The Application of the First Amendment to Long Arm Jurisdiction

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NOTES

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Connor, an Alabama official, brought an action for an alleged libel against the New York Times, a New York corporation which had no permanent offices or employees in Alabama. The trial court found that the small circulation of the *Times* in Alabama (395 daily and 2,455 Sunday copies) was sufficient contact with that state to sustain jurisdiction under the Alabama long arm statute. The Times appealed to the Fifth Circuit. *Held, reversed*: Because of first amendment principles surrounding the law of libel, a foreign publisher must have greater contact with the forum than a non-publisher to be subject to jurisdiction therein. *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966).

In a similar fact situation, Buckley, a Connecticut resident, brought a libel action against the New York Post, a Delaware corporation. The Post had no offices in Connecticut but maintained a small circulation of its papers there; insufficient, according to the trial court, to hold the Post amenable to service pursuant to the Connecticut long arm statute.[1] Buckley appealed to the Second Circuit. *Held, reversed*: The distribution of 2,000 newspaper copies by a foreign corporation with allegedly libelous material about a resident of Connecticut is sufficient contact with that state to sustain jurisdiction. *Buckley v. New York Post*, 373 F.2d 175 (2d Cir. 1967).

I. History of the Long Arm Statute

Historically, jurisdiction over foreign corporations had been predicated upon such restrictive tests as corporate presence[2] and corporate consent.[3] These mechanical tests were discarded in *International Shoe Co. v. State of Washington*,[4] in favor of a less restrictive qualitative test based upon the "nature and quality" of the defendant's acts within the forum. Under this standard, to be amenable to service a foreign corporation needed only such "minimum contacts" with the forum that "the maintenance of the suit did not offend traditional notions of fair play and justice."[5] In *McGee v. International Life Ins. Co.*[6] the Supreme Court extended the standard to uphold jurisdiction over a foreign insurance company whose only contact

[1] Buckley v. New York Post, 260 F. Supp. 282 (D. Conn. 1966).

[2] *See, e.g.*, International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Pennoyer v. Neff, 95 U.S. 714 (1877).

[3] *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. 404 (1856).

[4] 326 U.S. 310 (1945).

[5] *Id.* at 316. *See also* Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963) where the court noted various factors comprising the "minimum contacts" standard. Accordingly, the factors included: (1) the nature and character of the defendant's business; (2) the number and types of activity within the forum by the defendant; (3) whether or not the defendant's activities give rise to a cause of action; (4) whether the forum has some special interest in granting relief; (5) the relative convenience of the parties.

[6] 335 U.S. 220 (1957).

with the forum was the mailing of an insurance renewal policy to a resident of that state.

In response to the broad assertions of personal jurisdiction invited by *International Shoe* and *McGee*, several states, including Connecticut and Alabama, have enacted long arm statutes.[7] Pursuant to these statutes, jurisdiction has generally been limited by the "minimum contacts" standard set forth in *International Shoe*.[8] Corporations have generally met this standard and jurisdiction has been upheld if the corporation has been "doing business" in the forum.[9] Conversely, if a foreign corporation has not been "doing business" in the forum, the "minimum contacts" necessary to satisfy due process have not been found and jurisdiction has not been upheld.[10] Some courts have combined the "doing business" concept with any tortious conduct of the defendant within the forum in order to sustain jurisdiction under a long arm statute.[11] Other courts have held that tortious conduct alone is sufficient to satisfy the "minimum contacts" standard.[12] Even committing a single tort within a forum, irrespective of any business transaction there, has been held to be sufficient contact to sustain jurisdiction.[13] But in determining jurisdiction over foreign corporations, regardless of whether the courts looked to business activity, tortious conduct, or to a combination of both, the ultimate decision since *International Shoe* has depended upon whether or not the "looked to" activity measured up to the "minimum contacts" standard.

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[7] The two sections of the Connecticut long arm statute pertaining to jurisdiction over foreign corporations were adopted in 1959 and became effective in 1961. CONN. GEN. STAT. ANN. § 33-411 (1966) provides for jurisdiction over foreign corporations:

> (3) Out of the production, manufacture or distribution of goods by such corporations with the reasonable expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers; or
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> (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

ALA. CODE tit. 7, § 199(1) (1960) provides for jurisdiction as follows:

> Any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or services, shall be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such works, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee. . . .

[8] Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Bach v. Friden Calculating Mach. Co., 167 F.2d 679 (6th Cir. 1948); Grace v. Procter & Gamble Co., 95 N.H. 74, 57 A.2d 619 (1948); Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

[9] Worley's Beverages Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Allegue v. Gulf of South America S.S. Co., 103 F. Supp. 34 (S.D.N.Y. 1952); Perkins v. Louisville & N.R.R., 94 F. Supp. 946 (S.D. Cal. 1951); Perkins v. Berguet Consolidated Mining Co., 155 Ohio 116, 98 N.E.2d 33 (1951).

[10] Miller Bros. v. Maryland, 347 U.S. 340 (1954); Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956); Canvas Fabricators v. William E. Hooper & Sons, 199 F.2d 485 (7th Cir. 1952); Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960); Cole v. Stonehard Co., 12 F.R.D. 508 (N.D.N.Y. 1952); Read v. Corbitt Co., 10 F.R.D. 125 (E.D. Pa. 1950).

[11] Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

[12] Ehlers v. United States Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963); Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W.2d 607 (1961). For an interesting opinion that equates tortious conduct with doing business for jurisdictional purposes, see Hill v. Electronics Corp. of America, 253 Iowa 581, 113 N.W.2d 313 (1962).

[13] Elkart Engineering Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965).

II. Application of Long Arm Statutes to Publishers

Since *International Shoe*, the same "minimum contacts" standard has generally been applied in determining jurisdiction over foreign publisher corporations.[14] Thus, jurisdiction under a long arm statute was sustained where a court found that a foreign publisher had "minimum contacts" with the forum by virtue of its "doing business"[15] therein, committing a tort[16] therein, or by a combination of both activities.[17] Applying the broad jurisdiction standard, jurisdiction was upheld over a foreign publisher who had no offices or employees in the forum and whose only contact was the circulation of a few copies of allegedly libelous material within the forum,[18] and over a foreign publisher whose only contact with a forum was the mailing of an alleged libel to independent distributors in the forum.[19]

Applying the same standard, jurisdiction was not upheld where a foreign publisher distributed 26 daily copies of an alleged libel within a forum;[20] or where the publisher circulated 391 daily copies of an alleged libel and solicited small amounts of advertising from the forum;[21] or where the foreign publisher's total contact with the forum consisted of the mailing of periodicals to subscribers and independent distributors within the forum.[22]

On the other hand, some courts, without indicating a reason, have clearly applied a *variation* of the "minimum contacts" standard to foreign publishers. Consequently, a few courts, while purporting to apply the traditional jurisdictional standard, denied jurisdiction over publishers where the same contact with the forum was apparently sufficient to sustain jurisdiction over non-publishers.[23] In one such case a foreign publisher was not subject to jurisdiction in a forum even though the publisher owned realty there and received about 3.2 per cent of its total business from that forum.[24] This decision was predicated on an earlier case which held that a foreign publisher was not amenable to service even though it maintained offices

[14] St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966); Brandon v. Memphis Pub. Co., 194 F. Supp. 376 (E.D. Ark. 1961); Sonnier v. Time, Inc., 172 F. Supp. 576 (W.D. La. 1959); Gayle v. Magazine Management Co., 153 F. Supp. 861 (M.D. Ala. 1957); Putnam v. Triangle Pub. Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). Jurisdiction over a foreign publisher is complicated by the conflict of laws problem surrounding the single and multiple publication rules. This Note, however, will attempt to deal only with the first amendment and its application to foreign publishers.

[15] Manning v. Time, Inc., 223 F. Supp. 985 (E.D. La. 1964); Hunter v. Afro-American Co., 133 F. Supp. 812 (E.D.S.C. 1955); Totero v. World Telegram Corp., 245 N.Y.S.2d 870 (Sup. Ct. 1963).

[16] Bible v. T.D. Pub. Co., 252 F. Supp. 185 (N.D. Cal. 1966); Manning v. Time, Inc., 233 F. Supp. 985 (E.D. La. 1964).

[17] Brandon v. Memphis Pub. Co., 194 F. Supp. 376 (E.D. Ark. 1961); Totero v. World Telegram Corp., 245 N.Y.S.2d 870 (Sup. Ct. 1963).

[18] Brandon v. Memphis Pub. Co., 194 F. Supp. 376 (E.D. Ark. 1961).

[19] Bible v. T.D. Pub. Co., 252 F. Supp. 185 (N.D. Cal. 1966).

[20] Walker v. Field Enterprises, Inc., 332 F.2d 632 (10th Cir. 1964).

[21] Buckley v. New York Times, 338 F.2d 470 (5th Cir. 1964).

[22] Walker v. Savell, 218 F. Supp. 348 (N.D. Miss. 1963).

[23] Curtis Pub. Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966); Insull v. New York World Telegram Corp., 172 F. Supp. 615 (N.D. Ill. 1959), *aff'd*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); Brewster v. Boston Herald-Traveler Corp., 141 F. Supp. 760 (D. Me. 1956); Putnam v. Triangle Pub., Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

[24] Brewster v. Boston Herald-Traveler Corp., 141 F. Supp. 760 (D. Me. 1956).

and employees in the forum and received nearly 30 per cent of its total volume of business from that forum.[25] Moreover, the Fifth Circuit held that the distribution of 69,000 copies of an alleged libel was not, by itself, sufficient contact with the forum to permit the court to uphold jurisdiction over a foreign publisher.[26]

Although the above cases do not clearly manifest a reason for applying a variation of the "minimum contacts" to foreign publishers, one possible explanation lies in the first amendment concepts. In *Putnam v. Triangle Pub. Inc.*[27] the Supreme Court of North Carolina expressly attributed to the first and fourteenth amendments a requirement that the court adopt a more narrow standard when determining jurisdiction over foreign publishers. In *Walker v. Savell*[28] the Fifth Circuit stated that, because of the necessity to protect the freedoms guaranteed by the first and fourteenth amendments, it was the established policy of the state of Mississippi to require more than minimal contacts with that state to sustain jurisdiction over a foreign published. In *Buckley v. New York Post*[29] the trial court indicated that first amendment considerations necessarily find their way into jurisdictional assessment over foreign publishers because the law of libel represents an effort to balance the competing interests favoring freedom of the press and protection of reputation.

III. Buckley and Connor

Thus, while it is apparent that most courts have rather indiscriminately applied the "minimum contacts" standard to foreign publishers and non-publishers alike, there does exist, in a minority of courts, a distinct variation of this standard when applied to foreign publishers. This apparent variation of the "minimum contacts" standard is sharply contrasted in *Buckley* and *Connor*. In *Connor* the Fifth Circuit extended this variation by openly declaring that the traditional standard, applicable in obtaining jurisdiction over other foreign corporations, is not applicable to foreign publishers defending against a libel action. The court reasoned that the freedom of press and speech, guaranteed by the first and fourteenth amendments, requires a higher jurisdictional standard in the case of a foreign publisher. According to the Fifth Circuit, first amendment principles must be extended to jurisdictional concepts in order to protect foreign publishers from abusive and vexatious litigation resulting from the application of the traditional "minimum contacts" standard. Supposedly, such litigation would tend to discourage foreign publishers from distributing in less profitable foreign states.[30]

[25] Lee v. Memphis Pub. Co., 195 Miss. 264, 14 So. 2d 351 (1943), Annot., 152 A.L.R. 1428 (1944).

[26] Curtis Pub. Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966).

[27] 245 N.C. 432, 96 S.E.2d 445 (1957).

[28] 335 F.2d 536, 544 (5th Cir. 1964).

[29] 260 F. Supp. 282, 285 (D. Conn. 1966).

[30] The Fifth Circuit does not cite any evidence to indicate that foreign publishers have actually been discouraged from distributing in distant areas. For an interesting discussion of this aspect of the libel law, see Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581 n.2 (1964).

By engrafting principles of the first amendment upon jurisdictional concepts, the Fifth Circuit purports to lighten the potentially heavy burden placed upon foreign newspapers under the "minimum contacts" standard. The decision by the Fifth Circuit favors a less restricted circulation of foreign newspapers by affording such corporations special protection from the reach of long arm statutes.

In *Buckley*, however, the Second Circuit found no reason for superimposing a first amendment standard upon the application of long arm statutes. Instead, the Second Circuit was content to resolve the jurisdictional problems by applying the traditional "minimum contacts" standard to uphold jurisdiction over the Post in Connecticut. Applying this standard, the Second Circuit declared that the distribution of 2,000 copies of an alleged libel about a resident of Connecticut was sufficient contact with that state to uphold jurisdiction.[31] In so deciding, the court specifically rejected the Fifth Circuit's first amendment standard.[32]

The Second Circuit also noted that a free press system, capable of furnishing the public with fresh, contrasting ideas, is indeed essential, but that the hazards to publishers from libel actions have been recently mitigated by the Supreme Court, notably in *New York Times v. Sullivan*.[33] Thus, while both courts considered the importance of the first amendment in libel actions, the Second Circuit basically confined its application to substantive law, whereas the Fifth Circuit superimposed constitutional freedoms upon procedural rules, thereby giving foreign publishers additional protection which would enable them to escape burdensome suits without the normal trial and appeal process.

To support *Connor*, the Fifth Circuit pointed to the recent freedom of speech cases, in which the Supreme Court greatly restricted the discretion exercisable by the jury in deciding whether or not a given case falls within the "privileged" category.[34] In these cases, however, the Supreme Court attacked the problem of jury discretion on the substantive level by imposing certain limitations to be applied at the trial.[35] The Court, though it emphasized that first amendment considerations required greater protection for publishers, did not, in any of these cases, go beyond making substantive modifications. In *Connor* the central problem is analogous to these cases insofar as it involves the conduct and discretion of the judge and jury in libel cases. But the addition of the first amendment to jurisdictional concepts, as proposed by the Fifth Circuit, does nothing to solve the problem. Instead, the suggested approach merely inconveniences the plaintiff

[31] Buckley v. New York Post, 373 F.2d 175, 183 (2d Cir. 1967).

[32] *Id.* at 182.

[33] 376 U.S. 254 (1964). The major safeguard provided by *Sullivan* was the Court's ruling that the element of malice must be shown in order for a public official to recover damages for an alleged libel, provided, of course, that the libel was connected with the official status of the plaintiff. The public official concept has recently been extended to include public figures, one of whom was a chemistry professor. Pauline v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir. 1966).

[34] New York Times v. Sullivan, 376 U.S. 254 (1964); Speiser v. Randall, 357 U.S. 513 (1958). *See also* Pauline v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir. 1966).

[35] The Court has extended the protection to publishers by requiring malice to be proved before a public official can recover damages in a libel action and by expanding the public official concept to include public figures of all sorts.

by compelling him to seek the defendant in a different, perhaps distant forum, where the problem of uncertainty at the trial court level will once again be squarely in issue.

Nevertheless, the protection afforded by *Connor* does have several advantages. First, it reduces the chances of a foreign publisher losing a libel suit at the hands of a local jury and being compelled to pay enormous damages. This is particularly desirable when a foreign publisher has attempted to report highly controversial issues, perhaps inflammable by their very nature.[36] This danger is further complicated by the fact that the law of libel itself allows the judge and jury great latitude in construing the law to the detriment of a foreign defendant.[37] As a second advantage, the special protection afforded foreign newspapers might tend to encourage continued newspaper service to distant areas which might otherwise be economically unfeasible.[38] This aspect of *Connor* is particularly warranted because many areas are restricted to one local newspaper, and therefore often depend upon a foreign newspaper for broader coverage[39] or a different viewpoint.[40] Much, then, can be said in favor of the *Connor* decision if the protection afforded by the application of the first amendment to jurisdictional concepts can guarantee a continued variety of news coverage.

Aside from any advantages, however, the incorporation of the first amendment into the jurisdictional standard, as proposed in *Connor*, inevitably results in several undesired consequences. First, and most obvious, is the fact that the Fifth Circuit outlined a new standard for obtaining jurisdiction over publishers without defining the standard. The court merely stated that a foreign publisher must have greater contact with a forum than a non-publisher in order to be subject to the jurisdiction of that forum.[41] Just what greater contacts are necessary is left unanswered, except that the circulation of 395 daily copies and 2,455 Sunday copies of an alleged libel within a forum is not sufficient contact.[42] Furthermore, the first amendment standard proposed by the Fifth Circuit would prevent a state from protecting its own residents, regardless of the damage inflicted,

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[36] As illustrative, see the record in New York Times v. Sullivan, 376 U.S. 254 (1964). *See also* the discussion of *Sullivan* in 43 N.C.L. REV. 315, 348 (1965). In *Buckley*, the Second Circuit also noted this aspect of the libel law and partially distinguished *Connor* on this basis:

> The record affords no ground for a prediction that the added danger of a plaintiff's verdict from having a libel suit by a resident tried in Connecticut rather than in New York—presumably rather slight—would cause the Post to forgo the substantial revenues from these sales and thus deprive Connecticut readers of its news and editorials, as might have been the case if the Times were subjected to repeated libel suits in southern states for articles on racial problems.

Buckley v. New York Post, 373 F.2d 175, 184 (2d Cir. 1967).

[37] *See* Berney, *Libel and the First Amendment—A Constitutional Privilege*, 51 VA. L. REV. 1, 55 (1966).

[38] A single news source to any given area could also create a "uniform" news system dependent upon wire service reproductions. For a discussion of the consequences resulting from such uniformity, see Terminiello v. Chicago, 337 U.S. 1 (1949); United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); M. ERNST, FIRST FREEDOM 93 (1946).

[39] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949).

[40] The Supreme Court has recognized that the unfettered flow of information to the public is essential for "fair" coverage, and that a variety of sources is therefore desirable. *See* Whitney v. California, 274 U.S. 357 (1927).

[41] New York Times v. Connor, 365 F.2d 567, 573 (5th Cir. 1966).

[42] *Id.* at 570.

so long as the defendant happens to be a foreign publisher. Therefore, inherent in this standard is the fact that the forum most appropriate to determine the damages, most convenient to the witnesses, and generally most convenient to the parties, is powerless to adjudicate. The problem is further complicated when the defendant has clearly and maliciously libeled the plaintiff. For even in the clearest case of malice, a plaintiff would not be afforded the protection of his own state courts.[43]

Moreover, the application of the first amendment standard results in a benefit for foreign publishers not shared by a resident publisher. The foreign publisher is permitted to escape the jurisdiction of a distant forum although the resident publisher of that forum cannot invoke the first amendment and achieve the same result. Thus, the existence of a state border allows the foreign publisher to circumvent the trial and appeal process. If this circumvention is designed to protect the freedom of the press as a whole, then it fails in purpose because a resident publisher must still take its chances with the normal trial and appeal process. Finally, the proposed application of the first amendment creates a double standard, whereby a distinction is drawn between foreign publishers and all other foreign corporations. Accordingly, a foreign publisher is not subject to jurisdiction under a long arm statute in a forum where it commits the tort of libel, even though the same statute could be used to obtain jurisdiction over a foreign manufacturer who commits a tort in that forum by circulating a defective valve therein.[44]

IV. Conclusion

The protection sought by the Fifth Circuit for foreign publishers can be achieved without producing the undesirable consequences of *Connor*. This result can be accomplished by appropriate substantive changes. Indeed, the Supreme Court has already made substantial progress in this area.[45] In fact, after refusing to sustain jurisdiction in *Connor*, the Fifth Circuit went on to exonerate the Times on the merits, ironically basing its decision on substantive developments, which the court had apparently, and, if so, erroneously, believed to be an inadequate safeguard.[46] By confining the protections to substantive developments, the double standard created by *Connor* is avoided. Furthermore, both foreign and resident publishers share the substantive benefits equally. Finally, and perhaps most important, appropriate substantive changes assure the continuation of a trial and appeal process for all litigants in this area even when one party happens to be a foreign publisher.

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[43] Thus, *Connor* goes farther than *Sullivan* by prohibiting a resident legal recourse in his own state courts even when the requisite malice called for by the Supreme Court is or can be shown.

[44] *See* Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963).

[45] *See* note 33 *supra*. There is still much room for modification on the substantive level as indicated by Justice Goldberg in his concurring opinion in New York Times v. Sullivan, 376 U.S. 254, 297 (1964), where he called for the complete abolition of libel suits involving public officials.

[46] New York Times v. Connor, 365 F.2d 567, 573 (5th Cir. 1966).