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*Freedom to Read Briefs
Fiscal Years 2008-2009*



*Freedom to Read Committee
Association of American
Publishers*

Publishers understand that the First Amendment is not an abstract legal concept. Threats to free speech, including government attempts to curb violence and “indecentcy” in the media, lawsuits to impose liability on publishers, film-makers and others for criminal acts allegedly inspired by their works, libel litigation at home and in plaintiff-friendly foreign courts aimed at silencing authors and publishers, the erosion of fundamental protections for journalists and authors, efforts to remove “offensive” materials from public libraries, school libraries, and classroom supplemental reading lists.--all have a profound impact on the business of publishing.

The Freedom to Read Committee works on behalf of AAP’s members to protect the free marketplace of ideas. Through participation in important First Amendment court cases, sponsorship of educational programs, and its work with Media Coalition and other anti-censorship groups within and beyond the book community, the Freedom to Read Committee serves as the publishing industry’s early warning system, watchdog, and advocate in the area of free expression.

LIBEL TOURISM AND THE EHRENFELD CASE

“Libel tourism,” the cynical exploitation of foreign plaintiff-friendly libel laws as a weapon to silence U.S. authors and publishers, is an increasing concern for AAP members. “Libel tourists” use their vast financial resources to bring lawsuits overseas in order to intimidate U.S.-based authors. Even if no attempt is made to enforce the foreign libel judgment in the United States, its very existence can—and has—silenced the kind of reporting that our laws are designed to encourage and protect.

While several of the most recent high-profile examples of libel tourism involve judgments obtained in England by Saudis implicated in the funding of terrorism, the threat is wider and more insidious. The sale of books over the Internet exposes U.S. authors and publishers to the danger of being sued almost anywhere in the world, and libel tourist litigation remains a threat in any country where our strong constitutional protections for speech are absent.

Libel tourism has received increased attention as a result of the Rachel Ehrenfeld case. In 2004, soon after her book *Funding Evil: How Terrorism is Financed—And How to Stop It*, was published in the United States, Dr. Ehrenfeld, a New York-based author, was sued for libel by Saudi billionaire banker Khalid bin Mahfouz in a London court under England’s notoriously plaintiff-friendly libel laws. The fact that the book was never

published in England and that a mere 23 copies were sold there via the Internet did not stop an English judge from issuing a default judgment against Dr. Ehrenfeld, awarding substantial monetary damages and costs, ordering a public apology, banning her book in England, and ordering the destruction of all unsold copies. Mr. bin Mahfouz has successfully sued or silenced some 40 authors and publishers and boasts of these “victories” on his web site.

Instead of taking part in the English proceedings, Dr. Ehrenfeld counter-sued in federal court in New York seeking a declaration that the English judgment was unenforceable in the United States. The Freedom to Read Committee provided *amicus* support for her in federal court and in the New York Court of Appeals, the state’s highest appellate court. However, a ruling by the New York Court of Appeals that New York’s long-arm statute did not permit the exercise of personal jurisdiction over bin Mahfouz led to the dismissal of her suit. AAP actively lobbied the New York State Legislature for remedial legislation. The Libel Terrorism Protection Act was introduced in January and passed on March 31. Dubbed “Rachel’s Law,” it prohibits enforcement of a foreign libel judgment unless a New York court determines that it does not violate the free-speech and free-press protections guaranteed by the First Amendment and the New York State Constitution, and it broadens the power of New York courts to exercise personal jurisdiction over non-residents who obtain foreign libel judgments against New Yorkers. It was signed by Governor Paterson on April 30. A similar law was enacted in Illinois in August.

While passage of the New York and Illinois legislation was heartening, it underscored the need for a federal statute to address the problem on a nationwide basis. In 2008 two versions of a federal libel tourism bill were introduced in the House, one which would have prohibited U.S. courts from recognizing a foreign defamation judgment unless the court determines it to be consistent with the free-speech and free-press protections guaranteed by the First Amendment, the second (with a companion bill in the Senate) would have allowed the U.S. author to counter-sue in federal court and to seek treble damages if the actions of the foreign plaintiff were taken to suppress the U.S. author’s First Amendment rights. In the closing days of the 110th Congress the House passed the first, more conservative version, but no further action was taken.

In the early days of the new Congress, oversight hearings were held by the House Judiciary Subcommittee on Commercial and Administrative Law. In a statement submitted for the record AAP told the Subcommittee that libel tourism is a growing concern for its members and that the legislation passed by the House in the fall of 2008 did not go far

enough. Among its recommendations, AAP urged that those targeted by foreign libel tourist judgments be allowed to counter-sue in U.S. courts for declaratory relief and compensatory damages. The complete text of the statement can be found on the AAP web site at: http://publishers.org/main/PressCenter/Archives/2009_Feb/LibelTourismHearing.htm

JOURNALISTS’ PROTECTION

The erosion of fundamental free press protections is a serious concern for AAP and its members. The Freedom to Read Committee continued to monitor and oppose coercive attempts to force journalists to reveal confidential sources.

One of the most egregious examples involved former *USA Today* reporter Toni Locy. In March of last year AAP joined in seeking an emergency ruling from the U.S. Court of Appeals for the District of Columbia to temporarily suspend payment of fines of up to \$5,000 per day imposed on Locy for refusing to disclose sources for stories about the 2001 anthrax attacks. The fines were imposed in connection with a Privacy Act lawsuit brought against the government by former Army biological weapons expert Stephen Hatfill. In issuing the contempt citation against Locy, who now teaches journalism at West Virginia University, the judge refused to stay payment of the fines pending appeal and ordered Locy to “personally bear the responsibility” of paying the fines without assistance from *USA Today* or anyone else, a ruling which our brief called “unwarranted, unprecedented, and overbroad.” The following day the federal appellate court suspended payment of the fines pending Locy’s appeal.

The appeal was argued in May, but no decision was handed down. Hatfill subsequently settled with the government for \$5.8 million and the federal appeals court dismissed the appeal and vacated the district court’s contempt order.

The Locy case points up the need for a federal shield law for journalists.

IN THE COURTS

An Unlamented End to COPA: In January 2009, ending almost ten years of litigation, the Supreme Court denied the government’s petition to re-hear the COPA (Child Online Protection Act) case, leaving in place a ruling by the Third Circuit which found COPA to be unconstitutionally vague and overbroad and not the least restrictive means of preventing

minors from accessing harmful to minors materials on the Internet.

Enacted by Congress after the Supreme Court struck down the Communications Decency Act, COPA sought to criminalize transmission of harmful to minors materials via the World Wide Web if those materials could be accessed by minors. COPA was struck down twice by the same federal district court judge and three times by the Third Circuit. The Supreme Court upheld a preliminary injunction against its enforcement but remanded the case for re-trial to take into account technological changes which had occurred since enactment. AAP took the lead on a several *amicus* briefs which argued that the statute placed an unconstitutional burden on protected speech between adults and that filtering technology administered by parents is a more effective, less intrusive way of protecting minors than criminalizing First Amendment-protected speech on the Internet.

VSDA v. Schwarzenegger: In February 2009 the Ninth Circuit upheld a lower court ruling which struck down California's statute banning the sale or rental of violent video games to anyone under 18 and requiring manufacturers and distributors to place warning labels on such games. A year ago, AAP joined in filing an *amicus* brief to the federal appellate court, arguing that the statute was unconstitutionally vague and that the district court was right in rejecting the state's attempt to regulate First Amendment-protected material on the basis of violent content. In its ruling the 9th Circuit found that the statute did not meet strict scrutiny, and rejected the state's argument that the harmful to minors standard be extended to violent content. The appellate court also held the labeling requirement to be impermissible compelled speech.

Powell's v. Myers: In April 2008 AAP joined with six Oregon booksellers, ABFFE, the ACLU of Oregon, and other plaintiffs in a legal challenge to a new Oregon statute that criminalizes the dissemination of sexually explicit material to anyone under the age of 13 or the dissemination to anyone under the age of 18 of any material with the intent to sexually arouse the recipient or the provider. ABFFE said that enforcement of the statute would be a "logistical nightmare" for Oregon booksellers.

Calling the statute unconstitutionally vague and overbroad, the suit, which which was filed in federal district court in Portland sought an injunction, pointing out that the statute lacked any provision for judging the material as a whole or for considering its serious literary, artistic, or scientific value as mandated by Supreme Court rulings in *Miller v. California* and *Ginsberg v. New York*.

In December 2008, in a radical judicial reading of the statute which relied heavily upon legislative history rather than the actual language, the district court refused to strike down the statute. AAP has joined in an appeal to the 9th Circuit.

Big Hat Books et al v. Prosecutors: In May 2008 AAP joined with booksellers, librarians, the Indianapolis Museum of Art and other plaintiffs in a lawsuit challenging a new state law that clearly violated the First Amendment rights of booksellers and other retailers in Indiana.

The new law required any retailer who created a new establishment or relocated an existing one and who sold any "sexually explicit material," to register with the Indiana Secretary of State as an "adult" business, in effect creating a blacklist of "adult" retailers, and to pay a \$250 registration fee. The statutory language was so broad and ambiguous that bookstores carrying art and photography books, sex and health education materials, romance novels, and even classic fiction would be caught up in the "adult" business registry.

On July 1, the day the law was to go into effect, it was struck down by a federal judge in Indianapolis. Granting plaintiffs' motion for summary judgment and holding the statute to be unconstitutionally vague and overbroad, U.S. District Court Judge Sarah Evans Barker pointed out that "A romance novel sold at a drugstore, a magazine offering sex advice in a grocery store checkout line, an R-rated DVD sold by a video rental shop, a collection of old Playboy magazines sold by a widow at a garage sale—all incidents of unquestionably lawful, non-obscene, non-pornographic material being sold to adults—would appear to necessitate registration under the statute." The State of Indiana did not appeal the ruling.

Gorran v. Atkins: In May 2008, AAP welcomed a ruling by the Second Circuit dismissing *Gorran v. Atkins*, an unfair trade practices suit brought by a disgruntled former Atkins dieter against the best-selling Atkins book and web site. AAP had taken the lead the previous year in an *amicus* brief which urged the appellate court to reject arguments that the book, Dr. Atkins New Diet Revolution, as well as portions of the Atkins web site, are "commercial speech" and thus unprotected by the First Amendment and subject to state unfair competition laws because they promote the sale of Atkins-branded products. In its ruling, the Second Circuit held that the book and the web site were not commercial speech but rather First Amendment-protected expression which sought to "communicate a particular view on health, diet, and nutrition, with an offer to purchase the message."

Trump v. O'Brien: In October 2008 AAP welcomed a ruling by the New Jersey Superior

Court overturning a lower court order that would have compelled author Timothy O'Brien to turn over research material and identify confidential sources for his book *TrumpNation*. O'Brien and his publisher, Warner Books, were sued for defamation by Donald Trump, who claimed injury to his business reputation from the book's low estimation of his net worth. The trial court's order was particularly disturbing in its conclusion that O'Brien's confidential sources were not entitled to state shield law protection since the book was "entertainment" not "news,"—notwithstanding the fact that as a financial reporter for *The New York Times* O'Brien covered Trump's business dealings for years. AAP joined in filing an *amicus* brief supporting O'Brien and was particularly gratified that the appellate court made several references to our *amicus* brief in its ruling.

Florida Rejects “False Light” Claims: In October 2008 the Florida Supreme Court ruled that “false light invasion of privacy” was not recognized as a cause of action under Florida law. AAP and other leading media organizations had filed an *amicus* brief in *Rapp v. Jews for Jesus*, after a lower state appellate court asked for a ruling on the viability of “false light” claims under Florida law. The case was argued in the spring of 2008, along with another false light case, *Anderson v. Gannett*, in which AAP had also filed an *amicus* brief.

“False light” claims, which are recognized in a number of states, allow plaintiffs to bring what are essentially defamation suits without having to surmount the substantive and procedural protections afforded defendants under defamation law. In its ruling, the Florida Supreme Court followed arguments made in our *amicus* brief, finding false light invasion of privacy to duplicate defamation without the First Amendment protections of defamation law, and finding the standard for false light (speech that is “highly offensive to a reasonable person”) to be too vague to avoid chilling protected speech.

BOOK BANNING AND CENSORSHIP

Battles continue across the country as students, teachers, librarians, and community members fight for the right of young people to read a wide variety of books of their own choosing in public and school libraries and classrooms.

In March 2008 AAP joined with the National Coalition Against Censorship and other groups in urging members of the Topeka, Kansas library board to reverse an ill-advised decision to remove several sex education books from the open shelves of the library's health section. The previous month, over the objections of library staff and fourteen of the sixteen people who spoke at an open meeting, the Board voted 5-3 to restrict access to *The Joy of*

Sex, The Joy of Gay Sex, the Lesbian Kama Sutra and Sex for Busy People. The letter said, in part: “We agree with those who view the board's action as fundamentally at odds with the role of a public library in providing the information that its patrons require as individuals, community members and citizens.”

EDUCATIONAL PROGRAMS

From the early days of Rachel Ehrenfeld's lawsuit, the Freedom to Read Committee has been instrumental in championing her cause and in raising awareness of libel tourism as a threat to free speech. In June 2008 the Freedom to Read Committee joined with the ALA Intellectual Freedom Committee in sponsoring a program at the ALA Annual Conference in Anaheim, California. Entitled “The Biggest Threat to Free Speech You May Never Have Heard Of,” the program featuring Dr. Ehrenfeld and Freedom to Read Committee counsel Jonathan Bloom (Weil Gotshal & Manges) played to a standing-room-only audience.

At its “Open Forum” each spring, the Committee brings current members together with alumni and guests for a wide-ranging discussion of First Amendment issues. The 2008 program, held in June, focused on libel-in-fiction, a particularly relevant topic as a defamation action arising out of the novel *The Red Hat Club* moves toward trial in Georgia state court. (In July 2007 AAP had unsuccessfully sought dismissal of the case in an *amicus* brief filed with the Georgia State Court of Appeals.)

**THE FOLLOWING SERVED AS REGULAR MEMBERS OF THE AAP
FREEDOM TO READ COMMITTEE DURING FY 2008/2009**

Chair: **Elisabeth Sifton** (Farrar, Straus & Giroux); **Terry Adams** (Little, Brown & Co.); **Karen Andrews** (Hachette Book Group); **Rosemarie Cappabianca** (McGraw-Hill Education); **Virginia Duncan** (Greenwillow Books/HarperCollins); **Colin Harrison** (Scribner/Simon & Schuster); **Beverly Horowitz** (Random House Children's Books); **Florence Howe** (The Feminist Press at CUNY); **David Levithan** (Scholastic); **Valerie Merians** (Melville House Publishing); **Nancy Miller** (Collins/HarperCollins Publishers); **Bruce Nichols** (Collins/HarperCollins Publishers); **Emily Remes** (Simon & Schuster); **Beth Silfin** (HarperCollins); **Anke Steinecke** (Random House); **Suzanne Telsey** (McGraw-Hill); **Tina Weiner** (Yale University Press); **Amy Wolosoff** (Macmillan)