Davis Wright Tremaine LLP

Libel Tourism and the SPEECH Act

Presented by Laura R. Handman at the Los Angeles Copyright Society on March 8, 2011.

I welcome the opportunity to speak to you tonight. Please be thinking of questions to ask when I am done.

What do Cameron Diaz, Arnold Schwarzenegger, Tom Cruise, Brittney Spears, Jennifer Lopez, and Roman Polanski all have in common? No, not the same agent. They all sued U.S. publications in Ireland or the U.K. Thanks to U.S. celebrities, along with Russian oligarchs and Saudi businessmen accused of financing terrorism, London has become known as "The Town Named Sue." Why did they all choose to sue far away from where they lived and worked, far away from where their reputations were centered and would be most harmed, far away from their regular counsel, in a place where the circulation was minimal at best?

What happened to a small New York newspaper provides the answer.

It's 1990 – Before the Internet – *i.e.*, the Ice Age.

Imagine you publish a small New York-based newspaper and wire service named *India Abroad*. Your audience is mostly ex-pats from India living in the U.S. You have a small readership in the U.K. and a small U.K. office. You read in a leading Swedish newspaper that kickbacks from a Swedish munitions company may have been deposited in the Swiss bank accounts of Ajitabh Bachchan, a member of the inner circle of the Prime Minister of India. This would be of great interest to your readers.

But all you have for your information is the Swedish paper, *Daghsens Nyter*, the *New York Times* of Sweden. You, along with every leading Indian newspaper, publish the story citing the Swedish newspaper's report.

Bachchan turns out to have a residence in the U.K. and brings suit against your little paper and the Swedish paper in London.

The Swedish paper immediately retracts, saying it was an "unwitting victim" and apologizes - profusely.

Only 1,000 copies of your story appear in the U.K. – 2% of the distribution, over 90% were distributed in the U.S.

In the U.S., plaintiff would have the burden of proving the story false. Statements about matters of public concern are presumed true in the U.S. If you defended in the U.K., you have the burden of proving the story is true. But how would you do that?

What do you do now that your only source says it's false and has retracted?

And if you defend the truth, you risk aggravated damages.

Plus the U.K., unlike the U.S., has very limited discovery so the burden of proving truth is that much more difficult.

Under U.K. law at the time, you have no other defense than truth.

Reliance in good faith on a reputable publisher would be a dynamite defense in the U.S. BUT NOT IN THE U.K.

And the plaintiff is a public figure. Not only was he close to the prime minister, but he was the manager for his brother, Amitabh Bachchan, India's biggest Bollywood star – immortalized in the recent movie *Slumdog Millionaire*, when the protagonist of the film, crawls through a latrine covered in mud and feces in order to touch the star who had just landed in a field near the slums. As a public figure in the U.S., Bachchan would have to prove actual malice, that is knowledge of falsity or serious doubts as to the truth. No way could plaintiff prove *India Abroad* knew it was false or had serious doubts at the time of publication. But, particularly at the time, England was strict liability. If you can't prove it's true, you pay.

Under U.K. law, since 2001, perhaps in response to cases like *India Abroad* and Article 10 of the European Convention on Human Rights, England has developed a "responsible journalism" defense – also known as the Reynolds defense – from a case of that name. Courts look to a number of factors – but it is not the same as actual malice, it is not nearly as hard to satisfy – it is much more a negligence standard with a heavy dose of the Court's 20/20 hindsight and subjective judgment instead of the journalist's subjective state of mind at the time of publication.

Likely now, *India Abroad* would be able successfully to invoke that defense – back then it was not available.

What happens?

Bachchan gets £40,000 pounds in damages – relatively small compared to U.S. verdict.

But, that is not all *India Abroad* was required to pay. As the prevailing party, Bachchan was entitled to his attorney's fees – a princely sum – which makes our legal fees look like small potatoes – you have to pay the fees of both a barrister and a solicitor. Since the law is heavily weighted in favor of plaintiff, the attorney's fees are a nearly certain add-on and usually dwarf any verdict. If it is a conditional fee – our contingency fee – there is a success fee that could be as much as 100% more than the actual fees.

Bachchan comes to New York to enforce his judgment against the newspaper.

Should he be able to enforce his judgment? How many think yes?

We want foreign countries to enforce our judgments, don't we? Those in the entertainment business are particularly concerned that our copyright judgments are recognized overseas to combat piracy.

England is the country from whose law our own law is derived, not some backward dictatorship with show trials and censorship.

But as far back as the 1770s, the British refused to enforce U.S. orders to return fleeing slaves who reached British shores – because it would "offend" British anti-slavery laws. Britain declines to enforce other punitive damage awards.

What should the New York state trial court judge do?

In 1990, there was no precedent for not enforcing a foreign libel judgment, especially from England.

But there was a Uniform Foreign Money Judgment Act that said courts may not enforce judgments that are "repugnant to public policy."

An unlikely hero of the First Amendment emerged. The late Justice Shirley Fingerhood of the New York Supreme Court agreed with us and refused to enforce the judgment holding:

"It is true that England and the United States share many common law principles of law. Nonetheless, a significant difference lies in England's lack of the equivalent to the First Amendment. The protection to free speech and free 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 to be antithetical to the protections afforded to the press by the U.S. Constitution."

Bachchan went home empty handed. I was introduced to British judges as the "American who had our libel law declared repugnant."

Let's look at a somewhat harder case involving two ex-pats both named Vladimir living in London. It is the mid-1990s - just as the Internet started to emerge. The plaintiff, Vladimir Telnikoff, a Soviet émigré turned British citizen, the defendant Vladimir Matusevitch, a U.S. citizen working in London for Radio Free Europe..

Telnikoff writes an op-ed in the *Daily Telegraph*, a leading British paper, that the BBC's Russian Service employed "too many Russian-speaking minorities" and "not enough of those who associate themselves ethnically, spiritually, or religiously with the Russian people."

Matusevitch, who was Jewish, took this as code for anti-Semitic sentiments and published a letter to the editor in the *Daily Telegraph* denouncing Telnikoff's "racialist recipe" and that Telnikoff advocated "switching from professional testing to a blood test."

Would this be actionable under U.S. libel law?

No. It would be viewed as pure opinion, rhetorical hyperbole, on a matter of public debate.

In England, saying Telnikoff was a "racialist" was viewed as "fact" and he was awarded £240,000 pounds.

Matusevitch returned to live in Maryland. Telnikoff came after him to enforce the judgment there.

I represented a group of media *amici* – and argued before Maryland's highest court.

What should that court do? This was published strictly in a U.K. paper for a U.K. audience – should the judgment be enforced? How many think yes?

You are still invoking the authority of a U.S. court to lend its coercive powers and gives its imprimatur to a judgment that would never be entered here.

Over one dissent, the court found "at the 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 precludes Maryland's recognition of Telnikoff's English libel judgment."

Turning now to the post 9/11 era. Sheik Khalid bin Mahfouz had a habit – some 29 times – of suing or threatening to sue anyone who said or posted material he felt damaged his reputation. He sued the lead investigator for the families of the 9/11 victims based on a book the investigator wrote on terrorist financing. In 2002, the U.K. publishers of *House of Bush, House of Saud*, written by an American author and published in the U.S. by Random House, cancelled the British publication of the book after bin

Mahfouz threatened a libel suit. Cambridge University Press pulped its copies of *Alms for Jihad* and asked libraries to remove the book from their shelves. The Saudi banker apparently had little interest in enforcing the libel judgments he won in London – instead, he created a website that listed all his victories.

American author Rachel Ehrenfeld published a book, *Funding Evil: How Terrorism is Financed-and How to Stop It*, that investigated bin Mafouz's alleged role in terrorist financing. The book was published in New York, where Ms. Ehrenfeld lives, and she never took any steps to cause the book to be made available to purchasers in England. Nonetheless, about 23 copies of *Funding Evil* found their way to England via online booksellers and the first chapter of the book was available online at ABCNews.com. Bin Mahfouz instituted libel proceedings in England.

Should this be enough for jurisdiction? It was in England.

The boom in libel tourism over the past two decades has been facilitated by the advent of Internet publishing. But the roots date back to 1849 when the Duke of Brunswick dispatched his manservant to a newspaper office to purchase a back issue containing an article published 17 years before. While the governing limitations for libel was then six years, the High Court held that the single purchase by the Duke's manservant constituted a new and separate "publication" on which a libel suit could be brought.

Thus originated the multiple publication rule – each individual sale or distribution of a book, magazine, newspaper or other work, no matter how minimal, is a publication that gives rise to a new cause of action. And in the age of Google– when a 17 year old article is not hidden away in some dusty old bookstore or on microfiche in the library, but now at everyone's fingertips, I have some sympathy for the Duke. There is no practical obscurity anymore. That is why, according to Monday's *Wall Street Journal*, we see European privacy actions against Google asserting "the right to be forgotten" – to have old stories disappeared and no longer indexed by search engines. The consequences of this rule for the Internet are devastating. This has become a regime where the statute of limitations runs anew **every single time** an article is downloaded off the Internet, threatening the very existence of archives on the web. This rule differs from U.S. law which follows a "single publication" rule where the statute of limitations generally begins to run from the first publication or Internet posting of the statement, even if the magazine or book remains on sale or the posting remains on the Internet.

Using this seemingly innocent, centuries-old rule, the U.K courts have adopted a creative notion of jurisdiction as well. Under the multiple publication rule, a plaintiff can bring multiple suits in multiple jurisdictions wherever copies of the challenged publication are sold or are downloaded. This is a totally different Internet jurisdiction than in the U.S. where the publication has to be targeted to the jurisdiction.

The British rule has allowed *Forbes* to be sued in London, Belfast and Dublin for an article about the North Pole published in the magazine's U.S. edition. This rule has allowed Cameron Diaz to sue the National Enquirer even though the story about her and Justin Timberlake was not published in the U.K. edition of the Enquirer. Jurisdiction was found because the story was viewed 279 times from an Irish IP address. The settlement required the Enquirer to agree to restrict its website from being accessed from IP addresses originating in the U.K. for 2 years. Less speech, not more speech at least for its U.K. readers.

It meant *In Touch* magazine not only did not publish its recent article about David Beckham in the U.K., but it did not even put the article on the Internet period. Less speech, not more speech, not only for its U.K. readers, but for its U.S. Internet readers and its readers worldwide. In essence, U.S. law is not being exported – British law is being imported and becomes the governing standard of Internet content. But as a result, Beckham sued in L.A., not in London and in February, my partner Elizabeth McNamara won

summary judgment under California's Anti-SLAPP statute on the grounds that Beckham would be unable to demonstrate actual malice.

Back to Rachel Ehrenfeld who chose not to appear and defend in the proceeding against her in London. A default judgment was entered against her in England-awarding bin Mahfouz damages and fees, enjoining publication of Ehrenfeld's book in the U.K. and requiring her to publish a "suitable" correction and apology. Again, a vast difference in the U.S., the First Amendment prohibits courts from ordering a U.S. publisher or author to publish an apology or retraction. And in the U.K., you can enjoin a publication found to be defamatory. In the U.S. – no way – as my partner Kelli Sager, who is here tonight, proved when in a libel suit, former DEA agents unsuccessfully tried to enjoin the movie *American Gangster*.

Bin Mahfouz never came to the United States to enforce his libel judgment; instead he published it on his website as a warning to future authors and journalists. But bin Mahfouz did not count on the force of nature that is Rachel Ehrenfeld. While Ehrenfeld faced little risk of actually having to pay damages, she nevertheless had an adverse defamation ruling hanging over her head – she said no one would publish her work. She needed a "name clearing" remedy. Ehrenfeld decided to file suit against bin Mahfouz in federal court in New York to obtain a declaratory judgment that her statements were not actionable under First Amendment principles. Somewhat ironically, having taken advantage of the U.K.'s expansive Internet jurisdiction, bin Mahfouz argued that the American courts had no personal jurisdiction over **him** because he transacted no business in New York. The Second Circuit certified the question of jurisdiction to New York's highest court which agreed with Bin Mahfouz. And while the New York Court of Appeals acknowledged the problem of libel tourism, it suggested that she direct her energy to the legislature.

And so she did. Most amazingly, libel tourism became libel terrorism thanks to bin Mahfouz. And New York, followed by a number of states including California, enacted laws that attempted to address the problem of the successful foreign libel plaintiff who chooses not to enforce here. California courts can decline to enforce a foreign libel judgment unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and the California Constitutions.

California courts now have the jurisdiction to give declaratory relief to the full extent of due process IF: the publication at issue was published in California and the person seeking the declaratory relief is a resident, or has assets in California that could be subject to an enforcement proceeding or may have to take actions in California to comply with the foreign judgment – in essence echoing the *Yahoo!* decision by the Ninth Circuit.

But then Rachel went national with the SPEECH Act - Securing the Protection of our Enduring and Established Constitutional Heritage Act. We will never know if the SPEECH Act would have passed if Bin Mahfouz had not decided to wage his campaign against authors writing about the money trail in international terrorism.

Last summer, in an unusual show of bipartisan support, Congress passed – unanimously – the SPEECH Act. It was signed by the President on July 31st. I testified in the House and worked on the drafting with the Senate Judiciary staff. The pool of Congressional support was a lot deeper than it would normally be because of the terrorism angle.

First, the SPEECH Act applies to all courts – state and federal – throughout the United States.

Second, where most state legislation, including California's, offers state courts the option of declining to enforce a foreign defamation judgment, the SPEECH Act makes non recognition mandatory unless the

party seeking enforcement can show either the foreign libel law is as protective as constitutional or state law OR that the U.S. defendant would have been found liable under American libel law.

Third, the SPEECH Act prohibits enforcement of a foreign defamation judgment if personal jurisdiction does not comport with U.S. principles of due process. So when foreign courts have established personal jurisdiction over American publishers based on minimal downloads of content published on American websites, the Cameron Diaz's of the world will find that their judgment will not be enforced.

Fourth, the SPEECH Act prohibits the enforcement of foreign defamation judgments against providers of interactive computer services who would be immune under Section 230 of the Communications Decency Act. This provision largely immunizes websites that host third party speech. In the U.K., if you don't take down after notice that third-party content is libelous, you have liability. Here, even after notice, a website like TMZ could not sued even if it did not take down libelous comments posted by third-parties on its site.

Fifth, the burden under the SPEECH Act falls on the party seeking enforcement to prove that the law is as protective, meets due process, and is consistent with Section 230.

Sixth, the SPEECH Act allows for easy removal from state to federal court without regard to the amount in controversy. Complete diversity between every plaintiff and every defendant is not required. Contacts can be aggregated nationwide, not just per state. Amazing to me how flexible the jurisdictional requirements of diversity are when you are a legislator, not a litigator.

Seventh, the SPEECH Act creates a name clearing remedy for any "United States person" which includes aliens residing in the U.S. at the time of publication. The action in federal court can be brought for a declaration that the foreign judgment would not be enforceable under the SPEECH Act. Jurisdiction is to the full extent of due process. The burden shifts here. The party bringing declaratory judgment has the burden of showing the judgment would not be enforceable.

Finally, what some might say was the most important provision, the SPEECH Act allows for the awarding of attorney's fees if the party successfully opposes domestic recognition or enforcement of a foreign defamation judgment. Attorneys' fees are not available, however, for a party who successfully prevails in a declaratory judgment.

While we are still waiting for the first test case under the SPEECH Act, the law may be more successful for the shaming affect it is having overseas. Deputy Prime Minister Nick Clegg labeled U.K. libel law "the laughing stock" and vowed to offer a reform bill. I met with a committee of the House of Commons that has proposed changes. A reform bill has been proposed by Lord Lester that would abolish the Duke of Brunswick rule and expand the "honest opinion" and "responsible publication" privileges. Jack Straw proposed a cap on conditional fees and in January, the European Court of Human Rights ruled that the success fees awarded to Naomi Campbell's counsel in her privacy case were a breach of the media's right to free expression. On February 25, the High Court in London threw out a libel case involving a Ukrainian billionaire who wanted to sue a Kiev newspaper over an article that was read by just 21 people in the U.K. The court refused to accept jurisdiction in the case saying that the Ukrainian businessman had no substantial links with the U.K.

Saudi Sheikh Mohammed Hussein Ali Al Amoudi has sued the US based online Ethiopian Review and its editor for libel in London based on articles the Ethiopian Review published about family improprieties and links to terrorism. The Sheikh has obtained a default judgment and this case may become the first under the SPEECH Act.

Many of you represent international media entities with assets overseas which can be subject to enforcement. But the deterrent effect of this law, combined with the declaratory relief, may take some of the starch out of those claim letters that come in tandem from L.A. lawyers and their British counterparts threatening lawsuits in both jurisdictions.

An article which I co-authored with my colleagues, Rob Balin and Erin Reid before the SPEECH Act was passed and a copy of the SPEECH Act are both available.

Questions?