected and its reports contain credibility. According to this approach statements on the Internet are unreliable and therefore cannot cause the level of harm required to damage state security.⁵⁶

Further support for the proposed position can be found in the Commission's report regarding the lifting of the anonymity of an author who pens harmful content.⁵⁷ The Commission is of the opinion that it is not always proper to expose the identity of the author, except in very serious cases.⁵⁸ Thus, in "non serious" cases of publication of a harmful statement, the identity of the speaker should not be disclosed. In this

55. Further Criminal Hearing 1789/98 State of Israel v. Kahane, 54 (v) P.D. 145; see Ayal Benivisti, *Freedom of Expression in a Polarized Society*, 30 MISHPATIM L. REV. (5759) 29.

56. For more on the military censor in the age of the Internet see Hillel Nossek & Yechiel Limor, *Normalization of an Anomaly: Military Censorship in Israel*, at 65-96 in ISRAEL AT THE BEGINNING OF THE 21st CENTURY (Hillel Nossek ed., 2002).

57. Investigation of Legal Issues, *supra* note 52, at 78.

58. See Investigation of Legal Issues, *supra* note 52 (the Commission recommends that disclosure of the identity be done solely by the courts, by giving weight to the nature of the harmful content, the extent of the damage, the connection between the harm and the damage as well as balancing the damage that will be caused by exposing the name of the author against the damage that may occur from the failure to reveal his name).

way the Commission demonstrated its position that libel on the Internet should be entitled to special protection and not considered as expression that confers upon its victim a cause of action to sue.

The low credibility of a statement made on the Internet, especially an anonymous and general statement, also means a limited power of that expression to constitute "defamation" under its meaning in the Defamation Law, and its ability to constitute actual harm (that is not trivial) to human dignity or a person's reputation.

IX. Special Protection for Defamation on the Internet

My recommendation is to establish, expressly by a new defense in the Defamation Law, or by way of interpretation of the existing law, that an anonymous, instant, unfiltered and unmediated statement for which there is no source and which does not make grounded factual claims cannot constitute a cause of action on which to base a lawsuit, since it cannot rise to the level of defamation. The presumption, which is rebuttable only in rare cases with persuasive evidence, is that a statement with the above described features that appears on the Internet does not have the ability to degrade a person in front of others; make him a target of hatred, ridicule or scorn; humiliate a person or harm his position.

My proposal of interpreting the existing law is based on and rests in a large part on a case decided by Israel's Supreme Court.⁵⁹ The Court held that referring to a person as a "rat" is not defamatory since nobody really thinks that the person is actually a rat.⁶⁰ The Court, led by Judge Barak, placed emphasis on the preliminary question, the first in any discussion of defamation, which is whether the expression can harm a person's reputation by an objective standard, taking into account the totality of the circumstances.

In the case of Herzkovitz, the circumstances included the nature of the public debate that arose, the use of satire and metaphors, the public nature of the discourse, and similar considerations. Judge Barak did not hesitate to hold that under these circumstances the expression used by the newspaper did not constitute defamation. Support for this ruling was given in

59. CA 4534/02 Schoken Networks Ltd. v. Ayalon (Loony) Herzikovitz. See Yuval Karniel, *Racism, Media and Defamation: Are you allowed to call a racist a Nazi*, 19 HAMISHPAT L. REV. (2005) 40, 51.

60. This may be a good place to mention that the District Court held that the publication is defamation, because it does not constitute legitimate criticism or an opinion but rather "insults, slander and mudslinging of the Plaintiff". The judge set damages at 500,000 shekels for harm caused or which could be caused to Herzkovitz. Civil File (Tel Aviv) 2546/99 Herzkovitz Loony v. Shocken Networks Ltd. (from 2.5.02).

a recent Supreme Court decision⁶¹ by Judge Rivlin. In this case the Court found that the term “deserter” used in describing the plaintiff’s shift from supporting the “Likud” party to his support of the “One Israel” party did not constitute defamation by taking into account the significance of the term under the circumstances of the case. This holding can be directly attributed to statements made on the Internet as well. The special circumstances of publication on the Internet, the low credibility and reliability of anonymous statements made on the Internet and the spontaneous and open discussions that are acceptable on parts of the web, transform a substantial portion of the negative statements made over the Internet into expressions that do not reach the level of “defamation” as defined by the law. The totality of circumstances test indicates that according to a subjective standard, words published in such manner, even if they are bitter and degrading, cannot constitute defamation under the law.

As stated previously, the proposal is limited only to the anonymous and general statements that do not undergo any intermediate, filtering or editing process and which do not purport to be based on a reliable source, or which do not deal with exact facts. These types of statements are accepted by a reasonable person as reflecting a person’s mood, expression of feelings, or rumors and insignificant slander. These statements are generally referred to as expressions of anger by the writer towards the person to whom his wrath is directed, as an expression of aspiration to curse, harm or humiliate him.⁶² However, as great as the desire to so act, so is its failure since anonymous statements on the Internet are insignificant and ineffectual. They can do nothing other than demonstrate that the writer is frustrated and hiding behind anonymity. Such statements cannot convey a reliable and serious position or information. Obviously any speaker can express himself in another medium or format, on a more serious and reliable level, and then the law would apply to him completely. There are ways to protect anonymity and convey a factual message or serious and reliable information. The way to do so is usually through a newspaper or other edited systems that promise integrity and reliability, which is how immunity of the press was created.

61. CA 9462/04 Ben Zion Mordov v. Yediot Ahronot Ltd. et al (unpublished issued on 28.12.05).

62. See Moran Carmon, *When Nobody Knows You are a Dog*, 30 PANIM 28-34 (2004), available at (<http://www.itu.org.il/Index.asp?ArticleID=2059&CategoryID=579&Page=1>) (on anonymous expression on the Internet that leads to outbreaks of maliciousness and evil. There exists an opposite relationship between the desire to express ourselves and experience feelings very intensely and between our ability to create a true interaction with others on the internet. This misunderstood disparity is in my mind the main factor for the discovery of frustration and evil on the Internet).

The protection will only apply to those “weak” expressions that are not substantiated by any real significance or a real speaker. Generally, these are expressions of teenagers in public chat rooms, widespread forums or talkbacks of sites that do not have any supervision or filtering.

Nothing stops those sites that wish to do so from accepting upon themselves a more conservative policy regarding their talkbacks and turning themselves into more serious and reliable places for discussion.

Ironically, however, the same sites that will take upon themselves the job of supervision and control and who make their talkbacks more reliable will increase their liability and responsibility. Therefore it is possible to distinguish between the two instances so that the anonymous speaker will know if he is participating in an open forum (of little significance and small risk of liability) or in a conversation that is being observed and audited with far greater influence but also with a far greater responsibility along with the risk of being sued.

X. Value and Dangers of the Proposal

The proposal to reduce the significance of free speech on the Internet, not to relate to it as a harmful force and thus not to consider it as “defamation” under its definition in the defamation laws, is intended foremost to promote and serve the value of freedom of expression and enable the continuation of free, spontaneous and open cultural expression that has over the past years developed on the Internet. Behind the proposal is the presumption that even though there are degrading expressions, most of which are completely meaningless, and evil rumors disseminating throughout the Internet, there is sometimes a true story, such as the first story of the relations between former President Clinton and Monica Lewinsky which was published on the Internet. In reality the main story was the refusal of Newsweek to publicize the incident. If the story would have remained as an online tidbit it would have had no force, no power to harm a reputation, nor any public or political power.

However, the appearance of the story on the Internet led, at the end of a very quick process, to its adoption by the traditional, professional and reliable media. The appearance of the story in the traditional press made it into the incident that we all are familiar with.⁶³ In the same

63. *See generally* ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* (PublicAffairs) (2000).

way, libelous rumors and other stories that appear every day in forums, talkbacks and chat rooms on the Internet that do not leave any real impression also have a positive potential. In certain cases, the person about whom the stories are circulating is aware of the truth and takes steps to amend his ways or stop the behavior that is being exposed. In other cases the publication on the Internet can encourage continued investigation or examination by other journalists or relevant supervisory institutions.

For example, one can only imagine what would have happened if the sexual harassment by Hanan Goldblatt,⁶⁴ would have appeared 20 years ago on the Internet (which did not exist at that time). The fact is that the stories did not reach the professional and serious press, maybe, *inter alia*, due to the fear of publicizing a libelous statement or infringement of privacy. Only on the Internet can these things appear, anonymously, and help initiate an investigation of the person himself and his conduct. The culture of free discussion on the Internet gives us a new tool which we never had in the past. It is an initial filtering process that uninhibitedly permits rumors and slander and promotes a natural investigative process to discover the truth. During this process either the truth or at the very least additional information is revealed that enables other media sources, or identifiable individuals, to express their claims in a more open and grounded manner. Mere statements without any truth behind them will not make any impression and will be ignored. Stories with some accuracy will begin to circulate and be investigated and may even lead to publication. In any event the free and spontaneous expression enables the speaker to express his feelings and positions in an open manner, without precedent, which also contributes to human dignity, his liberty and the free flow of information. This occurs even when the basic information that we receive from the expression is that the speaker is angry or holds a grudge against the person he is attempting to slander.

On the other hand, the danger of allowing unbridled expression on the Internet may be harmful to a person's reputation, without justifica-

64. Vered Luvitch, *Actor Hanan Goldblatt sentenced to 7 years for rape*, YNET-NEWS, July 10, 2008, <http://www.ynet.co.il/english/articles/0,7340,L-3618876,00.html> (the actor Hanan Goldblatt was convicted of rape and sexual harassment of young actresses who received acting training by him. The indictment was filed after an extensive investigation was published in Yediot Ahronot newspaper. The investigation led to the exposure of similar incidents by the actor from 20 years previously).

tion or without circumstances that provide a defense. This danger must be minimized by identifying the circumstances in which anonymous expression on the Internet could actually cause harm (that is not in the purview of trivial matters) to a person's reputation. I assume that general ungrounded expression anonymously posted on the Internet reflects more of an emotional message of anger or bitterness which cannot constitute defamation under its definition in the law. The negative expression only becomes defamation when the speaker clearly identifies himself or when he make very specific factual claims, that have a pretense and a purpose to publicize to the public a new negative factual truth that is harmful and degrading.

Conclusion

Freedom of expression on the Internet is a new reality. For technological and economic reasons we cannot at present fight or change it dramatically. However, it is important for me to explain that even if we could fight it or rid the Internet of its lawlessness⁶⁵ of free speech, I would object. There is a place in this world for every type of speech, even wanton speech. This is part of the freedom of conscience and freedom of expression in its broadest sense, and an integral part of human dignity and liberty and belongs many times in the private sphere. It is also supported by democratic principles. Within the Internet section of the private law, crude and abandoned expression may enter into the public domain but remains in essence a spontaneous private expression, with limited or no significance. It cannot cause substantial harm to the reputation or dignity of another person.

There is reason to give it broader protection (despite the fact that it is not unlimited protection). The purpose of this paper is to draw the proper boundaries between the type of speech which appears on the Internet. The first type of speech is in a spontaneous, anonymous manner without any filtering or intermediaries. The second type of speech is within serious publications, behind which are identifiable individuals, respectable forums or important bodies, that can actually have an effect on a person's reputation, life and can cause actual damage. The reckless speech discussed in this paper is usually a general expression,

65. There are those who maintain that in an age of loss of privacy there will be available in the near future the ability to find and impose liability on all advertisers, by imposing liability on the site owners, access providers and other persons who manage the web.

an expression of anger or hurt and lacks the components of a factual detailed reliable description. There is room on the Internet for such anonymous speech, even if it is reckless. These types of expressions can be insulting but cannot really cause harm and should remain outside of the law and away from the reaches of the justice system.



The Court of Arbitration for Sport: A Subtle Form of International Delegation

Abbas Ravjani*

Table of Contents

Introduction.....	242
I. Overview of the Court of Arbitration for Sport (CAS).....	246
A) Emergence and Evolution of the Court of Arbitration for Sport	247
B) The Institutional Structure of the Current Court of Arbitration for Sport	251
II. International Delegation and the Court of Arbitration for Sport	254
A) International Delegation Defined.....	255
B) Benefits and Costs of International Delegation	258
III. Why States Delegate to the Court of Arbitration for Sport	259
A) States Delegate Control to the CAS—indirectly and directly: The Importance of Low Visibility Delegation to the CAS	260
1) Low Visibility Delegation to the CAS through the New York Convention	261
2) Low Visibility Delegation to the CAS through the World Anti-Doping Code	265
3) Domestic Delegation within States Triggers CAS Jurisdiction	269
B) Delegation to the Court of Arbitration for Sport is Efficient and Effective	272
1) The Evolution of the CAS through Litigation in State Courts Increased the Efficiency and Effectiveness of the Institution	273

*JD Candidate 2009, Yale Law School. The author would like to thank Professor Oona Hathaway, Sumon Dantiki, Martha Lovejoy, and Jesse Townsend for their helpful comments and edits on this article. The author can be reached at abbasravjani@gmail.com.

2) Features of the CAS that Demonstrate Efficiency and Effectiveness.....	276
3) Perceived Effectiveness Promotes Delegation: Two Examples.....	278
IV. The Impact and Future of the Court of Arbitration for Sport	280
A) The Effect of Delegation to the CAS.....	280
B) The Importance of Lower Visibility Delegation	281
C) United States CAS Involvement: Will It Increase?.....	282
V. Conclusion	283

Introduction

American cyclist Floyd Landis received his day in court—sort of. Landis has been stripped of his Tour de France championship because of doping violations, charges he contended were false.¹ In order to clear his name, Landis could not go to a typical court; he was subject to an arbitration agreement entered into by all cyclists competing in the Tour de France.² After exhausting all remedies within cycling channels, his only hope for recourse was the little-known Court of Arbitration for Sport (CAS) which ultimately ruled against him.³

Landis is one of the many athletes that have had their fate decided by the CAS. The CAS is an arbitral body that handles cases arising out of international sports competitions and has appellate jurisdiction given to it by certain international federations, such as the International Cycling Union (UCI) under whose auspices the Tour de France is conducted. All matters before the CAS have the consent of the parties to the proceeding. Agreement to arbitration by the CAS is often a prerequisite for an athlete to compete in an international sports competition such as the Olympics. Though not a “court” in the traditional sense, the CAS has court-like tendencies and has over the years developed its own body of

1. Brendan Gallagher, *Floyd Landis Could Compete in Tour de France Against Lance Armstrong Next Year*, TELEGRAPH (London), Sep. 25, 2008, <http://www.telegraph.co.uk/sport/othersports/cycling/2797108/Floyd-Landis-could-compete-in-Tour-de-France-against-Lance-Armstrong-next-year—Cycling.html>.

2. UCI Cycling Regulations, Part 14 Anti-Doping Rules of the UCI 46-47 (2004); see also Court of Arbitration for Sport, Code of Sports-Related Arbitration, R27 Application of the Rules.

3. Court of Arbitration for Sport, CAS 2007/A/1394 Floyd Landis v/ USADA 50, available at [http://www.tas-cas.org/d2wfiles/document/1418/5048/0/Award%20Final%20Landis%20\(2008.06.30\).pdf](http://www.tas-cas.org/d2wfiles/document/1418/5048/0/Award%20Final%20Landis%20(2008.06.30).pdf).

jurisprudence.⁴ While CAS decisions do not officially create binding precedent for the Court to follow in future matters, many observers of the CAS argue that a type of *lex sportiva* is emerging and continues to grow as the Court matures.⁵ In the past four years, the CAS caseload had increased dramatically. Sixty percent of the total cases over the life of the CAS (1984-present) were brought to the Court between 2004 and 2007.⁶

Given these developments in international sports law and the trend towards a *lex sportiva*, the lack of attention given to the CAS's broad power to interpret international sports law is puzzling. International sports law has been viewed "as much a matter of international law as sports law"⁷ and is an important aspect of transnational law that has developed its own distinctive body of rules over time.⁸ Most countries and international sports federations have acceded to the jurisdiction of the CAS, despite some countries, including the United States, being concerned about the threat of their nationals being tried by foreigners in forums such as the International Criminal Court (ICC).⁹ One author

4. Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 420, 437 (Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek eds. 2006) (acknowledging that the CAS is not a court but describing those characteristics that make it function like a court, including jurisdiction over most international sports disputes and the use of precedent).

5. James A.R. Nafziger, *Lex Sportiva and CAS*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 409 (Ian S. Blackshaw, et al. eds. 2006).

6. CAS Statistics available at <http://www.tas-cas.org/statistics> (925 of the 1501 total cases ever filed with the CAS were filed between 2004 and 2007).

7. James A.R. Nafziger, *Globalizing Sports Law*, 9 *MARQ. SPORTS L.J.* 225, 237 (1999).

8. Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 *EMORY INT'L L. REV.* 347, 349-350 (1994).

9. The United States passed the American Service-Members' Protection Act (also known as the Hague Invasion Act) into law in 2002. The American Service-Members' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (2002) (providing that "The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals"); The United States also withdrew its signature from the ICC in 2002. Press Statement, U.S. Dep't of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002) (providing the text of a letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary General Kofi Annan), available at <http://www.state.gov/t/pa/prs/ps/2002/9968.htm>. See also John Yoo & Eric Posner, *International Court of Hubris*, *WALL STREET JOURNAL*, April 7, 2004 (criticizing the ICJ); Jack L. Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 *DAEDALUS* 47 (2003), reprinted in *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 350 (Oona A. Hathaway & Harold Hongju Koh, eds. 2005).

argues that international sports law is respected as *opinio juris*.¹⁰ This acceptance of the CAS is especially curious given the general hostility and skepticism of the United States towards international adjudication. With the CAS, a foreign body determines the fate of an American athlete, as in the Landis case. This type of international delegation would appear to have some sovereignty costs that have not been at the heart of the discussion surrounding the CAS. It would seem important for a government to have some control over how its citizens are treated, especially in a field with such mass appeal as sports. While most individuals may not be conversant on the intricacies of international human rights law, the average citizen easily understands—and probably has an opinion on—a sporting event. Sports have a profound influence on people worldwide and sports activity has been described as “the largest social force of our time.”¹¹ The stakes appear too high to let a foreign body determine the fate of a nation’s athlete.

This article will offer some explanations as to why adjudication by the CAS has been relatively uncontroversial. Although the Court of Arbitration for Sport possesses similarities to arbitral bodies (which also tend not to be controversial), it also shares several attributes with the international courts to which commentators have so strenuously objected. There is reason to expect, then, that countries—especially the United States—would be reluctant to allow the rights of their athletes to be decided by the CAS. I argue that the CAS has avoided the typical criticisms lodged against international adjudication, including the erosion of sovereignty, for two main reasons.

First, states are more willing to delegate to an international tribunal when the delegation is perceived to be benign and has low visibility. Delegation that directly implicates the state either as a party to a dispute or through an official government representative, such as a military official, appears more facially threatening than an indirect delegation that implicates a state’s citizens in an individual capacity. Athletes representing a nation typically appear before the CAS, not the nation itself. By being one step removed from the proceedings, a state has lowered the visibility of the delegation. However, low visibility delegation, whether

10. James A.R. Nafziger, *INTERNATIONAL SPORTS LAW* 12 (2d ed. 2004).

11. *Id.* at 9 (citing *OLYMPIC REV.*, March 1984 at 156). See also Jan Paulsson, *Arbitration of International Sports Disputes*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 40 (Ian S. Blackshaw et al. eds. 2006) (describing the passion and business behind sports).

direct or indirect, can still have a large impact upon international law. By signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, countries have implicitly delegated authority to all arbitral tribunals that meet the standard of a fair arbitral tribunal—a standard I argue that the CAS has met. As a result, this low visibility international delegation to the CAS has not conjured-up the typical arguments against international delegation. Similarly, the lack of a high-profile dispute implicating a specific country's sports team has kept issues of national pride from erupting when the CAS hands down an adverse decision. Individual athletes are predominantly the litigants before the CAS, rather than an entire national team, shielding the CAS from scrutiny—at least for the time being.¹²

Second, the CAS provides efficiency and effectiveness to international sports disputes. The use of arbitration in contractual disputes has increased over the years, with parties to contracts often preferring arbitral proceedings for a variety of reasons. While many of the arguments in support of arbitration are not unique to the CAS and can be seen in other types of international arbitrations, the complex rules of international sports competitions coupled with the need for swift decisions inherent in sporting events lend credence to the position that the CAS provides the optimal level of efficiency and effectiveness in resolving sporting disputes, thereby avoiding the sovereignty debates. States recognized the efficiency of delegation to the CAS for adjudicating doping disputes when they supported the World Anti-Doping Code, giving appellate authority to the CAS.

Part I of this article provides an overview of the CAS that highlights the types of disputes that come before the court along with the historical development of the institution. Part II discusses the concept of international delegation and examines how delegation to the CAS fits within the broader international delegation literature. Part III addresses the question of why states delegate to the CAS in two sections. First, the delegation to the CAS has low visibility and is indirect. In particular, this section examines the impact of the low visibility delegation by international sports bodies and through the New York Convention.

12. Scant media attention has been brought to the CAS proceedings in March 2008 involving the case of well-known American cyclist Floyd Landis. While I concede that a well-known national icon, such as Michael Jordan, could evoke strong emotions and outcry, it is more likely that a national team being taken in front of the CAS would create such emotions.

Second, the CAS is efficient and effective and these characteristics increase the acceptability of delegation to that body. This section also demonstrates how the CAS is best-suited to handle international sports disputes and why there has not been a large sovereignty outcry despite this foreign institution determining the fate of a particular country's citizens. Part IV examines the impact of this delegation and then looks to the future of the CAS and the implications for both the field of international sports law and the broader area of international adjudication and delegation.

I. Overview of the Court of Arbitration for Sport (CAS)

International sports-related disputes are nothing new. Since the Olympic Games began, disputes arising from international sports competitions had to be adjudicated in some fashion. Without an independent sports tribunal available, those seeking to resolve disputes had to resort to procedures within a specific sports federation or with domestic courts within the country the competition took place. These remedies had the potential for bias, since, for instance, the International Olympic Committee (IOC) was tasked with being the final arbiter for disputes even when it was itself a party to the dispute.¹³ Throughout the modern Olympic era, the number of sports-related issues prone to disputes has risen, prompting a need to create an institution that has the ability to offer expertise in this specialized area of law and be considered a neutral arbiter in these disputes.¹⁴ International sports have become big business with billions of dollars at stake;¹⁵ a system that could provide timely resolution of issues in a cost-effective manner was needed.

Not only do corporations have billions of dollars at stake in these large-scale sporting events, but countries, athletes, and spectators all

13. Additionally, the nature of international sports competitions could lead a party to challenge a law in a country whose legal system is subject to corruption or suffers from home-country bias—a fear exacerbated in sports competitions where national pride is at stake.

14. Similarly, many other areas of law have seen private bodies emerge to handle disputes, most notably the International Centre for Settlement of Investment Disputes (ICSID).

15. For obtaining the United States broadcast rights, “NBC television network contracted to pay \$793 million to broadcast the 2004 Games in Athens and \$894 million for the 2008 Games in Beijing.” James A.R. Nafziger, *INTERNATIONAL SPORTS LAW* 10 (2d ed. 2004) (citing *CHRISTIAN SCIENCE MONITOR*, Aug. 23, 2000, at 20). Broadcast rights for the FIFA World Cup in 2002 and 2006 totaled \$1.7 billion—an increase of over eight times from the previous three World Cups combined. *Id.* at 11 (citing *ECONOMIST*, June 1, 2002, at 4).

have a vested interest in fair outcomes. For countries, the grandeur of trumpeting a championship over one's peer nations equalizes the playing field in international relations. While countries like Argentina or Mexico may never become dominant superpowers in world politics, they can boast of their incredible prowess on the pitch during World Cup competitions. The vast amount of resources host cities invest into the Olympic Games—and by those even submitting a bid to host—demonstrates the importance of sports on the world stage. For athletes, one's career often hinges on a single competition. By being declared ineligible to compete, a sports federation or judicial body takes away an athlete's liberty, and the loss of eligibility in a single competition is compounded by the fact that athletes only have short age windows to compete, especially in Olympic competitions that only occur every four years.¹⁶ And for even the casual sports observer, winning an international competition produces feelings of national pride and identity. On the other hand, a bitter sense of loss can overcome a nation that performs poorly in an international competition and can have a profound impact upon a nation's citizens.¹⁷ An overview of the CAS since its emergence in the 1980s is important to appreciate how the court has become an efficient and effective arbitral tribunal—a criterion for international delegation I contend is important in gaining the acceptance of international sports bodies and individual nations.

A) *Emergence and Evolution of the Court of Arbitration for Sport*

In the early 1980s, H.E. Juan Antonio Samaranch, IOC President, and H.E. Judge Kéba Mbaye, who was at the time a judge at the International Court of Justice (ICJ), laid the groundwork for the creation of an arbitral

16. See Jessica K. Foschi, Note, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 DUKE J. COMP & INT'L L. 457, 467-68 (2006) (describing the case of Kicker Vencill, a 25 year old American swimmer who tested positive for doping and was subsequently suspended for two years. Vencill later won a civil judgment against the maker of the vitamin supplement he took that was found to be contaminated with a steroid precursor and was awarded \$578,635 in damages. The suit later settled, but Vercill remarked "all the money in the world can't rewind the clock.").

17. James Sturcke, *We thought the World Cup would help our country learn to smile again*, THE INDEPENDENT (London), June 13, 2002, available at <http://www.independent.co.uk/news/world/americas/we-thought-the-world-cup-would-help-our-country-learn-to-smile-again-606391.html>. (describing the sense of grief after Argentina was upset in the World Cup in the same time period when the country was suffering from an economic downturn).

body with jurisdiction over sporting disputes.¹⁸ From their vision, the Court of Arbitration for Sport was created. The CAS officially came into existence in 1984 and is becoming the preeminent international sports judicial body handling generally three types of cases: disciplinary, eligibility-related, and commercial.¹⁹ The CAS is headquartered in Lausanne, Switzerland (also home of the IOC) and currently maintains offices in the United States and Australia in order to make the court more accessible to a broader range of potential litigants.²⁰ Each office has the full authority of the court to conduct proceedings and issue final results. While designed primarily with the Olympics in mind, the CAS has expanded in scope with most major international sports institutions acceding to the jurisdiction of the court.²¹ Decisions of the CAS do not officially create binding precedent; however, many observers of the court believe a *lex sportiva* is beginning to develop, as CAS arbitrators frequently refer to previous CAS judgments when providing reasoning for their decisions.²² This section will provide the background on how and why the CAS began to flourish and has seen rapid growth especially since 2004.

A court appearing out of nowhere is unlikely to gain immediate acceptance by the international community. While initially conceived to handle disputes arising from major international sports competitions, namely the Olympics, the founders of the CAS also wanted to create an institution that would be available to any party in need of resolving a sports dispute by giving sporting federations the ability voluntarily to submit a case to the CAS.²³ In order to address potential skepticism of this new arbitral body and gain legitimacy, the founders understood that consent by the parties before the CAS was critical.²⁴ Only parties that consent to jurisdiction before the CAS will be heard, an idea that has been retained in many parts of the Code of Sports-Related Arbitration

18. Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 31, 32 (Ian S. Blackshaw et al. eds. 2006).

19. Nafziger, *supra* note 10, at 41.

20. Office locations available at <http://www.tas-cas.org/address>.

21. All International Federations that compete in the Olympics must accede to the jurisdiction of the CAS. Additionally, FIFA has submitted to its jurisdiction.

22. See Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do its Job Better*, 36 *LOY. U. CHI. L.J.* 1203, 1255-56 (2005); Neil Weare v. Guam National Olympic Committee, Court of Arbitration for Sport Decision Aug. 13, 2004 (on file with author).

23. See Straubel, *supra* note 22, at 1204-05.

24. Reeb, *supra* note 18, at 32.

(a document produced as a result of the 1994 reforms discussed in the next section).²⁵

Consent to jurisdiction to the CAS can be granted in multiple forms. First, parties to a contract relating to sports can choose to make the CAS the forum for potential disputes. The method is similar to any standard contractual agreement that designates the dispute resolution mechanism (such as contracts designating ICSID or AAA), with the CAS allowed only to hear cases that it retains jurisdiction over—i.e. sports-related disputes. Second, national and international sports bodies can adopt the CAS as the court of choice to resolve sports disputes and have done so mostly for appellate review. Most National Olympic Committees (NOC),²⁶ International Federations (IF),²⁷ and National Governing Bodies (NGB)²⁸ have some sort of internal dispute resolution mechanism available to its members. After internal mechanisms are exhausted, these bodies can designate the CAS as the final appellate authority for disputes. Finally, major international sports competitions,

25. Court of Arbitration for Sport, Code of Sports-Related Arbitration, R27 Application of the Rules, R38 Request for Arbitration, R47 Appeal.

26. The international sports system has many overlapping layers that should be briefly defined before proceeding. The best known organization in international sports is the International Olympic Committee (IOC). The IOC governs all aspects of the Olympic Movement and has been the leader in promulgating rules and regulations concerning the nature of international sports competitions. Underneath the IOC is the National Olympic Committee (NOC) of each country. Countries at the Olympic Games are not necessarily represented by the state itself; instead, each country that is a part of the Olympic Movement is represented by a NOC which is responsible for certifying a country's participants in the Olympic Games. The United States created the United States Olympic Committee (USOC) by statute and its charter explicitly cites the independence of the USOC from the U.S. Government and has upheld this aspect of its mission. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987) (holding that the USOC is not a state actor). Under the Olympic Charter, NOCs are encouraged to maintain independence from governments; however, in practice many nations exert influence over the actions of their respective NOCs even if they are constituted as separate entities. The USOC has been immune to direct, heavy governmental influence though some have argued that it is influenced by the government. *See Dionne L. Koller, Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?* 50 ST. LOUIS U. L.J. 91, 94-95 (2005).

27. Each sport that participates in the Olympics, and even many that are not Olympic sports, has an International Federation (IF) that is responsible for promulgating the rules and regulations of that particular sport. While the IOC provides the rules broadly for how the Olympic Games are governed, each IF has the authority to set rules of play for its particular sport.

28. One step below the IFs is the National Governing Body (NGB) of each sport which is responsible for the development of a particular sport within the country. For instance, the International Basketball Federation (FIBA) is the IF responsible for international basketball competitions; underneath FIBA, each country that participates has an NGB that coordinates the nation's activity (in the case of the United States the entity is "USA Basketball").

such as the Olympic Games²⁹ or the FIFA World Cup,³⁰ have designated the CAS as the venue to resolve disputes arising during the course of those events. Any athlete who wants to compete in these competitions must sign a form submitting to CAS jurisdiction,³¹ and the CAS even sets up ad hoc divisions to handle disputes needing an immediate resolution during the Olympics and World Cup competitions.³²

From the CAS's inception until now, an increasing number of bodies have acceded to its jurisdiction. While technically speaking, consent to jurisdiction by the athlete is voluntary and athletes can simply choose not to participate in a certain competition, many scholars have questioned the de facto nature of acceding to jurisdiction.³³ The initial idea of the founders that the CAS would not be imposed upon athletes or federations remains in principle; however over time, since most international sports competitions have chosen the CAS as its court of choice, the decisions of the Olympics or World Cup trickles down to the IFs, NOCs, NGBs, and ultimately to individual athletes. As a practical matter, the choice for an athlete or international federation is not whether or not to use the CAS; the choice can be more accurately described as whether or not an athlete or International Federation participates in a sports competition which has already chosen the CAS to resolve its disputes. However, parties designating the CAS as their court of choice in a commercial, contractual matter seem to retain full autonomy over this choice. But, legally, consent to jurisdiction has been granted in all cases before the CAS.

Consenting to jurisdiction in advance is not a novel concept. For instance, parties must consent to International Court of Justice (ICJ) jurisdiction before they can submit a case to the Court. States, the only actors that can bring claims to the ICJ, can submit to the compulsory jurisdiction of the court broadly, submit to jurisdiction in a specific controversy, or submit to jurisdiction via treaty arrangements that list the

29. International Olympic Committee, Olympic Charter, art. 59: Disputes—Arbitration (2007) (providing CAS exclusive jurisdiction to disputes arising from the Olympic Games).

30. International Federation of Association Football, FIFA Statutes: Regulations Governing the Application of the Statutes, Standing Orders of the Congress, Articles 58, 60-63 (2007) (providing CAS appellate jurisdiction to disputes appealed from FIFA's legal bodies).

31. See Stephen A. Kaufman, Note, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527, 527-30 (1995) (describing a scenario by which an athlete would sign jurisdiction to the CAS in order to compete in a competition).

32. Reeb, *supra* note 18, at 38.

33. Kaufman, *supra* note 31.

ICJ as the court to handle any disputes arising under the treaty.³⁴ This process is similar to how the CAS obtains jurisdiction from parties—either consent broadly from federations and particular international competitions or specifically through individual contracts that list the CAS as the court of choice. It is unclear how much influence Justice Mbaya of the ICJ, a founding member of the CAS and former President, had on developing a model that was similar to the ICJ. It is noteworthy that the CAS has had success in having its judgments that arise from contractual disputes enforced, while ICJ judgments arising out of treaties often have trouble being enforced.³⁵ I will return to this point later in Part III (A), and suggest that the use of the New York Convention on the Enforcement of Foreign Arbitral Awards, coupled with the nature of sports competitions themselves, provides an effective enforcement mechanism for CAS awards.

B) *The Institutional Structure of the Current Court of Arbitration for Sport*

As a backdrop for why the CAS has avoided the typical criticisms lodged against international adjudication, it is important to understand the structure and operation of the current CAS. The body's intricate rules and procedures highlight the degree to which this institution has become increasingly efficient and effective over its twenty-year life and also indicates the willingness of the CAS to adapt to changing circumstances, a point to note in looking ahead to the future of the institution over the next twenty years and the implications of such changes to international delegation.

The major structural changes that came out of the 1994 reforms in response to the *Gundel* decision,³⁶ discussed *infra* Part III(B), are enshrined in the Code for Sports-Related Arbitration, a document that sets forth the rules and procedures by which sports disputes will be adjudicated. In particular, the IOC relinquished direct control of the CAS by creating the International Council for Arbitration of Sport (ICAS), a twenty-member body that handles the administration and financing

34. United Nations, Statute of the International Court of Justice, Article 36(1), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

35. See, e.g., *Medellin v. Texas*, 128 S.Ct. 1346, 1372 (2008).

36. See *infra* Part III (B); In the *Gundel* decision, the Swiss Federal Tribunal (the Supreme Court of Switzerland), ruled against Elmar Gundel, a horse rider who had appealed his suspension by the International Equestrian Federation (FEI) to the CAS. The Tribunal upheld the CAS as a true arbitral tribunal for sports, but did offer some dicta relating to the independence of the CAS that was troubling to the body.

of the CAS, with each member of the ICAS pledging to exercise his/her appointment in a personal capacity.³⁷ While there is some overlap between the ICAS and the IOC, the ICAS operates independently and also provides an additional layer of separation between the IOC and the CAS. Along with this bureaucratic shift, the reforms also expanded the CAS's pool of arbitrators and diversified its funding base—another move towards increased independence from the IOC.³⁸

Additionally, the new Code of Sports-Related Arbitration further refined the mission and mandate of the CAS. The CAS has the “task of providing for the resolution by arbitration and/or mediation of disputes arising within the field of sport”³⁹ Article R27 of the Code of Sports-Related Arbitration sets forth the jurisdiction of the CAS:

These Procedural Rules apply whenever the *parties have agreed to refer* a sports-related dispute to the CAS. Such disputes may arise out of an *arbitration clause* inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an *appeal* against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, *any activity related or connected to sport*.

These Procedural Rules also apply where the CAS is called upon to give an advisory opinion (consultation proceedings).⁴⁰

A couple aspects of Article R27 are worth highlighting. First, there are two fairly straightforward criteria the CAS uses to determine whether it has jurisdiction: 1) whether the parties to the dispute have consented to jurisdiction of the CAS; and 2) whether the dispute in question relates to sport.

Second, Article R27 introduces the two forms of arbitration that the CAS undertakes: ordinary arbitration and appellate review. Throughout the history of the CAS, parties with access to the CAS have infrequently utilized the ability of the CAS to be a court of first instance. By contrast, the appellate function of the CAS has seen a tremendous amount of work, with a spike in the number of cases since 2004. Since

37. Court of Arbitration for Sport, Code of Sports-Related Arbitration, S4.

38. Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 ASPER REV. INT'L BUS. & TRADE L. 289, 299 (2006).

39. Court of Arbitration for Sport, Code of Sports-Related Arbitration, S12.

40. Court of Arbitration for Sport, Code of Sports-Related Arbitration, R27 Application of the Rules (emphases added).

the adoption of the Code of Sports-Related Arbitration in 1994 through the end of 2007, 1,127 cases have been presented on appeal to the CAS while only 167 have come through the court's ordinary arbitration procedures.⁴¹ That disparity grows even wider if one looks at only the past four years (2004-2007) in which only 57 cases have come using ordinary procedures while 842 have been the result of an appeal to the CAS.⁴² The structure and development of the CAS lends itself to being a court of final appellate review since many sports disputes arise within the context of another organization that may also have its own internal adjudication structure and has delegated appellate review authority to the CAS. Some have even labeled the CAS as the "Supreme Court of World Sport,"⁴³ a description the CAS does not avoid.

The CAS docket generally deals with three types of cases: commercial, disciplinary, or eligibility-related.⁴⁴ Commercial cases are often a result of the CAS's ordinary arbitration procedure and disciplinary and eligibility cases come to the Court on appeal from International Federations. Based upon the statistics cited above, parties entering into commercial contracts related to sport seem less likely to use the CAS to resolve their disputes, instead preferring more traditional methods of international commercial arbitration, despite a sports connection with the contract. However, the number of groups that have begun to use the CAS as a court of appellate review, coupled with the dramatic spike in the number of cases submitted to the Court, signals a growing acceptance of the CAS as a legitimate avenue to resolve sports disputes.⁴⁵

41. CAS Statistics, available at <http://www.tas-cas.org/statistics>.

42. *Id.*

43. See DIGEST OF CAS AWARDS II 1998-2000, at xii (Matthieu Reeb ed., 2002) (describing Juan Antonio Samaranch's use of the expression "supreme court of world sport"); *Editor's Preface*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004 XI (Ian S. Blackshaw et al. eds. 2006).

44. Nafziger, *supra* note 10, at 41.

45. The CAS has a few other dispute resolution mechanisms in addition to the ordinary and appellate procedures. First, upon request, the CAS offers consultation procedures which provide advisory opinions. Court of Arbitration for Sport, Code of Sports-Related Arbitration, R60 Request for Opinion. One such recent advisory opinion regarded the use of full body swimsuits for the Olympic Games. Advisory Opinion CAS 2000/C/267, Australian Olympic Committee (AOC), 1 May 2000 reprinted in DIGEST OF CAS AWARDS II 1998-2000, at 725 (Matthieu Reeb ed., 2002). Only 75 such requests have been made in the entire life of the CAS. See CAS Statistics available at <http://www.tas-cas.org/statistics>. Additionally, parties may agree to CAS mediation, a non-binding, informal procedure that is conducted with the assistance of a CAS mediator in the hopes of settling a sports-related dispute. See Court of Arbitration for Sport, Code of Sports-Related Arbitration, S3. The CAS mediation procedures can only be used for disputes that are related to the CAS ordinary procedure and will not mediate

The attention to detail within the procedures described above, coupled with the rapid-response of the CAS to pressing matters is an important aspect of the efficiency and effectiveness of the institution. As will be argued *infra* Part III, international delegation is more likely to occur when the delegated-to institution is able to demonstrate its competence to adjudicate disputes in a fair and timely manner.

II. International Delegation and the Court of Arbitration for Sport

International delegation is a contentious topic in international law as countries are sometimes hesitant to give up their sovereign control over adjudicating disputes that implicate their citizens. A large subset of international delegation has concerned economic and commercial matters, such as with the World Trade Organization, as countries have seen a compelling interest in pursuing relationships with one another that produce mutual economic gain. Other areas of international law, such as human rights or criminal adjudication, have seen less success as nations attempt to protect their citizens from the perceived biases of foreign courts.⁴⁶ The field of international sports law is unique as non-state actors are the primary agents that participate in the international arena. International sports law is mostly private in nature, albeit under the color of some state authority. While corporate entities in commercial arbitration also share the non-state actor characteristic, the distinguishing aspect of sports is that athletes participate in international competition under the flag of a specific state, rather than as a solely private entity, and are perceived by society as ambassadors of a particular country, especially when they are draped with their national flag at a victory celebration. Each country has mechanisms that are put in place to select athletes to “represent” them during international competition.⁴⁷ Therefore, despite a lack of direct governmental link to a particular athlete or team, the overriding perception by spectators of sports is that a country is being represented during a particular international sports competition. This informal association adds additional

disciplinary matters, such as doping issues. As a result, just as the number of cases handled by the ordinary procedures is low, the mediation aspect of the CAS is not used that often in settling contractual or other disputes. See CAS Statistics available at <http://www.tas-cas.org/statistics>.

46. See, e.g., Jack L. Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003), reprinted in FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 350, 356 (Oona A. Hathaway & Harold Hongju Koh, eds. 2005).

47. See *infra*, Part III(A)(3).

importance to international competition for individual states, as their reputations are at stake.

This aura of state involvement in international sports competition would appear to favor some government involvement in safeguarding its name and reputation during these highly visible events. National governments, as in other areas of law, would want to retain control over how its citizens were treated when accused of wrongdoing. However, countries have not demanded such direct control. The current scholarly literature on international delegation attempts to define the concept of international delegation and also addresses the perceived costs and benefits of a state's decision to delegate authority. However, the literature lacks a comprehensive discussion of two key elements that are essential to the examination of international delegation: 1) the visibility and explicit nature of the delegation and 2) the efficiency and effectiveness of the bodies to which authority is delegated. A discussion of the CAS highlights these areas that the traditional literature has underdeveloped and shows when and how these issues matter in the discussion on international delegation.

Countries have decided to delegate authority over international sports law to private bodies, which have subsequently delegated additional authority to the CAS. First, I explore the literature on the concept of international delegation, placing the subject of international sports law within that discussion. Then, I examine the benefits and costs of such international delegation.

A) *International Delegation Defined*

As the international community adapts to the globalizing world around it, an increasing number of international problems need to be dealt with collectively. Getting multiple countries to cooperatively make decisions in a timely fashion each time an international problem arises, no matter how small the issue, would be a difficult task. As a result, countries delegate authority over certain issues to other institutions. On its most basic, intuitive level, international delegation is the idea that a nation decides it will allow some other person or institution to make decisions on its behalf. Despite this simplistic notion of international delegation, there is a growing literature and debate on the issue.

Curtis Bradley and Judith Kelley define international delegation as “a grant of authority by two or more states to an international body to make decisions or take actions.”⁴⁸ A key aspect of their definition

48. Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW AND CONTEMPORARY PROBLEMS 1, 3 (2008).

of international delegation is the *ex ante* grant of authority. Bradley and Kelley attempt to distinguish delegations from mere commitments, with the former having a grant of authority and the latter simply being a promise to act in a certain capacity.⁴⁹ Bradley and Kelley contend that grants of authority do not only have to allow an international body to take actions that bind a state under international law; in fact, they argue that international delegation can exist even when the international body can issue only non-binding statements.⁵⁰ As a result, they argue the degree and depth of an international delegation can be affected by the limits placed on the body to which power is delegated.⁵¹

A second aspect of their definition worth noting is the breadth of what they consider an international body. Traditionally, scholars would point to state-run institutions, such as the United Nations Security Council, the European Union (EU), or the World Trade Organization (WTO), as examples of international bodies to which power has been delegated. While these traditional bodies are the subject of much scholarship, Bradley and Kelley also briefly discuss private bodies being granted authority by states. They identify the International Accounting Standards Board (IASB), a body that sets financial reporting standards that all EU countries must follow, as an example of a private body being delegated authority.⁵² They argue that in situations in which private bodies receive authority from states or groups of states, an international delegation has occurred.⁵³ In this case, the European Commission delegated to the IASB. In the next section, I describe how the CAS is similar to the IASB as it is also a private body that has been delegated authority by states to adjudicate international sports disputes, both implicitly and explicitly.

Other authors have also offered their perspectives on defining international delegation. The definition offered by Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney is similar to the Bradley-Kelley definition, but frames the issue as a principal-agent relationship and explicitly defines the grant of authority as “conditional.”⁵⁴ “Delegation is a conditional grant of authority from a *principal* to an

49. *Id.*

50. *Id.* at 4.

51. *Id.*

52. *Id.* at 8.

53. *Id.* at 8-9.

54. Darren Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 3, 7 (Darren Hawkins et al. eds., 2006).

agent that empowers the latter to act on behalf of the former.”⁵⁵ The Hawkins group focuses on the ability of the principal to rescind authority from the agent as an important aspect of the delegation relationship, which Bradley and Kelley would view as indicative of the depth of the delegation.

Andrew Guzman and Jennifer Landsidle provide a critique of the Bradley-Kelley approach, claiming that their definition is overbroad.⁵⁶ Guzman and Landsidle emphasize the legal dimensions of delegation as providing a better guidepost for examining international delegation and look to the work of Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal who describe delegation in terms of grants of authority to “implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.”⁵⁷ Edwards T. Swaine has a similar emphasis on rules in his discussion of international delegation.⁵⁸ All of these different methods of analyzing international delegations underscore the complexity of the issue and the importance of the concept to international law.

Despite this debate over what constitutes an international delegation, even Guzman and Landsidle concede that granting authority to an international tribunal—as opposed to simply international entities—to make decisions affecting international law is the ultimate form of international delegation.⁵⁹ The development of the CAS as a body to which states delegate authority to adjudicate sports-related disputes will fit under many of the previously stated conceptions of international delegation, but can easily fit under the category of an international delegation to a tribunal despite being private in nature like the International Accounting Standards Board. Regardless of how the concept of international delegation is specifically defined, the CAS has received authority from states, both directly and indirectly, to adjudicate disputes that arise from international sports competition; as a result, a form of international delegation has occurred. However, the reasons why states have been willing to delegate need to be considered, both as to the various arguments

55. *Id.*

56. Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, at 6, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=andrew_guzman.

57. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000).

58. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1507-12 (2004).

59. Guzman & Landsidle, *supra* note 56, at 15-16.

on why states delegate in the broad sense, and then how the CAS fits into this framework.

B) *Benefits and Costs of International Delegation*

International delegation is done for a reason. The increase in acts of delegation confirms that states believe that delegation produces gains. Even some skeptics of international delegation see certain benefits in the use of international tribunals.⁶⁰ The most discussed perceived cost of international delegation is the loss of state sovereignty. Inherent in the act of delegating to another is the transfer of authority from one party to another. While a legitimate concern in some areas, Oona Hathaway directly disputes the conventional wisdom surrounding the sovereignty costs of international delegation by arguing that one must not only look at the loss of authority in the delegation but must also look at the fact that a state actor is *consenting* to that delegation.⁶¹ Hathaway views the delegation as an act of “sovereign consent” that demonstrates a state’s sovereign ability to delegate authority—a quintessential act of exercising state sovereignty.⁶²

Bradley and Kelley also discuss some of the relative costs of delegation. In particular, they note that the scope and range of issue areas involved can have an impact on the delegation costs.⁶³ When the issue at stake is relatively uncontroversial, cooperation can bring about significant social benefits.⁶⁴ The costs of the delegations may be low, but the net benefits are often quite large.⁶⁵

While the major cost associated with international delegation comes from the perceived loss of state sovereignty, there are many benefits that have been highlighted by scholars discussing international delegation. Hathaway explains some of the benefits of delegation that help explain generally why international delegation can be in a state’s interest even though there may be some sovereignty costs associated with that delegation.⁶⁶ The first of these is the ability of a state to project its

60. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 6-7, 14 (2005) (describing some limited circumstances that delegation to tribunals may be effective).

61. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW AND CONTEMPORARY PROBLEMS 115, 121-22 (2008).

62. *Id.* at 122. For more development on the idea of consent in international delegation, see *id.* at 123-140.

63. Bradley & Kelley, *supra* note 48, at 30.

64. *Id.* at 27.

65. *Id.*

66. Hathaway, *supra* note 61, at 141.

own values, such as human rights norms, through international agreements.⁶⁷

Two additional benefits that Hathaway articulates have more salience in the discussion of the CAS. States often delegate both as a way to coordinate their activity and as a means to overcome a collective-action dilemma.⁶⁸ In essence, delegation on specific issues provides for efficient outcomes that may not be achievable independently. For instance, states are willing to coordinate their activity by establishing uniform overflight rules.⁶⁹ Additionally, states can jointly agree to economic actions, such as lower tariffs, that could not be achieved through state-to-state action: reciprocity is needed through an international body.⁷⁰ These efficiency arguments as they relate to the CAS are discussed *infra* in Part III(B).

One of the most important benefits of international delegation—especially in relation to the CAS—is the gain achieved from specialization. As explained by the Hawkins group, states understand that sometimes a specialized body is in a better position to act on a particular international issue and that allowing that body to act on its behalf will produce more efficient outcomes than if they tried to act alone.⁷¹ Specialized bodies often have greater expertise in a particular subject matter and can more effectively resolve disputes because of this core competence.⁷² States have recognized the value of the CAS in providing this expertise on international sports disputes.⁷³

III. Why States Delegate to the Court of Arbitration for Sport

The scholarly literature provides insight into the general structure and benefits of acts of international delegation; however, it lacks a comprehensive discussion on the importance of certain more particularized aspects of the delegation process: the visibility of the delegation and the perceived efficiency and effectiveness of the bodies to which authority is delegated. Understanding these two aspects of delegation is important, especially as the skeptics of delegation become increasingly vocal in their opposition.

67. *Id.* at 143.

68. *Id.* at 143-44.

69. *Id.*

70. *Id.* at 144.

71. Hawkins et al., *supra* note 54, at 13.

72. *See Id.* at 13-15; *see also* Bradley & Kelley, *supra* note 48, at 25-6.

73. *See infra* Part III (B).

I define the visibility of a delegation to be indicated by the degree of direct state involvement in the action. Signing the Rome Statute to accede to the jurisdiction of the International Criminal Court would be an instance of high visibility delegation; on the other hand, an action that occurs under the aura of state involvement, but is instead carried out by non-governmental or other actors would be classified as low visibility. I argue that the low visibility delegations have the chance to be deeper and more widespread than the typical high visibility state delegations since they appear more benign and do not have huge political ramifications. Thus, the low visibility delegations provide an important window into how states might try to increase delegation without being perceived to sacrifice sovereignty.

Additionally, the efficiency and effectiveness of a particular arbitral body is important in garnering *ex ante* approval by states for specific acts of delegation. This aspect of delegation provides insights into state behavior and how to go about gaining support for future institutions.

The role of visibility in the success of delegation to the CAS is best examined through the prism of three particular examples: 1) the New York Convention; 2) the World Anti-Doping Code; and 3) domestic delegation that leads to CAS jurisdiction. Similarly, the efficiency and effectiveness of the CAS in handling international sports disputes is illustrated by three specific areas: 1) domestic court litigation that has helped shape the CAS; 2) features of the CAS that enhance efficiency and effectiveness; and 3) the perceptions of states.

A) *States Delegate Control to the CAS—indirectly and directly: The Importance of Low Visibility Delegation to the CAS*

States are more apt to delegate when the delegation does not appear facially to implicate state sovereignty. States do not see effective arbitration as a threat to state sovereignty; in fact, states are willing to delegate authority to arbitral institutions that can better adjudicate disputes on specific subject-matter.⁷⁴ However, one should not confuse less visible with less effective; in fact these low visibility delegations can have a profound impact on areas of international law. The lower visibility can allow for greater depth of delegation, as countries are less concerned

74. See Project on International Courts and Tribunals, The International Judiciary in Context (Chart), available at http://www.pict-pcti.org/publications/synoptic_chart.html (showing a chart with the wide-range of arbitral tribunals in existence today).

with a huge public backlash against allowing decisions regarding their citizens to be subject to a foreign tribunal. Additionally, an act of international delegation does not have to be explicit. As demonstrated by the New York Convention, state actions can implicitly delegate authority and still retain features present in the traditional notion of an international delegation.

In the context of sports, two major acts of international delegation demonstrate the acceptance of the CAS as the venue of choice for international sports disputes. First, a state signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, implicitly delegates authority to any arbitral body that can prove itself as a legitimate tribunal—including the CAS. The New York Convention not only sets up a system that presumptively approves of arbitration, but the signing of the document is also an act of delegation that allows for the growth of more delegation—since any subsequent arbitral tribunal created is presumptively legitimate until domestic courts rule otherwise. Second, states convened in 2003 at the World Conference on Doping in Sport and adopted the World Anti-Doping Code, a document that specifically delegated final judicial authority to the CAS in disputes arising from alleged doping violations. These examples will help fill in some of the gaps in the existing international delegation literature by demonstrating the impact of the visibility of delegation. Since both of these delegation acts do not formally implicate the state in any proceedings, they would be considered low visibility delegations.

1) LOW VISIBILITY DELEGATION TO THE CAS
THROUGH THE NEW YORK CONVENTION

International arbitration has been the dispute resolution mechanism of choice for many, especially in the commercial arena. While arbitral awards should be facially binding upon the parties to the proceeding, sometimes an additional mechanism is needed to enforce an award upon a specific party. To accommodate for this enforcement need, states came together in 1958 and adopted the New York Convention. To date, 143 parties have signed the New York Convention⁷⁵ and it remains one of the foundational documents in the field of international arbitration.

75. Convention on the Recognition and Enforcement of Foreign Arbitral Awards *available at* <http://treaties.un.org/pages/participationstatus.aspx> (select “CHAPTER XXII”; then select “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”) (listing parties ratifying the Convention).

The Convention has been labeled the “single most important pillar on which the edifice of international arbitration rests.”⁷⁶ I contend that a state’s adoption of the New York Convention is an implicit delegation of authority to *any* arbitral body—including the CAS—subject to certain provisions of the Convention by which state courts can vacate the awards of arbitral tribunals. In essence, the New York Convention allows for effective arbitration to occur by any arbitral body that can meet certain standards of fairness and legitimacy. The Convention grants *ex ante* authority to all arbitral tribunals to adjudicate matters, but limits that grant of authority to *ex post* scrutiny on a small subset of issues. Additionally, the implicit, less visible delegation of authority through the New York Convention is an act of delegation that allows for the growth of delegation over time. This single act of delegation—the signing of the New York Convention—has allowed for the proliferation of arbitral tribunals, such as the CAS, to occur unnoticed by many and has significant potential for more indirect delegations of authority over a wide-range of issues.

The adoption of the New York Convention does more than simply set forth the internationally accepted rules of arbitration. The distinction between this Convention, and for instance, the Vienna Convention of the Law of Treaties, is the degree of control states now have since the signing of the treaty. While the Vienna Convention sets forth the rules of the road, in order for that treaty to be of value, *states* have to enact other treaties that will benefit from the Vienna Convention’s guidance on the appropriate procedures. This is different from the implicit delegation that occurs with the signing of the New York Convention. After signing, a state does not have to take any affirmative action with respect to the creation of other arbitral tribunals. Private actors create the arbitral tribunals whose awards states have already agreed to implement under the Convention, as long as they meet certain standards. This implicit delegation is similar to the model used by the International Centre for Settlement of Investment Disputes (ICSID); the major difference is that states only delegated to ICSID in its founding document,⁷⁷ while states delegated to *all* future arbitral tribunals through the New York Convention.

76. J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT’L ARB. 91, 93 (1990).

77. See International Centre for the Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/9.htm.

In order to have an effective arbitral system, a balance must be struck between independence of the arbitral body and some sort of national judicial review.⁷⁸ Too much autonomy could lead to abuse of power, but too much national power to nullify awards would cripple the arbitration scheme.⁷⁹ The New York Convention attempts to balance the independence and judicial review interests. Articles I through IV of the New York Convention set forth the parameters by which a foreign arbitral award is enforceable by state courts. These articles provide the procedural rules states must follow in giving effect to arbitral awards. Included in these articles are the provisions for the arbitral agreement to be in writing and the procedures a party must take in order to submit an award for enforcement by a state.⁸⁰

However, Article V provides the *ex post* mechanism for judicial review of an award, but only on certain grounds. These limited grounds for review include: incapacity, lack of notice for arbitration, agreement not being in accordance with the law of the country in which the arbitration took place, or the award has already been set aside under the law of the country in which the arbitration took place.⁸¹ Additionally, the award may be set aside if the subject matter was not capable of settlement by arbitration under laws of that country or if the enforcement of the award would be in violation of the public policy of that country.⁸² These limited grounds of prohibiting enforcement mean that national “[c]ontrol under the New York Convention essentially involves policing procedure and not substance.”⁸³ United States federal courts have also agreed with this sentiment.⁸⁴ Since states only have these very limited grounds for vacating an arbitral award,⁸⁵ I contend that states have

78. W. Michael Reisman, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 113 (1992).

79. *Id.*

80. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I-IV, June 10, 1958, *available at* <http://www.uncitral.org/pdf/1958NYConvention.pdf>.

81. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (1)(a-e).

82. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (2)(a-b).

83. Reisman, *supra* note 78, at 115.

84. See *Int'l Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Comercial*, 745 F.Supp. 172, 178 (S.D.N.Y. 1990) (holding that “ ‘the competent authority of the country under the law of which, [the] award was made’ refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case.”).

85. One of the most telling cases of court deference to arbitral awards under the New York Convention is demonstrated by *National Oil Corporation v. Libyan Sun Oil*,

ex ante implicitly delegated authority on a whole range of issues to arbitral institutions—including the CAS. The impact of this broad delegation of authority will be explored further in Part IV.

Many of the awards rendered by the CAS need no outside actor for enforcement, since the sports competition can simply change its result or disqualify an athlete.⁸⁶ However, a contractual dispute or the payment of litigation costs could require the outside enforcement of the award. In that case, a state court could conduct an *ex post* review and refuse enforcement of the award under one of the enumerated grounds of the New York Convention discussed above, though the standard for refusing to enforce is high.

Conversely, challenges to the CAS award itself must be made to the Swiss Federal Tribunal—the court of the nation where the arbitration took place.⁸⁷ The CAS has been found to be a legitimate arbitral tribunal, meaning its awards can be enforced through the New York Convention.⁸⁸ In particular, when litigants challenged whether the CAS was a fair and impartial arbitral tribunal, the Swiss Federal Tribunal upheld the legitimacy of the CAS in both the *Gundel* and *Lazutina/Danilova* decisions discussed *infra* in Part III(B).⁸⁹ The findings by the Swiss court on these challenges to the alleged flaws in a decision uphold the use of the New York Convention to enforce CAS awards when needed.⁹⁰ This does not mean that CAS awards will be recognized by the Swiss court in every case, but challenges to the independence or impartiality of the CAS will likely fail.⁹¹

Other nations have also adopted the view that the CAS is a legitimate arbitral tribunal that operates under the parameters of the New York Convention. In light of the United States adoption of the New

733 F.Supp. 800 (D. Del 1990). In the case, a U.S. court demonstrated the strong power of the New York Convention in enforcing an arbitral award against a U.S. company in favor of a state designated by the U.S. as a state-sponsor of terrorism. The decision further highlights the narrow public policy grounds by which an arbitral award can be vacated.

86. This method of enforcement can be termed a “speech act” since stating a decision has the desired effect despite any potential resistance by a party. For instance, taking away a medal from someone does not require physically recovering the medal; by announcing a new winner, the sports body already inflicts the desired penalty even if the tangible material (the medal) is not recovered. Yi, *supra* note 38, at 322-24.

87. Reeb, *supra* note 18, at 38.

88. *Id.*

89. See DIGEST OF CAS AWARDS 1986-1998, at 543-44 (Matthieu Reeb ed. 1998).

90. *Id.*

91. Stephen A. Kaufman, *Issues in International Sports Arbitration*, 13 B.U. INTL L.J. 527, 542-43 (1995).

York Convention, U.S. courts have deferred to the judgment of arbitral tribunals in the area of sports.⁹² The Justin Gatlin case demonstrates the unwillingness of United States courts to police the substance of CAS rulings unless they reach the point of violation of public policy.⁹³ Despite sympathizing with Gatlin and calling the actions of the CAS arbitrary and capricious, the Northern District of Florida held that Gatlin's only remedy for relief was the Swiss Federal Tribunal since challenges to the award had to be made in the seat of the arbitration under the New York Convention.⁹⁴ Additionally, an Australian court had the opportunity to examine a decision by the CAS and similarly held that the award should stand because it did not have jurisdiction to hear the case since the matter was *foreign* not *domestic*.⁹⁵ The Australian court refused to interfere with a CAS decision handed down by the Ad Hoc Division in Australia on behalf of an Australian athlete since Lausanne, Switzerland is the seat for CAS.⁹⁶ This decision implicitly upheld the legitimacy of the CAS as set forth by Swiss law in the *Gundel* decision and demonstrates the power of the New York Convention.⁹⁷ The New York Convention implicitly delegates an incredible amount of authority to arbitral tribunals and the CAS has benefited from this delegation.

2) LOW VISIBILITY DELEGATION TO THE CAS
THROUGH THE WORLD ANTI-DOPING CODE

The fight against doping in sport required collective action from a variety of stakeholders. Harmonizing the various doping standards into a unified set of principles was a major goal of the World Anti-Doping Agency (WADA) and their efforts came to fruition at the second World Conference on Doping in Sport held in Copenhagen, Denmark in March 2003. At this conference, some 1200 delegates representing 80 governments, the IOC, all International Federations for Olympic Sports, athletes, and others came together and unanimously agreed to adopt the World Anti-Doping Code (Code) as the basis for the fight against

92. See, e.g., *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 601 (7th Cir. 2001) (rejecting an appeal from an arbitral tribunal under the enforcement feature of the New York Convention).

93. *Gatlin v. U.S. Anti-Doping Agency, Inc.* Order, June 24, 2008. Case No. 3:08-cv-241/LAC/EMT.

94. *Id.*

95. Nafziger, *supra* note 10, at 45-46 (citing *Raguz v. Sullivan* [2000] N.S.W. Ct. App. 240 (unpublished opinion), reprinted in G. KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS* 51 (2001)).

96. *Id.* at 46.

97. *Id.*

doping in sport.⁹⁸ Participants at the Conference demonstrated support for the Code by adopting the Copenhagen Declaration, the political document signed by governments at the Conference that explicitly stated each actor's role in supporting and implementing the Code.⁹⁹ The Code, which entered into force on January 1, 2004,¹⁰⁰ grants jurisdiction for appeals involving international-level athletes exclusively to the CAS.¹⁰¹ I argue that the adoption of the World Anti-Doping Code is an explicit act of international delegation by states to the CAS, albeit indirect since states never directly interact with the CAS.

The Code attempts to provide the framework to harmonize the standards different International Federations used in adjudicating doping matters by setting forth guidelines for doping regulations.¹⁰² Before the adoption of the Code, the CAS heard appeals on some doping disputes; however, the manner in which it did so was sporadic and unpredictable. While IFs still each have their own regulations for adjudicating doping disputes, certain aspects of the Code are supposed to be adopted verbatim and the other principles of the Code adopted with the same substantive intent.¹⁰³ One of the mandatory items is making the CAS the final appellate authority for disputes in cases involving international-level athletes.¹⁰⁴ Designating the CAS as the final appellate authority is one way the adoption of the Code served as act of international delegation to the CAS.

As a result of the Code's adoption and the passage of the Copenhagen Declaration, states committed to implement these principles at the national level. For instance, the U.S. created the United States

98. World Anti-Doping Agency, What is the Code? Introduction, *available at* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=364>.

99. World Conference on Doping in Sport Resolution, Adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003.

100. "The current Code, which went into formal effect on 1 January 2004, underwent a thorough review and consultation with WADA stakeholders for its practical improvement. This 18-month, 3-phase process culminated at the Third World Conference on Doping in Sport in November 2007, at which time the WADA Foundation Board approved the newly Revised Code and identified the required implementation date for all stakeholders as being January 1, 2009." World Anti-Doping Agency, 2009 Code Implementation, *available at* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=735>.

101. World Anti-Doping Code art. 13.2.1.

102. World Anti-Doping Agency, What is the Code? Introduction, *available at* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=364>.

103. World Anti-Doping Code, Introduction.

104. World Anti-Doping Code art. 13.2.1. It is noteworthy that Article 13.2.2 pertaining to national-level athletes does not require appeals to be heard by the CAS; other tribunals deemed to meet certain standards, like AAA in the United States, are acceptable.

Anti-Doping Agency (USADA) which functions independently as the drug testing arm for the USOC and any United States NGB.¹⁰⁵ The USADA implements the Code on behalf of the United States and has the authority to transmit drug testing information to relevant International Federations and WADA.¹⁰⁶ Parties to a dispute involving the USADA can ask for a hearing in front of the American Arbitration Association (AAA) and if not satisfied with the result, can appeal to the CAS.¹⁰⁷

The USADA sets forth the foregoing procedures in its Protocol for Olympic Movement Testing, but it also directly incorporates the Code into Annex A of the Protocol entitled: "Articles from the World Anti-Doping Code that are Incorporated Verbatim into the USOC Anti-Doping Policies and the USADA Protocol for Olympic Movement Testing."¹⁰⁸ United States participation at the World Conference and its support for the Code at the governmental level indicated a willingness to delegate final judicial authority to the CAS, and this implicit delegation was codified on behalf of the United States by the USADA in the Protocol.

WADA, as a non-governmental organization, recognized that the Code it drafted may not be considered legally binding by states.¹⁰⁹ Consequently, a few different methods of rectifying this problem were put in place. First, the Copenhagen Declaration mentioned above was designed to be a political document that demonstrated commitment to the Code by states; though again, this can be seen merely as indicating interest in the Code, rather than being a legally binding mechanism. Second, the bigger political mechanism for adoption of the Code came from the United Nations Educational, Scientific, and Cultural Organization (UNESCO)-led effort to create an International Convention Against Doping in Sport.¹¹⁰ Governments unanimously adopted this document at the 33rd UNESCO General Conference in Paris in October 2005.¹¹¹ At the time of publication, 108 states have ratified or acceded

105. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, at 1.

106. *Id.*

107. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, at 10.

108. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Annex A.

109. World Anti-Doping Agency, Q&A on the Code *available at* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367>.

110. *Id.*

111. *Id.*

to the Convention¹¹² including the United States which recently ratified it during August 2008¹¹³ and many more states indicating their intent to do so soon. The first session of the Conference of States Parties to the International Convention against Doping in Sport was convened on 5-7 February 2007 and brought together the 41 states that had ratified the Convention by the end of 2006.¹¹⁴ “The fight against doping was thus inscribed for the first time in international law, and governments, sports federations and civil society—as well as the Olympic movement—were provided with a binding legal instrument.”¹¹⁵ Finally, the IOC has taken additional steps to ensure the Code is adopted by all members of the Olympic Movement by amending the Olympic Charter to make adoption of the Code mandatory.¹¹⁶ All NOCs, IFs, and others that are a part of the Olympic Movement¹¹⁷ will have to be bound by the Code.

These three mechanisms binding states and other international sports actors to the Code are important acts of international delegation to the CAS. States have directly signed documents supporting delegation to the CAS; have indirectly had their NOCs and other agencies, such as USADA, submit to jurisdiction; and continue to have their athletes compete in competitions that make jurisdiction to the CAS mandatory. In doing so, states explicitly granted their approval for the ability of the CAS to be a fair and neutral arbiter of sports disputes.

A final issue is why delegation to the CAS through the World Anti-Doping Code can be considered an act of low visibility delegation. As contrasted with the New York Convention example, states have directly endorsed the CAS through the Code. It might appear that this act of delegation could be considered a straightforward act of delegation by states; however, in many countries, including the United States, the specific

112. International Convention Against Doping In Sport: Paris, 19 October 2005. List of parties *available at* <http://portal.unesco.org/la/convention.asp?KO=31037&language=E&order=alpha>.

113. White House Press Release, President George W. Bush, Message to the Senate of the United States, (February 7, 2008); UNESCO News Service, United States ratifies International Convention against Doping in Sport, *available at*: http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html.

114. Media Advisory, International Convention Against Doping in Sport: 41 States will take part in First Conference of States Parties, (Jan. 9, 2007) *available at* http://portal.unesco.org/en/ev.php-URL_ID=36578&URL_DO=DO_TOPIC&URL_SECTION=201.html.

115. *Id.*

116. International Olympic Committee, Olympic Charter, art. 44: World Anti-Doping Code (2007); *see* World Anti-Doping Agency, Q&A on the Code *available at* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367>.

117. International Olympic Committee, Olympic Charter, art. 1: Composition and General Organisation of the Olympic Movement (2007).

delegation did not occur at the governmental level—the delegation occurred when the USOC, a non-governmental body, created the independent USADA which adopted the Code into its procedures.¹¹⁸ States never formally directly delegated any authority to the CAS; they only indirectly did so through their internal regulatory bodies. They did however indicate their support for the Code in the Copenhagen Declaration and through the UNESCO document and as a result have implicitly ceded authority to the CAS. Thus, I consider the delegation to be low visibility since it does not facially implicate the state in any fashion but is done under the authority of the grant of delegated power by the state.

3) DOMESTIC DELEGATION WITHIN STATES TRIGGERS CAS JURISDICTION

States also interact with the CAS through domestic delegations that have international implications—namely where states have chosen to delegate issues of international sports disputes to domestic agencies which then, in turn, submit to the jurisdiction of the CAS on behalf of the state. In essence, the adoption of the New York Convention and the World Anti-Doping Code by individual states are actions on the macro level that provide the authority under which state-created domestic agencies can interact with the CAS on the micro level. This implicit delegation of authority has gone unnoticed and demonstrates the ability of less visible delegation to have a profound impact on international law.

Unlike the typical instances of international delegation discussed earlier,¹¹⁹ an act of domestic delegation indirectly leads to the international delegation to the CAS. Individual countries are represented at international sports competitions by national bodies. In the Olympics, each country must set up a National Olympic Committee (NOC) that is a particular country's representative at the Games.¹²⁰ While there is no explicit requirement for the NOCs to be completely independent of the government, the language of the Olympic Charter leans in that direction.¹²¹ Additionally, at other non-Olympic international competitions, each country that participates usually has a National Governing Body (NGB) that organizes and is responsible for administering

118. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Annex A.

119. *See supra* Part II.

120. International Olympic Committee, Olympic Charter art. 28: Mission and Role of the NOCs (2007).

121. *Id.*

a particular sport. For instance, 'USA Basketball' is responsible for putting together the U.S. team that competes in all international basketball competitions.¹²²

The state, as a sovereign entity, is usually not represented at these competitions, unlike, for example, the United Nations where a permanent representative is an agent of the state. Certain countries have gone a step further and have even completely removed the government from the process of making decisions concerning international sports competitions. As a result, they have delegated this authority over international law to their respective NOCs and NGBs. For instance, in the United States, the Ted Stevens Olympic and Amateur Sports Act,¹²³ creates the United States Olympic Committee (USOC) and lays out the rules for creation and governance of National Governing Bodies. The Stevens Act creates an independent, federally chartered corporation (the USOC) that will represent the interests of the United States in international sports competitions.¹²⁴ Through this domestic delegation, the U.S. has essentially ceded its sovereign authority to private, independent actors (the USOC and the NGBs for each sport) that will pursue the broad goals highlighted in the Act on behalf of the United States with theoretically no government control.¹²⁵ As a result, the United States has also delegated its authority on issues of international sports law, as the types of activities these domestically-created bodies will participate in are inherently international in nature.

This indirect international delegation through the Stevens Act leads to the jurisdiction of the CAS. The International Federations for each sport set the parameters for participation in their respective competitions. Whether in the context of the Olympic Games or the FIFA World Cup, each institution has created a mechanism for the adjudication of disputes that arise from international sports competitions. Increasingly, these bodies have acceded to the jurisdiction of the CAS.¹²⁶ In order to get access to these international competitions, countries, typically

122. Inside USA Basketball *available at* <http://www.usabasketball.com/inside.php?page=inside>.

123. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501 et seq. (1998).

124. 36 U.S.C. § 220502.

125. Formally, there is no government involvement. But as will be discussed *infra* the government often has some influence on the positions these bodies take, such as in a boycott of the Olympic Games.

126. 36 U.S.C. § 220503; International Olympic Committee, Olympic Charter art. 59: Disputes—Arbitration (2007) (Participation in the Olympics requires an IF or NOC to submit to CAS jurisdiction.).

through their representatives (the NOCs), must be willing to play by the rules set forth by these bodies—including the jurisdiction of the CAS. Since the country is getting a tangible benefit by getting the ability to have its athletes compete in these competitions, few have questioned the de facto mandatory nature of the delegation or the sovereignty costs associated and have consented to CAS jurisdiction.¹²⁷ By competing in the Olympics, the USOC and its athletes are subject to CAS jurisdiction.¹²⁸

Delegation to domestic regulatory agencies is not a new phenomenon. Government officials, particularly elected officials, often delegate to agencies in order to benefit from the gains of specialization. Mark Thatcher specifically addresses this phenomenon of delegation to domestic regulatory agencies.¹²⁹ His analysis on why government officials would delegate authority on certain domestic matters to regulatory agencies sets the backdrop for my argument on why countries would similarly delegate to domestic actors that have the ability to act internationally in the field of sports.

Increased information requirements provide an obstacle for elected officials to gain any political benefit from certain actions, and as a result, politicians prefer to delegate those actions to regulatory bodies.¹³⁰ In essence, the benefits of certain programs and policies are too difficult to explain in the short attention span of the average voter that those issues become too costly for politicians to devote time towards. For instance, regulatory bodies have been created to address public policy problems, such as food safety or the environment, since these policy issues require more specialist involvement.¹³¹ In addition to the lack of electoral benefit conferred by some of these very technical policy areas, officials can shift the blame for unpopular decisions to these regulatory bodies.¹³² And to some extent, policymakers recognize the need for specialists dealing with technical matters to further efficiency.

These bodies provide a win-win solution for the politician: they focus on politically important issues and allow the politician to blame others when things go wrong in areas that have been delegated. However, the

127. See discussion on “consent” *supra* Part II.

128. Maidie E. Oliveau, *Navigating the Labyrinth of ‘Amateur’ Sports ADR Procedures*, 13 No. 3 DISP. RESOL. MAG. 6, 7 (2007).

129. Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, in *THE POLITICS OF DELEGATION* 125 (Mark Thatcher and Alec Stone Sweet, eds. 2003).

130. *Id.* at 132.

131. *Id.* at 128.

132. *Id.* at 131.

same substantive policy concern does not necessarily get delegated in every country. There is “no automatic link between functional advantages of delegation and the creation of IRAs [independent regulatory agencies].”¹³³ In the sports context, it would seem counterintuitive for politicians to give up the ability to make decisions over international sports, an area of law that a large section of the voting population deeply cares about and has some knowledge of.¹³⁴ Sports arouse such high emotions from those who follow athletic competitions that it would seem politicians would want to benefit from being able to claim they were involved in the process at some level.¹³⁵ However, despite the emotions that sports elicit, the technical aspects of international doping regulations and other sports-related rules make sports a prime area in which a country would consider delegating to a regulatory body. It would be difficult for politicians to try to explain the intricacies of doping standards in international sports competitions, and indirectly allowing for the delegation of the job to a specialized body, like the CAS, does provide the politician some political cover and ability to cast blame if the CAS reaches an adverse decision.

However, this analysis does not provide all of the underlying reasons why politicians would let the domestic regulatory body independently sign the nation’s name to arbitration agreements under the CAS or participate in competitions that have mandatory arbitration clauses with jurisdiction under the CAS. The efficiency and effectiveness of the CAS provides the other half of the story.

B) *Delegation to the Court of Arbitration for Sport is Efficient and Effective*

The second reason I contend that the CAS has avoided the major criticisms of international adjudication is that the CAS has proven to be an efficient and effective arbitral tribunal. The court that began operations in 1984 is strikingly different from the court that operates today. This

133. *Id.* at 136.

134. I do concede that U.S. domestic sports—the NBA, NFL, or MLB—tend to be more popular in the United States than international sports such as soccer; however, this fact does not take away from my argument since the CAS only deals with international sporting competitions. Large international sports competitions, such as the Olympics, evoke a tremendous amount national pride and affect perhaps even a wider audience than the hardcore sports fan attuned to U.S. leagues. Additionally, for most of the rest of the world, sporting competitions that are conducted each year are more international or regional in scope than sports in the U.S.

135. There are instances when elected officials do get involved in sports, but those are generally only when tangible political gains can be achieved or are done at a high

willingness to evolve has kept its critics relatively silent. By no means is the CAS perfect, and it still has its fair share of critics; however, states have shown a willingness to legitimate the court as is shown by the adoption of the World Anti-Doping Code, which designates the CAS as the final appellate authority for all doping disputes arising from international competition. This recognition and explicit delegation by states, noted in the *Lazutina/Danilova* and *Gundel* decisions by the Swiss Federal Tribunal, underscores the efficiency and effectiveness of the CAS as a true international sports arbitral body. I argue that states are more willing to cede authority over their nation's citizens, even indirectly, when they believe the body to which authority is given is efficient and effective. This Section highlights those attributes that have led states to recognize the ability of the CAS to be an efficient and effective tribunal. First, it examines the impact domestic court litigation has had on the evolution of the CAS. Next, it explores the features that embody the efficient and effective institution. And finally, it analyzes the perceptions of efficiency and effectiveness and how perceptions correlate with a country's position towards the international tribunal.

1) THE EVOLUTION OF THE CAS THROUGH LITIGATION
IN STATE COURTS INCREASED THE EFFICIENCY AND
EFFECTIVENESS OF THE INSTITUTION

In addition to consent, the CAS needed to be perceived as an impartial judicial body that was independent from the International Olympic Committee (IOC) in order for the CAS to retain legitimacy over the long-term. From the founding of the CAS, the IOC had a major role—it was the IOC that saw a need for such a court and then spent the time and money to create the institution. For the first ten years of the CAS, the Court retained a heavy influence from the IOC, especially since the majority of the CAS's budget came from the IOC.¹³⁶ The IOC also had a great deal of control over the appointment of arbitrators and of the rules under which the CAS operated.¹³⁷ The strong links between the IOC and the CAS would be troublesome for the court's image as a

level of generality. For instance, the baseball steroids scandal caught the attention of Congress once the scandal caught the headlines of major media outlets. See Dave Sheinin, *Baseball Has A Day of Reckoning In Congress*, THE WASHINGTON POST, March 18, 2005, at A01. Additionally, the President often invites winning athletes and teams for photo-opportunities at the White House. See White House Press Release, President Welcomes University of Texas Longhorns, 2005 NCAA Football Champions, to the White House (February 14, 2006) available at <http://www.whitehouse.gov/news/releases/2006/02/20060214.html>.

136. Reeb, *supra* note 18, at 33.

137. *Id.*

neutral, independent body capable of fairly adjudicating international sports disputes.

The relationship between the IOC and CAS began to change as a result of a public law appeal of a CAS decision to the Swiss Federal Tribunal¹³⁸ in a case involving Elmar Gundel, a horse rider who had appealed his suspension by the International Equestrian Federation (FEI) to the CAS (hereinafter "*Gundel*").¹³⁹ Gundel claimed that the CAS was not sufficiently independent of the IOC and FEI, and as a result, the CAS ruling against him should be abandoned. In its judgment in March 1993, the Swiss court upheld the judgment of the CAS, recognizing its role as "a true arbitration court."¹⁴⁰ However, the court, in dicta, made it clear that certain aspects of the CAS's relationship with the IOC were troubling, especially the funding and membership links between the CAS and IOC.¹⁴¹ In response to this judgment, the CAS underwent a restructuring process in late 1993 that focused on making the Court more independent of the IOC. These reforms, adopted in 1994, have set the CAS on a more autonomous path, solidifying its legitimacy as a true court of arbitration.

The 1994 reforms of the CAS¹⁴² responding to the dicta in the *Gundel* decision seemed to place the CAS on more independent footing. However, the CAS was subsequently challenged in 2003 when the Swiss Federal Tribunal once again examined whether or not the CAS was a sufficiently independent body able to resolve sports disputes—this time specifically in the backdrop of the court's relationship with the IOC. The Swiss Tribunal's decision on this matter arising from the 2002 Winter Olympics affirmed that the 1994 CAS reforms adequately addressed the independence concerns, leaving no doubt as to the credibility of the institution to handle international sports disputes.

The 2003 case involved two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, who were challenging the decision heard on appeal by the CAS that upheld their ban from the 2002 Olympic Winter Games based on violations of doping (hereinafter "*Lazutina/*

138. Swiss Courts had jurisdiction over challenges to the CAS in the *Gundel* case since the CAS's headquarters are in Switzerland.

139. Extract of the judgment of March 15, 1993, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case *G. versus Fédération Équestre Internationale and Court of Arbitration for Sport (CAS)* (public law appeal) (translation), CAS 92/63 *G. v/ FEI in DIGEST OF CAS AWARDS 1986-1998*, at 561 (Matthieu Reeb ed. 1998) [hereinafter cited "*Gundel*"].

140. *Id.* at 543.

141. *Id.* at 570.

142. *See supra* Part I.

Danilova”)¹⁴³ In the *Gundel* case, the “Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases in which the IOC is not a party,”¹⁴⁴ but in this 2003 case, the court would have the opportunity to decide whether the CAS could be considered a true arbitral tribunal even if the IOC was a party to this dispute—an issue the *Gundel* court addressed only in dicta. The *Lazutina/Danilova* case demonstrated that the 1994 reforms created true independence from the IOC and would have a lasting impact on the future of the CAS.

Not only did the Swiss court grant a stamp of legitimacy to the new CAS structure, it also furthered the contention that the CAS is a “true ‘supreme court of world sport.’”¹⁴⁵ The Swiss Tribunal held: “[I]t is clear that the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State courts.”¹⁴⁶ Going one step further, the Swiss Tribunal discussed the adoption of the 2003 Copenhagen Declaration on Anti-Doping in Sport at the World Conference on Doping in Sport, in which many States, including China, Russia, and the United States, committed to adopting “the World Anti-Doping Code as the basis for the worldwide fight against doping in sport.”¹⁴⁷ Under the Code, the CAS is the appellate body for all doping-related disputes (such as the Floyd Landis case). The Swiss court viewed this delegation of authority by States as a “tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC.”¹⁴⁸ This does not mean, however, that CAS awards will be recognized in every instance; but a challenge to the independence and impartiality of the tribunal will likely fail.¹⁴⁹

143. Excerpt of the judgment of 27 May 2003, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case A. & B. versus International Olympic Committee (IOC) and International Ski Federation (FIS) (4P. 267, 268, 269 & 270/ 2002/ translation) in DIGEST OF CAS AWARDS III 2001-2003, at 674, 675 (Matthieu Reeb & Estelle du La Rochefoucauld eds. 2004).

144. *Id.* at 679.

145. *Id.* at 688.

146. *Id.* at 689.

147. *Id.* at 688.

148. *Id.*

149. See Kaufman, *supra* note 31, at 542-43 (discussing the *Gundel* decision in the context of the CAS’s impartiality.); see also, *supra* Part III(A)(2), for further discussion of this act of international delegation and the grounds for vacating CAS awards.

As the CAS continues to develop and becomes a body that sporting federations turn to more frequently, the importance of the institution in shaping international sports law will grow. Already the Court has made its mark in developing a body of jurisprudence on international sports issues, and the likely expansion of its role will depend on this legitimacy received from states. These two challenges to the independence of the CAS helped the court solidify itself as an efficient and effective tribunal.

2) FEATURES OF THE CAS THAT DEMONSTRATE EFFICIENCY AND EFFECTIVENESS

The CAS is perceived to be efficient and effective by states since it is identified as providing timely judgments, independent experts familiar with sport issues, and cost-effective litigation.¹⁵⁰ Many of these features are also attributed to commercial arbitration; however the CAS goes beyond these attributes and performs an essential function as a body that centralizes dispute resolution in sport.

First, CAS arbitrations are quick and efficient. The most telling example of the CAS's efficiency is the Ad Hoc Division that is formed during the Olympic Games and other large international sports competitions, such as the World Cup.¹⁵¹ The Ad Hoc Division addressed the need for quick turnaround on certain competition-related items (usually within 24 hours).¹⁵² The Ad Hoc Division also removed the organizer of the competition from the role of final arbiter on matters in which the organizer likely has some stake in the outcome. Additionally, the CAS "appeals arbitration procedure provides for a four-month time limit from the filing of the request for arbitration to issue a final award."¹⁵³ Such self-imposed constraints on operation provide the CAS with a comparative advantage and further the belief that the body is efficient and effective in handling sports disputes.

Second, CAS arbitrators are specialists in sports disputes. This characteristic is common to most arbitral bodies and is especially important in the context of sports, since the stakes for athletes competing in sport are very high.¹⁵⁴

150. Hilary A. Findlay, *Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making*, 16 MARQ. SPORTS L. REV. 73, 74 (2005).

151. The Ad Hoc Division grew out of a need to quickly adjudicate disputes arising during a competition that could not wait until the competition was over. Fifty-six cases have been submitted before Ad Hoc Divisions of the CAS. See CAS Statistics available at <http://www.tas-cas.org/statistics>.

152. Reeb, *supra* note 18, at 38.

153. *Id.* at 39.

154. See Foschi, *supra* note 16, at 468.

A final general reason for the preference of arbitration is that the costs of adjudicating a dispute are usually lower than in domestic court. Litigants don't have to be fearful of high court costs when bringing their disputes to the CAS and they avoid the costs of extensive discovery as well. The low cost is even further amplified since the CAS bears most of the costs of the arbitration while the litigants are responsible only for a few fees.¹⁵⁵

While the CAS retains many of the positive attributes of conventional arbitral tribunals, it also adds value in other areas since it is in a better position than domestic courts to handle issues unique to sports. In particular, the CAS centralizes judicial interpretation of rules and regulations, allowing for increased predictability and fairness in outcomes. The *lex sportiva* that has emerged serves as a guide for future litigants. International sports competitions are conducted all around the world with 205 National Olympic Committees currently a part of the Olympic Movement.¹⁵⁶ Were sports disputes to be adjudicated in domestic courts, athletes and organizations such as the IOC would be subject to a variety of conflicting laws in multiple jurisdictions, a situation that would be difficult for all parties. The CAS centralizes the dispute resolution process, reducing transaction costs for all parties. Additionally, any potential "home field advantage" athletes might get litigating in their home country could be offset by the time and cost of litigation coupled with the chance that an institution such as the IOC might not recognize a perceived tainted court decision.¹⁵⁷

Second, allowing individual International Federations to have a purely internal hearing structure is not appropriate for adjudicating sports disputes.¹⁵⁸ Allowing an International Federation or even the IOC to be the sole party bringing an action against an athlete and also be the judge in such a case is unfair to the athlete. The CAS adds a layer of scrutiny to internal hearings, creating a fairer, more transparent process. The accountability mechanism the CAS provides was underscored in the *Gundel* decision. In that case, the Swiss Tribunal indicated a need for the IOC to be independent from the CAS so that the IOC would not be a party to a dispute that it would have an influence in deciding.¹⁵⁹ The CAS is essential to providing judicial review to internal International

155. Reeb, *supra* note 18, at 39.

156. International Olympic Committee, National Olympic Committees available at http://www.olympic.org/uk/organisation/noc/index_uk.asp.

157. Yi, *supra* note 38, at 301, 302.

158. *Id.* 304-09.

159. *Gundel*, *supra* note 139, at 569.

Federation hearings, especially for potential doping violations that can severely impact an athlete's career. Similarly, IFs, the IOC, and others prefer the CAS to be viewed as a neutral arbiter presiding over their sport or competition. For IFs and the IOC, being perceived as credible institutions in the eyes of their participants is crucial to their growth and success. These actors get to 'pass the ball' to the CAS to make decisions, providing themselves "public relations insurance" by potentially distancing themselves from criticism over potentially controversial decisions.¹⁶⁰

Finally, the CAS is set up in a manner that provides an easy mechanism for its decisions to be enforced. In addition to the enforcement through the New York Convention, discussed *supra*, many of the disputes adjudicated by the CAS can be enforced by speech alone. For instance, if an athlete is disqualified and refuses to give back possession of a gold medal, the consequences of that holdout are negligible. The CAS ruling that a particular athlete is or is not the gold medal *winner* is more important than being the gold medal *holder*. The value of the medal in possession of the disqualified athlete becomes meaningless if the rest of the world does not recognize the achievement.¹⁶¹ As a result, the CAS rulings can have immediate teeth when implemented by all the International Federations and sporting competitions that have acceded to jurisdiction of the CAS.

3) PERCEIVED EFFECTIVENESS PROMOTES DELEGATION: TWO EXAMPLES

The decision by a state to delegate authority entails an assessment of the costs and benefits associated with that action. At the heart of this calculus is the notion that a state delegates in order to further its interests and refuses to delegate when it is safeguarding something it believes it cannot place in the hands of others. However, an institution that is perceived to be effective is more likely to gain the acceptance of holdout countries or participants—even when the issue is of high importance. While there are many issues and countries to explore, I look particularly at the United States and the Fédération Internationale de Football Association (FIFA). Examining these entities' responses to the CAS will help further the argument that the perceived efficiency and effectiveness of the CAS aided the act of international delegation.

As one of the more vocal critics of international delegation, the United States has implicitly endorsed the CAS without any major problems.

160. Yi, *supra* note 38, at 309-12.

161. *Id.* at 322-25.

One of the biggest critiques leveled against international delegation is the perceived loss of sovereignty by letting American citizens be tried in venues such as the International Criminal Court. For the United States, military matters are of paramount importance. With the robust military presence of the U.S. worldwide, it believes that its troops would be vulnerable to prosecutions at the ICC under false pretext. In essence, this is an argument based, in part, on the *perceived* ineffectiveness of the ICC as a neutral tribunal that would only try those who commit true war crimes rather than engage in political prosecutions. This is one of the reasons the U.S. has not given its support to this perceived ineffective institution.

Conversely, the United States, through the authority given to a private, non-governmental entity (the USOC), has deemed the CAS to satisfy the criteria of an effective institution that can adequately adjudicate matters concerning U.S. citizens. The explicit adoption of the Copenhagen Declaration on doping coupled with the ratification of the UNESCO Convention signifies the acceptance of the CAS as an effective institution on the governmental level.

On the one hand, the ICC deals with issues of high importance to the state (military matters) but is perceived to have low effectiveness by the United States; while the CAS adjudicates issues of low to medium importance to the state (sports) but is perceived to be highly effective. I argue that perceived effectiveness of an institution is an important facet of a country's position on international adjudication, as is evidenced by the position of the United States on each institution; however there may be other factors at issue, especially relating to sovereignty loss and issues of national security with the ICC. The extent to which perceived effectiveness of the institution determines a country's position is unclear and should be a subject for further study.

Similarly, one can look to soccer's governing body, FIFA, and see how the evolution of the CAS led to that organization ceding authority over disputes to this international tribunal. The main stakeholders in FIFA are countries that have a very strong attachment to soccer, particularly in Europe. One might even joke that decisions over soccer trump sovereignty, especially given European acceptance of the ICC,¹⁶² but initial hesitance of FIFA with respect to the CAS. However, over time, as the CAS began to prove itself a credible institution, FIFA and the

162. See International Criminal Court, The States Parties to the Rome Statute *available at* <http://www.icc-cpi.int/statesparties.html> (showing 108 countries that are a party to the Rome Statute).

countries involved, were willing to turn over some control over their beloved sport to this international tribunal.¹⁶³

IV. The Impact and Future of the Court of Arbitration for Sport

The Court of Arbitration for Sport provides an interesting look at a type of international delegation that has been underemphasized in the traditional literature. States have demonstrated their willingness to adjudicate international sports disputes through the CAS; however, the implications of that decision are unclear. This Part will examine the impact the CAS has had in the arena of international delegation. The first two sections examine the effect and importance of delegation to the CAS. The last section looks at the future of the Court, specifically with respect to U.S. involvement.

A) The Effect of Delegation to the CAS

Despite the initial inclination that delegation of authority by states over international sports disputes would reduce the amount of control a state had over the fate of its own citizens, the act of delegation to the CAS is actually a sovereignty enhancing device that adequately safeguards an athlete's rights without the extra burden for the state to get involved in all matters relating to international sports law. As a result of this delegation to the CAS, I contend that individual states retain the appropriate amount of control over potential disputes that affect their citizens while also allowing the state to exert its sovereign control in the international community.

First, when states put in place the mechanisms for delegation to the CAS, the act of delegation can be seen as the type of sovereignty enhancing action that Hathaway discusses.¹⁶⁴ Under the New York Convention, state courts are the *ex post* mechanism by which individual states can ensure that arbitral awards are legitimate; but in addition to ensuring the credibility of an award in a particular case, state courts, by maintaining the ability to review certain aspects of arbitral proceedings, actually enhance an arbitration body's credibility. In fact, having the state court provide an enforcement mechanism when a party refuses to comply with the results of an arbitral body actually enhances the strength of the arbitral system, preventing bad actors from frustrating an

163. Foschi, *supra* note 16, at 463-64.

164. Hathaway, *supra* note 61, at 148-49.

arbitration proceeding.¹⁶⁵ States legitimate the arbitral process through their sovereign legal authority on a macro level when they adopt the New York Convention; but they also subsequently allow the arbitral bodies to self-regulate.¹⁶⁶ Consequently, one can view this act of international delegation as sovereignty enhancing, with great benefits to states. Arbitral bodies need state recognition in case certain actors do not implement the results of a proceeding; the coercive power of the state helps add a level of credibility that adds value for all actors in the process.

In legitimating the arbitral process, states are allowing arbitral tribunals to self-regulate and operate autonomously, but I contend that they do maintain an appropriate amount of control over the decisions of arbitral bodies, including the CAS. The use of the New York Convention's limited grounds for refusing to enforce an arbitral award provides for adequate state judicial *ex post* involvement without overburdening the state judicial system every time there is a dispute. Additionally, the ability to challenge a CAS award in Swiss courts, the seat of the arbitration, allows for *ex post* review. In fact, the CAS is the most appropriate judicial organ to handle international sports disputes, as is demonstrated by the fact that most states have indicated their support for the body when they adopted the World Anti-Doping Code.

B) *The Importance of Lower Visibility Delegation*

Delegation that is less visible provides states more latitude in pursuing their international interests. States feel less threatened when an act of delegation does not facially implicate their sovereignty; however, even a seemingly benign act of delegation can have profound implications for international law. The importance of such delegation cannot be emphasized enough, as it provides a means for specialist issues, such as sport, to be resolved quickly and efficiently. I argue that the manner in which delegation is conducted matters; if a state directly tried to accede to the jurisdiction of a tribunal like the CAS, it might encounter more opposition because of the perceived sacrifice of state sovereignty. By contrast, the less visible delegation allows for better and increased cooperation, but still adequately safeguards the rights of a state's citizens.

The New York Convention is the ultimate example of an instrument that has allowed for less visible delegation to grow over time. The creation of a system whereby arbitral tribunals can emerge as needed and

165. Reisman, *supra* note 78, at 107.

166. Tom Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION* 23, 28 (Thomas E. Carbonneau ed., rev. ed. 1998).

already retain delegated enforcement authority from states through this Convention allows arbitral bodies that would potentially take years to form and garner affirmative consent from states to emerge in a quick and efficient fashion. Some might claim this is circumventing the democratic process since the government does not get to examine the merits of each created body; instead I argue that it is the appropriate amount of scrutiny by the government. These arbitral institutions must meet the minimum *ex post* safeguards of the Convention;¹⁶⁷ hence, state courts get the opportunity to ensure that the body is adjudicating disputes properly.

It makes sense from an efficiency point of view to allow *ex post* versus *ex ante* scrutiny of these developing tribunals. Often, there is an initial resistance to change in adjudication; allowing for only *ex post* review gives an arbitral institution the opportunity to develop on its own and prove itself as opposed to being denied even the chance to function because of an *ex ante* fear of change. If the skeptics to international adjudication were right and the body had some serious flaw, those deficiencies would emerge in the *ex post* review. The CAS went through such changes, as it has undergone transformations in response to court decisions that reviewed its independence. Allowing the arbitral body to be less visible from the outset is the best approach. Such low visibility helped states unanimously approve of the CAS as the final appellate authority for doping disputes when they adopted the World Anti-Doping Code. The low visibility of delegating to the CAS aided this impressive act of delegation. As the CAS becomes an increasingly important and known commodity by the public, the fact that it had more than twenty years to develop before it gets thrown into the spotlight will ensure fairness for the litigants and will instill confidence in the public that it can handle international sports law disputes. The visibility of the CAS in the future may subject it to more scrutiny given its increasing case load and use; however, since the Court has already proven to be willing to adapt and change, those questioning the erosion of sovereignty will likely be quieted without much effort. Other tribunals could also use this strategy of lowering visibility in order to avoid some of the typical criticisms lodged at international adjudication.

C) *United States CAS Involvement: Will It Increase?*

Despite the U.S. adherence to the CAS in international sports competitions and claims arising from doping, such as the Floyd Landis case,

167. See *supra* Part III (A).

the United States has chosen not to use the CAS as the appellate authority to resolve other national sporting disputes that arise between the USOC, NGBs, and athletes. Under the Stevens Act, disputes arising with those bodies can be taken to the American Arbitration Association (AAA) for final resolution.¹⁶⁸ While other countries have designated the CAS to handle such domestic sports disputes and others have advocated for the U.S. to follow suit,¹⁶⁹ there are likely reasons why the U.S. has not accepted CAS jurisdiction to date.

First, the Stevens Act was passed in 1978, roughly 6 years before the CAS came into existence in 1984. The U.S. system under the AAA has matured over the years and it does not seem that Congress has come to recognize a need for the use of a different body, especially since Congress could have altered the Act when it made revisions to the Act's amateur requirement in 1998. The United States is subject to the jurisdiction of the CAS, both in doping cases on appeal and all disputes that come out of international competitions that have adopted the CAS appellate jurisdiction (virtually all of them); however, it is unclear whether this momentum will lead the U.S. to abandon use of the AAA in favor of the CAS. If the United States were to modify the Stevens Act to place the CAS as the final appellate authority for domestic disputes, this would be an even bigger act of international delegation, since arbitration authority would be explicitly taken away from a solely American entity and placed in the hands of an international institution.

V. Conclusion

The CAS offers a shining example of the effect and benefits of less visible international delegation. The Court has gained the acceptance of the international community without much fanfare. The CAS may receive more attention because of its many recent high-profile cases, such as the Landis case, the case involving Oscar Pistorius (a runner who wears prosthetic racing blades who is challenging his eligibility for the Olympics),¹⁷⁰ and the appeal by Marion Jones' teammates challenging the decision of the IOC stripping them of the medals won on a team with Jones, who is serving a prison term stemming from her use

168. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220529 (1998).

169. See Edward E. Hollis III, Note, *The United States Olympic Committee and the Suspension of Athletes: Reforming Grievance Procedures Under the Amateur Sports Act of 1978*, 71 IND. L. J. 183, 200 (1995).

170. *Oscar Pistorius Receives His Day In Court*, Reuters, April 1, 2008, available at <http://www.reuters.com/article/idUS157079+01-Apr-2008+PRN20080401>.

of performance-enhancing substances.¹⁷¹ However, given the record of the CAS thus far and its dramatically increased caseload in the last few years, it seems that the court has kept its detractors relatively silent.

Additionally, it seems that the proponents and drivers of the CAS see the development of a body of precedent—a *lex sportiva*. If the CAS begins to take on more of the attributes of a court by using precedent more frequently, one might see an increase in debate over the institution.

By maintaining its low visibility and proving its efficiency and effectiveness, the CAS has developed into an institution that provides for deep delegation while safeguarding the rights of individual litigants. Countries have shown their willingness to support the CAS both directly and indirectly. Future tribunals can learn from the successes of the CAS, in particular focusing on creating institutions that do not directly implicate sovereignty and are perceived to be efficient and effective. Gaining *ex ante* credibility while maintaining some level of *ex post* review is a winning formula for states; it gives states the proper incentive to commit to delegation without a huge threat to state sovereignty.

171. IOC votes to strip Jones' teammates of medals from 2000 Games, Associated Press, April 10, 2008, available at <http://sports.espn.go.com/oly/trackandfield/news/story?id=3339267>.