

A Legislative Solution For Cross-Border Defamation Claims

The State of New York, and—recently—the United States Congress—are presently considering enacting laws that would give American authors legal recourse when they are sued abroad for defamation over literary works that would otherwise fall within the broad protections of the First Amendment to the United States Constitution.

In New York, both the Assembly and its Senate have unanimously passed a bill (dubbed the “Libel Terrorism Protection Act” (S.6687/A.9652)) that would give authors who are sued for libel abroad the right to obtain a declaration that such judgments are unenforceable because their works are protected under American law. Both the U.S. House and Senate are now considering federal legislation that would give authors the right to countersue those who have sued them for defamation in foreign courts, and obtain more than three times the amount of the libel judgment of the foreign court, if the American writer could prove the accuser was trying to intimidate the author from exercising his or her First Amendment rights.

As this article explains, the conflict between foreign judgments and the First Amendment has been brewing since 1941, when the U.S. Supreme Court starkly distinguished American protection of speech from that of England. Only recently, however, as England has become a choice venue for libel plaintiffs from around the world, has that country’s libel law come to have a disturbing impact on the First Amendment. The case against Rachel Ehrenfeld in England by Saudi banker Khalid Bin Mahfouz is illustrative. Her 2003 book named Mr. Bin Mahfouz as a possible funder of terrorism. Twenty-three copies of the book were sold in England, which led Mr. Bin Mahfouz to sue there. Ms. Ehrenfeld refused to appear before the English courts, and a judgment against her was entered in the amount of \$225,000. Ms. Ehrenfeld has sought a declaratory judgment in New York determining that the English judgment was not enforceable here, and that her work was protected under American law. But the New York Court of Appeals determined that her suit could not be heard under existing state law (because the state’s long-arm statute did not authorize personal jurisdiction over Mr. Bin Mahfouz), and it was the duty of the legislature to change that law if it sees fit.

See Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501 (N.Y. App. 2007). It appears now that that some change in that direction is starting to occur. English courts, however, are not the only one's creating this alleged conflict; consider Yahoo!'s cross-border struggle with French authorities over Nazi-era materials on its auction website. *See Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1204 (9th Cir. 2006).

More commentary on this pending legislation is available [here](#).