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## Nearly Toothless: Why the Speech Act is Mostly Bark, with Little Bite

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## NOTE

### NEARLY TOOTHLESS: WHY THE SPEECH ACT IS MOSTLY BARK, WITH LITTLE BITE

#### I. INTRODUCTION

In 1990, after his first appearance as the title character in *The Terminator*,<sup>1</sup> and before his stint as the thirty-eighth Governor of California,<sup>2</sup> Arnold Schwarzenegger found himself trying to squelch a public relations nightmare.<sup>3</sup> Two years earlier, celebrity journalist Wendy Leigh supplied information to a writer of a front-page story in Rupert Murdoch's *News of the World*, which claimed that Schwarzenegger was a Hitler admirer who held "fervent Nazi and anti-Semitic views."<sup>4</sup> By 1990, Leigh was on the verge of publishing an unauthorized biography filled with allegations of Schwarzenegger's past homosexual experiences, use and sale of steroids, and criminal history.<sup>5</sup> Leigh claimed that Schwarzenegger waged a campaign to halt the publication and sabotage the promotion of her book.<sup>6</sup> Schwarzenegger's publicist allegedly offered money to Leigh's publisher to drop the biography and threatened television producers who wanted to feature

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1. THE TERMINATOR (Hemdale Film 1984). The film marked Arnold Schwarzenegger's first of three appearances as the Terminator in a franchise created by director James Cameron. See *James Cameron*, IMDB, <http://www.imdb.com/name/nm0000116/> (last visited Mar. 1, 2012).

2. *Arnold Schwarzenegger*, STATE OF CAL., <http://governors.library.ca.gov/38-Schwarzenegger.html> (last visited Mar. 1, 2012) (stating that Governor Schwarzenegger took office in 2003).

3. See generally Neal Koch, *The Hollywood Treatment: The Terminator at Work?*, COLUM. JOURNALISM REV., Jan.-Feb. 1991, at 25, 28-29 (reporting on claims of Schwarzenegger's "heavy-handed campaign" to suppress the publication of Wendy Leigh's book, which contained damaging information about Schwarzenegger).

4. LAURENCE LEAMER, *FANTASTIC: THE LIFE OF ARNOLD SCHWARZENEGGER* 193-94 (2005) (internal quotation marks omitted). The article alleged that Schwarzenegger's father "had personally directed the rounding up of Jews to be taken to concentration camps." *Id.* Although Leigh was given a joint byline on the story, she did not take part in writing it. *Id.* at 194.

5. Charles Fleming, *Arnie's Army*, SPY, Mar. 1992, at 60, 63. *Time* correspondent James Willwerth verified Leigh's research, claiming that the biography "was very well reported." Koch, *supra* note 3, at 28 (internal quotation marks omitted).

6. Koch, *supra* note 3, at 28.

Leigh on their shows.<sup>7</sup> Nonetheless, attempts to suppress the dissemination of Leigh's work failed—that is, until Schwarzenegger sued Leigh and *News of the World* for libel.<sup>8</sup> When Schwarzenegger pursued the libel lawsuit in the United Kingdom, he became one of the world's first “libel tourists”<sup>9</sup>—a well-heeled public figure, scorned by a scandalous publication and seeking redress in a court outside the United States with plaintiff-friendly libel laws.<sup>10</sup>

Because U.K. libel law required *News of the World* to prove not only that it believed what it had published, but also that what it had published was actually the truth and important for the public to know, the paper settled with Schwarzenegger for £30,000.<sup>11</sup> Leigh, who initially claimed that the lawsuit was harassment, settled out of court in 1993 after her Schwarzenegger biography suffered disappointing sales.<sup>12</sup> She paid Schwarzenegger substantial damages and legal fees and publicly apologized for the *News of the World* article, stating that there was “not a word of truth” in it.<sup>13</sup> When later commenting on the Leigh debacle, Schwarzenegger allegedly said: “Everybody in [the United States] has the freedom to say what he or she wants to, but I sometimes think there is too much of that commodity for my taste.”<sup>14</sup>

Since 1990, libel tourism—the practice of forum shopping in non-U.S. courts whose defamation laws do not afford First Amendment-type protections to authors and publishers—has grown in popularity.<sup>15</sup> From

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7. *Id.* at 28-29.

8. LEAMER, *supra* note 4, at 194.

9. See Mark Stephens, Partner, Finers Stephens Innocent, Remarks at the Authors Guild Foundation Panel Discussion: Rules, Britannia! The Growing, Chilling Reach of Commonwealth Libel Laws (Sept. 25, 2006) (transcript available at [http://www.authorsguild.org/publications/seminar\\_transcripts/rules.html](http://www.authorsguild.org/publications/seminar_transcripts/rules.html)) (stating that Arnold Schwarzenegger “was the first libel tourist to climb aboard the Concorde and come over to London in three and a half hours in order to skip up the Strand with a writ in his hand merrily to issue it against an American authoress named Wendy Leigh”).

10. Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 468 (2010) (defining a “libel tourist” as a forum shopper who shuns the United States in order to file “a defamation lawsuit against a U.S. defendant in a forum with plaintiff-favoring defamation doctrines”).

11. LEAMER, *supra* note 4, at 194-95; Koch, *supra* note 3, at 29. The British paper also issued a public apology, stating that “there was no truth to any of the allegations.” LEAMER, *supra* note 4, at 195.

12. LEAMER, *supra* note 4, at 195-96; Koch, *supra* note 3, at 29.

13. LEAMER, *supra* note 4, at 196 (internal quotation marks omitted).

14. Fleming, *supra* note 5, at 64 (internal quotation marks omitted).

15. See *Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 49 (2009) [hereinafter *Libel Tourism Hearing*] (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP). The topic of libel tourism is so popular that it has even made primetime television. In an episode of *The Good Wife*, an American legal drama airing on CBS, Alicia Florrick (played by Julianna Margulies) successfully defends her

U.S. celebrities such as Britney Spears and Harrison Ford to “ex-Soviet oligarchs and Middle Eastern oil tycoons,”<sup>16</sup> wealthy litigants have used libel tourism against American authors and publishers (including those online) for various purposes: to obtain public apologies, retractions, settlements, or default judgments, or simply to intimidate and dissuade future publication about them.<sup>17</sup> As a result, libel tourism has had the dangerous result of depriving U.S. citizens of their First Amendment rights.<sup>18</sup> The practice has not only made celebrity tabloids think twice regarding whom they write about and what they publish about celebrities,<sup>19</sup> but it has also deterred reporting on matters of serious public importance.<sup>20</sup> In effect, libel tourism has taken a toll on the ability of scholars and journalists to publish their work.<sup>21</sup>

On August 10, 2010, President Barack Obama signed into law the Securing the Protection of Our Enduring and Established Constitutional Heritage Act (the “SPEECH Act”),<sup>22</sup> with hopes that the Act would put an end to libel tourism.<sup>23</sup> The SPEECH Act bars U.S. domestic courts from enforcing or recognizing foreign libel judgments, unless a court finds that the foreign judgment comports with the First Amendment.<sup>24</sup>

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client in the United States against a charge of libel, but must argue the case again via video conference when the suit is brought before a London court. *The Good Wife: The Death Zone* (CBS television broadcast Oct. 2, 2011). “Do you know the key distinction between the libel laws in your country and mine?” asks Eddie Izzard as opposing British counsel. *Id.* “The burden of proof is reversed.” *Id.*

16. See Ellen Bernstein, Comment, *Libel Tourism's Final Boarding Call*, 20 SETON HALL J. SPORTS & ENT. L. 205, 206-07, 212-13 (2010) (internal quotation marks omitted) (listing celebrities such as Jennifer Lopez, Marc Anthony, Cameron Diaz, Kate Hudson, Britney Spears, and Harrison Ford as plaintiffs who have sued for libel abroad; also listing Russian media tycoon Boris Berezovsky and Saudi businessman Khalid bin Mahfouz as libel tourists).

17. See *Libel Tourism Hearing*, *supra* note 15, at 8 (prepared statement of Rep. Peter King) (listing the multiple intentions litigants have in using libel tourism).

18. See U.N. Rep. of the Human Rights Comm., 93d Sess., July 7-25, 2008, ¶ 81, U.N. Doc. A/63/40 (Vol. I); GAOR, 63d Sess., Supp. No. 40 (2008), available at [http://www.ccrprcentre.org/doc/ICCPR/AR/A\\_63\\_40\(Vol%20I\)\\_Eng.pdf](http://www.ccrprcentre.org/doc/ICCPR/AR/A_63_40(Vol%20I)_Eng.pdf) (criticizing the United Kingdom's libel laws as having a chilling effect upon freedom of expression).

19. See Robert Verkaik, *Invasion of the Libel Tourists*, INDEPENDENT (Aug. 21, 2008), available at <http://www.independent.co.uk/news/uk/home-news/invasion-of-the-libel-tourists-904111.html>.

20. U.N. Rep. of the Human Rights Comm., *supra* note 18, ¶ 81.

21. *Id.*

22. 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. §§ 4101-4105 (Supp. IV 2011)).

23. S. REP. NO. 111-224, at 8 (2010) (“The SPEECH Act . . . will prevent the chilling of American free speech that is the inevitable result of these foreign libel lawsuits.”); *President Obama to Sign SPEECH Act Today*, STEVE COHEN FOR CONG. (Aug. 10, 2010), <http://www.cohenforcongress.com/2010/08/10/president-obama-to-sign-speech-act-today> (reporting that President Obama would sign into law the SPEECH Act, a law that “puts an end to libel tourism,” on August 10, 2010 (internal quotation marks omitted)).

24. 28 U.S.C. § 4102(a)(1)(A). The SPEECH Act bars a U.S. domestic court from recognizing

The Act also allows authors to seek a declaration that the foreign libel judgment is “repugnant to the Constitution or laws of the United States,” in order to combat the negative financial and professional repercussions the foreign libel judgment may have on their work.<sup>25</sup>

As much as the SPEECH Act might at first appear to afford American authors and publishers protection from foreign libel laws, it is likely that the Act will not end libel tourism and will have few discernible effects combating the practice.<sup>26</sup> In its current form, the SPEECH Act is inadequate to restrict a litigant’s ability to file libel suits overseas, win default judgments, gain publicity, and continue to intimidate American authors.<sup>27</sup> Without broader measures such as the ability to recover legal fees incurred abroad, the SPEECH Act is essentially without teeth in deterring those who contemplate suing American authors in the United Kingdom—a popular forum for libel tourism—or other foreign jurisdictions.<sup>28</sup> Not only does the SPEECH Act lack the means to actively combat the practice of libel tourism, but the Act also may create serious implications for international comity.<sup>29</sup> A decision by a U.S. court, pursuant to the SPEECH Act, not to enforce a foreign libel judgment could affect a foreign country’s willingness to enforce U.S. libel judgments, or judgments based on U.S. laws that are plaintiff-friendly.<sup>30</sup>

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or enforcing a foreign libel judgment unless the court determines that “the 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 laws of the state in which the court is located. *Id.* Nevertheless, even if the defamation law applied in the foreign court’s adjudication did not comport with the First Amendment, recognition or enforcement is permitted if the foreign-judgment creditor proves that the defendant in the foreign action would have been found liable for defamation under the U.S. Constitution and state law. *Id.* § 4102(a)(1)(B).

25. *See id.* § 4104(a)(1).

26. Mark A. Fischer & Franklin Levy, *The SPEECH Act: Speaking Softly?*, FIRST AMEND. CENTER (Oct. 12, 2010), <http://www.firstamendmentjournal.org/commentary.aspx?id=23483> (“Progressive at first glance, the SPEECH Act may . . . have few discernible effects.”).

27. *See Libel Tourism Hearing*, *supra* note 15, at 8 (prepared statement of Rep. Peter King). Representative King believed that the failed H.R. 6146, a bill similar to the SPEECH Act, did not go far enough to combat the threat of libel tourism. *See id.* He claimed that “[f]oreign litigants [would] still be allowed to file . . . libel suits overseas with no worry of being countersued here in the U.S.” *Id.*

28. *See id.* at 12 (statement of Rachel Ehrenfeld, American Center for Democracy); David B. Rivkin, Jr. & Bruce D. Brown, Op-Ed., ‘*Libel Tourism*’ Threatens Free Speech, WALL ST. J., Jan. 10-11, 2009, at A11. Rachel Ehrenfeld stated that provisions for damages and the ability to countersue “are essential to remove the chilling effect of foreign libel suits.” *Libel Tourism Hearing*, *supra* note 15, at 12 (statement of Rachel Ehrenfeld, American Center for Democracy).

29. EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO “LIBEL TOURISM” 14 (2010) (concluding that “[t]he passage of the SPEECH Act may have implications for international comity”).

30. *Id.* at 13 (“[S]ome countries condition recognition of foreign judgments on the foreign

The United States should take further legislative steps to ensure that American authors and publishers are shielded from foreign libel actions that are not adjudicated under First Amendment standards. However, the best answer to the libel tourism problem—an issue that threatens journalism and publishing not only in the United States, but around the globe—is a transnational solution.<sup>31</sup> International agreements that would harmonize laws relating to the exercise of jurisdiction over defamation cases may be the most effective means to solve the problem of libel tourism.<sup>32</sup>

Part II of this Note will compare American and British libel law, as well as certain aspects of the countries' civil procedure rules and practices. This comparison will demonstrate why libel tourism, and why bringing libel actions in the United Kingdom in particular, has become such a popular practice. Part II also will illustrate examples of libel tourism's chilling effect on coverage of business, history, politics, and national security news. Furthermore, Part II will explain the failed federal attempts to solve the problem of libel tourism, and how Congress purports to deter libel tourism's effect on American journalism and publishing under the SPEECH Act. Part III of this Note will identify the legal issues the SPEECH Act has raised. It will demonstrate that the SPEECH Act, in its current form, is a weak response to libel tourism, and may have negative repercussions on international comity. Finally, Part IV will propose two routes that can and should be taken to address the problem of libel tourism. First, Congress can modify the SPEECH Act to give it sharper teeth. Second, the United States can take steps to form agreements with the United Kingdom—and other sovereigns where libel tourism is a common practice—that would harmonize international jurisdiction law over defamation cases. The latter solution, involving foreign sovereigns like the United Kingdom, is the optimal solution, considering that libel tourism is an issue faced by authors and publishers not only in the United States but also around the world.

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country's reciprocal recognition of judgments of the same type. In such countries, U.S. courts' refusal to enforce libel judgments would likely serve as a ground for refusing to enforce libel judgments rendered by state or federal courts in the United States.").

31. See *Libel Tourism Hearing*, *supra* note 15, at 71 (prepared statement of Linda J. Silberman, Professor of Law, New York University School of Law).

32. Sayuj Banerjee, *Libel Tourism: Solving the Problem of Globetrotting Defamation Plaintiffs—with Legislation, Treaties, and Legal Outsourcing*, LAW WITHOUT BORDERS (Sept. 20, 2010), <http://lawwithoutborders.typepad.com/legaloutsourcing/2010/09/libel-tourism-solving-the-problem-of-globetrotting-defamation-plaintiffs-with-legislation-treaties-a.html>.

## II. WHY LIBEL PLAINTIFFS SUE ABROAD

Simply put, the purpose of libel law in the United States and the United Kingdom is to provide redress against false communications that harm a plaintiff's reputation.<sup>33</sup> Beyond that general purpose, however, the similarities end, and the glaring differences between U.S. and U.K. libel law begin. In fact, libel laws in these countries nearly "constitute mirror images of each other."<sup>34</sup> The most glaring difference lies in the burden of proof: In a U.S. libel action, that burden is on the plaintiff, whereas the burden is shifted to the defendant in a libel action within the United Kingdom.<sup>35</sup>

This and other differences in the countries' laws generate an incentive for libel plaintiffs to sue authors and publishers in the United Kingdom.<sup>36</sup> Although many U.S. principles of law derive from the English common law, a significant distinction between the countries' treatment of defamation suits lies in the United Kingdom's lack of an equivalent to the First Amendment.<sup>37</sup> This amendment, which is so entrenched in the U.S. legal system, prohibits Congress from creating any law that "abridg[es] the freedom of speech, or of the press."<sup>38</sup> It is the First Amendment that is at the heart of the legal dissimilarities giving rise to libel tourism.<sup>39</sup>

Although the U.S. Supreme Court initially refused to use the First Amendment as a means of protecting the media from libel lawsuits, the seminal case of *New York Times Co. v. Sullivan*<sup>40</sup> changed that.<sup>41</sup> The

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33. See AVI BELL, JERUSALEM CTR. FOR PUB. AFFAIRS, LIBEL TOURISM: INTERNATIONAL FORUM SHOPPING FOR DEFAMATION CLAIMS 9-10 (2008), available at [http://www.globallawforum.org/UserFiles/puzzle22New\(1\).pdf](http://www.globallawforum.org/UserFiles/puzzle22New(1).pdf).

34. *Libel Tourism Hearing*, *supra* note 15, at 46 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

35. *Id.*

36. See *infra* Part II.A-C.

37. *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) (stating that while "[i]t is true that England and the United States share many common law principles of law . . . a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the United States Constitution").

38. U.S. CONST. amend. I.

39. See *Bachchan*, 585 N.Y.S.2d at 665.

40. 376 U.S. 254 (1964).

41. Steven Pressman, *An Unfettered Press: Libel Law in the United States*, INFOUSA, <http://usinfo.org/enus/government/overview/libellaw.html> (last visited Mar. 1, 2012). See *Sullivan*, 376 U.S. at 256 ("We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action . . ."). Respondent Sullivan was a commissioner who supervised the police department of Montgomery, Alabama. *Id.* He sued the New York Times Company for running an advertisement about brutal police conduct against Black students. *Id.* at 256-57. Although the advertisement, which contained several inaccurate statements, did not refer to Sullivan by name, Sullivan argued that the

1964 case noted the United States's "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>42</sup> To create an environment where debate on issues and matters of public concern could thrive, the *Sullivan* Court applied a constitutional restraint on defamation actions.<sup>43</sup> Consequently, even though "hundreds of libel lawsuits are filed against newspapers, magazines, and radio and television stations in the United States" every year, few plaintiffs prevail over a media defendant's First Amendment rights.<sup>44</sup>

While defamation law in the United States has diverged sharply from its pro-plaintiff roots, the United Kingdom continues to be recognized as a country with substandard protection of authors and publishers.<sup>45</sup> The incentive for libel plaintiffs to sue in the United Kingdom is enhanced by the even more worrisome differences between American civil procedure and those rules in the United Kingdom.<sup>46</sup> For example, the United Kingdom is willing to exercise jurisdiction over a libel suit brought by a non-U.K. citizen concerning a foreign publication, so long as the plaintiff can demonstrate that the publication has had even the slightest exposure to the public within the country, and that the plaintiff's reputation was harmed there.<sup>47</sup> The combination of the countries' disparities in libel law, and in procedure and jurisdiction law, creates a so-called "perfect storm" in which the practice of libel forum shopping can flourish.<sup>48</sup>

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ad could be read as referring to him. *Id.* at 258. The jury awarded Sullivan \$500,000. *Id.* at 256. On appeal, the Supreme Court of Alabama affirmed the judgment, holding that the newspaper's statements were libelous per se. *Id.* at 263. The Supreme Court of the United States reversed; it held that state rules allowing public officials to recover damages for false statements made concerning their official conduct were unconstitutional—that is, unless those officials could prove the statements were made with actual malice. *Id.* at 264, 283.

42. *Sullivan*, 376 U.S. at 270.

43. See Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J.L. & LIBERTY 252, 256 (2009) (stating that the *Sullivan* Court's intent was "to give the press the 'breathing space' necessary to report on issues affecting the public without having to censor itself for fear of making a mistake").

44. Pressman, *supra* note 41.

45. BELL, *supra* note 33, at 15.

46. See *infra* Part II.C.

47. BELL, *supra* note 33, at 15-16. See Douglas Lee, 2 *International Libel Cases Could Benefit U.S. Publishers*, FIRST AMEND. CENTER (Oct. 18, 2005), <http://www.firstamendmentcenter.org/2-international-libel-cases-could-benefit-u-s-publishers> (noting that, in the case where Khalid bin Mahfouz, a non-U.K. citizen, pursued a libel action against American author Rachel Ehrenfeld, the United Kingdom was willing to entertain the suit even though only twenty-three copies of Ehrenfeld's book were purchased over the Internet by U.K. citizens).

48. Staveley-O'Carroll, *supra* note 43, at 255.



A. *U.S. Libel Law*

An individual who sues an author for libel in the United States must overcome the author's First Amendment right to free speech in order to prevail.<sup>49</sup> To do this, U.S. libel law requires a defamation plaintiff to bear three burdens of proof. The plaintiff must establish the *falsity* of a statement, the *fault* of the defendant (that is, the defendant's culpability), and the *harm* that the statement caused.<sup>50</sup> Under U.S. case law, burdens of proof vary further, depending on whom the libel plaintiff is and to what degree the defamatory information is important to the public.<sup>51</sup>

In a U.S. libel action, the falsity of a statement and the defendant's culpability are not presumed.<sup>52</sup> On the contrary, where the plaintiff is a public official or public figure,<sup>53</sup> he or she must first prove that the defendant's statement was *substantially* false.<sup>54</sup> Then, the plaintiff must prove with "convincing clarity" that the statement was made with "actual malice"—that is, with knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not."<sup>55</sup> Even in cases where the plaintiff is a *private* figure involved in a matter of public concern, falsity and fault are not presumed.<sup>56</sup> In such cases, the plaintiff must first prove that the allegedly defamatory statement was

49. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

50. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (holding that the plaintiff must bear the burden of showing falsity and fault); BELL, *supra* note 33, at 10-11.

51. See *Libel Tourism Hearing*, *supra* note 15, at 28 exhibit A (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

52. See *Hepps*, 475 U.S. at 777 (holding that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern"); *Sullivan*, 376 U.S. at 283-84 (rejecting the presumption of a defendant's culpability).

53. The term "public official" can apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). "Public figures" are those who "assume[] roles of especial prominence in the affairs of society," "occupy positions of . . . persuasive power and influence," or "thrust themselves to the forefront of particular public controversies." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). In any event, those classified as public figures are exposed to close public scrutiny. *Id.*

54. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id.* (internal quotation marks omitted).

55. *Sullivan*, 376 U.S. at 279-80, 285-86 (holding that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he can prove with convincing clarity that the statement was made with actual malice).

56. See *Libel Tourism Hearing*, *supra* note 15, at 28 exhibit A (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

substantially false, at least where a media defendant is involved.<sup>57</sup> The plaintiff must then prove that the defendant (at least) negligently made the false statement at issue.<sup>58</sup> Although these standards are rather lax in comparison to those set in cases where the libel plaintiff is a public official or public figure, these standards nevertheless are more protective against defamation actions than are U.K. libel laws.<sup>59</sup>

### B. *The Law of Libel in a Town Named Sue*<sup>60</sup>

While it is extremely difficult for plaintiffs to win a libel suit in the United States, the United Kingdom is recognized as one of the most plaintiff-friendly forums for defamation actions.<sup>61</sup> This, along with the United Kingdom's civil procedure and jurisdiction law, creates an incentive for litigants to bring their libel actions in U.K. courts.<sup>62</sup> In striking contrast to U.S. libel law, the law of libel in the United Kingdom treats any statement that negatively affects an individual's reputation as presumptively defamatory.<sup>63</sup> Therefore, to make a prima facie case for defamation, the plaintiff merely has to prove that the statement is about him or her, has a defamatory meaning, and was indeed published by the defendant.<sup>64</sup> After a plaintiff makes a prima facie showing, defendants—who would have had no burden of proof in a U.S. libel action—must either prove that the statement they made is true or establish another defense.<sup>65</sup>

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57. See *Hepps*, 475 U.S. at 768-69 (holding that where a media defendant “publishes speech of public concern, a private-figure plaintiff cannot recover damages without . . . showing that the statements at issue are [substantially] false”).

58. See *Gertz*, 418 U.S. at 351 (refusing to extend the actual malice standard set by *Sullivan* to defamation of private individuals). See also *id.* at 353 (Blackmun, J., concurring) (“[T]he Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard . . .”).

59. See *infra* Part II.B.

60. Bruce D. Brown testified before the former U.S. House Judiciary Subcommittee on Commercial and Administrative Law that “[i]t is a favorite line of London libel lawyers when they travel to conferences in the U.S. to quip with a nod to the great Johnny Cash, that they have just come from a town named Sue.” *Libel Tourism Hearing*, *supra* note 15, at 15 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

61. See Rivkin & Brown, *supra* note 28, at A11 (stating that libel tourists have exploited British courts and London, libel tourism's “hot destination,” in particular). See also *Daily Politics: Comedians Find England and Wales Libel Laws Unfunny* (BBC television broadcast Mar. 12, 2010) [hereinafter *Daily Politics*], available at [http://www.youtube.com/watch?v=lj\\_4ksUWyNI](http://www.youtube.com/watch?v=lj_4ksUWyNI) (stating that “London has become the libel capital of the world”).

62. See *Daily Politics*, *supra* note 61 (discussing why the United Kingdom's libel laws unfairly favor the plaintiff).

63. *Libel Tourism Hearing*, *supra* note 15, at 46 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

64. *Id.*

65. *Id.*

Defenses available in a U.K. libel action spare defendants from proving the truth of their statements.<sup>66</sup> One such defense includes the fair comment exception, which may apply to opinions made by defendants on a matter of public interest.<sup>67</sup> To satisfy that exception, the opinion must be one that the author could reasonably express based on true or privileged facts and must also be made without malice.<sup>68</sup> While the fair comment exception does give defendants a degree of protection when stating opinions based on true or privileged facts, it affords far less protection than U.S. libel law, which treats only statements of fact as actionable.<sup>69</sup> Generally speaking, statements of opinion based on accurate factual information are not actionable in U.S. courts, regardless of whether the opinions are reasonably expressed, and even if the author states his or her opinion with malice.<sup>70</sup>

Libel plaintiffs also have an incentive to sue in the United Kingdom because of that country's application of the multiple publication rule.<sup>71</sup>

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66. See *id.* Defenses available in a U.K. libel action include the following: justification, which requires the defendant to establish the substantial truth of the defamatory statements complained of; absolute privilege, which protects statements made in Parliament and during court proceedings, as well as the neutral and accurate reports of such statements; and qualified privilege, which protects certain statements made by defendants when they were not acting with malice and when they had a moral, social, or legal duty to convey the information to another who had an interest in receiving that information. Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165, 172-73 (2007). Factors used to determine whether the qualified privilege applies greatly narrow protection of libel defendants. See *id.* at 174-75.

67. Scordato, *supra* note 66, at 172.

68. *Libel Tourism Hearing*, *supra* note 15, at 46-47 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP); Scordato, *supra* note 66, at 172.

69. *Libel Tourism Hearing*, *supra* note 15, at 46-47 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

70. *Id.* at 47. Although the U.S. Supreme Court refused to create an "artificial dichotomy between 'opinion' and fact," where only the latter statements are actionable, the Court noted that "the issue of falsity relates to the defamatory facts implied by a statement." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 20 n.7 (1990) (emphasis omitted). The Court explained that the statement, "I think Jones lied," is provable as false in two respects: "First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is . . . the second level of falsity which would ordinarily serve as the basis for a defamation action . . ." *Id.* at 20 n.7.

71. See *Staveley-O'Carroll*, *supra* note 43, at 260-61 (explaining the United Kingdom's multiple publication rule). The rule also allows the statute of limitations to run anew each time a "publication" of defamatory material occurs; in contrast, under the United States's single publication rule, the statute of limitations begins to run from the date of the first publication. Robert Balin et al., *Libel Tourism and the Duke's Manservant*, MEDIA L. RESOURCE CENTER BULL., Sept. 2009, at 97, 105. The multiple publication rule derives from the nineteenth century case, *Duke of Brunswick v. Harmer*, (1849) 117 Eng. Rep. 75 (K.B.); 14 Q.B. 185. See *Staveley-O'Carroll*, *supra* note 43, at 261 & n.37. An article that allegedly defamed the plaintiff, the Duke of Brunswick, was published in the *Weekly Dispatch* in 1830. *Duke of Brunswick*, 117 Eng. Rep. at 75; 14 Q.B. at 185. Eighteen years later, after the statute of limitations had run, the Duke's servant bought a back-issue of the *Weekly Dispatch* containing the article; another issue was obtained from the British Museum.

This rule allows every publication of a single work to give rise to a separate defamation action.<sup>72</sup> For example, a plaintiff suing in a U.K. court for defamation found in a book may be able to bring multiple libel suits, even though those suits are based on the same defamatory material.<sup>73</sup> In contrast, most U.S. states apply the single publication rule.<sup>74</sup> In the United States, communication of allegedly defamatory information from books and newspapers to an entire group of people results in only one action for damages.<sup>75</sup>

Courts in the United States have almost unanimously applied the single publication rule to Internet sources as well.<sup>76</sup> In contrast, the United Kingdom has applied its multiple publication rule to material found on the Internet.<sup>77</sup> This essentially means that every Internet hit on a webpage containing allegedly defamatory information generates a new publication upon which a plaintiff can sue an Internet service provider (“ISP”) or user for libel in the United Kingdom.<sup>78</sup> Those who discover libelous information about themselves on the Internet have an even greater incentive to sue in the United Kingdom because the country has no law equivalent to Section 230 of the Communications Decency Act of 1996<sup>79</sup> in the United States.<sup>80</sup> The statute provides ISPs and website operators immunity from liability for defamatory information posted by users on the Internet, even if the ISPs and website operators were put on notice of that information.<sup>81</sup> Similarly, in the United Kingdom, ISPs and

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*Id.* at 76; 14 Q.B. at 187. After the Duke sued for libel, the Queen’s Bench held that once the Duke’s servant had bought the back-issue and read the allegedly defamatory material, a new, actionable “publication” occurred. *Id.* at 76; 14 Q.B. at 189.

72. Staveley-O’Carroll, *supra* note 43, at 260-61.

73. See *Duke of Brunswick*, 117 Eng. Rep. at 76; 14 Q.B. at 188-89.

74. Staveley-O’Carroll, *supra* note 43, at 260.

75. RESTATEMENT (SECOND) OF TORTS § 577A (1977) (stating that “[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication” and that “[a]s to any single publication . . . only one action for damages can be maintained”).

76. Itai Maytal, *Libel Lessons from Across the Pond: What British Courts Can Learn from the United States’ Chilling Experience with the “Multiple Publication Rule” in Traditional Media and the Internet*, 3 J. INT’L MEDIA & ENT. L. 121, 132 & n.64 (2010) (stating that U.S. courts that must confront the issue of whether to apply the single or multiple publication rule have noted that applying the single publication rule to the Internet furthers the goals of the rule).

77. Staveley-O’Carroll, *supra* note 43, at 261.

78. *Id.* (“To the dismay of journalists worldwide, British courts have continued to apply this Victorian-era [*Duke of Brunswick v. Harmer*] case in the modern information age, which has led to the absurd result that a single Internet hit in the United Kingdom constitutes a ‘publication’ for libel purposes.”).

79. Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 133, 137-39 (codified at 47 U.S.C. § 230 (2006)).

80. See Balin et al., *supra* note 71, at 106.

81. 47 U.S.C. § 230(c)(2) (protecting providers of interactive computer services from

website operators are not held liable for the initial dissemination of defamatory information posted by users—however, once ISPs or website operators are put on notice of and fail to remove defamatory user-generated content, they can become liable for the publication of such content.<sup>82</sup>

### C. U.S. and U.K. Civil Procedure and Jurisdiction

Not only does the stark contrast between U.S. and U.K. libel law induce plaintiffs to sue in the United Kingdom, but U.K. civil procedure and jurisdiction law in general also encourage litigants to bring their libel actions to U.K. courts. Specifically, the United Kingdom's laws concerning personal jurisdiction, the financing of litigation, and the level of review applied during appeals are plaintiff-friendly as compared to the procedure and jurisdiction law applied by U.S. courts.

#### 1. Exercising Personal Jurisdiction

For a U.S. court to exercise jurisdiction over a defendant, due process requires that a defendant have minimum contacts with the forum—that is, have sufficient dealings or affiliations so that the exercise of jurisdiction is fair and reasonable, and “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>83</sup> When defamatory content appears on the Internet, U.S. courts have held that the defendant has minimum contacts with a forum state if the defendant's Internet activity expressly targets that forum.<sup>84</sup> In contrast, U.K. courts have exercised personal jurisdiction over defendants that have little connection to the United Kingdom, simply on the basis that the statements at issue have reached or are accessible within the United Kingdom, either on- or offline.<sup>85</sup> U.K. courts have been willing to exercise jurisdiction over these defendants, even if their statements did not target the United Kingdom and even when the statements have had minimal exposure to the public within that forum.<sup>86</sup>

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defamation actions filed due to third-party content posted on their websites); Balin et al., *supra* note 71, at 106.

82. Balin et al., *supra* note 71, at 106.

83. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing requirements for a U.S. court to exercise personal jurisdiction over a defendant).

84. Staveley-O'Carroll, *supra* note 43, at 261-62.

85. See, e.g., Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156, [22]-[23] (Eng.).

86. See, e.g., *id.*

For example, in *Berezovsky v. Michaels*,<sup>87</sup> a U.K. court held that it could exercise personal jurisdiction over the publisher of *Forbes*.<sup>88</sup> The court did so, even though less than a quarter of one percent of the magazine's circulation occurred within the United Kingdom, and notwithstanding that reputational harm to the plaintiff, a Russian national, would likely occur in Russia and not the United Kingdom.<sup>89</sup> Similarly, in *Bin Mahfouz v. Ehrenfeld*,<sup>90</sup> only twenty-three copies of the defendant-author's book were purchased in the United Kingdom (via online booksellers), and only one chapter of the book was accessible to U.K. citizens on the Internet.<sup>91</sup> Nonetheless, a U.K. court exercised personal jurisdiction over American writer Rachel Ehrenfeld.<sup>92</sup>

## 2. Financing Litigation

Under the "American rule" of financing litigation, each party is responsible for paying its own legal fees.<sup>93</sup> In contrast, courts in the United Kingdom allow fee shifting, where the losing party must pay both its own legal fees and the legal fees of the winning party.<sup>94</sup> Fee shifting creates "a significant financial incentive to bring suit in the United Kingdom, because the losing party bears the costs associated with the litigation. Since the burden of proof lies with the defendant, the odds favor a plaintiff victory."<sup>95</sup> According to libel tourism experts, the prevailing plaintiffs' ability to recover their fees in U.K. libel proceedings, combined with plaintiff-friendly law, "accounts for much of libel tourism and its chilling impact on U.S. speech. . . . [T]he specter

87. [2000] 1 W.L.R. 1004 (H.L.) (Eng.).

88. *Id.* at 1007, 1013.

89. *Id.* at 1007-08. Circulation of *Forbes* in the United Kingdom was under 2000 magazines, as compared to the near 800,000 in circulation within the United States at the time. *Id.* at 1008; 2 GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 11.04(E), at 11-129 (3d ed. 2011). Delta and Matsuura, disagreeing with the British court's conclusion that international businessman Berezovsky had a reputation to protect in the United Kingdom, argue:

The harm to the reputation of a Russian citizen occurs in Russia, if anywhere. It is difficult to see what interest England could have in protecting the reputation of Russian nationals. If the decision of the House of Lords is taken to its logical conclusion, Berezovsky, as an international investor, has a reputation to protect in each country in which he has investments. Thus, he should be able to sue *Forbes* in any such country as long as at least one copy of the magazine is sold there.

2 DELTA & MATSUURA, *supra*, § 11.04(E), at 11-129.

90. [2005] EWHC (QB) 1156 (Eng.).

91. *Id.* at [14]-[15], [22]-[23].

92. *See id.* at [22]-[23].

93. Rendleman, *supra* note 10, at 479 & n.63.

94. *Libel Tourism Hearing*, *supra* note 15, at 49 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP); Rendleman, *supra* note 10, at 479 & n.69.

95. Staveley-O'Carroll, *supra* note 43, at 259 (footnote omitted) (comparing the United Kingdom's fee shifting provision to the "American rule").

of fees topping over £1 million causes U.S. publishers to think twice before publishing in the U.K. or writing about a U.K. resident.”<sup>96</sup>

### 3. Level of Review

The trial-level protections of libel defendants in the United States are supported by the appellate courts’ commitment to conducting a *de novo* review to ensure that constitutional limitations on a particular libel suit were properly applied.<sup>97</sup> Instead of conducting the typical appellate review of jury verdicts, judges are required to examine the entire record and ensure that “any judgment awarded to a plaintiff does not constitute a forbidden intrusion on the field of free expression.”<sup>98</sup> As a result, in the United States, upwards of seventy percent of libel judgments in the plaintiff’s favor are reversed on appeal.<sup>99</sup> The United Kingdom, however, has no equivalent rule to review libel verdicts.<sup>100</sup>

### D. Chilling Effect: Suppressing the Dissemination of Information

Libel tourism effectively subjects every author and publisher around the world to the laws of the most pro-plaintiff libel forum.<sup>101</sup> As a result, authors across the globe are discouraged from reporting on matters of public concern, for fear that any mistake made in their work will trigger liability in a plaintiff-friendly jurisdiction.<sup>102</sup> This fear has grown in the age of electronic communication.<sup>103</sup> Because books,

96. Balin et al., *supra* note 71, at 124 (discussing the incentives libel plaintiffs have in bringing suit in U.K. courts).

97. *Libel Tourism Hearing*, *supra* note 15, at 19 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

98. *Id.* (internal quotation marks omitted). *See also* Bose Corp. v. Consumers Union, 466 U.S. 485, 492-93, 511 (1984) (granting certiorari to determine what standard of review applies to libel appeals and holding that “[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice’”).

99. *Libel Tourism Hearing*, *supra* note 15, at 19 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP); Daniel Huff, *The Speech Act Should Not Pre-empt State Law*, NAT’L L.J. (Aug. 9, 2010), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202464311373&The\\_Speech\\_Act\\_should\\_not\\_preempt\\_state\\_law&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202464311373&The_Speech_Act_should_not_preempt_state_law&slreturn=1).

100. *Libel Tourism Hearing*, *supra* note 15, at 19 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

101. BELL, *supra* note 33, at 3. This is also known as the so-called “race to the bottom”—that is, the theory that libel tourists will pick the best, most plaintiff-friendly forum over any other forum. *See Are Foreign Libel Lawsuits Chilling Americans’ First Amendment Rights?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter *Hearing Before the S. Comm. on the Judiciary*] (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

102. *See Libel Tourism Hearing*, *supra* note 15, at 23 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

103. *Id.* at 45-46 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine

newspapers, journals, and other media are easily accessible on the Internet in any country, authors and publishers can be subjected to the libel laws of any forum abroad.<sup>104</sup> American authors in particular have censored themselves to ensure that their writing satisfies U.K. libel law, because they are not protected overseas by First Amendment standards.<sup>105</sup> Libel tourism therefore creates a “chilling effect” on free speech and cuts off the flow of information to the public in areas such as entertainment, business, politics, and national security news (among others).<sup>106</sup> A few examples of libel tourism’s chilling effect illustrate the danger that libel tourism poses to investigative reporting and journalism.

1. *Berezovsky v. Michaels*: How a Russian Businessman and Politician Used Libel Tourism to Intimidate *Forbes*

In 1997, a Russian businessman and politician named Boris Berezovsky sued the editor and publisher of *Forbes*, a New York-based publication, for libel in the United Kingdom.<sup>107</sup> The publication at issue was an article titled “Godfather of the Kremlin?,” written by Russian-American journalist Paul Klebnikov.<sup>108</sup> With the help of information obtained by anonymous sources, Klebnikov’s article exposed Berezovsky’s possible involvement in crime, including murder, to the public.<sup>109</sup> Berezovsky’s tactical move of suing *Forbes* in the United Kingdom was crucial to his lawsuit’s success.<sup>110</sup> Had Berezovsky, a public official, pursued the libel action against *Forbes* in the United States, he would have needed to prove that the *Forbes* article contained substantially false information and that such information was published with actual malice.<sup>111</sup> In contrast, in the United Kingdom, Berezovsky needed to prove much less—the article’s falsity and the defendant’s

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LLP).

104. *Id.* at 45.

105. *Id.* at 23 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

106. *Id.*

107. *Id.* at 20; *id.* at 51 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP). See also *Berezovsky v. Michaels*, [2000] 1 W.L.R. 1004 (H.L.) at 1008 (Eng.) (describing the procedural history of the case). Berezovsky brought suit in the United Kingdom, despite the fact that he and the second plaintiff lived in Russia and a very few number of *Forbes* copies were distributed in the United Kingdom. Readers Say, *Berezovsky vs. Forbes*, FORBES, Mar. 31, 2003, at 22, 22.

108. *Libel Tourism Hearing*, *supra* note 15, at 20 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP). See *Godfather of the Kremlin?*, FORBES, Dec. 30, 1996, at 90.

109. BELL, *supra* note 33, at 16-17. See, e.g., *Godfather of the Kremlin?*, *supra* note 108, at 91-92.

110. BELL, *supra* note 33, at 17.

111. *Id.* See *supra* text accompanying notes 53-55.



culpability were already presumed.<sup>112</sup> To rebut that presumption, *Forbes* needed to establish that the statements made in its article were true.<sup>113</sup>

Rather than face that burden of proof—made even more insurmountable in light of the article's anonymous sources—*Forbes* settled the case six years after the suit was first brought in the High Court of London.<sup>114</sup> Even though *Forbes* journalists had spent months researching and investigating the Berezovsky story,<sup>115</sup> *Forbes* made a formal retraction of the article in open court—after which Berezovsky withdrew the suit.<sup>116</sup> In its retraction, the magazine claimed that there was no evidence demonstrating Berezovsky's responsibility for any murder, and that it was wrong to have characterized Berezovsky as a mob boss.<sup>117</sup> Incidentally, Klebnikov, the author of the article, was murdered in Moscow in 2004.<sup>118</sup> With the threat of libel tourism, American journalists like Klebnikov can no longer depend on the First Amendment to protect their freedom of speech. Although it is unknown whether Berezovsky was involved in Klebnikov's murder,<sup>119</sup> Klebnikov and *Forbes*'s story demonstrates the extent to which libel tourism can have a chilling effect on journalists' willingness to report on business or political news.

## 2. Humayun Mirza: How Libel Tourism Destroyed a Man's Life's Work

American author Humayun Mirza dedicated years of his life to writing a 400-page biography of his father, Iskander Mirza, the first President of Pakistan.<sup>120</sup> Shortly after the biography was published in

112. BELL, *supra* note 33, at 17 ("In England . . . Berezovsky needed to prove nothing. . . . [H]e could force [*Forbes*] to try to produce its anonymous Russian sources in an English court."). See *supra* text accompanying notes 63-64.

113. See BELL, *supra* note 33, at 17.

114. *Libel Tourism Hearing*, *supra* note 15, at 20 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP) (describing the chilling effect of the *Berezovsky* case); Readers Say, *supra* note 107, at 22.

115. BELL, *supra* note 33, at 16.

116. Readers Say, *supra* note 107, at 22.

117. *Id.*

118. Valeria Korchagina, *Klebnikov Slaying Probed at Top Level*, ST. PETERSBURG TIMES, July 13, 2004, at 1.

119. See *id.* at 2. In a telephone interview conducted after Klebnikov's murder, Berezovsky claimed that "[s]omebody clearly did not like the way [Klebnikov] operated and decided to sort it out with him, Russian-style, not through the English courts like I did." *Id.* (internal quotation marks omitted).

120. *Libel Tourism Hearing*, *supra* note 15, at 18 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP) (describing the chilling effect of the Humayun Mirza incident). Mirza's book was titled *From Plassey to Pakistan: The Family History of Iskander Mirza*. *Id.* The book chronicles Mirza's lineage and more than 300 years of Indian and Pakistani history. *Id.*; HUMAYUN MIRZA, FROM PLASSEY TO PAKISTAN: THE FAMILY HISTORY OF ISKANDER MIRZA, THE

1999, however, Iskander's wife threatened to sue Humayun and his publisher for libel in the United Kingdom.<sup>121</sup> Apparently, she had been unhappy with the way Humayun depicted her in the book.<sup>122</sup> Since the biography was well-researched, each statement supported by firsthand observations, decades of conversations, and documents from the U.S. Department of State, there is no doubt that the biography would have been protected under the laws of the United States.<sup>123</sup> But due to her leverage as a potential libel plaintiff in the United Kingdom, Iskander Mirza's wife was able to intimidate Humayun into destroying the first edition of the book he spent years writing.<sup>124</sup> This account demonstrates that libel tourism has the effect of chilling even the most well-investigated stories, preventing authors and publishers from presenting them to the public.

### 3. *Bin Mahfouz v. Ehrenfeld*: How Libel Tourism Caused an American Author to Suffer Financial, Reputational, and Emotional Harm

To date, the most well-known libel tourism case is *Bin Mahfouz v. Ehrenfeld*, which prompted a change in N.Y. State libel law<sup>125</sup> and,

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FIRST PRESIDENT OF PAKISTAN (rev. ed. 2002).

121. *Libel Tourism Hearing*, *supra* note 15, at 19 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

122. 2 DELTA & MATSUURA, *supra* note 89, § 11.04(E), at 11-127.

123. *Libel Tourism Hearing*, *supra* note 15, at 19 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

124. *See Brown Testifies on Libel Tourism Before Senate Judiciary Committee*, BAKER & HOSTETLER LLP (Mar. 3, 2010), <http://www.bakerlaw.com/brown-testifies-on-libel-tourism-before-senate-judiciary-committee-03-03-2010/>.

125. Before the British libel action concluded, Ehrenfeld sued Bin Mahfouz (the plaintiff in the British suit) in the U.S. District Court for the Southern District of New York. *Ehrenfeld v. Bin Mahfouz*, 518 F.3d 102, 103 (2d Cir. 2008). Ehrenfeld sought a declaratory judgment that Bin Mahfouz could not prevail on the British libel claim and that any default judgment rendered against her in the United Kingdom would be invalid. *Id.* at 104. A year later, after a default judgment had been entered against Ehrenfeld in the United Kingdom, Ehrenfeld sought a declaration that the judgment in the British case was not enforceable in the United States based on First Amendment protections. *Id.* The court granted Bin Mahfouz's dismissal motion for lack of personal jurisdiction. *Id.* On appeal, the Second Circuit certified a question to the N.Y. Court of Appeals regarding the extension of personal jurisdiction over Bin Mahfouz. *Id.* The court held that authority to extend jurisdiction over libel tourists had to come from the N.Y. State legislature. *Id.* Based on that decision, the Second Circuit refused to extend jurisdiction over Bin Mahfouz, but stated that if a new bill extending jurisdiction over libel tourists were signed into law, Ehrenfeld could reopen her case. *Id.* at 106. In response, the N.Y. State legislature amended its long-arm statute, conferring jurisdiction to N.Y. courts over persons who have obtained a foreign defamation judgment against a N.Y. resident. N.Y. C.P.L.R. § 302(d) (McKinney 2010). The legislature also amended its state law on recognition of foreign judgments; now, a N.Y. court need not recognize a foreign defamation judgment unless it determines that the law applied by the foreign court is at least as protective of free speech as are the constitutions of the United States and New York. N.Y. C.P.L.R. § 5304(b)(8).

eventually, federal law.<sup>126</sup> The plaintiffs in the foreign defamation action were Saudi businessman Khalid bin Mahfouz and his two sons. They sued American author Rachel Ehrenfeld, as well as her publisher, for libel in the United Kingdom.<sup>127</sup> The publication at issue was Ehrenfeld's book, *Funding Evil: How Terrorism Is Financed—and How to Stop It*, which alleged that Bin Mahfouz funded al-Qaeda and other terrorist organizations.<sup>128</sup> When Ehrenfeld did not appear to defend herself in the foreign action, the U.K. court granted Bin Mahfouz a default judgment.<sup>129</sup>

Even though the suit was never decided on the merits, the default judgment against Ehrenfeld had a lasting effect on her ability to publish.<sup>130</sup> The Queen's Bench not only awarded damages and costs of the proceedings against her and her publisher, but it also included in its judgment a declaration of falsity against Ehrenfeld's book.<sup>131</sup> Moreover, the judgment directed her to publish an apology to the plaintiffs and included an injunction against further publication of *Funding Evil*.<sup>132</sup> In effect, the suit caused Ehrenfeld emotional distress and prevented her from traveling abroad.<sup>133</sup> Ehrenfeld has stated: "The psychological, emotional and financial effects of the threat of this libel suit against me in London will stay with me as long as I live."<sup>134</sup> Ehrenfeld's case demonstrates that the chilling effect on free speech caused by

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(McKinney Supp. 2011). Illinois, California, Florida, and other states have also enacted anti-libel tourism legislation. See generally *Libel Tourism*, MEDIA L. RES. CTR., [http://www.medialaw.org/Content/NavigationMenu/Hot\\_Topics/Libel\\_Tourism/Libel\\_Tourism.htm](http://www.medialaw.org/Content/NavigationMenu/Hot_Topics/Libel_Tourism/Libel_Tourism.htm) (last visited Mar. 1, 2012) (showing the status of current state anti-libel tourism bills).

126. See S. REP. NO. 111-224, at 3 (2010) (discussing how the high-profile case exposed the chilling effect of libel tourism, prompting the passage of the SPEECH Act).

127. *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC (QB) 1156, [1], [6]-[7], [12]-[13] (Eng.).

128. *Id.* at [13], [16].

129. *Libel Tourism Hearing*, *supra* note 15, at 12 (statement of Rachel Ehrenfeld, American Center for Democracy).

130. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 4-5 (statement of Kurt A. Wimmer, Partner, Covington & Burling LLP). Kurt A. Wimmer, an expert witness before the Senate Committee on the Judiciary, stated that a default judgment against Ehrenfeld "may impede [her] from obtaining future publishing contracts because publishers carry insurance policies that might make them shy away from an author that is already subject to a libel judgment." *Id.* at 5. See *Libel Tourism Hearing*, *supra* note 15, at 12 (statement of Rachel Ehrenfeld, American Center for Democracy).

131. *Bin Mahfouz*, EWHC (QB) 1156 at [74]-[75].

132. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 4 (statement of Kurt A. Wimmer, Partner, Covington & Burling LLP).

133. *Libel Tourism Hearing*, *supra* note 15, at 12 (statement of Rachel Ehrenfeld, American Center for Democracy) ("[Bin] Mahfouz also chilled my ability to travel to the U.K., lest I be arrested to enforce the British judgment against me. I run the same risk in Europe and in most Commonwealth states, due to their reciprocal enforcement of judgments.").

134. *Id.* at 11.

uncontrolled libel suits is not a mere abstraction, but a real threat that requires a strong, effective response.

### *E. The SPEECH Act and Other Federal Responses*

For years, Congress struggled to create legislation to effectively address the issue of libel tourism and its chilling effect. It attempted to tackle the issue by introducing a weak bill during the 110th Congress;<sup>135</sup> it also introduced two stronger responses, the Free Speech Protection Acts of 2008<sup>136</sup> and 2009,<sup>137</sup> during the 110th and 111th Congresses.

The weak bill, introduced by U.S. Representative Steve Cohen of Tennessee,<sup>138</sup> had the purpose of “protect[ing] the right to freedom of speech under the first amendment to the Constitution of the United States from the potentially weakening effects of foreign judgments concerning defamation.”<sup>139</sup> Nevertheless, the bill merely barred courts within the United States from recognizing or enforcing foreign defamation judgments inconsistent with the First Amendment.<sup>140</sup> It did not provide U.S. authors or publishers the ability to sue for a declaration that foreign libel judgments against them were unenforceable, and it never touched upon the award of attorneys’ fees.<sup>141</sup>

The Free Speech Protection Act of 2008 *did* allow U.S. persons defending libel actions abroad to seek declaratory, in addition to injunctive, relief from the enforcement of foreign judgments in U.S. domestic courts.<sup>142</sup> The act also allowed U.S. persons to seek three types of damages against libel tourist plaintiffs. First, the act provided that U.S. persons could recover damages in the amount of the foreign judgment, along with the costs they incurred while defending themselves

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135. H.R. 6146, 110th Cong. (2008).

136. Free Speech Protection Act of 2008, S. 2977, 110th Cong. (2008); H.R. 5814, 110th Cong. (2008).

137. Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. (2009); S. 449, 111th Cong. (2009).

138. *Libel Tourism Hearing*, *supra* note 15, at 1 (statement of Rep. Steve Cohen, Chairman, Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary).

139. H.R. 6146 § 1(b).

140. *Id.* § 2(a).

141. *See id.* §§ 1–2.

142. Free Speech Protection Act of 2008, S. 2977, 110th Cong. § 3(a), (c)(1) (2008); H.R. 5814, 110th Cong. § 3(a), (c)(1) (2008). *See* Howard Wasserman, *More on the Free Speech Protection Act*, PRAWFSBLAWG (May 21, 2008, 8:20 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/05/more-on-the-fre.html>. A pertinent part of the act allowed any U.S. person against whom a libel lawsuit was brought in a foreign country to bring an action in a U.S. district court against the person who brought that foreign suit, provided that the writing or speech at issue did not constitute defamation under the laws of the United States. S. 2977 § 3(a); H.R. 5814 § 3(a).

in the foreign action.<sup>143</sup> Second, the act permitted U.S. persons to recover damages for harms suffered as a result of adverse foreign libel judgments, including lost opportunities to publish, conduct research, or generate funding.<sup>144</sup> Finally, the act provided for an award of treble damages if a jury determined that the libel tourist-plaintiff pursued the lawsuit in a foreign jurisdiction in order to suppress a U.S. person's First Amendment rights.<sup>145</sup> Additionally, the act extended U.S. jurisdiction over anyone who sued a U.S. person for libel in a foreign country.<sup>146</sup> The Free Speech Protection Act of 2009 was nearly identical to the act introduced in 2008.<sup>147</sup> Neither passed, however, as they were deemed too forceful a response to the problem of libel tourism and would have placed an extraordinary strain on international comity.<sup>148</sup>

Less than a year later, Congress successfully passed the SPEECH Act.<sup>149</sup> According to its House Report, the Act's purpose is "to dissuade potential defamation plaintiffs from circumventing First Amendment protections by filing suit in foreign jurisdictions that lack similar protections."<sup>150</sup> Specifically, the Act purports to respond to libel tourism and deter its continued use by doing the following: mandating non-recognition and non-enforcement of foreign judgments that do not comport with the U.S. Constitution (with one exception); protecting interactive computer service providers from foreign libel actions; allowing authors and publishers to seek declaratory relief against foreign libel judgments; and providing for the recovery of reasonable attorneys' fees incurred in the United States for actions brought by foreign-judgment creditors to enforce their judgments.<sup>151</sup>

143. S. 2977 § 3(c)(2)(A)–(B); H.R. 5814 § 3(c)(2)(A)–(B); Wasserman, *supra* note 142.

144. S. 2977 § 3(c)(2)(C); H.R. 5814 § 3(c)(2)(C); Wasserman, *supra* note 142.

145. S. 2977 § 3(d); H.R. 5814 § 3(d); Wasserman, *supra* note 142. The proposed Senate bill of the Free Speech Protection Act of 2008 provided:

If . . . the jury determines by a preponderance of the evidence that the person or entity bringing the foreign lawsuit at issue intentionally engaged in a scheme to suppress rights under the first amendment to the Constitution of the United States by discouraging publishers or other media not to publish, 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, the court may award treble damages.

S. 2977 § 3(d). *See also* H.R. 5814 § 3(d) (providing treble damages if the finder of fact determines that the foreign lawsuit was brought to suppress First Amendment rights).

146. S. 2977 § 3(b); H.R. 5814 § 3(b).

147. Daniel C. Taylor, Note, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189, 207 n.109 (2010).

148. *See* Rendleman, *supra* note 10, at 486-87; Wasserman, *supra* note 142.

149. 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. §§ 4101-4105 (Supp. IV 2011)).

150. H.R. REP. NO. 111-154, at 1 (2009), *reprinted in* 2010 U.S.C.C.A.N. 812, 813.

151. *See infra* Part II.E.1-4.

### 1. Non-Recognition and Non-Enforcement

The SPEECH Act is a response to the effect that foreign plaintiff libel laws have had on American authors and publishers.<sup>152</sup> To offset that effect, the SPEECH Act prohibits every domestic court in the United States from recognizing or enforcing judgments of foreign jurisdictions whose libel laws are not as protective of freedom of expression as American law.<sup>153</sup> However, even if the libel laws applied in the foreign court's adjudication are not as protective, recognition and enforcement are allowed if the party seeking enforcement proves that the defendant in the foreign action would have been liable for defamation under the U.S. Constitution and state law.<sup>154</sup> Furthermore, the SPEECH Act is a response to the United Kingdom's lenient requirements to exercise jurisdiction.<sup>155</sup> The Act prohibits all domestic courts in the United States from enforcing a foreign judgment if the foreign forum's exercise of personal jurisdiction failed to comport with U.S. principles of due process under the Fifth and Fourteenth Amendments.<sup>156</sup> The party seeking recognition and enforcement of the foreign judgment bears the burden of establishing that the foreign court's exercise of personal jurisdiction comported with U.S. due process requirements.<sup>157</sup>

### 2. Protection of Interactive Computer Service Providers

The SPEECH Act is also a response to "the boom in Internet publishing that wiped out traditional, 'real-world' jurisdictional lines across the globe,"<sup>158</sup> which has made authors and publishers vulnerable to any forum with lax requirements for exercising personal jurisdiction.<sup>159</sup> The Act prohibits recognition or enforcement of a foreign libel judgment against interactive computer service providers, unless those providers would not have been protected under Section 230 of the Communications Decency Act of 1996.<sup>160</sup>

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152. According to the Act's Senate Report, the law's purpose is "to ensure that American authors, reporters, and publishers have nationwide protection from foreign libel judgments . . . . [The Act] combats the chilling effect that foreign defamation lawsuits are having on American free speech . . . ." S. REP. NO. 111-224, at 4 (2010).

153. 28 U.S.C. § 4102(a)(1)(A).

154. *Id.* § 4102(a)(1)(B).

155. See S. REP. NO. 111-224, at 4.

156. 28 U.S.C. § 4102(b)(1).

157. *Id.* § 4102(b)(2).

158. *Libel Tourism Hearing*, *supra* note 15, at 20 (prepared statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

159. See *supra* text accompanying notes 101-04.

160. 28 U.S.C. § 4102(c)(1); see *supra* text accompanying notes 79-81. The burden of establishing that the foreign judgment is consistent with the Communications Decency Act falls to the party seeking recognition or enforcement of that judgment. 28 U.S.C. § 4102(c)(2).

### 3. Declaratory Relief

Additionally, the Act gives U.S. persons sued abroad, and against whom a foreign libel judgment is entered, the opportunity to bring an action in federal court for a declaration that the foreign judgment against them is “repugnant to the Constitution or laws of the United States.”<sup>161</sup> The burden of establishing the unenforceability of the foreign libel judgment falls upon the party that raises a cause of action under the Act.<sup>162</sup> This declaratory relief affords American authors sued abroad for libel the opportunity to clear their names and stanch the foreign action’s adverse effects, be it monetary or reputational, upon their work.<sup>163</sup> Under this section of the Act, process may be served in the judicial district where the case is brought, or in any other U.S. district where the defendant may be found, resides, has an agent, or transacts business.<sup>164</sup> In effect, this authorizes nationwide service of process in actions for declaratory relief from foreign libel judgments, and allows an assertion of personal jurisdiction over foreign-judgment creditors to the greatest extent acceptable under U.S. due process principles.<sup>165</sup>

### 4. Removal and Award of Attorneys’ Fees

The SPEECH Act also creates broad ground for removing such actions from state to federal court, without regard to amount-in-controversy requirements and while permitting minimal diversity between the parties.<sup>166</sup> The SPEECH Act also allows U.S. persons to collect reasonable attorneys’ fees for actions that foreign-judgment creditors bring in the United States to enforce their judgments, absent exceptional circumstances.<sup>167</sup> This is in stark contrast to the Free Speech Protection Acts of 2008 and 2009, which allowed U.S. persons to recover damages in the amount of the foreign judgment, the costs and fees incurred while defending themselves in the foreign action, damages for harms suffered due to that foreign action, and treble damages.<sup>168</sup>

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161. 28 U.S.C. § 4104(a)(1).

162. *Id.* § 4104(a)(2).

163. See Laura R. Handman et al., *U.S. Congress Passes Historic Libel Tourism Bill*, CORP. FIN. L. BLOG (Aug. 3, 2010), <http://www.corpfinblog.com/2010/08/articles/federal-legislation/us-congress-passes-historic-libel-tourism-bill>.

164. 28 U.S.C. § 4104(b).

165. Handman et al., *supra* note 163.

166. 28 U.S.C. § 4103. See Handman et al., *supra* note 163.

167. 28 U.S.C. § 4105.

168. See *supra* text accompanying notes 143-45.

### III. SPEECH WITHOUT TEETH AND OTHER LEGAL ISSUES

Although many have celebrated the passage of the SPEECH Act,<sup>169</sup> there have been indications that the Act does not go far enough to protect against libel tourism.<sup>170</sup> Primarily, Congress declined the opportunity to give the Act teeth to combat the *root* of libel tourism; instead, it opted to enact legislation that goes somewhat beyond what the failed, weak federal bill proposed in 2008, but which is not nearly as toothsome as the failed, stronger Free Speech Protection Acts of 2008 and 2009.<sup>171</sup> The result is a federal response that does little to discourage litigants from pursuing libel actions in plaintiff-friendly forums in the first place.<sup>172</sup>

While the SPEECH Act does prohibit U.S. courts from recognizing and enforcing foreign libel judgments that do not comport with the First Amendment,<sup>173</sup> non-recognition and non-enforcement will not stop litigants who simply want to use libel tourism to intimidate authors and prevent them from exercising their First Amendment rights.<sup>174</sup> U.S. Representative Peter King of New York, a proponent of punitive measures to discourage filing of libel lawsuits abroad, has stated that “it’s not money [libel tourists] are after . . . . They want a settlement or default judgment. They want the publicity, an apology, and they want these books to disappear.”<sup>175</sup> According to expert witness Kurt A. Wimmer, who testified before the Senate Committee on the Judiciary:

If we know that U.S. courts will refuse to enforce a foreign judgment that does not comply with the First Amendment, is there still a chill? The answer, in my view, is yes. A foreign judgment, as soon as it is rendered, has an immediate and damaging effect on the author who has been sued, even if the judgment is never enforced in U.S. courts . . . .<sup>176</sup>

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169. See *Reception to Celebrate the Passage of the SPEECH Act of 2010*, HILL, <http://washingtonscene.thehill.com/party-events-pictures/archive/6269-reception-to-celebrate-the-passage-of-the-speech-act-of-2010> (last visited Mar. 1, 2012).

170. See Fischer & Levy, *supra* note 26.

171. See Taylor, *supra* note 147, at 206-07 (stating that the SPEECH Act falls somewhere in between a weak bill only providing for non-recognition and the stronger Free Speech Protection Acts of 2008 and 2009).

172. See *Libel Tourism Hearing*, *supra* note 15, at 8-9 (prepared statement of Rep. Peter King). Representative King believed that the failed weak bill (H.R. 6146), similar to the SPEECH Act, did not go far enough to combat the root of the libel tourism threat. See *id.*

173. See *supra* Part II.E.1.

174. See *Libel Tourism Hearing*, *supra* note 15, at 8 (prepared statement of Rep. Peter King).

175. *Id.* at 8-9.

176. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 4 (statement of Kurt A. Wimmer, Partner, Covington & Burling LLP).



Additionally, the reality is that very few litigants seek to enforce foreign libel judgments in the United States.<sup>177</sup> Those who have tried have met unfavorable results.<sup>178</sup> It therefore appears as though there was little need to fix this aspect of the libel tourism problem.<sup>179</sup>

Instead, federal legislation should have addressed the *financial* aspect of the problem, simultaneously discouraging libel tourists from filing lawsuits abroad in the first place, while helping authors and publishers seek damages for economic harms suffered due to libel tourism. In its current form, however, the SPEECH Act only allows U.S. persons to recover reasonable attorneys' fees when foreign-judgment creditors seek to enforce their judgments within the United States.<sup>180</sup> The Act awards neither damages to U.S. persons who may have been harmed by foreign libel judgments inconsistent with the First Amendment, nor attorneys' fees incurred by U.S. persons defending themselves in those foreign actions.<sup>181</sup>

Rachel Ehrenfeld, whose story demonstrates the chilling effect of libel tourism, has stated that "it would have been good had the SPEECH

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177. According to Wimmer, enforcement in the United States of a foreign libel judgment is merely an "occasional" issue. *Id.* at 16. "There have been only a few cases . . . largely because a lot of foreign libel plaintiffs really never intend to come to the United States to enforce." *Id.* Wimmer has stated that libel tourists enjoy having a foreign judgment they choose not to enforce because the judgment gives them an immediate sense of vindication without having to "deal with the First Amendment." *Id.*

178. See, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230, 251 (Md. 1997); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992). In both cases, a non-U.S. citizen who obtained a libel judgment from the High Court of Justice in London sought to have the judgment enforced in the United States. *Telnikoff*, 702 A.2d at 232, 235; *Bachchan*, 585 N.Y.S.2d at 661-62. Both U.S. courts held that the foreign libel judgments were repugnant to state public policy, as the judgments were imposed without regard to freedom of speech and freedom of the press. *Telnikoff*, 702 A.2d at 236, 251; *Bachchan*, 585 N.Y.S.2d at 662-64. Senator Patrick Leahy of Vermont has stated that "[n]o American court has ever enforced a foreign libel judgment." *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 8 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

179. See Paul Tweed, Editorial, *So Much for the 'Special Relationship,'* L. SOC'Y GAZETTE, July 23, 2009, at 10, 10, available at <http://www.paultweed.com/doc/Law-Gazette-Article-23.07.09.pdf> (stating that in his thirty years of practice as a media lawyer, Tweed never once had to seek enforcement of a U.K. libel judgment in an American court).

180. Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4105 (Supp. IV 2011).

181. See *id.*

Act provided for damages, too.”<sup>182</sup> When commenting on the more punitive Free Speech Protection Act, Ehrenfeld testified:

[Provisions allowing countersuits and damages] are essential to remove the chilling effect of foreign libel suits, because they will serve as a deterrent to people contemplating to sue American writers and publishers in England or other foreign jurisdictions. Do you think [Bin] Mahfouz would have sued me had he known I could countersue him and ask for damages? And would not that be true for others who sue the Americans in London or elsewhere?<sup>183</sup>

Furthermore, many potential libel tourism victims possess assets overseas.<sup>184</sup> These foreign assets are not shielded by the Act, and can be collected to satisfy foreign libel judgments.<sup>185</sup> Moreover, a default judgment in a foreign jurisdiction can still potentially restrict an author’s ability to travel and work abroad, and might hinder his or her ability to deal with certain media and publishing outlets in the future.<sup>186</sup> In summary, the SPEECH Act does little to prevent the financial consequences Americans face vis-à-vis their involvement in foreign libel actions. Without broader measures permitting American authors and publishers accused of libel in foreign jurisdictions to force their accusers to pay for damages to their reputation or for legal fees incurred abroad, Americans will continue to feel the chilling effect of libel tourism.<sup>187</sup>

Congress also declined the opportunity to make the SPEECH Act more protective of American authors and publishers *after* a foreign judgment has been rendered against them. For example, the Act failed to fully address what Bruce D. Brown, an expert witness testifying before the Senate Committee on the Judiciary, identified as the problem of “legal limbo.”<sup>188</sup> The issue can be described as follows: If the judgment

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182. Sydney Smith, *U.S. Libel Tourism Protection Act Signed into Law, British Activists See Call for Reform*, AM. CENTER FOR DEMOCRACY (Aug. 27, 2010), <http://www.acdemocracy.org/viewarticle.cfm?category=Free%20Speech%20-%20In%20the%20Media&id=1054> (internal quotation marks omitted).

183. *Libel Tourism Hearing*, *supra* note 15, at 12 (statement of Rachel Ehrenfeld, American Center for Democracy).

184. *See id.* at 57 (prepared statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP) (noting that many large news organizations have assets overseas against which libel judgments can be enforced).

185. S. REP. NO. 111-224, at 10 (2010); Huff, *supra* note 99.

186. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 5 (statement of Kurt A. Wimmer, Partner, Covington & Burling LLP).

187. *See* S. REP. NO. 111-224, at 10 (“Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages.”).

188. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 7 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

creditor does not move to enforce the foreign judgment in the United States, a judgment debtor who does not have the means to bring an action for declaratory relief will be left in legal limbo—a perpetual state of uncertainty as to whether the judgment creditor will ever try to enforce the judgment.<sup>189</sup> To fix this issue, Congress could have set a limitations period whereby judgment creditors would not be able to enforce their libel judgments in the United States after a certain period of time.<sup>190</sup>

Although a stronger SPEECH Act could have discouraged the filing of libel suits abroad and been more protective of American authors and publishers, the enactment of such a federal response to libel tourism would have put a serious strain on international principles of reciprocity.<sup>191</sup> Generally speaking, the danger the world faces if U.S. courts apply American principles of libel law when deciding whether to enforce foreign judgments is the notion of “libel tourism in reverse.”<sup>192</sup> That is, federal legislation in the United States that goes beyond making non-recognition and non-enforcement of foreign libel judgments mandatory can have the effect of imposing the views and values of the United States on the rest of the world.<sup>193</sup> Although the protections provided under the SPEECH Act do not smack of American legal imperialism, the Act—as it is in its current form—may have its share of negative repercussions on international comity.<sup>194</sup>

One reason why the SPEECH Act may prove to be problematic is that many countries, like the United Kingdom, adopt a reciprocity-based approach to recognition of foreign judgments.<sup>195</sup> For example, according to the Foreign Judgments (Reciprocal Enforcement) Act,<sup>196</sup> the United Kingdom will generally decline to recognize U.S. judgments if courts in the United States do not recognize similar U.K. judgments.<sup>197</sup> Therefore,

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189. *See id.*

190. *See id.*

191. *See* Taylor, *supra* note 147, at 219-20.

192. *Libel Tourism Hearing*, *supra* note 15, at 68 (prepared statement of Linda J. Silberman, Professor of Law, New York University School of Law) (internal quotation marks omitted).

193. *Id.*

194. *See* EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO “LIBEL TOURISM” 13-14 (2010). “Comity,” as defined by the well-known 1895 case of *Hilton v. Guyot*, is “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.” 159 U.S. 113, 163-64 (1895) (internal quotation marks omitted).

195. CONG. RESEARCH SERV., R41417, at 13.

196. Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 Geo. 5, c. 13 (Eng.) (explaining the United Kingdom’s reciprocity-based approach to enforcing foreign judgments).

197. *Id.* § 9.

a decision by a U.S. court not to enforce a libel judgment rendered in the United Kingdom could affect the United Kingdom's willingness to enforce libel judgments rendered in the United States.<sup>198</sup> Furthermore, a decision by a U.S. court not to enforce a foreign libel judgment could negatively affect a foreign country's willingness to enforce judgments based on plaintiff-friendly U.S. laws.<sup>199</sup> For instance, U.S. antitrust law is a very pro-plaintiff area of civil tort liability.<sup>200</sup> Due to the extraterritorial application of U.S. antitrust law,<sup>201</sup> many countries have passed legislation impeding the discovery of useful evidence in antitrust cases.<sup>202</sup> Legislation in the United Kingdom, in particular, has provided that U.S. antitrust judgments will not be enforceable in U.K. courts.<sup>203</sup> Foreign countries may employ similar types of retaliatory tactics in the aftermath of the SPEECH Act.<sup>204</sup>

In summary, the SPEECH Act does not stop the prosecution or enforcement of libel suits abroad.<sup>205</sup> The Act does little to make the practice of libel tourism less appealing to those who wish simply to dissuade future publication about them and to intimidate authors.<sup>206</sup> The Act does not provide protection to authors and publishers who have suffered financial and reputational harm due to the filing of libel lawsuits overseas.<sup>207</sup> Federal legislation could have been more protective had it addressed the "legal limbo" problem,<sup>208</sup> but the Act failed to do so. Yet even with all these deficiencies, the SPEECH Act may still negatively affect the United States's relationship with multiple forums around the globe.<sup>209</sup>

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198. *See id.*

199. CONG. RESEARCH SERV., R41417, at 13 (claiming that plaintiff-friendly U.S. laws may become vulnerable due to the SPEECH Act).

200. *Id.*

201. *See, e.g.,* Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124, 1126, 1139 (D.D.C. 1983), *aff'd sub nom.* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

202. William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363, 363 & n.1 (2001).

203. *Id.* at 363.

204. Taylor, *supra* note 147, at 219-20.

205. *See Libel Tourism Hearing*, *supra* note 15, at 8 (prepared statement of Rep. Peter King).

206. *See id.*

207. *See Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 5 (statement of Kurt A. Wimmer, Partner, Covington & Burling LLP).

208. *See id.* at 7 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

209. EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" 14 (2010).

#### IV. TWO SOLUTIONS WITH MORE BITE

Two routes can and should be taken to address the issue of libel tourism and finally end its chilling effect. First, Congress should modify the SPEECH Act to give it sharper teeth; this will reduce the practice of libel tourism until the United States can pursue a global solution to the problem. Second, the United States can take steps to form agreements with the United Kingdom and other countries where libel tourism is a common practice, harmonizing international jurisdiction law over defamation cases.

##### A. *Further Curbing of the Practice*

To further curb the practice of libel tourism, Congress should work toward fixing the defects of the SPEECH Act while bearing in mind the consequences a modification in statutory law could have on international relations. As a preliminary matter, if it were to amend the Act in any way, Congress should take care that modifications do not result in a change of normal due process rules.<sup>210</sup> Therefore, for proposed modifications to have any effect, federal legislation should reflect the requirement that individuals practicing libel tourism have minimum contacts, and be amenable to suit, in the United States.<sup>211</sup>

As already discussed, the threat of a default judgment and fee awards in the United Kingdom is the primary reason why libel tourism continues to have such a chilling effect.<sup>212</sup> For that reason, Congress should attempt to add teeth to the SPEECH Act by giving discretion to U.S. courts to award American authors and publishers the following: first, reasonable attorneys' fees when seeking a declaration that a foreign libel judgment is unenforceable;<sup>213</sup> and second, legal fees and other costs incurred in defending themselves in a foreign libel suit.<sup>214</sup> As to the latter modification, such an award of legal fees and costs should occur after a foreign-judgment creditor tries to enforce the judgment in the United States and upon a finding by a U.S. court that the judgment cannot be

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210. See Rivkin & Brown, *supra* note 28, at A11 (arguing that a federal legislative response to libel tourism should be consistent with due process).

211. See *id.*

212. See *supra* text accompanying notes 96, 175-76, 180-86.

213. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 7 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP). Currently, the SPEECH Act only allows U.S. persons to collect reasonable attorneys' fees for actions that creditors of foreign libel judgments bring in the United States to enforce those judgments. Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4105 (Supp. IV 2011). Under the SPEECH Act, U.S. persons cannot collect these fees when they seek declaratory relief. See *id.* §§ 4101-4105.

214. Balin et al., *supra* note 71, at 124.

enforced or recognized.<sup>215</sup> According to libel tourism experts, “[s]uch full fee awards in appropriate cases would help make publishers and authors whole and would . . . provide more meaningful deterrence to international forum shopping.”<sup>216</sup> By providing for an award of fees and costs incurred by U.S. authors and publishers in libel suits abroad, as well as reasonable attorneys’ fees in declaratory relief and domestic enforcement proceedings, libel tourists will be dissuaded further<sup>217</sup> and some of the financial repercussions of libel tourism to U.S.-based authors and publishers will be allayed.<sup>218</sup>

Furthermore, Congress could add teeth to the SPEECH Act by including a federal statute of limitations period for enforcement of foreign libel judgments.<sup>219</sup> Congress could provide that the statute of limitations period for libel judgment enforcement be equal to the limitations period set forth for defamation by the foreign jurisdiction in which the suit was filed.<sup>220</sup> This would eliminate the “legal limbo” problem faced by U.S. persons against whom foreign libel judgments are rendered, but who do not have the financial means to bring an action in the United States for declaratory relief.<sup>221</sup>

The SPEECH Act can also be amended to include the award of damages for economic and reputational harm suffered because of libel tourism, as well as treble damages as a means to penalize libel tourists.<sup>222</sup> Although these amendments can be effective ways to deter libel forum shopping and protect U.S. authors and publishers, Congress has previously viewed such measures as unwise and disregarding repercussions on international comity—therefore, they are unlikely to be passed any time soon.<sup>223</sup> But they are not the only solution to the deficiencies of the SPEECH Act. Instead, Congress could focus primarily on smaller changes to the Act that would give U.S. courts the authority to award costs incurred abroad and during declaratory relief proceedings, and that would address the “legal limbo” issue. Although nothing short of a transnational response can effectively solve the

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215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. *See Hearing Before the S. Comm. on the Judiciary, supra* note 101, at 7 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

220. *See id.*

221. *See id.*

222. *See, e.g.,* Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. § 3(c)(2), (d) (2009); S. 449, 111th Cong. § 3(c)(2), (d) (2009); Free Speech Protection Act of 2008, S. 2977, 110th Cong. § 3(c)(2), (d) (2008); H.R. 5814, 110th Cong. § 3(c)(2), (d) (2008).

223. *See* Taylor, *supra* note 147, at 219-21; Wasserman, *supra* note 142.

problems libel tourism poses, such federal changes will help curb the practice until the United States pursues an international solution.<sup>224</sup>

### B. Eliminating the Practice

Risks of offending international comity limit the ability of Congress to enact an aggressive federal statute to combat libel tourism.<sup>225</sup> For that reason, modification of the SPEECH Act will likely fall short of ending libel tourism and terminating its chilling effect once and for all.<sup>226</sup> Libel tourism is a global issue and should be combated through a transnational solution.<sup>227</sup> As already discussed, many non-U.S. courts have lax jurisdiction requirements and are willing to exercise control over authors whose works have had even the slightest exposure within their jurisdictions.<sup>228</sup> Potential libel tourism forums can include countries like New Zealand and Singapore, and even such unexpected places as Kyrgyzstan.<sup>229</sup> The Internet further exacerbates the global problem, as it blurs jurisdictional lines and allows information to travel worldwide in a matter of seconds.<sup>230</sup>

Only an international resolution can completely and effectively address and eliminate the issue of libel tourism.<sup>231</sup> Many libel tourism experts have expressed this same sentiment. For example, Kurt A. Wimmer, a witness testifying before the Senate Committee on the Judiciary, has written: "Will legislation within the United States solve [the libel tourism] problem entirely? To be sure, it would only be a step."<sup>232</sup> Bruce D. Brown, another witness before the Committee, has claimed that "[s]hort of having international treaties . . . we may not be able to eliminate [the threat of libel tourism] entirely."<sup>233</sup> Furthermore, a transnational solution would likely assuage concerns about international

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224. See *infra* Part IV.B.

225. See 156 CONG. REC. S5980 (daily ed. July 19, 2010) (statement of Sen. Patrick J. Leahy).

226. See *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 6 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

227. See BELL, *supra* note 33, at 3 (describing libel tourism as an issue that affects authors around the globe).

228. See *supra* note 47 and accompanying text.

229. See Balin et al., *supra* note 71, at 99 n.4.

230. See *supra* text accompanying notes 104, 158-59.

231. *Libel Tourism Hearing*, *supra* note 15, at 71 (prepared statement of Linda J. Silberman, Professor of Law, New York University School of Law) (arguing that "only an international solution can ultimately address an issue that has become as global as the Internet itself").

232. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 101, at 130 (prepared statement of Kurt A. Wimmer, Partner, Covington & Burling LLP).

233. *Id.* at 6 (statement of Bruce D. Brown, Partner, Baker & Hostetler LLP).

comity, since any agreement reached would necessarily be the result of international compromise and cooperation.<sup>234</sup>

Although an international treaty to establish common provisions on mutual recognition and enforcement of judicial decisions has failed in the past,<sup>235</sup> there is no reason why the United States should proceed on the assumption that creating an agreement to resolve the libel tourism problem is unachievable or improbable. On the contrary, the executive branch should vigorously pursue the possibility of drafting an international agreement that addresses libel tourism.<sup>236</sup> There are a number of possible ways an agreement can address the problem. First, an international agreement can set forth some modicum of harmonization between the countries' libel laws.<sup>237</sup> Second, an agreement can set forth a uniform choice of law rule.<sup>238</sup> Third, an agreement can harmonize jurisdiction law over defamation cases.<sup>239</sup>

An international agreement that would harmonize the defamation laws of the United States and foreign countries such as the United Kingdom would likely eliminate the problem of libel tourism—libel suits filed in the United States and abroad would necessarily be governed by the same laws. However, differences in cultural values and practices make it unwise or improbable to create such an agreement.<sup>240</sup> Not only do views of the meaning of “freedom of expression” vary significantly from country to country (and in the communities found within those countries),<sup>241</sup> but the notions of free speech and protection of reputation also differ considerably in importance.<sup>242</sup> In short, what is considered libelous in one country may not be libelous in another.<sup>243</sup> Even if international parties were to come up with a collective rule for defamation, such a rule necessarily would be complex, thus leading to a reduction of predictability in the law and the possibility that different

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234. Taylor, *supra* note 147, at 225.

235. See *id.* (discussing the failure of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters).

236. See, e.g., 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, 931-32 (2006) (proposing an international agreement to address libel tourism).

237. Martin George, *Hartley on the Problem of "Libel Tourism,"* CONFLICTOFLAWS.NET (July 19, 2010), <http://conflictoflaws.net/2010/hartley-on-the-problem-of-libel-tourism>.

238. *Id.*

239. *Id.* See Maly, *supra* note 236, at 931.

240. See George, *supra* note 237.

241. Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 203 (2006).

242. George, *supra* note 237.

243. Banerjee, *supra* note 32.



jurisdictions would interpret the law dissimilarly.<sup>244</sup> Therefore, while countries that draft an international agreement could certainly entertain the idea of harmonizing defamation law, such a solution would be unworkable.<sup>245</sup>

Alternatively, an international agreement could create a uniform choice of law rule with regard to libel suits.<sup>246</sup> That is, an agreement could identify which country's law should apply when litigation involves multiple jurisdictions.<sup>247</sup> However, a uniform choice of law rule would face similar issues as an international agreement that tries to harmonize substantive law. Although a uniform choice of law rule would ensure that the same substantive laws are applied to certain defamation cases, jurisdictions applying these laws could interpret them differently, based on their countries' values.<sup>248</sup> Moreover, it would be difficult to settle on a suitable rule.<sup>249</sup> An international agreement could apply the law of the place in which the defamatory work was published; the place where harm to the plaintiff's reputation occurred; the jurisdiction in which the plaintiff lives; or the jurisdiction in which the defendant lives—all applications that raise major issues and concerns.<sup>250</sup> An agreement that creates a uniform choice of law rule would therefore be unfeasible.

The most effective avenue for solving the libel tourism problem is to create an international agreement that harmonizes the jurisdiction law used for defamation cases. If countries such as the United States and the United Kingdom could agree upon a forum that has the authority to adjudicate libel cases, the number of forum choices available to a libel tourist would be limited and would not necessarily comprise the most plaintiff-friendly jurisdiction.<sup>251</sup> If possible, an international agreement should limit the libel plaintiff to filing his or her suit in the jurisdiction in which the defendant is domiciled or resides, or the jurisdiction where the plaintiff's reputation suffered actual harm.<sup>252</sup>

Alternatively, the agreement could limit the number of forums in which potential litigants can pursue a defamation action for a particular

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244. *Id.*

245. *See id.*

246. George, *supra* note 237.

247. *See* BLACK'S LAW DICTIONARY 275 (9th ed. 2009) (defining "choice of law" as "[t]he question of which jurisdiction's law should apply in a given case").

248. George, *supra* note 237.

249. *Id.*

250. *See id.* For example, "[i]t is difficult to define where the harm occurs (especially in the case of the Internet), and it might not be obvious where the damage is felt." *Id.*

251. *See* Banerjee, *supra* note 32.

252. *See id.*

publication.<sup>253</sup> It could also limit recovery of damages to actual reputational harm suffered in the particular jurisdiction where the action is brought.<sup>254</sup> Whichever route the harmonization of jurisdiction law takes, one thing should be made clear: A court's control over a libel defendant, exercised on the mere basis that the forum is the place of publication of the allegedly defamatory work, should be insufficient for personal jurisdiction purposes.<sup>255</sup> Such a limitation is necessary because, with the advent of the Internet, publication of defamatory work can occur anywhere around the globe.<sup>256</sup> An agreement adopting such a limitation on the exercise of jurisdiction over defamation cases would allow these cases to be tried in countries where they would be tried fairly, and would curtail the exploitation of pro-plaintiff forums by libel tourists.<sup>257</sup>

## V. CONCLUSION

Libel tourism severely threatens the nation's fundamental commitment to an open marketplace of ideas.<sup>258</sup> Authors and publishers have been forced to engage in self-censorship for fear that any error made in their work will serve as bait for litigants to exploit foreign jurisdictions with plaintiff-friendly libel laws.<sup>259</sup> Victims have suffered financially and professionally, and they have experienced the chilling effect that libel tourism has had on their ability to publish in the future.<sup>260</sup>

The SPEECH Act is a good first step toward combating libel tourism, but the Act will not solve a number of problems that the practice poses.<sup>261</sup> In particular, the Act does little to make the practice less appealing to those who file libel lawsuits overseas simply to dissuade future publication about them and to intimidate authors.<sup>262</sup> Because risks of offending international comity limit Congress's ability to enact an aggressive statute capable of eliminating the threat of libel tourism, Congress should focus primarily on smaller changes to the

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253. Maly, *supra* note 236, at 931.

254. *Id.* See Jonathan Frieden, *Calder "Effects Test" Applied to Internet Defamation Case*, E-COM. L. (Dec. 3, 2007, 10:40 AM), [http://ecommercelaw.typepad.com/ecommerce\\_law/2007/12/calder-effects.html#tp](http://ecommercelaw.typepad.com/ecommerce_law/2007/12/calder-effects.html#tp).

255. See Banerjee, *supra* note 32.

256. See *supra* notes 77-78 and accompanying text.

257. Banerjee, *supra* note 32.

258. See *supra* Part II.D.

259. See *supra* text accompanying note 105.

260. See *supra* Part II.D.

261. See *supra* Part III.

262. See *supra* Part III.

SPEECH Act.<sup>263</sup> Allowing, for example, libel tourism victims to recover legal fees and costs they incur in defending themselves in defamation suits abroad could curtail the practice until the United States pursues a transnational solution.

Only a transnational solution can fully address libel tourism, “an issue that has become as global as the Internet itself.”<sup>264</sup> The executive branch should pursue efforts to draft an international agreement that would harmonize laws relating to the exercise of jurisdiction in defamation cases.<sup>265</sup> No matter what form such an agreement takes, the agreement should explicitly restrict courts from exercising jurisdiction over libel defendants on the mere basis that the defamatory material at issue was published in the forum before which the libel suit is brought.<sup>266</sup> Because publication of defamatory material can occur in any forum around the world via the Internet, this restriction is crucial to limit libel tourists’ exploitation of forums with pro-plaintiff libel laws.<sup>267</sup> If such further steps are not taken, it is likely that journalism and scholarship in the United States and around the world will continue to suffer the chill of libel tourism.

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263. See *supra* Part IV.A.

264. *Libel Tourism Hearing*, *supra* note 15, at 71 (prepared statement of Linda J. Silberman, Professor of Law, New York University School of Law).

265. See *supra* text accompanying notes 251-57.

266. See *supra* text accompanying notes 255-57.

267. See *supra* text accompanying notes 256-57.

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