

The Daily Star

Committed to PEOPLE'S RIGHT TO KNOW

Vol. 4 Num 327

Fri. April 30, 2004

Point-Counterpoint

Inside America

Libel tourism chills US-based investigative journalism

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Craig Unger and Gerald Posner have a lot in common. They are both respected investigative journalists who have published best selling books in the US about the Saudi connection to the War on Terrorism and to US foreign policy. Both books (Posner's *While America Slept: The Failure to Prevent 9-11* and Unger's *House of Bush, House of Saud: The Secret Relationship between the World's Two Most Powerful Families*) were published by Random House. But there is one thing Unger and Posner no doubt wish they didn't have in common. Given their books' controversial content, Random House's lawyers reviewed them carefully to ensure they didn't contain anything libelous. Yet, despite the thorough 'vetting' procedure, the publisher has now decided not to publish the two books in England.

"The US has the world's best libel laws, but people with deep pockets can sue journalists in many other countries, including England," Unger said. "They don't have to win, just tie you up in court forever." Posner agreed with Unger's assessment and added, "In cases of real bad journalism, people should be able to sue here (the US), England or anywhere, for that matter. I want to see the bad journalists out of business, but I'm a journalist who did his homework and got it right. My publisher's lawyers meticulously checked my book for accuracy."

The "people with deep pockets" who stopped Unger's and Posner's best sellers in their tracks are rich and powerful members of the Saudi royal family. Unger's book investigates the intriguing relationship between the Saudi royal family and the extended political family of George W. Bush and its impact on the growth of terrorism and the events of 9-11. Posner's book revealed that Abu Zubayah, a key al-Qaeda operative captured last year in Pakistan, has confessed that important members of the Saudi establishment knew beforehand about the 9-11 attack but failed to alert the US.

One can understand why Saudi royal family members want to keep such information out of print, but why not first try to prevent the books from being published in the US, which has a far larger reading public than England and where the damage to one's reputation can be greater? "Libel laws differ around the world, but it's fair to say that the US has perhaps the greatest protection of writers and publishers through the First Amendment and other doctrines," explained Lawrence Savell, an attorney with the New York City based law firm of Chadborne & Parke. "The burden of proof is on the claimant, not the writer or publisher, to prove that his reputation has been damaged." Savell, who specialises in media law, represents several US media companies.

In England, on the other hand, the burden of proof lies with the publisher and the writer and that makes them attractive targets for libel claims. Writing in the England's *Guardian* newspaper, journalist Martin Soames explained what could happen: "Once the claimant has shown the English courts that he or she has been identified and that the defamatory allegation has been published here, the burden of proof is on the defendant. In other words, it is presumed to be untrue. It is then up to the publisher to prove the contrary."

The attractiveness of England as a jurisdiction in which to pursue legal claims has given rise to a practice known as "libel tourism" or "forum shopping." Individuals with fat bank accounts, not only from Saudi Arabia but also the US, Russia, England and Australia, are taking advantage of the laws in claimant friendly countries to sue for damages. And it's not only book publishers and their authors who end up in court or are intimidated into practicing what can be only be described as self censorship. In March 2002, Richard Pearle resigned as head of the Defense Policy Board in the George Bush administration, an influential organisation of ex-government Investigative journalist Seymour Hersh had written a piece in the *New Yorker* magazine that raised questions about Pearle's dealings with two Saudi businessmen and suggested that he might have tried to benefit from a war with Iraq. Hersh's article led to series of critical reports about Pearle, which prompted his resignation.

Pearle likened Hersh to a terrorist and announced his plans to sue in England where the *New Yorker* is sold. Hersh was already familiar with the British legal system. Earlier, media mogul Robert Maxwell had sued him in English court, but the investigative journalist counter sued and won. Maxwell and his company had to pay six figure damages.

The problem for US-based authors and publishers is that libel tourism can pay off big time in court. Russian business tycoon Boris Berezovsky, for instance, sued the New York City-based *Forbes Magazine* in English court and won. Last January the *Wall Street Journal* lost in court to Saudi businessman Mohammed Jameel over the newspaper's claims that anti tourist officials had monitored his bank accounts.

Noted filmmaker Roman Polanski wants to sue publisher Conde Nast for libel in England, but he doesn't want to set foot in the country for fear he can be arrested and extradited to the US from where he is a fugitive. The court is now deciding whether it will allow Polanski to give evidence via video hook up.

Saudi Sheikh Bin Mahfouz, in Unger's *House of Bush, House of Saud*, won substantial damages from Pluto Press after the British Court determined that the publisher had falsely suggested the Sheikh was related by marriage to Osama bin Laden. "The fear is that Sheikh Mahfouz has not only sued so many times, but he has won," Unger said.

It's easy to criticise a publisher like Random House for their timidity, Posner said, but he understands its move is nothing personal. "It's purely a bottom line business decision," the author explained. "If Random House spends \$500,000 or \$600,000 in British Court defending my book, it will certainly get a nice pat on the back. But that's additional money the publisher has to spend for the right to buy and publish the book. Unless the book does extremely well, the publishers can possibly be out hundreds of thousands of dollars defending the rights of an author in court."

So will libel tourism put a permanent damper on the willingness of US publishers to publish hard hitting investigative books in England and other countries where the law favours claimants? Savell believes the legal pendulum may be swinging against libel tourism. "To my understanding, it is not that the laws of libel plaintiff-friendly jurisdictions are changing as much as it is that courts in such jurisdictions," he explained. "Mindful of the forum shopping phenomenon, and understandably desirous of not inundating their dockets unnecessarily, these courts are appropriately being selective in cases they allow to be brought before them.

This has already happening in England, according to Savell. "British courts have dismissed libel actions brought by foreigners on the ground that England was not a suitable forum, or that there was another jurisdiction that was a more suitable forum, for the particular dispute to be litigated," he explained.

Meantime, readers in England who want a copy of Posner's and Unger's latest books will still be able to buy them. Many will most likely do it through Amazon.com

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