

Libel Tourism: Silencing the Press Through Transnational Legal Threats

A Report to the Center for International Media Assistance

By Drew Sullivan

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The Center for International Media Assistance (CIMA), a project of the National Endowment for Democracy, aims to strengthen the support, raise the visibility, and improve the effectiveness of media assistance programs by providing information, building networks, conducting research, and highlighting the indispensable role independent media play in the creation and development of sustainable democracies around the world. An important aspect of CIMA's work is to research ways to attract additional U.S. private sector interest in and support for international media development.

CIMA convenes working groups, discussions, and panels on a variety of topics in the field of media development and assistance. The center also issues reports and recommendations based on working group discussions and other investigations. These reports aim to provide policymakers, as well as donors and practitioners, with ideas for bolstering the effectiveness of media assistance.

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As a journalist, Sullivan served as city hall reporter and investigative reporter for the *Tennessean* newspaper in Nashville and worked for the Associated Press in New York. He has served on the board of directors of Investigative Reporters and Editors (IRE) and the National Institute for Computer-Assisted Reporting. He attended the masters program at the University of Missouri School of Journalism.

His journalism projects in the developing world have won a number of awards, including the Online News Association's Online Journalism Award for investigative reporting, the Global Shining Light Award for reporting under duress (with the investigative journalists network Scoop), the IRE Tom Renner Award for Outstanding Crime Reporting, the Overseas Press Club Award (both with the International Consortium of Investigative Journalists) and the Transparency International Integrity Award in Bosnia-Herzegovina.

Before coming to journalism, he was a structural dynamicist on the space shuttle project for Rockwell International Space Systems (now Boeing). Sullivan has a B.S. in aerospace engineering from Texas A&M University.

Disclosure: The author has worked with most media development organizations including many who are represented in this report. He has been named in legal threats discussed within but has not been directly named in any lawsuits.

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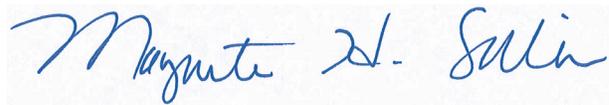
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Preface

The Center for International Media Assistance (CIMA) at the National Endowment for Democracy (NED) commissioned this study on transnational legal threats to journalism around the world to determine the legal risks faced by news media from the people they cover. A good legal environment is important to the development of media in democratic and transitional societies.

CIMA is grateful to Drew Sullivan, a veteran investigative journalist and media development specialist, for his research and insights on this topic.

We hope that this report will become an important reference for international media assistance efforts.

A handwritten signature in blue ink that reads "Marguerite H. Sullivan". The signature is written in a cursive style and is centered on a light blue rectangular background.

Marguerite H. Sullivan
Senior Director
Center for International Media Assistance

Executive Summary

The face of media around the world is changing. Traditional media in the United States are shrinking as the industry confronts both an extended recession and the long-term erosion of its economic model. In the developing world, the newly independent media of a decade ago maintain their vitality while attempting to find financial sustainability. The Internet has globalized the evolving media marketplace, and at the interstices of the media and internet businesses, new and exciting media organizations are springing up worldwide to fill needs in such areas as investigative reporting.

But the same democratizing technology that has made media global has also exposed them to a global risk. By publishing online, a media organization faces the risk of libel and defamation suits in just about every jurisdiction

in the world. Given the wide variety of defamation standards, court practices, and freedom of speech standards, the risks are almost impossible to manage. At the same time, vested political, business, and criminal interests—especially in Eastern Europe, the Middle East, and Asia—that have never faced independent media, are increasingly using the courts to redress harms, punish journalists, and scare off publishers. While there is a need for civil protections against overzealous

journalists and low standards in the media industry, often these legal tools are used to intimidate, harass, and bully media.

The United Kingdom has become the jurisdiction of choice for many. The plaintiff-friendly laws, high defamation awards, strong willingness of British courts to accept jurisdiction, and exorbitant cost of legal fees make the United Kingdom perfect for oligarchs, organized crime figures, and wealthy businessmen to punish authors and journalists regardless of the merit of

their cases. This practice of shopping for beneficial jurisdictions is known as “libel tourism.” It is growing and remains unchecked. The situation has gotten so bad that a consortium of American media has threatened to block readers in the United Kingdom from accessing their Web sites.

By publishing online, a media organization faces the risk of libel and defamation suits in just about every jurisdiction in the world. Given the wide variety of defamation standards, court practices, and freedom of speech standards, the risks are almost impossible to manage.

While this problem is not new, it is exacerbated by the changes in the news media, especially with regard to investigative journalism. While media arguably face serious legal risks, they are less capable financially and structurally to do so. As journalists fight to keep investigative reporting alive, they have often opted for small, nonprofit, or sole proprietorship structures that are chronically underfunded, difficult to insure, and ultimately dangerously exposed to liabilities.

Leveling the playing field requires the passage of laws in many jurisdictions and an industry-wide solution to the problems of insurance and legal defense. There is some progress on the legal side in the United States with successful efforts like “Rachel’s Law,” first passed in New York in 2008. That law—named after author Rachel Ehrenfeld, who could not afford to defend herself from a lawsuit brought in Britain and who refused to recognize the jurisdiction of the British courts—allows the courts in some states to disallow the enforcement of foreign libel awards if the judgments fail to consider First Amendment rights. The British parliament, which is acutely aware that the U.S. Congress is considering a national version of Rachel’s Law, has reviewed its court practices and there is pressure for change.

However, in much of the rest of the world, the news media have remained dangerously ignorant of the risks they face. Those that have faced the threats of foreign libel cases have either buried their heads in the

sand or capitulated to plaintiffs in ways that undermine their journalistic credibility.

What is needed to alleviate these problems:

- Changes in laws in libel tourism spots
- Changes in local laws to shield media from libel tourism jurisdictions
- More access to insurance, especially in the developing world
- Greater acceptance of pro bono work by international law firms
- Better training of editors in identifying and handling threatening situations
- Higher journalistic standards, especially in the developing world
- Greater awareness of the risks among media, especially in the developing world, and among media development organizations

Scope and Methodology

This report examines the practice of libel tourism and transnational legal threats to media organizations. It has focused on investigative reporting organizations because they disproportionately face legal attacks. Because legal protections and the climate of risk vary drastically from country to country, the report focuses on the transnational legal threats to materials published on the Internet. This could include libel tourism (the practice of suing for libel in a plaintiff-friendly country regardless of one's connection to that country) or the practice of suing media for Internet materials in countries with negative libel laws. In any one country, the legal threats can range from onerous civil libel penalties to criminal libel laws and insult laws that can lead to prison sentences for journalists.

The report does look in depth at the United Kingdom's legal system because its libel laws currently pose a serious threat to media around the world.

The report also looks at nongovernmental media organizations that increasingly play the role of investigative reporters and have broken a number of important stories. It also looks specifically at media development organizations, which have focused more and more on promoting investigative reporting as

an effective agent of change. All legal issues that apply to investigative reporting also apply to daily news reporting, so this focus should not limit the usefulness of the report.

The research draws in particular on several key sources:

- Testimony before (and submittals to) the House Judiciary Subcommittee on Commercial and Administrative Law conducted in February 2009.
 - Testimony before a British parliamentary committee on libel and privacy in 2009.
 - Interviews by phone and email with more than 30 investigative journalism centers and journalists, media development specialists, lawyers, NGO officials, and insurance specialists conducted between May and December 2009.
- A broad literature search of governmental reports, academic and legal journals, Web sites, and news articles.

It should be noted that this report looks at all issues from the interests of the news industry and does not pretend to be a thorough public policy evaluation.

This report examines the practice of libel tourism and transnational legal threats to media organizations. It has focused on investigative reporting organizations because they disproportionately face legal attacks.

Overview: The Global Media Landscape

In the last decade, media around the world have been swept up in the dramatic changes brought about by the Internet. Many of these changes were unforeseen—including how it has affected the media’s ability to face transnational legal threats.

In the developing world and especially in Eastern Europe and the former Soviet states, the new freedoms allowed by democratic changes have led to a massive flourishing of news media. Where a few state organs once existed, now dozens and even hundreds of news media organizations exist even in the smallest countries. While many are barely viable or operate as a vanity press for political, business, or criminal interests, a large number of truly independent standouts have emerged, such as B92 radio in Serbia, *Novaya Gazeta* in Moscow, and many others. Media in the developing world have continued to grow in both circulation and prestige.

Media in the United States have long been a model for those in the developing world. Every day, media development organizations are teaching the principles, procedures and philosophy of American media. But even American media are changing.

The U.S. media are adapting to new Internet-based models. While traditional newspapers have seen a decade of mass

layoffs and shrinking newsrooms, the new media world has lowered the barrier to entry into the news business, creating more competition. Web-only sites like the *Huffington Post*, *Voice of San Diego* and *Salon.com* have flourished, sometimes at the expense of traditional media. Bloggers and specialty news sites allow a single journalist to become his or her own “newspaper.” There are more places to get news than at any time in our history, and the competition to attract attention is stiff. But the financial

model has yet to prove that it is robust enough to support the breadth of reporting that was done in the past by major metro newspapers and television stations.

What this portends for the developing world is open to debate. Internet publications in the developing world are limited in many places due

to poor access rates. In 2007, Internet usage in the developing world averaged 17 percent and is less than 10 percent in many countries.¹ There is no reason to believe that media in developing countries will not face the same financial problems when the Internet becomes as ubiquitous in those countries as it is in the West.

Internet Publishing

The Internet has permanently and profoundly changed the way we get news.

In the last decade, media around the world have been swept up in the dramatic changes brought about by the Internet. Many of these changes were unforeseen—including how it has affected the media’s ability to face transnational legal threats.

In the developed world, almost all new media organizations are Internet-based—the principal growth area in media. Newspapers in developed countries are continuing a decade long decline in their circulation numbers (4.8 percent in 2008 for U.S. papers) while traffic to Internet-based news sites in the United States grew about 16 percent.²

These changes have had dramatic effects on transnational risks.

“It changes the game,” said Chad Milton, a former vice president at Marsh, a major insurance broker. “The Internet has taken exposure global.”³

While news outlets once had a local audience, any news outlet publishing on the Internet now has a global audience whether it wants it or not. Not only is news more available, but it is easier to find and monitor. Search engines, news alert systems, and other innovations make it easy for individuals concerned about news coverage to monitor worldwide news about themselves and find even the most obscure defamatory reference.

Once news is online, it may be available forever. The Internet Archive and online archives of news organizations make news products available for searching for years to come.

“The Internet has blasted everything open and it’s good we have a lot of small organizations getting things out there,” said David Kaplan, editorial director of the Center for Public Integrity. “It’s hard to keep secrets in this day and age.”⁴

The Internet has also made it nearly impossible for media outlets to control their product. News is extracted, edited,

repackaged and enhanced—often by software and intelligent filters—almost as soon as it is published. In many developing countries, this is done without permission and in egregious ways due to weak or nonexistent copyright laws. News media will often steal parts of stories or even whole stories and rebrand them, especially news copy from outside the country.

Book publishers have also found the Internet has had unexpected consequences. With sites like Amazon.com, books are sold worldwide, and publishers can no longer limit distribution geographically.

Growth of New Types of Media

Nonprofit investigative reporting has grown both in the United States and internationally but for entirely different reasons.

In the United States, traditional investigative reporting has been disproportionately affected by both the changes in the industry and the current economic crisis. Typically, investigative reporting is one of the first areas in the newsroom that is cut during lean times. This has led to the growth of nonprofit investigative reporting centers, more freelance reporters, and more investigative journalism done by nongovernmental organizations (NGOs) and media development organizations.

In the developing world, investigative journalism is becoming the purview of nonprofit groups because traditional media has sought to avoid conflict with political and financial elites. In many cases, the elite are owners or investors in large media organizations. In a distressingly large number of cases, the elite are involved in organized criminal activity

that investigative reporters may seek to expose. Organizations such as the Romanian Center for Investigative Journalism were founded by reporters seeking to write stories that were not appearing in the mainstream news media. The number of these centers is growing. A CIMA report from 2007 identified 39 different investigative reporting organizations operating internationally, most of which had started since 2003.⁵ That number has now likely grown to more than 50.

In the United States, there has also been a pronounced growth in the world of investigative journalism nonprofit groups. Charles Lewis, founder of the Center for Public Integrity (CPI), has called them an “an unfettered place to do unfettered journalism.”⁶

Projects like ProPublica in New York and small regional centers have sprung up to join old stalwarts like the Center for Investigative Reporting in San Francisco Bay Area and CPI in Washington.⁷ Regional and state-level investigative centers have formed in New England and Wisconsin, and investigative-focused online media are operating in Minneapolis, San Diego, and Mesa, Arizona. All are grant-supported but also rely on other sources of income including subscriptions and advertising.

These centers all over the world face a number of challenges. They do not have the resources of a large commercial publishing company like Gannett or the

New York Times. They rely on grants, which are by nature impermanent. They often see wild swings in funding levels.

Media in the developing world face a far larger set of problems. There is often no tradition of charitable donations in many parts of the world, and most NGOs are funded by government. There are only a few international donors who work with media, and their funding is limited. American donors, with the notable exception of the Open Society Foundation, provide almost no funds that can be used to keep centers alive. The wealthy elite in developing countries who could donate are precisely the sorts of people investigative centers often target.

The chronic lack of funding and inadequate resources make these centers vulnerable to legal attacks by people, businesses, or organizations with deep pockets.

“Everybody talks about physical violence against reporters and those risks, but a lawsuit can kill a center.”

— Paul Radu, cofounder, the Romanian Center for Investigative Journalism

“Everybody talks about physical violence against reporters and those risks, but a lawsuit can kill a center,” said Paul Radu, a cofounder of the Romanian Center for Investigative Journalism. “I worry about them, but I think most reporters in Eastern Europe never think about being sued in Europe and what that can mean.”⁸

Meanwhile, other investigative journalists have chosen to form sole proprietorships or become freelancers and make their money through blogging, book publishing or through freelance contracts. In the developing world where few investigative teams exist, freelance investigative

journalists are very common. Journalists working as sole proprietorships are sometimes at the greatest risk because they often must indemnify news organizations from libel to sell their stories. Even in large news organizations, journalists aren't always safe. One Ukrainian news organization that had been sued in the past in the United Kingdom and settled serves as an example. To cut costs, management decided that the members of the staff should become contract workers and asked them to sign contracts with indemnification clauses. They later dropped the requirement after the staff dissented.

While some journalists are supported by publishing companies, that is not always helpful. Where an author might not capitulate to demands from a plaintiff, book publishers and many news media houses are more likely to consider economic rather than journalistic issues first.

Some of the finest investigative reporting is done not by the news media but by civil society groups, NGOs, and even advocacy groups. They regularly break important stories that have been ignored by the news media. Their in-depth local access and long-term approach to problems help them

build trust with parties and document problems in ways media no longer can.

Human Rights Watch, Global Witness, Green Peace and others have been essential to documenting human rights abuses and criminality in both the developed and the developing world, yet they face the same libel threats when they publish their work.

Throughout the developing world, media development groups like the International Center for Journalists (ICFJ), Institute for War and Peace Reporting, International Research and Exchanges Board (IREX), Journalism Development Network (JDN), Chemonics International, and Internews Network work with local media. In an effort to have a greater impact, many of these groups promote investigative reporting, and some have even set up investigative reporting programs that are actively engaged in journalism.

These organizations have a quasi-journalistic status and their staffs may even exercise direct editorial control over a news product. There is little to stop plaintiffs from deciding to include them in defamation claims, although there is no known case of this happening.

Libel Tourism and Legal Threats to Media

All the journalists, lawyers, and insurance specialists interviewed for this report said the greatest transnational threat to media is libel tourism: the practice of filing a suit in plaintiff-friendly jurisdictions regardless of the connection of the plaintiff or defendant to the jurisdiction. Also of concern are libel suits against international journalists in jurisdictions that offer special protection to the government or its officials.

Libel tourism has significantly raised the risks to organizations publishing on the Internet.

“There is no surefire way to protect your client,” said Bruce Brown, a media lawyer with the firm of Baker Hostetler. “There is no ironclad advice to assure him or her that they won’t be slapped with a nuisance suit in an overseas jurisdiction ... It is very difficult.”⁹

Libel tourism has become a hot topic. It has led to proposed laws in the U.S. House of Representatives and Senate to protect American publishers and has prompted British lawmakers to reexamine their own laws. The libel tourism destination of choice is the United Kingdom.

As one British member of Parliament said, “The practice of libel tourism as it is

known—the willingness of British courts to allow wealthy foreigners who do not live here to attack publications that have no connection with Britain—is now an international scandal. It shames Britain and makes a mockery of the idea that Britain is a protector of core democratic freedoms.”¹⁰

In the developing world where there is less awareness of libel tourism, the practice has the potential to be even more damaging. A number of cases have been brought against media houses that were not familiar with British libel law. In e-mail interviews with four international centers for investigative

reporting and investigative reporters from three other countries, not one indicated concern about lawsuits in the UK.¹¹

How serious of a problem libel tourism poses for news organizations is hard to say.

Despite the lack of awareness in the developing world, all of those interviewed from Western countries for this report called it a serious problem. For those who are sued, it has become a life-changing experience.

“It is like a plane crash. It doesn’t happen often but when it does it is disastrous,” said Kurt Wimmer, a media lawyer and partner at Covington & Burling LLP.¹² However, the bigger problem may be how the threat of libel tourism

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compels media organizations to censor themselves or limit their distribution.

There is limited data on the problem worldwide. According to Reynolds Porter Chamberlain (RPC), a law firm in the United Kingdom, there were 259 high court defamation writs in the High Court in 2008, up from 233 cases in 2007 and 212 in 2006. How many of these were libel tourism cases are not clear.¹³ Most of these are settled before trials.

“These figures show that the UK remains a very attractive jurisdiction for libel claimants. This is because our laws are very pro-claimant, making it difficult for the media to defend claims, even when they are unmeritorious,” said Jaron Lewis, media partner at RPC.¹⁴

The author could find no comprehensive statistics on the issue worldwide.

“I have not seen a lot of good statistics on this issue ... There are limitations for what anyone can say,” said Charles Lewis of the Center for Public Integrity. However, many countries have criminal libel laws that have led to dozens of journalists being imprisoned in Africa, the Middle East and Asia.

Another legal danger for media is the growing threat of privacy laws to restrict free speech in the United Kingdom, which may lead to “privacy tourism.”

Libel, Slander, and Defamation

The most common legal threat that journalists face is libel suits resulting from slander or defamation of an individual.

Defamation is defined in legal terms in the United States as:

A false statement that injures someone’s reputation and exposes him to public contempt, hatred, ridicule, or condemnation.¹⁵

Libel is defined in U.S. legal terms as:

An untruthful statement about a person, published in writing or through broadcast media, which injures the person’s reputation or standing in the community.¹⁶

Libel is defamation in published form. Slander is simply an oral defamation. In the United States, libel is largely a civil tort, and news media can be held responsible for publishing a defamatory or slanderous statement. In other countries, libel is often both a civil and a criminal matter, and journalists can be jailed for publishing it.

The key elements in proving a libel case in most parts of the world are:

- A. Is the statement true?
- B. Was it published?
- C. Was the person identified?
- D. Was the person injured in some way?

Most jurisdictions differ significantly in how cases are treated. For example, in Britain, the journalist must prove the statement is true, whereas in U.S. courts the plaintiff must prove the statement

is false. U.S. law recognizes a distinction between public figures and private individuals and allows journalists much greater leeway in reporting on public figures. Public figures must prove a journalist acted with actual malice toward them.

The author could find no legal system in the developing world that makes such a distinction between public and private figures for providing greater protection to journalists. In fact, it is the opposite. In many countries, public figures in the form of government officials are provided *added* protections.

In some developing world jurisdictions, libel is expanded to include publishing materials that are merely insulting

to a person or agency.

Thus, a reporter need only insult a government agency to be prosecuted, and what constitutes an insult is open to wide interpretation.

In many cases, these laws provide a means for stopping all criticism of government.

In Singapore for example, most news organizations avoid directly criticizing the ruling party because it has never lost a libel case.

In the United States, libel cases by public figures are seldom won, giving media strong protection.

Criminal Libel Law

Criminal libel laws are still on the books in most of the world. A survey by Article 19, an

NGO dedicated to freedom of expression, showed that 158 of 168 countries reviewed had criminal libel laws in place as of December 2007.¹⁷ While some are residual laws that have not been used in years (only in July 2009 was the process started to remove British criminal libel law from the books after years of disuse), the laws in a vast majority of countries are used more regularly. From 2005 to 2007, at least 146 journalists worldwide were jailed for criminal libel, and probably many more.¹⁸ Even the United States is not free from the practice; 16 states maintained criminal libel statutes as of 2009, although the federal government does not have such laws.¹⁹

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Article 19 also found 113 countries with laws that protected the most powerful people in the country—including politicians—from criticism.²⁰

These protections sometimes also apply to various political, religious or social organizations.

Unlike libel tourism countries, most countries limit what cases can be brought to those with a direct connection to the jurisdiction, but this still represents a huge problem for media reporting on international issues. Many stories cover people, companies or industries that have legal standing in multiple countries around the world. Often it is not clear where a company or person is living or headquartered. Media is regularly exposed to criminal or civil libel penalties in any number of countries without being

aware. In countries like Bosnia-Herzegovina, Uzbekistan, Kazakhstan, and Hungary, there are more than 100 libel cases filed each year. Journalists from outside the country can face fees or criminal charges which might limit their newspapers ability to report. However, most of the cases are still designed to silence or punish local journalists.

Libel Tourism

Libel tourism, the practice of shopping for the most advantageous jurisdiction for suing news outlets or independent journalists, is currently the greatest legal threat to media around the world. The jurisdiction that is currently the most troublesome is the United Kingdom, although troubling cases have also appeared in Ireland.²¹

It is not a new problem; libel tourism cases appeared as early as the 1980s.²² However, the numbers of cases is increasing, spurred by the Internet and increased access to information. There is also evidence that some law firms are shopping their ability to sue authors and journalists directly to those who have been the targets of articles.²³

The United Kingdom

For journalists and authors, the United Kingdom is particularly troublesome. A series of rulings favorable to plaintiffs over the years has made the jurisdiction more attractive to them, and in the vast majority of cases they win.

“The Internet has sent the chilling effect of English libel law around the world,” said English Pen, a nonprofit organization that promotes human rights and literature.²⁴

In 2007, the Icelandic investment bank Kaupthing sued *Ekstra Bladet*, a Danish newspaper, in London after the tabloid wrote articles critical of the bank’s handling of tax shelters for the wealthy. The *Ekstra Bladet* stories were republished in English on a Danish Web site that gets few or no visitors from the United Kingdom, but British courts accepted jurisdiction after the bank argued that London was a major banking center and Kaupthing’s chief executive resided in Britain. Kaupthing was backed by the British law firm Schillings, which touts its

pro prowess in libel tourism cases, even displaying on its Web site a newspaper quote: “Schillings ... one of the legal companies most feared by Fleet Street.”²⁵ *Ekstra Bladet*, concerned about the huge costs of the case, sought a settlement from the beginning and eventually paid Kaupthing’s legal fees and additional damages and apologized

to the bank.²⁶ In December of 2009, the UK’s Serious Fraud Office announced an investigation into the bank’s practices.²⁷

Ekstra Bladet said the defense cost the paper five times more than they would have paid to defend a similar action in Denmark. In the words of the UK Media Lawyers Association, “UK libel law is in need of urgent reform. It is widely recognised as being amongst the most oppressive in the developed world and has a direct

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Rachel's Law

Dr. Rachel Ehrenfeld, director of the American Center for Democracy, probably didn't expect to be sued in 2004 when she wrote her third book, *Funding Evil: How Terrorism is Financed and How to Stop It*. She probably didn't expect to be sued in England where her publisher had decided not to publish the book. But, unknown to her publisher and Ehrenfeld, 23 copies of the book were sold in England through Amazon.com, the international Internet-based bookseller.

Ehrenfeld was sued by Saudi billionaire banker Khalid bin Mahfouz. Mahfouz had been chief executive of the National Commercial Bank of Saudi Arabia, which Ehrenfeld accused of having funding ties to al-Qaeda. This was not Mahfouz's only bank or only lawsuit. He had also been an investor and director of the infamous Bank of Commerce and Credit International or BCCI. The BCCI scandal, as it became known, erupted in the 1990s when the bank failed and law enforcement and regulators found it had been laundering money or providing other services for a host of organizations and people, including terrorists Abu Nidal and Osama bin Laden, Nicaraguan contras, and the Central Intelligence Agency.

Mahfouz, who died in August 2009, had brought more than 30 lawsuits against media organizations that had written negatively about him. His track record of winning was very good.

"What happened to me did not occur in a dark backwater of totalitarian repression like Syria, Saudi Arabia, or North Korea, but in England. Mahfouz does not live there. I do not live there. My book was not published or marketed there," Ehrenfeld said.¹

Ehrenfeld faced an almost impossible task. While her work was protected in the United States based on the *New York Times Co. v. Sullivan* ruling Mahfouz was clearly a public figure having been prominent in the news for two decades. But in the UK, Ehrenfeld had to prove not only that she had painstakingly pulled together court and other records but that everything she wrote was true, a difficult if not impossible task.

If she lost, she would have had to pay Mahfouz's lawyers and a stiff judgment for an author. She chose not to contest the case, and Mahfouz won a default judgment against her for hundreds of thousands of dollars, ordered her to prevent her book from entering England and demanded that she write retractions written by Mahfouz's lawyers.

"I refused to recognize the English court's jurisdiction because I should not have to defend myself abroad," she said.

Ehrenfeld instead sued Mahfouz in New York, arguing that her First Amendment rights were being violated. She argued that Mahfouz could not collect his judgment in the United States because the ruling in Britain did not consider the protections granted American authors. As an American author with no intent to distribute her book in the United Kingdom, the judgment was unfair, Ehrenfeld contended. The court ruled it could not rule on this case and suggested the legislature take up the issue. Ehrenfeld took the ruling to the New York legislature which agreed with her and passed what some know as "Rachel's Law," which says that New York courts need not enforce a foreign civil judgment if that judgment did not include at least the same protections afforded to free speech in New York. Since New York's legislature passed the law, others, including Illinois's and Florida's, have either followed suit or are considering such laws. A federal "Rachel's Law" has been passed by the House of Representatives, and the Senate has drafted an even stronger bill. Rachel's Law is controversial, and questions exist about its constitutionality because it overrides other laws, including those dealing with reciprocity with foreign governments. But for now at least, journalists in New York are protected from having to pay foreign judgments.

But it doesn't protect Ehrenfeld from attempts to enforce the judgment abroad, if she chooses to travel to the United Kingdom. Ehrenfeld and lawyers say her adverse judgment in Britain is likely to be enforced in other European Union and Commonwealth states because of a reciprocal enforcement agreement. Ehrenfeld may be blocked from entering Europe, Australia and dozens of other countries.

"Mahfouz's English judgment hung over my head like a sword of Damocles and kept me up at night," Ehrenfeld said. "In nearly forty cases, Mahfouz obtained settlements against his victims, all with forced apologies, by the mere threat of libel litigation."

¹Rachel Ehrenfeld, director of the American Center for Democracy, interview with the author.

and constant limiting impact on press reporting ... It is heavily weighted against a defendant and in favour of a claimant.”²⁸

The UK system is troublesome for a number of reasons:

I. Jurisdiction

By the Internet’s capacity to make a media organization’s work available worldwide, media now have worldwide liability for their work. The nature of that liability depends on the local law and court system.

Jurisdiction depends on local standards and laws. Most courts use a test to determine whether the person who has filed the suit has some standing in the community either legally, financially or otherwise. It is quite common everywhere for courts to accept jurisdiction in cases where the plaintiff has a local connection but the news organization does not. In these cases, the media may have published online and the site was visited by people from that country.

British courts have accepted jurisdiction for almost anything published on the Internet or otherwise—even in cases with the most tangential connection to the United Kingdom. In the case of American author Rachel Ehrenfeld, the courts accepted jurisdiction even though only 23 copies of an allegedly libelous book were sold in Britain.

Jurisdictional rulings have often defied logic. Ukrainian billionaire Rinat Akhmetov sued the *Kyev Post* newspaper and the *Obozrevatel* Web site²⁹ in Ukraine over stories about him.

The *Kyev Post* had barely 100 subscribers in Britain, while *Obozrevatel* had almost no visitors in the United Kingdom and published only in Ukrainian. The *Kyev Post* quickly settled and apologized. *Obozrevatel* did not defend itself, which would have cost more than the Web site could afford. Instead, Akhmetov won a default judgment of 50,000 pounds in June 2008. Akhmetov, a successful businessman now, but who has appeared in a Ukrainian government publication entitled “Overview of the Most Dangerous Organized Crime Structures in Ukraine,”³⁰ used Schillings, the British law firm that specializes in defamation cases.

By the Internet’s capacity to make a media organization’s work available worldwide, media now have worldwide liability for their work.

In another case, Dubai-based al-Arabiya, an Arabic language television network, was successfully sued by Sheikh Rashid Ghannoushi, the leader of Tunisia’s main opposition party, An Nahda, after the station alleged

he had ties to al-Qaeda and that he was a target of Britain’s anti-terrorism program. The main connection to the United Kingdom was that the station was available there via satellite. The station did not defend itself in court and was awarded a default judgment of 165,000 pounds.³¹

Challenging that jurisdiction is not always an option. As British media lawyer Mark Stephens of Finer Stephens Innocent told a parliamentary commission: “The problem with [challenging jurisdiction] is that it is hugely expensive. A challenge to jurisdiction is a full day in court with barristers. That’s going to be in the order of 50 to 80 thousand pounds in terms of legal costs including the evidence beforehand.”³²

II. Burden of Proof

In the United Kingdom, the burden of proof is on the defendant. According to the British law, a statement is considered defamatory if it is published and has a negative effect on a person's reputation. Such defamatory statements are presumed to be false.

“The English approach to libel therefore suggests that the reputation of the claimant is more important than the free speech of the defendant,” said a report from English Pen.³³

The plaintiff only needs to establish that the article was published, that it was about them, and that it had a defamatory meaning.

The defendant's only defense is to prove the statement was truthful and justified or establish some other privilege (such as public interest) in order to overcome the burden of proof.³⁴

Damages are also assumed whenever a court determines that a libel has been committed.

III. Injunctions and SLAPP suits

British courts have shown a willingness to grant injunctions against media from further publishing on an issue, something that would be considered prior restraint in the United States.

There is no provision in British law allowing media to counter sue against frivolous claims aimed at denying the media what in the United States are their first amendment rights.

“The English approach to libel therefore suggests that the reputation of the claimant is more important than the free speech of the defendant.”

— A report from English Pen

Such frivolous suits, or SLAPP (Strategic Lawsuit Against Public Participation), are designed to intimidate and silence critics by saddling them with legal costs. Anti-SLAPP laws, which in the United States are present in half of the states, can punish people or organizations for filing SLAPP suits. Anti-SLAPP laws are increasingly used by U.S. media lawyers to get libel cases thrown out before they get started.³⁵ They are unlikely to find a home in Britain or other libel tourism destinations.³⁶

IV. Statute of Limitations

The statute of limitations is officially one year in the United Kingdom, but because

of a British legal precedent that dates to the 19th century, there effectively may be no statute of limitations. In 1849, the Duke of Brunswick believed he had been libeled by an article printed 17 years earlier in the *Weekly Dispatch* newspaper. He

asked for and received a copy of the article from the newspaper and the British Museum. He sued, arguing that the release of the article from the archives of the newspaper constituted a republication. He won. Since then, any access to archival material is considered republication and an actionable tort by courts in the UK. This precedent has serious repercussions for newspapers that use their online archives as a means of earning money or attracting people to their site.³⁷

As the UK Media Lawyers Association states, “Anyone accessing a newspaper,

magazine or television website containing archival material can cause the republication of a defamatory article giving rise to a new cause of action well beyond the current one-year limitation period.”³⁸

This element of libel case law is especially controversial even in the UK and is one of the laws that most enable libel tourism. However, a Ministry of Justice report issued in late 2009 has recommended a rule change that would set a three-year statute of limitation based only on first publication. It is not clear whether the recommendations will be adopted.³⁹

V. Expense

Most media work hard to avoid lawsuits in Britain, including resorting to unwarranted apologies simply because it costs a very large amount of money to try a case.

“The cost of litigating is as much of a problem as the damages,” media lawyer Brown said.

Besides the high costs of lawyers in London (around \$750 an hour), the court system in the United Kingdom requires that both a barrister and lawyer be present, which raises expenses. British courts spend considerable time in procedural steps and are generally quite slow, raising costs even more. According to English Pen, libel cases in the United Kingdom cost 140 times the EU average.⁴⁰

“These costs deter anyone of limited means, such as charities, NGOs, regional newspapers, small magazines, publishers and individual writers from defending a libel suit,” English Pen said.⁴¹

British courts presume there are damages for any party that is libeled. This presumption of damages means that those losing cases will always pay something regardless of the seriousness of the libel. Media have historically lost 90 percent of all British libel cases, which creates a significant incentive to settle a case.⁴²

While the damage awards themselves are limited in libel cases, British courts also require the losing party to pay all attorney costs, including those of the other side, which can be much more significant than any fine.

The court also allows for Conditional Fee Agreements (CFA) in libel cases should a plaintiff desire them. These agreements were designed to allow people who have few resources to sue by allowing the lawyer representing the plaintiff to collect a success fee at a rate of twice the salary of the losing party. The lawyers collect no money if they lose. However, in libel cases, most plaintiffs win. This added cost could easily exceed \$1,500 per hour for their work along with the cost of the media’s lawyer as well. CFAs are commonly used even by wealthy clients.

“(CFA) use by celebrities and the wealthy is not about access to justice or fairness but about threat and blackmail,” the UK Media Lawyers Association claimed.⁴³

There are some mitigating factors that are supposed to help media. Recent rulings in Britain recognize that media have a legitimate duty to report on matters of public interest (from the case *Reynolds v. Times Newspapers Ltd.*), and therefore a news organization may claim public interest in the defense of a libel suit. A judge in this case must consider the following

standards: the seriousness of the charges, the steps taken to verify the information, the urgency of the story, whether the plaintiff's views were adequately represented, and other circumstances, including the timing of the story.

“The Reynolds defence has rarely succeeded, because few newspapers have been able to meet the stringent requirements imposed by the House of Lords. The defence is too inflexible; whilst it creates the possibility of a qualified privilege defence, in practice this creates an added burden of proof for the defendant,” said English Pen.⁴⁴

Attorney Mark Stephens agrees. “It has maybe knocked a few cases out—kept them from being filed—but not much else.”

And the cost of such a defense based on the rulings in the Reynolds case is high.

“The cost of a Reynolds defense is somewhere between 100,000 and 200,000 pounds plus the cost of the risk of losing. That’s the sort of money NGOs can not afford to spend. They have a good defense but the cost of implementing it is high,” he said.

VI. Solutions in the United Kingdom

Parliament is currently considering changes in the libel laws. Recently, justice secretary Jack Straw said he was “alarmed” by libel tourism.⁴⁵ In December 2009 he announced that he would appoint a panel of experts to look into how to prevent foreigners from using the British courts for libel and defamation cases with little or no connection to the United Kingdom.⁴⁶

Some of the changes being considered are:

- Repealing the presumption of falsity, which would remove the burden of proof from journalists
- Repealing the irrebuttable presumption of damages
- Strengthening the rights of those working in the public interest
- Setting a new statute of limitations that starts one year from first publication
- Limiting the acceptance of cases that have weak jurisdictional connections
- Eliminating the rights of companies to sue for defamation.

Should a bill with those provisions be drafted and passed into law, however, libel tourism still might not end.

“I think there will be some impact, but I don’t think it will resolve all of the problems. It will alleviate but not resolve,” Stephens said.

Besides the United Kingdom, Ireland, France and Singapore have been venues for similar libel tourism cases over the years, although just about any country has the potential to be a libel tourism venue.

Singapore

Singapore, which adopted defamation standards similar to British law, ranks among the lowest countries in the world in press freedom standards. A number

of large profile cases were filed there against American and other world media over the last decade, which has caused media to be wary about reporting on Singapore's leaders.

One fatality was the blog "Caustic Soda," written by a U.S.-based post-graduate student. The site now contains nothing but an apology to the chairman of Singapore's science and technology agency.⁴⁷

According to Amnesty International, defamation has been used for political purposes by the ruling People's Action Party (PAP) as far back as the mid-1990s: "The misuse of defamation suits by PAP leaders has contributed to a climate of self-censorship in Singapore and restricted the right of those Singaporeans with dissenting opinions to participate freely and fully in public life."⁴⁸

More recently, Human Rights Watch identified the same trend.

"The history of defamation in Singapore shows a pattern of making people pay dearly for exercising the basic right of peaceful expression," said Elaine Pearson, deputy director for Human Rights Watch's Asia division, in a 2008 article.⁴⁹

The suits have cost media dearly. The *Far Eastern Economic Review* was sued by government leaders when it quoted an opposition party member. The magazine lost. The *Wall Street Journal*, *International Herald Tribune*, *Bloomberg* and the *Economist* have all been sued by party leaders who have yet to lose a case.⁵⁰

Other countries

Ireland, France and Australia have had significant libel tourism cases as well.

France has attracted a number of high-profile cases not because of high awards (the court caps awards at 12,000 euros, or roughly \$17,600), but because libel is still considered a criminal case. French courts are also very cheap compared to UK courts, and cases can be wrapped up in weeks or months.

However, journalists losing cases in France can be branded criminals, which serves the needs of some plaintiffs.

Almost any country could become a libel tourism destination at any time. In truth, it only takes one successful lawyer or law firm to aggressively pursue libel cases to turn any jurisdiction into a libel-friendly location. In a future decade, it may be a different set of countries and a different set of concerns.

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Privacy

Some lawyers in the United Kingdom fear that privacy issues will become the next libel tourism. Lawyers for plaintiffs are using the concept of privacy as a means to attack and muzzle media. As with libel law, should a newspaper lose an invasion of privacy case, it is required to pay the fee of the plaintiff's lawyers regardless of the severity of the invasion.

The British media have accused the court system of making a de facto privacy law, something the Parliament has specifically avoided doing.

“Any form of privacy law is damaging to freedom of expression because of the way in which it potentially hands power to those who wish to gag newspapers and magazines on matters of public interest,” said the United Kingdom’s Press Standards Board.⁵¹

Instead, the Parliament passed the Human Rights Act in 1998 that “introduced a generalised right to respect for privacy.”⁵² With that law, Parliament agreed to leave it up to courts to decide between the right to privacy and the right to freedom of expression, both of which are defined in articles 8 and 10 of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, of which the United Kingdom is a signatory.

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Those read:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and

responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵³

It is this balance between these two rights that has become the issue in the United Kingdom. As with libel, the British courts may choose to be expansive in their jurisdiction. So far, courts have leaned harder toward protecting article 8 at the expense of article 10, critics say.

“Judges are making a subjective law of privacy, with little foresight or regard to the long term impact of this and without any proper balancing against the detrimental effects that this has upon freedom of expression and the commercial reality of publishing,” British media lawyers said in a brief to a parliamentary commission.⁵⁴

The Chilling Effect and Self Censorship

The greatest damage from libel and libel tourism is not necessarily to the media organizations that must pay the damages or costs of fighting a suit, although these financial and emotional costs are undoubtedly high. The mere threat of a suit can cause the same damage as an actual suit. It can cost news media money for lawyers to deal with the threat; it can waste staff time taking the endless hours to review notes, catalog documents and provide materials for lawyers. Bad libel law and libel tourism can seriously damage freedom of speech and the spread of information and lead to self censorship and the blocking of information society needs.

Lawyers and media organizations say one of the reasons for these lawsuits is to intimidate media organizations. Threatening media with expensive suits can force them to hold off on stories or remove materials from stories. It can discourage them from publishing future materials. If this is true, it has worked, many journalists and lawyers claim. Numerous media outlets have done everything from destroying printed books to apologizing for accurate materials and paying large awards in out-of-court settlements, all to avoid a suit in a libel tourism hotspot.

Cambridge University Press, one of the United Kingdom's most respected

publishers, paid a sizeable settlement fee to Saudi financier and serial libel tourist Sheik Khalid Bin Mahfouz and destroyed all unsold copies of the book *Alms for Jihad* by two American authors after Mahfouz threatened the publisher with a suit. The publisher even asked all libraries to take the book off their shelves. The basis of the suit was that the authors, in just a scant few paragraphs in the book, linked Mahfouz to Osama Bin Laden and funding of terrorism.⁵⁵ Mahfouz, who once was linked

to the infamous Bank of Credit and Commerce International (BCCI) in Saudi Arabia, had been a regular user of libel tourism, filing more than 30 such claims against journalists and authors. What was never discussed publicly in the *Alms for Jihad* case was the accuracy of the author's

claims. The publisher, afraid of the burden of proof under British law, capitulated despite the authors' protestations.

"The effects of libel tourism are felt well beyond the known public record. It has created a silent chilling effect that is felt by any author or publisher writing about controversial international subjects today. Journalists often find themselves forced to self-censor their speech," media lawyer Brown said.⁵⁶

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Charmian Gooch from Global Witness, a British-based nongovernmental organization, told a parliamentary commission, “I know of numerous instances of organizations that have held back on naming and shaming and putting details into reports because of fears particularly of libel tourism.”⁵⁷

“Libel tourism sounds innocuous, but underneath the banal phrase is a major assault on freedom of information, which in today’s complex world is more necessary

than ever if evil, such as the jihad ideology that led to the Mumbai massacres, is not to flourish,” Denis MacShane, a Labour Party member of Parliament, said in testimony in Westminster Hall.⁵⁸

The NGO English Pen was as blunt in a memorandum submitted to Parliament, saying “the limits which libel law places on public discourse are anti-democratic.”⁵⁹

Who Is Suing the Media

There is no easy way to classify those who represent legal risks to journalists. Media outlets, NGOs, and journalists have been sued by celebrities, oligarchs, organized crime figures, politicians, business leaders, and businesses. According to one report, one-third of the cases were brought by celebrities.⁶⁰

Some of these cases originate in the developing world including Eastern Europe and the Middle East.

Some have legitimate grievances but have used particularly aggressive means such as libel tourism in order to achieve their goal. Many of the cases would be thrown out of an American or other international court. In a few cases, plaintiffs have won default judgments because news organizations or journalists could not afford to defend themselves.

Many libel suits in Britain are brought by companies and not individuals. This obscures the identity of the real plaintiffs. Many jurisdictions do not accept libel suits from companies.

“A lot of malfeasance by the rich and powerful is undertaken through offshore companies ... I think, if someone wishes

to sue for libel, they should come out from behind the paper-thin veil of a corporation. Defamation is about compensating the hurt feelings of people, and companies don't have feelings,” Stephens said.

Some of those who have brought suits are organized crime figures or oligarchs, often with political connections. These interests control hundreds of billions of dollars in natural resource wealth, businesses, and

capital. They are investing more and more in Western European and American businesses. Increasingly, their wealth is serviced by Western banks, investment houses, hedge funds, and lawyers.

The media in the developing world, which in many cases still does not meet international standards for fairness and accuracy, pose

a risk to these interests. They continue to write stories about oligarchs and organized crime figures, who would rather be seen as businessmen than criminals. Western media are beginning to tackle many of these figures as they make high-profile investments in soccer clubs, car companies and other well-known businesses.

“A lot of malfeasance by the rich and powerful is undertaken through offshore companies ... I think, if someone wishes to sue for libel, they should come out from behind the paper-thin veil of a corporation. Defamation is about compensating the hurt feelings of people, and companies don't have feelings.”

— Mark Stephens, media lawyer and partner for Finer Stephens Innocent

Solutions and Challenges

There are a number of ways news organizations and NGOs can face these legal challenges, starting with their own practices.

Blocking Off Access to Sites

Media outlets can block off access to their sites from libel-friendly jurisdictions. While this may not be a possibility for all media, this may be a good approach for smaller organizations. Given that the United Kingdom can for some organizations account for most of the risk and yet very few readers, this approach is a pragmatic way to deal with the problem.

The *National Inquirer* did just this after they were sued by actor Cameron Diaz. Diaz sued in the UK based on 279 web visits to the article from the UK. After the suit, the *Inquirer* blocked access to all UK residents. And other American newspapers have threatened to follow suit. In a memorandum to the House of Commons committee, a number of American media outlets including the *Los Angeles Times*, *New York Times*, *Boston Globe*, *Bloomberg* and others have threatened to stop distribution of their products to the UK. According to the memorandum:

“Leading US newspapers are actively considering abandoning the supply of the 200 odd copies they make available for sale in London—mainly to Americans who want full details of their local news and sport. They do not make profits out of these minimal and casual sales and they can no longer risk losing millions of dollars in a libel action which they would never face under US law. Does

the UK really want to be seen as the only country in Europe—indeed in the world—where important US papers cannot be obtained in print form?”⁶¹

In addition, the media houses said Internet blocking may come next:

“The cost of fighting libel actions may lead internet publishers to build “fire walls” against access from the UK, in order to avoid such actions. This would damage British business and its communication and information services, and would draw international attention to the UK’s failure to protect free speech.”

But the solution is not perfect.

“Geofiltering is a band-aid, but I would sure hate it if becomes the long-term solution because it limits information to people, including those who can benefit most from it,” media lawyer Wimmer said.

Preparing for a Lawsuit

Media organizations should have some basic procedures and resources ready in case of a lawsuit.

Editors must be trained in libel law.

They need to know how to recognize dangerous stories and when to seek professional help. They must understand what constitutes high standards for proof in stories and must understand exactly how the information was gathered.

Beyond the editors, all media organizations should have a legal team in place for pre-publication story review. All of the new

organizations contacted for this report had such arrangements except some of the media development organizations. Pre-publication review helps editors make good decisions about risks and helps lawyers if the organization is sued. Lawyers often can find simple ways to mitigate risk and make stories less libelous.

“The ultimate libel protection is the truth,” Kaplan, of CPI, said. “But if we can change a single word or phrase that makes our point but keeps us out of court, I am happy to do that. You can achieve the high standard with some simple word changes that still protect you in court.”

While most American organizations have regular pre-publication review, such reviews are rare in developing countries. Many international organizations have lawyers they can call when things go bad, but far fewer regularly do pre-publication reviews.

Lawyers are also critical for dealing with threats of lawsuits. How a media organization responds to threats can either help avoid a suit or avoid making the situation worse.

Should a newspaper be sued, lawyers are needed to respond to the suit and try to get it dismissed or settled. Should it go to trial, a media organization must have the resources to defend itself in complex cases that can go on for months and cost millions

of dollars. Additional outside trial lawyers are sometimes needed in other countries to defend claims. These costs are covered either by pro bono lawyers or through media insurance. All of the U.S. organizations that were contacted for this report have either pro bono attorneys, insurance, or a media defense fund. Only a few of the international organizations were covered.

Most media firms carry some form of insurance that covers them should they have to defend themselves or should they lose a suit and face a large judgment. Almost none

of the organizations contacted had insurance.

Responding to a Suit

Responding to an international lawsuit is difficult for all but the largest international media organizations. For media in the developing world, it is next

to impossible except for large television networks. The responses media have used are to ignore the suit, settle it or fight it. Few media organizations fight. Many have settled, especially in London where the risks and costs of losing are high.

Some have chosen to ignore suits and when they have, they have invariably lost default judgments. If the journalist or organization has no assets in the country where the suit takes place, they may have little to lose. However, the journalist may not be able to travel to that country without risking arrest. They may also have problems in

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*— David Kaplan, editorial director,
Center for Public Integrity*

Under Siege: The Personal Toll of Media Lawsuits

When sued for libel in other countries, most media in the developing world have sought to settle cases by issuing apologies or retractions rather than fighting. However, many journalists find this approach undermines credibility. Fighting a case is the only approach for many journalists and investigative centers who feel capitulating will undermine their work. Yet few know the personal toll that fighting a suit can cost. One organization and one director knows firsthand what it means to fight.

In late 2000, despite 10 years of careful work in journalism and a record of no lawsuits, the Washington-based Center for Public Integrity (CPI) was sued three times during an 18-month period. Five years later the lawsuits were proven to be groundless, but the price paid by CPI's founder, Charles Lewis, was significant in other ways. The experience left CPI without an insurance carrier and as vulnerable as ever to legal threats. But it also led to even stricter editing, fact-checking and legal vetting rules that are a model in the journalism industry.

The most serious was a suit by OAO Alfa Bank, a Russian bank run by two oligarchs. CPI wrote about the connections between Alfa Bank's principals and organized crime and narcotics trafficking. Alfa, represented by the D.C. law firm of Akin Gump Strauss Hauer & Feld LLP, sued CPI and its two reporters in the District Court of Washington. It would prove to be one of the largest and costliest libel suits in U.S. history, eventually costing the center \$4 million and the plaintiffs more than double that amount, Lewis estimated. Discovery lasted five years and included 20 depositions and 107,000 pages of documents.¹

"The cost in human terms was rather substantial; the amount of energy spent was incalculable. I feel like a survivor having gotten through it," said Lewis, who has only recently started talking about the cases. "It was a profoundly sobering experience."

Lewis said from the very beginning he was determined to not let the lawsuits affect the center or the tenacity of its reporting. He did this by shielding his staff from the suits and handling the issues himself. Lewis said the suits made his other work more difficult including running and raising money for the center.

"You become aware of the fragility of it all, that your enterprise can fail at any time. We were up against multibillion-dollar people," he said. "This was nothing but sport for the litigants."

To help the center in its legal troubles, Lewis started a 509a3 support organization, ultimately raising \$4 million on top of the \$4.5 million he needed to raise to keep the center going. The new center, called the Fund for Independence in Journalism, was created as a self-insurance mechanism.

Working closely with attorney Michael Sullivan, CPI was eventually able to get a summary judgment to dismiss the case in September 2005 on the grounds that the oligarchs were public figures and that they did not prove the center had malicious intentions. Lewis feels fortunate that the suit was filed in the United States and not in the United Kingdom.

The stress was a contributing factor in his decision to step down as the center's director.

"I bore the brunt of it," he said. "I think that was an enormously stressful time."

Still, he feels the center is better. They now have a self-insurance program, five law firms committed to doing pro bono work on behalf of the center, and some of the most careful vetting of stories in the news business. CPI has not been sued in the past five years. Still, the experience has left a permanent mark.

"Reporters like to puff out their chest and like to feel the pen is mightier than the sword, but money talks," Lewis said. "If someone has a load of money they can ruin your life, it leaves you with a profound humility of your limitations."

¹ Charles Lewis (founder of the Center for Public Integrity), interview with the author.

countries with reciprocity agreements with that country. For example, if a judgment is issued in a European Union country, journalists may have to avoid just about all of Europe. There is also the risk that the plaintiff will seek to get a local court to enforce the default judgment. Ignoring suits is not possible for large news outlets that have assets in a libel tourism country and at a minimum need to be able to report on that country. Many libel tourism hotspots, such as the United Kingdom, are too important to avoid.

“We don’t have assets in many places but you want to defend yourself against any legal challenges anywhere,” Kaplan said. “London is a world capital and you need to be able to go there.”

A lost and unenforced judgment also looks bad to readers and undermines the credibility of news organizations.

Media Insurance

The problems of libel tourism and other transnational threats would not be as serious if all media organizations had affordable insurance to protect themselves. However, only major American and international media have such insurance. In fact, those most at risk—small investigative journalism organizations—are least likely to have insurance. Part of this is due to the major demographic shift in the news industry that has separated investigative reporting from traditional news organizations.

“As the parts of the organizations that create the risk, the content creators, are being separated from the economic engine that paid for that risk, what do you do?” asked Marsh insurance’s Milton. “The risk creators are being pushed out on their own, and the risk market hasn’t accommodated for that.”

Small investigative organizations, especially those in the developing world, are difficult to insure, insurance experts say. These organizations are more likely to get sued, yet they are focused almost exclusively on journalism and do not have other parts of a major news organization to support them. They can not attract the advertising

and classified advertising revenues that a standard news organization gets.

News organizations abroad, especially those in the developing world, are unlikely to get insurance. One

reason is that high-priced civil libel suits are a phenomenon largely of the English-speaking world. In other countries, the need is not considered as great, either because libel is treated as a criminal matter or because the judgments have not been large enough to justify coverage, Milton said. However, with libel tourism, news organizations in countries that have never faced a financial risk are now endangered. These news organizations often do not understand the risk, but even if they did, there are few options to protect themselves except to purchase insurance in the countries of greatest risk. “If you have a small newspaper in Hungary, they may have a small risk there but a

The problems of libel tourism and other transnational threats would not be as serious if all media organizations had affordable insurance to protect themselves.

significant risk in the UK. But there isn't an insurance market they can go to to cover their risk in UK," Milton said. Insurance companies are ignoring this problem, Milton said. "They're only insuring entities that have significant contact to English-speaking countries," he said.

Discussions with seven investigative journalism organizations for this report revealed that not a single organization had insurance except for the Center for Investigative Reporting in Bosnia-Herzegovina (CIN), which had insurance through the Journalism Development Group, an American nongovernmental organization that helped start the organization. This organization also covered other news organizations for stories on which they worked together. Only one of the other organizations said it was seeking insurance. Most were not familiar with its use.

There are potential solutions for protection against libel lawsuits, but they require an industry-wide approach or significant resources. Most of the solutions rely on bundling the risk by including as many organizations as possible in insurance premiums.

I. Self Insure

Organizations can insure themselves by raising enough money for a legal war chest to fight off threats. However, this approach requires sufficient capital (in the millions of dollars) and still runs the risk of multiple suits depleting the self-insurance fund. An organization would need a fund with tens of millions of dollars to survive a judgment, which far exceeds what most organizations are capable of raising. U.S. investigative reporting organizations only have budgets

of about \$30 million. International organizations have only \$2.6 million. Money for survival is a higher priority.⁶²

II. Create an Insurance Company

If the organizations at risk could reach a consensus, it would be possible to create an insurance company solely for the purposes of insuring investigative centers. The insurance company would have a social rather than financial mandate. The participating organizations in a mutual company would pay in some yearly premium to operate the insurance company and provide protection. If there were a shortfall, participants would be charged an additional premium. If there were a dividend, it would be redistributed to the participants.

This model has been used in the past. American newspapers in the 1960s created Mutual of Bermuda to insure themselves against libel suits. The company has since expanded beyond its original mandate and is a stand-alone company. The model could be replicated, insurance experts say.

III. A Joint Legal Defense Fund

It is possible to create a joint legal defense fund that might rely on donors, funds from participating organizations, pro bono lawyers, retained lawyers and insurance. Such a system might retain lawyers or use pro bono lawyers to review articles before publication. The organizations could build a defense fund to pay high deductibles. Insurance would be retained only if the costs exceed a certain amount. The system would minimize the risk for insurance companies, leading to a favorable premium rate and helping to protect news organizations. There are many ways to structure such a system.

Changing Laws

Laws can be changed in libel tourism countries. Short of this, it is possible to pass laws in any country to protect against libel tourism judgments being collected. However, these processes can take many years.

There is an understanding in the United Kingdom among some members of Parliament, journalists, lawyers and activists that British law is an unnecessary burden for not only UK media but all international media. Hearings in the House of Commons and new opinions from the Ministry of Justice are positive signs that change could come.

“It looks like it is on the right track but these reforms take a long time. There is recognition that change needs to be made but there is a big powerful plaintiff’s bar which will fight this,” said Wimmer.

If Britain and other countries such as France or Singapore were to alter their laws to make libel less onerous to news organizations, introduce the concept of fair comment on public figures, adapt anti-SLAPP provisions or limit awards, media could manage their risk better.

A second option is for countries to adopt laws that limit the ability of plaintiffs to enforce judgments in those countries. A number of U.S. states have taken this approach, notably New York and Illinois. Bills that would do this have also been proposed in the U.S. House of Representatives and Senate.

Article 19 has defined what it considers suitable standards for defamation.

Some highlights of their definition:

- “The only legitimate purpose of defamation laws is to protect reputations. At the same time, the practice in many parts of the world is to abuse defamation laws to prevent open public debate and legitimate criticism of wrongdoing by officials. Many countries have laws designed to safeguard the honour of certain objects, including national or religious symbols. Inasmuch as an object, as such, cannot have a reputation, these laws do not serve a legitimate aim.”⁶³
- “Groups which have no legal existence do not have an individual reputation in any credible sense of that term. Defamation laws which purport to protect such groups’ reputations cannot, as a result, be justified.”
- “Some States seek to justify defamation laws, particularly those of a criminal nature, on the basis that they protect public interests other than reputations, such as maintaining public order or national security, or friendly relations with other States. Since defamation laws are not carefully and narrowly designed to protect these interests ... such interests, where legitimate, should be protected by laws specifically devised for that purpose.”
- “All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”

Pro Bono Attorneys

Many of the organizations facing transnational legal threats have sought and received assistance for free from attorneys. Many legal firms have a strong history of diligent and exemplary work in support of news organizations. Most media houses in the nonprofit world have agreements with law firms to do some pro bono legal work, from pre-publication vetting to actual trial defense.

Lawyers in the United States say pro bono representation works in their country.

However, many of these firms can do this work because they maintain a number of large, wealthy clients that provide them with sufficient income so that they can take on pro bono work.

In Europe, pro bono legal assistance is less common. Many of the organizations, including investigative centers in Romania, Bulgaria and Serbia, have pro bono legal assistance in their countries. However, they do not have it in the United Kingdom, Ireland, Singapore, France and other higher risk libel tourism countries.

“The reality is it is so expensive to litigate, nobody will fund a case for you. Unless it’s a high profile case—then you might get a lawyer to represent you pro bono. But you can’t rely on it as a media defense,” Peter Noorlander of the Media Legal Defence Initiative (MLDI) said.

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— Peter Noorlander, *Media Legal Defence Initiative*

Brown, who has done pro bono work for American organizations, agrees. “Pro bono lawyers are eager to help out when they can, and it’s part of the solution. It’s one thing to defend a case [in the United States] under favorable libel law, but it’s a very different matter to find pro bono assistance overseas, where the laws are less favorable and if you fail your client is responsible for a large award,” Brown said.

Some Other Legal Assistance

The London-based MLDI and other organizations provide legal assistance internationally to journalists and news organizations operating in hostile media environments. The MLDI’s primary focus is providing financial support for journalists and media organizations to defend themselves in court from libel and defamation cases, but it also does some training of journalists and lawyers.

Through its Media Law Working Group, the International Senior Lawyers Project assists journalists’ organizations, media lawyers, and other stakeholders in drafting and pushing to enact laws covering defamation, insult, privacy, censorship, and other freedom of information issues. It also helps defend journalists in individual cases.

And at the University of Pennsylvania’s Annenberg School of Communication, the Center for Global Communication Studies has launched globalmedialaw.com, which

provides legal resources and information for news organizations and journalists as well as for individuals and institutions involved with media law and policy.

Precedents

The most important precedents in U.S. and UK law were set in cases involving large news organizations (usually newspapers) with large teams of the very best lawyers. *New York Times Co. v. Sullivan*, *Reynolds v. Times Newspapers Ltd.*, and other cases have defined and improved libel law for media.

“It is clear there is value in having powerful media organizations like the *New York Times* and the *Washington Post* that can stand up and make good case law and fight cases all the way to the Supreme Court,” Kaplan said.

Without these news organizations continuing their proactive and rigorous defense of media rights, there is a danger that media could move backwards. The poor economic conditions newspapers find themselves in could lead to less rigorous defense. “It is not the *New York Times* [that] media lawyers worry about. It is the combination of the economic entrenchment and how that affects some of the players who are not as strong. It’s the mid-level players who will drop out. The combination of the closing of foreign bureaus and harassing lawsuits makes for a deadly combination to a smaller organization,” said Brown. Those precedent setters are largely

Everyone agrees that better journalism goes a long way to mitigating some libel problems. High international standards for proof and accuracy make it easier to defend the journalism in the event of a courtroom battle.

missing from the media in the developing world. While there are many large media conglomerates in the developing world, they are far more likely to cut a deal with a political or business interest and much less likely to fight for an industry issue at their own cost. This is due to a number of factors including limited resources, low professional standards, ownership that has political, business or criminal connections, and a general lack of interest for industry issues.

Doing Better Journalism

Everyone agrees that better journalism goes a long way to mitigating some libel problems. High international standards for proof and accuracy make it easier to defend the journalism in the event of a courtroom battle.

“The best investigative reporting is rock solid ... British standards aren’t much different if we base

what we have on public records, and you have evidence to back it up,” Kaplan said.

Kaplan said CPI and the International Consortium of Investigative Journalists have detailed fact-checking regimens derived from prior legal problems. Every fact is checked by an independent fact-checker.

“It can drive our reporters crazy, but ultimately it has served us well,” Kaplan said.

In the developing world, standards are much lower. In many countries, the repetition of rumor or gossip is considered standard

media fare. Very few developing world media would bother spending the time or resources to verify all information and rarely are fact-checkers employed. Many editors and reporters simply do not have the skills. When developing world media standards face off against British lawyers in a UK court, the results are predictable. This puts media in the developing world at greater risk.

Some of the organizations in the developing world most at risk have been changing procedures. In Bosnia, the Center for Investigative Reporting uses a fact-checker and vets stories with British lawyers. The Romanian Center for Investigative Journalism has an agreement with an international organization to have international editors read stories.

Libel tourism “has raised our need for accuracy, checking documents, and using public source documents. We try to

avoid records from private sources—it’s harder to use them to defend yourself,” Radu, of the Romanian center said.

Many plaintiffs are knowledgeable about the tools available to them, so journalists must meet the highest standards for reporting and writing a story in order to avoid libel accusations. Oligarchs and organized crime figures have hired sophisticated business intelligence firms that often hire ex-police or intelligence agents to ferret out information during the news gathering stages, Radu said.

“We have to be careful how we report our work. What we say at meetings. Who we meet with,” Radu said. “We’ve gotten calls from interested parties such as due diligence companies and business intelligence firms and they are often hired by the people we are reporting on. They misrepresent themselves and try to get information from you. You never know what information they are going to use against you.”

Conclusions and Recommendations

There are no simple solutions to the problem of transnational legal threats. For the foreseeable future, media will continue to face serious risks especially in the United Kingdom. All media can do to mitigate risk is to have good pre-publication lawyers, well-trained editors, high news standards, and good insurance.

It is unlikely that most media in the developing world will achieve these goals soon.

In the long term, what is needed to alleviate the problems is:

- ▶ Changes in laws in libel tourism spots
- ▶ Changes in local laws to shield media from libel tourism jurisdictions
- ▶ More access to insurance, especially in the developing world
- ▶ Greater acceptance of pro bono work by international law firms
- ▶ Better training of editors in identifying and handling threatening situations
- ▶ Higher standards, especially in the developing world

There are no simple solutions to the problem of transnational legal threats. For the foreseeable future, media will continue to face serious risks especially in the United Kingdom.

- ▶ Greater awareness of the risks among media, especially in the developing world, and among media development organizations

It is also important to get better statistics and better tracking of which countries represent the most risk and which ones represent future trouble spots. The absence of data makes it harder for news organizations to assess risk.

Large media organizations and media-support organizations are currently putting pressure on courts to change laws, and

there is a good chance they will, at least in Britain. But there is no organization working to solve this problem worldwide. There is a lack of consensus in the media industry to solve the problems through insurance, pressing for pro bono support, and training of editors.

The principal players—large media support organizations—need to take up this cause and work with the insurance industry and major law firms to build a support structure. Major donors need to support this effort. American donors, who have ignored the plight of the media in developing world on this issue, need to reassess their strategies, because all media will suffer if libel tourism worsens.

Ultimately an inexpensive and sustainable support structure could be built. Some elements of this could include:

- ▶ An insurance policy that pools the risk for quality news organizations around the world, possibly starting with nonprofit investigative journalism organizations and media development organizations. This could be paid for in large part by the organizations themselves.
- ▶ A structure that allows media organizations in developing world access to British or U.S. legal expertise for vetting dangerous stories. This could be done by a consortium of law firms around the world and could include both pro bono assistance and some base retainer fees.
- ▶ Efforts by media development organizations and news media organizations to raise awareness around the world of the risks.
- ▶ Training of editors in understanding libel, recognizing it in stories, knowing how to deal with it and knowing when to get stories checked by lawyers.

A meeting of stakeholders including investigative reporting organizations, law firms, insurance companies, donors and media organizations should be organized to

create a process for building such a support structure. While the concept is simple, there are many approaches that would need to be considered. Solutions could include everything from creating a new mutual-style insurance company (as was done in the 1960s in the U.S. by newspapers to cover their libel risks) to working with one insurance company to define a far-reaching protection policy. Combining an insurance policy with a program of legal advice, story vetting and trial work can reduce premiums and allow for higher insurance deductibles. Solutions need not be expensive. One solution for a group of 20 to 50 organizations could be done for just a few hundred thousand dollars.

However, the details are complex and it is important to define whom a program might cover, what the requirements would be for inclusion, how it would be sustained and other critical issues.

In the meantime, a pragmatic approach is to configure Internet firewalls to block all access to residents in particularly libel-friendly countries like the United Kingdom. While the approach seems draconian, for most investigative organizations that have few visitors in those countries, it may be the only way to control the risk.

Until a solution is found, the damage will continue—not in the lawsuits so much as in the countless news stories that are shelved or watered down every day.

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