

THE CORNERSTONE PAPERS

A SERIES OF OCCASIONAL ESSAYS
ON THE FIRST AMENDMENT



No. 6

Global Free Expression and the Internet: Three Modest Goals for American Media

Kurt Wimmer

It was not a typical visit from a client.

He had been targeted by his president, Slobodan Milosevic, he told me. His newspaper in Belgrade, the *Dnevni Telegraph*, had been summarily subjected to ruinous fines for expressing opinion, all on a pretext and without any hope of legal challenge. It was no longer safe for him to publish. But he had found a publisher in Montenegro, just south of Serbia, and a sympathetic trucking firm that would hide bundles of his magazine, *Evropljanin*, under heads of lettuce and shipments of grain. His magazine could come right into the markets in the center of Belgrade, he told me, with a wry smile. He would give it away if he could not sell it.

But can this be safe, I remember asking. Shouldn't you stop? He was incredulous. "I will never stop," he said. Upon returning to Serbia, he was sentenced to five months in prison.

On April 11, 1999, as he walked home from Orthodox Easter Mass, Slavko Curuvija was assassinated.

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World Press Freedom Day, celebrated annually on May 3, is a fitting reminder of the tenacity and the courage of those who fight for global free expression on the world's most difficult battlefields. Mr. Curuvija's assassination was not an isolated incident; the dedication of those who

are on the front lines is legend. Just a few months before, Zeljko Kopanja, editor of *Nezavisne Novine* in Bosnia, a newspaper recognized by U.S. experts for its independence, was the victim of a car bomb; even after losing both legs, he was editing his newspaper from his hospital room. The Committee to Protect Journalists has confirmed that 20 journalists were assassinated or killed in the line of duty in 2002; another 13 died of suspicious causes, and at least four more simply disappeared. In 2001, 37 were lost. And it has been going on for as long as there have been conflicts between those in authority and those who would criticize authority. My own grandfather, a printer in Luxembourg, criticized the Nazi invasion until his presses were destroyed by the SS; he was among scores of publishers who were silenced in the first half of the century.

Sacrifices have been made in America for the First Amendment and the Bill of Rights. Those who marched with Dr. King, who risk imprisonment to protect sources, who endanger their life and livelihood to speak their hearts and minds, who publish secret documents that belong to the people and who fight unfair libel accusations, from John Peter Zenger to the Washington Post—these are the American heroes who have shaped a legal system that provides us with unparalleled free speech. But the values these heroes have won are in



danger today, as the Internet and our shrinking world have made the fight for freedom of expression a global battle for all speakers. Those who are fighting on the front lines against the worst despots are fighting for all of us, because freedom of expression in a wired world has become a zero-sum game. We can no longer complacently take pride in the American system for protecting free speech because the failings of other legal systems now are eroding our own freedoms. Consider:

- Andrew Meldrum, an American journalist working for the Guardian, a London newspaper, was prosecuted in Zimbabwe for publishing statements claimed to be inaccurate under an “information law” that clearly violates international legal standards. He was prosecuted in Zimbabwe even though the Guardian does not publish there simply because a prosecutor managed to access it via the Internet.

- *Fortune* magazine has a handful of Web subscriptions in Australia. The Australian High Court has forced Dow Jones to respond to a libel case under strict liability that would never be permissible under the First Amendment for one reason: because *Fortune* is available on the Internet.

- Until a federal court in California applied the First Amendment to stop it, Yahoo.com was under orders from a French court to stop publishing information relating to Nazi speech to any country, even though that speech was clearly protected by the U.S. Constitution—despite Yahoo’s full compliance with restrictive French hate-speech laws on its Yahoo.fr site.

- A committee in the European Commission has proposed a rule that would apply the country of the victim to all defamation cases in the European Union, regardless of whether the publisher has any contacts at all with that country.

- In November 2001, the Council of Europe approved an additional protocol to the Cybercrime Convention, under which signatories will be required to outlaw “any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence against any individual or group of individuals, based on race.” So far, 11 countries have ratified it.

A new battle is being waged. It is no longer a battle in which our federal courts can be a dependable refuge, no longer a battle where Congress can be relied upon to pass laws such as those that protect U.S. newsrooms from searches. It is a battle being fought by two very different groups of media companies and journalists. The first are the U.S. media outlets that find themselves threatened

with criminal prosecutions in distant lands, subpoenas before foreign courts and libel suits under the harsh laws of countries where they have no presence outside of Internet availability. The second are the fledgling media and reporters of countries where the worst laws exist, news outlets that may have far fewer resources than the average small campus radio station but whose expression may inform the entire population of a European capital.

Both groups need the full support of the American media community. But what can we do to help?

The first goal: Create an international system to protect free expression. We cannot export the First Amendment, as much as we would like to do so. But we can get to know international laws and treaties and do our best to help our European, African, and Asian colleagues to shape those laws to protect free expression internationally.

The most favorable developments have been under the European Convention for the Protection of Human Rights of the Council of Europe, a document that protects some 46 countries. Article 10 of the European Convention provides a framework for protecting expression. Its weakness, and the weakness of virtually all international treaties and constitutions, is that it incorporates broad exceptions for national security, protecting reputation, maintaining security and the like. But the European Court of Human Rights, which sits in Strasbourg, France, has interpreted Article 10 in a manner that has strengthened it dramatically. In a series of cases dealing with prior restraint, criminal and civil libel, insult laws and official secrets, the European Court has established a number of principles that are a strong foundation for protecting free expression.

The European Court has recognized that public officials must accept a broad range of harsh criticism without legal recourse under libel law. It has used this principle to dismiss defamation judgments against public officials in a wide variety of cases. It also has explicitly endorsed the “watchdog” role and responsibility of the press, a recognition that will be a valuable building block for the future. It has found that insult laws and other relics of European civil law tradition violate the law. It has stopped governments from censoring speech, banning books and limiting the development of independent broadcasting systems. It has not, of course, come close to adopting an approach that would be parallel to *New York Times v. Sullivan* or the Pentagon Papers case, but it is important to recognize the value of even incremental steps toward protecting free expression. Each step in a thousand-step journey takes us closer to the goal.

Other treaties and conventions applicable to Africa, South and Central America and Asia are similar in scope and structure to the European Convention. Perhaps the determination and energy that has built U.S. First Amendment law over the past century can be applied to help struggling media companies and journalists in other parts of the world to challenge government acts and begin to develop principles that foster free expression. The effort will, however, need to be coordinated, organized, determined, and forceful.

The second goal: Apply public international law to the Internet. Legal systems thrive on geopolitical boundaries. The Internet does not respect these limitations. As revolutionary as the Internet is, it is not the first communications medium to challenge traditional values. International point-to-point telecommunications can have the same effect; who can forget the role of the lowly fax machine in focusing the world on Tiananmen Square? The fact is that legal principles exist that can help to resolve the current land grab over Internet jurisdiction.

It is settled international law that a nation can prescribe internal law as long as that law does not infringe upon the right of other sovereign nations to prescribe their own internal law. Our system of global coexistence depends on this principle. An exercise of jurisdiction to adjudicate a dispute can exceed a state's right to act. If, for example, an English court imposes a judgment on a U.S. company in a libel or prior restraint adjudication, England has prescribed a rule of law that functionally controls conduct within the United States and impairs the United States' ability to regulate speech in accordance with its own Constitution.

There is no principled effort being made to apply international law principles to Internet jurisdiction. Courts in Italy, Germany, Zimbabwe, France and elsewhere typically find that a matter was "published" in their country because an Internet communication can be accessed in that country, and then apply their own country's law to a dispute and require a foreign publisher to defend in that country. This is not analysis at all; it is simply a seizure of jurisdiction. This approach does not comply with international law. It is our duty as advocates to urge the application of long-settled rules of international law (and corollary principles such as *forum non conveniens*) to stop the foreign land grab over speech rights.

There are, to be sure, bright spots on the horizon. The European Union's E-Commerce Directive applies a system under which the law of the country of the content provider

applies to the content that it produces, but it is far from clear that this approach will be applied to non-contractual disputes. Closer to home, U.S. courts routinely refuse to enforce foreign judgments that would violate our Constitution (although this approach is of less value to media companies that hold assets abroad that can be seized to satisfy a foreign judgment). These principles should be applied and extended.

The third goal: Support the journalists who are fighting the toughest battles. The acts that pose the greatest danger to free speech are those taken by the worst despots. As Slavko Curuvija, the assassinated Serb publisher, told Congress: "I come from the country where there is no rule of law. By making an example out of me, the regime sends a message to all who would oppose it." The abuses resulting from these acts endanger not only foreign journalists and deny foreign audiences the right to receive information; they also endanger the ability of all media outlets, including those in the United States, to speak freely now that Internet publication extends the reach of our publications. Before the Milosevic era ended in Serbia, his administration's Information Law resulted in the shuttering of numerous news outlets; its closure of Radio B-92 was thwarted only by journalists taking their lives in their hands and streaming audio over the Internet to be beamed back into Serbia through Radio Free Europe. Western non-governmental organizations were crucial in facilitating the self-expression that led to the overturn of an oppressive regime.

Congress and the State Department have played a pivotal role in securing free expression in conflict areas in the Balkans, the former Soviet Union, East Timor, and even Afghanistan; perhaps Iraq will be next. By funding non-governmental dedicated and tireless organizations such as the International Research & Exchanges Board's Promedia program, Internews, and the International Center for Journalists, the U.S. government is creating an infrastructure that has permitted independent media to exist where they otherwise would not have had a fighting chance. These programs should be continued, strengthened, and supported.

But what can American media do?

First, they can support NGO programs in the region when they need experts and advice. Second, they can show solidarity with overseas journalists and media lawyers as they fight the most difficult battles. In addition, for example, to supporting Dow Jones in its efforts to overturn the Gutnick case in Australia, U.S. news organizations can support less visible but by no means less crucial causes. When the *Feral Tribune*, a crusading and



courageous Croatian newspaper, was prosecuted under criminal libel laws and its journalists were jailed, U.S. media outlets focused attention on the case and helped to make it more difficult for the Tjudiman regime to silence its critics. More recently, U.S. media outlets stood with *Washington Post* reporter Jonathan Randal in opposing a subpoena from the international court in The Hague governing Bosnian war crimes prosecutions. Opportunities to support free expression outside of the United States abound—the State Security Court in Turkey is today prosecuting a Turkish publisher for translating Jonathan Randal’s book on Kurdistan into Turkish, despite Turkey’s effort to become a member of the European Union; journalists in Belarus, Ukraine and elsewhere in Central Europe and Asia are uniformly and routinely subjected to intimidation and punishment for expressing opinions contrary to the state line. Focusing our attention and energy on these issues can accomplish two complementary purposes—it can help these journalists as they fight the most difficult battles in the world for free

expression, and it can help create a rule of law that will be more favorable for U.S. companies that can no longer assume that they will be subject only to American law.

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There is surely more we can do, but moving toward these goals would be a start. Even today, as we consider what we can do to help, we can be sure that those on the front lines are doing all they can. They are making sacrifices on par with those made by our founders and those who brought the state of First Amendment law to where it is today. We can help. We must.

Kurt Wimmer is managing partner of the London office of Covington & Burling, where he concentrates on media law, intellectual property, and data protection. He has represented numerous media companies and journalists on newsgathering matters, libel and privacy defense, public policy, and free expression issues

The Cornerstone Papers are published under the auspices of the Cornerstone Project, The Media Institute’s public awareness and education program celebrating the First Amendment. The goal of Cornerstone is to give the American public a renewed appreciation of the importance of free speech and free press.

Activities of the Cornerstone Project include books, a luncheon series, public service advertisements, and a national symposium in Washington, D.C. The Cornerstone Papers will be published throughout the duration of the Cornerstone Project. For more information, contact The Media Institute or visit our Web site at www.mediainstitute.org/cornerstone.