LIBEL TOURISM'S FINAL BOARDING CALL

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INTRODUCTION

Imagine that you are a popular, United States-based entertainer who enjoys an international reputation. Imagine further that, on a trip to the grocery store, you discover that you and your spouse – also a well-known entertainer– are on the cover of a tabloid newspaper that links you to a drug scandal.[1] You decide to sue the tabloid for damages, a retraction, and a public apology.[2] You are aware, however, that American law places a heavy burden on celebrity plaintiffs in libel actions.[3] Luckily for you, the story also appeared in the publication's international editions.[4] With the assistance of an attorney based in Northern Ireland, you sue

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1. *See Jennifer Lopez, Marc Anthony Suing National Enquirer*, FOXNEWS.COM, Apr. 16, 2007, http://www.foxnews.com/story/0,2933,266408,00.html [hereinafter *Jennifer Lopez*].

2. *Id.*

3. *See* ROBERT D. SACK, SACK ON DEFAMATION § 2.1.1 (3d ed. 2007); Michael M. Rosen, *Ah, the Adventures of Libel Tourism*, POLITICO.COM, Aug. 5, 2008, http://www.politico.com/news/stories/0808/12286.html.

4. *See Jennifer Lopez, supra* note 1.

the American tabloid in a Belfast court.[5]

The scenario described above occurred in 2007 and is currently playing out in a Northern Ireland courtroom involving Jennifer Lopez and Marc Anthony. With the assistance of their Belfast-based attorney, the pair is suing the *National Enquirer* for an article published in the tabloid's U.S. and international editions linking them to a heroin scandal.[6] The practice of litigants suing in foreign jurisdictions with libel laws more favorable to plaintiffs is known as "libel tourism." [7] It is a phenomenon with which the rich and famous, both American and international, are well acquainted. Libel tourism allows those who believe they were defamed in magazines, newspapers, books, and the like, written and published in the United States by American authors and publishers, to circumvent United States law and sue in jurisdictions that do not have the freedom of speech or the press guarantees of the First Amendment to the Constitution.[8] Countries from Australia to Indonesia have played host to libel actions for allegedly defamatory material that entered their borders, usually via the Internet.[9]

The most popular host courts by far, and those on which this Comment will focus, are those of Great Britain and Ireland.[10] For Hollywood bigwigs and other A-listers with deep pockets, London, especially, has become "a good place for shopping and suing."[11] Those seeking a true libel safari have

5. *See* Martin Soames, *The Threat of Libel Tourism*, GUARDIAN (London), Mar. 29, 2004, at 10, *available at* http://www.guardian.co.uk/media/2004/mar/29/mondaymediasection8.

6. *Jennifer Lopez*, *supra* note 1; Suzanne Breen, *She's Just Jenny From the H-Blocks to Lawyer Tweed; Hollywood's Elite Vote Irishman Best Libel Expert in the Business*, SUNDAY TRIBUNE (Dublin), Aug. 31, 2008, at N10, *available at* http://www.tribune.ie/news/international/article/2008/aug/31/shes-just-jenny-from-the-h-blocks-to-lawyer-tweed/.

7. Peter King, *'Libel Tourism': The Fix We Need*, N.Y. POST, Oct. 6, 2008, at 29, *available at* http://www.nypost.com/seven/10062008/postopinion/opedcolumnists/libel_tourism__the_fix_we_need_132279.htm.

8. *Id.*; *see generally* U.S. CONST. amend. I ("Congress shall make no law…abridging the freedom of speech, or of the press;...").

9. *See generally Hacks v beaks; Media freedom*, THE ECONOMIST (U.S. Edition), May 10, 2008, *available at* http://www.economist.com/displayStory.cfm?Story_ID=E1_TTPPPDDG [hereinafter *Media freedom*]; Soames, *supra* note 5.

10. Soames, *supra* note 5; Breen, *supra* note 6.

11. Soames, *supra* note 5.

the option of instituting proceedings simultaneously in Dublin, Belfast, and London.[12] Britain's popularity with libel tourists, especially when it comes to American celebrities, is the result of libel laws that are quite favorable to plaintiffs. Once a plaintiff has shown that he or she has been identified in print and that a defamatory allegation has been published, the burden of proof falls to the defendant publisher or author to prove that the allegation is true.[13] Analysts estimate that one-third of the libel suits brought in England and Wales during the period of October 2007 to October 2008 were filed by celebrities, many of whom were Americans on libel holiday.[14]

Because it is easier to prevail in a libel suit in Britain than in the United States,[15] celebrities, American and otherwise, with international fame and deep pockets have been flocking to foreign courts seeking damages for allegedly defamatory articles published in the U.S. media.[16] In recent years, libel tourists Cameron Diaz, Kate Hudson, Britney Spears, and Harrison Ford, among others, have sued U.S. publications for libel in Britain.[17]

Vindication for celebrities comes at a price to a truly free press. Libel tourism exposes the dark side of forum shopping. The practice demonstrates that plaintiffs can skirt American speech and press protections by suing the publisher and/or author of an allegedly defamatory statement in a jurisdiction

12. Breen, *supra* note 6.

13. Soames, *supra* note 5; Raymond W. Beauchamp, Note, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3078 (2006).

14. Robert Verkaik, *London Becomes Defamation Capital for World's Celebrities,* INDEPENDENT (London), Oct. 13, 2008, at 4, *available at* http://www.independent.co.uk/news/uk/home-news/london-becomes-defamation-capital-for-worlds-celebrities-959288.html.

15. *See Media Freedom*, *supra* note 9 (quoting Chris Walker of Freedom House).

16. *See* Adam Cohen, *"Libel Tourism" – When Freedom of Speech Takes a Holiday*, N.Y. TIMES, Sept. 15, 2008, at A24, *available at* http://www.nytimes.com/2008/09/15/opinion/15mon4.html?scp=1&sq=libel%20tourism&st=cse.

17. Ian Herbert, *Celebrities flock to "more favourable" British courts to sue for libel*, INDEPENDENT (London), Aug. 2, 2007, *available at* http://www.independent.co.uk/news/uk/crime/celebrities-flock-to-more-favourable-british-courts-to-sue-for-libel-459934.html; Robert Verkaik, *Invasion of the Libel Tourists*, INDEPENDENT (London), Aug. 21, 2008, at 8, *available at* http://www.independent.co.uk/news/uk/home-news/invasion-of-the-libel-tourists-904111.html.

where the defendant must prove the truth of the statement, and all the plaintiff must show is that the writing is somehow defamatory. The celebrity plaintiff suing abroad need not prove malice, a burden required by U.S. law.[18] Such a disparity in the manner in which libel verdicts are handed down, and a fear of being sued for libel in other countries – particularly Britain – where the law makes it significantly easier for a well-known plaintiff to prevail, leads to a chilling effect on free speech and publishing in the United States.[19]

Libel tourism has led to greatly increased traffic in British courtrooms, and judgments against American media defendants – ordinarily enforceable in the United States – have been entered as a result. Legislation has been passed at the state level, and has been introduced at the federal level, in direct response to the threat posed by libel tourism. The legislation would render unenforceable in the United States judgments against American authors and publishers entered in countries that do not have free speech and press protections similar to those guaranteed by the U.S. Constitution and the state Constitutions.[20]

If permitted to continue as it has, libel tourism will have a devastating chilling effect on freedom of speech in the United States.[21] Authors – whose "livelihood depends on [their] reputation" – will cease to write on controversial subjects, or celebrities with deep pockets, for fear of exposing themselves to lawsuits and being hauled into faraway courtrooms.[22] Publishers will shy away from printing newsworthy, pertinent pieces for much the same reason. Moreover, publishers will

18. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

19. Verkaik, *supra* note 17.

20. *See* Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. § 2 (2008); H.R. 6146, 110th Cong. § 2 (2008); Free Speech Protection Act of 2008, S. 2977, 110th Cong. § 2 (2008); Libel Terrorism Protection Act, S.B. 6687/A.B. 9652 (2008); Libel Terrorism Protection Act, S.B. 2722, Public Act 095-0865 (2008); S.B. 1066/H.B 949 (2009).

21. *See* Cohen, *supra* note 16.

22. Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J.L. & LIBERTY 252, 269 (2009). *See generally Publishers Cheer House Passage of Libel Tourism Legislation*, ASS'N OF AMERICAN PUBLISHERS, Sept. 29, 2008, http://www.publishers.org/main/PressCenter/Archives/PublishersCheerLibelTourismbillpassage.htm (commenting that libel tourism "seeks to intimidate and silence American authors and deprive [the public] of vital information on issues of public concern.") [hereinafter *Publishers Cheer House Passage*].

"steer clear of authors who have been sued for libel, because they represent a risk of future litigation."[23] Ultimately, the entertainment industry – the revenues of which depend in large part on stories that feature celebrities, printed in publications both tabloid and legitimate – will see a decline in profits.

Following the lead of New York State and its groundbreaking Libel Terrorism Protection Act, as well as Illinois and Florida and their respective anti-libel tourism laws, the United States Congress should pass similar, pending legislation that would render libel judgments entered in foreign countries with less free speech protection unenforceable in the United States.[24] Congress should also pass pending legislation that would go further than the mere non-recognition of foreign judgments, by giving U.S. authors and publishers the ability to sue in the United States if the writing is not defamatory under U.S. law, and penalizing those who filed the foreign libel suits with the intent to suppress free speech rights.[25]

Part I of this Comment sets out a brief history of libel tourism and discusses the wake-up call for state and federal lawmakers to step in and enact legislation to stop libel tourism. Part II analyzes American and British defamation law, and identifies legislative solutions to libel tourism. The Comment concludes that a robust free press in the United States depends upon the passage of federal legislation that deters libel tourism, first, by declaring foreign judgments unenforceable if they were issued by countries with fewer free speech and free press protections than those guaranteed by the First Amendment, and, secondly, by permitting defendants in the underlying foreign libel suits to sue those plaintiffs who use libel tourism as a way to suppress those First Amendment rights.

I. BACKGROUND

To bring a defamation lawsuit in a given country, a plaintiff must show that there was a publication in that

23. Staveley-O'Carroll, *supra* note 22.
24. *See* H.R. 6146.
25. *See* H.R. 5814; S. 2977.

country and that the plaintiff enjoys a reputation there.[26] Though the practice has not always had such a catchy name, libel tourism has existed for decades.[27] As long ago as 1959, American entertainer Liberace sued the *Daily Mail* newspaper in Britain for alleging that he was gay.[28] The singer was awarded substantial damages.[29] In 1990, Los Angeles-based Arnold Schwarzenegger traveled to London to sue Vivian Leigh, the Florida-based author of his unauthorized biography which was published in the United States, for alleging in her book that he held pro-Nazi views.[30] The parties settled out of court in 1993.[31]

Not only is it possible for a plaintiff to sue American publications in foreign courts, but the plaintiff need not even be present in the foreign court to present his or her case.[32] For example, film director Roman Polanski sued publishing giant Condé Nast, owner of the American magazine *Vanity Fair*, in England.[33] A July 2002 article on Polanski claimed that in 1969, the director had tried to seduce a Swedish model in New York while en route to his wife Sharon Tate's funeral.[34] *Vanity Fair*'s circulation is primarily United States-based: in 2002, 1.13 million copies were sold or otherwise distributed in the U.S.[35] However, the magazine has a small circulation in Europe: in 2002, 53,000 copies were sold or distributed in England and Wales, as well as 2,500 copies in France.[36] This relatively minor circulation was enough for Polanski, a French citizen living in France, to be able to lay

26. Soames, *supra* note 5.
27. *Id.*
28. *Id.*
29. *Id.*
30. Mark Stephens, *Consign Libel Tourism to the Dustbin of History*, TIMES (London), May 13, 2008, *available at* http://business.timesonline.co.uk/tol/business/law/article3904787.ece; LAURENCE LEAMER, FANTASTIC: THE LIFE OF ARNOLD SCHWARZENEGGER 194-96 (St. Martin's Press 2005).
31. LEAMER, *supra* note 29, at 196.
32. *See* Robert Verkaik, *Polanski Wins Libel Payout of £50,000 From 'Vanity Fair'*, INDEPENDENT (UK), July 23, 2005, *available at* http://www.independent.co.uk/news/uk/crime/polanski-wins-libel-payout-of-16350000-from-vanity-fair-499893.html.
33. *Id.*
34. *Id.*; Polanski v. Condé Nast Publications Ltd., [2005] UKHL 10, (2005) 1 All E.R. 945.
35. *Polanski*, [2005] UKHL at [12].
36. *Id.*

venue in London court.[37] What is most notable – and troubling – about the Polanski case is that the director did not appear personally in the London courtroom.[38] Because Polanski fled the United States in the late 1970s and is considered a fugitive subject to extradition, Polanski testified during trial via video-link from Paris.[39] By way of libel tourism, non-Brits can sue other non-Brits in British courtrooms without ever setting foot in British court.

The international editions of United States-based tabloids can expose U.S. publishers to liability abroad for stories written in the United States about United States-based celebrities.[40] The Jennifer Lopez and Marc Anthony suit against the *National Enquirer*, based on a story that appeared in the tabloid's British, Irish, and American editions, is just one example of the libel tourism trend.[41]

The widespread popularity of American tabloids' Internet sites has also made it uncomplicated for plaintiffs to bring suit against American authors in the United Kingdom for material written in the United States.[42] British law has long recognized that "publication is regarded as taking place where the defamatory words are published in the sense of being heard or read."[43] Further, British common law maintains that publication of an Internet posting occurs when it is downloaded.[44] In other words, after allegedly libelous material

37. *Id.*

38. *See* Verkaik, *supra* note 32.

39. *Id.* Polanski pled guilty in 1977 to having sex with a thirteen-year-old girl, and then fled the United States prior to his sentencing. Luchina Fisher, *Roman Polanski: What Did He Do?,* ABC NEWS, Sept. 30, 2009, http://abcnews.go.com/Entertainment/roman-polanski/story?id=8705958&page=1. On September 26, 2009, Swiss authorities arrested Polanski at the Zurich airport in connection with the decades-old conviction. Michael Cieply & Brooks Barnes, *Polanski's Arrest Could Lead to Extradition*, N.Y. TIMES, Sept. 27, 2009, *available at* http://www.nytimes.com/2009/09/28/movies/28polanski.html?_r=1. As of November 18, 2009, the director was being held in Zurich, "pending possible extradition to the United States." Michael Cieply, *Request Is Made to Bring TV Cameras Into Polanski Hearing*, N.Y. TIMES, Nov. 18, 2009, *available at* http://artsbeat.blogs.nytimes.com/2009/11/18/request-is-made-to-bring-tv-cameras-into-polanski-hearing/?scp=3&sq=roman%20polanski&st=cse.

40. Verkaik, s*upra* note 17.

41. *Jennifer Lopez*, *supra* note 1.

42. *See* Verkaik, *supra* note 17.

43. King v Lewis, [2004] EWHC 168 (citing Bata v Bata, [1948] W.N. 366).

44. *Id.* (citing Godfrey v Demon Internet [2001] Q.B. 201, (1999) 4 All E.R. 342; Loutchansky v Times Newspapers Ltd [2001] EWCA Civ 1805, [2002] Q.B. 783 at [58];

is published in the United States, it is "republished" in the United Kingdom each time it is read or downloaded. In 2004, American boxing promoter Don King sued Lennox Lewis in London for allegedly defamatory speech on the U.S.-based website *boxingtalk.com*.[45] The court found that King's "substantial reputation" in the United Kingdom, as well as the website's ability to be downloaded in Britain, made London an appropriate venue for his lawsuit.[46] Another successful American plaintiff whose cause of action arose out of Internet speech is Cameron Diaz, whose lawsuit against the *National Enquirer* settled in March 2007.[47] Diaz sued the tabloid after an article published in its United States edition, with limited Internet distribution in the United Kingdom (the site received 279 hits from British readers), alleged that the actress was having an affair with the married producer of her MTV show, *Trippin'*.[48] Diaz's reputation in the United Kingdom, and the 279 "publications" of the story in the region, gave her standing to sue the paper in London.[49] In addition to an undisclosed settlement amount, the tabloid apologized to Diaz.[50]

The most fervent libel tourists, however, are not American celebrities. Rather, libel tourism has been described as "manna from heaven for deeply illiberal and fantastically wealthy ex-Soviet oligarchs and Middle-Eastern oil tycoons." Indeed, the term "libel terrorism" has been coined for suits by such plaintiffs.[51] Newfound Russian wealth has made it possible for Russian nationals and expatriates living in Britain to sue United States-based publications for allegedly libelous articles. Russian media tycoon Boris Berezovsky sued *Forbes* magazine, which is based in New York City, for publishing an article maligning his business background (the article suggests that Berezovsky is a mobster).[52]

Dow Jones & Co. Inc. v Gutnick, [2002] HCA 56 at [44]).

45. Soames, *supra* note 5; *King* at [6], *supra* note 41, at [6].

46. *King*, *supra* note 41 at [23]; Soames, *supra* note 5.

47. Lauren Melcher, *Celebrity Settles U.K. Libel Suit With National Enquirer*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Mar. 5, 2007, http://www.rcfp.org/news/2007/0305-lib-celebr.html.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See Media freedom*, *supra* note 9.

52. Soames, *supra* note 5; Berezovsky v Forbes, [1999] EMLR 278.

The "most feared overseas claimants," however, are Saudi Arabian nationals, who "place a high value on the defence of their reputations."[53] In 2004, Khalid bin Mahfouz, a Saudi businessman, sued Rachel Ehrenfeld, a New York-based author, in Britain for libel.[54] Ehrenfeld had accused Mahfouz and members of his family of funding and providing other support for Al Qaeda in her book *Funding Evil: How Terrorism is Financed and How to Stop It*.[55] Although Ehrenfeld's book was never published in Britain, twenty-three copies of the book were sold online to buyers in England and Wales, and the book's first chapter was available on a news website.[56] Ehrenfeld did not travel to London to defend herself, and a default judgment was entered against her.[57] In December 2004, Ehrenfeld sued in the United States District Court for the Southern District of New York for a declaratory judgment seeking a declaration that the British judgment was not enforceable in New York because of Britain's weaker free speech protections, and that such a judgment would contravene the First Amendment.[58] Ehrenfeld appealed the court's decision that there was insufficient jurisdiction over Mahfouz to sue him in the United States, and the Court of Appeals for the Second Circuit certified the jurisdictional question to the New York Court of Appeals.[59] The New York high court decided that there was no personal jurisdiction over Mahfouz for such an action.[60] Outcry spread throughout the publishing world as calls came for legislative action at both the federal and state levels.[61]

As a result of the unfavorable foreign verdict in *Ehrenfeld v. Mahfouz* and the chilling effect it could have on a free American press, the New York State Legislature passed a bill

53. Soames, *supra* note 5.

54. *See Rep. Cohen Introduces Legislation to End "Libel Tourism,"* US FED. NEWS, May 23, 2008.

55. *See id.*

56. Verkaik, *supra* note 17; Mahfouz v Ehrenfeld, [2005] EWHC 1156 (QB), [2005] All E.R. (D) 361 (Jul).

57. New York City Bar Committee on Communications and Media Law, *The Libel Terrorism Prevention Act*, NYC BAR, http://www.nycbar.org/pdf/report/LTPA.pdf (last visited Oct. 16, 2009) [hereinafter NYC BAR].

58. *Id.*; Ehrenfeld v. Mahfouz, 518 F.3d 102, 105 (2d Cir. 2008) (citing Ehrenfeld v. Mahfouz, No. 04 civ. 9641, 2006 U.S. Dist. LEXIS 23423 (S.D.N.Y. Apr. 26, 2006)).

59. *Ehrenfeld*, 518 F.3d at 104-05.

60. Ehrenfeld v. Bin Mahfouz, 851 N.Y.S.2d 381 (2007); NYC BAR, *supra* note 56.

61. *See* NYC BAR, *supra* note 56.

which was signed into law on May 1, 2008 by Governor David Paterson, known as the Libel Terrorism Protection Act.[62] The Act, also known as "Rachel's Law," protects New Yorkers by prohibiting the enforcement of libel judgments from countries that do not protect freedom of speech to the extent it is protected in New York and the United States.[63] Other states have followed suit. In August 2008, then Illinois Governor Rod Blagojevich signed the Libel Terrorism Protection Act, which declares that the state will not recognize foreign judgments obtained in countries that do not provide protection for free speech and free press equal to the protection provided by the United States and Illinois Constitutions.[64] In June 2009, Florida Governor Charlie Crist signed a bill similar to those passed in New York and Illinois, designed to protect Floridians from abusive foreign libel judgments.[65] The legislatures of California, New Jersey, and Hawaii have also introduced legislation designed to combat libel tourism.[66]

The United States Congress has followed the lead of these states and has proposed and considered similar legislation that would have nationwide effect. H.R. 6146, sponsored by Representative Steve Cohen, passed in the House of Representatives on September 27, 2008.[67] The bill would

62. Libel Terrorism Protection Act, S. 6687/A. 9652 (2008); NYC BAR, *supra* note 56.

63. *Id.*

64. Libel Terrorism Protection Act, S.B. 2722, Public Act 095-0865 (2008); Jacob Parsley, *House Passes Libel Tourism Bill; Illinois Enacts Its Own Law*, SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW, Fall 2008, *available at* http://silha.cla.umn.edu/Bulletin/Fall%202008%20Bulletin/House%20Passes%20Libel%20Tourism%20Bill;%20Illinois%20Enacts%20Its%20Own%20Law.html.

65. S.B. 1066/H.B 949 (2009); *Crist Rejects a Pair of Public Records Exemptions*, JACKSONVILLE OBSERVER, June 25, 2009, *available at* http://www.jaxobserver.com/2009/06/25/crist-rejects-a-pair-of-public-records-exemptions/; *See* Rachel Ehrenfeld, *California Acts to Stop Libel Tourism*, HUFFINGTON POST, May 5, 2009, http://www.huffingtonpost.com/dr-rachel-ehrenfeld/california-acts-to-stop-l_b_196666.html.

66. Ehrenfeld, *supra* note 64 (California's Anti-Libel Tourism Act, S.B. 320, passed unanimously in the State Senate in late April 2009); Michael Booth, *Libel Tourism Bill Passed by Senate Committee*, N.J. L.J., May 18, 2009, *available at* http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202430803259&slreturn=1 (New Jersey's Senate Judiciary Committee recommended the passage of S-1643 in mid-May 2009); Rachel Ehrenfeld, *U.K. Libel Laws Chill Another American Book*, FORBES, June 8, 2009, *available at* http://www.forbes.com/2009/06/08/libel-tourism-protection-act-opinions-contributors-free-speech.html.

67. *See Publishers Cheer House Passage*, *supra* note 22.

"prohibit recognition and enforcement of foreign defamation judgments" issuing from countries that "provide less protection to defamation defendants" than is required by the United States Constitution.[68] The Free Speech Protection Act of 2008, H.R. 5814, sponsored by Representative Peter T. King, would go further than Cohen's bill, and would "create a federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States."[69] The Act would render a foreign defamation judgment unenforceable in the United States if the court determines that the writing at issue in the underlying foreign lawsuit does not constitute defamation under U.S. law.[70] The Senate companion to King's bill, sponsored by Senators Arlen Specter and Joseph Lieberman, would have the same effect as the House bill.[71] It would also allow American writers "to recover defense costs and additional damages if there is proof that the foreign plaintiff is engaged in a scheme to suppress First Amendment rights."[72]

II. ANALYSIS

A comparison of American libel law and British libel law reveals why so many plaintiffs – both American and foreign nationals – file suit against American authors and publishers in the United Kingdom: American libel law places a heavy burden on well-known plaintiffs in libel actions to prove that the statement in question was both false and made maliciously, while British libel law presumes that the statement in question is false and places the burden of proving the truth of the statement on the defendant.[73]

68. H.R. 6146.
69. H.R. 5814.
70. *Id.*
71. *See* S. 2977.
72. Stephanie A. Middleton, Letter to the Editor, *Protecting Free Speech*, N.Y. TIMES, Oct. 4, 2008, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C03E3D61331F937A35753C1A96E9C8B63&scp=2&sq=libel%20tourism%20specter&st=cse; *accord* Free Speech Protection Act of 2008, S. 2977.
73. *See* Verkaik, *supra* note 17.

A. American Libel Law

The tort of defamation protects a plaintiff's interest in maintaining a good reputation,[74] and it can at times be difficult to reconcile that protection with the freedom to publish.[75] A communication is considered defamatory if it has the ability to harm one's reputation "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[76] To impose liability for defamation on an author or publisher, there must be: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[77] A statement that is unflattering or annoys, embarrasses, or hurts the plaintiff's feelings is not actionable.[78] Rather, the statement made must actually injure the plaintiff's reputation.[79]

Libel is the publication of defamatory statements by written or printed words, "by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words."[80] Whereas the spoken word is fleeting, libel can be especially injurious to one's reputation because of the permanent or long-lasting nature of printed words.[81]

A "public" plaintiff's difficulty in prevailing in a defamation suit in the United States can be traced to the landmark Supreme Court case *New York Times Co. v. Sullivan*,[82] in which the majority held that public officials seeking to recover for a defamatory falsehood made concerning their official conduct must prove "that the statement was made with actual malice."[83] The Court defined

74. SACK, *supra* note 3, at § 2 (citing West v. Thompson Newspapers, 872 P.2d 999 (Utah 1994)).
75. Celle v. Filipino Reporter Enters., 209 F.3d 163, 171 (2d Cir. 2000).
76. RESTATEMENT (SECOND) OF TORTS § 559 (1977).
77. *Id.* at § 558.
78. SACK, *supra* note 3, at § 2.4.
79. *Id.*
80. RESTATEMENT (SECOND) OF TORTS § 568(1) (1977).
81. *See* SACK, *supra* note 3, at § 2.3.
82. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
83. *Id.* at 279-80.

actual malice as "knowledge that [the statement] was false or [was made with] with reckless disregard of whether it was false or not."[84] The Court reasoned that the public official plaintiff's proving actual malice protected the Constitutional commitment to "uninhibited, robust, and wide-open" debate on public issues.[85] The Court determined that requiring the defendant in a defamation action to prove truth as a defense would deter not only false speech, but speech in general.[86]

The Supreme Court extended the *New York Times* proof-of-actual-malice requirement from "public officials" to "public figures" in *Curtis Publishing Co. v. Butts*.[87] In *Curtis Publishing*, the Court found that Wallace Butts, the former athletic director and football coach of the University of Georgia, who was alleged to have fixed a football game against the University of Alabama and who was a well-known and respected figure in athletics,[88] was a public figure.[89] In his concurrence, Chief Justice Warren concluded that the *New York Times* test should extend to public figures as well as public officials because the views and actions of public figures with respect to public issues are of great concern to citizens, much like those of public officials.[90] The Chief Justice reasoned that public figures play an important and influential role in society and that society has a legitimate and substantial interest in public figures' conduct, as well as an interest in the maintenance of a free press that may report on public figures' conduct and criticize such conduct as it sees fit.[91] Notably, the Chief Justice mentioned that public figures, whose fame allows them to "shape events in areas of concern to society," have access to the media, and that such access to media sources allows them the opportunity to influence society as well as to counter any criticism the media may have heaped on them.[92]

In the 1974 decision *Gertz v. Robert Welch, Inc.*, the Supreme Court clarified its definition of public figure

84. *Id.*
85. *Id.* at 270-71.
86. *Id.* at 279.
87. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).
88. *Id.* at 135-36.
89. *Id.* at 154.
90. *Id.* at 162 (Warren, C.J., concurring).
91. *Id.* at 164 (Warren, C.J., concurring).
92. *Id.* (Warren, C.J., concurring).

plaintiffs in defamation cases, as well as the actual malice test, drawing on its decision in *New York Times*.[93] The Court posited that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures and. . .may recover for injury to reputation *only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth*."[94] The Court went on to note that public figures occupy a special, prominent place in society, and that most public figures have "thrust themselves to the forefront" of controversy, thus voluntarily exposing themselves to media attention and any increased risk of injury to reputation.[95] The majority held that factors pointing to one's public figure status include general fame or notoriety and name recognition arising from involvement in societal affairs.[96] The Court posited that public figures are both less vulnerable to injury and less deserving of recovery because they have the ability to use their access to media channels to contradict any falsehoods published about them.[97]

The fact that public figures, a class which includes celebrities and other individuals with international reputations, have the opportunity to access the media in an effort to rebut falsehoods published about them is significant.[98] Whereas the burden for private individuals to rebut false statements concerning them would be onerous, public figures often place themselves voluntarily in the spotlight, and any criticism of them may be seen as coming with the territory.[99] Thus, public figures must use the media not only as a channel to enhance their careers but also as a self-help tool to remedy any negative, potentially defamatory press.

The requirement of proving actual malice presents celebrities who bring libel suits in United States courts with a heavy burden. Whereas private plaintiffs are viewed as more

93. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
94. *Id.* at 342 (emphasis added).
95. *Id.* at 345.
96. *Id.* at 352.
97. *Id.* at 345.
98. *Id.* at 338 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 70 (1971)).
99. *Id.*

deserving of actionable libel claims, American courts view celebrities as a group who have gotten what they have bargained for: publicity, be it positive or negative. Furthermore, because the truth of published statements is presumed, celebrity plaintiffs have to not only prove the falsity of the statement, which is often easier, but that it was made with actual malice, which is often impossible. One can see why public figures who believe they have been defamed in American print seek out other, kinder arenas in which to sue U.S.-based authors and publishers.

B. British Libel Law

British law defines defamation much the same as American law. Defamatory statements, under British law, "expose someone to hatred, ridicule, or contempt; cause someone to be shunned or avoided; lower that person in the estimation of other right-thinking people; cause a loss of business, trade, rank or professional standing."[100] Much like in the United States, libel in the United Kingdom consists of a defamatory statement in a permanent form.[101] A defamatory written statement, therefore, might be found libelous in Britain. Libel in the United Kingdom is actionable *per se*, that is, a plaintiff need not prove special damage as a specific sum of money.[102]

British libel law parts ways with its American counterpart in that, once a libel plaintiff proves that he or she has been identified in the writing at issue and that a defamatory allegation was made, British courts presume that the allegation is false.[103] A libel plaintiff in Britain need prove only that the statement was defamatory.[104] Unlike American law, which requires celebrities and other public figures to prove that the statement in question was both false and made with actual malice, British law essentially allows such plaintiffs to shift to the author or publisher of the statement the often impossible task of proving the statement's truth.

100. *Defamation*, MEDIA LAW UK, http://www.media-solicitors.co.uk/defamation3.htm (last visited Oct. 16, 2009).

101. VIVIENNE HARPWOOD, MODERN TORT LAW § 18.2.1 (6th ed. 2005).

102. *Id.*

103. Soames, *supra* note 5.

104. *Media freedom*, *supra* note 9.

The burden of proof in British libel cases falls to the publisher or author-defendant, who must prove that the allegedly defamatory statement is true.[105] Proving the truth of a statement can be vexing, and the requirements make it quite difficult for a defendant to win a libel suit in the United Kingdom. Defendants may avail themselves of affidavits from witnesses, but it is rarely the case that witnesses to the content of the story can be found.[106] If witnesses are found, their testimony is not often seen as reliable.[107]

Because British libel law favors plaintiffs in libel actions, one can understand why celebrities and other well-known individuals would choose to sue American authors and publishers in British, as opposed to American, courts. American courts show little sympathy toward celebrity plaintiffs, infrequently finding that publishers or authors committed libel, but often finding that celebrities who thrust themselves voluntarily in front of a harsh and unforgiving media are public figures who cannot satisfy the actual malice burden. Without having to prove the falsity of the published statements or the actual malice with which they were made, and without having to engage in self-help through the media, a libel suit in Britain against an American media defendant is a walk in Hyde Park for celebrity plaintiffs.

International plaintiffs and their attorneys have become more aware of the possibility of bringing their libel suits in courtrooms throughout the United Kingdom, thanks in part to British media lawyers who have been making the rounds in Hollywood and speaking about the benefits of British libel law.[108] One such lawyer is Belfast-based Paul Tweed.[109] Tweed has been described in the press as a force to be reckoned with: he has never lost a case, and is "probably the best libel lawyer in the world. . . .Anybody who is anybody in the movie or music industries hires him if they reckon they've been wronged by the media."[110] Indeed, his reputation has garnered Tweed several big-name clients. In recent years,

105. Soames, *supra* note 5; HARPWOOD, *supra* note 100, § 18.5.8.

106. HARPWOOD, *supra* note 100, § 18.5.8.

107. *Id.*

108. Verkaik, *supra* note 17.

109. *Profile of Paul Tweed*, JOHNSONS SOLICITORS, http://www.johnsonssolicitors.com/default.aspx?CATID=6577 (last visited Oct. 28, 2008).

110. Breen, *supra* note 6.

Tweed has represented, among others, Jennifer Lopez, Harrison Ford, and Britney Spears in cases brought in the United Kingdom against American media defendants.[111] In August 2008, Tweed was invited to speak at a meeting of the Beverly Hills Bar Association.[112] At the meeting, he "told lawyers that the best way to silence the American tabloids" is to skirt U.S. laws and file suit in British courts instead.[113] Tweed also argued for the rights of American celebrities to their reputations; he maintained that "a U.S. national should have the same right to sue for damage to his reputation in the same way that if he were physically injured in an accident in Belfast or London."[114] The right to sue for damage to one's reputation aside, assertions that a free and robust American press should be silenced, and U.S. laws sidestepped in favor of an easy verdict, are downright chilling.

For a variety of reasons, many American defendants, publishers and authors alike (but more often authors), choose not to defend libel suits brought against them in foreign jurisdictions.[115] For one, it is expensive to travel to and stay in England during the course of proceedings. Further, it is expensive to hire a British lawyer: to defend a libel action in the United Kingdom costs roughly the equivalent of $200,000 up front.[116] American defendants who do not defend themselves in British courts, however, will have a default judgment entered against them if they are found guilty of libel.[117] Rachel Ehrenfeld's case is a notable example of one such default judgment.[118] Default judgments may be staggering in amount, and *not* paying the judgment may lead to problems for defendants who later enter the United Kingdom or other countries that enforce British judgments.[119]

111. Roy Greenslade, *An End to the Libel Tourist Trap*, GUARDIAN (London), Oct. 20, 2008, at 6, *available at* http://www.guardian.co.uk/media/2008/oct/20/pressandpublishing1.

112. Liz Trainor, *Libel Lawyer Shares Press Advice in LA*, IRISH NEWS (Ir.), Aug. 22, 2008, *available at* http://www.johnsonssolicitors.com/Site/53/Documents/IrishNews_220808.pdf.

113. *Id.*

114. *Id.*

115. *Media freedom*, *supra* note 9.

116. *Id.*

117. *Id.*

118. *Id.*

119. Clifford D. May, *The Big Chill*, NATIONAL REVIEW, Aug. 28, 2008, http://article.nationalreview.com/?q=Y2JiNTMxMzU4Njc5YmE5MDI1Zjk5NzA3NTMx

This poses a great problem for authors with strong ties to the United Kingdom, who may own property there or for whom Britain is a common topic or focus.

C. Dangers of Libel Tourism

Several threats are inherent in libel tourism. First and foremost is the chilling effect it has on a free and robust media. Authors will engage – and already have engaged – in self-censorship by avoiding coverage of certain topics and individuals for fear of being called into foreign courts to prove the absolute truth of their work. Publishers, fearing their own liability, will hesitate to contract for works written by authors who continue to cover such topics and individuals. The fact that in Britain an author or publisher-defendant may proffer the truth of the writing as a defense does nothing to curtail libel tourism's chilling effect. On the contrary, "would-be critics. . .may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[120] Such deterrence leads inevitably to self-censorship which is the antithesis of the robust free press prized in the United States and protected by the First Amendment.

A further threat to free speech is posed by British libel lawyers who actively recruit American celebrities as clients in their foreign libel suits against American media. In speaking to United States-based Bar associations, and in taking on numerous United States-based celebrities as clients, these attorneys suggest that the American justice system does not offer adequate protection for defamation victims. In a more disturbing alternative, this odd courtship suggests that American protections are fine but that justice is something that one can shop for, much like a tangible good – it suggests that there is always a better venue out there. Libel tourism and the attorneys who promote it essentially encourage plaintiffs to engage in a sort of self-help – albeit a different self-help from that propounded in Supreme Court defamation cases – to seek out and avail themselves of venues where they will be treated most favorably. Celebrities and other

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120. *N.Y. Times*, 376 U.S. at 279.

internationally-known individuals are thus encouraged to shop for a venue like they would for any other commodity.

D. Legislative Solutions, and Support and Opposition Thereto

If the United States is to continue to enjoy vigorous protection of free speech and the free press that comes along with it, protective legislation mirroring that of New York's Libel Terrorism Protection Act, Illinois' Libel Terrorism Protection Act, and Florida's Libel Protection Bill must be passed at the federal level. To allow foreign libel judgments to be enforced in United States courts will lead only to "a 'race to the bottom': writers will have only as much protection as the least pro-free-speech nations allow."[121]

The passage of H.R. 6146, which would prohibit United States courts from recognizing or enforcing a foreign defamation judgment unless a U.S. court finds that the foreign judgment is in line with First Amendment protections,[122] would be a step in the right direction in extinguishing the phenomenon of libel tourism. The law would strip celebrity plaintiffs of the advantage gained by suing American media defendants in foreign court if the foreign judgment could not be enforced in the United States. Arguably, however, H.R. 6146 does not go as far as it should. What would be a more effective deterrent against libel tourism is a law that would also penalize – and therefore deter – those plaintiffs who seek to undermine First Amendment rights by suing abroad.

To that effect, Congress should pass the Free Speech Protection Act of 2008 (the "Act"), which has been introduced in both the House of Representatives and the Senate.[123] In addition to refusing to recognize or enforce foreign judgments entered in countries with fewer free speech protections than the United States, the Act would "create a Federal cause of action to determine whether defamation exists under U.S. law in cases in which defamation actions have been brought in foreign courts against U.S. persons on the basis of

121. Cohen, *supra* note 16.
122. *See Rep. Cohen Introduces Legislation*, *supra* note 53.
123. H.R. 5814; S. 2977.

publications or speech in the United States."[124] In other words, the American defendant in the underlying foreign action could sue the plaintiff in the United States to determine whether the publication was, in fact, defamatory. The Act would also permit U.S. federal courts to award treble damages in cases where the court or jury determines that the plaintiff in the underlying foreign lawsuit "intentionally engaged in a scheme to suppress rights under the First Amendment to the Constitution of the United States by discouraging publishers or other media not to publish. . ."[125] The Free Speech Protection Act of 2008 would therefore penalize plaintiffs in the underlying foreign suits against American media defendants if the plaintiffs are found to have sued abroad in order to silence the American press by sidestepping American laws. The Act would be an effective deterrent against libel tourism and would force would-be celebrity plaintiffs to think twice before labeling a publication libelous and suing the U.S. media abroad.

While legislation that will put an end to libel tourism is generally favored in the United States and abroad, such legislative solutions are not without their detractors.[126] The passage of the legislation could cause British libel lawyers' practices to dwindle. Paul Tweed has called the federal bills "disgraceful"[127] and "an insult to the British legal system,"[128] and is concerned that the bills' passage would render helpless those who seek redress for damage to their reputations.[129] On this side of the Atlantic, attorney John Walsh, who has written about the "myth" of libel tourism,[130] has argued that the federal legislation pending in the United States Congress is an attempt to globalize American freedom of the press and to immunize American authors and publishers from foreign judgments.[131] Walsh also has said that if the federal bills

124. *Id.*
125. *Id.*
126. *See generally* Greenslade, *supra* note 111.
127. *Id.*
128. *Id.*
129. *Id.*
130. John J. Walsh, *The Myth of 'Libel Tourism'*, N.Y.L.J., Nov. 20, 2007, *available at* http://www.clm.com/publication.cfm/ID/177.
131. Greenslade, *supra* note 111. *See also* Todd W. Moore, Note, *Untying Our Hands: The Case For Uniform Personal Jurisdiction Over "Libel Tourists"*, 77 FORDHAM L. REV. 3207, 3236 (2009).

were to pass and foreign libel judgments were no longer enforced in the United States, it would be "less likely that people who suffer from irresponsible journalism in publications that appear in Britain will have the chance for redress."[132]

However strong the federal bills' detractors may be, support for the legislation is enthusiastic and outcry against libel tourism is vocal on both sides of the Atlantic. The Association of American Publishers, the United States' national trade association for publishers, applauded the passage of H.R. 6146.[133] The organization's President and CEO referred to the bill's passage as "a strong and encouraging step forward."[134] Another powerful proponent of the federal legislation, the New York *Times*, called the passage of H.R. 6146 "an important blow for free expression,"[135] and urged the passage of a companion bill by the Senate and the President.[136] Anti-libel tourism legislation has garnered support in Britain as well. Recently, a member of Parliament ("MP") referred to libel tourism as "an international scandal," and "a major assault on freedom of information."[137] That same MP also called for an investigation into British lawyers who actively court foreign clients to sue for libel in the United Kingdom.[138] Still other MPs, who applaud anti-libel tourism legislation in the United States, have referred to English libel laws as "Soviet-style"[139] and have accused the British legal system of censorship in the name of protecting the rich and powerful.[140] At present, a MP is drafting a bill that, if passed, should substantially curb the flow of libel tourists to the United Kingdom: the bill would

132. *Id.*

133. *Publishers Cheer House Passage*, *supra* note 22.

134. *Id.*

135. Editorial, *Bringing an End to 'Libel Tourism'*, N.Y. TIMES, Sept. 30, 2008, at A26, *available at* http://www.nytimes.com/2008/09/30/opinion/30tue3.html.

136. *Id.*

137. *Libel Tourism Writ Large*, THE ECONOMIST.COM, Jan. 8, 2009, http://www.economist.com/world/international/displayStory.cfm?story_id=12903058&source=hptextfeature.

138. *Id.*

139. Dominic Kennedy, *MPs Accuse Courts of Allowing Libel Tourism*, TIMES (London), Dec. 18, 2008, *available at* http://business.timesonline.co.uk/tol/business/law/article5362364.ece?&EMC-Bltn=JLU90A.

140. *Id.*

require that foreigners prove actual harm in Britain before they are permitted to sue in British courts.[141]

CONCLUSION

The United States has long enjoyed a free press, founded on its "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[142] while recognizing that such debate might include "vehement, caustic, and sometimes unpleasantly sharp attacks. . ."[143] Unless those attacks are false and made with actual malice, however, a celebrity plaintiff who feels he or she has been wronged has no cause of action in United States courts and is currently free to turn to libel tourism to seek justice in foreign courts. Libel tourism permits plaintiffs suing American media defendants to sidestep the free speech protections of the First Amendment and to sue abroad, bringing with it devastatingly chilling effects on American media and the U.S. entertainment industry, and erosion of First Amendment protections. If we are to continue to enjoy a robust free press, the Senate must pass H.R. 6146 and both houses of Congress should do the same with the Free Speech Protection Act of 2008.

141. Sarah Lyall, *Britain, Long a Libel Mecca, Reviews Laws*, N.Y. Times, Dec. 11, 2009, at A1, *available at* http://www.nytimes.com/2009/12/11/world/europe/11libel.html?_r=1&scp=1&sq=libel%20tourism&st=cse.

142. *New York Times*, 376 U.S. at 270-71.

143. *Id.*