

**IS IT TIME FOR THE MEDIA
TO INTERVENE IN STRASBOURG?**

by Alina Pravdychenko, Vita Volodovska and Richard N. Winfield

Media organizations and their lawyers are now confronting these questions:

Should media organizations reconsider their historical disinterest in submitting amicus curiae briefs in media freedom cases in the European Court of Human Rights? Has the Court's sea change become so adverse to the media in recent years that the media's intervention by filing amicus curiae briefs has become a matter of necessity rather than mere choice? If the media became proactive by intervening, what are the chances that their amici briefs will help reverse the sea change?

Two recent cases decided by the 17-judge Grand Chamber of the Court may suggest some answers. The first, Bedat v. Switzerland¹, created a serious setback for journalists and media outlets by upholding the criminal punishment of a journalist covering a widely reported multiple murder case. A mentally disturbed driver rammed his car into a crowd of pedestrians killing three and injuring eight. Two years before the defendant's trial before a single professional judge, the journalist published an accurate news story reporting some details of the defendant's mental state. The journalist obtained this information from a police investigative file which he obtained legally, unaware that it was confidential. The defendant made no claim that his privacy or fair trial rights had been violated. Swiss prosecutors, however, obtained a criminal conviction and fine against the journalist under a criminal code provision punishing publication of secret documents.

¹ 29 March 2016

In July 2014 a 7-judge chamber in Strasbourg found that Switzerland had violated the journalist's guarantee of freedom of expression under Article 10 of the European Convention on Human Rights. On March 29, 2016, however, the Grand Chamber reversed, 15-2, finding no violation.

Significantly, not a single media organization, journalists' association or NGO saw fit to intervene by filing an amicus curiae brief while the case was pending. This is notwithstanding that the case presented a dangerous challenge to widely accepted journalistic practices. Among other issues, the media missed the opportunity to advise the court how very rare were journalists' prosecutions for such coverage in modern democracies. The media's silence spoke volumes.

The second case before the Grand Chamber, Magyar Helsinki Bizottsag v. Hungary² similarly presented a fundamental issue: whether Article 10 of the Convention guaranteed the media a right of access to information held by government. Here the Grand Chamber had to confront its own earlier negative precedent, and a forceful effort by the United Kingdom to convince the Court to find against the media.

In the Magyar case, however, five NGOs actively participated as interveners. They were Media Legal Defence Initiative, the Campaign for Freedom of Information, Article 19, the Access in Information Programme and the Hungarian Civil Liberties Union. Their amici curiae brief surveyed the existence of about 100 national FOI laws around the globe constituting, in the aggregate, a true international norm. Aided by this research and advocacy, the Grand Chamber reversed its earlier holding, and, remarkably, found access to information to be a human right.

It would be comforting to believe that active media intervention in important press freedom cases is the rule. Sadly, however, it is the exception. The media community is

² 30 November 2016

consistently indifferent to exercising its right and its opportunity to participate in Strasbourg cases involving freedom of expression.

Indifference to Intervention

This will show the depth of that apathy. The ECHR decided over 1,000 cases involving Article 10, the European Convention provision guaranteeing freedom of expression. Between 1986 and 2013, however, when the Court decided many hundreds of such cases, NGOs intervened and submitted amicus curiae briefs in fewer than 30 cases. In those years, the Court's record was generally supportive of free expression. Significantly, when NGOs did intervene, the media was victorious over 70% of the time.³ One case illustrates the powerful and wide ranging impact that a competently written amicus brief can have.

A group of Russian local public officials sent a letter to the presidential envoy complaining that the management department of the Russian Supreme Court in the region was engaged in irregularities in the sale of timber. A local newspaper published the written complaint verbatim. The management department of the court sued the newspaper for defamation. The trial court held that the newspaper failed to verify the information in the complaint, found for the management department, and assessed damages of 15,000 roubles. Appellate courts upheld the trial court.

The newspaper filed an application with the ECHR. A Russian media NGO, Moscow Media Law and Policy Institute and Open Society Justice Initiative as interveners, requested permission to file an amicus curiae brief. The Court granted permission, and pro bono media lawyers from International Senior Lawyers Project wrote and submitted the brief supporting the applicants. The ISLP brief thoroughly surveyed decisions from the highest courts of major

³ Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, *Netherlands Quarterly of Human Rights*, 2013 Vol. 31/3, 271-313.

democracies, all of which protected news reports of this kind. Citing and relying heavily on the ISLP amici brief, the Court found in favor of the newspaper and directed the Russian government to pay it 3,260 Euros. Importantly, the ECHR held for the first time that Article 10 protects a newspaper's fair and accurate report of non-confidential official documents. Romanenko v. Russia.⁴ Eight months later, the Russian Supreme Court adopted a resolution which declared for the first time that Russian media law will protect the media's fair and accurate reports of non-confidential official documents. The resolution thus adopted as a matter of Russian law the ruling issued 8 months earlier by the ECHR. It is unmistakable that the ISLP amici brief for the two NGOs was crucial in creating this newly won press freedom.

Why Amici Briefs

The Romanenko case is no exception to the rule that amici briefs regularly play a major role in affecting how judges rule. They provide important information to the court that the parties overlooked. They cite relevant precedents of both the court and the highest courts of prominent democracies. They show whether there exists an international consensus. They describe the public interest in the case, and its broader consequences. Where the applicant's presentation is legally deficient, as is sometimes the case in some transitional democracies in Eurasia, amici briefs can overcome those deficiencies.

For these reasons, judges look to and often rely upon professionally crafted amici briefs from responsible organizations. The court frequently refers to amicus briefs in its judgments. More than one ECHR judge has stated that such briefs are welcome and needed to assist the Court. The U.S. Supreme Court is notably reliant upon amicus briefs. In the 2012-2013 term, amicus briefs were filed in almost 76% of the cases before that Court. In the 2010-2011 term, an

⁴ 8 October 2009

average of 9 amicus briefs were filed in each case. In that term, 63% of the Supreme Court decisions cited references to amicus briefs. Justice Stephen Breyer stated that amicus briefs "play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions." Justice Samuel Alito agrees, observing that "[e]ven when a party is very well represented, an amicus brief may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice."

Media Amici in the U.S.

Media outlets and NGOs in the U.S are robust participants in and beneficiaries of this system. Up to 2007, the Supreme Court decided 100 cases in which mainstream media institutions played a direct role as parties or amici. The most active 16 of those entities, such as major daily newspapers, broadcast networks, and publishers' or journalists' associations, submitted a total of 306 amici briefs in those cases. Amici briefs are frequently highly consequential. The New York Times, and the whole of the media, faced a crucial juncture when the court was deciding what became the famous defamation case of New York Times Co. v. Sullivan.⁵ The amicus brief filed by a competitor, the Washington Post, emphasized a novel argument that the Times had bypassed. The Supreme Court adopted the reasoning of the Post's amicus brief to create the famous "actual malice" standard. It is not unusual to find scores of media outlets and NGOs joining each of several media amici briefs in every Supreme Court case involving freedom of expression. As diverse as they are, the U.S media are united in the commitment that it is absolutely necessary for all to litigate vigorously and voluntarily to protect the freedom of expression for all.

⁵ 376 U.S. 254 (1964)

It would be an understatement to conclude that a strong correlation exists between this robust participation of the media community in Supreme Court cases on freedom of expression, on the one hand, and the thick protective shield which that court has clothed freedom of expression, on the other hand.

How U.S. media organizations and their lawyers produce the quality and quantity of their amici curiae briefs offers a model that might be reproduced elsewhere.

Bartnicki v. Vopper⁶ provides a useful example. A small town radio broadcaster, Vopper aired a tape recording of a private phone conversation between two teachers' union officials who discussed using violent methods to accomplish their collective bargaining goals. The law clearly criminalized such use of recordings. Relying on that law the union officials sued Vopper demanding damages for invasion of their privacy. Vopper showed that an unknown person made the illegal recording, left it for Yocum, who gave the tape to Vopper for broadcast. Vopper, who was not complicit in the illegal taping, aired the recording knowing that it was the product of an illegal act.

When the case was about to reach the U.S. Supreme Court, scores of lawyers in the media bar and many news executives correctly recognized the peril if the Court were to hold that the First Amendment did not protect this broadcast. Such a ruling would have far-reaching and very negative consequences on investigative reporting.

It was a matter of necessity to undertake a major legal effort to convince the Court not to diminish the right of the media to publish accurate information of public interest and concern where the information had been obtained in this fashion. What resulted was the filing of three amici curiae briefs, among others, by Dow Jones Company, the American Civil Liberties Union,

⁶ 532 U.S. 514 (2001)

and a coalition of 22 media organizations and related non-profits. The latter included nearly all major newspaper groups, most major daily newspapers, all major broadcast networks and the major media NGOs. The author of the media entities' brief was the preeminent First Amendment lawyer and scholar, Floyd Abrams. No less than thirty-three other media lawyers from all over the country assisted in its preparation. While the brief of thirty pages was a collective enterprise, Abrams' voice was unmistakable. Vopper's attorney, Lee Levine, was himself among the most respected media lawyers in the country.

What resulted was a ruling by the Court affirming the durability of the protection for the media even under such controversial circumstances. It is reasonable to speculate that the Court might very well not have reached this result without the expert and vigorous appellate advocacy of the media organizations.

The Bartnicki example is far from exceptional. Every year most major news organizations and NGOs write or sign on to about 30 different amici briefs in America's federal and state appellate courts. This will describe how these kinds of briefs are devised, written, and financed.

- *First*, the media industry and its lawyers learn of a disturbing case pending in an appellate court.
- *Second*, editors, lawyers and other stakeholders confer about the best legal strategies to appear as amici.
- *Third*, they reach agreement on such issues as overall strategy, choice of a leading law firm to write the brief, and the names of the media organizations which will sign on to the brief.
- *Fourth*, they discuss the fee to be charged by the drafting firm and the share of the fee to be contributed by each organization. The typical share amounts to about \$2,000.

- *Fifth*, the drafting firm submits draft briefs to lawyers for each organization, confers with them, and files the brief. The briefs are of the highest quality; the drafting firm achieves wide recognition, and frequently produces the brief at a substantial discount.

It is worth noting that vigorously competing media outlets routinely join coalitions. In their view, the imperative of protecting freedom of expression prevails over such competitive factors as market share, readership, editorial views, and profit margins. It is also worth noting that the most effective amici curiae briefs avoid statements or analyses of the facts in the record of the case. They avoid explicit advocacy for the rights of the media outlet which is a party. A persuasive amicus brief is just that: it serves to assist the court reach an outcome which is in accordance with the law and is fair and just.

Sea Change in Strasbourg

Returning to Strasbourg, the case for media organizations to abandon their non-involvement and become active interveners lies in the sea change within the Grand Chamber in recent years. In case after major case, the highly influential Grand Chamber has decided against the media, finding no violation of Article 10. The respected scholar, Dr. Dirk Voorhoof of Ghent University, surveyed what he termed "highly controversial" cases and concluded, "As has become common knowledge among 'Strasbourg observers' that the Grand Chamber of the European Court of Human Rights doesn't have the best reputation in terms of guaranteeing the right of freedom of information and expression."⁷

In addition to Bedat v. Switzerland described above, among other highly controversial cases criticized by Professor Voorhoof were these, where the Grand Chamber:

⁷ ECHR Blog, 7 April 2016

• Upheld the criminal conviction of a journalist for publishing an accurate account of a revealing confidential report for the Swiss ambassador handling his government's controversial negotiations to compensate Jewish families of Holocaust victims, surely a subject of profound public interest. Here, too, the journalist obtained confidential document legally. Stoll v. Switzerland,⁸ Grand Chamber, 2007

• Upheld the 17.5 hour detention and criminal conviction of a journalist covering a large public demonstration who merely disobeyed a police order to leave the scene. Four judges, including the Russian judge, vehemently dissented, criticising the majority for its failure to protect the press performing its watchdog role over the government's use of force. Pentikainen v. Finland, Grand Chamber, October 2015⁹

Some statements of ECHR judges will further document the sea change in Strasbourg. Judge Zupancic of Slovenia famously wrote, "Moreover, I believe the courts have to some extent under American influence, made a fetish of the freedom of the press". Von Hannover v. Germany(1) (2004).¹⁰ Judge Loucaides wrote, "[T]he case law on the subject of freedom of speech has on occasion shown an excessive sensitivity and granted over-protection...with freedom of expression . . ." Lindon-Otchakovsky and July v. France, 2007¹¹

It is significant that in deciding many, if not most, of these "highly controversial" cases, the court did so without the benefit of amici curiae briefs from media organizations. The Court thus decided fundamental issues of freedom of the press and the right of the public to be

⁸ 10 December 2007

⁹ 10 October 2015

¹⁰ 24 June 2004

¹¹ 22 October 2007

informed in the absence of scholarly research and advocacy by an expert non-party which could have advised the court how to avoid unnecessarily erroneous results.

A few excellent media NGOs intervene in some Article 10 cases, including, Media Legal Defence Initiative and Article 19. To this list should now be added the leading Ukrainian NGO, Centre for Democracy and Rule of Law (CEDEM) formerly Media Law Institute). CEDEM lawyers previously lodged four Article 10 applications on behalf of Ukrainian journalists, and supported an additional 32 press freedom cases, including five applications to the ECHR. This reflects CEDEM's concern about the protection of journalists in Ukraine, especially regarding numerous human rights violations in the occupied territories.

With a view to encourage other media organizations to intervene, CEDEM has filed amicus curiae briefs in two cases, important both in Ukraine and the whole of the Council of Europe community.

The first case was initiated by Slovo Batkivshchyna,¹² newspaper, founded by the political party in Ukraine. The newspaper published two articles about a member of parliament, and was ordered at trial to refute the statements found untrue and pay non-pecuniary damages to the politician and her party. Dealing with the fundamental questions concerning the efficacy of Article 10 regulating defamation actions brought by a political party and members of parliament against the mass media, CEDEM addressed the issues of whether a newspaper, founded and owned by a political party, should enjoy the same level of protection under Article 10 as other media and, what's more important, whether the award of damages to political party constitutes a violation of Article 10.

¹² Application no. 23335/07

The second case CEDEM intervened in, Saure v. Germany,¹³ raised before the Court one of the most debatable issues as to whether Article 10 of the Convention should be read as protecting a general right to access information held by public authorities. Having profound expertise in the implementation of the Information Act in Ukraine, in its amici brief CEDEM supported the idea by providing analysis of the international standards and practices in the field of freedom of information, emphasizing the value of seeking information for freedom of speech in a democracy, CEDEM's lawyers intervened in Saure v. Germany shortly before the Grand Chamber, with amici assistance from several media NGOs, decided Magyar Helsinki Bizottsag v. Hungary,¹⁴ described above. CEDEM's philosophy holds that intervening in Strasbourg represents one of the most effective instruments to influence development of an enabling legal environment for the media on both national (Ukrainian) and international levels.

How to Intervene

Media organizations and their lawyers will find that that intervening and submitting amici briefs is a straightforward process. It consists of the following four steps: monitoring the ECHR docket, identifying the Article 10 cases ripe for intervention, requesting the Court to permit intervention, and, once granted, writing and submitting the amici brief. Article 36, s.2 of the Convention and Rule 44 s.2 of the Rules of Court will guide prospective interveners.

Monitoring the Docket. The best practice is to make regular, at least monthly, visits to the ECHR website, www.echr.coe.int to locate Article 10 cases recently communicated to governments. This means that the Court has examined the journalist's application and has forwarded it to the target government for a response. The date of communication opens a

¹³ Applications no. 4550/15, 6091/16 and 8819/16

¹⁴ See Magyar, supra, note 2.

window of twelve weeks for prospective interveners to request the Court for permission to intervene.

Identifying the Article 10 Cases. The Court's communication to the target government consists of a few pages summarizing the facts, provisions of national law, the applicant's complaint of an Article 10 violation, and the legal issues raised by the Court. Depending on the issues, media organizations and their lawyers will decide whether to seek to intervene. Recognizing the serious challenges presented by the Court's sea change, the more well-reasoned interventions the better.

Request to Intervene. Within the twelve-week period, media organizations will submit a letter to the President of the Section or Chamber. The letter describes the media organization's experience and expertise in media and media law and outlines the legal issues to be addressed in the proposed brief.¹⁵

Writing the Brief. The Court grants most such requests from reputable organizations. It will prescribe the maximum length and due date for the brief and may caution the intervener to avoid arguments on the facts or merits. Examples of superior interveners' briefs are presented in publications by Professor Philip Leach and Paul Harvey.¹⁶

The sea change is an undeniable fact. It is not irreversible. In order to energize the media community to act to help reverse the sea change, we urge an action plan that aims to:

- Educate the media community of its right and opportunity to intervene,

¹⁵ CEDEM submitted the letter shown in the Appendix seeking permission to intervene in an important Article 10 case; the Court granted permission and CEDEM submitted its brief. The Court seems to prefer the terms "written comments" or "observations" rather than "amicus curiae" briefs.

¹⁶ Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, 3d ed., 2011, pp. 49-52. Harvey, *Third Party Interventions before the ECHR: A Rough Guide*. <http://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-echr-a-rough-guide/>

- Show that unless the media community acts, the consequences to freedom of expression will become even worse,
- Arouse interest and commitment within the media community to become proactive in intervening,
- Provide practical training to media outlets, NGOs and media lawyers in the skills of intervention and writing effective, persuasive amicus briefs,
- Provide seed money to media lawyers, through NGOs, to pay them to write such effective briefs,
- Work with such institutions as the European Centre for Press and Media Freedoms and Media Legal Defence Initiative to coordinate filing of amicus briefs, and
- Assist all stakeholders to self-organize, to monitor the ECHR docket carefully, and to insure that excellent amicus briefs are submitted in all, or nearly all Article 10 cases.

Only with active and coordinated measures such as these will be the media community, and the public at large, create a legal environment protecting both freedom of expression and the free flow of information to that public.

The authors are Alina Pravdychenko and Vita Volodovska, lawyers in the Media Law Institute, Centre for Democracy and Rule of Law (CEDEM), Kyiv, Ukraine; and Richard N. Winfield, professor of comparative mass media law, Columbia Law School and co-chair, media law working group, International Senior Lawyers Project.