Written Statement of the
American Civil Liberties Union

Caroline Fredrickson
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

before the
House Judiciary Committee
Subcommittee on Commercial and Administrative Law

February 12, 2009

Hearing on Libel Tourism

AMERICAN CIVIL LIBERTIES UNION

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Chairman Cohen, Ranking Member Franks, and Members of the Committee:

The American Civil Liberties Union (ACLU) has more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide. We are one of the nation's oldest and largest organizations advocating in support of individual rights in the courts and before the executive and legislative branches of government. In particular, throughout our history, we have been the nation's pre-eminent advocate in support of individual free speech rights. We write today to express our strong support for legislation to resolve the problem known as 'libel tourism'. Some say no such problem exists.[1] Those who believe it is a problem don't necessarily agree on the best approach to dealing with the issue. The ACLU is less concerned with these differences of opinion than with upholding the constitutional standards found in the U.S. Constitution against challenges arising out of foreign laws that fall short of accepted international standards. We encourage this committee to craft legislation to protect the free speech rights of those authors and writers entitled to such protection from the chilling effect of foreign laws that fail to conform to basic international human rights agreements.

A party seeking libel damages may bring a claim in any jurisdiction where the libelous communication was published. Given the pervasive scope of modern-day electronic communications, many prospective plaintiffs could sue in nearly any country in the world. This circumstance affords libel plaintiffs, in particular, broad forum-shopping opportunities – directly proportionate to the scope of distribution of the communications claimed to be libelous. The sharp conflict between defamation legal standards in the United Kingdom and the U.S. – combined with the likelihood of at least incidental parallel publication due to common bonds of language, business, and culture – increases the likelihood of libel tourism involving these two countries. Plaintiffs prefer to bring suit in the U.K. because British law places the burden on the author to prove the truth of a

[1] *See, e.g.,* Paul H. Aloe, *Unraveling Libel Terrorism*, New York Law Journal, June 18, 2008; John J. Walsh, *The Myth of 'Libel Tourism'*, New York Law Journal, Nov. 20, 2007.

published statement, whereas in the U.S. the plaintiff must prove its falsity before winning a defamation claim. Under our First Amendment, the free speech right gives strong protection to those who discuss public figures or matters of public interest.[2]

The most egregious British libel tourism cases involve publications with only incidental circulation in the U.K., plaintiffs and defendants with only minimal connection there, and plaintiffs with little or no connection to the United States. Such was the case of American author Rachel Ehrenfeld, who sold in England a mere 23 copies of her book about terrorism financing. She was sued there by a Saudi businessman who claimed the book defamed him. Her testimony today before this committee will speak for itself. Suffice to say, however, that the businessman's connections to the U.K. and damages there were tenuous, that the U.K.'s libel standards are easier to meet, and that the claim would have been marginal, if not frivolous, under U.S. law.

A free society is one in which there is freedom of speech and of the press -- where a marketplace of ideas exists in which all points of view compete for recognition. Whether viewpoints or ideas are wrong or right, obnoxious or acceptable, should not be the criterion. Therefore, we regard the existence of a right of action for defamation arising out of a discussion of a matter of public concern to be violative of the First Amendment. Even in private matters, the First Amendment should protect against liability unless the plaintiff can prove with clear and convincing evidence that the false and defamatory speech was made with knowledge of its falsity or with reckless disregard as to its truth or falsity and with intent to damage an identifiable party's reputation.

The operation of foreign laws should not be permitted to chill the exercise of constitutionally protected rights here in the U.S. Proposals offered during the 110th Congress would help preserve the right of free speech by affording some ability to challenge the enforcement in the U.S. of such foreign libel judgments. S. 2977 offered by Senator Specter and its companion, H.R. 5814, offered by Representative King, would have helped preserve the right of free speech by giving individuals the ability to challenge the validity of foreign defamation judgments when plaintiffs attempt to enforce them in this country. After incorporating modifications to its original language in the Senate, the bill would have entitled U.S. speakers to seek a claim against foreign judgment holders if and when they attempted to serve court papers here. It would have only rendered the foreign judgment unenforceable if the foreign lawsuit did "not constitute defamation under United States law."[3]

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[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

[3] The bill in its original form was somewhat broader in its application and created issues relating to the validity of the court's exercise of personal jurisdiction. That approach, which comes closer to the path taken by the New York State Legislature in its attempt to resolve the libel tourism issue for N.Y. residents, was improved by the changes offered by Senator Specter during deliberations in the Senate Judiciary Committee tying personal jurisdiction to the foreign plaintiff's attempt to make service on the libel tourism victim within the U.S. Even as strengthened, however, observers do not agree whether the personal jurisdiction criteria will meet the 'minimum contacts' standards first elucidated in the landmark *International Shoe* decision. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)

Chairman Cohen's bill offered in the 110th Congress, H.R. 6146, took a more defensive posture. Instead of providing the libel tourism victim a claim against the foreign plaintiff, it instead would have barred enforcement of such a judgment in the U.S. The bill had fewer questions surrounding its validity and would certainly have provided protection for the victim whose assets were in the U.S., thereby requiring the original plaintiff to come to courts here to enforce the judgment. On the other hand, the bill would have been less effective against American victims with assets overseas and would have done little to discourage foreign plaintiffs from bringing the actions in the first place.

We have expressed concern with establishing a framework that effectively precludes enforcement of foreign judgments in the U.S. As a general rule, those within the family of nations ought to respect each other's court judgments. In these circumstances, however, we believe the United States is justified in standing up for its progressive free speech standards which are far closer to international standards than those of Great Britain. In fact, in July the United Nations Human Rights Committee recommended that the United Kingdom revise its libel laws to bring them into accord with international standards.

> The Committee is concerned that the [U.K.'s] practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.[4]

The Committee recommended, among other things, that plaintiffs in Britain be required to make some preliminary showing of falsity or the existence of some failure to conform to journalistic standards.

With support of such international authorities, we believe that passage of any of the bills offered in the 110th Congress would not be contrary to our role as a member of the family of nations – respectful of the laws and rights of others. To the contrary, as we stand for the importance of one of our basic freedoms – the right to speak freely – we stand for an ideal to be pursued by all nations as recognized by existing international agreements. We do believe that changes to the Specter/King bill as suggested by Senator Specter in the Senate Judiciary Committee last year improve that affirmative approach to the libel tourism issue. We also believe that Chairman Cohen's approach last year would be an effective solution for many Americans subject to libel tourism claims. In our view, a victim of libel tourism should not suffer the consequences of a foreign libel judgment when the site of the judgment has failed to conform its laws to accepted international standards. The essence of each of these bills moves in that direction. It helps the United

[4] International Covenant on Civil and Political Rights, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations at para. 25 (July 30, 2008).

States to stand as a beacon for the preservation of individual free speech rights and encourages other nations to adopt similarly strong standards in line with agreed-upon international norms.

Thank you for your efforts to highlight this important human rights issue and to advance legislation designed to address this problem. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at mmacleod@dcaclu.org.

Sincerely,

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