

# U.S. libel tourism law silences foreign courts

Fears that libel tourism — the practice of bringing libel actions in “plaintiff friendly” jurisdictions — is part of a terrorist ploy to suppress speech, have led to the creation of U.S. legislation hailed as championing First Amendment rights. What the American media are not saying is that the new legislation may be unconstitutional and in violation of the principle of comity.

The *Libel Terrorism Protection Act*, passed in New York State in 2008, prevents the enforcement of foreign libel judgments where the foreign law applied does not afford the same level of protection for freedom of speech as U.S. law. *The New York Times* endorsed the “good bill” given that libel protections elsewhere are “notoriously weak.”

The Act and its unusual name are the result of lobbying by New York author Rachel Ehrenfeld, who was sued for libel in the U.K. by a Saudi Arabian businessman, Khalid Bin Mahfouz. In her 2003 book, *Funding Evil*, Ehrenfeld claimed that Mahfouz and his family funded terrorist groups — a claim which Mahfouz vehemently denies.

Mahfouz obtained a default judgment, but

never sought to have it enforced. Ehrenfeld nevertheless sought a declaration in New York that the U.K. judgment was unenforceable.

The New York State Court of Appeals found that there was no basis to assume personal jurisdiction over Mahfouz. The Act amends New York’s jurisdiction provisions related to non-residents to provide New York courts the jurisdiction they lacked in *Ehrenfeld v. Mahfouz*. Defendants in foreign libel actions now have a basis to seek a pre-emptive declaration of unenforceability in New York.

This legislation reflects the significant differences between libel litigation in the U.S. and other countries. Due to constraints placed on libel law by the First Amendment, libel plaintiffs in the U.S. have to show fault, that is, knowledge that the defamatory statement is



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untrue, or recklessness.

Traditionally, in the U.K., Canada and many other jurisdictions in cases with non-media defendants, the plaintiff need only establish that material is defamatory. After that, the onus is on the defendant to prove that the statement made was true or to raise another defence. As no jurisdiction outside the U.S. offers the same level of protection for freedom of speech, the Act essentially gives the libel defendant a mechanism to render most foreign libel judgments unenforceable in New York.

This Act is troubling for a number of reasons. New York lawyers, including media lawyer

dian courts retain the fundamentals of libel law.

The second fundamental point is jurisdictional. The due process clause of the American constitution requires a foreign defendant to have minimum contacts with the U.S. jurisdiction and that assumption of jurisdiction is reasonable. In short, it must be foreseeable that the foreign defendant could, as a result of their actions, be “hailed into court” in New York. A foreign plaintiff would likely be surprised to become a defendant in a New York action merely because he or she obtained a libel judgment against an individual with ties to New York.

Ironically, because Ehrenfeld had a tenuous connection to the U.K. (the book was never published there, although roughly 20 copies were sold there online and a chapter of the book was accessible on the Internet), it is

likely that Mahfouz’s judgment would not have been enforceable in the U.S. The new legislation undermines the very due process protections that would have shielded Ehrenfeld (see, for example, *Telnikoff v. Matusevich*, 347 Md. 561 (Ma. 1996)).

Ehrenfeld is currently lobbying for similar legislation at the federal level, and last year,

Senator Joe Lieberman introduced the *Free Speech Protection Act* in the Senate. The bill did not pass in 2008 and was reintroduced on Feb. 13.

Like the New York legislation, the bill allows U.S. defendants of successful foreign libel suits to sue the plaintiff in a U.S. court before any step is taken to enforce the foreign judgment. The U.S. defendant-turned-plaintiff may also sue for damages (and in some cases treble damages) for their foreign legal fees, the amount of the foreign judgment and for impairment to their ability to work arising from the suit. ■

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John Walsh, senior counsel at Carter, Ledyard & Milburn LLP, have articulated some of these concerns.

The first significant concern is that the Act effectively extends First Amendment protections beyond U.S. borders and shelters media with ties to New York from foreign libel judgments purely on the basis of superficial differences in the foreign jurisdiction’s libel laws. This violates the international legal principle of comity, which calls for mutual respect for the laws of sovereign states.

In Canada, for example, the Supreme Court has specifically considered and rejected the U.S. First Amendment standard for libel (see *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130). Pursuant to the Act, no Canadian libel decision will be enforceable in New York regardless of the merits, unless Cana-