By James E. Stewart and Laurie J. Michelson

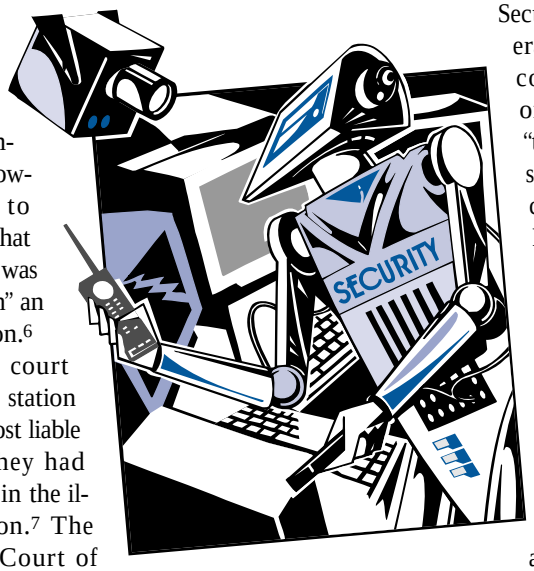
Don't Blame the Messenger

In the past few years, litigation against the news media has included an increasing number of actions attacking the way the news was gathered rather than the more traditional defamation claims attacking the content of the reporting. Especially with the nearly daily broadcasting of shows such as *Dateline, PrimeTime,* and *20/20*—which frequently employ undercover and hidden-camera techniques—the news media has increasingly been defending claims for trespass, intrusion, fraud, and misrepresentation.[1]

The news media have likewise had to struggle with state and federal wiretap laws that, generally, make it illegal to wrongfully intercept the private discourse of others and to divulge the contents of such communications. What, then, is a reporter to do when a concerned citizen sends him or her a tape recording of a cell phone conversation (picked up on a police scanner) that appears to expose corruption of a public official;[2] or the ex-husband of a former Wayne County Circuit Court judge sends him or her secretly taped telephone conversations of the judge making racial slurs and anti-Semitic remarks;[3] or the *Sally Jesse Raphael* show wants to air the taped conversation between a daughter confronting her mother over the influence the Church of Scientology is having on the mother's life.[4]

In the recent case of *Bartnicki v Vopper*,[5] the United States Supreme Court offered the news media some guidance for when the media obtain tapes of intercepted telephone calls they deem newsworthy. *Bartnicki* began with an illegally intercepted cellular telephone call in which the president of a Pennsylvania teacher's union told the union's chief negotiator that if the school board failed to move on salary increases, "we're gonna have to go to . . . their homes . . . to blow off their front porches." A tape of the call was left anonymously with Jack Yocum, the president of a tax payer's group that opposed the union's position. Recognizing the voices on the tape, Yocum provided a copy of it to Frederick Vopper, a radio talk show host, who played it over the air.

The union officials then sued Yocum, Vopper, and the radio station for violating the federal wire tap statute and a similar state statute prohibiting the disclosure of the "contents of any wire, oral or electronic communication, knowing or having to reason to know that the information was obtained through" an illegal interception.[6]



The district court found the radio station and talk show host liable even though they had not participated in the illegal interception.[7] The Third Circuit Court of Appeals reversed, holding that while the wire tap statute is a content-neutral restriction on speech subject to intermediate scrutiny under the First Amendment, the statute could not meet that test at least concerning the defendants who lawfully obtained information of concern to the public. The United States Supreme Court accepted the case for review on June 26, 2000.[8]

Justice Stevens delivered the May 21, 2001 opinion of the court finding the media defendants not liable. Justices Breyer and O'Connor joined in a concurring opinion. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented.

In the opinion of the court, Justice Stevens accepted the petitioner's claim that the interception was intentional and therefore unlawful and that at a minimum the defendants had "reason to know" that it was unlawful. Since this conduct would violate Section 2511 of the Federal Wire Tap Act, the court defined as the only question whether "the application of these statutes in such circumstances violates the First Amendment."

The court observed that in its previous decisions in *Smith v Daily Mail Publishing Co*, 443 US 97 (1972), and *Florida Star v BJF*, 491 US 524 (1989), it had held that any state action punishing the publication of truthful information can seldom satisfy constitutional standards. While reiterating the court's earlier refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment, the court considered whether, in the facts of this case, the interest served by Section 2511 could justify its restrictions on speech.

In answering this question, the court found that removing an incentive for parties to intercept private conversations by punishing those who publish them was *not* a justification for the speech restrictions: "[I]t by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends."

This column addresses proceedings before the United States Supreme Court that are of interest to *Michigan Bar Journal* readers. The column is edited by Leonard M. Niehoff.

The court then considered whether the public interest in privacy of communications was a justification for the statute's restrictions. While specifically noting that the court did not need to decide whether that interest was strong enough to justify the application of Section 2511(c) to disclosure of trade secrets, domestic gossip, or other information of purely private concern, the court noted that the enforcement of the provision "in this case however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern."

The court then held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."

Justice Breyer, joined by Justice O'Connor, agreed with the result but wrote separately to emphasize that the court's holding "does not imply a significantly broader constitutional immunity for the media." Instead, Justice Breyer agreed with what he described as the court's "narrow" holding based on the following "special circumstances present here":

- First, the broadcasters here "neither encouraged nor participated directly or indirectly in the interception."
- Next, the speakers had little or no legitimate interest in maintaining the privacy of the particular conversation. Justice Breyer specifically noted the fact that this conversation raised significant concerns for the safety of others.
- Finally, the speakers themselves, as president of a teacher's union and the union's chief negotiator, were limited-purpose public figures who had voluntarily engaged in a public controversy. Accordingly, they had subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs.

In summary, Justice Breyer's concurrence held that:

> *[T]he court does not create a "public interest" exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. Here, the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high. Given these circumstances, along with the lawful nature of respondents' behavior, the statutes' enforcement would disproportionately harm media freedom.*

The First Amendment will protect public disclosure of illegally intercepted conversations.

In dissent, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas strongly disagreed with the holding that an illegally intercepted conversation could then be publicized only because it touched upon a matter of "public concern, an amorphous concept that the court does not even attempt to define." The dissent also found that the court put "an inordinate amount of weight" on the fact that the receipt of the illegal intercept has not been criminalized, noting that "this hardly renders those who knowingly receive and disclose such communications 'law-abiding.'"

Finally, the dissent strongly disagreed with the court's reliance on the *Daily Mail* line of cases, distinguishing those cases because the information there had been obtained from the government itself, the information was already publicly available in court proceedings or public records, and the rationale in those cases of "preventing timidity and self-censorship was not applicable in this case. In fact enforcing the statutes' prohibition on publication of illegal intercepts would prevent timidity and self-censorship of persons engaged in private conversations."

While *Bartnicki* provides some guidance, it certainly does not offer a bright-line test for the media to follow or apply when they are given a recording of an intercepted communication. The conclusion from the majority and concurring opinions in *Bartnicki* seems to be that the First Amendment will protect public disclosure of illegally intercepted conversations—at least in the situations in which the material itself is of significant public concern, the publisher has had no part in the illegal intercept itself, and the participants do not have a very strong expectation of privacy in the contents of the communication. Thus, before deciding whether to publish or broadcast the contents of a tape-recorded conversation, the media have to ask at least the following questions: who are the speakers, what are they speaking about, why is it important to the public, what are the speakers' expectations of privacy compared with the importance of disclosure, and were we involved at all in the interception.

Some further light on this issue might be shed in the case of *Boehner v McDermott*,[9] which the Supreme Court remanded to the court of appeals for consideration in light of the *Bartnicki* decision. In *Boehner*, a cell phone conversation between Representative John Boehner and Representative Newt Gingrich was intercepted and passed to Representative Jim McDermott, who leaked it to the media. The court of appeals for the District of Columbia circuit had ruled that banning intentional disclosure of contents of electronic communications known to have been obtained through interceptions did not violate the First Amendment. Given that the speakers were public officials speaking on what should be deemed a matter of public interest and that the media played no role in the interception, the *Bartnicki* opinion should protect the conduct of the media defendants. ✦

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FOOTNOTES

1. See, e.g., *Veilleux v NBC*, 206 F3d 92 (CA 1, 2000); *Food Lion v ABC*, 194 F3d 505 (CA 4, 1999); *American Transmissions, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695 (2000); *Sanders v ABC*, 27 Media L Rep 2025 (Cal 1999).
2. *Peavy v WFAA-TV*, 221 F3d 158 (CA 4, 2000).
3. *Ferrara v Detroit Free Press, Inc*, 26 Media L Rep 2355 (ED Mich 1998).
4. *Dickerson v Raphael*, 461 Mich 851 (1999).
5. 121 S Ct 1753 (2001)
6. 18 USC 2511(d).
7. 121 S Ct at 1757–58.
8. 120 S Ct 2716 (2000).
9. 191 F3d 463 (DC Cir 1999).