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Litigation, Privacy and the Electronic Age[†]

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I. INTRODUCTION

^{¶1} It is a pleasure to be with you this afternoon and to have an opportunity to discuss one of the major challenges facing the courts - adaptation of law and the legal system to the special problems and opportunities created by the stunning advances in information technology that we all have seen and presumably will continue to see for the foreseeable future. Some of these problems have drawn a vast amount of attention, notably the intersection of copyright law and the Internet, as evidenced by the Napster, DVD and MP3.com cases. But there is another problem of at least equal importance that has drawn considerably less attention - the increasing clash between the privacy interests of litigants, both individual and corporate, and the vast explosion in the availability of information in our society. It is a conflict, moreover, that in many ways is just beginning and that will command more and more of our attention as time goes by.

II. THE GENESIS OF THE PROBLEM

^{¶2} The notion of a problem concerning the privacy interests of litigants initially might strike one as involving an oxymoron. After all, openness is a central value in our society and our legal system. The Sixth Amendment guarantees criminal defendants the right to a public trial. Court records long have been presumptively open to public inspection.¹ Gag orders are subject to the most intense constitutional scrutiny.² But despite the apparent transparency of the system, the reality long has been very different except in the most extraordinary cases.

A. The Practical Obscurity of Information

^{¶3} To begin with, for a great many years, extending well into my early years in practice, the very existence of litigation that might attract public attention or otherwise threaten privacy interests usually was not widely known. While the courthouse doors and files were open, there were far too many courthouses to visit in the hope of finding something of interest. In fact, there was at least one major state - New York - in which it was possible until recent years to start a lawsuit and litigate it virtually to the point of trial without the creation of any public record of its existence. So unless one side or the other went to the press or another interested audience, there often was no practical way to learn of a lawsuit.

^{¶4} Even if the existence of a lawsuit was known, it used to be - and to a considerable extent still is - hard for an outsider to find out what was or is going on. Pretrial exchanges of documents typically take place between the attorneys and are not on the public record. Deposition transcripts in some courts usually are not filed and so often do not become available for public inspection.

^{¶5} Finally, and perhaps most important, the means of public dissemination - the newspapers, magazines, radio and television - usually were broad spectrum media. The only cases that drew their

attention were those of interest to a large, usually general interest audience. So litigation did not pose much of a threat to the privacy of ordinary people or of most businesses.

B. Technological Advances and the Erosion of Privacy

^{¶6} This practical obscurity of information generated in all but the most exceptional cases has been eroded by technological advances. The difficulty of finding litigation involving a particular person or entity began to disappear in the 1970's with the introduction of Lexis-Nexis and then Westlaw, which made it a simple matter to find many cases. And today, it is much easier. We now have a case index on the Internet that allows anyone to determine whether any individual or entity is a party to a federal law suit anywhere in the country and, if so, the title and docket number of the case. PACER, another system in the federal judiciary, gives access to the docket sheets in federal cases anywhere in the nation. Many courts, including my own, have web sites on which many judges post decisions and even routine orders. And the most significant change from the courts' point of view is right around the corner. The federal courts have been developing an electronic case filing system in which all or most litigation documents will be filed in electronic form and accessible electronically. That system already is in use in a few courts on a prototype basis, and we are not far away from rolling it out to the entire federal system.

^{¶7} These changes have been paralleled by changes in the media. The development of cable made it feasible to generate content for narrow audiences. This in turn meant that litigation, sometimes even routine litigation, suddenly was of interest to some content providers. The most notable example, of course, is Court TV, which began broadcasting trials live.

^{¶8} Cable, however, has its limits. The market for coverage of routine trials is limited. Many courts do not welcome cameras in their courtrooms. So cable has not, as far as I can see, really taken off. But an even bigger change has come with the Internet.

^{¶9} The Internet has created an infinite demand for content. There is someone out there who wants to post almost anything one can imagine. There are web sites maintained by interest groups, web sites following particular kinds of litigation, and web sites run by law firms. Search engines make all of this readily accessible to anyone in the world. The potential for invasion of privacy is enormous.

^{¶10} The judiciary has been trying to accommodate this changing world as technology has developed.

III. CONFIDENTIALITY ORDERS

^{¶11} The earliest manifestation of the clash between the presumptive openness of court proceedings and privacy, I think, was the development of the now long-standing problem of confidentiality orders to protect information turned over in the discovery process and sometimes used at trial.

^{¶12} The starting point is Rule 26(c) of the Federal Rules of Civil Procedure. That rule provides that a court may take any appropriate action "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" as part of the discovery process, including prohibition of the discovery of its disclosure. All that is required is a showing of good cause. And as the practical obscurity of information in court files has eroded, controversy has developed regarding the circumstances in which confidentiality orders should be entered and the form that such orders should take.

A. Modern Litigation and Restrictions on Discovery

^{¶13} The broad contours of the arguments are plain enough. Proponents of high transparency argue that courts do public business and that the public therefore has a right to know how they do it.

Further, they say, certain types of litigation such as products liability cases often generate information, the dissemination of which is in the interest of public health and safety. On the other hand, there are those who argue that the fact that one is involved in a lawsuit ought not to give any pair of curious eyes the right to sift through sensitive business or personal information.

¶14 I am not here to propose a resolution of that debate at an abstract level. Indeed, I suspect it cannot be resolved at an abstract level. But I do want to focus on the intensely practical consequences of the debate for the effective handling of litigation in federal courts.

¶15 The showing of good cause that Rule 26 requires for entry of a confidentiality order is readily and swiftly made where the material in question is the paradigmatic trade secret, such as the secret formula for the manufacture of a popular soft drink. Such particularized determinations of good cause once were common, back when it was necessary to protect only the crown jewels with such an order because the chances were great that no one would even know of the lawsuit. But that situation has changed.

¶16 Modern litigation of all sorts requires disclosure of vast amounts of information of substantial sensitivity to the person required to make the disclosure. Antitrust litigation frequently requires disclosure of pricing data, strategic plans, and a host of other material which the disclosing party is loathe to place on the public record or reveal to its competitors. Employment discrimination litigation almost invariably involves the disclosure of personnel evaluations and salary information, to name just a couple of areas, not only of the plaintiff but of the plaintiff's comparators, and sometimes of quite scandalous allegations against or comments about various individuals. Even personal injury cases typically require disclosure of plaintiffs' medical records which often contain highly sensitive data. In fact, almost any case involves one or another sort of sensitive information. And now that information in court files is so readily found and disseminated, litigants are insisting on far broader protection and they want it in a great many cases.

¶17 This change in the climate, I suggest, makes it plain that if parties seeking discovery insisted upon a showing of good cause as to each bit of sensitive information, the entire system of civil justice would grind to a halt. Both the lawyers and the judges would have little time in which to do anything but litigate the good cause issue, document by document and page by page. So the system has evolved to accommodate this concern.

¶18 In recent years, sophisticated litigators have come to understand that the costs in time, their clients' money and the courts' good will of insisting on item-by-item good cause determinations far outweigh the potential benefits. Lawyers generally enter into a fairly standard protective order that permits either party, as well as non-party witnesses, to designate as confidential documents or other information that the producing party in good faith asserts is entitled to protection. Once the information is designated as confidential, the other side is obliged to use it solely for purposes of the litigation and not to disclose it to others unless and until the court determines that protection is inappropriate. The confidentiality designation, however, does not bar the party seeking the disclosure from challenging the confidentiality designation before the court. If such a challenge is made, the party that designated the information confidential bears the burden of persuading the court that good cause exists for according the information the relevant level of protection. And there are variations on the theme, including for example an even more secure level of protection which restricts dissemination of extremely sensitive data to attorneys or even to outside counsel. The key point, however, is that confidentiality designations made under such orders seldom are challenged, so the courts and the litigants usually are spared the burden of litigating the good cause issue.

B. The Limits of Confidentiality

¶19 As a general matter, orders of this kind are a perfectly practical solution to what otherwise would be a very troublesome problem. Although one of the magistrate judges in our court recently

declined to approve such an order absent a detailed showing of the need for it,³ I believe that this is an exception to a broad tendency of district courts to approve and even to require such orders over opposition.⁴ The fact is that good cause exists to restrict the dissemination of at least some information turned over in much modern litigation. If the parties voluntarily agree to protect confidentiality, there usually will be no reason to question their judgment. But that of course does not completely address the problem for two reasons.

¶²⁰ First of all, as I indicated a moment ago, there are some kinds of litigation in which the private interests of the parties are not the only relevant considerations. Discovery in an action involving a claim that a broadly distributed product is unsafe, for example, may implicate public policy concerns that could make a confidentiality order inappropriate, whatever the wishes of the litigants before the court. I express no view on what might be the proper course in such a case, but litigants must be aware that courts may well take such concerns into account, even against their expressed wishes.

¶²¹ Second, it is important to understand that there may be limits to the protection that parties to such a consensual protective order may rely upon. Where confidentiality protection rests on a judicial determination of good cause, the parties may rely upon the maintenance of confidentiality even in the face of a subsequent challenge by a non-party.⁵ Where there is no judicial determination of good cause, however, the parties to such an order take their chances that a court later will conclude, in response to a challenge by the press or another non-party, that good cause is absent and require disclosure.⁶

¶²² But confidentiality orders now are beginning to look like the thin edge of the wedge as respects privacy in litigation. There now are other concerns, including electronic case files or ECF.

IV. ELECTRONIC CASE FILES AND THE INTERNET

¶²³ When ECF is in full operation, most court papers will be filed in digital form. They will be accessible over the Internet. Someone interested in digging for information on someone already is able to search an Internet-accessible case index in order to determine whether the subject is or has been a party to litigation in any federal court in the nation. Having located the titles and docket numbers of any such cases, the investigator then will be able to go to the courts' web sites, scroll through the docket sheets, call up on the screen an image of every document in the court file, and download or print out whatever may be of interest unless, of course, public access is limited in some way. That information may be of only private interest to the searcher. Or it may be of interest to a somewhat broader audience, in which case its availability will be promoted on the Internet.

¶²⁴ At the moment, the Federal Rules provide that "all papers . . . required to be served upon a party . . . shall be filed with the court within a reasonable time after service" although district courts have the authority to exclude discovery papers from this requirement.⁷ The content of court files therefore often includes very personal information. Most court files contain litigants' home addresses. Case files in personal injury suits often contain the most intimate sorts of medical information. Bankruptcy files contain debtors' Social Security numbers. The examples go on and on. And ECF, unless the current system is changed, will end what is left of the practical inaccessibility of nominally public court files by making them available and searchable anywhere in the world. The danger of mischief is serious.

¶²⁵ One partial answer is plain enough. Under existing rules, district courts may take advantage of Rule 5(d) to prohibit the routine filing of discovery materials. We have done that already in the Southern District of New York, although I am frank to say that I gather we did so because we do not have room for it and not out of concerns about privacy. But this goes only part of the way because much sensitive information finds its way into motion papers and other filed materials.

^{¶26} As so often is the case, the technology initially got out in front of these issues. But the relevant committees of the Judicial Conference of the United States have begun to focus on the privacy issues. A number of policy alternatives are on the table, including redefinition of what constitutes the "public file" in a federal case, limiting access to ECF or to certain categories of information within ECF, and imposing a waiting period between a request for access and its grant in order to permit the raising of objections. These and other possibilities deserve close and prompt attention.

V. LITIGATION AS CONTENT

^{¶27} Thus far, I have been discussing information, the disclosure of which is sought because it is necessary for the resolution of the case before the court. But the increasing dissemination of information of limited general interest to narrow audiences that are intensely concerned with it has broadened the extent to which material concerning specific lawsuits is of interest to particular segments of the media. And this has created another risk - the use of a lawsuit, or of particular events in a lawsuit, to generate content for media outlets rather than to obtain evidence useful in deciding the case. Let me give you two recent examples of what appear to me to have been efforts to use litigation to generate media content rather than to accomplish a genuine litigation purpose.

^{¶28} The first was in a case called *Paisley Park Enterprises, Inc. v. Uptown Productions*,⁸ which was an action brought by an entertainer who then styled himself as The Artist Formerly Known As Prince and now, I gather, has reverted to Prince. He and others sued the operators of an Internet web site devoted to Prince - something like an electronic fan club. The defendants promptly sought to take Prince's deposition and to record it on videotape. The plaintiffs sought a protective order barring the videotaping of the deposition on the theory that the defendants did not need the videotape for any legitimate litigation purpose, but intended to post the videotape on their web site in order to increase its traffic. The defendants opposed the motion but were unwilling to agree not to post the videotape on the Internet although they were unable to offer any reason for permitting its public dissemination. So while the court permitted the videotaping to proceed on the ground that it might be useful in cross-examination at trial, it imposed stringent conditions designed to ensure that the tape was used only for purposes of the litigation and not posted on the Internet.⁹

^{¶29} What appeared to me to be an analogous incident occurred in the DVD case that I tried this summer, *Universal City Studios, Inc. v. Reimerdes*.¹⁰ As I am sure you all know, that was a suit by major motion picture studios under the Digital Millennium Copyright Act¹¹ to enjoin a web site operator from posting or linking to a computer program that decrypted DVDs containing copyrighted motion pictures. During the course of the pretrial proceedings, the defendants conducted a deposition of Jack Valenti, president of the Motion Picture Association of America. Here is what I wrote about it at the time:

Defendants' deposition of Jack Valenti . . . consisted in substantial part of hypothetical questions, efforts to elicit legal opinions from a lay witness, and argumentative questioning. Defendants subsequently posted the deposition transcript on their web site. While they had a right to do so, the nature of the deposition and the fact of the posting support the view that the deposition was largely unnecessary and conducted as it was for purposes unrelated to the resolution of the factual issues in dispute in this action.¹²

VI. CONCLUSION

^{¶30} The point of all of this, I suggest, is straightforward. Technology is having a dramatic effect on litigation by making everything that takes place in relation to a lawsuit instantly and practically

available to all comers. The practical obscurity that protected the privacy of information generated in litigation, despite its theoretical public nature, is rapidly disappearing. That in turn imposes two important responsibilities on courts. The first is to rethink in light of new circumstances the boundary between what is public and what is private in litigation, taking into account the need for public accountability and the legitimate privacy interests of litigants. The second is to exercise heightened vigilance lest their processes be used for purposes other than those for which courts traditionally exercise their powers to compel the production of information. And there is more at stake here than simply accommodating the competing interests in personal privacy and public accountability.

³¹ We all are aware of the burgeoning of alternative dispute resolution mechanisms. One of the reasons for their growth is the privacy they afford. There is a growing dissatisfaction with the fact that our system of civil justice sometimes does not offer adequate protection for this important value. That dissatisfaction will increase exponentially if we do not adequately deal with privacy in the electronic age. We have to recognize that the public system of civil justice is competing with these free market alternatives just as surely as the post office is competing with Federal Express and the Internet. And the stakes are the same. If the public system cannot give the customers what they want, the customers who can afford to go elsewhere will do so.

³² We don't have to look far to imagine the consequences of an expansion of that trend. There are indications all around us in New York and other cities - in their school systems, their housing stock, and in countless other examples. If the public justice system cannot give appropriate protection to privacy interests, we increasingly will have ADR for the rich and litigation for the poor and those lacking any choice in the matter.

³³ Those of us who believe that a system of public civil justice - one that is fair to all and embodies the values of our society - is at the very heart of the notion of a government of laws, rebel at such a notion. So we must understand the potential impact of the electronic age on privacy in litigation. We must focus attention on this issue and assist the federal and state courts in striking the appropriate balance between privacy and public access as technology increasingly makes readily available to everyone that which previously lay unknown in dusty case files in clerks' offices and courthouse basements.

[†] Edited transcript of remarks delivered to the Yale Law and Technology Society on November 6, 2000.

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¹ See, e.g., *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995); *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995).

² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

³ *Excelsior Ins. Co. v. Yang*, No. 99 Civ. 10769 (RPP) (KNF), 2000 WL 628713 (S.D.N.Y. May 16, 2000).

⁴ See, e.g., *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); *DeCarlo v. Archie Comic Pubs., Inc.*, No. 00 Civ. 2344 (LAK), 2000 WL 781863 (S.D.N.Y. June 20, 2000).

⁵ See *Geller v. Branic International Realty Corp.*, 212 F.3d 734 (2d Cir. 2000).

⁶ See *Greater Miami Baseball Club L.P. v. Selig*, 955 F. Supp. 37 (S.D.N.Y. 1997).

⁷ FED. R. CIV. P. 5(d).

⁸ 54 F. Supp.2d 347 (S.D.N.Y. 1999).

⁹ *Id.* at 349.

¹⁰ 111 F. Supp.2d 294 (S.D.N.Y. 2000).

[11](#) 17 U.S.C. §§ 1201 *et seq.*

[12](#) Universal City Studios, Inc. v. Reimerdes, 104 F. Supp.2d 334, 342 (S.D.N.Y. 2000).

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