

## **THE SPEECH ACT DEFENDS THE FIRST AMENDMENT: A VISIBLE AND TARGETED RESPONSE TO LIBEL TOURISM**

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## INTRODUCTION

Libel tourism is the term given to the practice of obstructing the First Amendment by suing American authors and publishers for defamation in foreign courts where a lower legal standard allows for easier recovery.<sup>1</sup> Libel plaintiffs typically seek out countries whose laws disfavor speech critical of public figures, and the countries often have a tenuous connection to the purportedly defamatory statements that prompted the suit.<sup>2</sup> This new trend ultimately undermines the Constitution's First Amendment principles of free speech and free press by providing a "legal loophole."<sup>3</sup> Moreover, due to the rise of technological advances and Internet accessibility worldwide, a published document has the potential to appear in any jurisdiction in the world. As a result, a libel plaintiff may have the option of initiating litigation in any jurisdiction they may choose, even though the publication occurred in the United States.<sup>4</sup> In addition, under the doctrines of reciprocity and comity, the United States courts can enforce these foreign judgments so long as a court that recognizes and enforces United States judgments rendered the decision. All these circumstances taken together effectively allow the foreign libel plaintiff to bypass the protections afforded by the First Amendment.<sup>5</sup>

The differences in U.S. and U.K. libel law were once a topic reserved for academic journals and law school classrooms. However, a case in 1996 caused the two countries' divide over libel law jurisprudence to be brought to the forefront.<sup>6</sup> Controversial English

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<sup>1</sup> See Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 9-10, 1 (2009) [hereinafter *Hearing*]; *Historical Libel Tourism Bill Becomes Law*, BAKER HOSTETLER (Aug. 10, 2010), available at <http://www.bakerlaw.com/news/historic-libel-tourism-bill-becomes-law-08-10-2010/>.

<sup>2</sup> *Hearing*, supra note 1, at 1.

<sup>3</sup> The "legal loophole" refers to the practice of libel plaintiffs who strategically seek out foreign countries that have a lower legal standard than provided by the United States First Amendment even though a United States court would be a more appropriate forum. Tara Sturtevant, Comment, *Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad can Kill the Freedom of Speech at Home*, 22 PACE INT'L L. REV. 269, 269 (2010).

<sup>4</sup> Publication is defined as "the communication of the allegedly defamatory material to a third person." It can be accomplished through many means, for example, it can be "written, oral, broadcast, printed, photographic, etc." MARC A. FRANKLIN ET AL., MASS MEDIA LAW 234 (8th ed. 2011).

<sup>5</sup> See discussion of reciprocity and comity *infra* Part IV.

<sup>6</sup> *Hearing*, supra note 1, at 20 (written statement by Bruce D. Brown, Partner,

historian David Irving sued Deborah Lipstadt, a professor from Emory University, in London for defamation after she correctly called him a “Holocaust denier.”<sup>7</sup> The Irving-Lipstadt case was international news, and dramatically brought the significant divide between U.S. and U.K. defamation law into focus.<sup>8</sup> Ms. Lipstadt assumed the litigation would be a “classic nuisance suit” but after five years, a ten day trial, and costs of more than \$3 million she escaped liability.<sup>9</sup>

Soon after the Irving-Lipstadt case, a case arose that “opened a new phase in the transatlantic free speech rift”: a lawsuit brought in England by a non-U.K. resident to capitalize on the country’s plaintiff-friendly libel laws.<sup>10</sup> In 1997, Boris Berezovsky, a Russian tycoon, filed suit in London against *Forbes* magazine over an article titled “Godfather of the Kremlin?” written by Russian-American journalist Paul Kiebnikov.<sup>11</sup> *Forbes* argued that it made little sense to litigate a case in England, involving a Russian plaintiff and a New York magazine, when only a fraction of the article’s readers were located there.<sup>12</sup> Nevertheless, the British courts refused to “loosen their grips”<sup>13</sup> on the suit and *Forbes* eventually withdrew their claims and settled the case rather than face trial.<sup>14</sup>

Following the rise in Internet publishing that weakened traditional notions of jurisdictional lines across the globe, politicians and billionaires “soon flocked – virtually, at least – to England to settle their scores where they knew the deck was stacked in their favor.”<sup>15</sup> The

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Baker & Hostetler, LLP).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Sarah Lyall, *Where Suing for Libel is a National Specialty; Britain’s Plaintiff-Friendly Laws Have Become a Magnet for Litigators*, N.Y. TIMES, July 22, 2000, <http://www.nytimes.com/2000/07/22/arts/where-suing-for-libel-national-specialty-britain-s-plaintiff-friendly-laws-have.html>.

<sup>10</sup> Hearing, *supra note 1*, at 20 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

<sup>11</sup> Editor’s Note, *Berezovsky versus Forbes*, FORBES.COM, Mar. 6, 2003, [http://www.forbes.com/forbes/1996/1230/5815090a\\_print.html](http://www.forbes.com/forbes/1996/1230/5815090a_print.html).

<sup>12</sup> See *Berezovsky v. Michaels and Others*, (House of Lords), [2000] 1, W.L.R. 1004, 1008-09 (Eng.), available at <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000511/bere-1.htm>.

<sup>13</sup> Hearing, *supra note 1*, at 20 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

<sup>14</sup> Editor’s Note, *Berezovsky versus Forbes*, FORBES.COM, Mar. 6, 2003, [http://www.forbes.com/forbes/1996/1230/5815090a\\_print.html](http://www.forbes.com/forbes/1996/1230/5815090a_print.html).

<sup>15</sup> Hearing, *supra note 1*, at 20 (written statement by Bruce D. Brown, Partner,

leading case to highlight the phenomenon of libel tourism, which subsequently prompted state and federal legislation,<sup>16</sup> was *Ehrenfeld v. Mahfouz*.<sup>17</sup> In 2004, Khalid Salim Bin Mahfouz, libel tourism's most notorious "frequent flier,"<sup>18</sup> filed a defamation lawsuit against Dr. Rachel Ehrenfeld in an English court in response to being named a potential terrorism financier in Dr. Ehrenfeld's book *Funding Evil: How Terrorism is Financed and How to Stop It*.<sup>19</sup> Mahfouz obtained a default libel judgment against her enjoining further publication of the statements about Mahfouz in England and Wales.<sup>20</sup> Subsequently, Dr. Ehrenfeld sought a declaratory judgment against Mahfouz in the District Court for the Southern District of New York in which she argued that the foreign judgment was unenforceable and repugnant to her First Amendment rights.<sup>21</sup> The district court dismissed the action for lack of personal jurisdiction over Mahfouz.<sup>22</sup> In a certified question to the Court of Appeals of New York, Dr. Ehrenfeld claimed that absent a U.S. court ruling regarding her rights, the foreign judgment would have the practical effect of chilling her protected speech rights in the United States.<sup>23</sup> On December 20, 2007, the Court of Appeals of New York held that Mahfouz's contacts with the state of New York did not constitute a transaction of business in the state and thus New York's long arm statute<sup>24</sup> did not confer personal jurisdiction over him.<sup>25</sup> Because a U.S. court cannot adjudicate a case without personal jurisdiction over a

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Baker & Hostetler, LLP).

<sup>16</sup> See discussion of New York's Libel Terrorism Protection Act and the SPEECH Act *infra* Part V.

<sup>17</sup> *Ehrenfeld v. Mahfouz*, 518 F.3d 102 (2d Cir. 2008); *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC (QB) 1156 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2005/1156.html>.

<sup>18</sup> Hearing, *supra note 1*, at 20 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

<sup>19</sup> *Id.*; *Ehrenfeld*, 518 F.3d at 103-04.

<sup>20</sup> *Ehrenfeld*, 518 F.3d at 103-04.

<sup>21</sup> *Id.* at 104.

<sup>22</sup> *Id.*

<sup>23</sup> *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834 (N.Y. 2007).

<sup>24</sup> N.Y. C.P.L.R. 302 (a)(1) (McKinney 2008) ("[A]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state.").

<sup>25</sup> *Ehrenfeld*, 881 N.E.2d at 831.

defendant, the case had to be dismissed.<sup>26</sup>

While Dr. Ehrenfeld's case generated a great deal of media attention, her case is not exceptional. Throughout the world, journalists are increasingly forced to defend themselves against libel suits, particularly in the United Kingdom, where the libel laws are stricter than those in their own country.<sup>27</sup> Moreover, foreign courts readily affirm jurisdiction over journalists if the material they publish is viewed in those countries, thereby eviscerating American journalists' reliance on First Amendment protections.<sup>28</sup>

The widespread use of the Internet expands this problem. Material posted on the Internet can be accessed in any country. As a result, "the actions of unrelated third parties – readers of articles online, online book purchasers – substantiate jurisdiction in foreign defamation disputes."<sup>29</sup> Because they are being exposed to suit in practically any jurisdiction, American journalists must undertake the daunting task of anticipating all the laws they may be subject to by virtue of the fact that their material may land in a foreign jurisdiction. In effect, this nearly impossible task results in the chilling of free speech for those who do not want to face litigation in foreign jurisdictions.

In order to remedy this problem and effectively preserve First Amendment principles, Congress enacted the Securing the Protection of our Enduring and Established Constitutional Heritage Act (the "SPEECH Act"). This Note will examine this federal response and its effect on libel tourism. Part I of this Note briefly examines the history and principles behind the First Amendment in the United States. Part II articulates the different laws and policies that attract libel tourists to England and other countries. In particular, Part II compares the libel laws of the United States with popular libel plaintiff-friendly jurisdictions, specifically England and Australia. Part II also compares certain civil procedure principles within the United States and England. Part III discusses the prevalence of libel tourism through relevant case law and illustrations. In addition, Part III examines the chilling effects of libel tourism on First Amendment principles, and Part IV discusses

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<sup>26</sup> See discussion of personal jurisdiction *infra* Part II B 1.

<sup>27</sup> David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203, 1204-05 (2004).

<sup>28</sup> See discussion of personal jurisdiction, particularly in the UK *infra* Part II B 1.

<sup>29</sup> Heather Maly, Note, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL'Y 883, 885 (2006).

policy considerations and enforcement mechanisms in the United States. Part V discusses state and federal responses to libel tourism, in particular the New York Libel Terrorism Protection Act and the federal SPEECH Act. Finally, Part VI analyzes what impact, if any, the SPEECH Act will have on libel tourism. Specifically, Part VI examines the policy and procedural perspectives of the legislation, and concludes that the SPEECH Act is constitutionally the furthest the United States can reach to protect American citizens from foreign defamation judgments.

### ***I. FIRST AMENDMENT THEORY AND DEFAMATION LAW***

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>30</sup> This constitutional protection holds a “near sacred place in American society”<sup>31</sup> and “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>32</sup> Freedom of expression is an indispensable means to the discovery of truth and a democratic self-government, in which “the greatest menace to freedom is an inert people.”<sup>33</sup> It is secured in our legal system to uphold the expression and dissemination of ideas without fear of persecution by the government.<sup>34</sup>

The language of the First Amendment could be misread to suggest that the rights protected are absolute; however, this would be a great over-generalization. The tort of defamation provides restrictions on what can be spoken and printed.<sup>35</sup> On the other hand, American free speech jurisprudence is rooted in the “fourth estate” principle, which reflects the notion that the press imposes a critical check on governmental powers by keeping the public informed, and that therefore

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<sup>30</sup> U.S. CONST. amend. I.

<sup>31</sup> Maly, *supra* note 29, at 889.

<sup>32</sup> Roth v. United States, 354 U.S. 476, 484 (1957).

<sup>33</sup> Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>34</sup> Sturtevant, *supra* note 3, at 272.

<sup>35</sup> 50 AM. JUR. 2D LIBEL AND SLANDER § 6 (defamation is a false publication that causes injury to a person’s reputation, or exposing him to contempt, public hatred, ridicule, shame or disgrace, or which affects him adversely in his trade or business); *see also* RESTATEMENT (SECOND) OF TORTS § 568 (1977) (“Libel consists of the publication of defamatory matter 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.”).

it must receive the utmost protection in its ability to report the news without restraint.<sup>36</sup> In the landmark case *New York Times v. Sullivan*, the Supreme Court recognized that the First Amendment represents “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>37</sup> The Court noted that the press protections demanded by the Constitution were an intentional departure from the British form of government.<sup>38</sup> In order to give the press the “breathing space” essential to reporting on issues of public concern, the Court conceded that the “erroneous statement is inevitable in free debate” and thus placed strict limitations on libel suits.<sup>39</sup> The plaintiff has the burden of proving that the disputed statement was false, and if the plaintiff is a public official, he must prove that the statement was made with “actual malice,” which means the defendant had knowledge that the statement was false, or displayed a reckless disregard for the statement’s truth or falsity.<sup>40</sup> The Constitution demands that the plaintiff must display this high level of fault with “convincing clarity.”<sup>41</sup> Underlying the Court’s decision was the fear that any other standard would deter “would-be critics of official conduct . . . from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the expense of having to do so.”<sup>42</sup>

The Court continued to provide heightened speech protections by expanding the holding of *New York Times* through subsequent case law. In *Curtis Publishing Co. v. Butts*, the Court held that the principles articulated in *New York Times* were also applicable to defamatory

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<sup>36</sup> Sarah Staveley-O’Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252, 255-56 (2009).

<sup>37</sup> This case concerned an advertisement in the *New York Times* on behalf of several individuals and groups protesting a “wave of terror” against blacks involved in non-violent demonstrations in the South. Plaintiff, one of three elected commissioners of the City of Montgomery, Alabama, was in charge of the police department. He filed a libel action against the newspaper and four black ministers whose names appeared in the ad, claiming that the allegations against the Montgomery police defamed him personally. It was uncontroverted that there were some inaccuracies in the two allegedly libelous paragraphs. *New York Times v. Sullivan*, 376 U.S. 254, 256-58, 270 (1964).

<sup>38</sup> *Id.* at 274.

<sup>39</sup> *Id.* at 271.

<sup>40</sup> *Id.* at 279-80.

<sup>41</sup> *Id.* at 285-86.

<sup>42</sup> *Id.* at 279.

statements criticizing “public figures.”<sup>43</sup> Although the Court declined to extend the actual malice standard of *New York Times* to defamation of individual persons who were neither public officials nor public figures, the Court nevertheless rejected the English law of strict liability and required a private plaintiff to show some degree of fault, with negligence being the minimum.<sup>44</sup> As a result, a plaintiff who is a public official or figure has a much greater obstacle to overcome in satisfying the constitutional requirements.

## II. WHAT FEATURES ATTRACT LIBEL TOURISTS ABROAD?

London is often referred to as the “libel capital of the world”<sup>45</sup> and has become the most attractive destination for libel tourists across the globe.<sup>46</sup> While England has a very respectable legal system, there are many reasons why libel tourists find England a hospitable sanctuary to bring their grievances. First and foremost, England’s libel jurisprudence values reputation, while the United States values freedom of expression. As will be discussed, this shifts the burden to the defendant to prove the truth of an allegedly defamatory statement. In addition, England’s rules of civil procedure, most importantly the law of personal jurisdiction, makes England a favorite destination for libel tourists.

### A. *Contrasting U.S. and English Libel Law*

Freedom of expression is a fundamental element to democracy, but countries differ in how they value this basic right. In the United States, freedom of expression is accorded the highest value, and injury to one’s reputation, although regrettable, is sometimes an inevitable consequence of preserving this freedom.<sup>47</sup> Conversely, in other countries, particularly England, damage to one’s reputation may trump the value of free expression. In these instances, some defamation laws permit the courts to impose criminal sanctions on the accused.

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<sup>43</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967); *see also* *Gertz v. Welch*, 418 U.S. 323 (1974) (holding that private figures who report on matters of public concern are not necessarily subject to the actual malice standard, but must be subject to some standard of fault, negligence being the minimum).

<sup>44</sup> *Gertz*, 418 U.S. at 347; Hearing, *supra* note 1, at 47 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>45</sup> Hearing, *supra* note 1, at 1.

<sup>46</sup> *Id.*

<sup>47</sup> Maly, *supra* note 29, at 888-889; *see also* discussion of First Amendment and *New York Times v. Sullivan*, *supra* Part I.



Of particular importance is the stark contrast between British and American jurisprudence. While both countries value freedom of expression, they balance the other interests – for instance reputation – differently and thus reach conflicting outcomes.<sup>48</sup> Britain remains highly protective of an individual’s reputation and imposes much more rigid requirements on media defendants, while the United States understands that damage to reputation is an unavoidable consequence.<sup>49</sup> This dichotomy between the United States and Britain lies at the heart of the trouble of libel tourism and contributes directly to the uncertainty American authors and publishers face when deciding what to publish, and in what jurisdiction they may be forced to defend a defamation suit, thereby chilling their First Amendment rights.

### 1. English Libel Law

England’s defamation law can be seen as a “mirror image”<sup>50</sup> of the defamation law in the United States,<sup>51</sup> which explains how England became the “libel capital” and has attracted so many libel plaintiffs to bring their grievances to England.<sup>52</sup> England’s defamation law retains many of the common law principles overturned in the United States by *New York Times* and its progeny.<sup>53</sup> Thus, any alleged defamatory statement that adversely affects an individual’s reputation is prima facie defamatory.<sup>54</sup> Specifically, the burden of proof shifts from the plaintiff to the defendant, where any alleged defamatory statement is presumed false and the defense has the burden to prove its truth.<sup>55</sup> In addition, England does not impose any standard of fault, therefore, even if the defendant believed the alleged defamatory statement to be true, he can still be found liable for defamation.<sup>56</sup> The only burden placed on the plaintiff is to establish that the statement was directed to the plaintiff,

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<sup>48</sup> Hearing, *supra note 1*, at 46 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See discussion of United States libel jurisprudence *supra* Part I.

<sup>52</sup> Hearing, *supra note 1*, at 46 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>53</sup> Todd W. Moore, *Untying our Hands: The Case for Uniform Personal Jurisdiction over “Libel Tourists,”* 77 *FORDHAM L. REV.* 3207, 3212 (2009).

<sup>54</sup> Hearing, *supra note 1*, at 46 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>55</sup> Moore, *supra note 53*, at 3212.

<sup>56</sup> *Id.*

was published by the defendant, and conveyed a defamatory meaning.<sup>57</sup>

Because the alleged statements are presumed false, the defendant's only recourse is to demonstrate the truth of the statements or establish an exception in order to prevail over the charges.<sup>58</sup> The English courts have acknowledged that there are some matters so important to the public interest that the defendant does not have to face the high burden of proving the truth of the underlying statement at issue.<sup>59</sup> This is known as the "fair comment" exception and may apply to communications made by the defendant on matters of public interest; it also must be an opinion that the author could reasonably communicate based on facts, and made without malice.<sup>60</sup> Although the fair comment exception can relieve a defendant from the burden of proving the truth of the underlying statement at issue, it gives far less protection than the laws in the United States.<sup>61</sup>

Another exception to England's libel law is the absolute privilege exception that applies to comments made by members of Parliament.<sup>62</sup> Members of the press can also claim this privilege "for fair and accurate reporting on judicial proceedings."<sup>63</sup> In addition, England's libel laws recognize a qualified privilege when reporting on a government entity, reasoning that "government bodies should be open to criticism and these institutions should be unable to prohibit speech."<sup>64</sup> Nevertheless, the application of this privilege is unclear, and is dependent on the circumstances of each case.<sup>65</sup>

## 2. Australian Libel Law

While England remains the "libel capital" of the world and the main focus of libel tourism commentary, other countries also have similar defamation laws that attract libel tourists to these countries. Like

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<sup>57</sup> Hearing, *supra* note 1, at 46 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>58</sup> Maly, *supra* note 29, at 900.

<sup>59</sup> Reynolds v. Times Newspapers Ltd, [2001] 2 A.C. 127 (U.K.), available at <http://www.bailii.org/uk/cases/UKHL/1999/45.html>.

<sup>60</sup> Maly, *supra* note 29, at 901.

<sup>61</sup> Hearing, *supra* note 1, at 46 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>62</sup> Maly, *supra* note 29, at 901.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also Reynolds, *supra* note 59.

<sup>65</sup> Maly, *supra* note 29, at 901-02.

the United States, Australia's legal roots are derived from the English common law.<sup>66</sup> However, where the United States deviated from England's defamation law, Australia continued to follow its example.<sup>67</sup> Thus, Australia holds reputation in higher regard than freedom of expression.<sup>68</sup>

In addition, Australia does not have any similar standard akin to the *New York Times* requirement that public figures must demonstrate that the defendant acted with actual malice.<sup>69</sup> Australian lawmakers support the lack of a different requirement for public figures by arguing that it would unjustly burden those in the public eye simply because of their status.<sup>70</sup> Therefore, like England, the alleged defamatory statement is presumed false, and the burden is on the defendant to prove its truth, in which there is no burden of fault.<sup>71</sup>

As an illustration, in *Dow Jones v. Gutnick*, Gutnick sued Dow Jones, publisher of the *Wall Street Journal* and *Barron's Magazine*.<sup>72</sup> An edition of *Barron's Online*, found on the *Wall Street Journal's* website included an article titled "Unholy Gains" that allegedly defamed Gutnick.<sup>73</sup> In the suit, Dow Jones argued that Australia's libel laws chilled U.S. notions of free speech and that the Australian court did not have jurisdiction over the matter.<sup>74</sup> The High Court<sup>75</sup> responded by affirming the judgment, reasoning that since the Internet allowed for Australian subscriptions to the website, and that "common law adapts even to radically different environments,"<sup>76</sup> then Dow Jones could rightfully be bound by the libel laws of Australia.

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<sup>66</sup> Sturtevant, *supra* note 3, at 281.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 281-82.

<sup>71</sup> *Id.* at 282.

<sup>72</sup> *Dow Jones and Co. v. Gutnick*, [2002] HCA 56 (Austl.).

<sup>73</sup> *Id.* at 2.

<sup>74</sup> Sturtevant, *supra* note 3, at 282.

<sup>75</sup> The High Court of Australia is the final court of appeal in Australia. *Operation of the High Court*, HIGH COURT OF AUSTRALIA, <http://www.hcourt.gov.au/about/operation>

<sup>76</sup> *Dow Jones and Co. v. Gutnick*, [2002] HCA 56, 90 (Austl.).

*B. Contrasting U.S. and British Civil Procedure*

## 1. Personal Jurisdiction

As mentioned in the Introduction, a U.S. court cannot adjudicate a case without first obtaining personal jurisdiction over the defendant.<sup>77</sup> This obstacle serves as the primary barrier in deciding whether a U.S. court can adjudicate the enforceability of a foreign judgment.<sup>78</sup> In order to acquire personal jurisdiction over the foreign party, the court must comply with the forum's statutory requirements and the due process requirements of the Constitution.<sup>79</sup> To satisfy these requirements, the court must apply either an applicable federal statute or a state long-arm statute. A federal statute or the forum state's long arm-statute indicates under what conditions a foreign party can be hauled into court in a particular forum.<sup>80</sup> At the same time, the state's basis for exercising personal jurisdiction must comply with the constitutional standard of minimum contacts.<sup>81</sup>

The Due Process Clause of the Fourteenth Amendment restricts a court's ability to exercise personal jurisdiction over a foreign party. Due process requires that the defendant have "certain minimum contacts" with the forum state such that the suit "does not offend 'traditional notions of fair play and substantial justice.'"<sup>82</sup> What constitutes minimum contacts has been an issue of debate for the Supreme Court over the years; however, the enduring rationale is to protect a defendant from the inconvenience of traveling to a foreign forum to defend against the suit, and to make certain that states do not overextend their sovereign powers.<sup>83</sup> However, the issue of sovereignty may play a greater part in international jurisdictional questions. In those situations a court may employ comity principles to refrain from meddling with another country's fair exercise of jurisdiction.<sup>84</sup>

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<sup>77</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>78</sup> Moore, *supra* note 53, at 3222.

<sup>79</sup> FED. R. CIV. P. 4(k)(1)(A) and (C).

<sup>80</sup> Moore, *supra* note 53, at 3222.

<sup>81</sup> See *Int'l Shoe*, 326 U.S. at 316 ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts.").

<sup>82</sup> *Id.* (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>83</sup> Moore, *supra* note 53, at 3223; see also *World Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>84</sup> See discussion of comity and reciprocity *infra* Part IV.

If a defendant cannot assert “continuous and systematic . . . contacts”<sup>85</sup> with the forum state sufficient for personal jurisdiction, the defendant can also claim specific jurisdiction – jurisdiction based exclusively on the defendant’s contacts arising from the plaintiff’s claim.<sup>86</sup> However, it is important to note that it is the *defendant’s* contacts with the forum state that are relevant to the court’s inquiry concerning whether proper jurisdiction exists.<sup>87</sup> The defendant’s act must “purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws[;]” this is also known as the purposeful availment doctrine.<sup>88</sup>

Perhaps most troubling is how to reconcile the standard of minimum contacts and traditional geographic boundaries with the Internet, since the Internet has created a world unrestricted by traditional geographic limits. Specific jurisdiction has been applied to the Internet context, whereby the defendant’s Internet activity must expressly target the forum state.<sup>89</sup> The mere act of placing material on the Internet is not sufficient to sustain a finding of personal jurisdiction; rather, the defendant must have the requisite intent to target the readers of the forum state.<sup>90</sup> In *Young v. New Haven Advocate*, a recent case that reviewed the purposeful availment doctrine’s application to the Internet, the Fourth Circuit looked at the advertisements and contents of the newspaper’s website, as well as the content of the article in question, to determine whether a Connecticut newspaper intended to target a Virginia audience.<sup>91</sup> The Court then concluded that since the advertisements and other content on the website, coupled with the local content of the specific article, were all aimed at a Connecticut audience, it was unreasonable for the newspaper to anticipate being hauled into court in Virginia, and therefore jurisdiction was not proper.<sup>92</sup>

Another difficult issue applies to defamation. Defamation is a non-physical tort, without specific geographical boundaries, in which the method of publication (such as investigating, writing, printing and

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<sup>85</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

<sup>86</sup> *Id.* at 414 n.8.

<sup>87</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>88</sup> *Id.* (citing *Int’l Shoe*, 326 U.S. at 319).

<sup>89</sup> *Young v. New Haven Advocate*, 315 F.3d. 256, 262-63 (4th Cir. 2002).

<sup>90</sup> *Id.* at 263.

<sup>91</sup> *Id.* at 263-64.

<sup>92</sup> *Id.*

disseminating) may occur in many different jurisdictions.<sup>93</sup> Consequently, the jurisdictional issues do not neatly comport with the standard for minimum contacts.<sup>94</sup> An example of this problem is illustrated in *Calder v. Jones*.<sup>95</sup>

In *Calder*, the *National Enquirer, Inc.*, a Florida corporation with its principal place of business in Florida, published an allegedly defamatory article about Calder, a California resident.<sup>96</sup> The *National Enquirer* publishes a national weekly newspaper, with a circulation of over 5 million, and approximately 600,000 of those copies were sold in California.<sup>97</sup> The article in dispute alleged that Calder drank so heavily as to interfere with her professional responsibilities.<sup>98</sup> In the suit, the *National Enquirer* argued that jurisdiction was not proper in California. Nonetheless the Court held that because “the brunt of the harm,” regarding both the emotional distress and injury to reputation claims, was suffered in California, jurisdiction was proper.<sup>99</sup> In other words, jurisdiction was appropriate “based on the ‘effects’ of [the *National Enquirer*’s Florida conduct in California.”<sup>100</sup> Despite the fact that the Court clearly expanded the purposeful availment doctrine, it is questionable whether the effects test applies outside the scope of intentional torts.<sup>101</sup>

Like American courts, an English court will find jurisdiction proper if the defendant caused a tort to occur in the forum.<sup>102</sup> However, where the United States courts require the allegedly defamatory statements to target the particular forum, the English courts do not. As a result, based on the multiple publication rule,<sup>103</sup> the English courts have had no trouble finding jurisdiction even if the publication consisted of merely a few Internet hits or hard copies purchased online in England.<sup>104</sup>

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<sup>93</sup> Maly, *supra* note 29, at 910.

<sup>94</sup> *Id.*

<sup>95</sup> *Calder v. Jones*, 465 U.S. 783 (1984).

<sup>96</sup> *Id.* at 784-85.

<sup>97</sup> *Id.* at 785.

<sup>98</sup> *Id.* at 789 .

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Moore, *supra* note 53, at 3226.

<sup>102</sup> Staveley-O’Carroll, *supra* note 36, at 262.

<sup>103</sup> See discussion of the multiple publication rule that every online hit constitutes a separate actionable tort discussed *infra* Part II B 3.

<sup>104</sup> Staveley-O’Carroll, *supra* note 36, at 262.

Recently, the English courts have become more willing to assert jurisdiction based on the belief that, with the growth of the Internet, plaintiffs have a greater interest in defending their reputations.<sup>105</sup> In *King v. Lewis*,<sup>106</sup> the English Court of Appeals noted that it is “the publisher’s choice of a global medium” and thus “the Internet publisher’s very choice of a ubiquitous medium, at least suggests a robust approach to the question of forum: a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant.”<sup>107</sup> In that case, the English court allowed Don King, a boxing promoter and Florida resident, to sue a New York resident in England based on a libelous statement made on a California website.<sup>108</sup> The Court reasoned that since boxing was very popular in England, Don King had a reputation to protect there, and that the publisher’s choice to post the article on a global medium exposed himself to a global forum.<sup>109</sup>

## 2. Statute of Limitations

While not demanding of much explanation, the comparison between the statute of limitations in the United States and England is important. In the United States the statute of limitations begins to run from the first publication of the statement, albeit the publication may remain on sale or posted on the Internet.<sup>110</sup> In England, however, the statute of limitations runs until the publication is no longer available in print format or online.<sup>111</sup>

## 3. Single vs. Multiple Publication Rule

Related to the statute of limitations issue is the disparity between the United States and England’s publication rule. The difference between the statute of limitations results from what the American and English courts consider a “publication.” Most U.S. states follow the “single publication rule,” which states that “[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a

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<sup>105</sup> *Id.*

<sup>106</sup> *King v. Lewis*, [2004] EWCA Civ. 1329, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1329.html>.

<sup>107</sup> *Id.* at [31].

<sup>108</sup> *Id.* at [2]-[4].

<sup>109</sup> *Id.* at [13], [27]-[32].

<sup>110</sup> Hearing, *supra note 1*, at 48 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>111</sup> *Id.*

motion picture or similar aggregate communication is a single publication,” and can give rise to only one action for defamation.<sup>112</sup> Accordingly, a plaintiff can only bring one action, even if the harm was suffered in numerous jurisdictions.<sup>113</sup> The courts adopted this rule to protect publishers from facing lawsuits in multiple jurisdictions and from the “undue harassment” that may result because of mass publications.<sup>114</sup> The single publication rule also applies to the Internet context. Thus, the statute of limitations on the article begins to run when it is first published on the website.<sup>115</sup>

England adheres to the “multiple publication rule,” which states that every publication of the disputed material gives rise to an actionable tort, even if the statement appears in multiple jurisdictions throughout the world.<sup>116</sup> This rule was announced in 1849 in *The Duke of Brunswick v. Harmer*,<sup>117</sup> where the Court held that a purchase of a seventeen-year-old back issue of a newspaper constituted a new “publication” and therefore gave rise to an actionable tort, regardless of the original publication date.<sup>118</sup> As a result of this archaic rule, a single Internet hit will constitute a publication for libel purposes.<sup>119</sup> However, due to the absurdity of this result, the Ministry of Justice sought a review of the rule, and in March 2010 found that it was appropriate to introduce a single publication rule, while leaving discretion to extend the time period if necessary.<sup>120</sup> The detailed provisions necessary to administer the operation of the single publication rule are currently under consideration.<sup>121</sup>

<sup>112</sup> RESTATEMENT (SECOND) OF TORTS § 577A(3) (1977); *see* definition of publication, *supra* note 4.

<sup>113</sup> RESTATEMENT (SECOND) OF TORTS § 577A(4)(b).

<sup>114</sup> Staveley-O’Carroll, *supra* note 36, at 260.

<sup>115</sup> Robert D. Sack, *Statutes of Limitation and the Single Publication Rule*, P.L.I. SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 7.2.1 (2011); *see, e.g.*, *Firth v. State*, 775 N.E.2d 463, 465-66 (N.Y. 2002) (holding that a libel claim was barred by New York’s one-year statute of limitations where the disputed speech was initially posted on the Internet more than a year before plaintiff filed suit).

<sup>116</sup> Staveley-O’Carroll, *supra* note 36, at 260-61.

<sup>117</sup> *The Duke of Brunswick v. Harmer*, (1849) 117 Eng. Rep. 175 (Q.B.).

<sup>118</sup> *Id.* at 176-77.

<sup>119</sup> Staveley-O’Carroll, *supra* note 36, at 261.

<sup>120</sup> *Defamation and the internet: the multiple publication rule*, MINISTRY OF JUSTICE (2010), <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>.

<sup>121</sup> *Id.*



#### 4. Fee Shifting

Fee shifting rules provide a considerable incentive for libel plaintiffs to bring suit in England. In the United States each party to the litigation pays their own attorney's fees, unless the statute or contract grants specific authority to collect those fees.<sup>122</sup> The prevailing party does not collect attorney's fees unless authorized by law.<sup>123</sup>

On the other hand, under fee shifting in England the losing party bears all of the costs related to the litigation.<sup>124</sup> This is significant in the libel context because the defendant bears the burden of proof, and the likelihood of a plaintiff victory is substantial. Furthermore, the cost of litigation in England can run into the millions of dollars because most libel cases require multiple attorneys.<sup>125</sup>

#### 5. Forum Non Conveniens

One possible solution for a media defendant facing a defamation suit in England is to argue that the suit should be dismissed on *forum non conveniens* grounds. This legal doctrine allows for dismissal where personal jurisdiction is proper, but the practicalities of facing litigation in the forum places an undue burden on the defendant and thus the case should be transferred to a more convenient court.<sup>126</sup> However, in effect, this procedural device does little to restrain the reach of English courts, because it is dependent on the discretion of the judge, and British judges view their jurisdiction broadly.<sup>127</sup> British courts justify jurisdiction based on the argument that the tort occurred there, even when the connection to England is tenuous.<sup>128</sup> They have also indicated that because the action would most likely not "survive" in the United States, "there would seem little point in addressing how much more convenient [a U.S. forum] would be."<sup>129</sup>

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<sup>122</sup> FED. R. CIV. P. 54(d).

<sup>123</sup> *Id.*

<sup>124</sup> Hearing, *supra note 1*, at 49 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>125</sup> *Id.*; *see also* Staveley-O'Carroll, *supra note 36*, at 259.

<sup>126</sup> Hearing, *supra note 1*, at 21 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP); *see generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

<sup>127</sup> Staveley-O'Carroll, *supra note 36*, at 264.

<sup>128</sup> *Id.*; *see also* Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007) (only 23 copies sold in UK but still sustained jurisdiction because the tort occurred there).

<sup>129</sup> King, *supra note 106*, at 18.

### **III. PREVALENCE AND CHILLING EFFECTS OF LIBEL TOURISM ON FIRST AMENDMENT PROTECTED SPEECH**

While the comparison of libel laws and jurisdictional issues between the United States and England depicts an undoubtedly sharp divergence in their approaches to defamation, and reveals why England is a significantly more attractive venue to bring a defamation suit, it is important to ascertain just how prevalent this “legal loophole” is and who its victims are. Is the intentional and strategic decision to forum shop and file suit outside the United States, in actuality, a problem to be remedied by federal legislation, or does *Ehrenfeld* stand out as an outlier, an atypical case with an extreme set of facts?

A foreign defamation judgment may have wide-ranging implications. Arguably, the one most concerning and troubling for media defendants is its ability to chill their protected First Amendment free speech rights. Libel tourism’s chilling effect cuts off the free flow of information that should reach the public, and instead silences authors and journalists.<sup>130</sup> Journalists are often compelled to self-censor their speech to ensure that their statements not only conform to the standards of the First Amendment, but also that they satisfy the more “stifling strictures of English libel law.”<sup>131</sup> Although it is difficult to evaluate if and how libel tourism may chill free expression because it is impossible to catalogue what has been held from publication, testimony from prominent media lawyers indicates just how far reaching the chilling effect is, particularly on writings about controversial international subjects.<sup>132</sup>

Media lawyers, such as Bruce D. Brown, partner at Baker & Hostetler, LLC, who review their clients’ material before it is published, have firsthand knowledge of how libel tourism has altered the “legal landscape.”<sup>133</sup> For example, more than a decade ago, Mr. Brown’s colleagues represented journalist Craig Unger in a libel suit filed by Robert McFarlane against *Esquire* magazine.<sup>134</sup> The alleged defamatory statement concerned an article entitled “October Sunrise,” which

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<sup>130</sup> Hearing, *supra note 1*, at 23 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 24; *see also* McFarlane v. Esquire Magazine, 74 F.3d 1296 (D.C. Cir. 1996).

discussed efforts to negotiate the release of the American hostages in Iran.<sup>135</sup> The U.S. Court of Appeals for the D.C. Circuit found in Mr. Unger's favor, indicating that there was no evidence to suggest the material in the article was false. However, approximately a decade later, Mr. Unger's British publisher canceled their plans to bring to England his book, *House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Dynasties*, a U.S. bestseller.<sup>136</sup> A potential suit by the members of the Saudi Royal Family prevented the publication of Mr. Unger's book even though it was cleared for publication and published in the United States.<sup>137</sup>

As a further illustration, Laura Handman, partner at Davis Wright Tremaine, LLP testified that the U.S. publishers her firm represents repeatedly receive letters on behalf of U.S. celebrities and businesspeople from both U.S. and British law firms threatening lawsuits in England if the allegedly defamatory statements are published.<sup>138</sup> If the work has already been published, U.S. publishers are eager to settle the claims because of the high economic risk, and the knowledge that the claim will likely succeed in England.<sup>139</sup> Consequently, while media lawyers may feel reassured that their clients are well protected by the First Amendment in the United States they must also counsel their clients about the risks of their work being exposed in England and the high probability of eventual litigation.

Furthermore, Dr. Ehrenfeld experienced first-hand the chilling effects that the English judgment against her had on her U.S. protected free speech rights. She testified that she had many "sleepless nights" worrying that Mahfouz would come to New York to enforce the English judgment against her.<sup>140</sup> Although he never attempted to enforce the judgment in the United States, the potential that he would "left it hanging over [her] head like a sword of Damocles," thereby exacerbating the chilling effect.<sup>141</sup> In addition, Ehrenfeld testified that the English judgment affected her ability to publish, and to travel to

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<sup>135</sup> Hearing, *supra note 1*, at 24 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 56 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 12 (testimony of Rachel Ehrenfeld).

<sup>141</sup> Hearing, *supra note 1*, at 12.

England, lest she be arrested to enforce the judgment against her.<sup>142</sup> Those who once “courted” her now refuse to publish her.<sup>143</sup> Ehrenfeld was not Mahfouz’s only victim; he has obtained settlements in nearly forty cases, and boasts about his conquests on his website, thereby silencing and intimidating any of his would-be critics.<sup>144</sup>

#### **IV. PRINCIPLES OF COMITY AND ENFORCEMENT OF FOREIGN DEFAMATION JUDGMENTS**

While states in the United States enforce the judgments of other states under the Full Faith and Credit Clause of the Constitution, there is no such requirement for foreign money judgments, and there is no federal law that mandates recognition and enforcement of foreign judgments in the United States.<sup>145</sup> In addition, the United States is not a party to any treaties or international agreements dealing with the recognition and enforcement of foreign judgments, although Congress does have the authority to enact legislation that would prohibit the enforcement of foreign judgments if those judgments were found to be inconsistent with the First Amendment.<sup>146</sup>

Curiously, the enforcement and recognition of foreign country judgments has largely been left to the states.<sup>147</sup> Many, but not all, states have adopted the Uniform Foreign Money-Judgments Recognition Act;<sup>148</sup> however the adoptions are not consistent. For example, some states have incorporated the requirement of reciprocity that a foreign judgment will be recognized and enforced in the United States so long as a U.S. judgment would be enforced in a foreign country under similar

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<sup>142</sup> *Id.*; see discussion of enforcement of judgments *infra* Part IV.

<sup>143</sup> Hearing, *supra* note 1, at 14 (written statement by Rachel Ehrenfeld).

<sup>144</sup> *Id.*; Bin Mahfouz posts on his website how often he brings defamation suits against various American authors. BIN MAHFOUZ, [http://www.binmahfouz.info/en\\_index.html](http://www.binmahfouz.info/en_index.html) (last visited Mar. 1, 2012).

<sup>145</sup> *Hilton v. Guyot*, 159 U.S. 113, 181-82 (1895).

<sup>146</sup> Hearing, *supra* note 1, at 52 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP) (indicating that the Hague Convention on Choice Agreements would require Convention signatories to recognize judgments rendered by a court in another signatory country, and would apply to defamation judgments, but the United States has not yet ratified the Convention).

<sup>147</sup> *Id.* at 62 (written statement by Linda J. Silberman, Professor, New York University School of Law).

<sup>148</sup> UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005).

circumstances.<sup>149</sup> Other states do not have this requirement; the adoption of the Uniform Act is left to the discretion of the states, and as a result, a foreign judgment may be enforced in one state, but not in another.<sup>150</sup> In sum, there is no uniform American law governing the recognition and enforcement of foreign judgments.

At the same time, the United States may enforce a foreign judgment despite the fact there is no law mandating enforcement. The underlying rationale of recognizing and enforcing foreign judgments against U.S. parties is the general principle that in order to be enforced in the United States, the judgment must have been achieved through a fair and impartial process.<sup>151</sup> This principle has been developed by the notion of comity – “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, and to the rights of its own citizens.”<sup>152</sup> In other words, the doctrine of comity is meant to foster friendly international relations.<sup>153</sup> On the other hand, a foreign judgment may be refused recognition if the judgment or cause of action is repugnant to the public policy of the United States or the state where recognition is wanted.<sup>154</sup> In particular, U.S. courts have refused to recognize foreign defamation judgments when the enforcement would encroach on traditional First Amendment rights, and is thus repugnant to public policy.<sup>155</sup>

In *Bachchan v. India Abroad*, a Swedish daily newspaper reported that Swiss authorities had frozen the bank account of Indian national Ajitabh Bachchan.<sup>156</sup> A small New York publication, *India Abroad*, transmitted the story to India and printed and distributed the story in

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 63.

<sup>151</sup> Moore, *supra* note 53, at 3217.

<sup>152</sup> Hilton, *supra* note 145, at 163-64.

<sup>153</sup> *Id.* at 165.

<sup>154</sup> See e.g. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3) (1962) (“[A] foreign judgment need not be recognized if [the cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state”); see also UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(c)(3) (2005) (“[A] court of this state need not recognize a foreign-country judgment if the foreign-country judgment or the [cause of action] [claim for relief] on which the foreign-country judgment is based is repugnant to the public policy of this state or of the United States.”).

<sup>155</sup> Hearing, *supra* note 1, at 64 (written statement by Linda J. Silberman, Professor, New York University School of Law).

<sup>156</sup> *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 661 (Sup. Ct. 1992).

England and New York. Bachchan, a well-known public figure in India and around the world, sued both the Swedish newspaper and *India Abroad* for libel in England.<sup>157</sup> Even though the primary distribution occurred overwhelmingly in the United States, and only 1,000 copies were distributed in England, a judgment was entered against *India Abroad*, where it was held strictly liable for £40,000 for “publishing a story based on another paper’s ‘unwitting’ error.”<sup>158</sup>

Although Bachchan was victorious in England, he had less good fortune in the United States. After his win in England, Bachchan instituted a proceeding in New York to enforce the English judgment against *India Abroad*.<sup>159</sup> The Court declined to enforce the judgment on public policy grounds, stating that the First Amendment “would be seriously jeopardized by entry of [a] foreign libel judgment[s] granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded [to] the press by the U.S. Constitution.”<sup>160</sup>

The Maryland high court reached the analogous conclusion that a foreign libel judgment contravened the First Amendment and precluded recognition of the judgment. In *Telnikoff v. Matusevitch*, Telnikoff, an English citizen, complained in an op-ed column published in London’s *Daily Telegraph*, that the BBC’s Russian Service employed too many “Russian-speaking national minorities” but not enough of “those who associate themselves ethnically, spiritually or religiously with the Russian people.”<sup>161</sup> Matusevitch, a Maryland resident, responded with an angry letter also published in the *Telegraph*.<sup>162</sup> The letter protested what he considered Telnikoff as advocating for a “switch from professional testing to a blood test” and was “stressing his racist recipe by claiming that no matter how high the standards and integrity ‘of ethnically alien’ people Russian staff might be, they should be dismissed.”<sup>163</sup> In the United States, the letter would have been considered the “heated hyperbole uttered in the course of public debate that is protected by the First Amendment in this country as non-

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 662; Hearing, *supra note 1*, at 52-53 (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>159</sup> *Bachchan*, 585 N.Y.S.2d at 662.

<sup>160</sup> *Id.* at 664.

<sup>161</sup> *Telnikoff v. Matusevitch*, 702 A.2d 230, 233 (Md. 1997).

<sup>162</sup> *Id.* at 565-66.

<sup>163</sup> *Id.* at 566.

actionable opinion.”<sup>164</sup> However, the English jury concluded otherwise, and found that the letter expressed the “fact” that Telnikoff was a racist, and awarded Telnikoff £240,000.<sup>165</sup>

Telnikoff then sought to enforce the judgment in the United States. “The United States District Court for the District of Columbia entered judgment for Matusевич,” concluding that the “English libel judgment was ‘repugnant to the public policy of the state’ of Maryland and the United States.”<sup>166</sup> After Telnikoff appealed the district court’s decision, the D.C. Circuit certified the question whether Telnikoff’s foreign judgment was repugnant to the public policy of Maryland to Maryland’s highest court.<sup>167</sup> The Maryland Court of Appeals answered in the affirmative, stating:

[A]t the heart of the First Amendment . . . is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of Telnikoff’s English libel judgment.<sup>168</sup>

Aside from the public policy defense, a party may also sue for declaratory relief, pursuant to the Declaratory Judgment Act,<sup>169</sup> that a foreign judgment is unenforceable in a U.S. court. The court will “declare the rights and other legal relations of any interested party” and the judgment for her “shall have the force and effect of a final judgment or decree and shall be reviewable as such.”<sup>170</sup> However, this provision does not provide for any further jurisdictional powers upon U.S. courts, thus personal jurisdiction remains a complex threshold matter.

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<sup>164</sup> Hearing, *supra note 1*, at 53-54 (2009) (written statement by Laura Handman, Partner, Davis Wright Tremaine, LLP).

<sup>165</sup> *Telnikoff*, 347 Md. at 571.

<sup>166</sup> *Id.* at 572.

<sup>167</sup> The United States District Court for the District of Columbia held that the cause of action underlying the English libel judgment was “repugnant to the public policy of the State within the meaning of Maryland’s Uniform Foreign-Money Judgments Recognition Act” and that “recognition of the foreign judgment under principles of comity would be repugnant to the public policies of the State of Maryland and the United States.” Alternatively, the District Court held that recognition and enforcement would violate the First and Fourteenth Amendments. Telnikoff appealed to the United States Court of Appeals for the D.C. Circuit, which certified the question of whether the English judgment was repugnant to the public policy of the state of Maryland. *Id.* at 572-73.

<sup>168</sup> *Id.* at 602.

<sup>169</sup> See 28 U.S.C. § 2201(a) (2006).

<sup>170</sup> *Id.*

In *Bachchan* and *Telnikoff*, the states of New York and Maryland concluded that recognition of foreign libel judgments in the United States impaired the public policy of New York and Maryland, as well as of the United States. However, a more recent effort to declare a foreign libel judgment unenforceable in the United States proved unsuccessful. The New York Court of Appeals in *Ehrenfeld*, while acknowledging the problem of libel tourism, determined that Mahfouz's contact with New York could not establish a proper basis for jurisdiction, and therefore Ehrenfeld's argument to expand New York's long-arm statute must be directed to the legislature.<sup>171</sup>

## V. RESPONSES TO LIBEL TOURISM

It was evident from the *Ehrenfeld* decision that to combat the problems of libel tourism effectively, a legislative response was crucial. The decision prompted a national public outcry and united free speech advocates to fight on Ehrenfeld's behalf.<sup>172</sup> New York responded with the Libel Terrorism Protection Act<sup>173</sup> and other states were quick to follow with similar versions of their own.<sup>174</sup> In August 2010, the SPEECH Act, a federal answer to libel tourism, was signed into law by President Barack Obama.<sup>175</sup>

### A. States' Responses

Motivated by the *Ehrenfeld* decision, the New York legislature responded by enacting the Libel Terrorism Protection Act (often dubbed "Rachel's Law") and amending their jurisdictional statute.<sup>176</sup> First, the Act amended New York's version of their Uniform Act and provided that a defamation judgment rendered outside the United States will not

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<sup>171</sup> *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834-37 (N.Y. 2007); see discussion of state's responses *infra* Part V; see also discussion of personal jurisdiction *supra* Part II B 1.

<sup>172</sup> Adam Cohen, 'Libel Tourism': When Freedom of Speech Takes a Holiday, N.Y. TIMES, Sept. 14, 2008, available at <http://www.nytimes.com/2008/09/15/opinion/15mon4.html>.

<sup>173</sup> See N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009).

<sup>174</sup> For example, Illinois passed a similar version of the New York Act. See ILL. COMP. STAT. 5/12-621(b)(7) (2009).

<sup>175</sup> See Securing the Protection of our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101-05) (2010)).

<sup>176</sup> N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009); N.Y. C.P.L.R. 302(a) (McKinney 2009).



be enforced in New York courts unless the court in New York concludes that the defamation law applied by the foreign court provides “at least as much protection for freedom of speech and press . . . as would be provided by both the United States and New York constitutions.”<sup>177</sup> Since virtually “no other jurisdiction provides as high a level of protection for speech as the United States,” the Act disables almost every foreign defamation judgment.<sup>178</sup>

Second, the Act amended New York’s long-arm statute by attaching jurisdiction to foreign defendants, so long as the allegedly defamatory publication was published in New York, the domestic plaintiff is a resident of New York and is amenable to jurisdiction in New York, or may have to take action in New York to comply with the judgment.<sup>179</sup> This extension of jurisdiction in effect provides that no territorial nexus between the foreign defendant and the domestic plaintiff is required. As a result, a domestic plaintiff can bring an action for declaratory relief with much greater ease and can seek to preempt an enforcement suit.

Soon after, Illinois followed suit. Taking the New York bill as a model, Illinois amended its version of the Uniform Foreign Money-Judgments Recognition Act. The Illinois law extended long-arm jurisdiction over libel tourists, and provided grounds for non-enforcement of foreign defamation judgments.<sup>180</sup>

### B. Federal Response

Upon the urging of media lawyers, legislators, legal commentators, and other lobbying groups, the Securing the Protection of our Enduring and Established Constitutional Heritage Act or “SPEECH Act” was enacted and signed into law by President Obama on August 10, 2010.<sup>181</sup> The purpose is to prohibit recognition and enforcement of foreign defamation judgments against United States’ authors and publishers, as well as certain foreign judgments against the providers of interactive computer services, in other words, to prevent libel tourism. The SPEECH Act operates as both “a shield and a sword to protect [United

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<sup>177</sup> N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009).

<sup>178</sup> Staveley-O’Carroll, *supra* note 36, at 276.

<sup>179</sup> N.Y. C.P.L.R. 302(a) (McKinney 2009).

<sup>180</sup> 735 ILL. COMP. STAT, 5/12-621(b)(7) (2009); 735 ILL. COMP. STAT, 5/2-209(b)(5) (2009).

<sup>181</sup> See 28 U.S.C. §§ 4101-05.

States' citizens] from foreign defamation judgments.”<sup>182</sup> The “shield” feature in the law permits an American defendant to remain passive, given that a foreign defamation judgment cannot be enforced in the United States unless the judgment holder meets the requirements of the SPEECH Act. It also acts as a “sword,” because it creates a cause of action for declaratory relief in federal court to challenge the enforceability of the foreign defamation judgment.

The “shield” aspect of the SPEECH Act sets forth a three-pronged approach. In an action to enforce the foreign judgment, the person seeking to enforce the judgment must first prove that the foreign court’s application of their defamation law provided at least as much protection as the First Amendment of the United States Constitution, and the constitution and law of the state where the domestic court resides; or that the American defendant would have been liable anyway under the state’s libel law.<sup>183</sup> Second, where applicable, the defendant must prove that the foreign defamation judgment is consistent with Section 230 of the Communications Act of 1934.<sup>184</sup> Finally, the foreign defendant must prove that the foreign court’s exercise of personal jurisdiction over the media defendant comported with the U.S. Constitution’s due process requirements.<sup>185</sup> If a foreign defendant cannot meet these requirements, the state or federal court cannot recognize or enforce the foreign defamation judgment.<sup>186</sup>

The SPEECH Act applies to both state and federal courts; however, a defendant has the discretion to remove the case to federal court with no amount in controversy requirement.<sup>187</sup> The law also provides an award of reasonable attorneys’ fees to the party opposing recognition or enforcement of the foreign defamation judgment.<sup>188</sup> This provision is one-sided, and only provides attorneys’ fees to the party

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<sup>182</sup> Jennifer A. Mansfield, *New Federal Law Protects Authors, Interactive Computer Services from Foreign Defamation Judgments*, HOLLAND & KNIGHT (Sept. 22, 2010), available at <http://www.hklaw.com/id24660/PublicationId2984/ReturnId31/contentid55120/>.

<sup>183</sup> 28 U.S.C. § 4102(a)(1)(A)-(B).

<sup>184</sup> 28 U.S.C. § 4102 (c); Section 230 provides immunity from liability for providers and users of an interactive computer service who publish information by third parties. Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).

<sup>185</sup> 28 U.S.C. § 4102 (b).

<sup>186</sup> *Id.*

<sup>187</sup> 28 U.S.C. § 4103.

<sup>188</sup> 28 U.S.C. § 4105.

opposing enforcement.<sup>189</sup>

The SPEECH Act can also act as a “sword.”<sup>190</sup> It provides that any U.S. person may bring an action in federal court for a declaratory judgment that the foreign defamation judgment is repugnant to the U.S. Constitution (the First Amendment) or the laws of the United States.<sup>191</sup> Additionally, this provision can also serve as a “double-edged sword,”<sup>192</sup> in which the law provides for nationwide service of process, thus making it easier to obtain personal jurisdiction over a foreign defendant.<sup>193</sup> On the other side, though, is the requirement that the domestic plaintiff bears the burden of demonstrating that the foreign defamation law is repugnant.<sup>194</sup> In addition, it appears that the attorneys’ fees provision only applies in an action “to enforce a foreign judgment for defamation,” not for declaratory judgments.<sup>195</sup> Under the Act, declaratory judgment actions seek to declare the foreign defamation judgment invalid, not to enforce it; therefore, it seems to only apply when the media defendant “acts solely in a defensive manner.”<sup>196</sup>

#### VI. IMPACT OF THE SPEECH ACT

The SPEECH Act is a national response to libel tourism. The issues and illustrations described earlier indicate that libel tourism is a global problem in need of a national remedy. However, in order to continue to foster friendly international relations and remain respectful of other countries’ sovereignty, federal legislation needs to carefully balance the interest of protecting American citizens’ First Amendment free speech rights on the one hand, while also being mindful to not overly intrude upon another country’s jurisdiction. The SPEECH Act provides this remedy. Nevertheless, it is uncertain whether the SPEECH Act will have the intended effect, because the balance provides gaps whereby a U.S. person facing litigation abroad may not have the SPEECH Act as protection. Moreover, the problem of libel tourism is international in scope; thus, the most effective solution must be

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<sup>189</sup> *Id.*

<sup>190</sup> Mansfield, *supra* note 180.

<sup>191</sup> 28 U.S.C. § 4104(a)(1).

<sup>192</sup> Mansfield, *supra* note 180.

<sup>193</sup> 28 U.S.C. § 4104(b).

<sup>194</sup> 28 U.S.C. § 4102(a)(2).

<sup>195</sup> 28 U.S.C. § 4105.

<sup>196</sup> Mansfield, *supra* note 180.

international as well.<sup>197</sup> Despite this, the SPEECH Act provides a national solution to libel tourism, and reaches as far as permitted by the U.S. Constitution.

#### A. Libel Perspective

One troubling feature of the SPEECH Act is that it does not define who specifically is a libel tourist.<sup>198</sup> However, in Congress' findings it is clear that the SPEECH Act expressly refers to the problem of persons "obstructing the free expression rights of *United States* authors and publishers."<sup>199</sup> In addition, the cause of action for declaratory relief directly references "Any *United States* person against whom a foreign judgment is entered."<sup>200</sup> Thus, it is evident that the SPEECH Act is limited to those libel plaintiffs who initiate litigation abroad against United States persons for the purpose of capitalizing on the foreign country's plaintiff friendly libel laws. As an illustration, the SPEECH Act would not apply to an Englishman who has assets in the United States, and is sued by another Englishman in England.<sup>201</sup> Because the SPEECH Act directly references United States persons, the Englishman faced with a lawsuit in England is not a United States person as defined by the SPEECH Act.<sup>202</sup>

<sup>197</sup> Justin S. Hemlepp, *Recent Development: "Rachel's Law" Wraps New York's Long-Arm Around Libel Tourists; Will Congress Follow Suit?*, 17 J. TRANSNAT'L L. & POL'Y 387, 391 (2008).

<sup>198</sup> The SPEECH Act only references in its findings that "[s]ome persons are obstructing the free expression rights of United States authors and publishers . . . by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction." 28 U.S.C. §§ 4101-05.

<sup>199</sup> 28 U.S.C. §§ 4101-05 (emphasis added).

<sup>200</sup> 28 U.S.C. § 4104(a)(1) (emphasis added).

<sup>201</sup> Hearing, *supra note 1*, at 90 (Letter from John J. Walsh, Carter Ledyard & Milburn, LLP) (discussing his concern that the proposed bill, H.R. 6164 would also bar enforcement of an Englishman's English libel judgment against a fellow Englishman who has assets in the United States needed to satisfy the judgment).

<sup>202</sup> "The term 'United States person' means—  
 (A) a United States citizen;  
 (B) an alien lawfully admitted for permanent residence to the United States;  
 (C) an alien lawfully residing in the United States at the time that the speech that is the subject of the foreign defamation action was researched, prepared, or disseminated; or  
 (D) a business entity incorporated in, or with its primary location or place of operation in, the United States."  
 28 U.S.C. § 4101(6).

Another problem arises. What if the defamation suit is based on a meritorious claim that an American person or publication sincerely defamed the libel plaintiff? For example, what if an American is sued in England for passing out leaflets in Piccadilly Circus that allegedly defamed an English person? Can this United States person come to the United States and seek declaratory relief that the foreign judgment is unenforceable? The answer must be no. Based on the spirit and language of the SPEECH Act, it is evident that Congress was referring to those libel plaintiffs who purposely seek out foreign countries for their libel laws and when the allegedly defamatory statements have little or no connection to the forum where litigation is initiated.<sup>203</sup> The jurisdictional and declaratory relief provisions of the SPEECH Act provide a means to distinguish between colorable claims that are of legitimate interest to foreign courts and those that are merely abusive.

Most significantly, the SPEECH Act will serve as a solution to the chilling effect that libel tourism has had on so many American publishers and journalists. If an American finds him or herself in the position of defending a defamation suit abroad, he or she can default on the suit and seek declaratory relief in the United States.<sup>204</sup> Since the United States' libel laws favor freedom of expression rather than damage to reputation, it is likely that a U.S. court will find that the foreign court's application of their defamation law does not comport with the First Amendment, especially if the defamation suit is initiated in England.<sup>205</sup>

In addition, the SPEECH Act may have a deterrent effect on libel tourists. If the libel plaintiff is interested in seeking a money judgment from a media defendant who does not have assets in the foreign forum, the libel tourist may reconsider the prospects of filing a defamation suit. If the suit is filed in England, it is highly likely the libel plaintiff will be victorious, but if the judgment cannot be enforced in the United States, then the foreign judgment will effectively be rendered meaningless. Without assets in the country from which the libel plaintiff can collect,

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<sup>203</sup> 28 U.S.C. §§ 4101-05 (Congress' findings state that "Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, *by seeking out foreign jurisdictions* that do not provide the full extent of free-speech protections.") (emphasis added).

<sup>204</sup> 28 U.S.C. § 4104.

<sup>205</sup> See discussion of differences between the United States and England's libel laws, *supra* Part I and II.

the defamation suit is of little value.<sup>206</sup> Furthermore, if the libel tourist chooses to enforce the foreign judgment before the media defendant seeks a declaratory judgment, and the libel tourist loses, he will be subject to reasonable attorneys' fees.<sup>207</sup> Accordingly, the libel tourist has much to lose with the enactment of the SPEECH Act, and it can therefore be a very costly endeavor to protect one's reputation.

On the other hand, for wealthy executives like Bin Mahfouz who often bring these suits,<sup>208</sup> seeking enforcement of the judgment is of no great importance. Rather, these libel tourists initiate litigation to silence American authors and journalists. The defamation suit acts as an intimidation tool to threaten Americans from publishing writings on subjects of international concern, specifically on matters of terrorism.<sup>209</sup> As a result, the SPEECH Act may provide little deterrent effect for these particular libel tourists. However, as discussed above, by seeking a declaratory judgment, the chilling effects are greatly diminished because American authors and journalists will feel less threatened and intimidated by foreign litigation and therefore continue to report on matters of international concern.

### *B. Civil Procedure Perspective*

The SPEECH Act grants a national service of process provision for actions seeking declaratory relief in federal court. This provision will make it easier to obtain personal jurisdiction over a foreign defendant. In other words, personal jurisdiction will be proper so long as the due process minimum contacts requirement is satisfied or specific jurisdiction is obtained.<sup>210</sup> The nationwide service of process provision will allow a court to sustain jurisdiction, provided that the foreign defendant has some connection to the United States; the contacts do not have to be found in a particular forum, but rather the United States as a

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<sup>206</sup> On the other hand, for example, Rachel Ehrenfeld cannot travel to the UK without running the risk of being arrested to enforce Mahfouz's judgment against her. Hearing, *supra note 1*, at 14 (prepared statement of Rachel Ehrenfeld).

<sup>207</sup> 28 U.S.C. § 4105.

<sup>208</sup> Bin Mahfouz posts on his website how often he brings defamation suits against various American authors. See *Bin Mahfouz Information*, BIN MAHFOUZ, [http://www.binmahfouz.info/faqs\\_4.html](http://www.binmahfouz.info/faqs_4.html).

<sup>209</sup> Hearing, *supra note 1*, at 8 (prepared statement of the Honorable Peter King, Representative in Congress from the State of New York).

<sup>210</sup> See *supra* Part II B 1 (discussion of personal jurisdiction).

whole.<sup>211</sup> Courts have repeatedly held that when a federal statute contains a national service of process provision the provision will bestow personal jurisdiction in any federal district court on any defendant with minimum contacts to the United States.<sup>212</sup> This provision ensures that a libel tourist, who may do occasional business throughout the United States, but not enough to satisfy a minimum contacts test in a particular jurisdiction, will still be amenable to suit in a federal court.

However, the SPEECH Act does not assure that personal jurisdiction will be found in all cases. The constitutional requirements must still be satisfied. If the foreign defendant has no contacts sufficient to obtain jurisdiction, the U.S. court will have to dismiss the case for lack of personal jurisdiction, and thus the declaratory judgment cause of action will be of little assistance to the domestic plaintiff. Such an outcome would be unfortunate, but it comports with due process.

New York's Libel Terrorism Protection Act extended New York's long-arm statute to sustain personal jurisdiction over any person who obtains a foreign defamation judgment against a resident of New York or a person amenable to jurisdiction there, regardless of the foreign defendant's ties to the state.<sup>213</sup> Although the law has not been challenged, many critics argue that the jurisdictional provision violates "long-standing principles of due process."<sup>214</sup> The Advisory Committee on Civil Practice has questioned the constitutionality of the provision, and predicted that it would face court challenges.<sup>215</sup> So while the New York law makes obtaining jurisdiction dramatically easier, it is most likely unconstitutional. As a result, the SPEECH Act's jurisdiction provision is the greatest constitutional measure that can be taken, short of an international solution.

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<sup>211</sup> 28 U.S.C. § 4104(b).

<sup>212</sup> See, e.g., *Medical Mutual of Ohio v. DeSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (holding that Congress has the power to confer nationwide personal jurisdiction); *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974) (holding that the Securities Exchange Act of 1934 allows for a national contacts test for personal jurisdiction).

<sup>213</sup> N.Y. C.P.L.R. 302(a) (CONSOL. 2012).

<sup>214</sup> *Staveley-O'Carroll*, *supra* note 36, at 279.

<sup>215</sup> Joel Stashenko, *Civil Practice Committee Finds Fault with Libel Tourism Bill*, N.Y.L.J. March 4, 2008, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1204544930713&srreturn=1&hblogin=1>.

*C. Comity and Reciprocity*

While there are more direct ways to prevent a U.S. author or publisher from defending a suit in a foreign court, for example, through injunctive relief, this would cause great intrusion into the affairs of the foreign tribunal. The SPEECH Act does not go this far. It does not enjoin the foreign court proceedings, but does allow for lack of jurisdiction as an additional ground for non-enforcement and a cause of action for declaratory relief. In this way the SPEECH Act both respects the sovereignty of other countries, while also protecting Americans' First Amendment rights.<sup>216</sup> The doctrine of comity allows a U.S. court to enforce a foreign judgment, so long as it was rendered by a fair and impartial process.<sup>217</sup> Similarly, a U.S. court can refuse enforcement of a foreign judgment if the laws of the foreign court do not comport with the laws and Constitution of the United States on grounds of public policy. These principles are not affected by the SPEECH Act. The law does not automatically render a foreign defamation judgment unenforceable. Rather, the party seeking enforcement, or the party seeking declaratory relief, must prove that the foreign court's defamation law offends the principles of the First Amendment.<sup>218</sup>

A declaration by a U.S. court that a foreign judgment is repugnant to the First Amendment will give United States publishers a mechanism and the comfort necessary to continue to publish their material, regardless of a contrary verdict in England. For example, Bin Mahfouz would not have been able to deter Rachel Ehrenfeld from publishing similar allegations or material. Ehrenfeld does not have to wait for Mahfouz to come to the United States to enforce his judgment against her, but rather empowers Ehrenfeld to respond proactively.

*D. Is the SPEECH Act Necessary?*

The problems posed by libel tourism make clear that the *Ehrenfeld* decision is not just an atypical case, and does not stand as an outlier. Instead, libel tourism is a major threat to American authors and publishers and to the First Amendment in general. As the many illustrations and cases indicate, the readiness of British libel law judges to generously extend the jurisdiction of their courts allows foreign

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<sup>216</sup> See *supra* note 200 (SPEECH Act's definition of a United States person).

<sup>217</sup> See *supra* Part IV (discussion of comity).

<sup>218</sup> 28 U.S.C. §§ 4101-05.



claimants to bring suit even when the allegedly defamatory statement has a tenuous connection to the United Kingdom.<sup>219</sup> Although libel tourism does threaten the First Amendment, the need for a federal response is debatable. The tide seems to be turning in England, as recent commentary suggests that England's archaic libel jurisprudence may be changing.<sup>220</sup> In addition, other remedies for libel tourism exist. Such remedies include a public policy argument and a proposed federal statute that would create a uniform national rule for enforcement of foreign country judgments not limited to the concern of libel tourism.

### 1. England's Reaction to Libel Tourism

Even though libel tourism is a problem of international concern, it could arguably be stated that with the existing law and various doctrines already in place, the SPEECH Act is unnecessary legislation. To begin with, there is reason to believe that England, the libel capital, is in the process of amending their defamation laws. An article from Economist.com hinted that concerns are being expressed in Britain regarding their defamation law.<sup>221</sup> Denis MacShane, a senior Labour MP, stated in a debate in the House of Commons, that libel tourism is "an international scandal" and "a major assault on freedom of information."<sup>222</sup> In addition, the article stated that a parliamentary committee dealing with the media has "received a large number of submissions from people worried about libel tourism."<sup>223</sup>

Furthermore, as discussed previously, British defamation case law provides for exceptions to the traditional plaintiff-friendly standards. In particular, in *Jameel v. Wall Street Journal*, the British court recognized a defense to libel since the allegedly defamatory article dealt with a matter of genuine public interest.<sup>224</sup> In addition, the disputed statement made a proper contribution to the whole force of the publication, the publisher acted reasonably and fairly in obtaining the material, and the

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<sup>219</sup> See Hearing, *supra* note 1, at 153 (response to post-hearing questions from Laura R. Handman, Davis Wright Tremaine, LLP) (citing recent examples of Britain's generous jurisdictional reach).

<sup>220</sup> See *infra* Part VI D 1 (discussion of England's reaction to libel tourism).

<sup>221</sup> *Are English Courts Stifling Free Speech Around the World?*, ECONOMIST.COM, Jan. 8, 2009, available at <http://www.economist.com/node/12903058>.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Jameel v. Wall St. Journal S.P.R.L.* [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.).

disputed article was of important public interest.<sup>225</sup> The defense in *Jameel* is also known as the “responsible journalism” exception, which allows a defendant to publish the disputed material if the statements are researched and presented professionally and the subject matter is in the public interest.<sup>226</sup>

As a result, if Britain changes its defamation law, the SPEECH Act will be deemed unnecessary for a majority of libel tourism suits. However, English defamation law is deeply rooted, and thus highly unlikely to reach the high level of protection one finds in the First Amendment to the United States Constitution in the near future. On the other hand, with the passage of the SPEECH Act, the British legislature and courts may become more compelled to amend their defamation laws in the direction of First Amendment protection of the press. In other words, if American publishers and journalists choose not to publish in England out of fear of a defamation suit, there will be more incentive to amend British defamation law.<sup>227</sup>

## 2. Redundancy

A related issue to the comity and reciprocity concerns is one of redundancy. U.S. courts have already refused to enforce foreign defamation judgments. As discussed previously, in *Bachchan* and *Telnikoff*, the courts, on grounds of public policy, refused to enforce the British libel judgments, concluding that the foreign judgments were repugnant to the First Amendment. With these cases as precedent, other U.S. courts may decide that they have the authority to refuse enforcement, without the protection of the SPEECH Act.

In addition, there is a proposed federal statute creating a uniform national rule for enforcement of foreign country judgments that has

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See UNITED KINGDOM MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL CONSULTATION PAPER CP3/11 (March 2011), <http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf>, (proposing a new Defamation Bill that will issue in the next few months that seeks to reduce the chilling effect on freedom of expression that exists due to the present law); see generally *What Does Lord Lester's Defamation Bill Propose?*, GUARDIAN.CO.UK, May 27, 2010, available at <http://www.guardian.co.uk/law/2010/may/27/lord-lester-defamation-bill-analysis>; *Criticized Libel Laws to Change*, PRESSTV, Jan. 11, 2011 available at <http://www.presstv.ir/detail/159744.html>.

been adopted by the American Law Institute (ALI).<sup>228</sup> The recommended legislation authorizes negotiation of agreements with foreign countries, regarding reciprocal enforcement of each other's judgments.<sup>229</sup> The legislation also offers incentives to foreign countries and their courts to enforce the judgments from the United States.<sup>230</sup>

On the other hand, the SPEECH Act provides a visible, targeted response to the chilling effects of libel tourism. While U.S. courts have refused enforcement of foreign defamation judgments, there is no federal law mandating the recognition or refusal. The Uniform Foreign Money Judgments Recognition Act has been adopted at the state level, but not all states have adopted it, and those who have, have adopted inconsistent versions.<sup>231</sup> Therefore, one state may refuse enforcement as repugnant to the public policy of the state; another state may recognize the foreign judgment. In order for an American author or journalist to be fully protected and certain that they will be protected by the laws of the United States, the federal response was necessary. With the enactment of the SPEECH Act, there is little doubt that all American authors and publishers are bound by the principles set forth in the First Amendment.

### CONCLUSION

The SPEECH Act provides a national response to the practice of libel tourism. Although the Act will not deter all foreign defamation litigation abroad, it is a step in the right direction. The gaps that are found in the legislation are constitutionally inevitable. Short of an international solution, the SPEECH Act reaches as far as constitutionally permissible. In addition, the SPEECH Act reminds United States citizens of America's commitment that "debate on public issues should be uninhibited, robust, and wide-open."<sup>232</sup> The SPEECH Act stands as a forceful barrier for those who wish to circumvent the First Amendment and undo the free speech protections that hold an acclaimed place in American society.

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<sup>228</sup> RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1-6, *available at* [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=82](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=82) (Proposed Federal Statute drafted by the American Law Institute).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *See supra* note 153.

<sup>232</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).