

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PAUL TRUMMEL,
Appellant,

v.

STEPHEN MITCHELL and COUNCIL HOUSE, INC.,
Respondents.

BRIEF OF AMICUS CURIAE

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS
NATIONAL UNION OF JOURNALISTS/
LONDON FREELANCE BRANCH
INTERNATIONAL FEDERATION OF JOURNALISTS

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United Kingdom, Human Rights Act, art. 106, 7

United Nations, Universal Declaration of Human Rights art. 19...6, 8, 11, 12

I. IDENTITY AND INTEREST OF AMICUS

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. The Society's mission is the professional welfare of journalists and authors, and a vital part of that mission is the Society's active, long-standing defense of the First Amendment together with a deep concern for censorship issues. The livelihood of the Society's members depends on the free exercise of speech and of the press.

The National Union of Journalists (United Kingdom and Ireland) is a bi-national trade union representing 35,000 journalists (including writers, editors, photographers, cartoonists, public relations workers, etc.) working in all media, including about 6000 freelances. The London Freelance Branch is the branch (in United States labor parlance, the "local") of which Paul Trummel is a member. It is composed of about half of the total number of freelances in the union, and its members may be based anywhere in the United Kingdom, Ireland, or the rest of the world. The London Freelance Branch of the NUJ is directly interested in this case insofar as one of its members, Paul Trummel, has suffered infringement of his freedom of expression through the trial court's rulings – not to mention imprisonment stemming from exercising his journalistic and personal freedom of expression.

The International Federation of Journalists is the world's largest journalists' group. It is a confederation of journalists' trade unions and associations with members in 110 countries and represents more than 500,000 reporters, editors, and creators working in all sectors of media.

The IFJ's mandate is to defend the social and professional interests of journalists, which it carries out through a global program of assistance, training and professional development. The IFJ is based in Brussels and has regional offices in Europe, Latin America, Asia, and Africa.

II. STATEMENT OF THE CASE

The relevant facts and procedural history are set forth in the briefs filed by appellant Paul Trummel.

III. ARGUMENT

The trial court's conclusion that Paul Trummel's speech was not protected by the First Amendment was based, in large part, on the trial court's finding that Trummel's claim to be a journalist was "bogus" [sic]. RP (4/19/01) at 6; CP 143. Other amici address the substantive First Amendment issues. This amicus brief addresses Mr. Trummel's status as a journalist. It also addresses the troubling implications of the trial court's ruling for national and international journalists publishing on the Internet.

A. Statement of the American Society of Journalists and Authors

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. We would like to present our views in this amicus curiae brief because the issues in this case bear directly on the concerns of all writers.

One of the primary issues appears to be whether Mr. Trummel was serving as a “journalist” when he wrote or posted the texts in question. We believe it is important for the court to note that in none of the fifty states in the United States is there a licensing requirement for journalists. Nor are there other legal or quasi-legal requirements for becoming a journalist. That is because, under the prevailing interpretation of the First Amendment, it would be a de facto violation of that amendment for the government to impose a journalism license or other requirement. The act of writing – whether or not the writer is a member of any association or union – is sufficient. No person and no organization can decide who is or is not a journalist.

The trial court noted that Mr. Trummel did not have a publisher. But even a publisher is not necessary to serve as a journalist. Some of the most important statements in the history of our nation have been self-published or have appeared in small, private newsletters or broadsides.

Tom Paine and I.F. Stone are notable examples, but the list could go on and on.

The trial court's ruling seems to saying that because it did not consider Mr. Trummel to be a journalist, he is not entitled to protection under the First Amendment. But that amendment protects free speech for all people, regardless of whether the words are committed to paper. Even if Mr. Trummel had simply stood on his porch and spoken his opinions, he would have the right to do so under the First Amendment. That applies to the respondents as well. They would have done better to respond to him with more speech rather than with an attempt to gag him. They would have done better to use permissible tools, such as libel law, rather than attempt to exercise prior restraint against his free speech.

B. Statement of the National Union of Journalists, London Freelance Branch.

This now internationally notorious case presents the appalling spectacle of an elderly journalist thrown in jail and forced to endure several weeks in solitary confinement for exercising rights guaranteed by the United States' First Amendment, the United Nations' Universal Declaration of Human Rights, and the United Kingdom's Human Rights Act.

The case also raises troubling questions about freedom of expression in relation to the Internet, a new medium with per se international reach, in which the right of free expression has yet to be clearly established and in which, therefore, that right may be especially vulnerable.

Paul Trummel is a veteran journalist, public relations worker, media academic, and member of our union of journalists. He worked for many years in London and then moved to America.

Please note that as journalists, not lawyers, we are concerned with the principles of the practice of our profession and with our members' welfare. As we understand this case, Paul was jailed last year because he refused to acquiesce to a court order to remove various statements and items of information from his website, Contracabal,¹ and so was held in contempt of court. We contend that it was a gross error to restrict his freedom of expression and then to jail him because he would not submit to that restriction.

As British people, but as journalists in particular, we greatly appreciate the fundamental protection of freedom of speech afforded to all Americans by the First Amendment to the Constitution. By that

¹ The website may be found at <http://www.contracabal.org>

straightforward criterion it is very hard for us to understand how the court could have treated Mr. Trummel as it did, in America of all places.

However, since this case is in large part about freedom of expression on the Internet, a medium which is by its very nature affords automatic global access to everything published on it, we feel it is also relevant to refer to civilised standards of freedom of expression that transcend national boundaries. For those standards protect the essential human aspiration to that freedom which is held dear by people in every country no matter what regime prevails currently. And those standards are enshrined in documents universally recognized by the civilised world. For example, the United Nations' Universal Declaration of Human Rights declares:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR 3d Sess., at 71, U.N. Doc. A/810 (1948), art. 17 (emphasis added).

The United Kingdom Human Rights Act addresses the same issue in nearly the same terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

authority and regardless of frontiers.

Human Rights Act of 1998, c. 42 (Eng.), art. 10.

Freedom of expression seems to us to be the crucial and overarching concern in this case.² But we would like to address several other points of detail arising from Mr. Trummel's case.

It appears that Mr. Trummel's bona fides as a journalist and his lack of a publisher other than himself became issues in the trial court. It was argued at the trial court that because he was publishing himself Mr. Trummel was not a journalist and therefore somehow not entitled to write what he chose, whether fact or opinion. If this characterization is even remotely accurate, the underlying notion seems far removed from national and international standards governing freedom of speech and journalism. It takes little imagination to notice just how very damaging the implications would be for all publishing media. But it would especially

² We say this with full regard to the second part of Article 10 of the Act:

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

damaging in the realm of the Internet, where many more people, professional or amateur, are finding a new outlet to put their material in front of the public at relatively low cost. This change in the very way ideas can be expressed and promulgated enhances individual freedom of expression itself and provides alternative voices to the corporate giants that increasingly control the “traditional” media in the UK, Ireland, the US, and worldwide. And it would be tragic to hobble this new medium just at the moment when it has emerged as the first eminently practical vehicle for implementing the Universal Declaration of Human Rights’ recognition of the “right to freedom of opinion and expression ... regardless of frontiers.”

Further, the strange logic of the original judgment seemed to imply that if a purported journalist is not a journalist he or she possesses even fewer rights than the ordinary citizen. That is, restrictions were imposed on Mr. Trummel’s publication partly because the court, by its own criteria, deemed him not to be a journalist and then further deemed that this meant he did not have an ordinary citizen’s right to express his or her ideas and publish them. Even by the standards of legal logic, this seems very strange thinking indeed.

In regard to the content of Mr. Trummel’s site, we do not have the comprehensive knowledge to argue that any given part of it is accurate,

fair, and so on. But it seems undeniable that his freedom of expression was restricted by the court (first by order and then by incarceration) on the basis, in part, of statements by individuals that what he wrote caused them offence or pain.

Again we do not have the knowledge to argue that any given part of the case presented by Mr. Trummel's accusers is accurate, fair, and so on. But if this line of thinking is to be any part of judicial response to journalistic or other expression in any country, then freedom of expression is in deep trouble. It is evident that journalists often cause offence to all sorts of people, including politicians, by telling the truth. But the court's judgment in Mr. Trummel's case would suggest that if anyone complains that, in some fashion, they are offended by anything they read then its publication could be restricted or terminated. This would lead to constant prior restraint of publication, the limitation of existing publications, and, generally, the dominance of what might be called "the official version" of any set of events. It would lead only to a travesty of the whole principle of freedom of expression.

It appears that the original judgment resulted from an almost farcical—yet for Mr. Trummel quite appalling—confusion of an anti-harassment action with all sorts of other concerns that should never have been on the same table. Whatever the necessary limits on freedom of

expression in a democracy—one thinks of the law of defamation—they simply cannot include the unconscionable sorts of abuses to which Paul Trummel was subjected by the trial court in this case.

C. Statement of the International Federation of Journalists

The case of Paul Trummel has been brought to our attention by the National Union of Journalists (UK and Ireland), which is an affiliate organisation of the IFJ. We understand from the NUJ that Paul Trummel has suffered infringement of his journalistic, as well as personal, freedom of expression through restrictions imposed by a superior court in Washington State that led to his imprisonment.

The IFJ is concerned about this case for a number of reasons:

First, because it appears to involve limitation on the freedom of expression of Mr. Trummel, not just within the locality with which the court is concerned, but on a global basis, and

Second, because it concerns interference with the content of an Internet publication where precise rules regarding free expression have yet to be determined.

The IFJ accepts the statements of the NUJ regarding the status of Mr. Trummel as a journalist of standing and one with international experience.

The IFJ believes that the actions of the court to demand that Mr. Trummel should remove statements from his website, Contracabal, were unjustified restraint on his freedom of expression. The fact that his refusal led to him being held in contempt and then sent to prison adds to our concerns.

The IFJ believes that freedom of expression, as set out in Article 19 of the Universal Declaration of Human Rights, is a professional obligation of journalists, and should only be limited in the most extreme cases. This opinion has been upheld by courts in the United States in defence of the First Amendment of the US Constitution.

The IFJ believes that decisions on editorial content – whatever the mode of dissemination – are matters for journalists' themselves to decide. The practice of self-regulation in journalism is recognised internationally within the agencies of the United Nations and within the democratic community of nations.

Of course, journalists have a responsibility to respect the truth and to be aware of the consequences of what they do, but the resolution of ethical dilemmas is a something that should be left to them and their conscience.

The use of law in this area should be minimal and should only apply where there is a danger to the safety and welfare of individuals and the public at large.

The IFJ believes that because this case involves an Internet publication, there is even more need for caution. The impulse to monitor, control, and interfere with this new medium of communication has already led to some unwelcome developments in parts of the world where governmental authorities seek to limit access to and use of information on the Internet leading to a serious denial of free expression rights. There is a danger that the actions taken against Mr. Trummel may be seen as validating serious violations of free expression rights elsewhere.

Removal or interference with editorial content is only justified where the consequences of continued publication are of a serious and damaging nature. This is particularly important when there is no legal framework for covering the dissemination of content beyond national borders.

We believe there is no justification in this case for limiting Mr. Trummel's right to freedom of expression. This right is articulated very clearly in the UDHR, in the Press Freedom Declaration of the Inter-American Human Rights Commission, and in the European Convention on Human Rights.

The IFJ also considers that it is not appropriate for the court in the original judgement against Mr. Trummel to question his status as a journalist. The definition of who is a journalist varies from country to country. In some the law defines the term professional journalist, establishes criteria for persons wishing to enter the profession, and sets out the legal rights and responsibilities of persons carrying out this work.

In most democratic countries, however, journalism is an open and free profession with no legal restrictions on entry. In the United States journalism is open to all and journalists themselves do not believe generally that their work should be defined in any manner that might limit access of anyone to work in media.

New communications technologies have led to dramatic reshaping of the media landscape and the way journalists work. Today more journalists than ever are working freelance or as independent reporter/publishers. In these circumstances new and flexible definitions need to be applied.

Many thousands of new publications exist that go beyond the notion of “traditional” media. All of them are engaged in journalism, even if it is not instantly recognisable as such. It is inappropriate to try to apply a definition in the case of Mr. Trummel that sets him outside journalism. His history of employment, his work as a freelance, and his involvement

in new forms of publication are a testament to his role as a *bona fide* journalist.

The IFJ takes no position on the dispute between Mr. Trummel and those who have complained against him, but we strongly dispute the attempt to discredit his status as a journalist.

He is fully entitled to publish material, even that with which other might disagree or take offence. His rights should not be limited because others are offended or hurt by what he publishes. Existing laws provide sufficient means to protect reputations, rights to justice, and public welfare, all of which may be applied against journalists.

The IFJ believes that in this case it is necessary to take account of international standards of free expression and the exercise of journalism and to suggest remedies for the dispute that do not infringe upon freedom of expression.

IV. CONCLUSION

The trial court's actions in this case manifest a profound and troubling disregard for Mr. Trummel's freedom of speech. And the trial court's reasoning represents a real and direct threat to the freedom of thought and expression on which journalism depends. A free press, in turn, forms an integral part of the very foundation of democratic

institutions. For these reasons, the trial court's orders should be reversed and the contempt proceedings should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 15th day of October, 2003.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this *Brief of Amicus Curiae* and accompanying motion were served on each of the parties below as follows:

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DIVISION ONE**

PAUL TRUMMEL,

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STEPHEN MITCHELL and
COUNSEL HOUSE,

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No. 48662-4-I

MOTION FOR LEAVE TO
FILE AMICUS BRIEF

I. IDENTITY AND INTEREST OF AMICUS

A. The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. The Society's mission is the professional welfare of journalists and authors, and a vital part of that mission is the Society's active, long-standing defense of the First Amendment together with a deep concern for censorship issues. The livelihood of the Society's members depends on the free exercise of speech and of the press.

B. The National Union of Journalists (United Kingdom and Ireland) is a bi-national trade union representing 35,000 journalists (including writers, editors, photographers, cartoonists, public relations workers, etc.) working in all media, including about 6000 freelancers. This

motion is submitted by both the NUJ and its London Freelance Branch. The London Freelance Branch is the branch (in United States labor parlance, the “local”) of which Paul Trummel is a member. It is composed of about half of the total number of freelances in the union, and its members may be based anywhere in the United Kingdom, Ireland, or the rest of the world. The London Freelance Branch of the NUJ is directly interested in this case insofar as one of its members, Paul Trummel, has suffered infringement of his freedom of expression through the trial court’s rulings.

C. The International Federation of Journalists is the world’s largest journalists’ group. It is a confederation of journalists’ trade unions and associations with members in 110 countries and represents more than 500,000 reporters, editors, and creators working in all sectors of media.

The IFJ’s mandate is to defend the social and professional interests of journalists, which it carries out through a global program of assistance, training, and professional development. The IFJ is based in Brussels and has regional offices in Europe, Latin America, Asia, and Africa.

II. FAMILIARITY WITH ISSUES

Counsel for the ASJA, NUJ, and IFJ has read the parties’ briefs. Counsel is familiar with the scope of the arguments presented by those

parties, and has not unduly repeated arguments raised by other parties. Because collectively they represent over one-half million journalists worldwide, ASJA, NUJ, and IFJ possess immense familiarity and expertise regarding journalism, journalistic practices, media, and freedom of expression.

III. ISSUE TO BE ADDRESSED BY AMICUS

The amicus brief of the ASJA, NUJ, and IFJ will address the trial court's conclusion that Paul Trummel's speech was not protected by the First Amendment based, in large part, on the trial court's finding that Trummel's claim to be a journalist was "bogus" [sic]. RP (4/19/01) at 6; CP 143. Other briefs explain the substantive First Amendment issues. This amicus brief addresses Mr. Trummel's status as a journalist. It also addresses the troubling implications of the trial court's ruling for national and international journalists publishing on the Internet.

IV. WHY AMICUS BRIEFING WILL ASSIST THE COURT

Each of the journalists' groups participating in the amicus brief possesses in-depth familiarity and expertise concerning journalistic practices and freedom of expression. They are far more familiar with what constitutes a "journalist" than the trial court. Just as appellate courts traditionally defer to administrative agencies because of their specialized expertise, so may this Court benefit from the cumulative and in-depth

expertise of these journalists' groups in deciding a case, such as this one, with profound national and international ramifications for the practice of journalism and for institutions founded on freedom of expression. In addition, the views of the journalists' groups participating in this amicus provide some index of national and international professional opinion regarding the treatment of Paul Trummel by the trial court.

RESPECTFULLY SUBMITTED this 15th day of October, 2003.

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