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**Statement of
The Association of American Publishers
to the
Subcommittee on Commercial and Administrative Law
of the
Committee on the Judiciary
U.S. House of Representatives
February 12, 2009**

**Concerning Libel Tourism**

We are pleased to have the opportunity to submit this statement for the record on a subject of intense concern for the Association of American Publishers and its members: "libel tourism," the cynical exploitation of plaintiff-friendly foreign libel laws as a weapon to intimidate and silence U.S. authors and publishers.

The Association of American Publishers (AAP) is the national trade association of the U.S. book publishing industry. AAP's approximately 300 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, post-secondary and professional markets, and computer software and electronic products and services. The Association represents an industry whose very existence depends upon the unfettered exercise of free-speech and free-press rights guaranteed by the First Amendment. Libel tourism is a direct threat to those First Amendment rights and an increasing concern for AAP and its members.

Typically, "libel tourists" use vast financial resources at their disposal to bring lawsuits overseas in order to punish and intimidate U.S.-based authors who write about sensitive but vitally important subjects such as the funding of terrorism. Even if they do not attempt to enforce the foreign libel judgment in the United States, the very existence of such judgments can silence 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 free speech protections are absent.

The threat posed by 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. Dr. Ehrenfeld decided to fight back.

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. 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 Mr. bin Mahfouz led to the dismissal of her suit but prompted swift action by the New York Legislature in passing the "Libel Terrorism Protection Act." Dubbed "Rachel's Law," it prohibits the 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 into law by Governor Paterson on April 30, 2008. A similar law was enacted and signed into law 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 of libel tourism on a nationwide basis. We are deeply grateful to the Chairman of this Subcommittee, Representative Cohen, for his leadership in introducing and shepherding through to House passage in the 110th Congress a bill to prohibit U.S. courts from recognizing a foreign defamation judgment "based upon a publication concerning a public figure or a matter of public concern" unless the court determines that the foreign judgment is consistent with the free-speech and free-press protections guaranteed by the First Amendment. We are equally grateful to Representative Peter King for introducing and championing legislation taking a more aggressive approach and allowing U.S. authors targeted by meritless foreign libel suits to counter-sue in U.S. courts. Our preferred legislation lies somewhere between these two proposals, and we hope that such a bill will emerge from these hearings.

The legislation introduced by Representative Cohen and passed by the House in the closing days of the 110th Congress is fine as far as it goes. AAP agrees on the importance of codifying the principle that foreign defamation judgments that fly in the face of

established First Amendment law are not enforceable in U.S. federal or state courts. This would send a clear message to those who would seek a foreign defamation judgment against a U.S. author or publisher without proving falsity or demonstrating actual malice. It would ensure that a U.S. court would engage in the appropriate comity analysis in any proceeding to enforce a foreign defamation judgment that could not have been obtained in a U.S. court.

But Representative Cohen's original bill does not go far enough. It merely formalizes a legal doctrine courts already apply. Under the doctrine of comity, countries generally recognize and enforce the legislative, executive, or judicial acts of other countries unless doing so would be contrary to their own laws or public policies. Comity is accorded by U.S. courts except where enforcement would be "repugnant to fundamental notions of what is decent and just" under U.S. law. Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (citing Hilton v. Guyot, 159 U.S. 113 (1895).

Fundamental U.S. notions of justice obviously come into play in cases where the recognition or enforcement of foreign libel judgments would conflict with free-speech rights guaranteed by the First Amendment and state constitutions. In such cases, courts have held the judgments unenforceable because they were rendered without protections afforded to libel defendants by the First Amendment. In Bachchan v. India Abroad Publications, Inc., 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Co. 1992), for example, the court refused to enforce an English libel judgment obtained without proof of falsity or the required degree of fault, and observed: "The protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."

The problem with going no further than codifying this comity analysis is that, while it would give some comfort to U.S. authors subject to foreign defamation judgments, it would, in many cases, leave them lacking the legal tools needed to maintain a declaratory judgment action aimed at defusing the threat of an enforcement proceeding. Such an unexecuted threat of enforcement – the proverbial Sword of Damocles – can inflict ongoing harm in the form of injury to reputation, impairment of credit rating, lost publishing opportunities, and speech chilled by fear of retribution. Without a basis for obtaining a judgment of unenforceability, a U.S. author may have no recourse against these harms. Dr. Ehrenfeld's case clearly demonstrates the problems inherent in this situation.

The bill passed by the House last September, H.R. 6146, stopped short of the laws enacted in New York and Illinois by failing to provide the basis for a declaratory judgment action such as the one initiated by Dr. Ehrenfeld. It is true that in states such as California, where the applicable long-arm statute already reaches to the limits of due process, a federal law may not be necessary to provide the ability to obtain personal jurisdiction over a foreign libel plaintiff. However, where the unfettered exercise of First Amendment rights on subjects of profound public concern such as the funding of terrorism is involved, it would be a mistake to stop short of providing strong and uniform

protection across the country. Adopting the approach taken in H.R. 6146 would represent a missed opportunity to ensure that U.S. authors and publishers across the country are able to initiate litigation to remove a foreign threat to the exercise of their First Amendment rights in the United States.

AAP views the approach taken in the Free Speech Protection Act (H.R. 5418), introduced last year by Representative King, as having both strengths and weaknesses. Legislation in this area, which touches upon international relations, norms of private international law, due process limits on the exercise of personal jurisdiction, and Article III limits on the jurisdiction of the federal courts, should be written to accomplish the goal of protecting freedom of speech within the limits imposed by these countervailing considerations. We believe several modifications to the approach taken in the Free Speech Protection Act are warranted.

Although AAP supports the goal of discouraging the filing of foreign defamation actions against U.S. speakers, we believe a foreign defamation judgment would need to be rendered before a declaratory judgment action could be undertaken. Allowing the mere filing of a foreign action to trigger a U.S. cause of action is not advisable since a U.S. court would in all probability lack Article III jurisdiction to determine the enforceability of a foreign defamation judgment that does not yet exist. Moreover, making the mere filing of a foreign defamation action unlawful risks sending a message of disrespect for differing foreign legal systems that AAP believes is not desirable.

Another concern arises from the constitutional "minimum contacts" limitation on the exercise of personal jurisdiction under the Due Process Clause. The approach taken in the Free Speech Protection Act would base the exercise of personal jurisdiction on nothing more than service in the United States of legal documents in connection with the foreign action. The splintered en banc ruling of the Court of Appeals for the Ninth Circuit in Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006), however, suggests that the service of process in the United States in connection with a foreign lawsuit would not be enough, by itself, to make the exercise of personal jurisdiction over the foreign plaintiff constitutional. AAP therefore suggests that the bill predicate the exercise of personal jurisdiction on the service of judicial documents in the United States and on the foreign defamation judgment requiring the U.S. person to take or cause to be taken speech-related action in the United States, such as issuing an apology or removing content from the Internet. These dual requirements would make the bill less vulnerable to constitutional objections.

The most aggressive feature of the Free Speech Protection Act is the provision authorizing an award of treble damages where it can be shown that the foreign plaintiff brought the defamation action as part of an intentional "scheme to suppress" the First Amendment rights of the U.S. speaker. In our view, an award of compensatory damages plus costs and attorney's fees attributable to the foreign action will provide adequate recovery for the U.S. speaker and sufficient disincentive to potential libel tourists.

Beyond the fact that it may contribute little in the way of additional deterrence, the treble damage provision is problematic because under principles of private international law many foreign courts will not enforce U.S. punitive damage awards, just as U.S. courts do not enforce monetary fines or penalties awarded by foreign courts. (In the U.K., indeed, there is a statute barring enforcement of multiple-damage awards.). It would seem advisable and prudent not to respond legislatively to foreign judgments that are contrary to U.S. law and public policy with a treble damage provision that is contrary to public policy in many foreign jurisdictions. AAP believes the core objectives of the legislation – giving U.S. speakers the means to remove the cloud of a foreign defamation judgment and discouraging the filing of such actions in the first place – can be achieved without a treble damages provision that may well be unenforceable in the home country of the foreign defamation plaintiff.

AAP also is concerned that any legislation aimed at libel tourism must be directed toward true libel tourism. It should distinguish forum shopping aimed at silencing U.S. speakers from legitimate efforts to obtain redress for reputational injury where the speech in question, while originating in the United States, was intentionally distributed in or otherwise targeted at the foreign jurisdiction. Although a declaration of non-enforceability would be appropriate in either situation if the foreign judgment does not meet First Amendment standards, AAP recommends distinguishing between the two situations by allowing the recovery of damages only where the speech giving rise to the foreign action was not published in or otherwise targeted at the foreign jurisdiction.

The following is a summary of the preferred bill AAP would like to see speedily passed by the 111th Congress. We are grateful for this opportunity to express the views of the U.S. book publishing industry and urge Congress to act quickly on this issue.

**Summary of AAP Preferred Bill**

1. A cause of action may be brought in federal district court against a foreign defamation plaintiff by a U.S. person against whom a foreign defamation judgment has been rendered. Personal jurisdiction over the foreign defamation plaintiff is proper where (i) the foreign defamation plaintiff served or caused to be served legal documents in the United States in connection with the foreign action and (ii) the foreign judgment requires the U.S. person to take speech-related action in the United States.

2. An action may be brought in any district in which the U.S. person is domiciled or owns property that could be executed against to satisfy the foreign defamation judgment.

3. The district court shall award injunctive relief barring enforcement of the foreign defamation judgment in any state or federal court if that judgment was rendered under legal standards that violate accepted First Amendment jurisprudence.

4. The court may, in addition, award damages to the U.S. person based on (1) harm caused to the U.S. person as a result of the foreign action and (2) costs incurred by the

U.S. person attributable to the foreign action, provided the speech giving rise to the foreign action was not published in or otherwise targeted at the foreign jurisdiction.