

05-5927-CV

United States Court of Appeals
for the
Second Circuit

SARL LOUIS FERAUD INTERNATIONAL,

Plaintiff-Appellant,

S.A. PIERRE BALMAIN,

Consolidated-Plaintiff-Appellant,

– v. –

VIEWFINDER, INC., doing business as Firstview,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* ELECTRONIC FRONTIER
FOUNDATION, CENTER FOR DEMOCRACY AND
TECHNOLOGY, AND AMERICAN CIVIL LIBERTIES UNION IN
SUPPORT OF DEFENDANT-APPELLEE VIEWFINDER, INC.**

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INTERESTS OF AMICI

The Electronic Frontier Foundation (“EFF”) is a nation-wide, nonprofit, civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society and maintains one of the most-linked-to Web sites (www.eff.org) in the world. EFF believes that free speech is a fundamental human right and that free expression is vital to society.

The Center for Democracy and Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT represents the public’s interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the Constitutional principles of liberty and equality. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet.

SUMMARY OF ARGUMENT

Freedom of expression has a long and cherished history in this nation. Words and ideas, even those that challenge our most treasured values, enjoy a measure of protection under our Constitution that is almost unheard of elsewhere in the world. The French judgment that prompted this appeal places our tradition of free expression in jeopardy. It represents a direct attempt by a foreign nation to apply its law extraterritorially to restrict the freedom of expression of U.S.-based online speakers who are protected by the First Amendment. It does so because the Defendant, Viewfinder Inc. (“Viewfinder”), has chosen the Internet as its means of communication.

The French court’s order is but one example of the sort of judgment that this and other American courts can expect to see with increasing frequency as Internet use expands throughout the world. Because of the Internet’s global character, conflicts will inevitably arise concerning speech protected by the U.S. Constitution but forbidden or more heavily regulated in other countries. The court below correctly recognized that enforcement of the French Order would violate basic First Amendment principles and refused to permit the seeds of foreign censorship to be planted on U.S. soil. *Sarl Louis Feraud International v. Viewfinder Inc.*, 406 F.Supp.2d 274 (S.D.N.Y. 2005). This Court should affirm that judgment.

Perhaps in recognition of the obvious claim to constitutional protection enjoyed by Appellee's expression, Appellants do not challenge the district court's conclusion that the First Amendment protects Viewfinder's photographs and website, and focus instead on the lower court's factual findings and ruling on fair use. But this case was decided on First Amendment grounds and the federal and state constitutions provide the essential backdrop against which Appellants' arguments must be considered. Thus, First Amendment principles must inform any consideration of Appellants' arguments.

Quite obviously, the United States may not say what the laws of another nation may be. It is one thing, however, for a foreign nation to use its authority to silence or regulate speakers within its borders. It is quite another for a foreign nation, entity or person to obtain a foreign judgment and demand that a court in the United States silence a U.S.-based speaker engaged in lawful, constitutionally protected speech. No American court should become complicit in such censorship. To open the door to foreign restrictions on U.S. speakers even the slightest crack would allow foreign courts to impose restrictions on speech that even Congress could not validly enact, fundamentally undermining First Amendment protections for Internet speech. This door must be kept closed, and closed tightly, both by refusing

to enforce such judgments and by affirming thoughtful rulings, like the one below, to preclude their *in terrorem* effects.

ARGUMENT

I. ENFORCEMENT OF THE FRENCH COURT ORDER IN THE UNITED STATES WOULD FUNDAMENTALLY CHANGE THE NATURE OF THE INTERNET AS A MEDIUM OF FREE EXPRESSION

A. American Courts Have Recognized the Importance of the Internet as a Unique New Medium of Communication

Since the advent of the Internet, U.S. courts have been presented with a number of significant cases involving attempts to restrict information available on the Internet and World Wide Web. This growing body of law required courts to devote significant attention to the nature of the Internet as a medium of communication and to assess its importance to the American system of free expression.

The courts have been emphatic that the Internet is entitled to the highest level of protection and that attempts to censor its content or silence its speakers are to be viewed with extreme disfavor.¹ In the seminal Internet

¹ See, e.g., *Ashcroft v. ACLU*, 124 S.Ct. 2783 (2004), *Reno v. ACLU*, 521 U.S. 844 (1997), *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (Table), *aff'g*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001) (permanent injunction); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (permanent injunction); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (preliminary injunction); *American Libraries*

speech case of *Reno v. ACLU*, 521 U.S. 844 (1997) (*Reno I*), the Supreme Court held that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.* at 870; *see Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 566 (2002) (“[t]he Internet ... offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” (quoting 47 U.S.C. § 230(a)(3) (1994 ed., Supp. V)).

The Internet is a source of information as “diverse as human thought.” *Reno I*, 521 U.S. at 851, 852 (quoting district court, 929 F.Supp. 824, 842 (E.D. Pa. 1996)), and has been characterized as “the most participatory form of mass speech yet developed.” *Reno I*, 929 F.Supp. at 824 (Dalzell, J.). It offers a new and powerful democratic forum in which anyone can become a “pamphleteer” or “a town crier with a voice that resonates farther than it could from any soapbox.” *Reno I*, 521 U.S. at 870. Expansion of the Internet has created countless new opportunities for self-expression and discourse, ranging from the private diary to the multi-million-reader blog, Web page, or even Webcast.

Ass’n. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff’d*, 521 U.S. 1113 (1997).

The Internet enables not only speech but also the First Amendment right of association. *Doe v. Ashcroft*, 334 F.Supp.2d 471, 509-10 (S.D.N.Y. 2004) (“the importance of the Internet as a forum for speech and association” is “undisputed”), *appeal pending*. The Internet, because of its low barriers to entry, is an essentially participatory medium that not only enables one-way publication but facilitates conversation. The medium hosts tens of millions of dialogues carried out via e-mail, Web publications, Usenet newsgroup message boards, and more, as individuals and associations disseminate their opinions, ideas, photographs, and music to a worldwide audience. For good reason, the courts have recognized that the Internet “may well be the premier technological innovation of the present age.” *Pataki*, 969 F.Supp. at 161.

A key characteristic of the Internet that is crucial here is the medium’s global nature. Cyberspace is located in no particular place, has no centralized control point, and is available to anyone, anywhere in the world with access. *Reno I*, 521 U.S. at 851. This characteristic makes geography “a virtually meaningless construct on the Internet.” *Pataki*, 969 F. Supp. at 169. In “the medium of cyberspace . . . anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any of the Framers could have imagined.” *Reno*

II, 31 F.Supp.2d at 476. The Internet makes information available “not just in Philadelphia, but also in Provo and Prague.” *Reno I*, 521 U.S. at 854 (quoting 929 F.Supp. at 844).

Viewfinder’s website epitomizes the type of worldwide communication made possible on the Internet. Although its services are in English and are based in the United States, its home website at <http://www.firstview.com> (hereinafter “firstVIEW”) is accessible globally, as are all Internet sites. It is the global availability of Internet communication that accounts for much of its speech value, but also forms the basis of the legal dispute in this case.

B. Recognizing the French Court Judgment Would Undermine Domestic Protection for Internet Communication

Recognizing the essential character of the Internet as a global medium, American courts overwhelmingly have rejected attempts to censor it. This is not true elsewhere. Other nations have imposed controls on the Internet intended to silence disfavored expression originating within their borders and to keep out disfavored expression originating abroad. At least 59 different countries limit freedom of expression online.²

² Reporters Sans Frontieres, ENEMIES OF THE INTERNET 5 (2001) (“ENEMIES OF THE INTERNET”); see also Leonard Sussman, CENSOR DOT

When nations restrict their own citizens' access to news, information, or ideas from abroad, the impact of their repressive policies remains localized. However, when nations seek to control content on the Internet by applying their domestic laws extraterritorially to speech originating in the United States, the broader threat to freedom of expression is palpable.

China, which severely restricts Internet communication, including most forms of dissent and the free reporting of news, serves as the most obvious example of a nation whose approach to speech, if exported to the United States, would directly conflict with the First Amendment. Chinese officials have tried to stop online protest messages available on overseas websites, including those based in the United States, from which much pro-democracy speech emanates.³ In the past year, these concerns have only grown with China's regulation of U.S. companies doing business in China. As the U.S. government recently noted, the Chinese government "adopted measures to control print, broadcast, and electronic media more tightly and pressured Internet companies to censor and restrict the content of material available on-line." U.S. Department of State, *Supporting Human Rights and*

GOV: THE INTERNET AND PRESS FREEDOM 2 (2000)
<<http://www.freedomhouse.org/pfs2000/sussman.html>>.

³ See Leonard Sussman, CENSOR DOT GOV: THE INTERNET AND PRESS FREEDOM 2-3 (2000).

Democracy: The U.S. Record 2005 – 2006,

<<http://www.state.gov/g/drl/rls/shrd/2005/63945.htm>>. Major U.S.-based Internet service providers (ISPs) have recently come under fire for their acquiescence to online censorship demanded by the Chinese government. See “Tech Firms Help Tyrants Keep their Grip,” Hiawatha Bray, *The Boston Globe*, June 20, 2005, at C2.

Western democracies have also censored speech that is protected by the First Amendment. For several years now, Yahoo! has been under the cloud of a French judgment requiring it to block French citizens’ access to Nazi material displayed or offered for sale on its United States site or face significant daily fines. The French judgment was found unenforceable because it violated the First Amendment. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F.Supp.2d 1181, 1194 (N.D.Cal. 2001) (“the First Amendment precludes enforcement within the United States”), *reversed on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*).⁴

Clearly, a foreign court judgment imposing significant daily fines on U.S.-based speech that is perfectly lawful in the United States can

⁴ Although a majority of the eleven-judge *en banc* court found that the district court in *Yahoo!* had personal jurisdiction over the defendants, six judges found that the action should either be dismissed for lack of ripeness or for lack of personal jurisdiction over the defendants.

substantially harm the U.S. speaker. Although the Ninth Circuit reversed in *Yahoo!*, it did so on jurisdictional grounds, not on the merits. Indeed, eight of the eleven judges on the *en banc* panel expressly approved of the First Amendment ruling by the court below in this case. *Yahoo!*, 433 F.3d at 1222 (“If it were true that the French court’s orders by their terms require Yahoo! to block access by users in the United States, this would be a different and much easier case [and] we would be inclined to agree with the dissent.”) (*citing Viewfinder*); *id.* at 1239 n.4 (““American courts have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with *our* notions of what is fair and just, and conflict with the strong public policy of *our* State [New York].””) (*quoting Viewfinder*, 406 F.Supp.2d at 282) (emphasis in original).

Granting recognition to the French court’s judgment would have practical and legal ramifications that extend far beyond one nation’s law or a single court order. The conclusion that the French Order may be enforced in the United States despite its conflict with our constitutional freedoms would establish an international regime in which any nation would be able to enforce its legal and cultural “local community standards” on speakers in all other nations. In such a regime, ISPs and content providers would have no

practical choice but to restrict their speech to the lowest common denominator in order to avoid potentially crushing liability.

The implications of such a regime would be wide-sweeping given the range of speech-restrictive laws in foreign nations that U.S. courts would be required to enforce. In addition to China and France, a host of nations impose restrictions on speech that would be deemed unconstitutional in the United States. Saudi Arabia censors criticism of its government. Syria bans Internet speech that is considered to be pro-Israel. The Australian government attempted to ban websites protesting the World Trade Organization under laws designed to regulate pornography. *See* “Secret Web Bans in FOI Amendments,” Simon Hayes, *The Australian*, October 1, 2002. More recently, Singapore has banned podcasts, audio recordings distributed over the Internet, that discuss candidates in parliamentary elections. *See* “Reporters group concerned about Web censorship ahead of Singapore elections.” *San Jose Mercury News*, April 7, 2006, <<http://www.mercurynews.com/mld/mercurynews/business/14289678.htm>>.

The impact of such a lowest common denominator approach is measured not by counting the number of nations that already have sought to apply their laws beyond their borders but by assessing the practical effects of

such an approach on website operators. Operators will face daunting tasks, both legally and technically. They will be forced not only to take measures to disable access to or remove any information that may be illegal in any foreign country, but they will also be required to steep themselves in the vagaries of the laws of each and every foreign nation.

The Appellants' reasoning would permit enforcement of any nation's limitations on Internet speech, regardless of the extent to which such restrictions conflict with our fundamental freedoms. *Amici* believe that freedom of expression is a fundamental human right and disagree strongly with policies that deny individuals the right to voice their own dissent or to hear a competing point of view. While some nations have made these policy choices, they may not be permitted to export them, thus undermining freedom of expression in the rest of the world. Yet that is the inevitable result if foreign judgments restricting free speech are applied extraterritorially.

National governments are not, of course, the only threat to speech. A growing set of examples involves foreign libel or defamation judgments against U.S.-based speakers. *See Bangoura v. The Washington Post*, [2004] 235 D.L.R. (4th) 564 (finding that Ontario was an appropriate forum for a

libel suit against the U.S.-based Washington Post for communications appearing on its web page where the alleged libel was based on the plaintiff's work in Africa and where plaintiff only later became a citizen and permanent resident of Canada), *rev'd*, [2005] O.J. No. 3849 (Ont. C.A.), *leave to appeal dismissed*, [2005] SCCA No. 497 (Feb. 16, 2006); *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56 (2002) (upholding jurisdiction of Australian court over U.S.-based Dow Jones in libel action by South African plaintiff living in Victoria, Australia, on the basis of an article published on the defendant's web site that was downloaded by subscribers in Australia and limiting damages to that suffered by the plaintiff in Victoria); *see also*, *Seeking U.S. Turf for a Free-Speech Fight*, Sara Ivery, N.Y. Times, Apr. 4, 2005, at C8 (detailing U.S. declaratory judgment action filed by author Rachel Ehrenfeld against Khalid bin Mahfouz, a Saudi sheik who had sued her for libel in London over her book) (*Ehrenfeld v. Mahfouz*, No. 04-CV-9641(RCC) (S.D.N.Y.)).

Many ISPs and websites create valuable fora for speech and communication – fora that are available to millions of speakers at little or no charge. If they face growing fines imposed by foreign courts because of constitutionally protected speech posted by them or their users, many service providers will curtail their users' ability to engage in the open and robust

speech and debate that is the hallmark of this medium. Indeed, the pressure created by mounting foreign judgments against speech protected in this country could threaten the business models of some service providers, and thus could reduce the ability of millions of Americans to speak freely and lawfully over the Internet.

Although some speakers might have the confidence and resources to withstand such pressure, others would have little choice but to remove lawful content from the Internet. The chilling effect would be particularly acute for the many individuals and small organizations for whom the Internet is an indispensable means of reaching an audience but who lack the resources to participate in overseas legal proceedings.

Under such a regime, U.S. courts would become vehicles for enforcing foreign speech restrictions on U.S. speakers. Such a rule is fundamentally inconsistent with the First Amendment and with U.S. public policy.

II. ENFORCEMENT OF THE FRENCH JUDGMENT WOULD BE REPUGNANT TO PUBLIC POLICY

Judgments of foreign courts are not entitled to automatic recognition or enforcement in American courts. *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997). Whether the forum court will honor a foreign judgment

is determined by principles of comity. *Id.* at 808. Among these is the rule that a court need not enforce a foreign judgment if to do so will offend the public policy of the forum state. *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986); *Laker Airways Ltd v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929, 931, 937, 943 (D.C. Cir. 1984); *Yuen v. U.S. Stock Transfer Co.*, 966 F. Supp. 944, 948 (C.D. Cal. 1997); see *Hilton v. Guyot*, 159 U.S. 113 (1895) (outlining fundamental principles of comity); N.Y. C.P.L.R. 5304(b)(4) (court may refuse to enforce foreign judgment that “is repugnant to the public policy of this state”).

A classic example of a judgment that will not be enforced on public policy grounds is a judgment that unconstitutionally impairs individual rights of personal liberty. *Ackermann v. Levine*, 788 F.2d at 841; see *Hilton v. Guyot*, 159 U.S. at 164, 193; *Somportex Ltd v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971). This includes a judgment based on laws or procedures that do not comport with fundamental First Amendment principles or their state constitutional counterparts. See, e.g., *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995), *aff'd on other grounds*, 159 F.3d 636 (D.C. Cir. (1998) (Table); *Bachchan v. India Abroad Publ'ns. Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992). Similarly, judgments cannot be enforced if they violate an explicit public policy expressed by Congress. Here, enforcement of the French Order would violate public policy as expressed in both statutory and constitutional law.

A. Enforcement of the French Judgment Would Violate the First Amendment

The firstVIEW website both displays its photographers' artistry and conveys news of the fashion shows it depicts to those unable to travel to

attend in person, including other magazines. This is publication of speech entitled to full First Amendment protection.

The First Amendment freedom of the press applies with as much force to Internet magazines as to the products of more traditional printing presses, and as much to fashion publications as to political or literary ones.⁵ See *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996) (“The First Amendment’s fundamental purpose . . . is to protect all forms of peaceful expression in all of its myriad manifestations.”) (protecting visual artists selling their work at public places without vendors’ license) (*citing Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)).

Appellants apparently concede that Viewfinder’s images are protected by the First Amendment, but they nevertheless seek to denigrate the degree of protection for Viewfinder’s speech. This Court has properly rejected past attempts to treat visual depictions as somehow less deserving. “Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.” *Bery*, 97 F.3d at 695. The Supreme Court has

⁵ It is well settled that “clothes are not copyrightable.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995). Thus, this case does not present a conflict between the First Amendment and U.S. copyright law.

clearly recognized that “the Constitution looks beyond written or spoken words as mediums of expression.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). “Our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika.” *Id.* (internal citations and quotations omitted).

Indeed, the Supreme Court has rejected the reasoning of *Spence v. Washington*, 418 U.S. 405 (1974), on which Appellants relied below, saying that “a narrow, succinctly articulable message is not a condition of constitutional protection”; if it were, the First Amendment “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U.S. at 569.

The Supreme Court has also adopted an inclusive definition of “press,” striking a statute regulating distribution of “circulars, handbooks, advertising, or literature of any kind.” *Lovell v. City of Griffin*, 303 U.S. 444 (1935). The Court held that

[T]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These

indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Id. at 452.

Finally, “[i]t is clear that speech does not lose its First Amendment protection because money is spent to project it. . . . 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.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (internal citations omitted). Bookstores and movie theaters are for-profit enterprises, and the First Amendment nevertheless protects books and movies. *Smith v. California*, 361 U.S. 147, 150 (1959) (books) (“It is of course no matter that the dissemination takes place under commercial auspices.”) (citations omitted); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”) (footnote omitted). In short, the First Amendment protects the photographs on the firstVIEW website whether or not they are offered for sale.

Further, the availability of news sites like firstVIEW fuels the public's First Amendment right to receive information and ideas. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] ... necessarily protects the right to receive"); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring). "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

As the District Court recognized, "There is no question that Viewfinder's activities fall within the purview of the First Amendment." 406 F.Supp.2d at 282. The First Amendment therefore prohibits Appellants from importing the French Order, which penalizes publication on the firstVIEW website with no reference to these First Amendment values.

Moreover, these conflicts are not limited to the French Order per se. As noted above, the legal regimes governing Internet speech of many nations are fundamentally at odds with First Amendment jurisprudence. They restrict websites precisely because "the Internet represents a brave new

world of free speech,” *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) – the direct opposite of our legal presumptions. Applying such rules to U.S. websites simply because the Internet makes them available without regard to international borders would be fundamentally at odds with First Amendment policy.

In a number of cases, U.S. courts have refused to enforce libel judgments based on foreign law because of the First Amendment limits on American libel law declared in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that standards of liability in defamation law must accommodate First Amendment concerns).

For example, in *Telnikoff v. Matusevitch*, 702 A.2d 230, 238-239 (Md. 1997), the court denied enforcement of a foreign judgment as contrary to the First Amendment, even though the allegedly defamatory statements were published only in the LONDON DAILY TELEGRAPH. *See also Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d at 665 (protections of free speech “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 the press by the U.S. Constitution”). Similarly, in *Ellis v. Time, Inc.*, 1997 WL 863267, 26 Media

L. Rptr. 1225 (D.D.C. 1997), the court held that applying English law to allegedly defamatory publications in England would violate the Constitution. *Id.*, at *13, 26 Media L. Rptr. at 1234; see also *DeRoburt v. Gannett Co.*, 83 F.R.D. 574, 580 (D. Haw. 1979) (public policy requires application of First Amendment to libel cases brought in United States).

Ordinarily, the question of whether to deny enforcement to a foreign judgment on public policy grounds is a matter of discretion. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 422 (1987); N.Y. C.P.L.R. § 5302. In this case, however, the conflict with U.S. law transcends mere questions of “public policy”; to enforce the French Order would directly violate the First Amendment.

In such cases, enforcement is constitutionally forbidden. *Matusevitch v. Telnikoff*, 877 F. Supp. at 4; *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S. 2d at 662 (“if . . . the public policy to which the foreign judgment is repugnant is embodied in the First Amendment . . . 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’”); *Ellis v. Time, Inc.*, 1997 W. 863267, at *13, 26 Media L. Rptr. at 1234 (D.D.C. 1997); *see* RECOGNITION AND ENFORCEMENT OF FOREIGN

JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE Sec. 5(a)(vi)
(American Law Institute Proposed Final Draft (Apr. 11, 2005)) (“A foreign judgment *shall not* be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that[] the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state in the United States when the relevant legal interest, right or policy is regulated by state law”) (emphasis added); *see also Dow Jones & Co. v. Harrods, Ltd.*, 237 F.Supp.2d 394, 432–33, 446 (S.D.N.Y. 2002) (declining to enjoin English libel action against a U.S.-based publisher on the ground that it was premature, but adding that it would have “little hesitation” in refusing to enforce a judgment inconsistent with First Amendment principles) (citation omitted), *aff’d*, 346 F.3d 357 (2d Cir. 2003).

Similarly, the New York State Constitution guarantees freedom of speech and press in even stronger terms than the First Amendment, declaring in Article I, § 8 that “Every citizen may freely speak, write and publish his or her sentiments on all subjects ... and no law shall be passed to restrain or abridge the liberty of speech or of the press.” The words

reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment ... but

instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.

Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (N.Y. 1991). The “consistent tradition in this State of providing the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events’ ... call[s] for particular vigilance by the courts of this State in safeguarding the free press against undue interference.” *Id.* (quoting *O’Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 528-529, 528 N.Y.S.2d 1, 523 N.E.2d 277. (N.Y. 1988)).

B. Enforcement of the French Judgment Would Be Repugnant to the Public Policy of the United States as Expressed by Congress

Congress has found that: “[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens“; “[t]hese services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops“; “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity“; “[t]he Internet and other interactive computer services have flourished, to the benefit of all

Americans, with a minimum of government regulation“; and “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” 47 U.S.C. § 230(a).

Accordingly, the statutory policy of the United States is to protect the Internet against both speech and economic regulation. Section 230 of the Communications Act establishes that the public interest is best served by “promot[ing] the continued development of the Internet and other interactive computer services,” and by “preserv[ing] the vibrant and competitive free market” for these services, “unfettered by Federal or State regulation.” 47 U.S.C. §§ 230(b)(1), (b)(2).

While the statute does not apply directly to the facts at issue here, Section 230 provides another example of the conflict between U.S. policy and that of other nations; it establishes as U.S. statutory policy that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). In this way, Congress created “a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert.*

denied, 524 U.S. 937 (1998). Just as with the cases cited above regarding Internet censorship, U.S. courts have applied this statutory immunity broadly. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 984-985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).

Such immunity from liability for third-party content is not the international norm. In *Godfrey v. Demon Internet, Ltd.*, 3 ILR (P&F) 98 (Q.B. 1999), for example, an English court held that an ISP could be held responsible for defamatory postings by a third party to the extent it made newsgroups containing the postings available. The court rejected the U.S. policy embodied in Section 230, noting that “[t]he impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law.” *Id.*

The French Order here does not simply create an “incentive” for self-censorship; it absolutely requires it. Giving effect to the French judgment – and, by extension, to all of the judgments from around the world that will undoubtedly follow in its wake – will strip the Internet of its hallmark characteristic as a “forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual

activity.” *See* 47 U.S.C. § 230(a)(3). It will eviscerate the protection for this “extraordinary advance in the availability of educational and information resources to our citizens” that Congress so clearly intended to provide. *Id.* § 230(a)(1). Because that result must inevitably frustrate “Congress’ desire to promote unfettered speech on the Internet,” the French judgment cannot be enforced. *Zeran*, 129 F.3d at 334.

III. THE FRENCH JUDGMENT’S INTELLECTUAL PROPERTY INTERPRETATIONS ARE INCONSISTENT WITH THE FIRST AMENDMENT

The answer is no different because the French judgment is styled as an “intellectual property” ruling. The French judgment here pertains to subject matter that U.S. copyright law does not protect, and attempts to stifle independent publication about a newsworthy event.

A. U.S. Copyright Law Is Tempered by Limitations on Subject Matter and Scope

U.S. copyright law, developed in a constitutional framework mindful of freedom of speech and press, provides structural and doctrinal accommodations for this First Amendment-protected speech. Both the fair use doctrine and the idea-expression distinction in copyright law serve indispensable First Amendment functions.

The fair use doctrine prevents private censorship, and preserves First Amendment freedoms, by shielding critical commentary and parody of privately owned expression. *See Harper & Row Publs, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999); *Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

The idea-expression distinction ensures that uncopyrightable facts and ideas and unpatentable functional principles remain in the public domain for future creators to build on. *Harper & Row*, 471 U.S. at 556; *Attia v. Society of New York Hosp.*, 201 F.3d 50, 54 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 109 (2000); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

These limits on the scope of copyright are designed to sever the link between state-granted monopolies and censorship. Without these doctrines as safety valves to prevent “abuse of the copyright owner’s monopoly as an instrument to suppress” facts, ideas, and critical commentary, copyright law would impermissibly abridge the freedom of speech. *Harper & Row*, 471 U.S. at 559-60. Foreign laws, operating in distinct legal frameworks, lack

these built-in safeguards. The French judgment that Appellants seek to enforce offers neither subject matter exclusions nor fair use considerations. It is therefore necessary for American courts to assess the First Amendment considerations anew when foreign judgments are invoked to bar U.S. speech.

B. The French Court’s Expansive Judgment Is Inconsistent with the First Amendment

Appellants cannot save the French judgment by framing it as a decision under U.S. copyright law. That is neither the proper way to read a foreign judgment, nor the correct application of U.S. law to the facts at issue.

As Viewfinder demonstrates, even if the photographs at issue here were reproductions of copyrightable content under U.S. law, the firstVIEW site would be a permissible fair use; the fair use doctrine strongly favors news reporting. 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work ... for purposes such as ... news reporting ... is not an infringement of copyright.”) This Court need not even reach that analysis, however, because this is not a complaint arising under U.S. law or even a dispute over subject matter protected by U.S. copyright law. It is instead an attempt to enforce a foreign judgment claiming exclusivity in material to which U.S. law does not grant copyright protection.

As a matter of U.S. law, the photographs could not infringe because clothing designs are not copyrightable; the United States favors public access to the ideas and aesthetics of fashion design over copyright exclusion. *See Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995) (“clothes are not copyrightable,” although fabric designs are). By bringing their judgment here for enforcement, Appellants are not trying to protect rights analogous to those granted by U.S. copyright, but rather to use incompatible French law to silence a U.S. speaker.

CONCLUSION

Internet publication offers a new wealth of speech opportunities. It also provokes wide-ranging attempts to censor that speech. In the United States, courts have been steadfast in supporting the Internet as a preserve for free expression, striking down restrictions on speech. This case, however, presents this Court with a situation that could undermine the protections of U.S. law and handicap the further development of the Internet. This Court should make clear that efforts to import censorship to the United States through the vehicle of this new medium are repugnant to U.S. law. Respect for the laws of other nations does not require enforcement of judgments in U.S. courts that would undermine longstanding legal and constitutional protections.

Accordingly, Amici respectfully urge this court to affirm the decision below

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7), the undersigned counsel certifies that the foregoing brief contains 6,350 words. This brief is in 14 point Times New Roman type. OpenOffice.org 2.0 was used to count the words in the foregoing brief.

WENDY SELTZER