

**Submission of Five U.S. News Organizations
to the
Ministry of Justice
and the
Joint Committee of Parliament
on the
Draft Defamation Bill**

Comments on behalf of:

ABC, Inc.
The Associated Press
CBS Broadcasting Inc.
NBCUniversal
The New York Times Company

Prepared by:

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
New York, NY

June 2011

INTRODUCTION

These comments are submitted on behalf of five U.S.-based news organizations, each of which has a direct and substantial interest in the reform of English defamation law. These news organizations all have a global reach that regularly extends to reporting on individuals and events with links of one form or another to the U.K., and they welcome the opportunity to comment on the proposed reforms. The organizations collectively submitting these comments are:

ABC, Inc., which alone and through its subsidiaries owns and operates, *inter alia*, ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces, among other programs, the daily news programs *World News with Diane Sawyer*, *Nightline*, and *Good Morning America*, the weekly news interview program *This Week with Christiane Amanpour*, and the weekly newsmagazine *20/20*.

The Associated Press (“AP”), the essential global news network, delivering fast, unbiased news from every corner of the world to all media platforms and formats. On any given day, more than half the world’s population sees news from the AP. Founded in 1846, the AP today is one of the largest and most trusted sources of independent newsgathering. The AP is considered by many to be the backbone of the world’s information system, serving thousands of daily newspaper, radio, television, and online customers with coverage in text, photos, graphics, audio and video.

CBS Broadcasting Inc. (“CBS”), which produces and broadcasts news, public affairs, and entertainment programming. Among other things, CBS owns and operates the CBS News Division, which produces morning, evening and weekend news programming, as well as news and public affairs magazine shows such as *60 Minutes* and *48 Hours*. CBS also owns and operates broadcast television stations throughout the United States.

NBCUniversal, one of the world’s leading media and entertainment companies in the development, production, and marketing of entertainment, news, and information to a global audience. NBCUniversal owns and operates news and entertainment television networks worldwide, a premier motion picture company, significant television production operations, a leading television stations group, and theme parks. NBCUniversal International businesses include CNBC International, Global Television Networks, International TV Distribution and Television Production, International Theatrical Marketing and Distribution, International Home Entertainment, and Theme Park Operations.

The New York Times Company, owner of *The New York Times*, *The International Herald Tribune*, *The Boston Globe* and 15 other daily newspapers in the U.S., together with more than 50 websites available worldwide. Both *The New York Times* and *The International Herald Tribune* circulate in England, and their combined global website is one of the most visited foreign news sites in the U.K.

SUMMARY OF COMMENTS

Since the advent of the Internet and other communications advances, U.S. news organizations have found themselves confronting libel claims and threats of libel litigation in the courts of England. England has gained a reputation as a haven for libel claimants, given the prevailing claimant-friendly laws and practices and jurisdictional standards that permit access to English courts by claimants with only tenuous connections to the jurisdiction. Under current law, English courts have adjudicated libel claims even when they involved news reports written for an audience outside of the U.K., by reporters based outside of the U.K., about people based outside of the U.K., and addressing events and actions outside the U.K. Reporting that is unquestionably protected by the First Amendment in the U.S. can nonetheless be challenged before the courts of England, a situation that imposes inappropriate and unacceptable burdens on U.S. news organizations.

We therefore welcome the dedication to reform evidenced in the Draft Defamation Bill and the efforts to strike a better balance between the right to freedom of speech and the protection of reputation. The proposed Bill makes many needed reforms. We write, however, to discuss two issues of overriding importance that deserve further attention and consideration: first, the presumption retained in the Draft Bill that any challenged statement is false, a presumption the defendant must bear the burden to disprove; and, second, the type of protections afforded to online service providers, which perform an essential function in making available a forum for the speech of others. We also underscore the need for the proposed jurisdiction reform and urge that it be retained or strengthened.

THE DEFENSE OF TRUTH [Clause 3]

Of all the provisions, we are most concerned by Clause 3 and its continued presumption that a challenged statement is false. Imposing on defamation defendants the burden to prove the truth of a statement is an aberration in tort law, which in all other contexts universally requires the claimant to prove his case. And it permits the punishment of truthful speech in error, even when a claimant has presented no evidence of falsity.

First, the allocation of the burden of proof in libel law runs contrary to the treatment of all other causes in tort law. In the common law system, tort defendants uniformly are assumed to have acted in accordance with the law unless and until proof to the contrary has been established. The purpose is clear: to discourage baseless claims and harassment through litigation, the claimant must be prepared to prove his case. Imagine the effect on business if every person who sued over a faulty product were presumed to be correct and the defendant had the burden to prove a lack of liability.

The assumption that a defendant’s speech is wrongful simply because the claimant filed a complaint empowers claimants to intimidate, harass, and silence critics through the preparation of mere paperwork. This result is fundamentally unjust and unwelcome in any legal system that values freedom of expression. Defamation claims—like all other tort claims—should require that the claimant bear the burden of proof. There is no justification for continuing this anomalous treatment for the tort of defamation.

Second, so long as the defendant bears the burden of proof, truthful speech on matters of public concern is not sufficiently protected. The “defense of truth” developed as one response to the presumption of falsity adopted by the common law. This defense recognizes that freedom of expression cannot survive in a legal regime where compensation can be awarded for injury to reputation caused by true statements. But this approach does not go far enough in protecting those who regularly cover the news.

In the U.S., the burden of proof was shifted to libel claimants after recognition that the First Amendment imposed constitutional limits on the tort of defamation. In making this shift, courts recognized that burdens of proof are much more than mere procedural tools; they represent a balancing of the scales of justice to reflect core societal values.¹ Where the risk of mistaken fact-finding is borne by defendants, they have every incentive to self-censor to avoid the perils of judicial adjudication of “truth.” As the U.S. Supreme Court recognized in *New York Times v. Sullivan*, this risk means that the press is constrained to publish, not what it reasonably believes to be true, but what it believes can be proven true in a court of law, at relatively little expense.²

These constraints exist even with a statutory defense for responsible publication. Given the cost of establishing the responsible publication defense and the uncertainty created by the many factors a court may consider in assessing that defense, a media entity faces significant pressure to omit critical details from its reporting, or to curtail entirely investigative journalism on certain topics. This pressure increases where a publisher also faces the task of foreseeing all adverse inferences flowing from an alleged defamation and proving each true. Many of the most significant and celebrated investigative pieces our organizations have produced would not have been published but for the burden of proof resting with the claimant.

One of the most important functions of a free press is to identify—*at an early stage*—social problems, political corruption, product defects, environmental threats, criminal activity and other dangers to society, and to question the veracity of scientific and medical claims. This role is particularly vital in order to galvanize public concern and government inquiry. But when the burden of proof is on the defendant, it necessarily chills this function because publishers must wait until incontrovertible, legal proof has been obtained—proof that may

¹ *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

² *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (“Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’”) (citation omitted).

never be obtained without the scientific inquiry or government investigation that news coverage brings.

For example, a newspaper that (accurately) reports on a high incidence of cancer in a community and then links those reports to the possibility of drinking water contaminants from a nearby industrial plant serves a vital role, as does a newspaper that (accurately) reports on higher than normal fatalities in car accidents and responsibly presents views that a newly-introduced model of seatbelt may be the cause. Such reports bring to public attention issues of potential concern, inform the public of wider trends they cannot detect, and prompt investigation by those in government.

But a newspaper is not a scientific lab. It cannot itself *prove* to a legal standard that the plant is causing the cancer or the seatbelt is to blame. It must rely on preliminary evidence or early reports. Furthermore, proof may never be developed without media attention and the public concern that follows—which is a key purpose of investigative pieces. Placing the burden of proving falsity on a libel claimant is an extension of the value judgment that it is preferable that news organizations report on early warning signs, before there is conclusive proof one way or the other, and risk being wrong, rather than staying silent. With a presumption of falsity, such speech is chilled. Truthful speech on important topics can be sanctioned in error, even where a claimant has offered no evidence of falsity.

In addition, the claimant bringing a defamation action often has exclusive control of the underlying data needed to prove or disprove the matter—what chemicals are produced at the plant, what testing has been done on the seatbelts—and thus has the greatest ability to marshal evidence concerning truth or falsity. In summoning the machinery of State power to operate on his behalf, the claimant should bear the burden of proving the allegations before that power is exercised to impose sanctions. As with any other tort claim, wrongdoing should not be assumed.

We strongly encourage revision of the Draft Bill to require a defamation claimant to prove falsity when a challenged statement involves a matter of public concern.

RULES GOVERNING PUBLICATION ON THE INTERNET

We believe it would be a mistake to adopt a statutory system that treats online defamation claims in an equivalent manner as online copyright disputes. Adopting a statutory system of protection akin to that currently available under Section 230 of the U.S. Communications Decency Act (“Section 230”) would provide a far preferable way to address defamation claims while protecting public discourse.³

Under Section 230, providers of any “interactive computer service,” including website owners and Internet service providers, are generally immunized from liability as a publisher or speaker of third party content. These providers are encouraged to police themselves (including through the voluntary removal and editing of content) and are required to respond, as always, to court orders and subpoenas in aid of lawsuits, but they cannot be treated as publishers or speakers of the content provided by others using their sites.

³ 47 U.S.C. § 230.

The Consultation queries whether “a statutory system akin to that which currently applies in relation to copyright disputes in the USA,” that is, one similar to that created by the U.S. Digital Millennium Copyright Act (“DMCA”), should be applied to assess responsibility for defamatory publications on the Internet. It should not. It would be a mistake to attempt to shoe-horn defamation claims into a statutory scheme that was developed to address the unique challenges of online copyright infringement. The consequence of applying such a system in the defamation context would likely undercut both protections for free speech and the growth of interactive online news services.

In the U.S., Congress deliberately imposed a different type of regime for libel claims than for copyright infringement claims, and for good reason. A stated purpose of the DMCA was to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”⁴ This builds on long-established traditions of secondary liability in copyright law that encourage accountability on the part of intermediaries for infringements that they know of and materially contribute to, or infringements that they have a right and ability to control and from which they derive a direct financial benefit. This policy makes sense in an area like copyright where issues center on factual questions of lack of authorization from the complaining party, and where matters of online infringement are often straightforward on their face. In the defamation context, ultimate liability is generally more difficult to predict, and centers on more difficult questions of veracity and subjective intent or negligence. Such disputes are far less amenable to resolution through a DMCA-style regime, including notice and takedown.

In our view, the Section 230 system strikes a far better balance among the interests at stake, offering greater predictability, promoting innovation and creativity online, and protecting robust expression and interaction.⁵

JURISDICTION [Clause 7]

We applaud the jurisdictional limitations contained in Clause 7. This addition is a critically important step toward curtailing international forum shopping in libel actions.

The current standards for personal jurisdiction in England allow U.S. defendants to be summoned into the courts of England and subject to English defamation laws in cases having almost no ties to the U.K. Specifically, U.S. news organizations face the threat of judgments that would be absolutely foreclosed by constitutional law at home—as well as the disruptions and expense of protracted litigation in a foreign jurisdiction. For example, in *Bacon v. Automattic Inc. and Others*,⁶ a U.S. claimant was recently able to employ the English judiciary to bypass the substantive and procedural protections of U.S. law to obtain court orders directed to three U.S.-based publications on speech connected with U.S. activities. The claimant’s primary basis for invoking the jurisdiction of the court was based on his

⁴ S. Rep. No. 105-190, at 50 (1998).

⁵ A recent academic conference, surveying the 15-year experience with Section 230, may be viewed here: <http://itunes.apple.com/itunes-u/id432913282>.

⁶ [2011] EWHC 1072 (QB) (Tugendhat J).

ownership of a residence in London (one of several he owned around the world), but his libel claim was plainly one that should be litigated in the U.S.

The real and tangible threat of forum shopping in defamation actions was most directly brought to the fore in the U.S. through the case of *Bin Mahfouz v. Ehrenfeld*,⁷ in which jurisdiction was found to exist over an American author on account of 23 copies of her book being sold to English residents. The book documented allegations that a Saudi billionaire, Sheikh Khalid Bin Mahfouz, was linked to the funding of terrorism. The default judgment entered against Ehrenfeld included a determination of falsity, an award of damages and attorneys fees, an order that she publish an apology, and an injunction against further publication.

This proceeding, and the subsequent attempt by Ehrenfeld to prevent enforcement of the judgment in the U.S., catalyzed the U.S. Congress to enact the Securing the Protection of our Enduring and Established Constitutional Heritage (“SPEECH”) Act, which was signed into law by President Obama in August 2010.⁸ The federal SPEECH Act reflects both the depth of hostility held by members of the U.S. Congress to the abuses of “libel tourism” and the sincerity of their belief that such lawsuits “not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for fear of a foreign lawsuit.”⁹

The Act prohibits any U.S. court, state or federal, from recognizing or enforcing a foreign judgment for defamation in any of three circumstances:

- (1) Where no judicial finding has been made that the judgment is consistent with the U.S. Constitution;
- (2) Where the exercise of personal jurisdiction over the defamation defendant is shown to be inconsistent with the U.S. Constitution; or
- (3) Where no judicial finding has been made that the judgment is consistent with Section 230 of the Communications Decency Act, which generally prohibits liability against website owners for the content of third-party posts.

Where the judgment is found unenforceable, the Act also allows the court to declare that judgment “repugnant to the Constitution or laws of the United States.”

The existing jurisdictional rules in the U.K., coupled with the substantive defamation law of England, were recognized in a 2008 report of the United Nations Human Rights Committee as serving “to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work.”¹⁰ Effective limitations on the ability of a libel claimant to summon U.S. and other non-

⁷ [2005] EWHC 1156 (QB).

⁸ 28 U.S.C. §§ 4101-05.

⁹ The findings articulated by Congress in support of promulgation of the Act are set out at Pub. L. 111-223, § 2, Aug. 10, 2010, 124 Stat. 2380.

¹⁰ Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/C/GBR/CO/6 (2008).

European defendants into English courts are therefore critical, particularly where the defendants are writing for a foreign audience and have taken few affirmative steps to publish the challenged statements in the U.K.

We therefore strongly urge that the Bill retain Clause 7 and the restriction of jurisdiction to cases where “of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place” for the libel claim to be heard.

Dated: June 3, 2011
New York, NY

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
David A. Schulz
Steven Zansberg
Katharine Larsen
321 West 44th Street, Suite 510
New York, NY 10036
United States
Telephone: +1 212 850-6100
Facsimile: +1 212 850-6299