

BY-LINED ARTICLE

The SPEECH Act: speaking softly?

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Amid the turmoil brought by rapid changes in the book industry, American authors and publishers have a little good news.

They have recently been granted some protection from at least one threat, "libel tourism." Libel tourism is the practice of filing libel lawsuits in foreign jurisdictions that are more plaintiff-friendly than the United States. Many countries, notably the United Kingdom, provide the media with less protection for the freedoms of speech and press than the U.S.

But how much new protection have American media really gained?

On Aug. 10, 2010, Congress passed the awkwardly named SPEECH Act (Securing the Protection of our Enduring and Established Heritage) on a unanimous vote. President Barack Obama signed it. The SPEECH Act may be characterized as a reaction to the internationalization of journalism – a congressional effort to protect American authors and publishers from the silencing effects of libel tourism. Designed to "promote the vigorous dialogue necessary to shape public policy," the act seeks to eliminate the chilling effect on writers and publishers who "but for the fear of a foreign lawsuit" would otherwise have written or published a critical work of serious public interest.

Because libel laws vary by country, plaintiffs, as libel tourists, literally travel to the friendliest jurisdictions. Should the tourists be victorious, they can bring their judgments home with them and attempt enforcement in the U.S. That victory is far easier to obtain abroad than at home. The First Amendment, historically affording media defendants broad protections, makes libel claims harder for plaintiffs to prove in the U.S. American libel law strictly requires that plaintiffs establish the falsity of the contested statements, and further that a defendant had "actual malice" if the statements in question were directed at a public figure. This high fault standard demands that the plaintiff public figure (including celebrities) prove that the contested statement was made either with knowledge of its falsity or with a reckless disregard for its falsity or validity.

In contrast, in the U.K. the burden of proof is not placed on the plaintiff; rather, the defendant is required to establish that the statements in question are true in order to defeat a libel charge – a task more onerous than that mandated by American libel procedure.

The SPEECH Act might first appear to afford journalists an impenetrable shield of protection from foreign libel laws. But although the act strives to combat libel tourism, it certainly does not end it. Instead, the act serves as just one weapon granted to media defendants by a Congress sensitive to the industry's needs.

Chiefly, the act deals solely with defamation and similar claims alleging reputational damage or emotional distress. Therefore, claims and damage awards that are separate and distinct from defamation, such as allegations of an invasion or breach of privacy, including under some provisions of the European Human Rights Act, are unaffected. Michael Douglas, Catherine Zeta-Jones, Naomi Campbell and Madonna have all won judgments against newspapers in England for breach of privacy. By focusing only on libel actions, the SPEECH Act affords no protections to American media in these types of cases.

Further, the act is of no consequence if the defendant has assets sufficient to pay the judgment in the country that decided the case. If the libel tourists win in England and there are assets in England, they can collect in England. A successful plaintiff in the U.K. is unaffected by the act so long as no enforcement actions are commenced in the U.S. So, publications such as *The National Enquirer* or even *The Wall Street Journal* and *The New York Times* might not get much help from SPEECH because they all have assets in foreign countries. American celebrities Kate Winslet, Angelina Jolie and Brad Pitt (to name a few) have all recovered damages against English newspapers published in England.

In passing SPEECH, Congress was clearly motivated by the case of Rachel Ehrenfeld, author of *Funding Evil: How Terrorism is Financed – and How To Stop It*, a 2003 book alleging that Saudi national Khalid Salim A. Bin Mahfouz financially supported terrorist organizations before the attacks of Sept. 11, 2001. Bin Mahfouz sued Ehrenfeld in London for libel and obtained a default judgment against her. Although Bin Mahfouz never tried to collect on the judgment, New York passed the Libel Terrorism Protection Act, which allows New York courts to declare a foreign libel judgment unenforceable in the state.

Along with state legislators, Courts had been developing protections for authors. A leading case involved Ajitabh Bachchan, an Indian national, who sued a New York news company for transmitting a wire-service story from a Swedish daily newspaper alleging that Bachchan's Swiss bank account contained kickbacks from arms sales to the Indian government. Though the story was printed in the defendant's New York newspaper, *India Abroad*, an edition of this paper was also distributed in the U.K., where the plaintiff successfully brought a libel suit. In this case the plaintiff tried to collect in the U.S., but the federal court in New York ruled that enforcement would jeopardize the freedoms embodied within the First Amendment and denied Bachchan any recovery.

Despite the objectives sought in the passage of the SPEECH Act, libel tourism isn't always a bad trip. To the extent that defamatory publication occurs internationally, it is not unfair for local laws to apply in cases of egregious defamation. But it is not reasonable to require U.S. courts to enforce judgments based on laws that are not consistent with the First Amendment's protections for the press.

Progressive at first glance, the SPEECH Act may, however, have few discernible effects. In 2004 Random House would not publish Craig Unger's best-selling *House of Bush, House of Saud* in the U.K. for fear of libel litigation. The act does nothing to change situations like that.

The SPEECH Act does demonstrate, perhaps symbolically, Congress' understanding that proper attention to our notions of a free press will be protected to a greater extent. May this trend continue.

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