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Before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

On Libel Tourism

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Mr. Chairman, Ranking Member Franks and Members of the Subcommittee:

## QUALIFICATIONS

I am Laura R. Handman, a partner in the law firm of Davis Wright Tremaine LLP, working out of the firm's offices in New York and the District of Columbia. I am truly honored to appear before you today about an issue on which I have been on the front lines for nearly 20 years.

Following a federal district court clerkship and four years as an Assistant United States Attorney, I have devoted 25 of my 31 years of practice to representing both U.S. and British-based newspapers, magazines, broadcasters, book publishers, book sellers and online publishers. For my clients, I provide counseling prior to publication or broadcast, advising them about the legal risks arising out of the content they propose to publish or broadcast. I also represent media organizations in litigation, from complaint through trial and appeal. My representation generally involves issues of libel, privacy, copyright, trademark, reporter's privilege, newsgathering, access to information and other First Amendment content-related matters. I have been named by the British-based Chambers, the leading lawyer directory, as one of "America's Leading Business Lawyers" in National First Amendment Litigation, and was awarded the 2007 International PEN First Amendment Award from the international writers' organization. I have chaired the Communications and Media Law Committee of the Association of the Bar of the City of New York and the Media Law Committee of the Arts, Entertainment and Sports Law Section of the D.C. Bar and have served on the Governing Board of the Forum on Communications Law of the American Bar Association. I am the past President of the Defense Counsel Section of the Media Law Resource Center, the leading national organization of media defense lawyers. I am currently Co-Chair of the committee of the Council for Court Excellence drafting a Journalist's Guide to the D.C. Courts.

I have been introduced by my British counterparts to English judges as the "American lawyer who got our libel law declared repugnant." I obtained the first – and last – decisions from U.S. courts refusing to enforce British libel judgments as contrary to public policy. In *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992), an English court had imposed liability on a New York-based newspaper

for a story about alleged corruption involving one of India's most prominent families. If England had had the equivalent of the actual malice standard, there would not been a judgment against the newspaper. Accordingly, the New York State court refused to enforce the British libel judgment. In *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997), I argued on behalf of many leading media organizations as *amici* in Maryland's highest court in support of an American citizen who wrote a letter to the editor in response to an op-ed column in a British newspaper, suggesting the op-ed author was a "racialist" espousing a "blood test" for employment in a foreign radio service. Such a clear expression of opinion could not have been the subject of a judgment in a U.S. court. In view of these starkly outcome-determinative differences about matters of clear public concern, the New York court in 1992 and Maryland Court in 1997 refused to enforce the British libel judgments.

Because of these precedent-setting victories, I have been asked to serve as an expert on U.S. libel law in foreign libel cases in Belfast, London and Melbourne, to speak on numerous panels comparing foreign and U.S. libel law, and to write on the problem of libel tourism.[1] I have served as an expert on U.S. libel law in support of the magazine *Barron's*, published by Dow Jones & Company in two cases, *Gutnick v. Dow Jones & Co.*[2] and *Chadha & Osicom Technologies, Inc. v. Dow Jones & Co.*[3] In the former, because the plaintiff was a resident of Australia, even though only five copies of the publication were sold in Victoria and just 1700 of the 550,000 international subscribers had Australia-based credit cards, jurisdiction was available in Australia. In *Chadha*, even though the London court initially found jurisdiction, because the plaintiffs were based in California with few ties to the U.K., it ultimately dismissed the case for *forum non conviens*. Unfortunately, such dismissals have been more the exception than the rule where minimal contacts and minimal publication have sufficed to keep U.S. publishers defending libel cases in British courts. I also served as an expert on behalf of Amazon.com in *Vassiliev v. Amazon.com* which involved, among other things, a review by a reader of a book sold by Amazon about the controversy over Alger Hiss. In the U.S., the website publication of a reader's comment would clearly have been protected by Section 230 of the Communications Decency Act,[4] but the U.K. has no equivalent for protection of websites for third-party comments.

## BACKGROUND

Global electronic and satellite communications have erased the traditional jurisdictional boundaries that previously applied to libel law. Today, any book, article, or broadcast found online, even those published exclusively in the United States, can be subject to the libel laws of another country. As a result, publishers, journalists, authors, booksellers and other members of the American media are increasingly concerned about the practice of

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[1] "*Bachchan v. India Abroad:* Non Recognition of British Libel Judgments: The American Revolution Revisited," *Communications Lawyer*, a publication of the ABA, Fall 1992 (with Robert D. Balin).
[2] [2002] HCA 56, 210 C.L.R. 575 (Austl.).
[3] [1999] E.M.L.R. 724, [1999] I.L.Pr. 829, [1999] EWCA Civ 1415.
[4] 47 U.S.C. § 230; *Schnieder v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) (Amazon.com not liable for reader's comment).

"libel tourism:" foreigners suing other foreigners in England or elsewhere, and using those judgments to deter authors, publishers and broadcasters from reporting on matters of public concern.[5] Libel tourism, long a tactic used by celebrities and political figures seeking to take advantage of claimant friendly libel laws, has increasingly become used to suppress legitimate reporting on public figures ranging from international financiers to business tycoons whose activities are under scrutiny.[6]

H.R. 6146 is a necessary step in the efforts to combat the effects of libel tourism. Passage of this legislation would provide protection for American authors, publishers and broadcasters from enforcement of foreign judgments that are inconsistent with the First Amendment. I have included some suggested amendments to address problems for which the current legislation may not offer sufficient redress.

**Differences between U.S. and English Libel Law**

Stark differences exist between U.S. and English libel law. In many ways, libel laws in the U.S. and England constitute mirror images of each other, with the burden of proof shifted to defendant in the U.K. and the plaintiff in the U.S. English libel law is essentially based on a system of strict liability – you make a mistake, you pay. As a result, many identical cases would be decided differently in the two countries. Under English law, any published statement that adversely affects an individual's reputation or the respect in which a person is held is *prima facie* defamatory.[7] The plaintiff's only burden is to establish that the allegedly defamatory statements apply to them, were published by the defendant and have a defamatory meaning.

Since allegedly defamatory statements are presumed false under British law, it is the defendant who must prove the truth or "justification" of the statements or establish another privilege to defeat the charges. If the defendant attempts to prove truth and fails, he can face an aggravated damages award. In the U.S., if the plaintiff is a public figure or public official or the statement at issue involves a matter of public concern, defendant does not have the burden of proving truth; the plaintiff has the burden of proving substantial falsity.[8]

While the "fair comment" exceptions under British law can save defendants from the burden of proving the truth of the underlying statement at issue, the exception provides far less protection than can be found under the comparable American law. The "fair comment" exception may apply to opinions made by the author on a matter of public interest, it must be an opinion that the author could reasonably express based on facts,

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[5] Rachel Donadio, *Libel Without Borders,* N.Y. Times, Oct. 7, 2007, http://www.nytimes.com/2007/10/07/books/review/Donadio-t.html?pagewanted=1&_r=2.

[6] Michael Peel & Megan Murphy, *English Courts In The Dock On "Libel Tourism,"* Financial Times, Apr. 2, 2008, http://us.ft.com/ftgateway/superpage.ft?news_id=fto040120082148266717.

[7] Rodney A. Smolla, *Law of Defamation* § 1.9 (2d ed. 1999).

[8] In *Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 768-69 (1986), the Supreme Court held that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages [in a defamation action] without also showing that the statements at issue are false."

and made without malice.[9] In the U.S., only statements of facts are actionable; statements that are not provable as true or false, *i.e.*, opinions, are not actionable regardless of whether a court or jury thinks they are reasonable, outlandish or harsh.[10] Statements of opinion, if the facts on which they are based are set forth fully and accurate, are not actionable, even if the speaker harbors ill will or malice.[11]

In the United States, the First Amendment provides a most important and distinct departure from England's strict liability, no fault standard. In *New York Times Co. v. Sullivan,* the U.S. Supreme Court noted that the press protections established by the American Constitution were a deliberate departure from the British form of government.[12] At the center is our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[13] Accordingly, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[14] The *Sullivan* court then went on to hold that such malice could not be presumed (376 U.S. at 283-84), that the constitutional standard requires proof having "convincing clarity" (*id.* at 285-86) and that evidence simply supporting a finding of negligence is insufficient (*id.* at 287-88). In order to succeed on a defamation claim, public figures or public officials bringing defamation actions must show that the alleged defamatory statement was made with actual malice – with the knowledge that it was false or with reckless disregard for whether or not it was false.[15]

In *Curtis Publishing Co. v. Butts,* the Supreme Court held that the principles set forth in *New York Times Co. v. Sullivan* were also applicable to the defamatory criticism of "public figures."[16] In *Gertz v. Robert Welch,* the Supreme Court held that, although the "actual malice" standard of *New York Times Co. v. Sullivan* did not extend to defamation of individual persons who were neither public officials nor public figures, the Court rejected English law of strict liability; even a private plaintiff would still be required to show some level of fault to recover damages, negligence being the bare minimum.[17]

Recent pressure by the international community against England's plaintiff- friendly libel laws have led to incremental changes in English libel law. In *Reynolds v. Times Newspapers Ltd.,* the House of Lords ruled that when the media has a legitimate duty in reporting matters of public interest, a news organization may be able to successfully defend itself against libel charges. Under the standard set forth in *Reynolds,* the criteria

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[9] Heather Maly, *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, 901 (2006).
[10] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).
[11] *Id.* at 20 ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").
[12] *New York Times Co. v. Sullivan,* 376 U.S. 254, 274 (1964).
[13] *Id.* at 270.
[14] *Id.* at 279-80.
[15] *Sullivan,* 376 U.S. at 279-80.
[16] 388 U.S. 130 (1967).
[17] 418 U.S. 323, 347 (1974).

include the seriousness of the allegation, the steps taken to verify the information, the urgency of the matter, whether the article contained the gist of the plaintiff's side of the story, whether the comment was sought from the plaintiff, and the circumstances of the publication, including the timing.[18]

In the recent case *Jameel v. Wall Street Journal Europe Sprl*,[19] a wealthy Saudi financier sued the *Wall Street Journal Europe* in London for reporting on Saudi oversight, at the request of U.S. law enforcement agencies, of certain bank accounts. Britain's House of Lords made clear that if a media defendant can show that an article or broadcast is a matter of public interest and a product of "responsible journalism," a plaintiff cannot recover libel damages. Although *Jameel* set forth a new standard for British courts to apply to the activities of American journalists or publishers who might be sued in the U.K., the protections afforded under *Jameel* are still less than those provided to publishers and authors in the U.S. The British standard of "responsible journalism" would seem to allow the judge to evaluate, with 20/20 hindsight, the fairness of the journalism; the actual malice standard sets a much higher bar, reaching only what is tantamount to deliberate falsehoods – a subjective bad faith test. Failure to adequately investigate is not the test for actual malice.[20]

The English system differs from the American system in other important ways. In England, the statute of limitations runs from whenever a magazine, book, newspaper, or Internet posting is available. In the United States, the statute of limitations generally begins to run from the first publication of the statement, even if the publication stays on sale or the posting stays up on the Internet.[21] With regard to jurisdiction, a few hits on a website on the Internet in Great Britain may be enough to give Commonwealth courts jurisdiction to hear the plaintiff's libel case, even if the content or the web server is physically located in another country.[22] Contrast this to the United States, where in *Young v. New Haven Advocate,* the Fourth Circuit held that an out of state defendant's Internet activity must be expressly targeted at or directed to the forum state to establish the minimum contacts necessary to support the exercise of personal jurisdiction over defendant by district court in the forum state.[23] In the U.S., Internet service providers are immune from liability for speech by third parties posted on their websites.[24] In Britain, no such immunity exists. Under British law, a libel plaintiff can obtain an injunction against publication of the defamatory material.[25] In the U.S., such an injunction would be deemed an illegal prior restraint.[26]

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[18] *Reynolds v. Times Newspapers Ltd*, [1999] 4 All E.R. 609, [2001] 2 A.C. 127, [1999] UKHL 45.
[19] *Jameel v. Wall Street Journal Europe Sprl*, [2007] 1 A.C. 359, [2006] 4 All E.R. 1279, [2006] UKHL 44.
[20] *St. Amant v. Thompson*, 390 U.S. 727 (1968).
[21] Judge Robert Sack, *Sack on Defamation,* § 7.2 (3d ed. 2007).
[22] *Celebrity Settles U.K. Libel Suit with National Enquirer*, News Media Update, Reporters Committee for a Free Press, Mar. 5, 2007, http://www.rcfp/news/200710305-lib.celebr.html.
[23] *Young v. New Haven Advocate,* 315 F.3d 256, 262 (4th Cir. 2002) (reversing and dismissing for lack of jurisdiction libel claims brought in Virginia against *The Hartford Courant* and *The New Haven Advocate*).
[24] Under the Communications Decency Act, 47 U.S.C. § 230, Internet service providers are immune from liability based on content created by a third party.
[25] *See* http://www.binmahfouz.info/news_2005053.html.
[26] Sack, *Sack on Defamation*, § 10.6.1.

Another stark difference between the English and American systems emerges around the issue of attorneys fees. In England, the courts allow fee shifting. Under fee shifting, the losing party must bear all of the costs associated with the litigation, including their own. This substantially increases the cost of litigation as most libel cases in the Great Britain require multiple attorneys. Under the "American rule," attorneys' fees are not awarded to the prevailing party unless authorized by law. State anti-SLAPP statutes are one such provision for fees to a prevailing libel defendant.[27]

**The Dangers of Libel Tourism**

The term "libel tourism" refers to what essentially amounts to international forum shopping. Often, the claimant will seek out friendly libel laws of foreign jurisdictions to bring claims against members of the American media that would be barred (or far more difficult to bring) under American law. [28] This practice permits the "libel tourist" to avoid the rigorous protections afforded to speech and press under American law by filing a claim against a publisher or an author in a country with far fewer protections for such defendants.

Libel tourism is a growing trend. Increasingly, individuals who claim to be maligned by American publications or authors are turning to courts overseas to try their claims. With laws that favor plaintiffs, countries like Great Britain are becoming tourist destinations for defamation claims.[29] Often, this occurs even when the foreign jurisdiction has virtually no legitimate connection to the challenged publication or to the claimant. *Forbes* is currently facing lawsuits in Ireland, Northern Ireland and England for a story published in its domestic edition about the North Pole. *The Washington Times* is currently facing a claim by an international businessman, a resident of London, for an article about an unpublished Pentagon report into the award of cell phone contracts in Iraq. No hard copies of *The Washington Times* were sold in the U.K. and there were only forty or so hits on the newspaper's website. The following are just a few recent examples highlighting the threats posed by libel tourism actions:

*Celebrities:* Celebrities, particularly Americans, are some of the most frequent libel tourists. In 2007, celebrities accounted for a third of all libel actions brought in England and Wales based on figures released by British legal publishers Sweet and Maxwell.[30] Advised that it is easier to win defamation and privacy claims in the United Kingdom

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[27] Cal. Civ. Proc. Code § 425.16.

[28] Michael Isikoff & Mark Hosenball, *Terror Watch: Libel Tourism,* Newsweek, Oct. 22, 2003, http://www.newsweek.com/id/61629.

[29] *See* Jack Schafer, *Richard Perle Libel Watch Week 2,* Slate, Mar. 19, 2003, http://www.slate.com/id/2080384. England is not the only jurisdiction with laws that favor the plaintiff in defamation actions. Singapore has been called a "libel paradise" and New Zealand and Kyrgyzstan are also noted for being friendly to plaintiffs. However, given the plaintiff friendly legal environment in London, its proximity to the United States and the exposure of many media companies to the English market, England remains a favored destination for plaintiffs looking to engage in libel tourism.

[30] Robert Verkaik, *London Becomes Dafamation Capital for World's Celebrities,* The Independent, Oct. 13, 2008, http://www.independent.co.uk/news/uk/home-news/london-becomes-defamation-capital-for-worlds-celebrities-959288.html.

than it is in the United States, the numbers of American celebrities who are bringing such actions in the United Kingdom is increasing.[31] Actor Harrison Ford has consulted a solicitor in Belfast over claims in United States newspapers relating to the reprisal of his role in the most recent Indiana Jones movie, *The Kingdom of the Crystal Skull.*[32] *The National Enquirer* is frequently visited by libel tourists – including Britney Spears, U.S. film producer Steve Bing, Jennifer Lopez and Marc Anthony.[33] In 2005, *The National Enquirer* cut off access to British viewers of its website based on a settlement with American actress Cameron Diaz over a story that Diaz cheated on Justin Timberlake.[34] Although the story did not appear in the U.K. version of the *Enquirer*, Diaz was able to sue because the story was viewed 279 times from U.K. Internet addresses.[35]

French citizen and Oscar-winning director Roman Polanski won £50,000 in damages against U.S.-based Condé Nast after it was published in the 2002 July edition of *Vanity Fair* that he tried to seduce a Swedish model on his way to California for Sharon Tate's funeral, claiming that he told the model he could make her "another Sharon Tate."[36] In granting Polanski, a native of France and a fugitive from the American justice system, permission to sue *in absentia* in a London court and appear in the civil proceedings via video link from Paris, the House of Lords held that the English judicial system did not preclude a fugitive from U.S. justice from bringing defamation proceedings in England.[37]

*International businessmen*: In 1989, American oil magnate Armand Hammer instituted a libel suit in London in connection with an unauthorized biography that was distributed primarily in the United States.[38] The late publisher Robert Maxwell sued *The New Republic* in Britain where less than 35 copies of the publication circulated. In 1997, Texas oil magnate Oscar Wyatt sued *Forbes* in London for libel based on an article titled: "Saddam's Pal Oscar." Even though the article in question made no mention of London, Wyatt chose London as a forum based on the frequency of his trips to London and the fact that his son was the Duchess of York's infamous toe-sucking paramour.[39] In 1997, California businessman Parvindar Chadha sued Dow Jones in London based on an article published in Barrons on his company (located in California) despite the fact that less than .4% of Barron's circulation is in the U.K.[40] In 2002, *New Yorker* investigative reporter Seymour Hersh wrote a series of articles highly critical of Richard Perle, one of President George Bush's most influential advisors. Perle vowed to sue Hersh in London but

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[31] *Id.*
[32] Robert Verkaik, *Invasion of the Libel Tourists,* The Independent, Aug. 21, 2008, http://www.independent.co.uk/news/uk/home-news/invasion-of-the-libel-tourists-904111.html.
[33] *Id.*
[34] Aline van Duyn, *Plug Pulled in UK over Libel Stance,* Financial Times, Mar. 17, 2007.
[35] *Id.*
[36] Claire Cozens, *Polanski Wins Libel Case Against Vanity Fair,* The Guardian, July 22, 2005, http://www.guardian.co.uk/media/2005/jul/22/pressandpublishing.generalelection2005.
[37] *See Polanski v. Condé Nast Publ'ns Ltd.*, [2005] 1 All E.R. 945, [2005] UKHL 10.
[38] Handman & Balin, *supra* note 1.
[39] Laura R. Handman & Robert Balin, *"It's a Small World After All: Emerging Protections for the U.S. Media Sued in England,* http://www.dwt.com/related_links/adv_bulletins/CMITFALL1998USMedia.htm.
[40] *Chadha v. Dow Jones & Co.,* slip op. (High Ct. of Justice, Queen's Bench Division, 1997).

ultimately failed to follow through.[41] Sheik Khalid bin Mahfouz has been a frequent user of England's libel laws. In addition to the lawsuit filed against author Rachel Ehrenfeld, bin Mahfouz has filed multiple libel lawsuits in England, targeting any media organization that has ever printed any allegations that the bin Mahfouz family has connections to terrorism.[42]

In 1997, Russian oligarch Boris Berezovsky sued *Forbes* for libel in the London High Court over an article that appeared in the domestic version of *Forbes*' publication. Of the more than 780,000 copies of the magazine distributed, fewer than 6,000 readers likely saw the magazine in England and Wales (1,915 copies were circulated through newsstands and subscriptions, the remainder through viewing on the Internet).[43] Lord Hoffman upheld Berezovsky's right to sue *Forbes* in London in the House of Lords, holding that London should provide a forum for libel litigants from around the world, "I do not have to decide whether Russia or America is more appropriate *inter se.* I merely have to decide whether there is some other forum where substantial justice can be done [...]. If a plaintiff is libeled in this country, *prima facie,* he should be allowed to bring his claim here where the publication is."[44]

Although British courts are beginning to recognize important protections for libel defendants, even Members of Parliament acknowledge international furor over the practice of libel tourism. In remarks given before the House of Commons on December 17, 2008 by The Rt Hon. Dennis MacShane MP, MacShane acknowledged the problem of libel tourism and the role that it is playing in the assault on freedom of information and called for Parliament to take action on the issue, noting that it was "unbelievable that the state legislators of New York and Illinois, and Congress itself, are having to pass Bills to stop British courts seeking to fine and punish American journalist and writers for publishing books and articles that may be freely read in the United States but which a British judge has decided are offensive to wealthy foreigners who can hire lawyers in Britain to persuade a British court to become a new Soviet-style organ of censorship against freedom of expression."[45]

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[41] Jack Schafer, *Richard Perle Libel Watch – the Finale,*" Slate, Mar. 15, 2004, http:/www.slate.com/2097180.

[42] *See http://www.binmahfouz.info.*

[43] Avi Bell, *Libel Tourism: International Forum Shopping For Defamation Claims,* Global Law Forum at 17 (2008), http://www.globallawforum/org/UserFiles/puzzle22New(1).pdf.

[44] *Id.* at 18.

[45] Remarks of the Rt. Hon. Dennis MacShane (Statement of MacShane before Parliament on Libel Tourism), Dec. 17, 2008, http://www.publications.parliament.uk/pa/cm200809/cmhansra/cm081217/halltext/81217h0001.htm. In his remarks, MacShane stated that, "[a]s in the 18th century, the British establishment is seeking to silence Americans who want to reveal the truth about the murkier goings-on in our independent world. The practice of libel tourism as it is known - the willingness of British courts to allow wealthy foreigners who do not live here to attack publications who have no connection with Britain – is now an international scandal. It shames Britian and makes a mockery of the idea that Britian is a protector of core democratic freedoms. Libel tourism sounds innocuous, but underneath that banal phrase is a major assault on freedom of information, which in today's complex world is more necessary than ever."

## Non Enforcement of British Libel Judgments by U.S. Courts

No federal law or standard exists for the recognition and enforcement of foreign country judgments in the United States.[46] While judgments of sister states are regulated by the Full Faith and Credit Clause of the U.S. Constitution, foreign country judgments are not.[47] The United States is not currently a party to any treaties or international agreements governing the recognition and enforcement of judgments rendered by the courts.[48] Congress has the authority to enact legislation that would prohibit the recognition and enforcement of foreign declaratory judgments if those judgments are inconsistent with the First Amendment.

I was involved in the only two decisions where American courts have refused to enforce English libel judgments on the broad ground that England's libel laws are repugnant to the fundamental protections afforded by the First Amendment and state constitutional law.[49]

### *Bachchan v. India Abroad*

In *Bachchan v. India Abroad Publications, Inc., India Abroad,* a small New York based publication reported that, according to Sweden's leading newspaper *Dagens Nyheter* ("*DN*"), kickbacks from arms sales to the Indian government had been deposited into the Swiss bank account of Indian national Ajitabh Bachchan. Bachchan, a close friend of then-Prime Minister Rajiv Ghandi, also served as business manager to his brother, Amitabh Bachchan, who at the time was India's leading Bollywood star. As a result, Ajitabh Bachchan was a well known public figure to Indians around the world. Bachchan sued both *DN* and *India Abroad* for libel in England. Although *India Abroad* was distributed overwhelmingly in the United States, Bachchan (an Indian national claiming London residency) sued *India Abroad* for libel in England based on distribution of 1,000 copies of a wire version of the *India Abroad* story.[50] Bachchan and *DN* (the original source of the story) subsequently entered into a settlement in which *DN* apologized, saying that it had been the "unwitting victim of a story planted by some unscrupulous...persons in India." Even though *India Abroad* (as well as every other

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[46] A proposed federal statute creating a uniform national rule for enforcement of foreign country judgments has been adopted by the American Law Institute (ALI). *See* American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute; Adopted and Promulgated by the American Law Institute, May 15, 2005 (2006), http://www.silha.umn.edu/Bulletin/Fall%202008%20Bulletin/House%20Passes%20Libel%20Tourism%20Bill;%20Illinois%20Enacts%20Its%20Own%20Law.html.

[47] *Hilton v. Guyot,* 159 U.S. 113, 181-82 (1895).

[48] The Hague Convention on Choice Agreements would require Convention parties to recognize, with some exceptions, judgments rendered by a court in another signatory country that was designated in a choice of court agreement between litigants. The Convention would likely apply to defamation judgments. The United States has not yet ratified the Convention, which to date has not entered into force.

[49] *Bachchan v. India Abroad Publ'ns, Inc.,* 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) and *Matusevitch v. Telnikoff,* 702 A.2d 230 (Md. 1997).

[50] This number represented approximately 2% of the total of copies of *India Abroad* distributed. Ninety-one point two percent (91.2%) of the copies were distributed in the United States. *India Abroad* had a U.K. subsidiary and a London office.

major Indian newspaper and wire service) had relied in good faith on *DN's* reporting of the story, and even though Bachchan was a public figure, he was not required to prove any fault by *India Abroad* (not even negligence) under English common law. Instead, *India Abroad* was held strictly liable in England to the tune of £40,000 for publishing a story based on another paper's "unwitting" error.

Bachchan had considerably less luck enforcing his judgment in the United States. Fresh off his victory in the English court system, Bachchan subsequently instituted a proceeding in a New York state trial court to enforce his English award against *India Abroad.* I was retained by the late Gopal Raju to represent *India Abroad* in the New York proceeding. Finding English libel law fundamentally at odds with First Amendment jurisprudence, the court declined enforcement on the public policy grounds that the enforcement of a British libel judgment in the United States is repugnant to American public policy:

> *It is true that England and the United States share many common law principles of law. Nonetheless, a significant difference between the two jurisdictions lies in England's lack of equivalent to the First Amendment. The protection to free speech and the press embodied in [the first amendment] would be seriously jeopardized by entry of foreign libel judgments pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded to the press by the U.S. Constitution.*[51]

Had this case been brought in an American court, the case would have been dismissed at the outset on the grounds that *India Abroad* had relied on a reputable news organization.[52]

***Matusevitch v. Telnikoff***

The Maryland high court reached a similar conclusion in *Matusevitch v. Telnikoff.* In *Telnikoff,*[53] Soviet émigré turned English citizen Vladimir Ivanovich Telnikoff complained in an op-ed published in London's *Daily Telegraph* that the BBC's Russian Service employed too many "Russian-speaking national minorities" and not enough of "those who associate themselves ethnically, spiritually or religiously with the Russian people." This op-ed prompted an angry letter to the editor (also published in the *Telegraph*) from Soviet Jewish émigré Vladimir Matusevitch who protested that Telnikoff was advocating a "switch from professional testing to a blood test" and was stressing a "racialist recipe" under which "no matter how high the standards 'of ethnically alien' people, they should be dismissed."[54] The letter written by Matusevitch, an American citizen by birth who, at the time, was living in London, working for Radio Free Europe, was a classic example of the heated hyperbole uttered in the course of

[51] *India Abroad,* 585 N.Y.S.2d at 684.
[52] Sack, *Sack on Defamation*, § 7.3.
[53] *Telnikoff*, 702 A.2d at 251.
[54] *Id.* at 233.

public debate that is protected by the First Amendment in this country as non-actionable opinion. In England, however, such discourse was not protected, and Telnikoff ultimately secured a £240,000 pound award against Matusetivch from a jury, which found that that Matusevitch's letter to the editor conveyed the "fact" that Telnikoff was a racialist.

After the decision, Matusevitch returned to the United States, settling in Maryland. When Telnikoff sought to enforce his English judgment against him in the U.S., Matusevitch instituted a civil rights action in federal district court in Washington, D.C. in this action. I represented major American media as *amici* at every level of the U.S. proceedings. The District Court found that the British award was repugnant to Maryland public policy and First Amendment principles. After Telnikoff appealed the district court's decision, the D.C. Circuit certified to Maryland's highest court the question of whether recognition of Telnikoff's English libel judgment would contravene the public policy of the state of Maryland. Reaching a conclusion similar to that of the *India Abroad* court, the Maryland Court of Appeals, by a vote of 6 to 1, broadly held that, "[a]t heart of the First Amendment...is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern...the importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of Telnikoff's English libel judgment."[55]

In *India Abroad* and *Telnikoff,* state courts in New York and Maryland held that recognition of foreign libel judgments in the United States contravened the public policy of not only New York and Maryland, but also the United States. In *India Abroad,* the court went one step further and stated that not only would the court not recognize or enforce Bachchan's libel judgment against *India Abroad,* the court had a constitutional obligation not to: "[i]f, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and is deemed to be, 'constitutional mandatory.'"[56]

Although *India Abroad* and *Telnikoff* set the precedent that English libel laws were repugnant to the fundamental speech and press protections afforded by the First Amendment and state press laws, more recent efforts to have foreign decisions declared unenforceable have been unsuccessful.[57] The leading case involves Rachel Ehrenfeld who was sued by bin Mahfouz for libel in England based on allegations Ehrenfeld made in her book, *Funding Evil: How Terrorism is Financed—and How to Stop It.* After

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[55] *Telnikoff,* 702 A. 2d at 251.

[56] *India Abroad,* 585 N.Y.S.2d at 662.

[57] *Ehrenfeld v. Bin Mahfouz,* No. 06-2228, 2007 WL 1662062 (2d Cir. June 8, 2007). In addition, other attempts to use the Declaratory Judgment Act to prevent recognition of U.K. libel judgments has proved unsuccessful on jurisdictional grounds. *See Dow Jones & Co. v. Harrods Ltd.,* 346 F.3d 357 (2d Cir. 2003) (Dow Jones attempt to bar Harrod's from filing a libel lawsuit in U.K. was dismissed on grounds that the Court did not have personal or subject matter jurisdiction.); *Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 433 F.3d 1199 (9th Cir. 2006) (en banc) (9th Circuit sitting en banc dismisses for jurisdictional reasons *Yahoo!* request for declaratory order preventing enforcement of French Court's order to ISP to block French citizen's access to Nazi material displayed or offered on *Yahoo's* United States site.)

Ehrenfeld did not appear in the English case, the English court issued a default judgment against her. Bin Mahfouz did not come to the U.S. to enforce the judgment; he instead posted the British judgment on his website as a warning to future authors and reporters. Immediately after the judgment was received, Ehrenfeld filed a complaint in the Southern District of New York seeking a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, asking the court to declare that (1) bin Mahfouz could not prevail on a libel claim against Ehrenfeld under the laws of New York and the United States; and (2) the judgment in the English case was not enforceable in the United States on constitutional and public policy grounds. Following dismissal on jurisdictional grounds, the Second Circuit certified the jurisdictional question to the New York Court of Appeals.

Answering the question certified to it by the Court of Appeals for the Second Circuit, the Court of Appeals found that the "[t]he mere receipt by a non-resident of a benefit or profit from a contract performed by others in New York is clearly not an act to confer jurisdiction under our long-arm statute."[58] According to the Court of Appeals, bin Mahfouz's contacts with Ehrenfeld were necessary to receive the benefit of his judgment. The Court of Appeals acknowledged the problem of libel tourism, but stated that "however pernicious the effect of this practice may be, our duty here is to determine whether [bin Mahfouz]'s New York contacts establish a proper basis for jurisdiction" and bin Mahfouz's contacts did not meet that threshold. Plaintiff's arguments regarding the enlargement of CPLR 302(a)(1) to confer jurisdiction upon "libel tourists" must be directed to the legislature.

New York and Illinois responded to the Ehrenfeld Court's call to act by passing legislation which would provide authors, publishers and media outlets in those states protection from threats of local enforcement of libel tourism. Illinois and New York have passed laws that give residents the right to file a complaint in the courts of those states to have foreign libel judgments declared unenforceable if issued by courts where free-speech standards are lower than those in the United States.[59] These extend the state's long arm jurisdiction to any person who obtains a judgment in a defamation proceeding outside the United States.

**Impact on Publishing Decisions**

Without the passage of this legislation, libel tourism threatens to have a significant "chilling effect" on the expressive activities of American authors, publishers, media organizations and non-governmental organizations. The Internet age of global satellite and electronic communications has produced a world without borders. Today, any book, article, television newscast or blogpost available online, even one published exclusively in another country, can ostensibly be subject to the libel law of a foreign jurisdiction.

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[58] *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007).

[59] *See* Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement Of First Amendment Rights By Foreign Libel Judgments, May 1, 2008, http://www.ny.gov/governor/press/press_0501082.html; 735 Ill. Comp. Stat. 5/2-209.

U.S. publishers my firm represents now routinely get letters on behalf of U.S.-based celebrities and businessmen simultaneously from both U.S. and British law firms threatening lawsuits in the United Kingdom if the U.S. publisher decides to publish an article the celebrity feels is defamatory. If the publication has already been published, confronted with the possibility of a claim in the U.K. where the law so favors the plaintiff, U.S. publishers are settling claims that would never succeed in the U.S. With the enormous economic constraints currently faced by newspapers and magazines, they cannot possibly incur the risk. Fear of a lawsuit by members of the Saudi Royal Family prevented publication in the United Kingdom of *House of Bush, House of Saud* by Craig Unger and *While America Slept: The Failure to Prevent 9-11,* by Gerald Posner, even though both books were cleared for publication and published in the United States and the information was of equal importance to a worldwide, not just domestic, audience.[60]

In Britain, the losing party must bear the fees of the prevailing party, as well as his own. The fees often far exceed by several multiples any damages award, since each party in the typical libel matter is represented by two barristers and two solicitors, at a minimum, and the fees typically run to 1 million dollars for each side.[61] Since the law so favors the plaintiff, the likelihood of a substantial fee award to the prevailing plaintiff only magnifies the burden faced by any defendant sued in a U.K. court. This is further compounded by the fact that jurisdiction lies wherever the publication is found. *Forbes* magazine is facing three separate claims arising out of the same article (about a marathon in the North Pole) published in its U.S. edition, brought in Ireland, Northern Ireland and England. The Belfast-based solicitor who brought the triple play has bragged to Dublin's *Sunday Tribune*: "Facing three separate legal costs and possible damages can be effective in terms of concentrating a publisher's mind and encouraging early settlement."[62]

## LEGISLATIVE PROPOSAL

H.R. 6146 is a strong measure effectively codifying on a federal level the two state courts decisions in *Bachchan* and *Telnikoff* which applied the provisions of the Uniform Foreign Money Judgments Recognition Act in effect at the time. The legislation sponsored by Chairman Cohen and passed by the House of Representatives in the 110th Congress last September is a much needed step toward ending the practice of forum-shopping by U.S. celebrities, foreign business tycoons, those suspected of supporting terrorism, or anyone seeking laws that lack the protections afforded the First Amendment to wield against U.S.-based authors, publishers, broadcasters and web publishers. By focusing on actions by public figures or matters of public concern, the legislation reaches public speech at the core of the First Amendment.

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[60] Ron Chepesiuk, *Libel Tourism Chills US-Based Investigative Journalism*, The Daily Star, Apr. 30, 2004, http://www.thedailystar.net/2004/04/30/d404301501109.htm.

[61] *Writ Large*, The Economist, Jan. 8, 2009, http://www.economist.com/world/international/displaystory.cfm?story_id=12903058.

[62] Suzanne Breen, *She's Just Jenny from the H-Blocks to Lawyer Tweed,* Sunday Trib., Aug. 31, 2008, http://www.tribune.ie/news/international/article/2008/aug/31/shes-just-jenny-from-the-h-blocks-to-lawyer-tweed/.

While it is a most important first step, there are a number of concerns that the legislation, as valuable as it is, leaves unaddressed. Many of the larger news organizations have assets overseas against which foreign libel judgments can be enforced. As a result, the successful overseas libel plaintiff need not come to the U.S. to enforce an otherwise unenforceable judgment against a larger media entity.

Even if there are no assets overseas, the successful libel plaintiff may choose to avoid the obstacles of enforcement in the U.S. but nonetheless use the judgment of the foreign court to discourage any further reporting about the controversy. Many media organizations will be fearful of publishing in face of a libel verdict that holds that the statements are not true, even if that verdict is the product of laws that would not have been applied in the U.S. and, even worse, the product of a process where the U.S.-based author or publisher did not appear to defend. That is, indeed, what happened in the *Ehrenfeld* case. Mr. bin Mahfouz posted his verdicts on his website as a warning sign to discourage future reporting. It has had the predictable effect, resulting in Cambridge University Press destroying its book, *Alms for Jihad*, on the subject.[63]

Finally, the absence of the various protections for speech is magnified several fold by fee-shifting that is standard in the U.K. for a prevailing party but is contrary to the American rule. The fees are typically several multiples of any verdict and, of course, the fees are times two since the losing party must bear his own as well as those of the prevailing parties!

To address these concerns, I suggest one or more of the following additions to the current legislation:

1. Add a remedy for declaratory judgment. This remedy could be added without expanding the jurisdictional due process constraints that would normally apply. Even with the due process constraints, libel plaintiffs who file overseas but are based in the U.S., have substantial contacts in the U.S., or take actions making suit in the U.S. foreseeable, would be subject to a declaratory judgment action in the U.S., even if they do not come to the U.S. to enforce the judgment.

2. Add an award of fees and costs to the party who has been sued in an overseas action and who prevails in the domestic court, so that they can recoup all reasonable attorney's fees and costs, including those incurred in connection with the overseas action. This would be akin to the fee provisions of anti-SLAPP statutes that have been passed in 25 states to discourage suits that are intended to burden speech.[64]

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[63] *See* http://www.binmahfouz.ufo/news_20070730.html. Bin Mahfouz sued Cambridge University Press for libel relating to allegations contained in *Alms for Jihad.* Rather than go to trial, Cambridge University decided to settle, agreeing to pulp all unsold copies of the book.

[64] We count 25 states and one territory with anti-SLAPP statutes: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington and Guam. Adapting the structure from California's Anti-SLAPP Statute, the party resisting a foreign libel judgment would be able to make a special motion within 60 days requiring the party seeking to enforce the judgment to make a *prima facie* showing that the judgment was consistent with

3. Require that a bond be posted by the party seeking to enforce the overseas judgment.

## CONCLUSION

The judges in *Bachchan* and *Matusevitch* and the legislatures in New York and Illinois have recognized the dangers posed by enforcement of foreign judgments inconsistent with the principles secured by the First Amendment. The passage of H.R. 6146 by Congress is a necessary step to restore to American authors, publishers, booksellers and other members of the media the speech rights that they have long enjoyed in this country.

I thank you for the opportunity to speak to you today and look forward to answering the questions of the Committee and working with the Committee in the future on this legislation.

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the First Amendment. If the party resisting enforcement were successful, that party would be awarded attorney's fees and costs. If the movant was unsuccessful, the party seeking to enforce the judgment would only be awarded fees if the motion were frivolous.