

# TRIBUNE

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## HAND DELIVERY

May 30, 2003

Floyd Abrams, Esquire  
Chairman  
Commission to Examine Future  
of Court Documents on the Internet  
c/o New York State Unified Court System  
25 Beaver St.  
New York, NY 10004

Re: Statement of Newsday, Inc. and Tribune Company

Dear Mr. Chairman and Members of the Committee:

Newsday, Inc. and the Tribune Company are grateful for the opportunity to submit comments relating to issues that arise from providing access to court files electronically and through the Internet. Besides *Newsday*, the Tribune Company publishes 11 daily newspapers, including the *Chicago Tribune*, *Los Angeles Times*, *Orlando Sentinel*, *South Florida Sun-Sentinel*, *Baltimore Sun* and *The Hartford Courant*. It also operates 26 television stations throughout the country, including WPIX in New York and WEWB in Albany.

My name is David Bralow and as Senior Counsel for Tribune Publishing, I am pleased to take this opportunity to address the issues before this committee.

#### A. The Policy and Presumption of Access

As with any discussion about access to judicial records, particularly electronic copies of court records, the starting point must be the acceptance and reaffirmation of a commitment to an open and transparent judicial system. The United States Supreme Court described such openness of process as “an indispensable attribute of any Anglo-American” jurisprudence. Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 569 (1980). But the tradition pre-dates modern observation. In 1820, when M. Hale wrote The History of the Common Law of England, (6<sup>th</sup> ed. 1820), he extolled the value of judicial transparency because: It discouraged perjury and the misconduct of the trial participants and assured that decisions were not made as a result of secret bias or partiality. Indeed, commentators as early as W. Blackstone in 1583 and J. Wigmore on Evidence in 1765 have recognized the important benefits of access to judicial proceedings and records. To Justice Oliver Wendell Holmes, the privilege that arises from reporting on judicial proceedings and access to those proceedings “stand in reason upon common ground.” Crowley v. Pulsifer, 137 Mass. 392, 394 (1884).

This “prophylaxis” of access is acknowledged in every state in this country. Its recognition is rewarded by presuming access to judicial records and proceedings and by requiring those that seek to prevent access to judicial records to demonstrate a compelling interest to justify such closure.

It is our position that any debate about access to these same judicial records in an electronic form or through the Internet must be informed by the same presumption. Discrimination between byte and paper – the imposition of restrictions on one but not the other -- requires a demonstration that access to the electronic record causes a qualitatively different effect than access to the paper record. And the difference, itself -- not simply the information -- must jeopardize some compelling interest. See e.g. In re: Petition of Post Newsweek Stations., 370 So.2d 764 (1979) (this standard is a reiteration of a standard created when cameras were permitted in Florida courtrooms).

To recognize such a difference threatens the presumption of access, itself. If access to judicial records is presumed to be in the best interest of the community in which we live -- and that is not doubted -- how can permitting more convenient, more accurate access to those same records result in a compelling threat?

If anything, the removal of barriers to courthouse records empowers the citizen in a way that was arguably lost in America and reinvigorates a core value associated with public observance of the judicial system. As the United States Supreme Court recognized in Richmond:

In earlier times, both in England and America, attendance in court was a common mode of "passing time." With the press, cinema and electronic media now supplying the representations of reality or the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet [i]t is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the administration of justice. Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim as functioning as a surrogate for the public.

448 U.S. at 572-73, (citations omitted). By providing records electronically, the court system has the possibility of restoring direct citizen contact with the judicial system and removing a media filter.

#### B. Tangible Benefits to the Public and the Media

This is not to say that *Newsday* and Tribune believe that the Press's function will be made obsolete by any such direct citizen involvement. To the contrary, we believe that access to judicial records in an electronic form improves the media's ability to fulfill our mission. Electronic access increases timeliness and accuracy and offers the reporter tools to discern trends that affect society and the judicial system.

Timely examination of court records is an indispensable part of the newspaper's craft and access to the records electronically will allow greater accuracy and more complete reporting. This is true not only for long-term projects, but it is also essential for daily journalism and articles that get published on deadline.

For daily reporting, this cumbersome and out-dated means of storing and retrieving information on important judicial developments creates a news barrier that burdens the newspaper to the disadvantage of

its readers. In addition to the burden on the court personnel to retrieve and copy files, sometimes, the "hard copy" paper method makes it impossible for the reporter to gather critical information. There are numerous incidents when our reporters are stymied and the readers deprived because the court file is in the judge's chambers or in the possession of attorneys. If access were permitted online, a newspaper could rely on the court file rather than the exigencies of extra-judicial statements.

There are other logistic considerations. In Suffolk County, for instance, there are state courts in five different locations - some 30 miles apart - and court clerks' offices in two of those locations. Court personnel often cannot locate a file or even say what courthouse the files is in. A reporter or any citizen is forced to drive back and forth just trying to find the file. The same holds true in Nassau County, even though the courts are closer together - 15 miles apart at most - but anyone who has driven there knows that traffic eats up valuable time even more so than distance.

There are other problems that can be resolved by electronic access. Without the benefit of authority or a sealing order, clerks, attorneys and prosecutors remove documents from files, even in criminal cases, based on the mere belief that the document should not be public or will impair an ongoing investigation. An electronic records retrieval system will compel trial participants to seek appropriate sealing orders rather than exfoliating the file.

Electronic filing may also resolve problems with uniformity. For example, a Newsday reporter examined hundreds of Surrogate Court files to document the fees attorneys received in trust and estate cases. Sometimes, the petition for fees and the Judge's order establishing the fees were missing. While the Courts have recently revamped its rules to protect against such lapses, we believe a process whereby material submitted to the Court is immediately placed online would solve this problem.

In addition to enhancing the accuracy and timeliness of coverage of specific cases, our ability to serve the community with complete and accurate news is enhanced when full text searching is permitted. That type of functionality permits the public to locate court records applicable to particular subjects.

Access to judicial records have helped Newsday produce articles of profound impact. For instance, Newsday published a series about Catholic priests who were allowed to continue their ministries despite being accused of sexual abuse. Another series focused on the prevalence of inmates who were beaten by correction officers and the medical care of inmates at the county jails. Critical information for both series originated from court records that had to be reviewed at the courthouses by reporters. However, without access to the files online, the process was expensive and time-consuming, creating barriers both to the Press and the public. With online access and full text searching, we can do in depth reporting more often and with greater insight and accuracy.

If full search access is not economically feasible, at a minimum, we request the ability to search using names of the parties, the county, attorneys/law firms of record, case or index number. It is only with an index system that that an electronic filing system is useful.

### C. Countervailing Interests in Privacy and Identity Theft

Against this backdrop which validates society's interest in an open judiciary, I do not ignore the concerns expressed about potential infringements on informational privacy and threats of identity theft. I have several observations.

First the notion of privacy must be defined with specificity before it can be addressed in a meaningful way. Privacy is an elastic concept. The unexamined trend is to distort that concept to unrealistic expectations of anonymity, comprehending even common information that is routinely found on the public street, in a phone book or on the Internet. Such an unspecified, generalized concern, cannot be the starting point for evaluating competing interests between access to judicial records and privacy. Furthermore, in New York, the notion that some information is private demands even greater attention because this State does not recognize a cause of action for disclosure of private facts.

As I stated above, before a notion of a private fact can meaningfully restrict access to a judicial record, the fact, itself, should be examined in relation to the harm caused by permitting it to reside in an open court file. This is nothing more than restating that individual judges are in the best position to protect whatever privacy right exists in any specific court files. There have always been adequate measures for

litigants and third parties to request the sealing of information based on well-established -- albeit difficult to meet -- standards. Furthermore, courts have been uniquely qualified to balance the harm against the presumption of access in case-by-case determinations. Requiring a court to determine the precise effect of online access to any specific judicial record neither significantly expands judicial labor nor requires a Court to make a decision without well-recognized standards .

A hypothetical toxic tort claim in context of Internet access to the judicial file illustrates the point. Assume that a lawsuit is filed in Nassau County against a chemical company that involves personal injury claims. The court file will, by necessity, contain medical information.

A motion to seal the file because of medical information would be evaluated on the particularized harm that arises to the individual and balanced against the necessity for public information on a subject of public importance. Furthermore, all courts recognize that when an individual seeks a remedy based on his or her medical condition, information that might be considered private in one context is no longer private when that medical condition is an integral part of the proceeding. Without some demonstration of a particularized and compelling reason for sealing, under these circumstances there would be no grounds for sealing such material. To do so, would be to ignore Craig v. Harney, 331 U.S. 367 (1947), that what transpires in a court is "public property."

The fact of the Internet and greater availability to the file cannot change the nature of the analysis. How can public information become private because a reporter now can review the court file at her office and his home? Can the public nature of this information change because of the technological advances that make access easier? I think not. But if there is some change in status that arises from greater access, the harm must be evaluated in a precise and non-speculative way. In other words, there must be some enunciated and demonstrated qualitatively different effect that arises from electronic access than that arising from access to the paper record.

This leads to the issue of identity theft. As a practical matter, I am not aware of significant problem of identity theft arising from access to judicial records. Indeed, the most common causes of identity theft are relatively low tech and do not involve court files, whatsoever.

Indeed, one cause of identity theft is rummaging through the trash for bank statements and discarded credit card offers. Identity Theft: Is there Another You?: Joint Hearing Before the House Comm. On Commerce, Subcomm. On Telecomm., Trade and Consumer Prot. And Subcomm. On Finance and Hazardous Materials, 106<sup>th</sup> Cong. 18 (1999)(statement of Jodie Bernstein, Director, Bureau of Consumer Protection, FTC). Stealing a purse or wallet is another common source of the problem. Other causes are taking out false driver's licenses, creating utility accounts under another's name, establishing false bank accounts. Identity Theft: How to Protect and Restore Your Good Name: Hearing Before the Senate Comm. On Judiciary, Subcomm. On Tech. Terrorism and Gov't Info., 106<sup>th</sup> Cong. 32 (2000). In TRW, Inc. v. Andrews, 534 U.S. 19 (2001), the first United States Supreme Court case addressing the issue, a secretary in a doctor's office copied the social security number from a patient's initial referral form. In a survey of literature available, there are very few anecdotes, if any, that make a connection between judicial records and identity theft.

This is not to say that the court system through judicial rule or the Legislature through statute may not find that some information is worthy of protection. Furthermore, it is equally possible that the judicial system may seek to reform what information should be required in the court file. But before limitations on access to court files on the Internet are imposed as a general rule because of fears of identity theft, this panel should seek empirical information that demonstrates that judicial records contribute to this risk and that risk is somehow greater because of access to the Internet.

This is simply a restatement of the initial standard discussed above -- that electronic access to judicial records should only be limited when it is demonstrated that there is a qualitatively different effect than access to the paper record.

I thank you for the opportunity to provide this input and I remain available to answer any questions.

Yours truly,



David S. Bralow

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