

## Two Recent Developments on Federal Statutes Impacting the Media

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While many federal officials—in both the executive and legislative branches—seem to make a habit of expressing hostility toward established First Amendment norms and the free press, there is some cause for optimism stemming from Congressional action—as two recent developments show. First, in California, a federal district court recently handed defamation defendants a key victory in the fight against libel tourism in *Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd.*<sup>1</sup> Applying the Federal SPEECH Act to an Australian injunction prohibiting a U.S. non-profit from speaking about a company’s intellectual property, the decision held that the injunction was unenforceable because it could not pass constitutional muster in the United States. Second, in response to the Department of Justice’s posture toward journalists and the press, two United States Representatives recently reintroduced the “Free Flow of Information Act of 2017,” which seeks to establish a federal reporter’s privilege and safeguard journalists’ right to maintain confidential source information. Both have the potential to be significant positive developments for journalists and media organizations in the coming year.

### ***EFF v. GEMSA: the SPEECH Act’s Application to Foreign Defamation Judgments***

In *Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd.*, decided on November 17, 2017, the United States District Court for the Northern District of California applied the SPEECH Act to declare an Australian injunction unenforceable.<sup>2</sup> The decision handed the media a key victory in the effort to curb “libel tourism,” the practice of circumventing First Amendment protections by obtaining, and attempting to enforce, judgments from foreign jurisdictions with plaintiff-friendly libel laws against U.S. writers, journalists, and media companies.

The creatively named Securing the Protection of our Enduring and Established Constitutional Heritage (“SPEECH”) Act<sup>3</sup> was signed into law in 2010 to address the increasingly common practice of obtaining defamation judgments in countries with fewer free-speech protections than the United States, such as Great Britain. The Act requires U.S. courts to deny recognition or enforcement of foreign defamation actions unless the foreign judgment was obtained in a jurisdiction providing at least as much speech protection as the United States Constitution and the constitution and laws of the state in which the court is located.<sup>4</sup> The Act also allows federal courts to issue declaratory judgments regarding the enforceability of a particular foreign judgment as soon as it is rendered.<sup>5</sup>

Electronic Frontier Foundation is a non-profit organization that advocates for reform of the United States patent system. As part of its advocacy efforts, EFF writes a “Stupid Patent of the Month” series, which highlights examples of patents that, in its view, “stifle innovation [and] harm the public.”<sup>6</sup> After naming one of Global Equity Management’s (GEMSA) patents the “stupid patent of the month,” GEMSA sued EFF in Australia for defamation. Although EFF never appeared in Australia, an Australian court issued an injunction ordering EFF to remove the article and refrain

from publishing any content regarding GEMSA's intellectual property; EFF faced asset seizure, imprisonment, and other related penalties under Australian law for non-compliance.<sup>7</sup>

In the U.S. court, EFF sought a declaratory judgment that the injunction was unenforceable under the SPEECH Act. The district court held that the First Amendment and California state law provided significantly more speech protection than relevant Australian law, and that none of GEMSA's claims "could give rise to defamation under U.S. and California law," and "EFF would not have been found liable for defamation in the United States." The court issued a declaratory judgment "(1) that the Australian Injunction is repugnant to the United States Constitution and the laws of California and the United States; and (2) that the Australian injunction cannot be recognized or enforced in the United States."<sup>8</sup>

## ***The Free Flow of Information Act: Another Attempt at a Federal Shield Law?***

Presumably in response to perceived hostility of the Executive Branch toward the press, two United States Representatives have revived a bill that would establish a federal reporter's shield law. On November 14, 2017, in testimony before the House Judiciary Committee, Attorney General Jeff Sessions declined to state categorically that the Justice Department would not prosecute journalists for failing to reveal confidential sources.<sup>9</sup> That same day, Maryland Democrat Jamie Raskin and Ohio Republican Jim Jordan introduced, the "Free Flow of Information Act of 2017," which would establish a qualified federal reporter's privilege.

While many states have some form of reporter's shield law, there is no comparable federal protection.

The Free Flow of Information Act, H.R. 4382,<sup>10</sup> seeks to address this gap by creating a federally applicable qualified privilege against compelled disclosure of journalists' confidential source information. If enacted, this bill would prevent federal bodies from unnecessarily compelling journalists to provide testimony or documents regarding information obtained while "engaging in journalism" unless the party seeking the information can overcome the privilege.<sup>11</sup> To do so, the body seeking the information must demonstrate that it has exhausted "all reasonable alternative sources," that the information sought is "critical" to the investigation at hand, and "that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information."<sup>12</sup>

Similar versions of this bill have previously passed the House, but each time failed in the Senate. The concept of a federal shield law has attracted at least some bipartisan support, and in the past, high-profile Republicans (including Vice President Mike Pence, when he served in the House) have supported the enactment of a federal shield law. While President Trump has yet to weigh in on the bill directly, his trademark antagonism to the press may suggest that any legislative fix will need enough support to overcome a presidential veto.

The bill has been referred to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. Although the bill is still in the early stages of the legislative process, the Free Flow of Information Act would provide significant and invaluable protection to journalists seeking to protect the confidentiality of their source material and the identity of their confidential sources.

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<sup>1</sup> No. 17-cv-02053, 2017 WL 5525835 (N.D. Cal. Nov. 17, 2017).

<sup>2</sup> *Id.* at \*15.

<sup>3</sup> 28 U.S.C. §§ 4101-05.

<sup>4</sup> 28 U.S.C. § 4102(a)(1).

<sup>5</sup> 28 U.S.C. § 4104 (a)(1) (explaining that the Declaratory Judgment Act is merely the mechanism by which a person subject to a judgment which violates the SPEECH Act initiates their SPEECH Act suit).

<sup>6</sup> 2017 WL 5525835, at \*2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*17.

<sup>9</sup> [House of Representatives Judiciary Committee, “Oversight of the Department of Justice” \(Nov. 14, 2017\)](#).

<sup>10</sup> [H.R. 4382 \(115th Cong. 2017\)](#).

<sup>11</sup> *Id.* at § 2(a).

<sup>12</sup> *Id.*