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Expert Analysis

SPEECH Act Strikes a Blow Against Libel Tourism

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"Libel tourism" is a term used to describe a type of forum shopping in which a plaintiff chooses to file a libel suit in a jurisdiction that is believed to be more likely to provide the plaintiff with a favorable result, and then tries to enforce that judgment in a less libel-friendly forum, such as the United States. Earlier this year, President Barack Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act). Though bombastically named, the statute provides real protection for authors and publishers against libel tourism. It follows on the heels of a similar law passed in New York in 2008.

A paradigm used often to illustrate the libel tourism problem is a defamation suit by a public figure brought in England. Under English law, a defamatory statement is presumed to be false unless the defendant can prove its truth, an often difficult task. Compare that to a libel case brought in the United States by a public figure, where the plaintiff would have the burden of proving actual malice—i.e., that the statement was published with knowledge that it was false or with reckless disregard to its truth.[1]

In today's world of globalized publications and Internet sales, it is almost impossible for an author to limit the reach of her writings to just one country. Thus, if some rich and powerful individual or multinational corporation does not like what was written about them, it would probably not be that difficult to find that offending writing in England. With that, the author can be sued in England and, since many authors would not be able to afford the cost and other burdens of such a foreign lawsuit, but could be financially liable in the event a defamation judgment from England is later enforced in the United States, there is a real risk of a chilling effect on free speech.

The 'Ehrenfeld' Case

The poster child for the ills of libel tourism is Rachel Ehrenfeld, the author of a 2003 book titled "Funding Evil: How Terrorism Is Financed—and How to Stop It." In the book, Ms. Ehrenfeld wrote that Khalid Salim A Bin Mahfouz—a Saudi Arabian businessman, financier and former head of the National Commercial Bank—and his family had provided direct and indirect monetary support to al-Qaeda and other Islamist terror groups.

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"Funding Evil" was published in the United States. However, 23 copies were purchased in the United Kingdom via the Internet and a chapter of the book, accessible from the ABCNews.com Web site, was also available in the U.K. Mr. Bin Mahfouz sued for libel in the English courts. The English court entered a default judgment against Ms. Ehrenfeld and then entered a money judgment (for about $230,000) and an order requiring that Ms. Ehrenfeld publish an apology.

Ms. Ehrenfeld brought a suit of her own in federal court in New York, seeking a declaratory judgment that, under federal and New York law, Mr. Bin Mahfouz could not prevail on a libel claim against her based upon the statements at issue in the English lawsuit and that the default judgment was unenforceable. When Mr. Bin Mahfouz moved to dismiss for lack of subject matter and personal jurisdiction, the U.S. Court of Appeals for the Second Circuit certified the personal jurisdiction issue to the New York State Court of Appeals.

The Court of Appeals held that there was no personal jurisdiction over Mr. Bin Mahfouz. According to the Court, none of Mr. Bin Mahfouz's relevant New York contacts invoked the privileges or protections of New York's laws, as would be required to establish jurisdiction; to the contrary, his communications in the state were intended to further his assertion of rights under the laws of England.

The Court also explained that the alleged effects of threatened enforcement of the English judgment may benefit Mr. Bin Mahfouz by chilling Ms. Ehrenfeld's speech in New York, but those effects did not arise from his invocation of the privileges and benefits of New York's laws; rather, they arose from an English remedy and Ms. Ehrenfeld's unilateral activities in New York. The Court remarked that jurisdiction was constitutionally permissible under these circumstances, but that New York was a state in which personal jurisdiction was limited to the specific situations included in the CPLR and the Legislature had not authorized personal jurisdiction for this set of facts.

In response to this decision, New York enacted "Rachel's Law" in 2008. Section 5304 of the CPLR was amended to provide that a foreign judgment need not be enforced if the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States unless the New York court first determined that the defamation law applied in the foreign court's adjudication provided

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at least as much protection for freedom of speech and press as would be provided by both the U.S. and New York constitutions. The law was also changed to provide for personal jurisdiction in a declaratory judgment action against a person who obtains a defamation judgment outside the United States against a New York resident for publications made in New York. CPLR 302 (d).

The Federal Response

Others outside the United States have also voiced concerned about libel tourism. In 2008, the United Nations Human Rights Commission warned that libel laws in Britain—the most popular destination for libel tourists—"served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as libel tourism."[2] Inside the United States, New York was not the only state to act. California, Florida, Illinois, Maryland, Utah and Tennessee all passed libel tourism laws. But this still left authors and publishers with only patchwork protection. The SPEECH Act filled the void.

The main provision of the federal statute is similar to the New York law. It provides that a federal or state court in the United States "shall" not recognize or enforce a foreign defamation[3] judgment unless the court determines that:

> [T]he defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.

28 U.S.C. 4102(a)(1)(A). Alternatively, the party seeking to enforce the foreign judgment may establish that the defendant would have been found liable by a U.S. court that applied U.S. libel standards, including the First Amendment. 28 U.S.C. 4102(a)(1)(B). In either situation, the burden of proof is on the party seeking to enforce the judgment.

Further protection was provided through a jurisdiction requirement. That is, a court in the United States may not recognize or enforce a foreign judgment for defamation unless the court determines that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States." 28 U.S.C. §4102(b). Moreover, an appearance by a party in the foreign proceeding giving rise to the judgment does not prevent the party from invoking the SPEECH Act. 28 U.S.C. §4102(d). And, as a procedural matter, the statute provides for removal to federal court of an action to enforce a foreign defamation judgment if (i) any plaintiff is a citizen of a state different from any defendant, (ii) any plaintiff is a citizen of a foreign state and any defendant is a citizen of a state, or (iii) any plaintiff is a citizen of a state and any defendant is a citizen of a foreign state. 28 U.S.C. §1403.

Another form of protection in the federal statute is that, as was the case with the New York statute, the author does not have to wait for the judgment holder to seek to enforce the judgment. Rather, in a provision added to the bill by the Senate, the person against whom a foreign judgment has been entered on the basis of a writing or other speech may seek a declaration that the judgment is repugnant to the Constitution or laws of the United States. 28 U.S.C. §4104.

As a final disincentive against libel tourism, Congress went even further than New York did. The SPEECH Act provides that if a party successfully opposes a proceeding seeking recognition or enforcement of a foreign defamation judgment under the act, the court "shall, absent exceptional circumstances," allow reasonable attorney's fees. 28 U.S.C. §4105. Interestingly, attorney's fees are not specifically authorized in a case in which the person against whom the judgment was entered seeks declaratory relief. And, one also wonders whether Congress could have gone even further and allowed victims of libel tourism to be paid the legal fess incurred in fighting the libel case in the foreign jurisdiction as well.

Conclusion

The SPEECH Act certainly strikes a blow against libel tourism and is beneficial to U.S. authors and publishers. At the same time, it is not unlikely to eliminate the practice. Defendants with assets outside the United States must still be concerned about plaintiffs obtaining judgments in libel-friendly jurisdictions and then enforcing them where the assets are located. This is especially simple if the assets are located in a European Union country, which will be obligated to enforce an English judgment under the Brussels Regulation. And, the fact that the SPEECH Act provides for a remedy does not mean that some speech will nonetheless be chilled, simply because authors will not want to risk having to go through the litigation process.

Admittedly, some of these lingering reservations are seemingly beyond the control of U.S. legislation. Thus, the focus should be on the fact that Congress took strong action on matters that were within its control. Indeed, especially in the partisan Washington of 2010, passing any legislation unanimously is an accomplishment. The fact that the SPEECH Act did not cure all ills should not detract from its being a significant benefit to American authors and publishers.

1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. U.N. Doc. CCPR/C/GBR/CO/6 (2008).

3. "Defamation" is defined as "defamation, libel, slander, or similar claim…." 28 U.S.C. §4101(1).