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STATEMENT OF PUBLIC CITIZEN ABOUT PROPOSED LEGISLATION TO PROTECT AMERICANS FROM JUDGMENTS IN FOREIGN COURTS THAT DISREGARD FREE SPEECH PROTECTIONS

Submitted to the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary

for its
Hearing on Libel Tourism
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Public Citizen thanks the Subcommittee and Chairman Cohen for holding a hearing to solicit public input about both the problems caused by libel tourism and the best possible legislative solutions. We agree generally with the testimony provided by all four witnesses who agreed, albeit from slightly different perspectives, that libel tourism is a problem worth addressing. We also agree with the position endorsed by all of the witnesses that national legislation is needed to declare a public policy against the enforcement of such judgments in the United States, and thus avoid the need to establish such a public policy through common law development in the courts, or through legislation in each of the fifty states. Last year H.R. 6146 was passed in the House and we hope that, this year, a similar bill can be enacted into law.

However, last year's bill did not address a common libel tourism problem that arises in free speech litigation in the Internet context and that, we hope, can be fixed by a modest change. I am attaching a letter that illustrates the problem. It responds to a threat to file a libel suit in England against a fairly large Internet Service Provider ("ISP") based in the Dallas area because of criticisms of a cell phone telemarketing company that appeared on a message board hosted by the ISP's customer, North Carolina resident Julia Forte.

Ms. Forte is a client whom Public Citizen has been advising for about a year

on issues that arise from consumer criticisms of companies on a pair of web sites that she operates about telemarketers. Her web sites appear at www.800notes.com and www.whocallsme.com. The theory of her sites is that when a consumer gets a call from an 800 number (or some other number) that she does not recognize, the consumer can go to Forte's web sites to see what others are saying about what the calls are about. The comments are organized, not by the name of the telemarketing company, but rather by the telephone number that the company uses. And, if the consumer does not find any previous comments for that number, she can begin a page for comments about that number, and leave comments about her own experience to begin the discussion. In several cases, an interactive discussion about experiences with the company ensues. All these postings can be made free of charge, and the company can respond to criticisms through free postings as well. We consider the message boards to be a useful consumer service as well as an outlet for discussion about telemarketers.

From time to time, Ms. Forte receives complaints about some of the comments posted on the message boards. She addresses these complaints on a case-by-case basis. Sometimes she concludes that the better solution is for the company to respond to the criticisms, and sometimes she concludes that one or more comments should be

removed. Under the Communications Decency Act, 47 U.S.C. § 230, the operator of a message board is immune from suit over comments posted by consumers on the message board; the operator is similarly immune from suit by any posters who are unhappy about the removal of their comments. Occasionally, instead of politely requesting removal of specific postings, with an explanation about why they ought to be removed, companies threaten to sue Forte herself for the content of the messages. In response, she explains her statutory immunity and that is generally the end of the matter.

Last year, Forte was sued in Canada by a company whose telephone number is discussed on her web sites. However, Ms. Forte, who is not subject to suit in Canada, would enjoy no statutory immunity under Canadian law, and so she has declined to appear there. Despite repeated efforts to intimidate her into hiring a lawyer to defend against the suit in Canada — most recently, she received a visit from a private investigator who harangued her about her obligation to go to Canada to defend the lawsuit there — she is waiting for the issuance of a Canadian judgment and plans to defend against an effort to enforce any judgment in the United States.

The most recent situation (reflected in the accompanying letter) takes the

problem a step further and reveals how serious the impact of threats to file suit can be in the online free content. Those who want to suppress free speech know very well how sensitive Internet Service Providers are to the prospect of litigation where they cannot rely on absolute statutory immunity from suit, such as under the Section 230 or the Digital Millenium Copyright Act ("DMCA"), 17 U.S.C. § 512. For example, during the last Presidential election campaign, some of the networks objected to the fact that both Senator McCain and then-Senator Obama used tiny clips from news broadcasts in the course of political ads carried on YouTube. The networks did not complain to the campaigns, or file suit against them for copyright infringement; in fact, no such suit would have been tenable, because these were obvious examples of fair use. Instead, they filed takedown notices under the DMCA, and Google was unwilling to make an individualized decision about the specific videos. Google just took the YouTube videos down and kept them down for the entire period of time required to retain its immunity from suit under the DMCA. This is the standard operating procedure for ISP's – cling to your statutory immunity and do nothing to risk it. The ISP keeps its protection, but the speech of the consumer (or other person) is sacrificed.

Senator McCain vigorously objected to Google, pointing out that the removal

of speech even for only two weeks may well be devastating in the context of a political campaign and urged Google to carve out an exception to its normal policy for clips sponsored by the campaigns of candidates for public office. Google was obdurate, pointing out that it is not always easy to distinguish video clips submitted by political candidates, noting that many other users engage in constitutionally important speech, and suggesting that Senator McCain should instead consider changing the law to protect the fair use rights of all speakers. The important point here, however, is that YouTube was simply doing what almost all ISP's do in these circumstances. They do nothing to risk the immunity provided by the law.

Seen from the ISP's perspective, the insistence is understandable. Most web site operators pay a relative pittance for hosting, or they pay nothing, and the site is supported by advertising. The margin of profit on any one web site, or one blog, or one YouTube account, is tiny. The hosts make their money by handling a large volume of sites and automating their relationship with the content providers (their clients, the actual operators of individual web sites). Without absolute immunity, the profits from hosting any one site would be vastly outweighed by the mere expense of defending against a defamation claim, at several hundred dollars an hour. (If there is immunity, the law is so clear that a plaintiff risks sanctions by filing suit.) Even

the expense of hiring legal professionals to examine claims that are put forward about particular speech being defamatory (or otherwise actionable) far exceeds the revenue that can be gained from hosting the web site at issue. And as a practical matter, this review must be done by legal professionals because, absent statutory immunity, what the ISP must do is assess the risk of being held liable if a court concludes otherwise than it does. So, what the ISP's need is immunity, not the possibility of making a vague public policy argument. Without immunity, almost every ISP is going to take the easy way out and just remove the challenged speech.

Of course, one could argue – and we do make this argument on behalf of our clients when communicating with ISP's – that if a given ISP gets a reputation for being a pushover and giving in to threats too easily, that could be bad for business, because web site operators will go elsewhere with their web hosting business. But that argument usually doesn't work, because **nearly every** ISP gives in easily when there is a realistic threat of litigation to which section 230 immunity would not apply.

Knowing this, a cynical target of critical speech who wants to suppress that speech doesn't have to bother to file suit against the offending speaker or web site host, or obtain any judicial determination that the speech was actionable. Such

companies or individuals just go up the line of web hosts, looking for a company that provides Internet access for companies lower down in the chain of hosting companies, that has no real stake in the controversy affecting its customers, and that is ready to cave in.

They do this recognizing that, by creating a threat of expensive litigation in which the ISP will have to make public policy arguments appealing to somewhat unsettled law, they will intimidate the ISP into simply pulling the plug on the customer rather than risking litigation expense and even enforcement of a foreign judgment. If the first ISP proves not to be a weak link, they go up the line further to an ISP that provides services for the first ISP, until they find a weak link who will suppress free speech rather than pay to litigate the client's rights in a case where the ISP is, after all, just a stakeholder concerning somebody else's free speech rights.

In the end, if someone who wants to suppress speech can find a way to file suit in another country – or even to **threaten** to file suit in some other country – they will often push the ISP to just give up its customer's rights. That would, in Public Citizen's opinion, have happened in the instance discussed in the attached letter had SoftLayer not had the benefit of an offer of pro bono representation from Public

Citizen. Of course, there are not many ISP's that can get pro bono services for a case like this one.

SoftLayer's CEO had the strength of character to take a stand against such bullying – and in our judgment deserves a great deal of credit for doing so – but there are other instances in our practice where the ISP simply told the speaker to take his business elsewhere rather than imposing on the ISP's low-margin budget with litigation expenses. In one case we are handling, the target of the speech first went to the ISP where the site was hosted; the ISP relies on its section 230 immunity; so the speech-suppresser went to the data center from which the ISP bought Internet access for all of its customers. The data center caved, telling the ISP that it would take down all of the ISP's customers unless the ISP sacrificed this one customer. The case is discussed at http://pubcit.typepad.com/clpblog/2008/10/another- case -of.html and http://pubcit.typepad.com/clpblog/2008/10/did-some-isps-g.html. There, the speech-suppresser was relying on the trademark exception to section 230 to threaten the ISP's with litigation, because he claimed that some hyperlinks on a critical web site infringed his trademark. But as the SoftLayer situation shows, it is all too easy to do the same thing in the libel tourism context.

The solution is to expand the libel tourism bill to provide that judgments in contravention of section 230 are against public policy.

Note that our original client here, Ms. Forte, is a small player, someone who had a clever idea for a consumer information web site. But the problem is a bigger one. It will ultimately affect newspapers and broadcasting stations, for example. It is generally said that the real future for the newspaper industry and even radio and TV is through their online presence. A smaller newspaper or radio or TV station is unlikely to have the clout with an ISP to persuade it to keep its material online when a libel tourism threat comes in. Maybe the New York Times, or Gannett, brings in enough business to an ISP that the ISP is willing to take its chances on being sued along with the media entity. But the small player, even small media entities, will generally not get the benefit of such consideration. Similarly, groups in the United States that focus on protecting human rights abroad (or groups abroad that host their speech on United- States-based servers to take advantage of our free speech traditions) could easily have their web sites shut down by threats to sue their web hosts for defamation.

In our view, including section 230 in the public policies expressly protected by

the proposed statute is the key. This could be accomplished by moving the definitions section to a new subsection (c) and including the following subsection (b):

> ‘‘(b) Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment against the provider of an interactive computer service (as defined in 47 U.S.C. § 230) concerning a published communication unless the domestic court determines that the foreign judgment is consistent with the express terms and purpose of 47 U.S.C. § 230.