SHATZKIN & MAYER, P.C.
ATTORNEYS AT LAW

KAREN SHATZKIN
DEBRA A. MAYER
MARK N. DILLER
JOHN B. McBRIDE
OF COUNSEL

1776 BROADWAY, 21ST FLOOR
NEW YORK, NY 10019-2002
TEL (212) 684-3000
FAX (212) 684-5333
www.shatzkinmayer.com

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TO: Filmmaker Clients and Friends

FROM: Karen Shatzkin

Re: Second Circuit decision in Chevron Corp. et al. v. Joseph A. Berlinger et al.

I expect most of you were aware of the dispute between the oil-industry giant Chevron Corporation and documentary filmmaker Joe Berlinger, which led to Chevron's successful motion in a New York federal district court to compel Berlinger to make available the outtakes from Berlinger's film *Crude*. In re Chevron Corp., 709 F. Supp. 2d 283 (S.D.N.Y. 2010).

On appeal, an important ruling was handed down by a three-judge panel of our federal appellate ("Second Circuit") court in mid-January that has important implications for documentary filmmakers. It was authored by Circuit Judge Pierre Leval, who is an eloquent supporter of First Amendment rights, including broad application of the fair use doctrine in copyright cases.

This memo reviews the background of the controversy and highlights of the Judge Leval's decision.

Background

The Film

Crude is about a lawsuit in Ecuador (the "Lago Agrio Litigation"). The lawsuit was brought in 2003 by residents of the Oriente region of Ecuador seeking billions of dollars in damages for pollution of their rainforests and rivers allegedly caused by Texaco's oil operations over a period of almost 30 years. Steven Donziger was a lead lawyer for the Lago Agrio plaintiffs.

(A decision in favor of the plaintiffs has now been handed down by the Ecuadorian court, subsequent to the Second Circuit ruling.)

In 2005, Berlinger was asked by Donziger to make a documentary to tell his clients' story. As the court described it, "For the next three years, Berlinger shadowed the plaintiffs' lawyers and filmed 'the events and people surrounding the trial,' compiling six hundred hours of raw footage."

In 2006, Ecuador elected a leftist President, Rafael Vincente Correa Delgato, replacing a government that had been friendly to the oil companies. In 2009, when Correa was re-elected to a second term, Chevron commenced an international arbitration seeking dismissal of the Lago Agrio Litigation, on the ground that the Ecuadorian Government abused the justice system and violated certain treaties in connection with the Lago Agrio claims.

Chevron's Motion

The Lago Agrio court had ordered that a global assessment of damages be conducted by a team of experts led by Richard Stalin Cabrera Vega, who was required to "perform his work in an impartial manner" and to "maintain strict independence with regard to the parties." Dr. Carlos Beristain, one of the expert witnesses appointed to Cabrera's team, contributed to Cabrera's damages assessment for cancer deaths based on meetings he had with focus groups of inhabitants in the region.

The ground Chevron urged for gaining access to the *Crude* outtakes was its belief, based on scenes contained in the finished film, that the outtakes contained evidence helpful to Chevron, which it claimed would show improper influence by Donziger on the court and on the supposedly neutral damages expert.

Chevron was joined on its motion by two individual Ecuadorian attorneys employed by Chevron who believed this evidence would help them defend against criminal prosecutions brought against them by the Ecuadorian government in connection with their actions in the Lago Agrio Litigation.

Berlinger opposed the motion, claiming the outtakes were protected under a qualified privilege for information gathered during a journalistic investigation.

The Privilege

The journalistic privilege invoked by Berlinger is not universally recognized in all jurisdictions, but is in our federal courts in New York. It may be helpful to briefly review the law relating to the privilege.

In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court declined to recognize a First Amendment reporters' privilege where it concerned a criminal prosecution. The Court held that reporters should be treated the same as any other citizen called before a grand jury investigating alleged criminal activity, regardless of any confidentiality promised by the reporter to the source.

When a crime is involved, New York federal courts also will likely require production of evidence and compel testimony. In the case of New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006), the Second Circuit held that reporters' (including Judith Miller of the Times) phone records should be disclosed because the reporters' unique knowledge was at the heart of the criminal investigation, and there were no alternative sources of the information.

In civil cases, the Second Circuit has recognized a qualified journalists' privilege that is applicable to both confidential and non-confidential press materials, in recognition that unrestricted third-party discovery into journalists' materials could have a substantial chilling effect. The two categories -- confidential and non-confidential -- impose different burdens of proof on the party desiring the information.

Where the reporter has not made a confidentiality commitment to her source, the privilege is more easily overcome: the person seeking the information need only show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

When there is a confidentiality agreement between the reporter and the source, and the confidential information is sought in a civil case, the burden to overcome the privilege is higher:

> Disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

McGraw Hill, Inc. v. Arizona, 680 F.2d 5, 7 (2d Cir. 1982).

Chevron: The Lower Court's Ruling

The district court judge, Judge Kaplan, concluded that Chevron had demonstrated that the information in the outtakes was of likely relevance to significant issues in the Lago Agrio Litigation, the arbitration and the criminal prosecutions of the two attorneys. He also held that the information was not reasonably obtainable from other sources, because it would be "'unimpeachably objective' evidence

of any misconduct on the part of plaintiffs' counsel, expert witnesses, or the [Government of Ecuador]."

Judge Kaplan caused turmoil in the film community when he ruled that Berlinger was required to produce all 600 or so hours of outtakes to Chevron. (He did not make his order narrower because Berlinger did not provide any proposal for distinguishing between relevant and non-relevant material.)

The judge rejected Berlinger's argument that the motion should be protected under a journalistic privilege. One explicit reason he gave was that Berlinger could not meet his burden of showing that his sources reasonably expected him to maintain the information he received from them in confidence.

Judge Leval's Opinion on Appeal

Although noting Judge Kaplan's finding about the lack of a promise by Berlinger to his sources of confidentiality, Judge Leval seized on a very different aspect of the lower court decision in upholding the order to turn over the outtakes. (The order was modified to restrict what Berlinger was required to turn over, to outtakes showing the Lago Agrio plaintiffs' counsel; private or court-appointed experts in the Lago Agrio Litigation; and current or former officials of the Ecuadorian Government.)

Judge Leval noted two factual findings Judge Kaplan had made: (1) "Donziger in fact solicited Berlinger to create a documentary of the litigation from the perspective of his clients"; (2) "Berlinger concededly removed at least one scene from the final version of Crude at their direction." (In a streamed Netflix version of *Crude*, Dr. Beristain is shown working with both the indigenous Cofan people and the Lago Agrio attorneys; following a request from the attorneys, Berlinger deleted all of Dr. Beristain's interaction with the attorneys from the scene in the DVD version released in the U.S.) Judge Leval concluded, "The clear import of these findings is that Berlinger failed to establish that he did his research and made his film with independence from a subject of the film."

Judge Leval reiterated the Second Circuit's commitment to a qualified evidentiary privilege for information gathered in a journalistic investigation. He explained that the privilege is intended to limit the circumstances in which litigants can gain access to press files in order to protect the public's interest in being informed by a "vigorous, aggressive and independent press" (emphasis the court's). That is:

> The protection accorded by the privilege, although not absolute, is at its highest when the information sought to be protected was acquired by

> a journalist through a promise of confidentiality. . . . But the privilege is not limited to circumstances where the sources of information have been promised confidentiality. We have observed, even when there was no issue of betrayal of a promised confidence, that [for one thing,] 'the wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties – particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.

The court explained that a person claiming the privilege does not have to be "a credentialed reporter working for an established press entity." However, the person must, first, have the "intent to disseminate [the information] to the public at the time the gathering of information commences." That is, he cannot have collected it for some other reason and subsequently decide to convey it to the public.

There is a second element the person claiming the privilege must satisfy, as well. While freedom of expression and the press apply to virtually everyone who wants to have a say on any subject, when there is a question as to the existence or strength of the journalistic privilege, "all forms of intention to publish or disseminate the information are not on equal footing." The key is the journalist's independence.

The court expressly stated that the fact that a film reflects the filmmaker's previously held point of view does not weaken the privilege. Judge Leval went on to explain:

> Our ruling . . . does not imply that a journalist who has been solicited to investigate an issue and presents the story supporting the point of view of the entity that solicited her cannot establish the privilege. Without doubt, such a journalist can establish entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence. But the burden is on the person who claims the privilege to show entitlement, and in this instance, Berlinger failed to persuade the district court that he undertook the task with independence.

Judge Leval concluded, "A person (or entity) that undertakes to publish commentary but fails to establish that its research and reporting were done with independence from the subject of the

reporting either has no press privilege at all, or in any event, possesses a privilege that is weaker and more easily overcome."

The court also considered Berlinger's argument that Judge Kaplan should have applied the stricter standard that relates to confidential (as compared with non-confidential) information. However, Berlinger merely testified that the people he filmed trusted that he would not turn over the raw footage to Chevron to be used against them; and this conclusory statement was undercut by the standard releases Berlinger had his film subjects sign, which specified that he could use the footage in connection with a production that could be released "in any media now known or hereafter invented." Therefore, the appellate court held that Judge Kaplan was justified in finding that Berlinger did not meet his burden to demonstrate that the information was conveyed to him in confidence.

In our practice, we have occasionally had situations where filmmakers had a concern over the protectibility of their footage. It sometimes has come as a shock to them to learn that their control of their footage (including choosing with whom to share it) may be trumped by the laws that entitle parties in litigation -- in the civil sphere as well as in criminal proceedings -- to obtain evidence they arguably need to prove or defend against a claim.

A clear appreciation of the risks -- and, at least in New York and Connecticut (which are within the Second Circuit), the potential for establishing an extra measure of protection -- are important for a filmmaker to take into consideration when embarking on a project on a controversial subject.

Best wishes,

Karen