

Fall 2005

An Evening With Richard D. Parsons

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by:
Richard D. Parsons

This evening was sold to me as an informal event. Even the name of the event, "An Evening with Dick Parsons," suggests informality. "Well," my wife said, "what are you doing tonight?" I told her that I was going to New York Law School because they are having were event called "An Evening With Dick Parsons," to which she replied, "Oh, those poor people."

Rather than preparing a long and windy script that may or may not be of interest, I thought that I would just give some reflections (which I will come to in a minute). So I figured I would keep my remarks grounded in the impact of law on media. I thought I would give some perspectives, not from the point of view of a lawyer (as I am by training), but from the point of view of a businessman, in terms of the intersection of law and business, and in this case, the business of media.

Last night, after thirty some-odd years, the identity of "Deep Throat" was finally revealed¹. The timing was propitious because of something else that is going on in our court system. Our company, Time Warner, in addition to being the largest media and entertainment company in the world has two

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¹ W. Mark Felt, the Federal Bureau of Investigation's second ranking official during the Nixon administration, was revealed as "Deep Throat" on May 31, 2005. David Von Drehle, *FBI's No. 2 Was 'Deep Throat,'* Washington Post, June 1, 2005, at A1.

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major characteristics. For one, it has a highly valued journalistic heritage. Second, it is a content creation company. We create content that is intended to either inform or amuse and then distribute it. I will touch on these observations because they are important matters in the law.

Let me start with “Deep Throat.” Every American learns in school that there was an man who informed the press about the events that resulted in the ultimate resignation of President Nixon and the breakdown of his Administration. The key to this was that someone on the inside felt sufficient security in terms of his relationship with the press and their ability to keep his identity secret to come forward. This remained a secret for some thirty odd years.

As it happens, a case right now involves one of our reporters, Matthew Cooper, who works for *Time Magazine*, and Judith Miller, who is a *New York Times* reporter. Both Judith Miller and Matt Cooper have been called before the grand jury that is investigating a leak regarding the revelation of the name of a U.S. Central Intelligence Agency agent serving in Africa². A special prosecutor³ was brought in to determine who leaked this woman’s name, which is Valerie Plame. She was a State Department employee, but worked with the Secret Service in Africa. Her name was revealed in a series of articles, and that is against the law; you cannot lawfully and intentionally reveal the name of CIA agents, because obviously that is not a good thing for their long term retirement plans.

Neither of these reporters first broke the story⁴ or disclosed the name. In fact, their reports followed up the initial reports; but the special prosecutor who was looking into this called them and asked them to reveal their sources –

² On July 6, 2005, Judith Miller, a reporter for *The New York Times* refused to testify and was jailed. Matt Cooper, a reporter for *Time Magazine*, agreed to testify after getting express permission from his source, Karl Rove. Tom Hamburger & Sonni Efron, *A CIA Cover Blown, A White House Exposed*, L.A. Times, Aug. 25, 2005, at A1. Judith Miller subsequently disclosed the identity of her informant as I. Lewis Libby Jr., former aide to Vice President Cheney, who as since been indicted on related charges. *Cheney's top aide indicted; CIA leak probe continues*, available at <http://www.cnn.com/2005/POLITICS/10/28/leak.probe/>.

³ Patrick J. Fitzgerald is the special prosecutor charged with looking into how the media learned that Valerie Plame was a CIA operative. *Id.*

⁴ Columnist Robert Novak was the first journalist to unmask the identity of Valerie Plame. *Id.*

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you know, “how did you get the name,” “who did you talk to,” etc. Both of these reporters, because they got the name in a confidential matter, refused to give up the name, and the trial court found that there was no federal shield law. Most states (including New York) have shield laws, which grant a certain confidentiality or sanctity to a relationship between a reporter and a confidential source, much like the law that grants sanctity to communications between husbands and wives, or sometimes between psychiatrists and patients, or priests and parishioners. However, the trial court found that there was no federal shield law, and it directed these reporters either to give up the name or be in contempt of the court. Also, since our reporter had shared his source with his editors at Time Inc., the court directed Time Inc. to give up the source now as well. I will be the first to tell you I do not know the name. It is a very important fact; I have been all over the reports about this case, but in fact I stayed far away from the anonymity issue. In any event, the court said that the reporters had to either give up the name or go to jail. The corporation obviously could not go to jail, but it could be fined heavily.

So we and the reporter appealed that case, first to the circuit court then we asked the Supreme Court to hear it. The appellate court affirmed the decision of the lower court.⁵ We asked the United States Supreme Court to grant certiorari, but it ultimately declined to.

From my perspective, as someone who runs an enterprise, at the end of the day, this case shows the importance of journalism. I became convinced by my journalists that in the absence of laws that will protect people, particularly people on the inside of governmental agencies or big corporations who have information, the public will not be informed. But who could be punished for sharing that information? Many of these people would not even come forward.

So in the “Deep Throat” case the informant’s actions are debated by people who thought that “Deep Throat” was a hero and others who thought that “Deep Throat” was sort of an arrogant employee. The course of this nation would have been altered in the absence of the revelations that came from “Deep Throat.” How would it be altered? Where would we be today? How would things be different? I do not know. Whether things would be better or worse, I do not know; but things would clearly not be where they are today. The nation would not have taken the course it did, and many believe that truth ultimately will set you free, and we would be in a lesser position today, had it not been for the actions of “Deep Throat.” Had he not had the

⁵ In Re Grand Jury Subpoena (Miller), 397 F.3d 964 (D.C. Cir. 2005).

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confidence to come forward, what he shared with these reporters would never have become public. It does not mean that his revelations would not be tested against other facts, or that these reporters would not exercise judgment in terms of what he had to contribute. But this issue is an important part of what makes America unique.

The argument for the federal shield law ultimately finds its roots in the First Amendment. It is implied that the Founding Fathers thought that it was important that people could speak freely and state points of view that were not consistent with the point of view of a King or the government, and that people ought to be able to do this in a way that did not result in reprisals. Whether the Supreme Court would find this to be a First Amendment protected right, or whether they would find that it was part of the common law is unclear. But a shield law is essential to the functioning of a free press. The objective of that press is to inform the public. Otherwise, if people with information are prevented from talking because of fear of reprisal, then basic information is kept from the public. So even though Watergate and "Deep Throat" are history, this is being replayed again today.

My second point is that we are a journalistic company and create content. A lot of it is animation, movies, television shows, and programming, and a lot of it is print. Until we spun off our music company, we were the world's largest copyright owner. We have more content that is protected by copyright than almost any other American corporation.

Because of the march of technology we are now moving into a "digital age," where bits of information, sounds or images can be reduced to electronic impulses and moved around to any number of places and recreated almost perfectly. In the old days, if you made a video tape of a television, and then you lent it to a friend, and they made a video and lent it to a friend, two or three generations down the line you had a pretty poor quality tape. In today's world, because digital recordings have reduced information to zeros and ones, you can make not only perfect copies of almost any recorded voice, moving image, or data, but can then send them by the Internet to one or a million or a billion folks around the globe. This technology has stressed the rights of people who own the underlying copyrights. We used to be in the music business, and one of the reasons we are not anymore is because that business has been, not destroyed, but substantially affected – even say afflicted – by the ability of people to pirate music, essentially through what is called file sharing between computers. Literally billions of people have access to this. The same phenomenon now threatens the visual arts, movies, television programming and here again, ultimately, this battle is going to be fought out in courts.

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Those who are on the side of sharing point to a case decided back in 1984, the *Sony Betamax* case⁶, in which the Supreme Court said that the mere fact that Sony manufactured a video recording device was not an infringement on the rights of the underlying copyright. Allowing people to make copies of television programs at home and then play them back at some later time was called “time-shifting”, which was a “fair use.” Copyright laws allow using the intellectual property of another under the doctrine of fair use.⁷ If you buy something and you want to enjoy it in different ways, so long as the use is fair and not commercial, copyright laws permit that. So many people feel that in a digital world the *Sony Betamax* precedent enables people to copy and store content and send it around the world over the Internet. There is the *Grokster* case that was decided on June 27, 2005, the Supreme Court held that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.⁸

Recently I was in China. One of our magazines, *Fortune*, had a global conference. We brought several hundred CEOs from around the world to Beijing to meet some of their Chinese counterparts to figure out how the world could do more business with China, and how China could do more business with the world. I always have dinner with or make some time to meet with the local artistic community. Now, two facts are of interest: China is probably the foremost pirating market. Ninety-five percent of the content that there is pirated -- someone will either get a “Harry Potter” disk, or they go to a movie theater with a camcorder. They make a digital copy of the movie and put it up on the Internet. In China big factories can pump out literally millions of disks, and vendors sell them on the street corner for a dollar. It is the same thing with music CDs – virtually any consumer entertainment is pirated in China. Ninety-five percent of what they get is pirated in the country.

Why? One reason is because they do not have a rule of law that respects individual property rights, or intellectual property rights. The second reason is because they do not enforce what laws they do have. Their creative community is pretty barren. The National Museum of China, which is actually not on the mainland of China, but located in Taiwan, reflects the

⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷ 28 U.S.C. §101

⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

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creativity of that five thousand year-old society. The Chinese at one point had by far the most developed arts and culture in the world. Today this is not so. They say “well, we cannot make any money. “ “We cannot make a living creating art.” Why? “Because whatever we create gets stolen.” So for years there was an entire culture with a glorious history in terms of arts and culture. There has been a sort of catastrophe, because they do not have a legal process or a legal system to protect the rights of the creators of intellectual property. Therefore, they do not have the incentives that come out of ownership of intellectual property and encourage creative people.

There always will be people with creative urges who want to create. But in order to have a vibrant, thriving, healthy community and industry, there must be laws to translate this into some form of self sustaining commerce. Anybody who thinks that all content should be free and everybody ought to have access the products of someone else’s mind, ought to reflect on the places in the world where you have vibrant, thriving, creative communities and creative output. My observation is that the places without laws protecting content simply do not have those who then can invest in a vibrant, creative community.

As we think about the intersection of law and media in our business, it hits right at the center of the bull’s eye. Without certain laws people may not know whether they are protected and how their individual rights can be protected. People simply abandon that field and do something else.