

Globalization Comes to Media Law

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In July, 2005 an *amici curiae* brief was filed in the European Court of Human Rights in an appeal presenting fundamental issues in media law; namely, whether governments or their subdivisions may sue for defamation, and whether the equivalent of a fair report privilege should apply in Russia. Perhaps as interesting as these issues in *Romanenko v. Russia*¹ were these facts: the *amici* were two prominent non-governmental organizations (NGOs) headquartered in Moscow and New York, respectively; the brief was written *pro bono* by a collection of experienced media lawyers from the United States, the United Kingdom and Albania; and the brief cited authorities not only from the European Court, but also the United States, United Kingdom, India, Germany, Ukraine, Bulgaria, Georgia, Serbia and Montenegro, and the Parliamentary Assembly of the Council of Europe.²

The *Romanenko* project illustrates what many media law practitioners and scholars have recognized, that media law has increasingly become internationalized. This trend is explained by the Internet, with its nearly infinite and instantaneous capacity to distribute problematic copy and liability exposure everywhere; and by the global reach of powerful media conglomerates, by satellite television, and by the efforts of states to assert sovereignty over their information space and protect it.

Internationalization has taken many forms. At the most pragmatic level, *i.e.*, litigation, media lawyers increasingly find themselves defending their United States-based clients in foreign courts, criminal and civil defamation or insult actions, privacy claims, contempt proceedings, and the like. For example:

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1. *Romanenko v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Nov. 17, 2005) (admissibility decision), available at www.jurix.ru/patterns/Romanenko_Applicability.pdf.

2. Brief for Open Society Justice Initiative and the Moscow Media Law and Policy Institute as Amici Curiae Supporting Petitioners, *Romanenko v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Nov. 17, 2005), available at http://www.justiceinitiative.org/db/resource2?res_id=102790.

- Dow Jones & Co. is haled into English and South Asian courts on a depressingly regular basis. Stuart Karle, Dow Jones' lead litigation counsel, has probably spent more time in these courts than in American courts. Few lawyers this side of the Atlantic possess his knowledge of the common law of defamation.
- Kurt Wimmer and Brian Macleod Rogers successfully represented a 50-party coalition of media companies and associations from the United States, Canada, Europe, Australia, Japan and Central and South America in support of the defendant in *Bangoura v. Washington Post*³ in the Ontario (Canada) Court of Appeal. The *Post*, and the coalition, convinced the court to dismiss this defamation action based on dubious access to the defendant's online archives.
- Robert Balin played a key role in the *amici* effort mounted by several international news organizations—including The Associated Press, ABC, CBS, NBC and The New York Times—in Taipei on behalf of two Taiwanese journalists who were prosecuted for criminal defamation by the business manager of the Kuomintang.⁴ The result was a landmark victory in 1997 in *Liu Tai-Ying v. Yuen Ying Chan*.⁵

London remains, in solicitor David Hooper's phrase, "the Town Called Sue." Libel tourism is alive and well in London, the world's most hospitable forum for well-heeled plaintiffs from Russia, Saudi Arabia and the United States seeking to sue American media outlets. English notions of *in personam* jurisdiction are seemingly limitless, and United States-based media organizations rarely prevail on motions challenging jurisdiction. American defense lawyers representing virtually every major media organization, including Dow Jones & Company, The New York Times Company, Forbes, CNN and Hearst, continue to assist their solicitor and barrister counterparts to try cases which, in American courts, would only rarely survive dispositive motions.

At the appellate level, when the High Court of Australia was about to consider the case of *Dow Jones & Co v. Gutnick*,⁶ media lawyers here and abroad correctly understood that it would very likely acquire watershed status. At issue was nothing less than the prospect of global

3. *Bangoura v. Washington Post*, [2005] O. J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2005] SCCA No. 497 (February 16, 2006) (also available at 2005 A.C.W.S.J. LEXIS 6141).

4. Brief for ABC, Inc. et al as Amici Curiae Supporting Defendants, *Liu Tai Ying v. Yuen Ying Chan*, (Taipei Dist. Ct., Apr. 22, 1997) (Taiwan), available at http://www.cpj.org/defamation/Taiwan_brief.pdf.

5. *Liu Tai Ying v. Yuen Ying Chan*, (Taipei Dist. Ct., Apr. 22, 1997) (Taiwan).

6. *Dow Jones & Co. v. Gutnick* [2002] 194 ALR 433.

exposure to liability of on-line publishers who had negligible contacts with remote foreign jurisdictions. Stuart Karle retained barrister Geoffrey Robertson and solicitor Mark Stephens from London, in addition to Australian counsel. David Schulz, representing Associated Press, organized an *amici curiae* brief which included most major American news organizations, in addition to Reuters and Amazon.com. Media lawyers from Australia, United Kingdom, United States and Hong Kong cooperated in what proved to be an unavailing effort to avert a High Court judgment allowing global exposure for online media.

To return to the *Romanenko* appeal mentioned above, this pro bono project in the European Court was preceded in 2005 by two draft *amicus curiae* briefs in that Court. In both cases Russian journalists had been held liable in civil defamation actions brought by unnamed Russian public officials and political activists; the national courts dismissed the appeals; and the European Court determined that both cases were admissible. A Russian NGO, Lawyers for Constitutional Rights and Freedoms (JURIX), filed *amicus* briefs based on drafts written by David Schulz and the author, on behalf of the media law working group of the International Senior Lawyers Project.

In the *Romanenko* appeal, the Open Society Justice Initiative (OSJI) assumed the lead role in the person of Darian Pavli, an Albanian lawyer and media law specialist. The Russian NGO was the Moscow Media Law and Policy Institute. With some help from the author, Kurt Wimmer organized the brief, which was written by Professor Peter Krug, David Bodney and David Heller of the Media Law Resource Center. The media law working group of the International Senior Lawyers Project and the Open Society Justice Initiative organized this *pro bono* effort.⁷

It is fair to ask why media lawyers spent the time and effort on these cases. At one level, we were simply helping to defend some Russian journalists whose reputations and solvency were assaulted by a Russian judicial system operating well outside international norms. At another level, we saw the cases as opportunities to present our views before a supra-national court about to adjudicate some of the anti-democratic excesses of Vladimir Putin's Russia. There was considerable admira-

7. A few months after the *amicus* brief was filed, the European Court of Human Rights in late 2005 granted admissibility in *Romanenko*. The Court's determination cited both amici by name and devoted most of its analysis to the amici's arguments, which the Court adopted in full. *Romanenko v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Nov. 17, 2005) (admissibility decision), available at www.jurix.ru/patterns/Romanenko_Applicability.pdf.

tion for the courage of the Russian journalists. We saw the rights of a free press as indivisible and transcending both geographic boundaries and languages. To diminish one journalist's rights to criticize political elites is to diminish all journalists' rights. It is likely that this philosophy motivates many media lawyers confronting oppressive governments and unfairness in foreign media litigation.

For many media lawyers there may be another explanation, and it has to do with corruption. Of all the obstacles to equitable economic development in the third world, and there are many, one stands out as particularly enfeebling and pernicious, namely corruption in government and business. Unlike other obstacles, such as drought or lack of natural resources, corruption does not rely on nature for a cure. Its cure lies solely with humans.

We tend to overlook the links between a free and independent press (the product, in part, of press-friendly media laws); the exposure and reduction of corruption (the product of a probing, courageous free and independent press); and economic vitality (the product of corruption-free, efficient markets). The World Bank conducted a study of the press, corruption, and economic and social indicators in 97 countries, and released a report in 2001 which supported the existence of those links.⁸ The World Bank survey found:

- Greater freedom of the press is associated with lower perceived corruption.
- Greater levels of government ownership of the press is associated with less free press, and dissemination of less information relevant to market economies.
- Government ownership of the press is associated with negative political and social outcomes, namely more corruption, inferior economic governance, less developed financial markets, and poorer education and health outcomes.

Where corruption is rife in a developing country, local businesses suffer, markets are distorted, and foreign capital stays away in droves. Corruption flourishes best where transparency is conspicuous by its absence, and where the press is unfree and dependent. As the World Bank report argued, a free and independent press can contribute significantly to economic vitality. To help foster such a press through liberalizing repressive media laws is to make a small but positive step in that direction.

8. WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS, 181-193 (2001).

Media lawyers are making some important contributions to this effort, as suggested by these cases:

- Before he became a judge on the U.S. Court of Appeals for the Second Circuit, Robert Sack appeared as co-counsel in Strasbourg before the European Court of Human Rights. He contributed to the Court's judgment in *Goodwin v. United Kingdom*⁹ in 1996, finding that the English courts' orders to compel disclosure of journalist Goodwin's confidential source violated Article 10 of the European Convention.
- In a more recent reporter's privilege appeal, Floyd Abrams represented an *amici curiae* group of 40 journalists and journalistic organizations before the International Criminal Tribunal for the former Yugoslavia. He contributed to the Tribunal's important finding in 2002 that Jonathan Randal, formerly of *The Washington Post*, need not testify at a war crimes trial concerning his interview with the defendant, Radoslav Brdjanin.¹⁰
- An *amicus curiae* brief written in 2004 by a *pro bono* team from Simpson Thacher & Bartlett,¹¹ led by S. Todd Crider with Darian Pavli of OSJI, before the Inter-American Court of Human Rights successfully challenged the criminal defamation conviction of journalist Maurice Herrera Ulloa by the Costa Rican courts.¹²
- David Schulz and his colleagues wrote an *amici* brief in 2004 for Associated Press and eight other major news organizations before the Inter-American Commission on Human Rights in a public official defamation case arising in Jamaica, *Abrahams v. The Gleaner*, which produced the highest libel verdict in Jamaican history.¹³
- In *Ehrenfeld v. Bin Mahfouz*,¹⁴ a Saudi Arabian plaintiff won a defamation judgment by default in London, and the American defendant seeks a declaratory judgment in New York barring enforce-

9. *Goodwin v. United Kingdom*, 22 Eur. H.R. Rep. 123 (Eur. Ct. H.R. 1996).

10. *Prosecutor v. Brdjanin & Talic*, Case No.IT-99-36-AR 73.9, Judgment, ¶ 50 (ICTY Appeals Chamber, Dec. 11, 2002).

11. Brief for Open Society of Justice Initiative as Amici Curiae Supporting Petitioner, *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (Sec. C), No. 107 (May 6, 2004).

12. *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (Sec. C), No. 107 (July 2, 2004).

13. Brief for Associated Press et al as Amici Curiae Supporting Petitioners, *Stokes v. Jamaica*, No. 28/04 (Inter-Am. C.H.R. June 29, 2004).

14. *Ehrenfeld v. Bin Mahfouz*, No. 04-Civ. 9641 (RCC), 2005 U.S. Dist. LEXIS 4741, (S.D.N.Y. Mar. 23, 2005). The case was subsequently dismissed for lack of personal jurisdiction under the New York State long arm statute, without a discussion of the merits of Ms. Ehrenfeld's declaratory relief request. 2006 U.S. Dist. LEXIS 23423 (S.D.N.Y. Apr. 26, 2006).

ment of the judgment here. Kurt Wimmer led the brief writing effort for a group of *amici curiae* which included Article 19, the London-based NGO; European Publishers Council; one of the biggest publishers in Australia; and the *Sunday Times* of London.

- In 2001, an appeals court in Bucharest, Romania, considered the author's brief. At trial, the Associated Press correspondent in Bucharest had been found civilly liable for calumny for reporting that a prominent politician had collaborated with the state security police of the discredited Ceausescu regime. While local counsel concentrated on Romanian law, our separate brief relied exclusively and successfully on the Article 10 jurisprudence of the European Court of Human Rights.

Aside from litigation, media lawyers are increasingly active as speakers and consultants assisting in the reform of media laws abroad. The scope and importance of this work is described by Professor Monroe Price in his 2002 book, *MEDIA AND SOVEREIGNTY*:

The American Bar Association through its Central and East European Law Initiative (CEELI) organizes lawyers around the United States to participate in what was deemed an important national opportunity to reshape the law elsewhere. Funded by USAID, CEELI, and similar public and private organizations, established offices with full-time staff in a score of countries throughout the former Soviet Union, and dispatched volunteer lawyers to work with local parliamentarians, judges, law schools and law offices there. Given the quantity and loci of contact, patterns of technical assistance emerged. CEELI organized workshops, trained and exchanged judges and lawyers and, like a dry cleaning service, provided almost overnight legal assessments of draft legislation and of proposed structural changes in a legal system. Media law received a great deal of attention"¹⁵

The experiences of two CEELI volunteer lawyers are typical. Roger Myers recently spent a year in Almaty, Kazakhstan training Kazakh media lawyers and successfully lobbying to defeat a particularly toxic media law. Barbara Swann performed similar long-term training functions in Georgia and Armenia. The author has undertaken short-term training assignments in media law in Albania, Algeria, Armenia, Croatia, Georgia and Serbia. Within recent years media lawyers also have traveled abroad and conducted media law reform workshops in Bulgaria, Romania, Macedonia, Russia, Moldova and an international conference in London. The workshops typically take two or three days, followed by exchanges of emails containing revisions of draft media laws.

15. MONROE PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER* 64-65 (2002).

Often the technical assistance takes the form of comprehensive written assessments of draft legislation pending in parliaments dealing with the media, insult, defamation and privacy laws, broadcast regulation, advertising, access to information, and the like. The assessments evaluate the legislation from the perspectives of Article 10 of the European Convention on Human Rights, our First Amendment, Article 19 of the Universal Declaration of Human Rights, and Article 19 of the International Covenant on Civil and Political Rights. Over the years, under the sponsorship of such organizations as CEELI, the Promedia program of the International Research and Exchanges Board (IREX), Internews and the International Center for Journalists (ICFJ), media lawyers have written assessments for such legislation in, among others, Albania, Algeria, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, China, Croatia, Czech Republic, Georgia, Indonesia, Iraq, Kazakhstan, Kosovo, Kyrgyz Republic, Macedonia, Moldova, Mongolia, Montenegro, Romania, Russia, Serbia, Slovak Republic, Turkey, Ukraine and Yemen.

In April 2005, seven members of the media law working group wrote assessments of the *Decision of the Plenum of the Supreme Court of the Russian Federation of February 24, 2005*, an important document providing guidelines and explanations for the disposition of defamation cases.¹⁶ Submitting assessments for this CEELI project were Kevin Goering, Kevin Goldberg, Professor Peter Krug, Madeleine Schachter, Barbara Swann, Kurt Wimmer, and the author.

In addition to CEELI, a number of other institutions sponsor media law technical assistance and training programs. They include OSJI, the U.S. Department of State, the United States Agency for International Development (USAID), Freedom House, and IREX. The Media Law Resource Center (MLRC) monitors developments abroad and conducts biennial conferences in London for media lawyers from many countries. Additionally, the media law working group of the International Senior Lawyers Project, an informal collection of media lawyers having an interest in reform of media laws abroad, often provides experienced volunteers for these institutions.

The roots of the volunteers' competence to provide training and technical assistance admittedly lie in their accumulated experience representing media outlets domestically. As if to compensate for any insu-

16. Decision of the Plenum of the Supreme Court of the Russian Federation. On Judicial Practice at Disposal of Cases on Protection of Honour and Dignity of Persons, and also Business Reputation of Persons and Legal Entities. Moscow No. 3, February 24, 2005, available at http://www.medialaw.ru/e_pages/laws/russian/supc-24-2005.htm.

larity, a body of comparative literature has emerged within the last ten years. Some important contributors include Professor Monroe Price (including MEDIA AND SOVEREIGNTY), Professor Peter Krug (law review articles on Russian constitutional and media law),¹⁷ Professor Benjamin Liebman (law review articles on Chinese media law),¹⁸ CEELI (concept papers on media law,¹⁹ Article 10 jurisprudence,²⁰ and freedom of information law,²¹ all produced by the media law working group), and the London-based NGO, Article 19.²² USAID published a monograph by Professors Price and Krug through the Programme in Comparative Media Law & Policy Centre for Socio-Legal Studies at Wolfson College, Oxford University. Their work, *The Enabling Environment for Free and Independent Media*, has received wide distribution. Charles Glasser's major work, INTERNATIONAL LIBEL & PRIVACY HANDBOOK, was published by Bloomberg Press in early 2006.²³

This represents but a sketch of the work of media lawyers in an age of internationalization. The work produces some unintended consequences. To learn the law of defamation of a nation is to glimpse into that society's tolerance for dissent and freedom to criticize the powerful. To study or practice international media law is to acquire, by reverse perspective, a deeper understanding of the American system of free expression. To work with media lawyers and journalists abroad to reform media laws is to write, with no sense of messianism, a professionally satisfying coda.

17. Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interest, the 1995 Civil Code, and the Constitution—Part Two*, 14 CARDOZA ARTS & ENT. L.J. 297(1996); Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interest, the 1995 Civil Code, and the Constitution*, 13 CARDOZA ARTS & ENT. L.J. 847 (1995).

18. Benjamin Liebman, *Innovation through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L.J. 33, No. 1, (2006); Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

19. American Bar Association/Central European and Eurasian Law Initiative, *Concept Paper on Media Law* (1996), available at <http://www.abanet.org/ceeli/publications/conceptpapers/home.html>.

20. American Bar Association/Central European and Eurasian Law Initiative, *Concept Paper on European Court of Human Rights and Freedom of Expression* (2004).

21. American Bar Association/Central European and Eurasian Law Initiative, *Freedom of Information: A Concept Paper* (2000), available at <http://www.abanet.org/ceeli/publications/conceptpapers/home.html>.

22. Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (2000), available at <http://www.article19.org/publications/global-issues/defamation.html>.

23. INTERNATIONAL LIBEL & PRIVACY: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS AND LAWYERS (Charles J. Glasser, Jr. ed., 2006).