THE CENTRE FOR INVESTIGATIVE JOURNALISM

The Centre for Investigative Journalism [CIJ] is a charity established in 2005 by journalists themselves, to promote high standards and provide training in best practice for journalists, students and NGO researchers. It holds an annual three-day summer school and conducts seminars on specific topics central to investigative journalism. More than 1000 attendees to date at the summer schools, from 35 countries, have been educated by a long list of prominent investigative journalists from around the world. CIJ is based at City University in London. Details are available at http://www.tcij.org/

CIJ is only interested in defending genuine investigations into bona fide public interest issues that, in the words of Lincoln Steffens, one of the pioneers of investigative journalism more than a century ago, afflict the comfortable and comfort the afflicted.

There are similar organisations in other countries, but CIJ is alone in the UK in working to encourage responsible investigative journalism. Through the experience of its trustees and advisory panel, CIJ is therefore in an exceptional position to contribute to the arguments about investigative journalism and the public interest.

There is an understandable public outrage, which CIJ shares, over phone hacking, bribery, "blagging" and other "dark arts". The inquiry has already heard, by contrast, a great deal about the benefits of investigative journalism, and how it needs to be protected from the chilling effect of changes in the law or regulation.

Much of that argument seems, unfortunately, designed to align the vested interests of "business as usual" celebrity targeting with the protection of true investigative journalism inquiring into matters of real public concern. It may be rejected as special pleading as a result.

Yet some proposals presented to the inquiry do indeed run the risk of unintended consequences. Ideas for improving the manner in which the media works might result in the very chilling effect on real investigations in the public interest, an effect that everyone claims to want to avoid.

Genuine investigative journalism already faces serious handicaps which favour those determined to protect themselves from public scrutiny. These problems come no longer primarily from the law of defamation, even though Britain has one of the more draconian systems in the world. The threat of expensive and unmerited libel actions should be reduced by the proposed changes in the new Defamation Bill. The battlegrounds for investigative journalism are now more over privacy, confidence, contract and copyright. Areas where those with something to hide traditionally can find support in the courts. Areas where a public interest defence is either lacking or restricted.

Those acting for politicians, wealthy individuals or large companies increasingly look first to using the courts' often narrow and sympathetic interpretations of those laws as a means to obtain injunctions and thereby impede publication of matters of legitimate public concern.

CIJ believes that three points in particular need to be addressed by the inquiry if proper investigative journalism is not to suffer from the current demand for changes in the way the media operates.

1. The need for a public interest defence.

2. The danger of imposing 'prior notification'.

3. The need for a proper shield law for journalists.

Lord Justice Leveson has repeatedly stressed the inquiry's commitment to the principles of a free press. We hope he will see the value of recommending these practical measures to protect genuine investigative journalism, as well as measures to regulate press misbehaviour.

1. A PUBLIC INTEREST DEFENCE

There needs to be a much clearer and broader public interest defence to any action brought to prevent publication which might have involved the commission of possible criminal offences or other wrongdoing, the use of confidential or copyrighted information or evidence provided by those acting in breach of a duty of confidence.

The old test, of whether disclosure reveals an "Iniquity", needs to be updated for the modern world of whistleblowing, to provide investigative journalists and their sources with greater protection. The onus of proof should also be reversed. It should be for the complainant to prove that publication is not in the public interest and that their narrow rights of contract or confidence are greater than the public's right to know.

At the heart of investigative journalism are frequently internal documents or inside information from employees. That currency is the one most vulnerable to attack on grounds of privacy, confidence or copyright.

The effect is often to create a lengthy delay in publication during an uncertain and extremely costly journey through the courts. Such "censorship by legal process" was described in his evidence to Leveson by the editor of Private Eye, Ian Hislop.

Judges rarely see news as a perishable commodity. They regularly ask "What is the rush to publish?" All too often they do not recognize that the delay is designed to prevent publication of an unpleasant truth by those with the means to do so. Those preventing publication can then arrange to pre-empt bad news by arranging for the publication of the information in a less harmful context or version while the original article is still injuncted.

"Gagging" clauses are regularly used to silence would be whistleblowers who are a prime source for investigative journalism. These are inserted in the settlements with disaffected employees and then used to block publication in the public interest. This is particularly the case in the National Health Service whistleblowers.

The most recent example reported by the BBC on 29 June 2012 is the reported

£500,000 payment made in 2011 to former chief executive Gary Walker by United Lincolnshire Hospitals Trust — a case which was raised last month by Stephen Phillips MP http://www.bbc.co.uk/news/uk-18639088.

The courts are then relied upon to enforce such confidentiality agreements, and usually do.

In libel, injunctions will not normally be given if the publishers are prepared to justify and take the ultimate risk of being sued and losing. But the courts have traditionally taken a much tougher stance where confidential material is concerned.

The Appeal Court even effectively ruled in 2010 - in the significant Imerman case [2010] EWCA Civ 908] that confidence was more important than the right to a fair trial. The court said it was a breach of confidence for a wife to "purloin" her husband's financial records, even if it was to stop him cheating in their divorce case.

Despite Article 10 of the European Convention of Human Rights, too often the continuing attitude of the British courts when presented with media cases involving confidential corporate documents seems little different from the rulings in Goodwin, in which a journalist was ordered to reveal his source on grounds the source had breached confidence.

After the Goodwin ruling had been criticised by the European Court of Human Rights (Goodwin v. the United Kingdom - 17488/90 [1996] ECHR 16 (27 March 1996), came similar rulings in the Centaur Communications (Camelot v Centaur Communications Ltd [1997] EWCA Civ 2554 (23rd October, 1997) and Cream Holdings [2003] EWCA Civ 103 cases — the latter only overturned in the House of Lords (Cream Holdings Limited and others (Respondents) v. Banerjee and others (Appellants) [2004] UKH.L 44) more than two years after the original injunction.

The reputations of professional men and senior company executives are often depicted as requiring protections unavailable to supposedly less important fellow citizens.

Details of the British Petroleum chief executive Lord Browne's entwining of his personal and corporate life only emerged after lengthy legal proceedings and only after it became clear that he had misled the court in his bid to prevent publication by the Mail on Sunday.

Lord Levy tried but ultimately failed in 2000 to prevent the Sunday Times publishing details from his tax return, which were held by a High Court judge to be in the public interest. Whether such a ruling would be made today is uncertain, given the judges' growing enthusiasm for privacy.

In 2008 accountants Ernst & Young were granted an injunction against its regulator, the Joint Disciplinary Scheme, preventing its findings regarding the audits of Equitable Life being passed to the Financial Services Authority pending an appeal against those findings. This was only done several months later in mid-2009 after Private Eye had intervened and overturned a ruling that even the existence of the injunction proceedings could not be published.

That decision was influenced by the recent Appeal Court ruling that had ended the five

month court-imposed delay that prevented Private Eye from publishing details of the disciplinary action taken by the Law Society against Michael Napier and Irwin Mitchell and the related Ombudsman report [2009] EWCA Civ 443.

Delay and large legal costs are powerful weapons against investigative journalism. Increasingly media organisations think twice about taking on such challenges. Those advising well-funded claimants know how to play that particular game. History has shown how determined litigants such as Robert Maxwell or Sir James Goldsmith can abuse the legal system to silence critics and prevent the truth being published.

2. PRIOR NOTIFICATION

Max Mosley has continued to urge that the press should be required, either by law or by code, to provide prior notification to their targets, before publishing private information about individuals. This is dangerous to investigative journalism and we oppose it.

Journalists do frequently approach people in advance. This is common sense — their explanations may put matters in a different light. It is also common decency, to give those who are about to be criticised some forewarning. Journalists will, in any event, often need to put defamatory allegations to their subjects beforehand, in order to gain the libel defence of "responsible journalism".

But those at the coalface know that sometimes it is important to publish first and argue later, especially where allegedly private information is involved. This is not because journalists intend to breach the law. It is because of the practical inequality of arms between an investigative reporter and those powerful individuals and corporations with unlimited funds and something to hide.

At the end of the day, the journalist may have a good defence, that, for example, the material did not have the necessary quality of confidence, or that it disclosed wrongdoing. But the "temporary" injunction is chilling, and for small, impecunious publications and book publishers in particular, often makes investigative journalism simply impossible.

Three recent examples of the prior notification problem, all from 2009:

1. Trafigura. The Guardian approached a firm of oil traders who had dumped toxic waste in West Africa, and notified them that the reporter was aware of the existence of their internal scientific report documenting the waste's hazardous nature. The company immediately obtained a so-called super-injunction, on grounds of confidence, suppressing not only disclosure of the report's contents, but also the fact that they had gone to court in the first place. The scientific report was eventually made public, and Trafigura paid large sums in compensation to African health victims.
   http://www. guardian. co .uldworld/2009/oct/17/trafigura-minton- report-revealed?INTCMP=SRCH

2. Barclays Bank. Internal documents detailing elaborate tax avoidance schemes devised by the bank fell into the hands of the Guardian. On this occasion, the paper did not notify the bank in advance but posted the documents in full on its website. The bank roused a judge at 2am to issue a temporary injunction forcing them to be taken

down on grounds of commercial confidence. Had the paper approached Barclays in advance, it is therefore evident that they would have taken similar

steps. Eventually, a High Court ruling by Mr Justice Blake permitted publication of certain details of the schemes. Thanks to the publications, one of the key Barclays schemes, known as Project Brontos, is now the subject of a criminal trial in Italy.
http://www.guardin.co.uk/media/2011 /feb/18/guardian-barclays-tax-secrets?INTCMP=SRCH
http ://vvww. guardian. co.uldbusiness/2012/j un/05/italian-banker-trial-unicredit-tax-fraud?INTCMP=SRCH

3. MPs' Expenses. As is well-known, the Telegraph obtained an unexpurgated dataset of MPs' expenses. This was an internal Commons document, which was being used as a basis for an official publication, and was to be extensively redacted. The Telegraph published the lot. The paper did not approach the Commons authorities in advance and inform them it was in possession of their data disc. Had they done so, an injunction would inevitably have been sought and most likely initially granted [The Telegraph did, of course, subsequently approach individual MPs it proposed to defame, and put to them details of the specific allegations against them. This was its practice of "responsible" journalism".] The Telegraph's publication involved potential breaches of duty, confidence, contract and copyright as well as possible criminal acts of theft for which those involved were substantially rewarded. Yet there can be no doubt that it was in the public interest for that information to be published - as the subsequent prosecutions, resignations, reparations and reforms make clear.

These examples involve supposedly private financial or commercial information. But it is easy to imagine similar examples of private sexual or even medical information, where an injunction might be granted at first instance, but it would in fact be wrong to suppress the information. A former Home Secretary, for example, was found to be having an affair with a married woman, and it was alleged that he had used his position to fast-track a visa application for her nanny.

Mr Mosley has claimed that prior notification is needed precisely in order to allow the target to get an injunction. He cites the News of the World exposure of his own sexual activities and the posting of a video, which was unwarranted yet was allowed to damage him irreparably. He identifies a mischief, certainly, but points to the wrong solution. The answer is to allow punitive damages in such cases. One or two such heavy privacy awards against wealthy newspapers would halt the practice in its tracks, and avoid the dangers, recognised for centuries in Britain, of censorship in advance.

3. THE NEED FOR A PROPER SHIELD LAW FOR JOURNALISTS.

Employers often want to identify a confidential journalistic source in order to dismiss him/her. The landmark decision of the Strasbourg Court in Goodwin v UK made clear that a court should not make a source disclosure order just because the employer wants one. The need for an overriding public (not private) interest in favour of enforced disclosure has been emphasized in numerous Strasbourg cases since.

In March 2000 the Committee of Ministers of the Council of Europe adopted a

Recommendation on the right of journalists not to disclose their sources of information (Rec R (2000) 7). This added the requirement that that the circumstances should be of a

"sufficiently vital and serious nature" before disclosure can be ordered. This effectively rules out disclosure orders in all but the most serious criminal cases.

R (2000)7 also emphasizes procedural protections for journalists. It makes clear that the state cannot use self-help remedies to try and discover journalistic sources ---- like bugging them or searching their homes (and so avoiding the need to go before a judge).

The UK authorities and courts have not always respected these important principles.

In 2008 Kingston Crown Court stopped a prosecution of a local journalist, Sally Murrer, as an abuse of process. Thames Valley Police suspected that Ms Murrer had a confidential source within the force. They prosecuted her on evidence obtained by bugging her car. But R(2000)7 made clear that this tactic was a violation of her Article 10 rights. In staying the proceedings the judge recognized that TVP should have made a source disclosure application before a High Court judge at which Ms Murrer could have been represented and asserted her Convention rights. A domestic shield law setting out these procedural rights would have made clear to TVP that the bugging was unlawful.

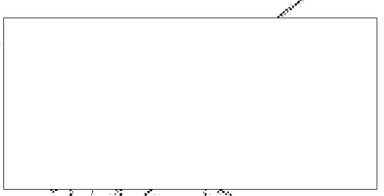
In 2009 the European Court of Human Rights overturned another High Court disclosure order in Financial Times v United Kingdom (App 821/03). The High Court had ordered the newspaper to hand leaked documents about a corporate takeover back to the company, even though it did not know the identity of the source. The Court of Appeal agreed. In overturning the order the Strasbourg court made clear our courts had not applied the Goodwin principles correctly. It also made clear that the journalist is protected against enforced disclosure of documents or information which might lead to the identification of the source.

The only statutory provision that journalists can rely on in this country is s.10 of the Contempt of Court Act 1981. But this fails properly to reflect the principles set out in R (2000)7 and the Strasbourg case law. Section 10 should be repealed and replaced by a comprehensive shield law reflecting these important principles.

13 July 2012

Statement of Truth

I believe the facts stated in this witness statement are true.

Signed 

Date 13-7-12