

## Comment

# If You Don't Have Anything Nice to Say, Say It Anyway: Libel Tourism and the SPEECH Act

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### I. INTRODUCTION

Consider the following:<sup>1</sup>

The National Affair publishes an article about Kim Kardashian and Kanye West. The article is titled: “Multi-Million Dollar Divorce: Late Night Lies, Intoxicated Fights; Kanye Files for Divorce & Custody—What Will Happen to Baby North?!” The magazine is predominately circulated throughout the United States, but is nonetheless accessible online from anywhere in the

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1. The following hypotheticals are entirely fictional and used solely to illustrate two different scenarios involving transnational defamation and international forum selection.

world. Over 500,000 issues of the magazine have been purchased in the United States. In addition, the article has received well over one million hits on the National Enquirer's website from IP addresses located within the United States. No issues have been purchased in the United Kingdom; however, approximately 3,000 Internet users have accessed the online article from within the country. Kardashian is infuriated by the false allegations surrounding her relationships with her husband and daughter; she files a defamation lawsuit in the United Kingdom. Kardashian has traveled to the United Kingdom for photo shoots and interviews. In addition, the pop culture icon spent an entire summer relaxing in London a few years ago.

HerezPilton.com, a celebrity gossip blog, posts an article on its website about the current behavior of well-known Canadian pop star, Justin Bieber. The article is titled: "Not So Baby Bieber at It Again: 2,518 Miles of Reckless Behavior from Toronto to Los Angeles." The entertainment blog is accessible online from anywhere in the world. The article has been accessed from approximately 300,000 IP addresses in the United States and 525,000 IP addresses in Canada. The blog post enrages Bieber; he claims that the allegations are false and that he has finally "straightened out." He files a defamation lawsuit in Canada. Bieber is a Canadian citizen and frequently visits his native country for tours and family affairs. His father remains a resident of Canada, and Bieber's Canadian fans have remained supportive throughout his career.

Both of the above situations result in damages awards for the plaintiffs in each of their respective courts. Additionally, both plaintiffs retreat to the United States to enforce their judgments against their individual defendants. The National Affair is a United States corporation and has no assets in the United Kingdom. Likewise, HerezPilton.com is operated solely from the United States; it has no assets in Canada. Without enforcement in the United States, both judgments are

essentially scrap paper.

*Which judgment is a United States court more likely to recognize and enforce?<sup>2</sup> The answer is—neither.*

The Kardashian lawsuit is an example of libel tourism: a form of *international forum shopping* where a globally recognized plaintiff files suit in an “illegitimate forum” to take advantage of plaintiff-friendly defamation law.<sup>3</sup> In contrast, the Bieber lawsuit is an example of *international forum selection*. While both suits involve transnational defamation and choice of forum, Bieber, as opposed to Kardashian, filed suit in a “legitimate forum.”<sup>4</sup>

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2. Although recognition and enforcement are often used interchangeably, the terms refer to different processes. See LAURA E. LITTLE, CONFLICT OF LAWS 827 (2013) (“Judgment recognition pertains to a court’s decision whether to give a judgment legal force and effect in a subsequent proceeding. This differs from judgment enforcement, which concerns the process by which a court transforms a judgment that it recognizes as valid into an actual remedy.”). Herein, “enforcement” is used to refer to both recognition and enforcement.

3. See Marissa Gerny, Note, *The SPEECH Act Defends the First Amendment: A Visible and Targeted Response to Libel Tourism*, 36 SETON HALL LEGIS. J. 409, 410 (2012) (“Libel tourism is the term given to the practice of obstructing the First Amendment by suing American authors and publishers for defamation in foreign courts where a lower legal standard allows for easier recovery.”); Sarah Staveley-O’Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J.L. & LIBERTY 252, 254 (2009) (“... a recent explosion of forum-shopping, aptly called ‘libel tourism.’ Instead of suing American members of the media in the United States, wealthy litigants increasingly file suit in claimant-friendly countries, where the publication and the parties have little connection and the plaintiff is more likely to win.”); Tara Sturtevant, Comment, *Can The United States Talk the Talk & Walk the Walk when It Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home*, 22 PACE INT’L L. REV. 269, 269 (2010) (“This legal loophole of ‘libel tourism’ refers to ‘obtaining libel judgments in foreign countries where libel laws do not have the free speech protections’ as this country affords, and subsequently trying to enforce such judgments here in the United States.” (quoting Paul H. Aloe, *Unraveling Libel Terrorism*, N.Y. L.J., June 18, 2008, at 1, 4)).

4. The terms “legitimate” and “illegitimate” are used to better exemplify the different types of forum selection. Although commonly referenced, there is no concrete dividing line. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1683–84 (1990) (“[T]he policy against forum shopping is not a principled distinction between legitimate and illegitimate actions, but rather a discretionary tool by which a court may

Legitimate forum selection is a plaintiff's choice between multiple available and appropriate forums, whereas the pejorative phrase, forum shopping, is more commonly associated with the selection of an illegitimate forum to gain a windfall.<sup>5</sup> A legitimate forum not only has jurisdiction over the cause of action, but would also be regarded as an appropriate selection because of the close connection between the forum and cause of action. An action in this forum is one that is not appropriately dismissed on forum non conveniens grounds.<sup>6</sup> In comparison, an illegitimate forum has jurisdiction over the cause of action under its own rules of jurisdiction, but nevertheless, is one that an American court would not regard as an appropriate forum for resolving the dispute. In other words, the forum is a product of forum shopping and a prime candidate for a forum non conveniens dismissal.

A *Harvard Law Review* note summarized the distinction as follows: "A court will call a practice 'forum shopping' when it wishes to paint it as an unsavory machination designed to thwart public policy and achieve an unmerited goal. By contrast, it will avoid the label when it considers the reasons behind the forum selection reasonable or justified."<sup>7</sup> Many other commentators have recognized the relationship between forum selection, forum

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constrain actions or motives it finds distasteful.").

5. See generally Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367 (2004); Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25 (2005); Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005 (2011); Emil Petrossian, Note, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257 (2007); Note, *supra* note 4.

6. Forum non conveniens literally means "unsuitable court." See BLACK'S LAW DICTIONARY 770 (10th ed. 2014) ("The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place. . . . Forum non conveniens allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice." (quoting JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.17, at 87–88 (2d ed. 1993)) (internal quotation marks omitted)).

7. Note, *supra* note 4, at 1683.

shopping, and the legitimacy of the forum.<sup>8</sup> For instance, Professor Bassett noted that “[t]he semantic distinction between forum ‘selection’ and forum ‘shopping’ suggests a legitimate choice versus an illegitimate one.”<sup>9</sup>

The *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (“SPEECH Act”) is federal legislation that aims to deter libel tourism and ensure First Amendment protection for potential defamation defendants in the United States.<sup>10</sup> Under the Act, a foreign defamation judgment is presumed unenforceable in the United States.<sup>11</sup> The presumption is rebuttable if the party seeking to enforce the judgment can prove that either: (a) the foreign law offers as much speech protection as the First Amendment and the constitution of the enforcing court;<sup>12</sup> or (b) the plaintiff would have been successful had the case originally been litigated in the enforcing court.<sup>13</sup> Essentially, the judgment will be enforced “*only* if the plaintiff would have been able to assert a successful claim for defamation under the substantive defamation law of the state in which the domestic court is located.”<sup>14</sup>

Neither judgment in the hypotheticals above would likely be enforceable in the United States under the SPEECH Act. First, the defamation law in both the United Kingdom and Canada is

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8. See, e.g., Bassett, *supra* note 5, at 342; Ghei & Parisi, *supra* note 5, at 1390–92.

9. Bassett, *supra* note 5, at 342. Professor Bassett continued by noting that the “distinction is impossible to maintain with any consistency.” *Id.*

10. 28 U.S.C. §§ 4101–4105 (2012). See also generally S. REP. NO. 111-224 (2010); H.R. REP. NO. 111-154 (2009).

11. See *id.* § 4102. Other commentators have advised attacking the issue of libel tourism from other conflict of laws viewpoints. See David A. Anderson, *Transnational Libel*, 53 VA. J. INT’L L. 71, 77–88 (2012) (choice of law); Darren J. Robinson, Note, *U.S. Enforcement of Foreign Judgments, Libel Tourism, and the SPEECH Act: Protecting Speech or Discouraging Foreign Legal Cooperation?*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 911, 928–30 (2013) (jurisdiction).

12. 28 U.S.C. § 4102(a)(1)(A).

13. *Id.* § 4102(a)(1)(B).

14. Mark D. Rosen, *The SPEECH Act’s Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism*, 53 VA. J. INT’L L. 99, 105 (2012) (emphasis added). In more mathematical terms, either A (foreign court law) = B (domestic court law), or  $A \neq B$ , but plaintiff would have been successful under the laws of B regardless. Either way, the law of B determines the outcome of the enforcement proceeding.

contrary to that of the United States.<sup>15</sup> Second, it is unlikely that either plaintiff would have been successful on domestic soil. To explain, it would be difficult to prove that either article was published with malice or that the opinions were supported by facts—two common requirements under United States defamation law.<sup>16</sup> Therefore, despite one's intuitive response that Bieber's judgment would have a greater chance at enforcement, the Act will treat both judgments the same. Neither judgment would be entitled to enforcement in the United States. Notwithstanding the legislative intent behind the statute—to curb libel tourism and protect the First Amendment—the Act fails to differentiate between legitimate forum selection and illegitimate forum shopping in its enforcement (or more accurately, non-enforcement) of foreign defamation judgments.<sup>17</sup>

This Comment argues that the SPEECH Act is overly broad in its application, and as a result, risks offending international comity. In Part II, I provide a brief introduction to libel tourism by explaining the substantive and procedural differences in the laws of the United States, United Kingdom, and Canada. I also discuss libel tourism's tendency to chill free speech under the First Amendment. In Part III, I outline various sections of the SPEECH Act and analyze the Act's application. I use the Fifth Circuit Court of Appeals' decision in *Trout Point Lodge, Ltd. v. Handshoe*<sup>18</sup> to exemplify the broad application of the SPEECH Act in Part IV. I argue that the Act fails to differentiate between legitimate forum selection and illegitimate forum shopping. Moreover, I assert that the Act affords too little protection to foreign defamation plaintiffs. I argue that the exceptions to non-enforcement are illusory and fail to provide courts with appropriate guidance. More pointedly, the Act does not explicitly state how speech protection should be applied in a given case. I

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15. See discussion *infra* Part II.A.

16. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21–22 (1990) (opinion); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (malice).

17. See *Rosen*, *supra* note 14, at 103–04 (“The Act makes no effort to distinguish between libel tourism—the suing in a foreign jurisdiction to wrongfully gain access to that country's pro-plaintiff law—and a defamation claim that does not constitute libel tourism (for instance, a claim litigated in a foreign country, under that country's defamation law, because everything relevant to the defamation occurred there).”).

18. 729 F.3d 481 (5th Cir. 2013).

conclude that the SPEECH Act jeopardizes international comity. In Part V, I suggest that forum non conveniens should be used as a threshold to the Act's applicability. I believe that this threshold will help courts differentiate between legitimate and illegitimate forums, as well as better effectuate the legislative intent behind the Act. I also suggest a statutory revision of the Act to provide courts with a structured framework and ensure consistency in foreign defamation enforcement proceedings. In Part VI, I offer some closing remarks.

## II. LIBEL TOURISM & THE FIRST AMENDMENT

The initial question asked by almost every plaintiff is: where should I file suit? But what appears to be a very straightforward question actually encompasses a variety of auxiliary questions. What forums have personal jurisdiction over the defendant? Which choice of law rules are used in that particular forum? Is the applicable law most beneficial to the plaintiff or the defendant? These types of questions converge to answer the macro-level question of where to file suit and enable the plaintiff to take advantage of the most plaintiff-friendly forum for the circumstances. The strategic selection of a forum, however, is not often viewed as an honorable litigation tactic.<sup>19</sup> Plaintiffs often select forums with little connection to the cause of action in order to gain a windfall and incentivize the defendant to settle out of court. This form of strategic decision-making at the outset of litigation is better known as “forum shopping.”<sup>20</sup>

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19. See, e.g., Algero, *supra* note 5, at 80–81 (recognizing that most law school students are taught that “selecting’ a forum [is] a necessary practice for those filing a lawsuit; ‘shopping’ for one, on the other hand, [is] forbidden”); Bassett, *supra* note 5, at 337 (acknowledging that one news article described forum shopping as “the notorious practice by which personal injury attorneys cherry-pick courts and bring lawsuits in jurisdictions that consistently hand down astronomical awards, even when the case has little or no connection to the State or locality” (quoting *Blunt Votes to Curb Libel Tourism*, U.S. NEWSWIRE, Sept. 14, 2004) (internal quotation marks omitted)). *But see* The Atlantic Star, [1974] A.C. 436 (H.L.) 471 (appeal taken from Eng.) (“Forum-shopping’ is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation.”).

20. See *supra* note 5; see also generally Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (describing

Libel tourism is a form of international forum shopping for defamation plaintiffs.<sup>21</sup> These plaintiffs engage in strategic forum shopping in order to locate a jurisdiction that has plaintiff-friendly defamation law.<sup>22</sup> In addition to the beneficial substantive law, defamation plaintiffs are able to consider forums that have little connection to the cause of action by taking advantage of liberal personal jurisdiction requirements in foreign countries.<sup>23</sup> Therefore, the concept of libel tourism as a form of forum shopping allows a plaintiff to benefit from both favorable substantive and procedural law. Libel tourists are most often plaintiffs who are defamed predominantly in the United States, but who file suit in forums such as the United Kingdom or Canada.<sup>24</sup> The aforesaid is due in large part to the differences in the countries' laws on free speech, with the United States regarded as deifying free speech and the United Kingdom and Canada, for instance, as placing reasonable restrictions where necessary to safeguard reputation.<sup>25</sup>

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historic forum shopping).

21. See *supra* note 3.

22. Cf. Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 468 (2010) (“[A] lawyer has a duty to his client to secure the most favorable result possible, which includes finding the most beneficial substantive law in the most hospitable forum.”).

23. See Bruce D. Brown & Clarissa Pintado, *The Small Steps of the SPEECH Act*, VA. J. INT'L L. DIG., March 19, 2014, at 1, 2 (“What is more, contrary to the standards in the United States, English courts [are] willing to assert personal jurisdiction over a defendant publisher who was not deliberately targeting a British audience.”); Gerny, *supra* note 3, at 410 (“Libel plaintiffs typically seek out countries who[] . . . have a tenuous connection to the purportedly defamatory statements that prompted the suit.”).

24. See, e.g., *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) [hereinafter *Hearing*] (statement of Rep. Steven Cohen, Chairman, S. Comm. on Commercial & Admin. Law) (referring to London as the “libel capital of the world”); Daniel C. Taylor, Note, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189, 190–96 (2010) (discussing exorbitant exercises of personal jurisdiction in the United Kingdom, in suits concerning defamation that predominately occurred in the United States). See also Am. Soc’y Int’l L., *U.S. Legislation Blocks Enforcement of “Libel Tourism” Judgments*, 104 AM. J. INT’L L. 681, 682 (John R. Cook ed., 2010) (“Australia, Brazil, Indonesia, and Singapore also have been cited as jurisdictions where harsh libel laws invite plaintiffs’ lawsuits against U.S. journalists, writers, and publishers.”).

25. See, e.g., Eugénie Brouillet, *Free Speech, Reputation, and the Canadian Balance*, 50 N.Y.L. SCH. L. REV. 33, 52 (2005–06) (“In the Canadian



A. *Substantive Differences in Defamation Law*

Substantively, defamation law in foreign countries differs significantly from that of the United States.<sup>26</sup> In the famous case of *New York Times Co. v. Sullivan*, the United States Supreme Court abandoned the common law, strict liability approach to defamation.<sup>27</sup> In doing so, the Court held that a public official who is defamed on public matters has the burden to prove that the defamatory statements were false and made with malicious intent.<sup>28</sup> Therefore, under United States defamation law, a purely public defamation plaintiff must prove that the statements were: (1) published, (2) directed towards the plaintiff, (3) capable of a defamatory meaning,<sup>29</sup> (4) false, and (5) made with malice.<sup>30</sup> The notion of a public official was expanded to include public figures in *Curtis Publishing Co. v. Butts*.<sup>31</sup> For those plaintiffs who are not considered “public,” but are, nonetheless, defamed in a public way, some form of fault is still required; however, the states are free to

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common law, the courts have chosen a low threshold for the establishment by the plaintiff of a prima facie cause of action in defamation, offering considerable protection to his right to reputation. . . . America laws . . . seem to show a certain bias towards freedom of expression and freedom of the press.”); Gerny, *supra* note 3, at 416 (“In the United States, freedom of expression is accorded the highest value, and injury to one’s reputation, although regrettable, is sometimes an inevitable consequence of preserving this freedom. Conversely, in other countries, particularly England, damage to one’s reputation may trump the value of free expression.”).

26. See, e.g., Stephen Bates, *Libel Capital No More? Reforming British Defamation Law*, 34 HASTINGS COMM. & ENT. L.J. 233, 241–54 (2012); Gerny, *supra* note 3, at 416–19; Staveley-O’Carroll, *supra* note 3, at 255–59.

27. 376 U.S. 254 (1964). See also Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England’s Modern Day*, 20 CARDOZO J. INT’L & COMP. L. 771, 777–81 (2012).

28. *N.Y. Times*, 376 U.S. at 279–80 (“The constitutional guarantees require[ ] . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

29. A defamatory statement is defined as one that “tends . . . to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” RESTATEMENT (FIRST) OF TORTS § 559 (1938).

30. See, e.g., 128 AM. JUR. TRIALS §§ 2–11, 26–36 (2013).

31. 388 U.S. 130, 155 (1967) (“[A] ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood.”).

impose the degree.<sup>32</sup> The First Amendment adds the requirements of falsity and fault to enhance protection of free speech.<sup>33</sup> In an area of law where proving truth or falsity is nearly impossible, the burdened party is not likely to be successful. Therefore, the burden often becomes dispositive.<sup>34</sup> For example, how exactly is a plaintiff supposed to prove that he *is not* in the mafia? Then again, how is a defendant supposed to prove that the plaintiff *is* in the mafia? The placement of and difficulty in satisfying the burden of proof in a defamation suit render United States defamation law defendant-friendly and effectively place a protective shield around speech.

In comparison, foreign countries such as the United Kingdom and Canada have defamation laws that differ considerably from those in the United States. In both of these jurisdictions, defamatory statements are presumed to be false, and the burden is placed on the defendant to prove the truth of the statements.<sup>35</sup> Additionally, proof of fault is not required, as both jurisdictions retain a strict liability approach to defamation.<sup>36</sup> Therefore,

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32. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (“[T]he States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”). The United States Supreme Court has never decided if the element of falsity applies to private plaintiffs who are publicly defamed. However, the element is required by a majority of states. See William G. Hagans, *Who Does the First Amendment Protect?: Why the Plaintiff Should Bear the Burden of Proof in Any Defamation Action*, 26 REV. LITIG. 613, 627 & n.81 (2007). In addition, the Court has never considered whether the traditional common law regime to defamation can be retained for a private-figure plaintiff defamed on matters of private concern. See discussion *infra* Part IV.D. Nevertheless, these scenarios are not common to libel tourism because a private-figure plaintiff is not likely to have a global reputation and defamation of private concern is not likely to have a global reach.

33. See *N.Y. Times*, 376 U.S. at 270 (explaining that the First Amendment encompasses “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

34. See *Staveley-O’Carroll*, *supra* note 3, at 257 (“Proving truth can be an insurmountable burden, particularly when journalists rely on confidential sources.”).

35. See, e.g., *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, paras. 28–33 (Can.); *Bates*, *supra* note 26, at 246–47 (discussing truth as a defense to defamation in the United Kingdom).

36. See, e.g., *Grant*, [2009] 3 S.C.R. at para. 28; *Staveley-O’Carroll*, *supra* note 3, at 257.

162 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152

under United Kingdom and Canadian defamation laws, a defamation plaintiff must prove that the statements were: (1) published, (2) directed towards the plaintiff, and (3) capable of a defamatory meaning.<sup>37</sup> Once again, the burden is dispositive.<sup>38</sup> Just as it was nearly impossible for the plaintiff to prove falsity, it is likewise nearly impossible for the defendant to prove truth. Foreign countries associated with libel tourism, such as the United Kingdom and Canada, have plaintiff-friendly defamation laws because the difficult burden is placed on the defendant.<sup>39</sup>

For example, consider the following: Paolo and Daniela end their romantic relationship. Daniela is devastated and writes the following on her well-followed blog: “Paolo is a mobster.” Under United States defamation law, Defendant Daniela would likely prevail because Plaintiff Paolo would undoubtedly have difficulty proving that the statement is false. Conversely, under United Kingdom and Canadian defamation laws, Plaintiff Paolo would likely prevail because Daniela would undoubtedly have difficulty proving that the statement is true. Considering the secrecy surrounding mafia activity, both parties would have difficulty presenting evidence that Paolo is, or is not, in the mafia. Thus, the success of a defamation suit for the same statement is often contingent on which party has the dispositive burden. These substantive differences in international defamation law render the tort a perfect contender for forum shopping.<sup>40</sup>

*B. Procedural Differences in the Law of Personal Jurisdiction & Difficulty Obtaining a Forum Non Conveniens Dismissal*

Procedural differences in the laws of other countries pave the

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37. See, e.g., *Grant*, [2009] 3 S.C.R. at para. 28; Staveley-O’Carroll, *supra* note 3, at 257.

38. See Sturtevant, *supra* note 3, at 275 (“[T]here is an extremely large burden on the defendant to unequivocally prove every detail of his statement, which in essence turns out to be almost impossible in the majority of cases.”).

39. The requirements for proof of damages in a defamation action are also dissimilar. In the United States, plaintiffs often have to prove actual damages; whereas, in many foreign countries, courts presume that damages have been suffered. Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974), with *Grant*, [2009] 3 S.C.R. at para. 28.

40. For additional differences in substantive law, see Staveley-O’Carroll, *supra* note 3, at 255–59 (detailing the differences between opinion and privilege in the United States and United Kingdom).

way for the substantive benefits gained by libel tourists.<sup>41</sup> A defendant's best defense against an illegitimately selected forum is either: (a) a motion to dismiss for lack of personal jurisdiction or (b) a motion for forum non conveniens. In a libel tourism setting, the former argument is sometimes problematic because of the liberal jurisdictional requirements in foreign countries. For example, the United Kingdom will find personal jurisdiction over the defendant in a defamation proceeding if the defamatory statements cause real and substantial harm to the plaintiff's reputation in the forum.<sup>42</sup> In an effort to curb libel tourism, the United Kingdom recently adopted the Defamation Act of 2013 and tightened the jurisdictional requirements for defamation proceedings.<sup>43</sup> The Defamation Act states that in an action against a person not domiciled in the United Kingdom or another European Union state:

A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.<sup>44</sup>

The Defamation Act has not yet been clearly fleshed out by English courts; therefore, it is unclear how high of a jurisdictional threshold courts will impose in practice.<sup>45</sup> Similarly, Canadian

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41. For additional differences in procedural law, see Gerny, *supra* note 3, at 423–25; Staveley-O'Carroll, *supra* note 3, at 259–61 (detailing the differences in attorneys' fees, statute of limitations, and publication rules).

42. See generally, e.g., Berezovsky v. Michaels, [2000] UKHL 25 (appeal taken from Eng.). The standard has been perceived as so loose that one commentator claimed, "in the Internet age the British laws can bite you, no matter where you live." Alan Rusbridger, *A Chill on 'The Guardian'*, N.Y. REV. BOOKS, Jan. 15, 2009, at 57, 57.

43. Defamation Act, 2013, c. 26, § 9(2) (U.K.). The Defamation Act also removes the presumption in favor of a jury trial, adds a defense of responsible "publication on matters of public interest," provides additional protection for website hosts, and reforms the affirmative defenses of truth and honest opinion. *Id.* §§ 2–5, 11.

44. *Id.* § 9(2).

45. After all, the new standard mimics the doctrine of forum non conveniens, a tool that English courts do not afford much weight. See *infra* notes 63–68 and accompanying text. Cf. Tanya J. Monestier, *A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada*, 33 QUEEN'S L.J. 179

courts will assume jurisdiction over a defamation defendant if the action has a real and substantial connection with the forum.<sup>46</sup> The lenient jurisdictional test was recently reinforced in the Supreme Court of Canada's decision in *Éditions Écosociété Inc. v. Banro Corp.*<sup>47</sup> There, the Supreme Court of Canada stated that a defamation action falls under the presumptive jurisdiction category, "the tort was committed in the province."<sup>48</sup> Despite acknowledging that a flexible jurisdiction test could subject a defamation defendant to suit in multiple jurisdictions, the Court stated that a tort is committed in the forum as soon as a defamatory publication occurs in the forum.<sup>49</sup> The Court additionally stated that "publication may be inferred when the libelous material is contained in a book that is circulated in a library."<sup>50</sup> Therefore, the real and substantial connection test stated above is presumptively satisfied as long as the plaintiff sufficiently alleges publication in the forum.<sup>51</sup>

Neither the United Kingdom nor Canada require that the defendant actually aim the defamatory statements at the forum in order to ground jurisdiction. By contrast, under United States law, a court will have jurisdiction over a defamation defendant *only* if the defendant aimed the defamatory statements at the forum in order to cause "effects" there.<sup>52</sup> In other words, a state will have jurisdiction over a defamation defendant only if the statements were directed with intent to defame the plaintiff's reputation in that forum. The stated test is commonly known as the "effects" test.<sup>53</sup> This strict jurisdictional test is required by due process and the standards set forth by *International Shoe Co. v. Washington* and its progeny.<sup>54</sup> The test ensures that the

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(2007).

46. See, e.g., *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, paras. 33–40 (Can.); *Breeden v. Black*, [2012] 1 S.C.R. 666, para. 20 (Can.).

47. [2012] 1 S.C.R. 636.

48. *Id.* at para. 39; see also *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, para. 90 (Can.).

49. *Éditions Écosociété*, [2012] 1 S.C.R. at para. 38.

50. *Id.*

51. See *id.* at paras. 38–39.

52. *Calder v. Jones*, 465 U.S. 783, 789–91 (1984).

53. See *id.* at 787 n.6.

54. 326 U.S. 310 (1945); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1965); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

defendant has sufficient minimum contacts in the forum.<sup>55</sup> A defendant that directs his statements to cause harm to a plaintiff's reputation in a given jurisdiction "purposely avails" himself of the privileges or benefits of that jurisdiction, such that "he should reasonably anticipate being haled into court there."<sup>56</sup> Therefore, to ground personal jurisdiction, the United States requires a stronger connection to the forum than do the United Kingdom and Canada. As a result, libel tourists enjoy the benefits of liberal jurisdiction standards, at least in relation to those that prevail in the United States.

To be sure, the foreign substantive and procedural advantages are not available to all defamation plaintiffs. Libel tourists must still have a reputation in the foreign forum that is capable of being defamed in order for the foreign court to be placed on the so-called "shopping list." Consequently, libel tourists are usually plaintiffs with a global reputation, such as celebrities, politicians, international entrepreneurs, etc.<sup>57</sup> Plaintiffs with global reputations are able to argue that allegedly defamatory statements harm their reputations worldwide. Modern technology only fortifies this argument because most publications are globally accessible on the Internet. Accordingly, the Internet facilitates a plaintiff's ability to demonstrate that his reputation was defamed in a variety of international jurisdictions. In fact, the Internet has been cited as the largest facilitator of libel tourism.<sup>58</sup> For example, one commentator noted that "due to the rise of technological advances and Internet accessibility worldwide, a

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55. See *Burger King*, 471 U.S. at 476; *World-Wide Volkswagen*, 444 U.S. at 297.

56. *World-Wide Volkswagen*, 444 U.S. at 297.

57. See, e.g., *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007) (Khalid bin Mahfouz, a billionaire Saudi Arabian financier); *Polanski v. Condé Nast Publ'ns, Ltd.*, [2005] UKHL 10 (appeal taken from Eng.) (Roman Polanski); *Lewis v. King*, [2004] EWCA (Civ) 1329 (Eng.) (Don King); *Richardson v. Schwarzenegger*, [2004] EWHC (QB) 2422 (Eng.) (Arnold Schwarzenegger); *Staveley-O'Carroll*, *supra* note 3, at 266 n.71 (Jennifer Lopez, Marc Anthony, Britney Spears, David Hasselhoff, and Cameron Diaz).

58. See, e.g., S. REP. NO. 111-224, at 2 (2010) ("Given the . . . world-wide access to U.S.-based content over the Internet, concerns over foreign libel lawsuits confront many American authors, reporters, and publishers."); H.R. REP. NO. 111-154, at 3 (2009) ("[C]oncerns have been raised that the Internet has rendered American authors and publishers especially vulnerable to libel suits in Britain.").

published document has the potential to appear in any jurisdiction in the world.”<sup>59</sup> She continued by stating that “[a]s a result, a libel plaintiff may have the option of initiating litigation in any jurisdiction they may chose, even though the publication occurred in the United States.”<sup>60</sup> Furthermore, in 2008, the United Nations Human Rights Committee acknowledged the “advent of the [I]nternet and the international distribution of foreign media” in connection with the Committee’s concern over the growth of libel tourism.<sup>61</sup> Thus, due to the global accessibility of defamatory statements, a plaintiff with a reputation capable of being defamed in a foreign forum will often have a compelling argument that his reputation was actually defamed in the forum of his choosing (albeit, not always substantially).

Defamation defendants likely will be unsuccessful in obtaining dismissal on a forum non conveniens motion as well. The doctrine of forum non conveniens permits dismissal of an action if there is another available, adequate, and more convenient forum to hear the case.<sup>62</sup> Nevertheless, the doctrine is discretionary and not all countries recognize or apply it in the same manner.<sup>63</sup> For example, a forum non conveniens dismissal

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59. Gerny, *supra* note 3, at 410.

60. *Id.*

61. U.N. Human Rights Comm. on its 93rd Sess., Int’l Covenant on Civil & Political Rights, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, ¶ 25, July 7-25, 2008, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008) [hereinafter U.N. Human Rights Report].

62. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). In a forum non conveniens analysis, the court considers both private and public interest factors to determine if the available and adequate forum is indeed more convenient. Such private interests include:

... relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Gulf Oil*, 330 U.S. at 508. Public considerations include avoiding the “[a]dministrative difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin,” as well as the “local interest in having localized controversies decided at home.” *Id.* at 508–09.

63. See Gerny, *supra* note 3, at 425; Staveley-O’Carroll, *supra* note 3, at 264–65.

in the defamation context is rare in the United Kingdom.<sup>64</sup> In *Lewis v. King*, the Court of Appeals restated the High Court's comment that "[t]here would seem to be little point in addressing how much more convenient it would be, or would not be, for people to give evidence [in the United States] rather than [in Britain]," because the cause of action was not likely to be successful in the United States.<sup>65</sup> Therefore, the court denied the forum non conveniens motion because the United States was not considered an adequate, alternative forum.<sup>66</sup> In comparison, the United States Supreme Court has directly rejected this view of adequacy in *Piper Aircraft Co. v. Reyno*, stating that "if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper," because plaintiffs often forum shop and choose a forum with "advantageous" choice of law rules.<sup>67</sup> Therefore, a forum non conveniens motion will likely fail to insulate defamation defendants from being haled into court in a forum virtually unconnected to the cause of action. With neither defensive motion—lack of personal jurisdiction or forum non conveniens—compelling, defendants victimized by libel tourists have few procedural escape hatches to utilize.

C. *The "Chilling Effect" on the First Amendment*

The substantive and procedural benefits offered by foreign countries render libel tourism a beneficial tool for those plaintiffs who can utilize it. Plaintiffs are able to strategically choose a forum that will deliver a judgment they would likely not receive in the United States. Nevertheless, libel tourism has major adverse consequences, mainly: a chilling effect on free speech, increased litigation costs, and unfavorable reputations for writers who have been victimized by libel tourists. The most notorious case of libel

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64. See Gerny, *supra* note 3, at 425 (stating that the doctrine of forum non conveniens "does little to restrain the reach of English courts, because it is dependent on the discretion of the judge, and British judges view their jurisdiction broadly").

65. [2004] EWCA (Civ) 1329, [18] (Eng.) (quoting *King v. Lewis*, [2004] EWHC (QB) 168, [37] (Eng.)).

66. See *id.* at [45].

67. 454 U.S. at 250.



168 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152

tourism is *Bin Mahfouz v. Ehrenfeld*.<sup>68</sup> Ehrenfeld, an American defendant, authored a book that detailed the funding of international terrorism.<sup>69</sup> The book claimed that Saudi Arabian billionaire, Sheikh Khalid Bin Mahfouz, was a regular supporter of terrorism prior to the September 11th terrorist attacks.<sup>70</sup> As a result, Bin Mahfouz filed a defamation suit against Ehrenfeld in the United Kingdom.<sup>71</sup> The High Court of Justice in England found personal jurisdiction over Ehrenfeld based on: (1) a mere twenty-three copies found in the forum, which were purchased from Internet distributors, and (2) the first chapter of her book being globally accessible on ABCNews.com.<sup>72</sup> Ehrenfeld chose not to defend the lawsuit in the foreign court, and a default judgment was entered against her.<sup>73</sup> The court held Ehrenfeld liable for £30,000 in libel damages and £30,000 in attorneys' fees.<sup>74</sup> In addition, the court enjoined further publication of the book in the United Kingdom and mandated that Ehrenfeld publish an apology.<sup>75</sup> Bin Mahfouz was unable to enforce the money judgment in the United Kingdom because Ehrenfeld did not have assets in the country.<sup>76</sup> Surprisingly, Bin Mahfouz did not seek enforcement in New York, where Ehrenfeld did have assets.<sup>77</sup>

Many scholars who have analyzed the famous case have observed that Bin Mahfouz is a "repeat libel-player."<sup>78</sup>

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68. [2005] EWHC (QB) 1156 (Eng.); *see also* *Ehrenfeld v. Bin Mahfouz*, 518 F.3d 102 (2d Cir. 2008); *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007).

69. *Ehrenfeld*, 881 N.E.2d at 831–32. The book at issue was RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT* (2003).

70. *Ehrenfeld*, 881 N.E.2d at 832.

71. *Id.*

72. *See id.*

73. *Id.* at 832–33.

74. *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC (QB) 1156, [74]–[75] (Eng.). According to 2014 currency rates, Bin Mahfouz and his sons were awarded approximately \$76,000.00 (USD) in defamation damages and attorneys' fees.

75. *Ehrenfeld*, 881 N.E.2d at 833.

76. *See* Staveley-O'Carroll, *supra* note 3, at 274.

77. *See id.*

78. *Id.* at 273; *accord* Gerny, *supra* note 3, at 412 ("frequent flier" (quoting *Hearing*, *supra* note 24, at 20 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP)) (internal quotation marks omitted)). Bin Mahfouz has a section on his personal webpage devoted to his libel suits. *See UK libel actions*, BIN MAHFOUZ INFO. [http://www.binmahfouz.info/faqs\\_5.html#uk\\_libel\\_actions](http://www.binmahfouz.info/faqs_5.html#uk_libel_actions) (last visited Sep. 24, 2014). It has been alleged

Presumably, a billionaire is indifferent to the receipt of £60,000. It is likely that Bin Mahfouz intended to silence Ehrenfeld and chill free speech, and many felt the judgment accomplished just that.<sup>79</sup> Ehrenfeld sought a declaratory judgment in the Southern District of New York stating that the foreign defamation judgment was unenforceable in the forum.<sup>80</sup> On a certified question from the Second Circuit, the New York Court of Appeals acknowledged that Ehrenfeld's case was a prime example of libel tourism.<sup>81</sup> The court, however, agreed with the federal district court: New York courts did not have personal jurisdiction over Bin Mahfouz.<sup>82</sup> Therefore, Ehrenfeld was unable to remove the "sword of Damocles" above her head.<sup>83</sup> It has been acknowledged that this sword has "undermined [Ehrenfeld's] reputation as a counter-terrorism expert and threatened her credit history."<sup>84</sup> The *Ehrenfeld* case is a prime example of a transnational defamation plaintiff's attempt to undermine the First Amendment.

The risk of a foreign defamation suit undermines the free speech protection afforded to writers in the United States. One commentator labeled libel tourism as a "legal loophole" to the First Amendment.<sup>85</sup> In the same 2008 U.N. Report noted above, the committee reported that the global difference in defamation laws "served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work."<sup>86</sup> In essence, libel tourism

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that he has brought or threatened to bring at least 29 libel suits in the United Kingdom. See *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816, at \*1 (S.D.N.Y. Apr. 26, 2006), *aff'd*, 518 F.3d 102 (2d Cir. 2008). In addition, he has secured at least four-dozen "corrections" to books and articles. See Staveley-O'Carroll, *supra* note 3, at 268.

79. See, e.g., Gerny, *supra* note 3, at 427 ("[Ehrenfeld] testified that she had many 'sleepless nights' worrying that Mahfouz would come to New York to enforce the English judgment against her."); Sturtevant, *supra* note 3 at 278 ("[S]peech was chilled . . . as Ehrenfeld's United Kingdom publisher promptly ceased publication of her book in the United Kingdom based on the English judgment.").

80. *Ehrenfeld*, 2006 WL 1096816, at \*2.

81. *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834 (N.Y. 2007).

82. *Id.* at 835–38.

83. *Hearing*, *supra* note 24, at 14 (written statement by Rachel Ehrenfeld).

84. Staveley-O'Carroll, *supra* note 3, at 275.

85. Sturtevant, *supra* note 3, at 269; accord Gerny, *supra* note 3, at 410.

86. U.N. Human Rights Reports, *supra* note 61, ¶ 25.

170 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

places an enormous chilling effect on free speech in the United States.<sup>87</sup> When publishing in the United States, writers need to take into consideration both the possibility of a domestic defamation suit as well as the possibility of a foreign defamation suit adjudicated under foreign law.<sup>88</sup> Libel tourism displaces much of the protection afforded by the First Amendment because writers cannot publish with confidence that, so long as they comply with United States law, their publications will be shielded from scrutiny in a legal proceeding.

The evidence of a chilling effect is troublesome to quantify because it is difficult to assess exactly what content American writers have withheld from writing and publishing. Nevertheless, prominent media lawyers claim to have firsthand knowledge of the chilling effect that libel tourism has created.<sup>89</sup> For instance, publishers have cancelled plans to release books in the United Kingdom—books that have already been cleared for publication in the United States—due to the risk of a defamation suit in the United Kingdom.<sup>90</sup> In addition, media lawyers report frequently receiving letters threatening foreign defamation lawsuits from both United States and United Kingdom law firms.<sup>91</sup> As a result, media lawyers “must . . . counsel their clients about the risks of their work being exposed [internationally] and the high probability of eventual litigation.”<sup>92</sup> By specific example, in 2007, Cambridge University Press “responded with an all-out effort to preempt [a] libel suit” threatened by repeat libel-player, Bin Mahfouz.<sup>93</sup> The publishers destroyed unsold copies, asked

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87. See S. REP. NO. 111-224, at 2 (2010).

88. See Gerny, *supra* note 3, at 426 (“Journalists are often compelled to self-censor their speech to ensure that their statements not only conform to the standards of the First Amendment, but also that they satisfy the more ‘stifling strictures of English libel law.’” (quoting *Hearing*, *supra* note 24, at 23 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP))).

89. See *Hearing*, *supra* note 24, at 23 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP).

90. See *id.* at 24 (written statement by Bruce D. Brown, Partner, Baker & Hostetler, LLP) (stating that a British publisher halted a book release due to threats from a Saudi Royal family).

91. See *id.* at 56 (written statement by Laura R. Handman, Partner, Davis Wright Tremaine LLP).

92. Gerny, *supra* note 3, at 427.

93. Staveley-O’Carroll, *supra* note 3, at 268 (citing Cinnamon Stillwell, *Libel Tourism: Where Terrorism and Censorship Meet*, S.F.GATE (Aug. 29,

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 171

libraries around the world to remove the book, issued an apology, and paid Bin Mahfouz an unspecified amount of money.<sup>94</sup>

Even if the judgment is not likely to be enforced by a domestic court, the mere cost of defending and litigating a lawsuit deters free speech. One writer explained that the Cambridge University Press' actions detailed above were "based not so much on a lack of confidence in the book as on a fear of incurring costly legal expenses and getting involved in a lengthy trial."<sup>95</sup> Aside from a monetary burden, a defamation proceeding could also affect a writer's reputation and future ability to publish. For instance, after the *Ehrenfeld* case, Ehrenfeld noted that two different publishers, which had routinely accepted her work, declined to publish her manuscripts.<sup>96</sup> She claimed that publishers are leery of authors who have been subjected to libel suits, and as a result, she has had to conceal portions of her research from her writings.<sup>97</sup> Accordingly, the risk of a foreign defamation suit, even in respect to wholly domestic matters, undermines the free speech protection guaranteed by the First Amendment.

### III. NATIONAL RESPONSE TO PROTECT FREE SPEECH

In an effort to curb libel tourism and the chilling effect on free speech, Congress enacted the *Securing the Protection of our Enduring and Established Constitutional Heritage Act* ("SPEECH Act") in 2010.<sup>98</sup> The SPEECH Act is federal legislation that

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2007, 4:00 AM), <http://www.sfgate.com/politics/article/Libel-Tourism-Where-Terrorism-and-Censorship-Meet-2544274.php>.

94. See Stillwell, *supra* note 93.

95. *Id.*

96. See *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816, at \*2 (S.D.N.Y. Apr. 26, 2006).

97. See *id.*

98. 28 U.S.C. §§ 4101–4105 (2012). The SPEECH Act was primarily motivated by the famous *Ehrenfeld* case and a string of state statutes that prohibited enforcement of foreign defamation judgments rendered under law repugnant to the First Amendment. See, e.g., CAL. CIV. PROC. CODE § 1716(c)(9) (West Supp. 2014); FLA. STAT. ANN. § 55.605(2)(h) (West Supp. 2012); N.Y. C.P.L.R. § 5304(b)(8) (McKinney Supp. 2014); see also CAL. CIV. PROC. CODE § 1717(c) (West Supp. 2014) (extending jurisdictional reach when seeking a declaratory judgment in the circumstances); N.Y. C.P.L.R. § 302(d) (McKinney 2010) (same). Prior to the SPEECH Act, enforcing courts were using the public policy exception to halt enforcement of defamation judgments rendered under law repugnant to the United States Constitution. See *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997). See also UNIF.

172 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

applies with equal force to federal and state courts.<sup>99</sup> In a nutshell, the SPEECH Act requires that United States courts presume foreign defamation judgments unenforceable.<sup>100</sup> The Act is comprised of five major sections: “Definitions,” “Recognition of foreign defamation judgments,” “Removal,” “Declaratory judgments,” and “Attorneys’ fees.”<sup>101</sup> The “Definitions” section classifies the types of defamation judgments that the Act aims to cover, as well as providing general definitions.<sup>102</sup> Defamation is defined to include “any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in

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FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(3) (2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3) (1962). However, the use of this exception in the defamation context has been criticized. *See, e.g.,* Rosen, *supra* note 14, at 859 (“Had the court [in *Telnikoff*] engaged in an ordinary comity analysis rather than its misplaced constitutional frolic, it probably would have decided to enforce the foreign judgment.”); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 *IND. L.J.* 635, 644 (2000) (“As the dissenting judge [in *Telnikoff*] emphasized, it is hard to see how freedom of the press or any United States interest was implicated in the case, because there was no American interest in the parties or the transaction.”).

99. 28 U.S.C. § 4101(2).

100. *See id.* § 4102.

101. *Id.* §§ 4101–4105. The Act also leads with congressional findings. *Id.* § 4101, findings. In short Congress found:

[F]reedom of speech and the press is enshrined in the [F]irst [A]mendment to the Constitution . . . [S]ome persons are . . . chilling the [F]irst [A]mendment . . . by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publishers in that foreign jurisdiction. . . . [Such] inhibit[s] other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit. . . . Governments and courts of foreign countries scattered around the world have failed to curtail this practice.

*Id.* (quoting Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. 111-223, § 2(1)–(3), (5) 124 Stat. 2380, 2380 (2010)). Congress additionally mentioned the commonality of foreign libel judgments that are inconsistent with First Amendment protections, as well as the U.N.’s acknowledgement of the Internet’s adverse affects. *Id.* (quoting SPEECH Act, § 2(4)–(5)).

102. *Id.* § 4101.

criticism, dishonor, or condemnation of any person.”<sup>103</sup> Therefore, the Act applies to all foreign defamation judgments, regardless of the subject matter.<sup>104</sup> The section also states that the Act applies to both federal courts and state courts in “each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.”<sup>105</sup> The SPEECH Act is binding on all United States courts, in all states and territories.

Section 4102, “Recognition of foreign defamation judgments,” outlines the scope for enforcement of foreign defamation judgments and is truly the heart of the Act.<sup>106</sup> Most importantly, the section presumes foreign defamation judgments unenforceable.<sup>107</sup> In essence, the section is structured so that a judgment will be enforced “*only* if the plaintiff would have been able to assert a successful claim for defamation under the substantive defamation law of the state in which the domestic

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103. *Id.* § 4101(1). One commentator argued that the definition of defamation is too broad, and “the SPEECH Act could be applied to matters not typically considered defamation in the United States.” Rosen, *supra* note 14, at 104.

104. *See infra* Part IV.D.

105. 28 U.S.C. § 4101(2), (5). The section defines United States person to include:

(A) a United States citizen;

(B) an alien lawfully admitted for permanent residence to the United States;

(C) an alien lawfully residing in the United States at the time that the speech that is the subject of the foreign defamation action was researched, prepared, or disseminated; or

(D) a business entity incorporated in, or with its primary location or place of operation, in the United States.

*Id.* § 4101(6). The Act fails to limit its applicability to United States persons. The distinction is only mentioned in § 4104, Declaratory Judgments. This shortcoming has been cited as a major flaw of the Act. *See* Rosen, *supra* note 14, at 102–03 (“[F]oreign corporations, foreign citizens, and other foreign entities would appear to be eligible to invoke its absolute defense against recognition and enforcement in [the United States].”).

106. *See* 28 U.S.C. § 4102.

107. *See id.* *Cf.* Robinson, *supra* note 11, at 932 (“[T]hey can be certain that the United States will not cooperate when it comes to libel judgments.”); Eric Goldman, *Big Victory In Effort To Curb Libel Tourism—Trout Point Lodge v. Handshoe (Forbes Corss-Post)*, TECH. & MARKETING L. BLOG (Sept. 13, 2013), [http://blog.ericgoldman.org/archives/2013/09/big\\_victory\\_in.htm](http://blog.ericgoldman.org/archives/2013/09/big_victory_in.htm) (“[T]he SPEECH Act means United States give effectively no deference to foreign defamation judgments.”).

174 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152

court is located.”<sup>108</sup> The section is primarily broken up into two main sub-sections: “First Amendment Considerations” (4102(a)) and “Jurisdictional Considerations” (4102(b)).<sup>109</sup> In order for a foreign defamation judgment to actually be enforceable, *both* considerations must be satisfied.<sup>110</sup> Both considerations, however, are stated in the negative, providing that a court “shall *not* recognize or enforce a foreign judgment for defamation *unless* the domestic court determines that . . .”<sup>111</sup> Therefore, although the statute does not contain the word “presumption,” the language unambiguously supports a presumption of unenforceability.<sup>112</sup>

The First Amendment Considerations sub-section provides two different avenues (exceptions) for enforcement of a foreign defamation judgment.<sup>113</sup> If a plaintiff satisfies either exception, the First Amendment Considerations sub-section is satisfied, and the litigant proceeds to the Jurisdictional Considerations. The first exception, what I label the “Equivalency Exception,” allows for enforcement of a foreign defamation judgment if:

[T]he defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the [F]irst [A]mendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.<sup>114</sup>

Essentially, the Equivalency Exception allows for enforcement if

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108. Rosen, *supra* note 14, at 105 (emphasis added).

109. 28 U.S.C. § 4102(a)–(b). For interactive computer service provider defendants, there is a third sub-section that essentially casts 47 U.S.C. § 230 (2012) onto foreign defamation proceedings. 28 U.S.C. § 4102(c). This particularized pocket is outside the scope of this Comment.

110. 28 U.S.C. § 4102(a)–(b).

111. *Id.* § 4102(a)(1), (b)(1) (emphasis added).

112. As stated below, the burden of proof is placed on the party seeking enforcement. *Id.* § 4102(a)(2). The fact that the burden is not placed on the party resisting enforcement further supports the presumption of unenforceability. Compare with UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(d) (2005) (“A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition . . . exists.”); see also CAL. CIV. PROC. CODE § 1716(d) (West Supp. 2014); DEL CODE ANN. tit. 10, § 4803(d) (2013); N.C. GEN. STAT. ANN. § 1C-1853(f)–(h) (2011).

113. 28 U.S.C. § 4102(a)(1)(A)–(B).

114. *Id.* § 4102(a)(1)(A).

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 175

the foreign country's speech protection is equivalent to the protection afforded by the law of the United States and the enforcing court. The second exception, what I label the "Domestic Success Exception," allows for the enforcement of a foreign defamation judgment if:

[T]he party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the [F]irst [A]mendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.<sup>115</sup>

In sum, the Domestic Success Exception requires a suit-within-a-suit and allows for enforcement if the enforcing court finds that the original defamation plaintiff would have been successful had the suit originally been filed in the enforcing court. In other words, the enforcing court must find that the outcome of the case would have been the same under both domestic and foreign law. The exception also reinforces that the exceptions are mutually exclusive, and enforcement can occur through either avenue.<sup>116</sup> The burden of establishing the application of either exception is placed on "[t]he party seeking recognition or enforcement of the foreign judgment."<sup>117</sup> Consequently, the original defamation plaintiff has the burden to prove that the judgment should be enforced in the United States. Nevertheless, even if an exception is satisfied, the party seeking to enforce the judgment must still satisfy the Jurisdictional Considerations.<sup>118</sup>

The party seeking recognition of the foreign judgment—the original defamation plaintiff—must prove that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States."<sup>119</sup> Accordingly, the foreign

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115. *Id.* § 4102(a)(1)(B).

116. *See id.* The Equivalency Exception focuses on the foreign forum, while the Domestic Success Exception focuses on the litigation at hand. *Compare id.* § 4102(a)(1)(A), *with id.* § 4102(a)(1)(B).

117. *Id.* § 4102(a)(2).

118. *See id.* § 4102(b).

119. *Id.* § 4102(b)(1). As with the First Amendment Considerations subsection, the burden of satisfying the jurisdictional inquiry is on the original defamation plaintiff. *Id.* § 4102(b)(2).



court's exercise of personal jurisdiction over the original defamation defendant must satisfy the "effects" test stated above.<sup>120</sup> In order to satisfy the Jurisdictional Considerations, a defendant must have directed the defamatory statements with intent to harm the plaintiff's reputation in the foreign forum.<sup>121</sup> Therefore, viewing both the First Amendment and Jurisdiction Considerations in conjunction with one another, *even if* the foreign law is equivalent to United States law, and/or *even if* the foreign suit would have produced the same outcome if litigated domestically, the foreign defamation judgment *still* will not be enforceable if the defendant did not aim the defamatory statements in the foreign forum with intent to cause effects there.

The remaining sections of the SPEECH Act offer additional protection to defamation defendants.<sup>122</sup> First, the Act grants the defendant the ability to remove an enforcement action brought in state court to federal court.<sup>123</sup> Removal is permissible if: (a) the parties are diverse, irrespective of the complete diversity rule; (b) the plaintiff is a foreign country or citizen and the defendant is a United States citizen; or (c) vice versa.<sup>124</sup> In addition, the section waives the amount in controversy requirement.<sup>125</sup> Second, section 4104 outlines the specific requirements for a declaratory judgment and grants additional protection to United States defamation defendants.<sup>126</sup> The cause of action is summarized as:

Any United States person against whom a foreign judgment is entered on the basis of the content of any writing, utterance, or other speech by that person that has been published, may bring an action in district court, under section 2201(a), for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States. For the purposes of this paragraph, a judgment is repugnant to the Constitution or laws of the

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120. *See supra* notes 52–56 and accompanying text.

121. *See Calder v. Jones*, 465 U.S. 783, 789–91 (1984). Likewise, section 4102(d) makes clear that a party can resist enforcement of a foreign defamation judgment and/or contest jurisdiction regardless if the party submitted to the foreign court in order to defend the litigation.

122. *See* 28 U.S.C. §§ 4103–4105.

123. *Id.* § 4103.

124. *Id.*

125. *Id.*

126. *Id.* § 4104.

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 177

United States if it would not be enforceable under section 4102(a), (b), or (c).<sup>127</sup>

Therefore, the section specifically allows United States defamation defendants to file suit in the United States seeking a declaratory judgment that the foreign defamation judgment is unenforceable. Enforceability, in turn, is determined in accordance with the First Amendment and Jurisdictional Considerations detailed above.<sup>128</sup> However, in contrast to the burden outlined in the First Amendment and Jurisdictional Considerations subsections, the burden in a declaratory action is placed on the party resisting enforcement.<sup>129</sup> Accordingly, a foreign defamation judgment is presumed unenforceable in a proceeding for recognition, and a foreign defamation judgment is presumed enforceable in a proceeding for non-recognition. The section also provides for nationwide service of process by stating, “process may be served in the judicial district where the case is brought or any other judicial district of the United States where the defendant may be found, resides, has an agent, or transacts business.”<sup>130</sup> Finally, section 4105 of the Act outlines an award of attorneys’ fees, stating that “the domestic court shall, absent exceptional circumstances, allow the party opposing recognition or enforcement of the judgment a reasonable attorneys’ fee if such prevails in the action on a ground specified in section 4102(a), (b), or (c).”<sup>131</sup> Thus, if the enforcing court finds the foreign judgment unenforceable, the court is required, absent exceptional circumstances, to grant the original defamation defendant reasonable attorneys’ fees. The award is available only for a party resisting enforcement, i.e., the original defamation defendant.<sup>132</sup> However, the grant of attorneys’ fees is applicable only in a proceeding for enforcement and not in a proceeding for a declaratory judgment.<sup>133</sup>

As is evident, the SPEECH Act provides an array of

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127. *Id.* § 4104(a)(1).

128. *Id.*

129. *Id.* § 4104(a)(2). The placement of this burden more closely mirrors the burden in other international judgment enforcement proceedings. *See supra* note 112.

130. 28 U.S.C. § 4104(b).

131. *Id.* § 4105.

132. *Id.*

133. *Id.*

protections to defamation defendants with assets in the United States. The Act presumes that foreign defamation judgments are not enforceable in the United States and specifically allows broad opportunity for the defendant to seek a declaratory judgment to that effect.<sup>134</sup> The Act is clearly aimed at deterring libel tourism.<sup>135</sup> While laudable in purpose, the Act may have overshot the mark. The main shortcoming of the Act is that it does not differentiate between judgments emanating from legitimate versus illegitimate forums. The Act aims to deter libel tourism; yet, it also applies strict principles of non-enforcement to foreign defamation suits originating from legitimate forums. The presumption of non-enforcement and the mandatory nature of the Act render the lack of differentiation between legitimate and illegitimate forums highly problematic.

The SPEECH Act provides too little protection to foreign defamation plaintiffs. The two exceptions allowing for enforcement are illusory. First, the United States affords the highest free speech protection in the world.<sup>136</sup> Therefore, it is unlikely that any foreign defamation law will be equivalent to, or provide as much protection as, that of the United States. Second, the Domestic Success Exception provides little guidance on how an enforcing court should litigate a claim in the abstract. For instance, it is unclear whether the success of the suit should be assessed on the merits (substantively) or on the pleadings (procedurally). As a result, the Domestic Success Exception can also be viewed as illusory due to the statutory ambiguity and difficulty in obtaining equal results under different laws. The Act also fails to explicitly state how speech protection should be applied in a given case. The above renders the Act over-inclusive

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134. See *id.* §§ 4102, 4104. Accord Gerny, *supra* note 3, at 434 (“The ‘shield’ feature in the law permits an American defendant to remain passive, given that a foreign defamation judgment cannot be enforced in the United States unless the judgment holder meets the requirements of the SPEECH Act. It also acts as a ‘sword,’ because it creates a cause of action for declaratory relief in federal court to challenge the enforceability of the foreign defamation judgment.”).

135. See S. REP. NO. 111-224 (2010); H.R. REP. NO. 111-154 (2009).

136. See Rosen, *supra* note 14, at 106 (“[T]he United States provides more constitutional protection for speech than do other liberal democracies.”); Robinson, *supra* note 11, at 913 (“The United States has substantial free speech protections under the Constitution’s First Amendment that most countries do not have.”). See also discussion Part IV.C.1.

and results in a high risk of offending international comity.

Eventual non-enforcement is a possibility that is often considered by international plaintiffs when strategically deciding where to file suit. However, given the complete opposite nature of United States defamation law as compared to many foreign countries, a transnationally defamed plaintiff choosing between two legitimate forums will often have to either: (a) risk non-enforcement in the United States, or (b) file in the United States and risk losing on the merits. Can this really be considered an option? Is it fair that a plaintiff be penalized for choosing the latter of two legitimate forums? The SPEECH Act's various caveats were considered in the first and only case to interpret the Act: *Trout Point Lodge, Ltd. v. Handshoe*.<sup>137</sup>

#### IV. *TROUT POINT LODGE, LTD. V. HANDSHOE* & THE BROAD APPLICATION OF THE SPEECH ACT

Although enacted in 2010, the SPEECH Act did not make its appearance in case law until September 2013 when the Fifth Circuit Court of Appeals decided *Trout Point Lodge, Ltd. v. Handshoe*.<sup>138</sup> Considering the frequency of libel tourism, one might have assumed that the first case to apply the SPEECH Act would have been a testament to the benefits of, and the need for, the Act. However, *Trout Point Lodge* was not an exemplar of libel tourism or illegitimate forum shopping. The forum selected in *Trout Point Lodge* was not chosen to “chill” free speech. Rather, the forum was selected because it was both plaintiffs’ domicile and the jurisdiction where the defamatory statements were aimed. In addition, and most importantly, the forum was the location where the plaintiffs suffered harm to their reputations. *Trout Point Lodge* was monumental, but not for First Amendment protection or the deterrence of libel tourism.<sup>139</sup> The case was monumental

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137. 729 F.3d 481 (5th Cir. 2013). The court in *Pontigon v. Lord*, 340 S.W.3d 315, 319 (Mo. Ct. App. 2011), was unable to interpret the SPEECH Act because the record did not contain a certified and authenticated copy of the judgment. In addition, the parties in *Investorshub.com, Inc. v. Mina Mar Group, Inc.*, Case No. 4:11cv9-RH/WS (N.D. Fla. filed June 20, 2011), entered into a stipulated judgment because of the near-conclusive nature of the SPEECH Act.

138. 729 F.3d 481. See also *Trout Point Lodge, Ltd. v. Handshoe*, 2012 NSSC 245 (Can.).

139. But see Goldman, *supra* note 107 (“This is the first appellate opinion

for exemplifying the broad reach of the Act and lack of guidance that Congress supplied the courts. In essence, *Trout Point Lodge* is a paradigm model of the flaws of the SPEECH Act. Despite the over-inclusive nature of the Act, one might have thought that *Trout Point Lodge* would exemplify the sort of foreign judgment that would “slip through the cracks” of the SPEECH Act. However, the judgment did not slip through the cracks; it did not even wedge itself in the opening. Put differently, if there was one judgment that was capable of United States enforcement under the SPEECH Act, it was this judgment. Nevertheless, the judgment in *Trout Point Lodge* did not even come close to enforcement.

A. *The Facts*

The defendant, Doug Handshoe, owns and operates a political blog from Mississippi called Slabbed.org.<sup>140</sup> Handshoe is a United States citizen and is domiciled in Mississippi.<sup>141</sup> His blog often discussed a Louisiana bribery scandal involving a man by the name of Aaron Broussard.<sup>142</sup> Broussard owned property in Nova Scotia, Canada, which was located in close vicinity to Trout Point Lodge, a hotel and wilderness resort.<sup>143</sup> Handshoe alleged that the owners of the lodge, Vaughn Perret and Charles Leary, were involved in the Louisiana bribery scandal.<sup>144</sup> As a result, the *Times-Picayune*, a newspaper in New Orleans, claimed that Broussard owned an interest in Trout Point Lodge.<sup>145</sup> Perret and Leary contacted the *Times-Picayune* and alerted the paper to the “factual errors in [its] reporting.”<sup>146</sup> The newspaper redacted the

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applying the SPEECH Act, and it’s a big win in the battle against libel tourism.”).

140. *Trout Point Lodge*, 729 F.3d at 483.

141. *Id.*

142. *Id.* at 483–84.

143. *Id.* at 484. See also TROUT POINT LODGE OF NOVA SCOTIA, <http://www.troutpoint.com> (last visited Sept. 26, 2014).

144. *Trout Point Lodge*, 729 F.3d at 484. Both Perret and Leary are American citizens, but have resided in Canada since 1998. See Brief of Appellants at 5–6, *Trout Point Lodge*, 729 F.3d 481 (No. 13-60002), 2013 WL 7089060. Moreover, the pair has been without a United States residence since 2005.

145. *Trout Point Lodge*, 729 F.3d at 484.

146. *Id.* (alteration in original) (internal quotation marks omitted).

earlier statements and issued a correction.<sup>147</sup> In addition, the corporate parent of the newspaper removed Handshoe's blog from the Internet.<sup>148</sup> In response, Handshoe relaunched his blog on a different hosting website and "began an internet campaign to damage Perret and Leary."<sup>149</sup> In sum, the statements claimed that the lodge owners were connected to the Louisiana scandal, had misled investigations by Canadian officials, and engaged in fraud, which was leading to corporate bankruptcy, and homosexual conduct.<sup>150</sup> Frustrated by the "derogatory, mean spirited, sexist, and homophobic" statements, the lodge owners brought a defamation suit against Handshoe in Nova Scotia.<sup>151</sup>

The plaintiffs alleged that the statements by Handshoe were both false and made with malicious intent.<sup>152</sup> However, the allegations were merely pled generally, as the burden is on the defendant to prove truth in a Canadian defamation proceeding.<sup>153</sup> Handshoe was served with process in Mississippi, but failed to appear in Nova Scotia.<sup>154</sup> The Nova Scotia court entered a default judgment against Handshoe and conducted a brief hearing on damages.<sup>155</sup> As a result, the court awarded \$352,000 in monetary damages.<sup>156</sup> The plaintiffs then filed suit in Mississippi state

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147. *Id.*

148. *Id.* It is not clear how the corporate parent of the *Times-Picayune* had any authority to remove Handshoe's blog from the Internet.

149. *Id.*

150. *Id.* at 484–85, 493 (specifically summarizing the statements by stating, "Trout Point Lodge and its owners were somehow involved in corruption, fraud, money laundering, and 'pay to play' schemes . . . misled investors and court officials in litigation with the Atlantic Canada Opportunities Agency . . . Trout Point Lodge business is actively failing, near bankruptcy . . . [and] have had a series of failed businesses that used other people's money . . . plaintiffs are either con artists or have no business acumen whatsoever . . . referred to Perret and Leary as girls, . . . queer f-g scum, and b-tches, published more than one reference to a gay-themed movie, and posted video clips of movies and music videos commonly associated with gay stereotypes." (quoting Pl.'s First Am. Statement Cl.) (internal quotation marks omitted)).

151. *Id.* at 484.

152. *Id.* at 485.

153. *Id.*; see also *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, paras. 29, 32–33 (Can.).

154. *Trout Point Lodge*, 729 F.3d at 485.

155. *Id.* At the damages hearing, the plaintiffs presented additional evidence regarding the alleged defamatory statements. *Id.*

156. *Id.* Specifically, the Nova Scotia court awarded "Trout Point Lodge

182 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

court seeking to enforce their Canadian judgment in the United States.<sup>157</sup> Handshoe removed the case to the United States District Court for the Southern District of Mississippi and resisted enforcement of the judgment under the SPEECH Act.<sup>158</sup> Both parties conceded that the issues were purely legal and submitted cross-motions for summary judgment.<sup>159</sup> The district court granted Handshoe's motion for summary judgment, and the plaintiffs appealed to the Fifth Circuit Court of Appeals.<sup>160</sup>

The Fifth Circuit Court of Appeals affirmed the district court's ruling.<sup>161</sup> The court held that the SPEECH Act blocked enforcement of the Canadian defamation judgment.<sup>162</sup> First, the court compared Canadian defamation law to that in the United States.<sup>163</sup> Not surprisingly, the court found that "Canadian defamation law is derivative of the defamation law of the United Kingdom, which has long been substantially less protective of free speech" than the United States.<sup>164</sup> Therefore, the court easily disposed of the Equivalency Exception. Second, the court assessed

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\$75,000 in general damages, and Leary and Perret each \$100,000 in general damages, \$50,000 in aggravated damages, and \$25,000 in punitive damages. It also awarded \$2,000 in costs." *Id.* The Nova Scotia court also issued an injunction against Handshoe "restraining him from disseminating, posting on the Internet or publishing, in any manner whatsoever, directly or indirectly, any statements about the plaintiffs, Trout Point Lodge, Charles L. Leary, and [Vaughn] J. Perret." *Id.* at 485 n.5 (alteration in original) (quoting *Trout Point Lodge, Ltd. v. Handshoe*, 2012 NSSC 245, para. 105 (Can.)) (internal quotation marks omitted).

157. *Id.* at 486.

158. *Id.*

159. *Id.* This concession was arguably in error on the part of the plaintiffs. By making this concession, the parties relinquished the opportunity to conduct discovery that never occurred in the Canadian suit. See Brief of Appellant, *supra* note 144, at 5; Brief of Appellee at 3, *Trout Point Lodge*, 729 F.3d 481 (No. 13-60002), 2013 WL 1332824. Although the SPEECH Act is fairly straightforward, application of the Domestic Success Exception can hardly be deemed strictly legal in nature. The exception calls for an inquiry into the success of the plaintiff's claim on domestic soil. See 28 U.S.C. § 4102(a)(1)(B) (2012). Issues of defamation are not purely questions for the court. Therefore, by forgoing discovery the plaintiffs' greatly limited their opportunity to satisfy the second exception, considering that the Canadian proceeding did not include discovery either.

160. *Trout Point Lodge*, 729 F.3d at 486.

161. *Id.* at 496.

162. *Id.*

163. *Id.* at 488–90.

164. *Id.* at 488.

whether the Canadian Statement of Claim (the equivalent of an American complaint) was sufficient to support a default judgment under Mississippi law.<sup>165</sup> In other words, the court assessed the Domestic Success Exception on the pleadings. The court found that in the Statement of Claim, falsity, which is an element of a plaintiff's prima facie defamation claim in the United States but not in Canada, was insufficiently pled.<sup>166</sup> Accordingly, the court found that the Statement of Claim was insufficient to support a default judgment in Mississippi.<sup>167</sup> The court reviewed the Canadian damages proceeding and briefly assessed the Domestic Success Exception on the merits—that being whether the defamatory statements were actually found to be false.<sup>168</sup> However, the court found that the Canadian record did “not contain specific findings of fact with respect to the falsity of Handshoe’s statements.”<sup>169</sup> As a result, the Court of Appeals failed to enforce the Canadian judgment under the Domestic Success Exception as well.<sup>170</sup> The court consequently held the Canadian defamation judgment unenforceable in Mississippi.<sup>171</sup>

B. *Lack of Differentiation between “Legitimate” Forum Selection and “Illegitimate” Forum Shopping (Libel Tourism)*

As discussed, the SPEECH Act fails to differentiate between defamation judgments from legitimate forums and illegitimate forums; rather, it paints all foreign forums with one broad brush.<sup>172</sup> This is despite the fact that, presumably, the Act was

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165. *Id.* at 491–94.

166. *Id.* at 492–93. The Court of Appeals also claimed that some of the statements alleged in the Statement of Claim were unverifiable opinions or legal conclusions. *Id.* at 493–94.

167. *Id.* at 494.

168. *Id.* at 494–96.

169. *Id.* at 495 (internal quotation marks omitted).

170. *Id.* at 496.

171. *Id.* The Court of Appeals did not analyze the Jurisdictional Considerations because the plaintiffs failed to satisfy the First Amendment Considerations. *Id.* Given the prominent role jurisdiction considerations often play in the enforcement of international judgments, this Comment will not critique the considerations in the context of the SPEECH Act. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT §§ 4(b)(2), 5 (2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 4(a)(2), 5 (1962).

172. See Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L.



enacted to deter only illegitimate forum shopping.<sup>173</sup> Many commentators have acknowledged the over-inclusive nature of the SPEECH Act. For example, one scholar questioned: “[W]hat if an American is sued in England for passing out leaflets in Piccadilly Circus that allegedly defamed an English person? Can this United States person come to the United States and seek declaratory relief that the foreign judgment is unenforceable?”<sup>174</sup> She quickly answered that “[t]he answer must be no.”<sup>175</sup> However, the answer must be “yes,” for the Act fails to differentiate between legitimate and illegitimate forums. There is absolutely nothing in the SPEECH Act that prohibits a United States citizen from seeking a declaratory judgment in these circumstances.

*Trout Point Lodge* is a prime example of legitimate forum selection. In *Trout Point Lodge*, the plaintiffs resided in Canada; the lodge was located in Canada; the statements were accessible by Canadian residents; and the statements mainly defamed the plaintiffs’ reputations in Canada, in the eyes of Canadian residents and foreigners visiting Nova Scotia.<sup>176</sup> The plaintiffs summarized the legitimacy of the forum in their reply brief, by stating:

Handshoe’s libelous publications concerned the Nova Scotia activities of Nova Scotia residents. The

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REV. 375, 387 (2011) (“Professor Douglas Rendleman . . . argues that a broad-brush rejection of all foreign defamation judgments ‘is both too blunt and too broad.’” (quoting Rendleman, *supra* note 22, at 487)).

173. See S. REP. NO. 111-224 (2010); H.R. REP. NO. 111-154 (2009). Cf. Gerny, *supra* note 3, at 436 (“One troubling feature of the SPEECH Act is that it does not define who specifically is a libel tourist.”).

174. Gerny, *supra* note 3, at 437. Another commentator noted:

[I]t seems intuitively unfair for a U.S. court to issue an award against a foreign plaintiff who lives in London and sues over an American publication that was widely published in London, since its impact would be felt where the plaintiff lives and works and plans to work in the future.

Staveley-O’Carroll, *supra* note 3, at 291–92. She went on to acknowledge that it would be easy to differentiate between legitimate and illegitimate forums by noting that “libel tourists tend to stick out—on the streets and in the courts—so in most cases, judges will be able to distinguish the real cases of libel tourism based on the plaintiff’s and the disputed work’s minimal connections to the foreign forum.” *Id.* at 292.

175. Gerny, *supra* note 3, at 437.

176. See *Trout Point Lodge*, 729 F.3d at 484; Reply Brief of Appellants at 2–3, *Trout Point Lodge*, 729 F.3d 481 (No. 13-60002), 2013 WL 1752668.

publications impugned the Trout Point plaintiffs' reputations and made allegations of moral turpitude against Perret and Leary, whose business and careers were and are centered in Nova Scotia. Many publications were drawn from Nova Scotia or Canadian sources, and Trout Point, Perret and Leary suffered the brunt of the harm, in terms both of their emotional distress and the injury to their professional reputations. Thus, Nova Scotia is the focal point both of Handshoe's publications and of the harm suffered.<sup>177</sup>

Unlike many libel tourism cases, the suit was not filed in jurisdiction *X* despite the reputational damage occurring in jurisdiction *Y*. Here, the reputational damage occurred in jurisdiction *X* and the suit was filed in jurisdiction *X*—Nova Scotia. Moreover, neither plaintiff had a global reputation. Perret and Leary, the plaintiffs, are private individuals who own a private resort.<sup>178</sup> Although they presumably have ties to both the United States and Canada, they are not in any sense “global” plaintiffs. Nova Scotia was clearly a legitimate forum for the cause of action.

In fact, it is questionable whether there was even another appropriate forum for the litigation. The plaintiffs lived and operated a business in Nova Scotia since 1998 and relinquished residency in the United States in 2005.<sup>179</sup> Therefore, it is uncertain if the plaintiffs' reputations in the United States were even defamed at all. Put differently, it is debatable whether the plaintiffs even maintained reputations in the United States that were capable of being defamed. If the plaintiffs were not defamed

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177. Reply Brief of Appellants, *supra* note 176, at 2. Alternatively, Handshoe alleged in his brief that his statements were directed at a Mississippi audience because his blog was Mississippi focused. *See* Brief for Appellee, *supra* note 159, at 13–14. Yet, he posted this statement on his blog:

I've just been informed . . .

That the newest chapter of the Slabbed Nation has been formed in Nova Scotia and those good folks are wanting to see a conclusion of some kind of our earlier posts on Trout Point Lodge and its connections to the Jefferson Paris Political Corruption Scandal. How can I deny our newest fans such a request? Simple [sic] I can't.

Reply Brief of Appellants, *supra* note 176, at 5 (emphasis in original).

178. *See* Brief of Appellants, *supra* note 176, at 2.

179. *See id.* at 6.

in the United States, the United States would clearly not be an appropriate forum for the defamation suit. The United States would only be connected to the case because the statement was published by a Mississippi resident, from a Mississippi computer.<sup>180</sup> Aside from the fact that the United States is an entirely inappropriate forum, it is uncertain whether any particular United States jurisdiction, aside from the defendant's domicile,<sup>181</sup> would have had personal jurisdiction over the defendant. Given the strict nature of the "effects" test for defamation jurisdiction, it would likely be difficult to argue that the defendant aimed his defamatory statements to cause effects in any jurisdiction aside from Nova Scotia, Canada.<sup>182</sup> Thus, Nova Scotia not only appears to be the most appropriate forum for the litigation, but may also be the only available forum.

C. *Too Little Protection for Foreign Defamation Plaintiffs*

To reiterate, the SPEECH Act provides two different exceptions to non-enforcement: the Equivalency Exception and the Domestic Success Exception.<sup>183</sup> The Equivalency Exception allows for enforcement of a foreign defamation judgment if the foreign country's speech protection is equivalent to the protection afforded under the United States Constitution and the constitution of the enforcing court.<sup>184</sup> The Domestic Success Exception allows for enforcement of a foreign defamation judgment if the enforcing court finds that the original defamation plaintiff would have been successful had the case been originally filed in the enforcing court.<sup>185</sup> However, using the facts of *Trout Point Lodge*, I argue that neither exception affords protection to a

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180. See Brief of Appellee, *supra* note 159, at 13.

181. A defendant's domicile is a paradigm basis for general jurisdiction. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (citing *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988)). See also Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 237 (2014) ("Notably, courts asserting general jurisdiction over a defendant can do so in the absence of any connection between the state and the underlying cause of action.").

182. See *Calder v. Jones*, 465 U.S. 783, 789–91 (1984). See also notes 52–56 and accompanying text.

183. See 28 U.S.C. § 4102(a)(1)(A)–(B) (2012).

184. *Id.* § 4102(a)(1)(A).

185. *Id.* § 4102(a)(1)(B).

foreign defamation plaintiff. The lack of protection afforded by the SPEECH Act only magnifies the issue that the Act does not differentiate between judgments emanating from legitimately and illegitimately selected forums.

1. *Equivalency Exception*

The Equivalency Exception does not offer protection to foreign defamation plaintiffs because foreign speech protection will almost never rise to the level of protection afforded by the First Amendment.<sup>186</sup> The Fifth Circuit Court of Appeals started its analysis in *Trout Point Lodge* by stating, “[t]here is *no meaningful dispute* that the law applied by the Nova Scotia Court provides less protection of speech and press than First Amendment and Mississippi law.”<sup>187</sup> Under the First Amendment and Mississippi law, a plaintiff is required to prove that defamatory statements are false;<sup>188</sup> whereas under Canadian law, the element of falsity is presumed and, truth is an affirmative defense for a defamation defendant.<sup>189</sup> The Court of Appeals acknowledged a difference in policy, stating that Canada offers “considerable protection to . . . right to reputation,” and “American laws both seem to show a certain bias towards freedom of expression and freedom of the press.”<sup>190</sup> In sum, the Court of Appeals’ brief and cursory analysis exemplifies that the application of the exception to the case was more of a formality. The protection that the exception was intended to afford to a defamation plaintiff is completely non-existent.

As discussed, the Equivalency Exception requires that the foreign law offer free speech protection *equivalent* to that in the

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186. See generally *International Defamation Law Database*, KELLY / WARNER, <http://www.kellywarnerlaw.com/defamation-around-the-world/> (last visited Sept. 26, 2014).

187. *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 488 (5th Cir. 2013) (emphasis added). Therefore, the court easily acknowledged that it was relatively clear that the Equivalency Exception was dispositive.

188. See, e.g., *id.* at 489; *Blake v. Gannett Co.*, 529 So. 2d 595, 602 (Miss. 1988) (quoting *Chatham v. Gulf Publ’g Co.*, 502 So. 2d 647, 649 (Miss. 1987)).

189. See, e.g., *Trout Point Lodge*, 729 F.3d at 489; *Grant v. Torstar Corp.*, [2009] 3. S.C.R. 640, paras. 29, 32–33 (Can.).

190. *Trout Point Lodge*, 729 F.3d at 489 (quoting Brouillet, *supra* note 25, at 52).

United States.<sup>191</sup> However, speech protection and constitutional protections, in general, are derived from the history and traditions of a country.<sup>192</sup> The laws of foreign nations will naturally differ from ours; the United States would be sanctimonious to expect a foreign country's principles and policies to mimic our own history and traditions. One commentator perfectly captured this idea when he stated that "[t]he idea . . . that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself a repugnant one."<sup>193</sup> Indeed, courts have consistently applied and enforced foreign law despite substantive differences in domestic and foreign law, commonly noting that:

[The] assessment does not depend on whether the standards for evaluating a cause of action or the elements required to state a claim are *identical* under domestic and foreign law. Instead, we necessarily focus on the *fundamentals* of the cause of action underlying the foreign judgment and defenses thereto, "not the differences in the bodies of law" or in the way in which remedies are afforded.<sup>194</sup>

Therefore, the SPEECH Act requires a higher standard than what courts were previously implementing in other enforcement proceedings dealing with public policy issues.<sup>195</sup>

It cannot be denied that most foreign speech protection will not rise to the level of United States speech protection. This is because many foreign countries protect principles of reputation over free speech.<sup>196</sup> By default, most foreign defamation judgments will not be rendered under law that is equivalent to that of the United States.<sup>197</sup> Commentators suggest that it would

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191. 28 U.S.C. § 4102(a)(1)(A) (2012).

192. See Rosen, *supra* note 14, at 107–08.

193. Rendleman, *supra* note 22, at 487.

194. Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 1005 (9th Cir. 2013) (quoting Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 995 (10th Cir. 2005)).

195. Cf. Klein, *supra* note 172, at 389 ("Does this mean that even 'minor' deviations' from case law interpreting the First Amendment would make a foreign judgment unenforceable in the United States?").

196. See *supra* note 25 and accompanying text.

197. See Staveley-O'Carroll, *supra* note 3, at 276 (discussing a state codification of the Equivalency Exception and acknowledging that "[s]ince no other jurisdiction provides the same level of protection for speech as the United States, this limitation applies to virtually every foreign defamation

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 189

not be unconstitutional to enforce a foreign judgment rendered under law that differs significantly from United States law.<sup>198</sup> For instance, Professor Rosen noted that “while such a foreign judgment may be ‘Un-American’ insofar as it comes from a non-American polity and reflects political values at variance with American constitutional law, neither the foreign judgment itself, nor its recognition or enforcement by an American court, could be unconstitutional.”<sup>199</sup> Professor Rosen provided different examples of when courts have enforced foreign judgments rendered under laws contrary to the First Amendment:

Courts enforce antidisclosure clauses in settlement agreements, even though a statute prohibiting disclosure of the same information would violate the First Amendment. Similarly, while the Establishment Clause bars states from enacting intestacy laws that would disinherit children who married out of a particular religious faith, state courts regularly enforce wills that contain such anti-intermarriage provisions.<sup>200</sup>

Accordingly, a United States court can enforce a foreign judgment without “triggering” the Constitution.<sup>201</sup> It would not be unconstitutional for an American enforcing court to enforce a judgment rendered under law that differs from that in the United States. The equivalency requirement that the SPEECH Act imposes is not constitutionally necessary.

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judgment”).

198. The scope of this paper cannot possibly encompass the full thrust of this argument. Nor can the argument be boiled down to a few paragraphs. For a more in-depth discussion on enforcing foreign judgments rendered under law in opposition to the United States Constitution, see generally Rosen, *supra* note 14; Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004).

199. Rosen, *supra* note 14, at 112.

200. *Id.* From a choice of law perspective, United States courts are often required to apply foreign law in domestic proceedings, even if the law applied could not have been constitutionally enacted by a state. *See id.* at 113. The ability to apply law that is contrary to the United States Constitution is permissible because the United States Constitution does not apply to foreign countries. *See id.*

201. *Id.*

## 2. *Domestic Success Exception*

The Domestic Success Exception allows for enforcement if the defendant would have been liable had the suit originally been filed in the enforcing court.<sup>202</sup> The exception poses an array of issues. At first glance, the exception appears to require that, as a precursor to enforcement, the foreign plaintiff would have been successful in the United States *on the merits*.<sup>203</sup> In other words, the exception appears to require an inquiry into the success of the suit as to the plaintiff's prima facie defamation claim. This is because the exception falls under the First Amendment Considerations sub-section.<sup>204</sup> If the purpose behind the sub-section is to ensure that the foreign proceeding receives as much speech protection as a domestic proceeding, then one would assume that the appropriate analysis is to consider the merits, or substance, of the case. However, the Fifth Circuit Court of Appeals in *Trout Point Lodge* barely analyzed the exception on the merits of the suit, or substantively.<sup>205</sup> Rather, the court primarily analyzed the exception *on the pleadings*, or procedurally.<sup>206</sup> The enforcing court in *Trout Point Lodge* considered whether the Canadian pleadings were sufficient to support a Mississippi default judgment under Mississippi pleading requirements.<sup>207</sup> Although pleadings entail substantive elements, the assessment of the validity of a default judgment more directly correlates to a procedural victory. The lack of guidance and clarity into how the exception should generally be applied is problematic for courts and is likely to cause difficulty in adjudication. Nevertheless, regardless of which approach courts adopt—substantive review on the merits or procedural review on the pleadings—neither offers much protection.

As indicated, the court in *Trout Point Lodge* primarily analyzed the Domestic Success Exception on the pleadings and reviewed the success of the plaintiffs' case in the United States without considerable attention to the merits.<sup>208</sup> Under

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202. 28 U.S.C. § 4102(a)(1)(B) (2012).

203. *See id.*

204. *Id.*

205. *See* 729 F.3d 481, 490–96 (5th Cir. 2013).

206. *See id.* at 491–94.

207. *Id.*

208. *See id.* at 490–96.

Mississippi law, “[t]he threshold question in a defamation suit is whether the published statements are false. . . . [M]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”<sup>209</sup> The plaintiffs relied on both the Statement of Claim and Nova Scotia damages proceeding to support their accusations of falsity.<sup>210</sup> The court primarily focused on the Statement of Claim.<sup>211</sup>

Since the plaintiffs were successful in Canada by default, the Court of Appeals required the plaintiffs to prove that the pleading was sufficient to support a default judgment under Mississippi law.<sup>212</sup> Under Mississippi law, a default judgment is enforceable, “but only so far as it is supported by well-pleaded allegations, assumed to be true.”<sup>213</sup> The court went on to state that “blanket assertions” are insufficient to support a claim.<sup>214</sup> Therefore,

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209. *Id.* at 490 (quoting *Armistead v. Minor*, 815 So. 2d 1189, 1194 (Miss. 2002) (internal quotation marks omitted)) (internal quotation marks omitted).

210. *Id.* at 490–91. The support the plaintiffs offered is debatably in error. The Statement of Claim and Canadian damages proceeding included very general accusations of falsity. For instance, the Nova Scotia court stated in a cursory fashion that Handshoe’s statements were “unfounded,” “misrepresent[ed] facts,” and “outrageous . . . in the face of true facts about the plaintiffs.” *Trout Point Lodge, Ltd. v. Handshoe*, 2012 NSSC 245, paras. 91, 93–94 (Can.); see also Brief of Appellants, *supra* note 144, at 23–34. The plaintiffs focused their argument on the fact that well-pleaded allegations are accepted as true in a default judgment proceeding. See Brief for Appellants, *supra* note 144, at 16–17. See also *Nishimatsu Constr. Co. v. Hous. Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). However, the key phrase is “well-pleaded.” Pursuant to Mississippi law, “blanket assertions” are not well-pleaded or sufficient to state a claim for relief. See *DynaSteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 985 (Miss. 1992). Therefore, it was arguably obvious that the plaintiffs’ general allegations were not going to be accepted as true or sufficient to support a default judgment had the same circumstances played out in Mississippi. The plaintiffs’ best argument under the Domestic Success Exception was to present evidence of falsity as if they were litigating the case for the first time. The Court of Appeals acknowledged this point by stating that “even [if the statements were] deemed admitted, the allegations likely would have been insufficient—without subsequent evidence, analysis, and fact-finding.” *Trout Point Lodge*, 729 F.3d at 494. The plaintiffs’ strong reliance on the Canadian suit and waiver of discovery might have assisted in digging their own grave.

211. See *Trout Point Lodge*, 729 F.3d at 492–94.

212. *Id.* at 491.

213. *Id.* (emphasis in original) (quoting *Leach v. Shelter Ins. Co.*, 909 So. 2d 1283, 1288 (Miss. Ct. App. 2005)).

214. *Id.* (citing *DynaSteel*, 611 So. 2d at 985) (internal quotation marks



falsity must have been well-pleaded, including more than blanket allegations, in order for the Canadian Statement of Claim to be sufficient to support a Mississippi default judgment. The Court of Appeals found that the Canadian Statement of Claim contained a few specific allegations of falsity; but overall, the Statement of Claim did not offer evidence to rebut Handshoe's allegations.<sup>215</sup> It was not even clear from the pleading which statements were generally alleged to be false.<sup>216</sup> In addition, the Fifth Circuit Court of Appeals categorized many of the alleged facts as unverifiable opinions or legal conclusions.<sup>217</sup> Neither unverifiable opinions nor legal conclusions are actionable in a defamation proceeding in Mississippi.<sup>218</sup> As a result, the Court of Appeals held that the default judgment was not enforceable in Mississippi because the Canadian Statement of Claim was not sufficient under Mississippi's pleading requirements.<sup>219</sup>

It may appear that not considering the merits was an easier option for the Fifth Circuit, as the case had not moved through discovery in Canada. The lack of detail and evidence would have made the case quite difficult to litigate in the abstract. Although a straightforward option, it makes little sense to consider whether a foreign complaint survives scrutiny under United States law, because a complaint, or its equivalent, will be drafted in accordance with the requirements of the applicable jurisdiction.<sup>220</sup>

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omitted).

215. *Id.* at 491–92.

216. *Id.* at 492.

217. *Id.* at 493–94. For example, the court stated that it was unverifiable opinion whether “Trout Point had ‘Champagne taste on a beer budget,’ Perret and Leary were a ‘litigious bunch,’ [or] the Nova Scotia action was ‘foolish and frivolous.’” *Id.* at 493 (quoting Pl.’s First Am. Statement Cl.). The court also noted, “[g]iven the legal significance attached to the word ‘falsity,’ Mississippi law requires Trout Point to do more than merely cry ‘false’ to prove its claim.” *Id.* at 494.

218. *Id.* at 493–94. *See also DynaSteel*, 611 So. 2d at 985 (“Allegations that are in effect conclusions of law are not considered well-pleaded allegations, however, and a defendant will not be held to have admitted such averments on default.”); *Johnson v. Delta-Democrat Publ’g Co.*, 531 So. 2d 811, 814 (Miss. 1988) (“[N]ame calling and verbal abuse are to be taken as statements of opinion, not fact, and therefore will not give rise to an action for libel.”).

219. *Trout Point Lodge*, 729 F.3d at 494.

220. If a court considers the exceptions in order, it can be assumed that the court would have already established the conflict in the laws of the two countries.

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 193

The plaintiffs in *Trout Point Lodge* would have likely drafted a completely different complaint had the suit been filed in the United States. Does it really make any sense to compare a pleading prepared under one law's requirements to what a pleading should be under a different law? Isn't it obvious that a pleading under law *X* may not necessarily be sufficient under the law of *Y*?

If the interpretation of the second exception requires scrutiny of foreign pleadings, this exception can also appear to offer no protection to defamation plaintiffs. Pleadings sufficient under more lenient law will almost never be sufficient under different, and more stringent, law unless the plaintiff has pled more than necessary. What plaintiff would plead unnecessary allegations? Although Congress offered little guidance on the appropriate application of the second exception, the pleading interpretation is not consistent with the intent of the legislature.<sup>221</sup> The SPEECH Act was enacted to protect the First Amendment, and the exception is listed as a First Amendment Consideration.<sup>222</sup> Moreover, the entire purpose of the Act is to compare foreign policy to that of the United States and only enforce judgments that are in harmony with United States principles of free speech.<sup>223</sup> Accordingly, it is likely that Congress did not intend for the exception to apply in the way the court in *Trout Point Lodge* discerned it; rather, it appears that Congress intended this exception to apply when a defamation suit in an American enforcing court would result in the same outcome on the merits as a foreign court.

Substantive application of the Domestic Success Exception appears to be in accord with the legislative intent. However, the interpretation leaves courts in even more of a debacle. How does one litigate a claim in the abstract? Evidentiary and procedural rules vary from country to country; therefore, a plaintiff would likely have had different advantages and disadvantages litigating under American laws. Should these considerations be taken into account when assessing whether the plaintiff would have been successful had the suit been filed in the enforcing court? For

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221. See S. REP. NO. 111-124 (2010); H.R. REP. NO. 111-154 (2009).

222. See 28 U.S.C. § 4102(a)(1)(B) (2012).

223. See *id.* § 4102(a). Albeit, there are likely none in accordance.

instance, American courts routinely have broader discovery than foreign courts.<sup>224</sup> It is unclear if the enforcing court should allow a discovery phase in accordance with American principles in order to determine the success of the plaintiff's claim on domestic soil; or if the enforcing court should limit discovery to the foreign court's rules; or if the enforcing court should just accept the foreign court's finding of facts.<sup>225</sup> Another problem arises in cases similar to *Trout Point Lodge*, where discovery has not yet taken place. Should the court accept the facts as pled or allow discovery to occur?

Furthermore, the statute may possibly imply a higher standard of proof than a domestic defamation proceeding. The statute states that the exception applies if the enforcing court finds that the defendant "*would have been* found liable" in a domestic proceeding.<sup>226</sup> The ambiguity surrounding the words "would have been" can result in two differing interpretations. One interpretation of this language is that the enforcing court must find the defendant liable with near certainty. In other words, the enforcing court must be more certain on liability than required by a preponderance of the evidence standard (which could easily shift either way), even though proof by preponderance in a domestic proceeding would still render a defendant liable. Another interpretation is that the enforcing court must find the defendant liable using the domestic standard of proof. These various questions are just some on a long-list left unresolved by Congress.<sup>227</sup>

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224. See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 542 (1987) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions."); *Heraeus Kulzer v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011) ("Discovery in the federal court system is far broader than in most (maybe all) foreign countries.").

225. In addition to the lack of guidance given by the legislature, the second exception is a waste of judicial resources. In essence, the court is litigating a claim that another court has already spent time and money litigating. See Robinson, *supra* note 11, at 923 ("It costs the nations far more to retry cases that have already been tried in other jurisdictions than to enforce a foreign judgment.").

226. 28 U.S.C. § 4102(a)(1)(B) (emphasis added).

227. Many are left unanswered because enforcing courts rarely engage in any analysis of the merits. Aside from the narrow exceptions to enforcement, judgments are often enforced even if the enforcing court finds that the judgment court acted in error in some way. This lack of inquiry is due to

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 195

In *Trout Point Lodge*, the Court of Appeals did briefly analyze the Canadian damages proceeding in an attempt to review the merits of the suit.<sup>228</sup> However, not only did the court find that the Nova Scotia court's findings were "insufficient to demonstrate falsity," it also noted that "the plain language of the SPEECH Act suggests that the purported 'factual findings' of the Nova Scotia Court are irrelevant to the enforceability inquiry."<sup>229</sup> The court continued by stating that "[t]he critical question is not whether the Nova Scotia Court found falsity, but rather whether a state or federal court in Mississippi faced with the allegations . . . would have done so."<sup>230</sup> It is clear from the statutory language that the enforcing court needs to "re-litigate" the substance of the case; however, it is not clear that the foreign court's factual findings are wholly irrelevant to the analysis.<sup>231</sup> If a foreign court happened to engage in more analysis than required by its own law—say, scrutinizing whether statements were false—why should those findings be wholly irrelevant to the enforcing court? In addition, the Court of Appeals stated that the Nova Scotia court supported the damage award with allegations and evidence that the Mississippi court would not have credited, such as allegations not initially pled in the Statement of Claim.<sup>232</sup>

Would *Trout Point Lodge* have been decided differently if the Court of Appeals interpreted the second exception to require a substantive analysis of whether the claim would have been successful in Mississippi? Without discovery from either the Canadian or American court, the question is difficult to answer. As discussed, the Canadian Statement of Claim did not contain

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principles of res judicata. Therefore, the Domestic Success Exception's "relitigation" is not in accord with res judicata preclusion principles. The Act, essentially, offends res judicata principles in order to determine if it should apply a res judicata effect.

228. See *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 494–96 (5th Cir. 2013).

229. *Id.* at 494–95.

230. *Id.* at 494.

231. Let alone *plainly*.

232. *Id.* at 495–96. It appears that the court is again returning to a procedural analysis, as opposed to the unguided substantive approach. The court also returned to the procedural analysis when it stated that "the Nova Scotia Court issued its factual findings at a damages hearing that occurred *after* it had already granted default judgment in favor of Trout Point." *Id.* at 495.

allegations of falsity as required by Mississippi law; however, the failure to sufficiently plead falsity does not mean that the plaintiff could not have gathered information to prove the insufficient allegations.<sup>233</sup> For example, the plaintiffs could have produced evidence to demonstrate that they did comply with Canadian authorities in order to rebut Handshoe's allegations that the pair attempted to mislead investigations. Although rare cases could produce the same result under different laws, the lack of guidance as to the application of the second exception renders the protection feeble.

The lack of protection afforded by the exceptions and lack of guidance given by the legislature add to the Act's over-inclusive nature.<sup>234</sup> The SPEECH Act does not differentiate between legitimate and illegitimate forums, nor provide any protection to foreign defamation plaintiffs. Due to the strict application of the exceptions, only a small percentage of foreign defamation judgments will be enforceable in the United States. Therefore, the vast majority of foreign defamation judgments will be unenforceable in the United States regardless of whether they fall into the category of libel tourism.<sup>235</sup>

#### *D. Additional Ambiguity in Applying Domestic Free Speech Protection*

The SPEECH Act fails to explicitly account for the variations in defamation law across the United States, namely the differences between private and public defamation. A purely private defamation suit occurs when a private plaintiff is defamed

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233. See *supra* note 210.

234. The SPEECH Act can also be viewed as under-inclusive. It aims to deter libel tourism and reduce the chilling effect on the First Amendment; however, it does not prohibit a foreign suit from commencing. Libel tourists may be able to enforce the defamation judgment abroad or force the defendant into a settlement position. Aside from a monetary award, libel tourists may bring suits to gain a moral victory or prosecute under criminal laws. The under-inclusive nature of the SPEECH Act has been addressed at length. For more in-depth discussion on the perspective, see generally Elizabeth J. Elias, Note, *Nearly Toothless: Why The Speech Act is Mostly Bark, With Little Bite*, 40 HOFSTRA L. REV. 235 (2011).

235. See, e.g., Reply Brief of Appellants, *supra* note 176, at 19 (summarizing the strict interpretation of the SPEECH Act and concluding, "there can never be a Canadian defamation judgment executed in the United States against an American citizen").

on a matter of private concern—to illustrate, a colleague falsely stating to another colleague that their employer is often intoxicated during work hours. A purely public defamation suit occurs when a public plaintiff is defamed on a matter of public concern—for example, *FOX News* falsely reporting that a government official embezzled government funds. A hybrid defamation suit can be either: (a) private plaintiff/public concern—local newspaper falsely reporting that a psychologically ill individual placed a bomb in a local mall, or (b) public plaintiff/private concern—a family member of Sandra Bullock falsely telling her friend that Bullock was deported to Canada.<sup>236</sup> Most defamation suits involve some public context, as purely private defamation is usually contained and may not result in a compensable diminished reputation. Different elements and degrees of fault apply depending on the categorization of the defamation suit.

The protection afforded to defamation defendants by the First Amendment is highly associated with publicity and the fear of defamation chilling speech on matters of important public concern.<sup>237</sup> As a result, defamation suits with private components often have less stringent standards.<sup>238</sup> Although the United States Supreme Court has not directly ruled on the issue, a variety of lower courts have held that the states retain the right to apply traditional common law principles of defamation to purely private suits. For example, the United States District Court for

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236. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14–20 (1990), the Court recognized a distinction between media defendants and non-media defendants, acknowledging that the First Amendment gives heightened protection to the press. It is unclear exactly what role this distinction plays in the defamation categorization analysis.

237. See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ ‘[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.’ Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy [sic] of First Amendment values,’ and is entitled to special protection.” (citations omitted) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))).

238. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985).

the Eastern District of Pennsylvania stated that “the [United States Supreme] Court has never ruled that the Constitution requires any change in the ‘features of the common law landscape’ as they relate to . . . a defamation action brought by a private plaintiff based on language relating to an issue of private concern.”<sup>239</sup> New York currently applies common law defamation elements to purely private defamation cases.<sup>240</sup> In 2002, the Supreme Court of New York stated in *Zaidi v. United Bank Ltd.* that “it appears that where there is a private plaintiff, private concern(s) and a *non-media* defendant . . . no degree of fault, i.e. strict liability, applies.”<sup>241</sup> The states also retain the right to impose the degree of fault required in a private plaintiff/public concern defamation suit—negligence, gross negligence, recklessness, malice, or intent.<sup>242</sup>

Traditional common law defamation closely mirrors the current defamation elements in both the United Kingdom and Canada. In short, the approach is a modified form of strict liability. No degree of fault or falsity is required; rather once a statement is held defamatory, the statement is presumed false, and truth is an affirmative defense.<sup>243</sup> Many states do impose a degree of fault or a requirement of falsity in purely private defamation suits; however, this can be interpreted as a sovereign decision and not a constitutional requirement. Consequently, there are a variety of different approaches in the United States to private defamation. These differences in private defamation law depend on a particular jurisdiction’s interpretation of the First Amendment.

By definition, the SPEECH Act applies to *all* causes of action where speech has allegedly caused reputational damage.<sup>244</sup> The

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239. *Roffman v. Trump*, 754 F. Supp. 411, 415 (E.D. Pa. 1990) (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986)). The court additionally stated that “the actionability of statements of opinion in the private plaintiff/private issue context must be determined by reference to state law.” *Id.*

240. *See, e.g., Zaidi v. United Bank Ltd.*, 747 N.Y.S.2d 268, 272–73, 279 (N.Y. Sup. Ct. 2002).

241. *Id.* at 279.

242. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

243. *See, e.g., Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 581–82 (5th Cir. 1967) (discussing libel per se); *Kilian v. Doubleday & Co.*, 79 A.2d 657, 659–60 (Pa. 1951) (discussing truth as an affirmative defense).

244. 28 U.S.C. § 4101(1) (2012).

language of the exceptions do not explicitly direct an enforcing court to apply speech protection in accordance with the enforcing forum's interpretation of the First Amendment.<sup>245</sup> As stated above, common law defamation closely mirrors current defamation law in the United Kingdom and Canada. There are clearly not policy issues with enforcing equivalent law. However, an issue can arise if the enforcing court does not apply the equivalent law, but rather some heightened version.

The United States House of Representatives recognized the possible broad application by noting:

The Supreme Court has reserved decision on whether the plaintiff must prove falsity if the [sic] he or she is a private (rather than a public) figure and the statement concerns a private matter. That narrow category of cases is not likely to be implicated by [the SPEECH Act]; but if it ever were to be, the courts would be able to address the question.<sup>246</sup>

Yet, the SPEECH Act does not explicitly guide courts in addressing this question.<sup>247</sup> This omission could result in foreign, private defamation defendants being afforded more constitutional protection than domestic private defamation defendants. For instance, a New York court (which would apply strict liability to a purely private defamation case) may use the standards imposed by *New York Times* (malice and falsity) when applying the SPEECH Act. Given the glorification of the First Amendment in the SPEECH Act, the New York court could easily interpret the Act to require application of the most stringent First Amendment protections. Even if the language is more comprehensive than anticipated, the lack of precise language will ultimately result in some incorrect interpretation. Without clear statutory language, defamation defendants could incorrectly receive free speech protection that the First Amendment does not necessarily require.

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245. *See id.* § 4102(a).

246. H.R. REP. NO. 111-154, at 2 n.3 (2009) (citation omitted).

247. It is not clear that the legislature even intended for the SPEECH Act to apply to purely private defamation cases. The failure to include a carve-out for those cases only magnifies the need to apply First Amendment jurisprudence in accordance with the enforcing forum's precedent.



*E. High Risk of Offending International Comity*

United States courts are not required to enforce foreign judgments; the recognition and enforcement of such judgments is largely dealt with by the individual states.<sup>248</sup> Still, despite lacking an international form of the Full Faith and Credit Clause, the United States largely enforces foreign judgments in order to gain reciprocity and demonstrate respect for the opinions of other courts.<sup>249</sup> The over-inclusive nature of the SPEECH Act risks offending international comity.<sup>250</sup> Such a risk could possibly result in non-enforcement of United States judgments in foreign courts or some other form of legal retaliation.<sup>251</sup>

Canadian courts have already exhibited signs of frustration in *Trout Point Lodge's* most recent litigation.<sup>252</sup> After the Fifth Circuit Court of Appeals' decision, the plaintiffs filed a request for reassessment of damages in Nova Scotia and also asserted a separate cause of action for copyright infringement.<sup>253</sup> The copyright infringement allegations centered on photos that were posted on Handshoe's blog, namely of the plaintiffs and the Lodge.<sup>254</sup> The court acknowledged that the defendant's blog was

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248. See generally *Hilton v. Guyot*, 159 U.S. 113 (1895).

249. See *id.* at 163–64 (“Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”).

250. See, e.g., Klein, *supra* note 172, at 387–91 (outlining the various comity concerns that the SPEECH Act imposes and suggesting revisions); Robinson, *supra* note 11, at 925 (“It may be useful for American lawmakers to take a ‘Golden Rule’ approach or, at least, to look into a metaphorical policy mirror. Under the current law, the United States refuses to enforce foreign libel judgments because of a fundamental belief in the importance of absolute free speech. What if other countries similarly refused to legally cooperate with the United States based on a fundamental societal belief?”). *But see* Gerny, *supra* note 3, at 441–43 (arguing that the SPEECH Act does not offend international comity and is possibly unnecessary because of reform in defamation law in the United Kingdom, recent proposals for an international judgment enforcement treaty, and the public policy exception).

251. *Cf.* Robinson, *supra* note 11, at 928 (“If other nations acted similarly based on their own idiosyncratic values, the world and the United States would suffer from a global lack of cooperation.”).

252. See *Trout Point Lodge, Ltd. v. Handshoe*, 2014 NSSC 62 (Can.).

253. *Id.* at para. 1.

254. *Id.* at para. 17.

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 201

used as a “commercial enterprise” and that Handshoe posted the photos to “destroy the business interests of Trout Point Lodge, Charles Leary and Vaughn Perret.”<sup>255</sup> Despite the new cause of action, more than half of the Canadian court’s opinion is dedicated to the previous defamation suit.<sup>256</sup> The court noted that the defendant failed to abide by the injunction and continued to defame the plaintiffs.<sup>257</sup> The Supreme Court of Nova Scotia awarded the plaintiffs \$425,000 in damages.<sup>258</sup> The court stated that “it is abundantly clear that Mr. Handshoe feels entirely immune from the orders of this Court. In fact it is not an overstatement to say that Mr. Handshoe ‘snubs his nose’ at all judicial officers and institutions of Nova Scotia.”<sup>259</sup> These bold statements clearly exemplify the frustration of the Nova Scotia Supreme Court. Just as *Trout Point Lodge* was the first case to illustrate the major issues associated with the SPEECH Act, Canada is the first country to react to the international disrespect the Act is generating.

The spin-off litigation of *Trout Point Lodge* is likely in retaliation of the Fifth Circuit’s holding. It is plausible that the Canadian court acted out of sympathy and wanted to ensure that the plaintiffs were sufficiently compensated for Handshoe’s “ongoing campaign to damage, harass and embarrass [them].”<sup>260</sup> One blogger noted that “[t]his time, Leary and Perret did an end-run around the constitutional loophole by claiming copyright infringement.”<sup>261</sup> The author noted that “[u]nlike the previous

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255. *Id.* at para. 18.

256. *Id.* at paras. 1–16. The discussion surrounding the proof of falsity does not appear to be escalated from the original proceeding in an effort to secure enforcement of the additional defamation damages in the United States. *See id.* It is apparent that neither the Canadian court nor the plaintiffs are willing to succumb to the broad application of the SPEECH Act.

257. *Id.* at para. 9.

258. *Id.* at paras. 13–16, 27–28. The breakdown of the damages is as follows: \$135,000 in additional defamation damages, \$60,000 in aggravated damages, \$50,000 in punitive defamation damages, \$80,000 in copyright infringement damages, and \$100,000 in punitive copyright infringement damages. *Id.*

259. *Id.* at para. 9.

260. *Id.* at para. 25.

261. Steve Mertl, *N.S. fishing lodge owners targeted online win another suit against Mississippi blogger*, YAHOO! SPORTS CAN. (Feb. 24, 2014, 9:37 PM), <https://ca.sports.yahoo.com/blogs/dailybrew/n-fishing-lodge-owners-targeted-online-win-another-023750915.html>.

202 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

case, the copyright infringement should not run afoul of the free-speech protection Handshoe *hid* behind in the defamation case.”<sup>262</sup> The plaintiffs are currently seeking to enforce the copyright damages in Mississippi state court.<sup>263</sup>

## V. CUTTING BACK THE BROAD APPLICATION OF THE SPEECH ACT

The policies behind the SPEECH Act are very clear: deter libel tourism and protect the First Amendment.<sup>264</sup> However, the Act’s broad scope and lack of guidance affects defamation suits that have a legitimate nexus with a foreign forum. First, the Act fails to differentiate between judgments emanating from legitimate versus illegitimate forums at the outset. Second, the exceptions offer little protection to foreign defamation plaintiffs because they are largely illusory and lack necessary guidance. Finally, the Act fails to explicitly direct enforcing courts to apply speech protection in accordance with the forum’s First Amendment interpretation. As a result, the over-inclusive nature of the Act risks offending principles of international comity. With that said, the Act provides significant benefits to defamation defendants involved in libel tourism and a complete elimination of the Act would discard valuable protection for them.<sup>265</sup> The predictability of enforcement can be very beneficial in the appropriate circumstances. Accordingly, I propose two revisions: (1) a forum non conveniens threshold to the Act’s applicability and (2) a statutory addition of an “Application” clause to the First Amendment Considerations sub-section.<sup>266</sup> The addition of a

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262. *Id.* (emphasis added).

263. See Petition to Enroll Foreign Judgment, *Perret v. Handshoe*, No. 14-0197 (June 2, 2014); see also *Perret v. Handshoe*, No. 1:14CV241-LG-JCG (S.D. Miss. Nov. 24, 2014) (PACER, Miss. Case law) (remanding case to state court). Handshoe told the *Toronto Star* that the recent decision was “worthless” and vowed to continue to urge tourists to stay clear of Trout Point Lodge. Peter Edwards, *Nova Scotia couple wins copyright lawsuit against homophobic U.S. blogger*, *TORONTO STAR* (Feb. 24, 2014), [http://www.thestar.com/news/canada/2014/02/24/nova\\_scotia\\_couple\\_wins\\_lawsuit\\_against\\_homophobic\\_american\\_blogger.html](http://www.thestar.com/news/canada/2014/02/24/nova_scotia_couple_wins_lawsuit_against_homophobic_american_blogger.html).

264. See S. REP. NO. 111-224 (2010); H.R. REP. NO. 111-154 (2009).

265. See 28 U.S.C. §§ 4102–4105 (2012). See also Gerny, *supra* note 3, at 437–40.

266. The proposals are suggested legislative amendments. Unfortunately, the enforcing courts have little “wiggle room” to manipulate the SPEECH Act.

threshold requirement would provide courts with the ability to differentiate between legitimate and illegitimate forums in the enforcement of foreign defamation judgments. The Application clause would provide enforcing courts with more guidance, thereby ensuring that domestic and foreign defamation defendants are treated equally. With these revisions, the interests of both plaintiffs and defendants would be adequately balanced.<sup>267</sup>

A. *Forum Non Conveniens Threshold*

Forum non conveniens is a doctrine utilized by defendants to seek dismissal of a case based on the fact that there is a more convenient forum elsewhere.<sup>268</sup> The litigation tactic is used at the front-end of litigation (pleading stage);<sup>269</sup> however, the use of a “reverse” forum non conveniens analysis at the back-end of litigation (enforcement stage) can help ensure that foreign defamation judgments emanating from legitimate forums are enforced.<sup>270</sup> The application of the threshold is straightforward.

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267. As discussed in grave detail, the SPEECH Act could benefit from substantial overhauling. The mere addition of the suggested Application clause does not even begin to address the current statutory issues. A more complete statutory revision is outside the scope of this Comment. The focus of this Comment is to address the lack of differentiation between foreign defamation judgments rendered by legitimately and illegitimately selected forums. The fact that the SPEECH Act provides little protection to foreign defamation plaintiffs only magnifies the problems associated with this lack of distinction. I believe that a forum non conveniens threshold would largely solve this problem. Any judgment still subject to the SPEECH Act after application of the threshold would likely be a product of libel tourism. At that point, the mess that the Act creates would be less of an issue.

268. See 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. 2013).

269. Although a forum non conveniens motion can be brought at any point during the litigation,

it behooves the defendant to raise the forum non conveniens defense within a reasonable time of becoming aware of the circumstances[,] . . . [because i]f the litigation has progressed significantly . . . a defendant’s belated assertion that the forum is not a convenient one is likely to be viewed dimly by the district judge.

*Id.* § 3828, at 580.

270. A form of reverse forum non conveniens has already been used in the enforcement context alongside other discretionary forms of non-recognition, such as the public policy exception. For example, many states allow a court to resist enforcement of a foreign judgment if the foreign country’s only basis

204 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

The enforcing court would conduct an inquiry into the hypothetical success of a *forum non conveniens* motion in the foreign court using federal *forum non conveniens* law.<sup>271</sup> If the enforcing court finds that the original proceeding should have been dismissed on *forum non conveniens* grounds, the SPEECH Act would apply to the enforcement proceeding. However, if the enforcing court finds that the original proceeding should not have been dismissed on grounds of *forum non conveniens*, the SPEECH Act would not apply, and the enforcement proceeding would be assessed in accordance with the applicable judgment enforcement law in the enforcing forum.<sup>272</sup>

Essentially, the *forum non conveniens* analysis is a surrogate for distinguishing between legitimate and illegitimate forums; the

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of personal jurisdiction over the defendant was personal service and the forum was inconvenient. *See, e.g.*, CAL. CIV. PROC. CODE § 1716(c)(6) (West Supp. 2014); FLA. STAT. ANN. § 55.605(2)(f) (West Supp. 2012); N.Y. C.P.L.R. § 5304(b)(7) (McKinney Supp. 2014). *Cf.* *Beals v. Saldanha*, [2003] 3 S.C.R. 416, paras. 185–86 (Can.) (LeBel, J., dissenting) (“There is an important difference between the inquiry conducted by a court assuming jurisdiction at the outset of the action and the test applied by a court asked to recognize and enforce a judgment at the end. In the former case, two steps are involved: the court must first determine that it has a basis for jurisdiction, and if it does it must go on to decide whether it should nevertheless decline to exercise that jurisdiction because another forum is clearly more appropriate for the hearing of the action. In the latter case of a receiving court, only the first step in this inquiry is relevant. Provided that the originating court had a reasonable basis for jurisdiction, the defendant had its chance to appear there and argue *forum non conveniens*, and cannot question the originating court’s decision on that issue in the receiving court. Nevertheless, the receiving court is not bound to agree with the originating court’s opinion that it had a reasonable basis on which to assume jurisdiction. If the connections to the originating forum are tenuous or greatly outweighed by the hardship imposed on the defendant forced to litigate there, the receiving court may conclude that it was not even a reasonable place for the action to be heard. It is no good to say that the defendant should have raised the question of hardship by arguing *forum non conveniens* before the foreign court. If it is unfair to expect the defendant to litigate on the merits in the foreign jurisdiction, it is probably unfair to expect the defendant to appear there to argue *forum non conveniens*.”).

271. *See generally* 28 U.S.C. § 1404 (2012); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

272. As discussed above, the doctrine of *forum non conveniens* may not always be available to a defamation defendant who was victimized by libel tourism. *See supra* notes 62–67 and accompanying text. The *forum non conveniens* threshold essentially steps in and does the job of the foreign court—inquiring into whether there was another available, adequate, and more convenient forum for the litigation.

goal is to have the SPEECH Act apply only to those judgments that originate from illegitimate forums. The threshold informs the parties, as a preliminary matter, whether the judgment is emanating from a legitimate forum (one that a United States court would regard as appropriate as gauged by United States forum non conveniens law) or an illegitimate forum (one that a United States court would regard as inappropriate as gauged by United States forum non conveniens law). In the latter scenario, the plaintiff is arguably a “libel tourist”—someone who is trying to take advantage of favorable foreign law without a significant basis for doing so. Therefore, the inquiry will provide courts with a tool to better effectuate the policy behind the Act. The inquiry will ensure that the Act only applies to the intended “tourists”—thereby eliminating the risk the current Act poses on international comity.

Aside from using the threshold at the outset of the enforcement analysis, the inquiry should also be available as a declaratory judgment by either party at the front-end of litigation as well.<sup>273</sup> A declaratory judgment as to the Act’s applicability at the outset of litigation would provide substantial predictability for both parties. For example, a defamation plaintiff could predict whether a foreign defamation judgment would be enforceable in the United States prior to adjudicating in a foreign country. In other words, if a defamation plaintiff obtains a declaratory judgment that the SPEECH Act does not apply, he can rest assured that he *will not* have to jump through hoops of fire to enforce a judgment in the United States. On the other hand, the inquiry could assist defamation defendants in the decision to defend the foreign suit, on account of the fact that the declaratory judgment will indicate that the plaintiff *will* have to jump through hoops of fire.

Regardless of whether the threshold is used at the front-end or back-end of litigation, the analysis would save judicial resources. The doctrine of forum non conveniens is usually

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273. This would be in addition to the declaratory judgment available to a defamation defendant after a judgment has been rendered by the foreign court. 28 U.S.C. § 4104 (2012). Since the forum non conveniens analysis would be the “front door” to the SPEECH Act, a successful declaratory judgment at this stage would state: (1) the SPEECH Act applies, and (2) the SPEECH Act halts enforcement of the foreign defamation judgment.

206 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152]

applied at the very early stages of a proceeding; therefore, the analysis requires minimal discovery and is not usually burdensome.<sup>274</sup> Although the Equivalency Exception may be fairly effortless for a court to assess, it still requires interpretation of foreign law.<sup>275</sup> Likewise, the Domestic Success Exception requires substantial consideration into the success of the defamed plaintiff's claim.<sup>276</sup> A *forum non conveniens* threshold would require fewer judicial resources and save additional expenditures for the cases that the SPEECH Act intends to deter. In sum, a *forum non conveniens* threshold to the applicability of the SPEECH Act would afford protection to judgments rendered from legitimate forums, effectuate the policy behind the Act, remove risks posed to international comity, provide substantial benefits to both parties, and save judicial resources.

B. *Additional Application Clause*

The statutory language of the SPEECH Act fails to explicitly direct courts to apply different levels of First Amendment protection in accordance with their state precedent.<sup>277</sup> Both exceptions merely state that a court should apply: (1) First Amendment law, and (2) state constitutional law.<sup>278</sup> The Act does not explicitly direct courts to apply these protections based on the private/public distinction. Without an explicit Application clause, some courts are bound to get it wrong and end up applying more speech protection than the First Amendment requires. I propose the following draft as an additional "Application" clause to the First Amendment Considerations sub-section:

**Application.**

**A domestic court should construe the protection for freedom of speech and press in the First Amendment to the Constitution of the United States and the constitution and law of**

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274. See *Piper Aircraft*, 454 U.S. at 258 (stating that extensive evidence for a *forum non conveniens* motion "is not necessary" and would "defeat the purpose of [the] motion").

275. See 28 U.S.C. § 4102(a)(1)(A).

276. See *id.* § 4102(a)(1)(B).

277. See *id.* §§ 4101–4102.

278. *Id.* § 4102(a)(1)(A)–(B).

2015] *IF YOU DON'T HAVE ANYTHING NICE TO SAY* 207

**the State in which the domestic court is located based on the facts of the particular case. An enforcing court should apply only the appropriate level of protection that is afforded by authoritative First Amendment precedent in the forum for the given circumstances.<sup>279</sup>**

The SPEECH Act already casts a wide net of American speech protection. An Application clause would ensure that cases receive the appropriate level of speech protection. Moreover, the proposed clause would ensure that domestic and foreign defamation defendants are treated equally.

#### VI. CONCLUSION

While laudable in purpose, the SPEECH Act overshot the mark. In a quest to deter libel tourism, the Act fails to differentiate between legitimate forum selection and illegitimate forum shopping. The overbreadth of the statute is not remedied by the statutory exceptions as they provide little protection to foreign defamation plaintiffs. In reality, the statutory language amplifies the broad nature of the Act by failing to explicitly state that speech protection should be applied in accordance with the precedent of the enforcing court. As a result, the SPEECH Act risks offending principles of international comity. The addition of a forum non conveniens threshold to the Act's applicability would assist in effectuating the policy behind the Act. The threshold would ensure that the Act only applies to illegitimately selected forums—that is, forums selected through libel tourism. For those cases where the SPEECH Act does apply, the additional statutory revision would provide some guidance to enforcing courts and ensure that foreign and domestic defamation defendants are, at least, treated equally. The need to deter libel tourism is high; however, the need to protect foreign defamation judgments

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279. I acknowledge that the suggested interpretation would make enforceability of foreign defamation judgments dependent upon which state the enforcement proceeding is filed in. Nevertheless, it is better to afford foreign defamation defendants an equivalent level of protection, rather than additional protection. *But see* Klein, *supra* note 172, at 389–90 (arguing that the SPEECH Act should apply the First Amendment in accordance with general United States speech protection and not tie itself to state specific details).



208 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 20:152

rendered by legitimately selected forums is higher.