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Cover Page Footnote

J.D., Certificate in International Law, Florida State University College of Law, 2008; B.A. in Political Science, B.S. in Journalism, University of Florida, 2005. The author would like to express his sincere gratitude for the support and encouragement of his family and friends, without whom so much would have been impossible.

“RACHEL’S LAW” WRAPS NEW YORK’S LONG-ARM AROUND LIBEL TOURISTS; WILL CONGRESS FOLLOW SUIT?

JUSTIN S. HEMLEPP*

State and federal legislators have recently made significant efforts to protect American publishers from foreign courts that apply foreign laws effectively chilling speech in the United States.¹ So-called libel tourism, or international forum shopping by libel plaintiffs looking for friendly jurisdictions, has become increasingly prevalent in the past decade.² The most popular destinations for libel tourists tend to be traditional common law countries, particularly England, where the availability of even one copy of a defamatory writing creates jurisdiction and a cause of action,³ and where, unlike in the United States, defamation jurisprudence is exceedingly plaintiff-friendly.⁴ The Internet’s impact on this scheme cannot be overestimated.⁵

While forum-shopping plaintiffs are not a new Internet-related phenomenon, in the wake of the Australian High Court of Justice’s landmark ruling in *Dow Jones v. Gutnick*,⁶ publishers the world over have awakened to the prospect of being hauled into courts “from Afghanistan to Zimbabwe”⁷ to face libel plaintiffs. In *Gutnick*, the High Court applied the traditional common law of defamation to the Internet and held that the act of publication takes place where the material complained of is comprehended by a reader.⁸ An Australian court was therefore not a clearly inappropriate forum for an American media defendant accused of

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1. See, e.g., Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. (2008), available at <http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5814>: (last visited July 9, 2008); Libel Terrorism Protection Act, N.Y. C.P.L.R. 302(d), 5304(b)(8) (McKinney 2008).

2. Doreen Carvajal, *Britain, a destination for “libel tourism”*, INT’L HERALD TRIBUNE, Jan. 20, 2008, available at <http://www.iht.com/articles/2008/01/20/business/libel21.php> (last visited Jan. 9, 2008); see Richard N. Winfield, *Globalization Comes to Media Law*, 1 J. INT’L MEDIA & ENT. L. 109, 109-10 (2006).

3. See UTA KOHL, JURISDICTION AND THE INTERNET 122-23 (2007).

4. Carvajal, *supra* note 2.

5. See generally Ashley Packard, *Wired But Mired: Legal System Inconsistencies Puzzle International Internet Publishers*, 1 J. INT’L MEDIA & ENT. L. 57 (2006) (examining “transnational approaches to private international law involving material on the Internet”).

6. (2002) 210 C.L.R. 575 (Austl.).

7. *Id.* at 609.

8. *Id.* at 606-07.

defaming a Victoria resident in an American Internet publication that enjoys paltry readership down under.⁹ The ruling, which was quite unremarkable outside the United States,¹⁰ sent shivers down the spines of publishers now worried about potential worldwide liability for their online actions.¹¹

The fears were well-founded. A legal industry specializing in holding American publishers to account in foreign courts has developed in common law countries, and libel plaintiffs have not failed to take advantage of the situation.¹² Indeed, “[l]ibel tourism is alive and well in London, the world’s most hospitable forum for well-heeled plaintiffs from Russia, Saudi Arabia and the United States seeking to sue American media outlets.”¹³

Among the most well-known examples of libel tourism is the case of author Rachel Ehrenfeld and the wealthy Saudi businessman Khalid bin Mahfouz, whom the author wrote in her book, “Funding Evil: How Terrorism is Financed – and How to Stop It,” was an Al Qaeda financier.¹⁴ The businessman sued the author in England.¹⁵ But Ehrenfeld, whose book was not distributed in England, refused to appear.¹⁶ The English court thus entered a default judgment against her.¹⁷

Ehrenfeld then sought from the U.S. District Court for the Southern District of New York a declaratory judgment that the foreign judgment was unenforceable.¹⁸ The District Court found it could not exercise personal jurisdiction over Bin Mahfouz under the state’s long-arm statute because he had insufficient contacts with New York.¹⁹ During the appeal of the District Court’s

9. *Id.* at 609.

10. *See, e.g.*, Michael Saadat, *Jurisdiction and the Internet after Gutnick and Yahoo!*, J.INFO. L. & POL. (2005), available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_1/saadat/ (last visited July 9, 2008).

11. *See, e.g.*, Editorial, *A Blow to Online Freedom*, N.Y. TIMES, Dec. 11, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9D05E7DE143AF932A25751C1A9649C8B63&sec=&spon=&pagewanted=print>; Press Release, *Court decision jeopardises freedom of expression on the Internet*, Reporters Without Borders, Dec. 12, 2002, available at <http://www.ifex.org/en/content/view/full/18113> (last visited July 9, 2008); Douglas McCollam, *Dateline Everywhere? How the Web may make us vulnerable to long-distance libel*, COLOM. JOURNALISM REV., May/June 2003 at 10; *Publish and be damned (or at least sued)*, LAWYERS WEEKLY MAGAZINE (Aust.), Nov. 26, 2004.

12. *See* Winfield, *supra* note 2, at 110.

13. *Id.*; *see also* Samuel A. Abady & Harvey Silvergate, Op-Ed, ‘Libel tourism’ and the war on terror, BOSTON GLOBE, Nov. 7, 2006, available at http://www.boston.com/ae/media/articles/2006/11/07/libel_tourism_and_the_war_on_terror/.

14. *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 *1 (S.D.N.Y. Apr. 26, 2006).

15. *Id.*

16. *Id.*

17. *Id.* at *2.

18. *Id.* at *1.

19. *Id.* at *5.

decision, the U.S. Court of Appeals for the Second Circuit certified a question to New York's highest court, the Court of Appeals: What is the scope of the State's long-arm statute?²⁰

The N.Y. Court of Appeals found that foreign parties must have contacts that further a business objective in order to trigger the long-arm statute.²¹ Bin Mahfouz's cease-and-desist letters and service of documents related to his action against Ehrenfeld did not further a business objective, the court explained, so New York therefore enjoyed no personal jurisdiction over him.²² In other words, the English judgment against Ehrenfeld could not be declared unenforceable in New York.

New York's State Assembly reacted quickly to the State Court of Appeals ruling, passing unanimously the Libel Terrorism Protection Act, or Rachel's Law.²³ Gov. David Paterson signed the bill into law April 30, 2008.²⁴ Rachel's Law, which amends New York's Civil Practice Law and Rules, provides that the state's courts have personal jurisdiction over libel tourists when New York publishers seek to have the tourists' prevailing judgments declared unenforceable.²⁵ Additionally, it makes clear that foreign judgments emanating from laws that run contrary to U.S. constitutional press guarantees need not be enforced in New York courts.²⁶

Rachel's Law was hailed by the press²⁷ and media advocacy groups.²⁸ Ehrenfeld herself was also praised for "the role she played in creating this country's first haven against foreign libel judgments."²⁹ However, as noted by Governor Paterson at the bill's signing, a federal law on point is needed to protect non-New Yorkers. "Although New York State has now done all it can to

20. Ehrenfeld v. Bin Mahfouz, 489 F.3d 542, 551 (2d Cir. 2007).

21. Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 834-38 (N.Y. 2007).

22. *Id.*

23. Assemb. B. 9652, 2007 Leg., 230th Sess. (N.Y. 2008) (identical companion to S. 6687). See Posting of Matthew Pollack to the Reporters Committee for Freedom of the Press' Sidebar, <http://www.rcfp.org/sidebar/index.php?op=keyword&key=91> (April 1, 2008) (last visited July 9, 2008).

24. Press Release, *Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments*, May 1, 2008, available at http://www.ny.gov/governor/press/press_0501082.html (last visited July 9, 2008).

25. N.Y. C.P.L.R. 302(d) (McKinney 2008).

26. N.Y. C.P.L.R. 5304(b)(8) (McKinney 2008).

27. See, e.g., Editorial, *Sign Rachel's Law*, N.Y. POST, April 29, 2008, available at http://www.nypost.com/seven/04292008/postopinion/editorials/sign_rachels_law_108609.htm

28. See, e.g., Douglas Lee, Commentary, *N.Y. protects authors against foreign libel judgments*, FIRST AMENDMENT CENTER ONLINE, May 12, 2008, available at <http://www.firstamendmentcenter.org/commentary.aspx?id=20033> (last visited July 9, 2008); Posting of Matthew Pollack, *supra* note 23.

29. Lee, *supra* note 28.

protect our authors while they live in New York, they remain vulnerable if they move to other states, or if they have assets in other states," Paterson said, according to a press release.³⁰ "We really need Congress and the President to work together and enact federal legislation that will protect authors throughout the country against the threat of foreign libel judgments."³¹

Congress appears to have heeded the call. Proposed legislation prohibiting enforcement of foreign libel judgments offensive to the First Amendment is now working its way through both houses on Capitol Hill. The Free Speech Protection Act of 2008, introduced in the House of Representatives by Rep. Peter King (R-N.Y.) on April 16, 2008³² and in the Senate by Sen. Arlen Specter (R-Pa.) on May 6, 2008,³³ would create a federal cause of action for American publishers defending against foreign defamation suits where "the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law."³⁴ The bill would also establish U.S. jurisdiction over the plaintiff bringing the foreign libel suit.³⁵ If the American defendant in the foreign suit proves the foreign action or judgment is contrary to First Amendment guarantees, "the district court *shall* order that any foreign judgment in the foreign lawsuit in question may not be enforced in the United States"³⁶ and may award injunctive relief.³⁷

The bill also would make damages available to an American defendant in a foreign libel suit based on "[t]he amount of the foreign judgment . . . [t]he costs, including all legal fees, attributable to the foreign lawsuit that have been borne by [the American defendant] . . . [and t]he harm caused . . . due to decreased opportunities to publish, conduct research, or generate funding."³⁸ Treble damages would be available where it is determined

that the person or entity bringing the foreign lawsuit at issue intentionally engaged in a scheme to suppress First Amendment rights by discouraging

30. Press Release, *supra* note 24.

31. *Id.*

32. Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. (2008), available at <http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5814>: (last visited July 9, 2008).

33. Free Speech Protection Act of 2008, S. 2977, 110th Cong., 2d Sess. (2008), available at <http://www.thomas.gov/cgi-bin/query/z?c110:S.2977>: (last visited July 9, 2008).

34. H.R. 5814 § 3(a).

35. H.R. 5814 § 3(b).

36. H.R. 5814 § 3(c)(1) (emphasis added).

37. *Id.*

38. H.R. 5814 § 3(c)(2)(a-c).

publishers or other media not to publish, or discouraging employers, contractors, donors, sponsors, or similar financial supporters not to employ, retain, or support, the research, writing, or other speech of a journalist, academic, commentator, expert, or other individual [. . .]³⁹

As of this writing, the House version of the bill is before the Subcommittee on Courts, the Internet, and Intellectual Property.⁴⁰ Its identical Senate companion is before the Judiciary Committee.⁴¹

Rachel's Law and its proposed federal counterpart, though steps in the right direction, are wholly insufficient to eradicate the issue of global forum shopping by libel plaintiffs. For instance, publishers with assets outside the United States would not be cloaked by the proposed federal law, and non-New Yorkers are not protected by Rachel's Law. As the problem of libel tourism is international in scope, the solution is necessarily international as well.⁴² Agreement on such a solution is unlikely in the near term, however, because the interests implicated by defamation are linked to a society's core values.⁴³ According to Columbia law professor Richard Winfield, "[t]o learn the law of defamation of a nation is to glimpse into that society's tolerance for dissent and freedom to criticize the powerful."⁴⁴ American tolerance for critical journalism, anchored in the *N.Y. Times v. Sullivan*⁴⁵ line of cases, is notably higher than in all other countries. Persuading a world wary of "American legal hegemony"⁴⁶ to abandon its traditions and instead embrace American-style press freedoms is a mammoth, if not impossible, task indeed.

39. H.R. 5814 § 3(d).

40. Search Results, The Library of Congress, THOMAS, H.R. 5814, available at <http://www.thomas.gov/cgi-bin/bdquery/z?d110:h.r.05814>: (last visited July 9, 2008).

41. Search Results, The Library of Congress, THOMAS, S. 2977, available at <http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN02977>: (last visited July 9, 2008).

42. See Packard, *supra* note 5, at 96 ("governments are going to have to negotiate a solution").

43. See *id.* at 89-92 (detailing Hague talks toward a convention on the jurisdiction and recognition of foreign judgments and the failure of U.S. and E.U. negotiators to agree on when jurisdiction in tort cases should exist).

44. Winfield, *supra* note 2, at 116.

45. 376 U.S. 254 (1964).

46. *Gutnick*, 210 C.L.R. at 653-54 (Callinan, J., concurring) (Austl.).

