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The Enforcement of Foreign Copyright Judgments in U.S. Courts and the First Amendment

Claire Guehenno*

I. INTRODUCTION

Often foreign entities obtain monetary damages against U.S. citizens in foreign courts, but find themselves unable to collect on the judgments because the defendant's assets are located not in the judgment's country, but in the United States. In these cases, plaintiffs may seek to enforce foreign judgments against American defendants in U.S. courts. The Uniform Foreign-Country Money Judgments Recognition Act, which has been adopted by many U.S. states, requires American states to give effect to and to enforce foreign judgments.[1] And indeed, American courts routinely recognize foreign judgments and ensure their enforcement.

But the Act also includes a number of exceptions, including notably the "public policy exception," which dictates that states may not enforce a judgment if it is "repugnant

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* JD Candidate, Harvard Law School, 2014.

[1] Unif. Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II (Supp. 2007) [hereinafter 2005 Uniform Act]; *see also infra* note 18.

to the public policy of this state or of the United States."[2] Several courts have used the public policy exception to justify decisions not to enforce a foreign judgment when it risks interfering with a constitutional right, including the First Amendment.[3] Over the past few decades, courts have repeatedly refused to enforce foreign libel or hate speech decisions, because they conflict with the protections of the First Amendment.[4] In a more recent case, *Sarl Louis Feraud International v. Viewfinder*,[5] a defendant to a foreign judgment in a copyright suit sought to bar its U.S. enforcement by invoking the First Amendment. The district court, relying on earlier libel cases, accepted this argument and refused to enforce the judgment as repugnant to public policy.[6] But the Second Circuit disagreed on appeal, holding that the district court should have included analysis of the doctrine of "fair use," which has already taken into account First Amendment concerns.[7]

This Note aims to use the *Viewfinder* decision as a starting point to consider more broadly the enforcement of foreign copyright judgments. It will caution against the temptation to summarily refuse to enforce foreign copyright judgment as inherently incompatible with the First Amendment. This Note will argue that the Second Circuit was correct in evaluating the foreign copyright judgment in conjunction with American copyright law, rather than solely through the lens of the First Amendment. Foreign copyright decisions, governed under their own intellectual property legal frameworks, should not go through the same analysis as libel and hate speech decisions, which fall at the center of First Amendment protections. Domestic copyright laws already include built-in protections, such as the doctrine of fair use, to ensure that First Amendment values are preserved.[8] Courts should thus evaluate foreign copyright judgments by comparing the protections provided by the foreign countries' intellectual property frameworks to domestic intellectual property laws.

Current scholarship on the enforcement of foreign copyright decisions, including the *Viewfinder* decision, is limited.[9] Some scholars have written on the enforcement of

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[2] *Id.* § 4(c)(3).

[3] *See infra* notes 31–32 and accompanying text.

[4] *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001); Telnikoff v. Matusevitch, 702 A.2d 230, 249 (Md. 1997); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 662–65 (Sup. Ct. 1992).

[5] 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005) *vacated and remanded sub nom.* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007).

[6] *Id.* at 285.

[7] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 482 (2d Cir. 2007).

[8] *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 853 (2010); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2546 (2009).

[9] Sharon Foster has written more broadly on the subject of foreign copyright decisions, but her article predates the *Viewfinder* decision. Sharon E. Foster, *Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?*, 10 PACE INT'L L.

foreign judgments, looking more broadly at First Amendment implications,[10] but none have focused on copyright cases in the aftermath of *Viewfinder*. This lacuna is unfortunate, because it suggests that foreign copyright judgments do not merit their own analysis, but rather fall within the same category as other foreign judgments implicating the First Amendment. Indeed, scholars writing on the subject of foreign judgments have treated the *Viewfinder* case as just another example of domestic courts addressing the First Amendment's effect on foreign judgments.[11] As this Note suggests, this analysis is flawed, because several reasons, including the increasing harmonization of intellectual property laws across countries, militate in favor of the enforcement of foreign copyright judgments that do not apply to the other foreign cases implicating the First Amendment which have come before courts. Furthermore, *Viewfinder* highlights the complexity of applying the First Amendment in the age of the internet, where speech is no longer territorially bound and content emanating from one country often reaches a global audience.

This Note proceeds in six parts. Part II of this Note will review the current state of the public policy exception, focusing on its application in cases involving the First Amendment. It will trace the evolution of the exception from a nineteenth century Supreme Court decision to more recent lower court attempts to apply the exception in the age of the internet. Part III will consider the *Viewfinder* decision and the differing applications of the public policy exception by the district court and the Second Circuit. It will compare the place of the fair use doctrine in both decisions and critique both approaches. Part IV will look at the doctrine of fair use as U.S. courts, including the Supreme Court, have interpreted it. It will suggest that, through the doctrine of fair use, American copyright law has built-in protections to safeguard the First Amendment. In addition, it will compare the American doctrine of fair use to foreign intellectual property laws. Part V will argue that, though fair use protections sometimes find no equivalent in foreign intellectual property regimes, courts should nonetheless weigh in favor of enforcing foreign copyright judgments when possible, in part because of the benefits of globalizing intellectual property protections. Part VI will conclude.

REV. 361 (1998). Some commentators have addressed the enforcement of copyright decisions in the broader context of the enforcement of foreign judgments. *See, e.g.*, Charles W. Mondora, *The Public Policy Exception, "The Freedom of Speech, or of the Press," and the Uniform Foreign-Country Money Judgments Recognition Act*, 36 HOFSTRA L. REV. 1139, 1149 (2008); *see also* Graeme B. Dinwoodie, *Developing A Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 762 (2009).

[10] *See* Dinwoodie, *supra* note 9; Mondora, *supra* note 9.

[11] *See, e.g.*, Dinwoodie, *supra* note 9, at 763; Mondora, *supra* note 9, at 1149.

II. THE PUBLIC POLICY EXCEPTION AND THE FIRST AMENDMENT

A. Codifying Comity

Any discussion on the enforcement of foreign judgments in U.S. courts must begin with *Hilton v. Guyot*,[12] a nineteenth century case where the Supreme Court recognized that comity demands the enforcement of foreign judgments. The Court in *Hilton* emphasized the importance of comity, which it defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience," in evaluating foreign judgments.[13] Comity, the Court held, requires recognition of such foreign judgments so long as certain procedural safeguards of the American judicial system are met through equivalent practices in foreign courts.[14] In *Hilton*, the Court allowed for the enforcement of a French court's judgment against two American citizens. While the standards by which to evaluate foreign judgments have evolved since *Hilton*, the principle it espoused of enforcing foreign judgments when practicable remains today in the jurisprudence of U.S. courts.[15]

The comity described in *Hilton* has been codified in legislative acts, including, most recently, in the 2005 Uniform Foreign-Country Money Judgments Recognition Act.[16] The Act, however, is enforceable only in so much as state legislatures have adopted it, because foreign judgments are evaluated through state law, not federal law.[17] At least

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12 159 U.S. 113 (1895); *see also* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 258–59 (1991) ("Few cases in state or federal courts discuss the issue of enforcement of foreign judgments in the United States without reference to the 1895 United States Supreme Court decision in Hilton v. Guyot.").

13 *Hilton*, 159 U.S. at 164.

14 *Id.* at 202–03 ("[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.").

15 *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001); Telnikoff v. Matusevitch, 702 A.2d 236, 249 (Md. 1997) ; *see also* Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274, 279 (S.D.N.Y. 2005).

16 2005 Uniform Act, *supra* note 1; Unif. Foreign Money-Judgments Recognition Act (approved by the N.C.C.U.S.L. in 1962), 13 U.L.A. pt. II (2002) [hereinafter 1962 Uniform Act].

17 This is so in the aftermath of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), which abolished the federal common law. *See* Brand, *supra* note 12, at 262 ("[F]ederal courts have consistently held that state law governs judgment recognition and enforcement in diversity

thirty states have enacted their own version of the Uniform Foreign-Country Money Judgments Recognition Act.[18] The Uniform Act provides that "a court of this state shall recognize a foreign-country judgment to which this [act] applies" unless it falls within the exceptions enumerated in the act, which include conflict with another judgment, fraud, lack of notice.[19] The statutory codification of the enforcement of foreign judgments thus ensures that states will embrace the same principles of comity espoused by the *Hilton* decision to promote the enforcement of foreign judgments in a consistent fashion.

While the enforcement of foreign judgments has been the subject of much academic debate, there is little case law on which to base discussions of the issue.[20] The primary reason for this lack of extensive case law on the subject, scholars have hypothesized, is that U.S. courts, more than many other countries, have tended to enforce foreign judgments.[21] "The paucity of decisions on enforcement may also reflect the fact that the United States has tended to enforce foreign judgments notwithstanding that the full faith and credit obligations imposed by the U.S. Constitution and federal legislation on state and federal courts do not extend to foreign judgments," Graeme B. Dinwoodie, an intellectual property scholar at Oxford University, writes.[22] As a result of this policy in favor of enforcement, exemplified in cases like *Hilton*, few cases arise where courts choose not to enforce a judgment on the basis of a conflict with American law.[23]

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cases."). Nonetheless, most cases involving foreign judgments arise in federal courts because of diversity jurisdiction. *Id.*

[18] *See e.g.*, Ala. Code § 6-9-250 (2012); Cal. Civ. Proc. Code § 1713 (2008); Colo. Rev. Stat. § 13-62-101 (2008); Conn. Gen. Stat. § 50a-30 (1988); D.C. Code § 15-364 (2012); Del. Code tit. 10, § 4803 (2011); Fla. Stat. § 55.601 (1994); Haw. Rev. Stat. § 658F-1 (2009); Idaho Code § 10-1401 (2007); IL ST CH 735 § 5/12-664 (2012); Ind. Code § 34-54-12-6 (2011); Iowa Code § 626B.101 (2010); Md. Code, Cts. & Jud. Proc. § 10-703 (2007); Me. Rev. Stat. tit. 14, § 8501 (1999); Mich. Comp. Laws § 691.1131 (2008); Minn. Stat. § 548.57 (2010); Mont. Code. § 25-9-601(2009); Nev. Rev. Stat. § 17.700 (2007); N.J. Stat. § 2A:49A-16 (1997); N.M. Stat. § 39-4D (2009; N.Y. C.P.L.R. 5303 (McKinney); N.C. Gen. Stat. § 1C-1850 (2009); Ohio Rev. Code. § 2329.91 (1985); Okla. Stat. tit. 12, § 718.1 (2009); Or. Rev. Stat. § 24.360 (2009); 42 Pa. Stat. § 22001 (1990); R.I. Gen. Laws § 9-32.1-11 (2009); Tex. Civ. Prac. & Rem. Code § 36.004 (1989); Utah Code § 78B-5-411 (2008); Va. Code § 8.01-465.6 (1990); Wash. Rev. Code § 6.44.100 (1991).

[19] 2005 Uniform Act, *supra* note 1, § 4(a).

[20] *See* Dinwoodie, *supra* note 9, at 762.

[21] *See* Rochelle Dreyfuss, *The Ali Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819, 822 (2005); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 179 (2004); Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1602 (1968).

[22] Dinwoodie, *supra* note 9, at 762.

[23] *See* Dreyfuss, *supra* note 21, at 922; Rosen, *supra* note 21, at 179.

B. The Public Policy Exception

One important provision invoked to try to bar enforcement of a foreign judgment in the United States is the "public policy exception,"[24] which dictates that a U.S. court need not recognize a foreign judgment where "the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States."[25] Though the public policy exception is frequently invoked,[26] its meaning and its reach have continued to puzzle scholars, in part because of the lack of a significant body of case law to explain it. [27] "To date, no U.S. court has enunciated a clear standard for using the public policy exception," writes one scholar.[28] As another commentator explains, "[t]he public policy exception to the recognition of foreign money judgments has been described as problematically under-theorized. Indeed, prior scholars have deemed it unsafe to delve into the meaning of the exception."[29] The limits of the applicability of the public policy exception are thus not clear, though courts have cautioned that it should apply only in extreme circumstances and that courts should favor the enforcement of foreign judgments.[30]

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[24] *See* von Mehren & Trautman, *supra* note 21, at 1670 ("[T]he public policy exception is perhaps the most often mentioned and, upon strict analysis, the least often used.").

[25] 2005 Uniform Act, *supra* note 1, § 4(c)(3). One important difference between the 2005 Uniform Foreign-Country Money Judgments Recognition Act and the 1962 is that the 2005 Act extended the public policy exception to apply not only to the cause of action, but also to the judgment itself. *Compare* 2005 Uniform Act, *supra* note 1, *with* 1962 Uniform Act, *supra* note 16. In this way, the 2005 Act "sought to align the public policy exception with the vast majority of cases interpreting the 1962 Act's public policy exception." Mondora, *supra* note 9, at 1140. Mondora notes that the commentary for the 2005 Uniform Act cited *Bachchan*, discussed later in this section. *Id.*; *see also infra* notes 41–45 and accompanying text.

[26] *See* von Mehren & Trautman, *supra* note 21, at 1670.

[27] Mondora, *supra* note 9, at 1141; *see also* Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 800 (1996); Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws,* 56 COLUM. L. REV. 969, 972 (1956*)*; Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 798 (2004); Jonathan H. Pittman, Note, The Public Policy Exception to the Recognition of Foreign Judgments, 22 VAND. J. TRANSNAT'L L. 969, 970 (1989).

[28] Minehan, *supra* note 27, at 800.

[29] Mondora, *supra* note 9, at 1141; *see also* Molly S. Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. Licra*, 24 MICH. J. INT'L L. 697, 700 (2003) ("Beyond this high threshold of repugnance, the exception has little clear content.").

[30] *See, e.g.*, Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) ("The standard [of the public policy exception] is high, and infrequently met."); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) ("The standard for refusing to enforce judgments on public policy grounds is strict."); Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650 (N.Y. 2006) ("The public policy inquiry rarely results in refusal to enforce a judgment

C. Foreign Judgments and the First Amendment

While no coherent doctrine defines the meaning of the public policy exception, courts have consistently held it to apply in cases in which the enforcement of a judgment would interfere with the protections of a constitutional right.[31] This problem has arisen frequently in cases involving the First Amendment, specifically libel cases, where a foreign judgment has some speech-suppressing effect that is not recognized in American libel law. In such cases, courts have repeatedly found a constitutionally required public policy exception to protect American freedom of speech.[32] A foreign judgment that would be in violation of the First Amendment if rendered by an American court, courts have thus held, may not be enforced in U.S. courts.[33] These holdings have even been affirmed by Congress, which recently passed the SPEECH Act prohibiting enforcement of foreign libel judgments unless they comply with the First Amendment.[34]

Two decisions on the enforceability of British libel judgments in the United States—*Bachchan v. India Abroad Publications Inc.*[35] and *Telnikoff v. Matusevitch*[36]—form the bedrock of the doctrine on the public policy exception in the context of foreign judgments involving the First Amendment. In both these cases, U.S. courts carefully analyzed and compared British and American libel laws to conclude that enforcing British libel judgments in American courts would violate the public policy of the states where the cases arose.[37] While scholars have often criticized the public policy analysis in these two cases,[38] *Bachchan* and *Tenikoff* remain the foundational decisions

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unless it is 'inherently vicious, wicked or immoral, and shocking to the prevailing moral sense' . . . .") (quoting Intercontinental Hotels Corp. [Puerto Rico] v. Golden, 203 N.E.2d 210 (N.Y. 1964)); Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) ("We are not so provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home."); *see also* Rosen, *supra* note 27, at 793; Minehan, *supra* note 27, at 799 ("Recognizing this potential for abuse, U.S. courts have narrowly construed the public policy exception and exercised it on rare occasions.").

[31] *See, e.g*, Telnikoff v. Matusevitch, 702 A.2d 230, 249 (Md. 1997); Abdullah v. Sheridan Square Press, Inc., No. 93 CIV. 2515 (LLS), 1994 WL 419847, at *1, *1 (S.D.N.Y. May 4, 1994); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 665 (N.Y. App. Div. 1992).

[32] *See id.*

[33] *Abdullah*, 1994 WL 419847, at *1; Desai v. Hersh, 719 F. Supp. 670, 680–81 (N.D. Ill. 1989); *Telnikoff*, 702 A.2d at 250–51; *Bachnan*, 585 N.Y.S.2d at 665.

[34] Securing the Protection of our Enduring and Established Constitutional Heritage ("SPEECH") Act, 28 U.S.C. §§ 4101–4105 (2010).

[35] 585 N.Y.S.2d 661 (Sup. Ct. 1992).

[36] 702 A.2d 230 (Md. 1997).

[37] *Bachnan*, 585 N.Y.S.2d at 665; *Telnikoff*, 702 A.2d at 250–51.

[38] See, e.g., Derek Devgun, United States Enforcement of English Defamation Judgments: Exporting the First Amendment?, 23 ANGLO-AM. L. REV. 195, 203 (1994); Craig A. Stern, Foreign Judgments and the Freedom of Speech: Look Who's Talking, 60 BROOK. L. REV. 999,

in this area of law[39] and courts addressing the enforceability of foreign judgment consistently return to these decisions in their analysis of First Amendment issues.[40]

In *Bachchan*, a New York court denied plaintiff's effort to enforce a British libel judgment against a New York newspaper for a story published abroad.[41] The court concluded that English libel laws did not comport with American constitutional free speech standards as defined in important libel decisions including *New York Times v. Sullivan*[42] and *Gertz v. Robert Welch, Inc.*[43] The court held that the speech at issue in the case was constitutionally protected under American laws and that the British system did not provide adequate equivalent protections.[44] "The protection to free speech and the press embodied in [the First Amendment] 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," the judge wrote.[45] Given the risks of "chilling" protected speech and of violating the speech rights of the news company, the court refused to enforce the foreign judgment, holding that it was repugnant to the public policy of the state of New York.[46] In reaching such a conclusion, the court suggested that interference with the First Amendment requires an exception to the enforcement of the judgment.

Similarly, in *Telnikoff,*[47] a Maryland court, later affirmed by the D.C. Circuit, also invoked the First Amendment, as it refused to enforce another British libel judgment. In *Telnikoff,* like in *Bachchan*, an English citizen sought to enforce money damages in

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1033–34 (1994); Joachim Zekoll, The Role and Status of American Law in the Hague Judgments Convention Project, 61 Alb. L. Rev. 1283, 1305–06 (1998); Jeremy Maltby, Note, Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts, 94 COLUM. L. REV. 1978, 1995-96 (1994); Jeff Sanders, Comment, Extraterritorial Application of the First Amendment to Defamation Claims Against American Media, 19 N.C. J. INT'L L. & COM. REG. 515, 552 (1994).

[39] Scholars writing about the public policy exception have focused on these cases. *See, e.g.*, Rosen, *supra* note 21, at 180 ("Two of these decisions are gathering precedential force, as courts have begun to rely on their analyses"); *see also* Minehan, *supra* note 27, at 805–06; Rosen, *supra* note 27, at 788–91.

[40] *See, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 480 (2d Cir. 2007) (citing *Bachchan*); Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 282 (S.D.N.Y. 2005) (citing *Bachchan* and *Telnikoff*); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (citing *Telnikoff* and *Bachchan*); Abdullah, 1994 WL 419847, at *1.

[41] 585 N.Y.S.2d at 665 (Sup. Ct. 1992)

[42] 376 U.S. 254 (1964).

[43] 418 U.S. 323 (1974).

[44] 585 N.Y.S.2d at 664–65.

[45] *Id.* at 665.

[46] *Id.* at 664–65.

[47] Telnikoff v. Matusevitch, 702 A.2d 230, 230 (Md. 1997).

an American court after winning a libel case in England under the looser English libel standards.[48] The court undertook its own lengthy analysis of *Sullivan* and *Gertz* to conclude that English and American libel laws presented a "stark contrast."[49] Given the American system's respect for the press and the different burdens and standards of proof between the two countries, the court concluded that, "recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country."[50] The court, citing *Bachchan*, thus held that the British judgment fell within the public policy exception and could not be enforced by an American court.

Bachchan and *Telnikoff* have shaped the ways that courts consider the public policy exception in the context of the First Amendment. In the years following these cases, courts extended the application of these two cases beyond the domain of libel law into other aspects of First Amendment speech that receive different protection in the United States than they do in other countries. In one important case concerning a foreign judgment, *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*,[51] a California court employed a similar approach as the courts in *Bachchan* and *Telnikoff* to deny the enforcement of a French hate speech judgment. Defendants in *Yahoo!* had obtained an order in a French court asking Yahoo!, an internet search and online media company based in the United States, to "render impossible" access to certain contents on American servers, specifically Nazi-related propaganda and materials.[52] The French court had found Yahoo! in violation of a national law criminalizing the "exhibition of Nazi propaganda and artifacts for sale"[53] and had ordered that Yahoo! take several steps to ensure that French citizens could not access such material. Yahoo! sought a declaratory judgment in U.S. court that the French judgment was unenforceable because of its conflict with constitutional First Amendment rights.

In evaluating the French judgment, the court looked to broad principles of comity citing *Hilton* and several more recent circuit decisions[54] for the proposition that "United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests."[55] Despite this presumption in favor of comity, the court held that the unconstitutionality of the

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[48] *Id.* at 232-35.

[49] *Id.* at 249.

[50] *Id.* at 250.

[51] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

[52] *Id.* at 1185.

[53] *Id.*

[54] The court cited *Somportex Ltd. v. Philadelphia Chewing Gum Corp.,* 453 F.2d 435, 440 (3d Cir.1971) *cert. denied,* 405 U.S. 1017 (1972), *Laker Airways v. Sabena Belgian World Airlines,* 731 F.2d 909, 931 (D.C.Cir.1984), and *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C.Cir.1981). *Id.* at 1192.

[55] *Id.* at 1192.

French order brought it into the public policy exception and thus prevented the recognition of the foreign judgment. The court emphasized that the order was a "content and viewpoint-based regulation" that "clearly would be inconsistent with the First Amendment if mandated by a court in the United States."[56] As a result, the court held that the judgment was unenforceable in an American court.

In addition to showing courts' continued reliance on *Bachchan* and *Telnikoff*, the *Yahoo!* case also demonstrated how the internet has complicated the doctrine on the enforcement of foreign judgments in cases implicating the First Amendment. The foreign judgment in *Yahoo!* sought to target speech territorially: the French judgment applied only against speech reaching a French audience.[57] In response to this, however, Yahoo! argued that following the judgment would require global restrictions on the content it publishes online.[58] The case did not fully resolve the possibility of geographic filtering to limit speech targeted to a particular location. Furthermore, the district court did not define the extraterritorial reach of the First Amendment, as it instead emphasized that the judgment was not enforceable because of its speech-chilling effects "within our borders."[59]

In each of these three cases addressing the First Amendment and foreign judgments—*Bachchan*, *Telnikoff*, and *Yahoo!*—courts have looked to domestic First Amendment case law in evaluating foreign judgments.[60] As the Supreme Court has explicitly protected libel and hate speech, these courts have easily interpreted the protections given to the speech at issue under the American system and compared them to the foreign laws at stake. In undertaking these evaluations, the courts have considered the enforcement of foreign judgments with speech-restrictive effects as the equivalent of domestic restrictions on First Amendment-protected speech and have thus held that it is constitutionally required to refuse to enforce the foreign judgment. This jurisprudential emphasis on the sanctity of the First Amendment in interpreting the public policy exception came into the spotlight again in the New York case of *Sarl Louis Feraud International v. Viewfinder*, a case which, like *Yahoo!,* involved speech published online.

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[56] *Id.*
[57] *Id.* at 1184.
[58] *Id.* at 1185–86.
[59] *Id.* at 1192
[60] *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001); Telnikoff v. Matusevitch, 702 A.2d 230, 244–46 (Md. 1997); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 663 (N.Y. App. Div. 1992).

III. THE VIEWFINDER DECISION

A. The District Court's Decisions

In 2001, French designers Sarl Louis Feraud International and S.A. Pierre Balmain brought a suit in France against American media company Viewfinder Inc., alleging that the company "made unauthorized use of their intellectual property" when it posted pictures on its website of models from the designers' fashion show wearing copyright-protected designs.[61] Viewfinder failed to answer the complaint and, a few months later, the French court granted a default judgment in favor of the plaintiffs.[62] The court ordered compensatory damages of 1,000,000 francs (around $183,007 at the time), as well as a coercive fine for each day Viewfinder did not comply with the judgment.[63]

Because the assets of Viewfinder, a Delaware corporation, were located in the United States, plaintiffs brought an action in the Southern District of New York to enforce the monetary judgment against the defendant.[64] Viewfinder moved for dismissal and summary judgment on several grounds, including an invocation of the public policy exception of the New York statute governing the recognition of foreign judgments.[65] The French judgment, Viewfinder argued, was repugnant to New York public policy because French copyright law "is inconsistent with American intellectual property law"[66] and because the judgment violates Viewfinder's First Amendment rights.[67]

In a brief opinion, Judge Lynch agreed with the latter argument and dismissed the action.[68] Judge Lynch emphasized the differences between European laws on free expression and the First Amendment. He used the examples of hate speech and libel, which, as discussed above, receive less protection in Europe than they do in the American judicial system. [69] Similarly here, Judge Lynch argued, Viewfinder's posting of the pictures "fall[s] within the purview of the First Amendment" because "the subject matter of protected expression extends beyond the political to include matters

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[61] Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274, 276 (S.D.N.Y. 2005).
[62] *Id.* at 277
[63] *Id.*
[64] *Id.*
[65] *Id.* at 279
[66] *Id.* at 280.
[67] *Id.* at 281–82.
[68] *Id.* at 285.
[69] Judge Lynch cited *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 169 F.Supp.2d 1181 (N.D.Cal.2001), where a U.S. court refused to enforce a French judgment against Nazi propaganda, and *Bachchan v. India Abroad Publications Inc.,* 585 N.Y.S.2d 661 (1992), *Abdullah v. Sheridan Square Press, Inc.,* No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994), and *Telnikoff v. Matusevitch,* 702 A.2d 230, 244 (Md. 1997), where American courts refused to enforce British libel judgments. *Id.* at 282.

of cultural import."[70] In this case, the photographs involved fashion shows, which Judge Lynch described as a "matter of great public interest," as evidenced, he argued, by the wide coverage they receive in the media.[71] He rejected plaintiffs' various arguments that the photographs should not have First Amendment protection because the website provides little news content and promotes commercial purposes by seeking to sell the photographs posted.[72] These concerns, he argued, were insufficient to overcome the protections granted by the First Amendment. "The First Amendment simply does not permit plaintiffs to stage public events in which the general public has a considerable interest, and then control the way in which information about those events is disseminated in the mass media," Judge Lynch wrote.[73] Judge Lynch's analysis, which centered around the First Amendment, thus represented an attempt to frame the issues in *Viewfinder* through the same lens as the foreign judgments in *Bachchan* and *Telnikoff*. This broad interpretation of matters of public interest and of the First Amendment's reach also served, however, to expand the application of the public policy exception to restrict the enforcement of foreign judgments.

B. The Second Circuit's Decision

But when the case reached the Second Circuit on appeal, the panel of three-judges took a different course, as Judge Pooler, writing for the panel,[74] emphasized that the public policy exception should apply only in rare circumstances and that courts should favor enforcement of foreign judgments.[75] The "public policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense," Judge Pooler wrote.[76] Judge Pooler thus suggested a presumption in favor of enforcement unless the case is "clear-cut" in favor of the defendant's invocation of the public policy exception.[77]

While Judge Pooler recognized that a violation of the First Amendment is sufficient to meet such a high burden, she concluded that the district court had not properly evaluated the First Amendment questions in this case. Rather than accepting the First Amendment as providing categorical protection to the reporting of news events, the district court should have considered the case through the lens of American

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[70] *Viewfinder*, 406 F. Supp. at 282.
[71] *Id.* at 283.
[72] *Id.* at 284
[73] *Id.* at 285.
[74] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007). Judge Pooler was joined by Judges Raggi and Sand.
[75] *Id.* at 479–80.
[76] *Id.* at 479 (quoting *Sung Hwan Co. v. Rite Aid Corp.*, 850 N.E.2d 647 (N.Y. 2006).
[77] *Id.* at 480 (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

intellectual property law, Judge Pooler noted.[78] Judge Pooler cited *Cohen v. Cowles Media Co.*,[79] a case where the Supreme Court held that the first Amendment did not bar a promissory estoppel claim against a newspaper that violated a promise of confidentiality, stating "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[80] As such, the First Amendment does not exempt news organizations from compliance with the law, including with intellectual property laws. Furthermore, Judge Pooler wrote in her opinion, American intellectual property laws are specifically designed to coexist with the First Amendment as evidenced most clearly through the fair use doctrine.[81]

Judge Pooler then suggested that the district court should have instead undertaken a comparison of the French cause of action and its equivalent in American copyright law. Judge Pooler identified a two-step process by which the court should evaluate the judgment against Viewfinder.[82] First, it should "determine the level of First Amendment protection required by New York public policy when a news entity engages in the unauthorized use of intellectual property at issue here."[83] Second, "it should determine whether the French intellectual property regime provides comparable protections."[84] Judge Pooler derived this test from the analysis applied to foreign libel judgments in *Bachchan* and cited to the decision.[85]

In this case, Judge Pooler emphasized, the analysis should center around the fair use doctrine, which already accounts for a balance of First Amendment protections in American copyright law. "[A]bsent extraordinary circumstances, the fair use doctrine encompasses all claims of First Amendment in the copyright field," Judge Pooler wrote.[86] Judge Pooler enumerated four factors to consider under the fair use doctrine as codified in Title 17 of the U.S. Code Section 107. To determine whether the publication was fair use, she wrote, a court should look first at "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; second, at "the nature of the copyrighted work"; third at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and fourth, at "the effect of the use upon the potential

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[78] *Id.*

[79] 501 U.S. 663 (1991).

[80] *Id.* at 669.

[81] *Id.*

[82] 489 F.3d at 481–82.

[83] *Id.*

[84] *Id.* at 482.

[85] *Id.* at 481. Judge Pooler also relied on *Abdullah v. Sheridan Square Press, Inc.,* No. 93 Civ. 2515, 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994).

[86] *Id.* (quoting *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.,* 996 F.2d 1366, 1378 (2d Cir.1993) (internal quotation marks omitted).

market for or value of the copyrighted work."[87] Rather than undertake this thorough case-by-case analysis, Judge Pooler remarked that the district court had "dispensed with the issue of fair use in a single sentence."[88] Given the district court's minimal consideration of the fair use issues involved in this case, Judge Pooler remanded the case to the district court to further develop the record on the fair use question.

C. The District Court on Remand

As the case returned to him, Judge Lynch undertook a more thorough analysis of the claim that Viewfinder's actions might constitute fair use and thus that they did not violate the intellectual property rights of the French designers. The parties produced additional discovery and the plaintiffs filed for summary judgment, arguing that Viewfinder had no claim of fair use as a matter of law.[89] Judge Lynch denied the motion, finding that genuine disputes of fact existed, rendering summary judgment inappropriate.[90]

Judge Lynch carefully followed the Second Circuit's instructions and analyzed the case through the statutory framework for fair use. Applying the statute's four factors to the *Viewfinder* case, however, Judge Lynch found that, while the first two factors favored the defendant, the third factor favored the plaintiff and the fourth factor was unresolved by the record.[91] Because the record was insufficient for Judge Lynch to determine whether Viewfinder's actions were fair use, he did not reach the "international" component of the foreign judgment analysis, where he would have considered whether French law provides analogous protections to the American fair use defense.[92] This prong of the test is essential to shaping a doctrine for public policy analysis, as it is the only aspect of the inquiry that undertakes a comparison between domestic and foreign laws. Whether courts take a more or less lenient approach in interpreting the adequacy of foreign laws will have significant effects on the breadth of the public policy exception and consequently on the enforcement of foreign judgments.

IV. THE FIRST AMENDMENT AND FAIR USE

The district court's instinct in *Viewfinder* to turn to First Amendment jurisprudence follows earlier cases on the enforcement of foreign judgments, including *Bachchan* and

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[87] *Id.* (citing 17 U.S.C. § 107).
[88] *Id.*
[89] Viewfinder, 627 F. Supp. 2d 123,125 (S.D.N.Y. 2008).
[90] *Id.* at 126, 133 (citing Fed. R. Civ. P. 56).
[91] *Id.* at 127–33.
[92] *See supra* note 84 and accompanying text.

Yahoo!, where courts looked to American libel and hate speech doctrines.[93] But in the context of foreign copyright decisions, a focus on the First Amendment case law misses the mark. In evaluating foreign copyright decisions, and intellectual property cases more generally, U.S. courts should look to American intellectual property law rather than to the First Amendment. American copyright laws already account for First Amendment considerations, as visible most prominently in the fair use doctrine, which permits certain unauthorized uses of copyright materials.[94] Furthermore, in addressing domestic First Amendment-based challenges to copyright decisions, courts have repeatedly emphasized that the analysis should focus on the fair use doctrine, rather than on the First Amendment.[95] The analysis of foreign copyright decisions should be no different.

A. Judicial Doctrine on Copyright and the First Amendment

The Supreme Court has spoken several times on the relationship between copyright law and the First Amendment. In 1985, in *Harper and Row Publishers, Inc. v. Nation Enterprises*, the Court emphasized the balance struck in copyright law between legal restrictions on the unauthorized reproductions of expression and First Amendment freedoms.[96] In *Harper*, the Court refused to expand fair use doctrine to allow for the unauthorized reproduction in a magazine of verbatim quotes from unpublished presidential memoires.[97] Citing the Second Circuit, the Supreme Court emphasized the manner in which copyright law "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[98] The Court relied both on the distinction in copyright law between ideas (not subject to copyright law) and expression (protectable) and on the doctrine of fair use—both of which provide safeguards to ensure free expression.[99] This scheme, the Court held, adequately protects First Amendment values.[100]

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[93] *See supra* notes 41–50 and accompanying text.

[94] *See* 17 U.S.C. § 107.

[95] *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001); Twin Peaks Prod., Inc. v. *Publ'ns* Int'l, Ltd., 996 F.2d 1366, 1378 (2d Cir. 1993); Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432, 1435–38 (S.D.N.Y. 1986) *aff'd*, 803 F.2d 1253 (2d Cir. 1986); Triangle *Publ'ns*, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1178 (5th Cir. 1980).

[96] 471 U.S. 539, 556 (1985). As Lawrence Lessig notes, the Court in *Harper* followed the reasoning of Melville Nimmer, who wrote an important article on copyright and the First Amendment in 1970, and cited him twenty-seven times. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1059 (2001); *see also* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

[97] 471 U.S. at 569.

[98] *Id.* at 556 (internal citation omitted).

[99] *Id.*

[100] *Id.* at 560.

In 2003, in *Eldred v. Ashcroft*,[101] the Court once again tested the relationship between copyright law and First Amendment values. In *Eldred*, the Court upheld the constitutionality of the Copyright Term Extension Act of 1998, concluding that it did not violate the First Amendment.[102] The Court again recognized that "copyright law contains built-in First Amendment accommodations."[103] Like in *Harper*, the Court emphasized, first, the distinction between ideas and expression, with copyright law protecting only the latter, and second, that the fair use defense creates an additional layer of protection by allowing for the use of copyrighted expressions in certain circumstances.[104] These safeguards, the Court held, adequately protect the First Amendment.[105] In both *Harper* and *Eldred*, the Court thus recognized that the First Amendment and copyright law can coexist without conflict because of the built-in protections of copyright law. This relationship between copyright law and the First Amendment is important in the context of foreign judgments because it suggests that copyright laws are not automatically in conflict with the First Amendment, at least not in American case law. The challenge remains to determine whether foreign intellectual property laws offer the same protections.

B. Statutory Codification of Fair Use

Statutorily, although the statute on fair use does not explicitly mention the First Amendment, it suggests that fair use exists to protect certain speech values.[106] Title 17 of the U.S. Code Section 107 provides that copyrighted material may sometimes be used for certain protected speech purposes without violating the owner's intellectual property rights.[107] Under the statute, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[108] The statute then lists the four factors by which to evaluate whether use of copyrighted material may constitute fair use, looking (1) to the "purpose and character of the use," (2) to the "nature of the copyrighted work," (3) to the amount of the copyrighted work reproduced, and (4) to the "effect of the use upon the potential market for or value of the copyrighted work."[109] These factors, through their focus on the use of the copyrighted material, seek to incorporate some of the values of the First Amendment in promoting a democratic society and

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[101] 537 U.S. 186, 219 (2002).
[102] *Id.* at 221–22.
[103] *Id.* at 190.
[104] *Id.*
[105] *Id.* at 190-91.
[106] 17 U.S.C. § 107 (2012).
[107] *Id.*
[108] *Id.*
[109] *Id.*

preserving speech in the public interest, while at the same time ensuring that it does not interfere with an owner's rights.[110] The statute on fair use thus creates an exception to copyright acts by recognizing that certain uses of material should be permissible to protect the speech values embodied in the First Amendment.

Both Supreme Court case law and the fair use statute itself thus suggest that copyright law has built-in safeguards to ensure the protection of First Amendment values. Just as fair use laws have defeated First Amendment claims in copyright cases like *Harper* and *Eldred*, they should have the same effect in cases concerning the enforcement of foreign copyright decisions. These decisions should thus depend, not on First Amendment analysis, as seen in Part II, but on a comparison of domestic and foreign copyright laws. In the *Viewfinder* decision, the Second Circuit recognized, although did not explicitly state, that First Amendment analysis should not dictate the enforcement of foreign copyright judgments.[111] Rather, the court emphasized that the analysis of foreign copyright judgments should entail a comparison of foreign intellectual property laws and domestic property laws with a particular focus on differing doctrines of fair use.[112]

C. Fair Use in Foreign Countries

Focusing on fair use rather than the First Amendment might seem to favor the enforcement of foreign copyright judgments in U.S. courts, but differences in American and foreign copyright laws complicate the comparison. Because American copyright law includes such robust speech protections, it is unlikely that foreign copyright laws will offer the same safeguards. As a result, attempts to enforce foreign judgments may still fail under the public policy exception, because foreign copyright laws might not adequately represent the interests of American intellectual property laws. However, the analysis of such situations should not proceed as it does with other First Amendment cases—as discussed in Part II, requiring a constitutionally mandatory exception. [113] Instead, courts evaluating foreign copyright judgments should compare the foreign system to domestic intellectual property doctrine to determine whether the values of the American fair use doctrine are present in the foreign country. Furthermore, as will be discussed in Part V, even when the same protections do not exist in foreign copyright doctrines, the distinct nature of copyright law—as a doctrine at the edge of the First Amendment which benefits

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[110] *See generally* Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

[111] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 480 (2d Cir. 2007). (stating that "[t]he First Amendment does not provide such categorical protection" and that the district court's analysis should consider intellectual property laws).

[112] *Id.*

[113] *See supra* notes 31–33 and accompanying text.

immensely from global cooperation—might nonetheless militate in favor of the enforcement of foreign judgments.[114]

Fair use doctrine is a uniquely American concept[115] and only a few countries, including Israel, Singapore, and the Philippines have adopted similar open-ended systems.[116] Though no exact equivalent exists in the intellectual property regimes of most other countries, the broader principle—that certain uses of copyright material should be permissible—has been widely adopted by many countries.[117] Many countries have "fair dealing" exceptions to copyright laws,[118] including the United Kingdom, and other common law countries.[119] The laws of countries with "fair dealing" doctrines include broadly defined categories of permissible uses of copyrighted material, often including research or educational purposes, but the permitted uses are still narrower than in the American doctrine of fair use.[120] Furthermore, in many other countries, including a number of European states, there is no broad exception at all, but rather a series of narrowly categorized permissible uses of copyrighted materials, further limiting opportunities for free use of copyrighted materials.[121]

The *Viewfinder* case highlights these differences between foreign and domestic copyright laws. In *Viewfinder*, the court never reached the last step of its inquiry, where

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[114] *See infra* notes 135–176 and accompanying text.

[115] *See* Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions - the Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 522 (2010) ("Whereas continental-European countries provide for a closed catalogue of carefully-defined limitations, the Anglo-American copyright tradition allows for an open-ended fair use system that leaves the task of identifying individual cases of exempted unauthorized use to the courts"); Tyler G. Newby, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1642 (1999) ("[T]he United States' section 107 is unique among the community of nations").

[116] Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1071 (2011).

[117] *See* Fair *Use and Fair Dealing in Foreign Countries,* CANADIAN CONFERENCE OF THE ARTS, http://ccarts.ca/wp-content/uploads/2011/11/FairUseandFairDealinginForeignCountries.pdf (last visited Mar. 1, 2013); *see also* Staff of S. Comm. on the Judiciary, 86th Cong., *Fair Use of Copyrighted Works, Study No. 14, in* COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS 1, 24–28 (Comm. Print 1960) (describing the specific categories of fair use in a number of countries).

[118] See *Fair Use and Fair Dealing in Foreign Countries*, *supra* note 117.

[119] Janice T. Pilch, *Fair Use and Beyond: The Status of Copyright Limitations and Exceptions in the Commonwealth of Independent States*, 65 COLLEGE & RESEARCH LIBRARIES 468, 470 (2004).

[120] *See id.*

[121] *See* Fair *Use and Fair Dealing in Foreign Countries, supra* note 117. For a more thorough study of fair use in foreign countries, *see* Newby, *supra* note 115, at 1642–45.

it would have compared American fair use doctrine to the French system.[122] If it had done so, it would have found that, in France, no broad doctrine of fair uses exists.[123] Rather, a few exceptions to the intellectual property code provide some, but not all, of the same protections. These exceptions allow for private use or parody of the work, or for "[a]nalyses and brief quotations justified on the grounds of the critical, polemic, educational, scientific, or informatory nature of the work in which they are incorporated, on condition the name of the author and source are clearly stated."[124] The use of the copyrighted material in *Viewfinder*, which consisted of pictures posted on a commercial site, thus likely fell outside of this French exception, while the American judge recognized that it might fall within American fair use. *Viewfinder* thus serves to exemplify how domestic fair use doctrine may conflict with more stringent foreign standards of permissible unauthorized uses.

Despite these common differences, scholars have recognized that, in recent years, concepts of "fair use" have expanded globally, bringing other countries closer to the American system.[125] This is evident in international copyright agreements, which have modeled their approach to unauthorized uses of copyrighted materials on a three-step test from the Berne Convention.[126] Article 9(2) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[127] The broad principles this embodies

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[122] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 482 (2d Cir. 2007).

[123] *Fair Use and Fair Dealing in Foreign Countries*, *supra* note 117; *see also* P. BERNT HUGENHOLTZ & MARTIN R.F. SENFTLEBEN, INSTITUUT VOOR INFORMATIERECHT, FAIR USE IN EUROPE. IN SEARCH OF FLEXIBILITIES 15 (2011), *available at* http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf. .

[124] *Fair Use and Fair Dealing in Foreign Countries*, *supra* note 117.

[125] *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2618 (2009) ("Although fair use began as a distinctively American copyright doctrine, commentators throughout the world have come to realize that copyright law is incomplete when viewed only as a law of author's rights . . . ."); *see also* Senftleben, *supra* note 115, at 551 ("[A European] fair use doctrine can . . . be expected to have a beneficial effect on the further harmonization of copyright limitations at the international level").

[126] World Intellectual Property Organization [WIPO] Copyright Treaty, art. 10, Dec. 20, 1996, S. Treaty Doc. No. 105–17 (1997) [hereinafter WIPO Treaty]; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention]; *see also* Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5., 2001 O.J. (L 167).

[127] Berne Convention, *supra* note 126, at art. 9.

reflect the same values as American fair use doctrine[128]—recognizing that certain uses of copyrighted materials should be permissible—but judicial interpretations of this test will shape its scope.[129] For example, one scholar suggests that this test, as it is incorporated in a European directive, should be interpreted broadly to promote flexible fair use elements, similar to the American system, and to further harmonize international copyright laws.[130] Such expansions of fair use doctrines abroad, including through interpretations of international agreements, might thus help to bring the intellectual property laws of foreign countries closer to the American system. Correspondingly, the alignment of foreign doctrines of fair use with the American system would also facilitate the enforcement of foreign judgments, as it would become easier for U.S. courts to follow the laws of other countries when those laws reflect similar conventions and practices as the American system.

V. ENFORCING FOREIGN COPYRIGHT JUDGMENTS

In evaluating countries' different approaches to "fair use," courts will have to develop metrics by which to compare foreign systems to American laws and to determine whether foreign intellectual property laws provide "comparable protections," as the Second Circuit characterized the evaluation in the *Viewfinder* case.[131] It is at this stage of the inquiry that concerns about the First Amendment might reenter the picture. As discussed in Part II, the point of the comparison is to determine whether a judgment is repugnant to the state's public policy.[132] As a result, to evaluate a foreign copyright judgment through the prism of fair use, one must consider what the relationship is between fair use and public policy. While it may never be advisable to have a "constitutionally mandatory" exception,[133] one way by which to measure the public policy interests of fair use is to determine whether fair use represents the constitutionally-required minimum protection of speech rights or whether it might be permissible under the First Amendment to enforce a judgment from a country that does not have the same broad speech protections inscribed into its copyright laws. Unfortunately, defining this constitutional minimum required by the First Amendment in copyright law may be challenging, as the Court has given little

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[128] *See* Senftleben, *supra* note 115, at 543 ("[A] line between the criteria of the three-step test and the factors to be found in fair use provisions, such as the U.S. fair use doctrine, can easily be drawn."); Newby, *supra* note 115, at 1636 (describing the Berne standards as somewhat analogous to the American fair use exception but arguing that similarity between the Berne test and American system will depend on interpretation).

[129] *See* Sam Ricketson, WORLD INTELLECTUAL PROPERTY ORGANIZATION Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment 10–27 (2003), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf.

[130] Senfteleben, *supra* note 115, at 550–51.

[131] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 482 (2d Cir. 2007).

[132] *See supra* note 2 and accompanying text.

[133] Mondora, *supra* note 9, at 1141.

guidance in its decisions on the subject.[134] As a result, the question of just how U.S. courts should evaluate foreign judgments and assess their compatibility with the American doctrine of fair use, and the First Amendment more broadly, remains largely unanswered. Indeed, without more direction from the Supreme Court on the requirements of the First Amendment in copyright laws, courts may be left only with broad conceptions of American free speech values to guide them in decisions on whether to enforce foreign judgments.

Yet even if the doctrine of fair use implicates First Amendment concerns, there are several arguments in favor of courts enforcing foreign copyright judgments, including in cases where foreign laws do not give the same robust fair use protections as the American system. In analyzing the public policy exception, several scholars have advocated for a more narrow approach than courts have thus far undertaken. This may be especially valuable—and constitutionally permissible—in the context of copyright law. The Supreme Court has not spoken as clearly on constitutional requirements in the domain of copyright law as it has in other First Amendment areas. More broadly, the Court has not treated copyright law in the same way as it has other First Amendment matters, including libel and hate speech, and it has left open the possibility that the First Amendment allows for more latitude in the domain of copyright law. Furthermore, copyright is any area that can benefit strongly from international cooperation, as demonstrated through international copyright agreements. These arguments all weigh in favor of treating the enforcement of foreign copyright judgments differently from other foreign judgments interfering with the First Amendment and each argument will be discussed in more detail in the subsections that follow.

A. Narrow Interpretation of the Public Policy Exception

First, courts have generally advocated in favor of a narrow approach to the public policy exception.[135] In *Viewfinder*, the court stated that the "'public policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.'"[136] "'[O]nly in clear-cut cases ought [the public policy exception] to avail defendant,'" the court added.[137] Courts outside of New York have also recognized this. For example, in *Laker Airways Ltd. v.*

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[134] *See* David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 284 (2004) ("Justice Ginsburg's majority opinion [in *Eldred*] . . .did not give any hint of what the Constitution itself requires.").

[135] *See* Minehan, *supra* note 27, at 799; *see also* Mehren & Trautman, supra note 21, at 1670 ("[T]he public policy exception is perhaps the most often mentioned and, upon strict analysis, the least often used.").

[136] 489 F.3d at 479 (quoting Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650 (N.Y. 2006)).

[137] *Id.* at 480 (quoting Tahan v. Hodgson, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981)).

Sabena, Belgian World Airlines, the D.C. Circuit emphasized that "[t]he standard for refusing to enforce judgments on public policy grounds is strict."[138] In advocating for a narrow approach to the public policy exception, courts have thus rarely applied it to bar the enforcement of foreign judgments.[139] Indeed, when construing the public policy exception, courts have even enforced damage awards that would not have been allowed in the United States, including in cases where domestic courts would not otherwise recognize the cause of action or where the type of damages awarded would not usually be permitted.[140]

Despite this strict approach, courts have been inflexible in refusing to enforce foreign judgments involving the First Amendment.[141] Yet several scholars have suggested that, even in cases involving the First Amendment, courts should revise their approach to favor the enforcement of foreign judgments, in line with principles of comity.[142] Courts, these critics suggest, should not necessarily see any interference with First Amendment rights as requiring a mandatory exception to the enforcement of the judgment.[143] Rather, they argue, the enforcement of a foreign judgment that has speech-restrictive effects might nonetheless be constitutionally permissible. As one scholar remarks on *Bachchan* and *Telnikoff*, "these cases ignore constitutionally significant differences between promulgation of speech-restrictive rules and mere enforcement of them."[144] Advocates of a more narrow approach have formulated two principle arguments to justify this view: one proposing that enforcement of foreign judgments does not constitute "state action" within the bounds of the First Amendment and the other focusing on the extraterritorial nature of foreign judgments and their different constitutional implications from domestic judgments.

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[138] 731 F.2d 909, 931 (D.C. Cir. 1984).

[139] *See* Minehan, *supra* note 27, at 804 ("U.S. courts have thus exhibited a profound tendency towards the liberal enforcement of foreign judgments that would not normally be awarded in U.S. courts.").

[140] *See* Minehan, *supra* note 27, at 800–04.

[141] *See supra* notes 31–33 and accompanying text.

[142] *See* Mondora, *supra* note 9, at 1151–52 ("[T]here has been a recent movement by the academic community criticizing the categorical, constitutionally mandatory application of the public policy exception in the Bachchan line of cases,"); *see also* Rosen, *supra* note 27, at 785; Van Houweling, *supra* note 29, at 700–01.

[143] *See* Mondora, *supra* note 9, at 1151–57; Rosen, *supra* note 27, at 785; Van Houweling, *supra* note 29, at 701–06.

[144] Van Houweling, *supra* note 29, at 698; *see also* Rosen, *supra* note 27, at 785 ("While such foreign judgments may well be 'un-American' insofar as they come from non-American polities and reflect political values that are at variance with American constitutional law, neither the foreign judgments themselves, nor their enforcement by an American court, is unconstitutional.").

1. State Action

With regard to state action principles, these academics argue that enforcing a foreign judgment that has speech-restrictive effects does not necessarily have "the same First Amendment (and, thus, public policy) implications as imposition of a speech-restrictive rule by a state actor."[145] Indeed, the argument goes, courts "routinely enforce speech-restrictive judgments where the source of the speech-limiting rule is something other than state or federal law—where, for example, speech is limited by a private contract in which the defendant has promised not to speak."[146] As a result, a court's decision to enforce a foreign judgment with First Amendment implications might not necessarily constitute a constitutional violation. To bolster this argument, scholars rely on *Cohen v. Cowles*, where the Supreme Court permitted a promissory estoppel claim against a newspaper that violated a confidentiality promise as distinct from a First Amendment violation,[147] because the speech restriction came from a private actor, not a state actor.[148]

The case that presents the strongest challenge to this characterization of state action by scholars is *Shelley v. Kraemer*,[149] where the Supreme Court held that judicial enforcement of a restrictive covenant in violation of the Equal Protection Clause would constitute unconstitutional state action. In refusing to enforce the French hate speech judgment, the *Yahoo!* court cited *Shelley*[150] and, indeed, taken at its letter, the latter case suggests that enforcing an unconstitutional foreign judgment, like enforcing a private contract, is itself unconstitutional.[151] Yet, relying on *Shelley* ignores the courts' routine practice of enforcing private contracts that conflict with the First Amendment. As one scholar notes, "with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does not trigger constitutional review, despite the fact that identical legislative limitations on speech would have."[152] This different treatment suggests that *Shelley*, which arose in the Equal Protection context, does not necessarily carry over to the First Amendment. Furthermore, the judicial enforcement of speech-restrictive private contracts provides strong support for the view that any judicial action with First Amendment implications is not necessarily a constitutional violation.

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[145] Van Houweling, *supra* note 29, at 701. Van Houweling remarks that one error in *Bachchan* and *Telnikoff* is the courts' insistence that "enforcement raises free speech concerns of the magnitude at issue in *N.Y. Times v. Sullivan*." *Id.*

[146] *Id.* at 702.

[147] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

[148] Van Houweling, *supra* note 29, at 702.

[149] 334 U.S. 1 (1948); *see also* Rosen, *supra* note 21, at 193.

[150] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001).

[151] *See Shelley*, 334 U.S. at 20 (holding that judicial enforcement of a private restrictive covenant violates the Equal Protection Clause).

[152] Rosen, *supra* note 21, at 193.

2. Extraterritoriality and the First Amendment

Scholars advocating against a constitutionally required exception also suggest that speech targeted abroad may not fall within "the ambit of the First Amendment."[153] The First Amendment, they argue, does not necessarily have the same requirements extraterritorially as it does domestically.[154] As seen in Part II, in both *Bachchan* and *Telnikoff*, the speech at issue in the judgment had reached a foreign audience.[155] Yet, in both cases, the courts assumed that the restriction still violated the First Amendment. While the courts cited domestic chilling effects to support this view, implicit in the decisions was the assumption that the First Amendment applies extraterritorially. Yet, the Supreme Court has articulated no clear position on the extraterritorial application of the Bill of Rights.[156]

Furthermore, in the context of the First Amendment, the question is especially complex because of the global nature of speech in the internet age. With the internet, speech can instantly reach a global audience, and subsequently sew confusion among conflicting national laws.[157] As such, speech may no longer be considered to be territorially-bound: content originating abroad may be accessible in the United States, just as content stored on U.S. servers may nonetheless reach a global audience.[158] While courts looking at foreign copyright judgments have assumed that the First Amendment has the same applications extraterritorially as it does within the United

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[153] Van Houweling, *supra* note 29, at 703

[154] *See* Van Houweling, *supra* note 29, at 705 ("[I]t is not clear that the First Amendment (and, hence, First Amendment-based public policy) protects speech directed to a foreign audience."); *see also* Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation,* 52 B.C. L. REV. 941, 945 (2011).

[155] *See* Telnikoff v. Matusevitch, 702 A.2d 230, 232 (Md. 1997); Bachchan v. India Abroad *Publ'ns* Inc., 585 N.Y.S.2d 661, 661 (Sup. Ct. 1992); *see also* Van Houweling, *supra* note 29, at 704–06); *but see* Sarl Louis Feraud Int'l,v. Viewfinder, 627 F. Supp. 2d 123, 125 (S.D.N.Y. 2008) (involving material published on a website based in the United States).

[156] *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) (holding that the Fourth Amendment did not apply extraterritorially) *with* Reid v. Covert, 354 U.S. 1 (1957) (holding that the Fifth and Sixth Amendments apply abroad) (plurality opinion). *See generally* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Jon Andre Dobson, Verdugo-Urquidez*: A Move Away from Belief in the Universal Pre-Existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Gerald L Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

[157] *See* Zick, *supra* note 154, at 947. *See also* Timothy Zick, *Territoriality and the First Amendment: Free Speech at – and Beyond – our Borders*, 1543 NOTRE DAME L. REV. 1543, 1581 ("Without uniform laws on subjects such as hate speech, the speaker may be subject to liability in multiple jurisdictions").

[158] *Viewfinder* and *Yahoo!* highlight these problems as both cases involved restrictions on internet speech. *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 483 (2d Cir. 2007); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1183–84 (N.D. Cal. 2001).

States, the answer to that question may be more complicated, especially when the speech at issue is published online. If the First Amendment does not apply abroad as it does domestically, then the enforcement of foreign judgments relating to speech targeted abroad does not necessarily raise the same constitutional concerns as domestic judgments.

B. Copyright and the First Amendment

Second, courts, including the Supreme Court, have treated copyright as bearing less on First Amendment concerns than other areas of speech. The Supreme Court has not articulated standards on the conflicts between copyright law and the First Amendment, in the same way at it has in other domains of First Amendment jurisprudence. In *Bachchan*, *Telnikoff*, and *Yahoo!*, where courts barred the enforcement of foreign judgments based on the First Amendment, judges were able to rely on Supreme Court case law explicitly implicating the same issues, specifically hate speech and libel. The Supreme Court has spoken clearly on these two areas of free speech law, granting much broader protections to these categories of speech than courts in other countries and delineating particular standards of protection. With respect to libel, the Court, relying on the First Amendment, has a strong tradition of protecting the freedom of the press, as demonstrated through decisions like *Sullivan*[159] and *Gertz*,[160]; the high burden of proof on the plaintiff to win a domestic libel case falls in line with this tradition. Similarly, the Court has unambiguously protected hate speech in important decisions like *R.A.V. v. City of St. Paul.*[161]

The same cannot be said, however, of copyright and the First Amendment. Copyright law exists in tension with the First Amendment by virtue of the fact that both are codified in the Constitution.[162] Just as the First Amendment guarantees freedom of expression, the copyright clause grants Congress the task: "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[163] Though the founders may not have envisioned any conflict between the two provisions, over time

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[159] 376 U.S. 254, 279–80 (1964); *see also* Nimmer, *supra* note 96, at 1184–85 (discussing the Court's definition of protected speech areas in *Sullivan*).

[160] 418 U.S. 323, 343 (1974).

[161] 505 U.S. 377. 391 (1992).

[162] *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 892 (2002) ("A legislative grant of this private power to stop speech on the basis of its content is in overt tension with the constitutional guarantees of speech and press freedom.").

[163] U.S. Const. art. I, § 8, cl. 8. *See also* Jennifer Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 480 (2010) ("The temporal proximity of the adoption of the Progress Clause, the First Amendment, and the first copyright act suggests that the Founders did not *see* any conflict between the two constitutional clauses.").

it has become clear that constitutional recognition of both expression rights and intellectual property rights has required the balancing of these two interests.[164]

Furthermore, as seen in Part IV, in several cases including *Harper* and *Eldred*, the Court has often found the balance to fall in favor of copyright, as the Court has emphasized the importance of copyright laws over the First Amendment, refusing to expand the doctrine of fair use to protect more speech. Other courts have followed this approach, repeatedly denying the existence of a conflict between the First Amendment and copyright laws.[165] In trying to explain this approach, some scholars have sought to describe copyright, which involves the copying of existing speech, as lower value speech than "new" speech,[166] though this characterization has not convinced many academics, who have continuously decried the clash between the First Amendment and copyright law.[167] Despite this academic pushback, the Court has continued to demonstrate a strong presumption in favor of copyright laws.[168] In

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[164] See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990); J. Matthew Miller III, *The Trouble with Traditions: The Split over Eldred's Traditional Contours Guidelines, How They Might Be Applied, and Why They Ultimately Fail*, 11 TUL. J. TECH. & INTELL. PROP. 91, 112 (2008) ("[t]he Framers viewed [copyright and the First Amendment] to be compatible, and history has proven this to be largely true").

[165] Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1281-1282 (2003) ("[i]n all but two of those cases, courts routinely rejected the conflict argument on various bases"); *see also* McGowan, *supra* note 134, at 284; Rothman, *supra* note 163, at 464 ("there has been a virtually unrelenting rejection of First Amendment review in copyright cases"); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU. L. REV. 1201, 1222 (2005) ("[a]ll told, the denial of the clash between copyright and free expression has shielded copyright from First Amendment challenges").

[166] *See* Nimmer, *supra* note 96, at 1191–92; Rothman, *supra* note 163, at 480–81. Other scholars justify the different treatment of copyright law by arguing that it is necessary to promote the purposes of copyright. *See* Baker, *supra* note 162, at 951 ("It might turn out that giving full force to First Amendment principles would be too destructive of the proper aims of copyright to be acceptable"); Lessig, supra note 96, at 1059 ("[copyright] limits some speech so that other speech might be created"). For more on the constitutionality of copyright laws, *see* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki*, 40 HOUS. L. REV. 697, 748 (2003).

[167] *See, e.g.*, Bauer, *supra* note 8, at 860; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 9 (2002); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

[168] *See* Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1171 (2007) ("[T]his outpouring of scholarship has been notably unsuccessful in winning judicial converts"); Rubenfeld, *supra* note 167, at 7 ("Copyright proceeds as if possessed of a magic free speech immunity, with most courts, including the Supreme Court, explicitly declining to subject copyright to any independent First Amendment review").

Eldred, the Court even noted that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[169] This comment reveals the Court's attitude toward copyright laws and its perception that copyright law falls somewhat outside of the First Amendment.

This argument alone is insufficient to justify a broader approach to the enforcement of foreign copyright judgments, but the existing case law helps to strengthen the view that copyright law should not be treated in the same way as other areas of First Amendment law. Of course, part of the reason why courts have exacted less stringent First Amendment scrutiny over copyright laws is not because free speech bears no effect, but because American copyright laws already incorporate the First Amendment, including through fair use, in a way that foreign laws may not.[170] Nonetheless, this judicial pattern suggests more broadly that the Supreme Court adopts a more lenient approach towards intellectual property laws and the First Amendment than it does towards libel laws and hate speech, for example. As a result, foreign copyright judgments, based on foreign laws, may pose less of a conflict to existing case law on the First Amendment in the domain of intellectual property than foreign judgments affecting other areas of First Amendment law.

C. A Global Approach to Copyright Law

Third, in the domain of intellectual property, global cooperation is especially important, because protected materials are no longer territorially bound, especially when they are published online. A coherent international framework of intellectual property can thus help to lessen the disorder caused by conflicting laws on copyrighted materials. This emphasis on harmonization is evident in recent treaties promoting the uniformization of copyright laws. Efforts to globalize copyrights protections are not new: the Berne Convention dates back to 1866, although the United States did not ratify the convention until 1989.[171] But the global effect of the Berne Convention is limited: although the Convention encourages reciprocity by requiring countries to recognize the copyright of works from other signatory

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[169] Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).

[170] Furthermore, even if foreign laws on permissible uses of copyrighted materials may be inadequate in comparison to the American doctrine of fair use, this is only one of the two safeguards built into copyright law. *See Id.* at 190; Harper & Row Publishers, Inc. v. Enterprises, 471 U.S. 539, 556 (1985). The distinction between ideas and expression, which is central to determining copyright privileges and to preserving a line between copyright law and the First Amendment, might also help preserve First Amendment values in enforcing foreign copyright decisions. It would thus also be necessary to compare the foreign copyright system to evaluate whether it has an idea/expression dichotomy in copyright.

[171] Jane C. Ginsburg and John M. Kernochan, *One Hundred and Two Years Later: the U.S. joins the Berne Convention*, 13 COLUM.-VLA J. L. & ARTS 1, 1 (1988).

countries, it applies only to certain types of copyrighted works and includes few enforcement mechanisms.[172] Recognizing the limits of the Berne Convention, as well as the increased need for the globalization of copyright protections with the advent of the internet, international agreements in the domain of intellectual property have expanded in recent years. The 1996 World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) remedied some of the problems of the Berne Convention by expanding its applicability to different types of works and, more importantly, by providing enforcement mechanisms through the WTO.[173] More broadly, the TRIPS agreement shows the recognition of the inextricable connection between international trade and copyright.[174] The same year, the World Intellectual Property Organization Copyright Treaty sought to further harmonization in copyright treatment of information technology, including by treating computer programs as literary works.[175]

These international agreements, though they are by no means the equivalent of U.S. courts enforcing foreign copyright judgments, demonstrate a recognition that international cooperation is beneficial, perhaps even necessary, in the domain of copyright law.[176] Indeed, in the age of the internet, where tracing the origins and targets of speech becomes increasingly difficult, the promotion of universal principles of intellectual property rights may serve to simplify the international legal regime in which we operate. Although the copyright agreements aim primarily to promote international reciprocity in the enforcement of domestic copyrights, rather than to create uniform international copyright laws, they nonetheless represent recent efforts to globalize intellectual property protection through cooperation. A presumption in favor of the enforcement of foreign copyright judgment thus serves the broader interest in an increasingly global copyright regime, exemplified in international copyright agreements signed by the United States.

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[172] Berne Convention, *supra* note 126.
[173] TRIPS Agreement, *supra* note 126; *see also* David Nimmer, *The End of Copyright*, 48 VAND. L. REV 1385, 1392 (1995) ("[i]ndeed, it embodies 'trade with teeth'").
[174] Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491, 492 (2006) "[n]ow, more than ever before, copyright serves the purpose of trade"); Nimmer, *supra* note 173, at 1386 ("[c]opyright has now entered the world of international trade").
[175] WIPO Treaty, *supra* note 126, at art. 4.
[176] *See* Foster, *supra* note 9, at 392 ("The refusal to recognize and enforce a foreign copyright judgment or arbitration award would undermine the purpose behind most international agreements in this field of law and may have significant political repercussions").

VI. CONCLUSION

Given the speech implications of intellectual property rights, it is natural that copyright decisions—foreign or domestic—should implicate the First Amendment. Yet, the presence of the First Amendment in the background of copyright decisions should not bar the enforcement of any decision from a country with different intellectual property laws. Foreign copyright judgments, like the one at issue in *Viewfinder*, do not implicate the same First Amendment concerns as prior cases where courts have found a constitutionally required public policy exception, including *Bachchan*, *Telnikoff*, and *Yahoo!*. In each of these earlier cases, the Supreme Court had spoken more clearly on the constitutional requirements of the First Amendment—specifically with regard to libel law and hate speech law—than it has in the context of copyright law. This lack of explicit standards gives courts more flexibility in evaluating foreign copyright judgments and they should use this flexibility to read the public policy exception narrowly and to enforce foreign copyright judgments.

Furthermore, the enforcement of foreign copyright decisions not only fits with the narrow view of the public policy exception, which courts and scholars have embraced, but it also serves to promote a broader interest in increasing international cooperation on copyright laws. The recent emphasis on the globalization of copyright laws, visible in the growing number of international copyright agreements, thus further militates in favor of the enforcement of foreign copyright judgments.