COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

for

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS,

PETITIONER,

v.

NORMAN BARNES,

DEFENDANT.

SJC – 11035

TRUSTEES OF BOSTON UNIVERSITY,
D/B/A WBUR-FM AND OPENCOURT,

INTERVENOR,

v.

COMMONWEALTH OF MASSACHUSETTS.

SJC – 11036

CHARLES DIORIO,

PETITIONER,

v.

FIRST JUSTICE OF THE QUINCY DIVISION
OF THE DISTRICT COURT DEPARTMENT.

SJC – 11052

ON APPEAL FROM RESERVATIONS AND REPORTS PURSUANT TO G.L. C. 211 § 3 OF DECISIONS BY THE QUINCY DISTRICT COURT

Brief for the Intervenor,
Trustees of Boston University, d/b/a WBUR-FM and OpenCourt

LAWRENCE S. ELSWIT
BBO No. 153900
BOSTON UNIVERSITY
Office of the
General Counsel
125 Bay State Road
Boston, MA 02215
(617) 353-2326
<lelswit@bu.edu>

CHRISTOPHER T. BAVITZ
BBO No. 672200
HARVARD LAW SCHOOL
Cyberlaw Clinic, Berkman Center
for Internet & Society
23 Everett St., 2nd Floor
Cambridge, MA 02138
(617) 495-7547
<cbavitz@cyber.law.harvard.edu>

COMPLIANCE WITH SUPREME JUDICIAL COURT RULE 1:21

Intervenor Trustees of Boston University is a charitable corporation organized under the laws of Massachusetts, and neither has a parent corporation nor has ever issued stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a trial judge's ruling that restricts a media outlet's right to disseminate information communicated during the course of open courtroom proceedings violates the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The cases before this Court evolved from Intervenor WBUR-FM radio's OpenCourt project ("OpenCourt"). Since May 2011, OpenCourt has streamed live video and audio recordings of proceedings in the Quincy District Court over the Internet, where they can be observed in real time or later retrieved through a website archive. The Commonwealth of Massachusetts (specifically, the Norfolk County District Attorney) and Charles Diorio (represented by the Committee for Public Counsel Services) seek to bar public access to certain OpenCourt audiovisual archives of judicial proceedings that have taken place in a public courtroom. Longstanding First Amendment principles, and the jurisprudence of this Court and of the United States Supreme Court, compel rejection of their arguments.

PRIOR PROCEEDINGS[1/]

Commonwealth v. Barnes

Defendant Norman Barnes has been charged with, inter alia, forcing two minor girls into prostitution, and statutory rape. On May 27, 2011, the Quincy District Court held a "dangerousness" hearing pursuant to G.L. c. 276, § 58A, which OpenCourt streamed live over the Internet. An audiovisual recording of the proceeding was planned for inclusion in OpenCourt's online archive. When Barnes's attorney inadvertently mentioned the name of the minor victim, the Commonwealth moved to stay public access to OpenCourt's archived audiovisual recordings of courtroom proceedings. The Quincy District Court, Coven, J., allowed the motion (the "May 27 Barnes Order"), thereby prohibiting OpenCourt from making its recordings available to the public. Barnes App. 35.

[1/] WBUR, which was not identified as a party in either the Barnes or Diorio cases, intervened in both actions in order to protect its First Amendment rights. Because the proceedings raise overlapping issues of constitutional significance, and with the assent of the Clerk of this Court, this brief will address the issues in both cases.

On May 31, OpenCourt, through counsel, wrote to the Court, noted its objection to the May 27 Barnes Order and stated that it would voluntarily redact the minor's name at issue from the public archive. OpenCourt also stated that it did not "assent to an order that functions as a prior restraint or a waiver of its First Amendment right to make its own determinations about publishing accurate information, lawfully obtained, about public court proceedings." Barnes App. 45.

On June 16, 2011, the District Court reversed the May 27 Order, and issued an order that (1) denied the Commonwealth's motion to stay public access to OpenCourt's archive, but (2) ordered that OpenCourt "redact the name of the alleged victim from both the video and audio recording" (the "June 16 Barnes Order"). (Appended hereto as Exhibit 1) Immediately thereafter, on June 20, the Commonwealth filed an emergency motion to stay the June 16 Barnes Order allowing public access to the OpenCourt archive. The District Court granted the Commonwealth's motion (the "June 20 Barnes Order"). (Appended hereto as Exhibit 2)

On June 23, 2011, the Commonwealth filed its "Emergency Petition Under G.L. c. 211, § 3, To Reverse the District Court Order Allowing Public Posting on the

Internet of the Video/Audio Recording of the Dangerousness Hearing." On the same day, the Honorable Margot Botsford, sitting as Single Justice, allowed the Commonwealth's request to stay the June 16 Barnes Order, thereby prohibiting OpenCourt from archiving the May 27 dangerousness hearing (the "June 23 Barnes Order"). Barnes App. 121.

On June 24, OpenCourt, unaware that the Commonwealth had filed a petition for emergency relief, and that it had been granted, filed its petition for relief from both the June 16 Barnes Order and the June 20 Barnes Order.

On August 4, 2011, Justice Botsford, serving as Single Justice, heard arguments by the Norfolk County District Attorney and counsel for Open Court.[2/] On August 8, 2011, Justice Botsford extended the June 23 Barnes Order to stay the Quincy District Court's June 16 Barnes Order (appended hereto as Exhibit 3) and issued a Reservation and Report to this Court. Barnes App. 124.

[2/] Counsel for Barnes did not participate.

Diorio v. First Justice of the Quincy Division

Charles Diorio is facing charges of, inter alia, assault with a dangerous weapon, kidnapping, and witness intimidation. On July 5, 2011, Diorio filed a motion to preclude cameras in the courtroom during his arraignment, claiming that OpenCourt's video and audio recording and archiving of the proceedings put him at risk of an "unduly suggestive identification process." On July 20, 2011, Diorio filed an "Emergency Motion to Recuse Coven, J. and Request for Immediate Appointment of Judge." On July 29, 2011, Judge Coven denied the motion to suspend OpenCourt's recording and archiving of courtroom proceedings pertaining to Diorio (the July 29 Diorio Order"). Diorio App. 58.

On August 3, 2011, Diorio filed a petition for relief before a Single Justice of this Court pursuant to G.L. c. 211, § 3, requesting an order "to stay the archiving of the video-streaming of the petitioner's July 5, 2011, arraignment and July 25, 2011, hearing on his motion."[3/] Diorio also requested the Single Justice to issue an order "staying the continued operation of

[3/] Because of a technical malfunction, OpenCourt did not record (and therefore did not archive) the July 5 arraignment. Affidavit of Valerie Wang, ¶ 36, appended hereto as Exhibit 4.

the OpenCourt project pending resolution of the issues raised herein." Diorio App. 7.[4/]

On September 2, 2011, WBUR filed a motion to intervene. Diorio's c. 211, § 3 petition was not argued before the Single Justice. On September 16, 2011, Justice Botsford issued a Reservation and Report, sending Diorio to this Court. The Reservation and Report stated, in part:

> This case shall be paired and heard with SJC-11035, Commonwealth v. Barnes, and the parties shall conform to the same briefing schedule. The parties may, by reference, refer to items in the record of the Barnes matter.

Diorio App. 162.

STATEMENT OF FACTS

The material facts are undisputed.

From the earliest days of our nation's history, American courtrooms have been accessible to the media. Richmond Newspapers v. Virginia, 448 U.S. 555, 565-73 (1980). As technology has evolved, methods of

---

[4/] Diorio's counsel did not serve OpenCourt with copies of its submissions to the Single Justice. Counsel for OpenCourt first learned of the challenges raised by the Diorio petition on August 4, 2011, when Justice Botsford mentioned it during oral argument in Barnes. Diorio App. 159, Docket Entry No. 4.

communicating about proceedings in public courtrooms have kept pace.

Consistent with that tradition, this Court has a long history of engagement with the media. In 1995, the Massachusetts Supreme Judicial Court Judiciary-Media Committee was established "to help foster good working relationships and to improve better understanding between the judicial branch and the media, both print and electronic. . . ." The membership of the Committee includes judges from this and other courts throughout the Commonwealth, courtroom clerks and administrative officers, and lawyers who have worked on issues relating to public access to the courtroom. John Davidow, Executive Producer of the OpenCourt project, is also a member of the Committee. Supplemental Affidavit of John Davidow, ¶¶ 4-5, appended hereto as Exhibit 5.

In 2009, WBUR applied for a grant from the Knight Foundation that was designed to "help speed media innovation by field-testing the most promising news technologies and techniques in specific geographic communities." Although WBUR's proposal was conceived within WBUR, independent of the Judiciary-Media Committee, it had the Committee's support. The grant application proposed "[t]o establish best practices for

digital recording from courtrooms" and to "create a model for greater citizen access and understanding of the judicial process through the integration of digital technology into the courts." Ex. 5, ¶¶ 6, 9.

In June 2010, the Knight Foundation awarded funding to WBUR to begin the project. The Honorable Mark Coven, Chief Judge of the Quincy District Court, allowed his courtroom to serve as a venue for recording and streaming live courtroom proceedings – both video and audio – through the Internet, and to enable these proceedings to be preserved, or "archived," online. Thus, users can look back to proceedings that had taken place at an earlier point of time. Ex. 5, ¶¶ 8-9.

OpenCourt does not have unique status in the Quincy District Court or special privileges as to the matters it covers. Like other media organizations, it has access only to public proceedings that take place in an open, public courtroom at the courthouse. Although it secures the audio portion of its audiovisual feed directly from the recording system in place in the courtroom, it does not record sidebar bench conferences or in-chambers discussions. OpenCourt self-limits the types of matters it transmits and has agreed to turn off its recording equipment when the judge orders it to do so. Ex. 4, ¶¶ 19, 21, 24.

To ensure that the many affected constituencies would become aware of the project and that the rights of participants in the judicial process were not compromised by the presence of cameras in the courtroom, in the summer of 2010, WBUR began working with the staff of the Quincy District Court. In particular, Mr. Davidow worked with Judge Coven, the Quincy District Court Clerk's Office, the Chief Counsel to the Massachusetts District Court, and the Court's Chief Technology Officer. WBUR also held several meetings in the courthouse, in which representatives of victims' advocates groups, court clerks, and both CPCS and the Norfolk District Attorney's office participated. Ex. 5, ¶ 10.

WBUR also organized an Advisory Board to guide the OpenCourt project. The Advisory Board's membership included judges from this Court and from the United States District Court, a range of advocates and scholars with expertise in First Amendment issues, a representative of the Norfolk County District Attorney's Office, this Court's Chief Public Information Officer, the Chief of the Victim Witness Services in the Office of the Attorney General, the general counsel to the Massachusetts Trial Court, and others. This group met in person, held conference

calls, and exchanged e-mails for several months as they discussed the issues that might arise when a camera was installed in the courtroom. Ex. 5, ¶¶ 11-12.

To facilitate the streaming of live video and audio proceedings on the Internet, OpenCourt hired a small staff, procured the necessary hardware, and reached agreement with the Quincy District Court to secure its audio feed directly from the Court's audio equipment. OpenCourt did not place any new microphones in the courtroom. It relied entirely upon the existing audio recording equipment that was already in place in the First Session courtroom. Ex. 4, ¶¶ 6-7, 16-24.

Nonetheless, OpenCourt placed signs at strategic locations throughout the courtroom warning lawyers and parties (frequently, defendants in criminal cases) that there were live microphones and suggesting locations where they might have private conversations. OpenCourt also ran training sessions for court staff, the Bar, and representatives from the Office of the Norfolk County District Attorney, both to provide an overview of the project and to give people an opportunity to express their concerns about it. Affidavit of John Davidow, ¶¶ 4-5, appended hereto as Exhibit 6; Ex. 4, ¶¶ 26-30.

In consultation with its Advisory Board, OpenCourt developed guidelines about what it would and would not stream live from the Quincy District Court.[5/] The guidelines reflect OpenCourt's interest in promoting access to the courtroom and its recognition of legitimate privacy interests. See infra, pp. 12-13.

Shortly before May 2, 2011, when OpenCourt's live video/audio feed actually went online, Norfolk County District Attorney Michael Morrissey expressed reservations about the project. On May 2, his office filed its first motion to restrict OpenCourt's reporting, and indicated that it would continuously file similar motions in future cases. Judge Coven denied the motion. Nonetheless, OpenCourt elected to voluntarily suspend posting of its archives — that is, a viewer could watch the live-stream but could not link to a recording of a hearing that had already taken place — while it attempted to work with the District Attorney and representatives of various interest groups to resolve outstanding issues. Conversations continued

---

[5/] These guidelines are described on the OpenCourt web site <http://opencourt.us/about/#guidelines> under the headings "Guidelines for when OpenCourt is online" and "Guidelines for when OpenCourt should go offline."

through the months of May and June, 2011. Ex. 5, ¶¶ 13-19.

OpenCourt also worked with its Advisory Board to create a framework to resolve the issue of public access to OpenCourt's archive, and ultimately adopted the following policies:

1) Each day's archived recording will be made publicly available two business days after it was created. Within that period, interested parties can request that specific items be redacted.

2) The archive will be posted in a manner to make it difficult for someone to save the video stream.

3) Access to the archive will require registration with the website and acceptance of terms of service.

4) The registration process will require a response to an e-mail verification.

5) The archive will remain available at no charge to the public.

6) Interested parties will be able to continue to request redaction even after a day's recording had been made public.

Ex. 5, ¶¶ 19-20.

In addition, and consistent with WBUR's policy, OpenCourt does not publish the names of minor victims of crimes, and redacts information it deems necessary to protect the identity of minors. It does not show restraining order proceedings unless they are connected with a domestic violence criminal case. OpenCourt also improved signage in and around the courtroom to inform lawyers, their clients, and the public that the proceedings were being streamed over the Internet. And OpenCourt's staff monitor the proceedings they record and flag such information for redaction. Ex. 5, ¶¶ 13-15, 21-22; Ex. 4, ¶¶ 27-28, 32.

On June 16, 2011, OpenCourt launched the public archive portion of its project, making its audiovisual archives available to viewers. On that date, and again on June 20, Judge Coven issued the Orders that are the subject of the dispute in Commonwealth v. Barnes. Ex. 1, Ex. 2, Ex. 5, ¶¶ 24-25.

On July 29, 2011, Judge Coven issued a Memorandum in Commonwealth v. Diorio denying Petitioner Diorio's motion to suspend the recording and archiving of courtroom proceedings in his case, thereby prompting his counsel to seek relief before a Single Justice of this Court. Diorio App. 58.

SUMMARY OF THE ARGUMENT

The restrictions the Commonwealth and Diorio seek to impose on OpenCourt's archiving of audiovisual recordings are unconstitutional prior restraints. The First Amendment affords broad protections to speech and, in particular, to the dissemination of information lawfully obtained in open and public fora. Consistent with those protections, a long line of cases holds that prior restraints on speech are presumptively unconstitutional (infra, pp. 15-17).

A party seeking to overcome that presumption of unconstitutionality must meet an extraordinarily high burden (infra, pp. 17-22). In Barnes, the Commonwealth has not demonstrated (and, indeed, cannot demonstrate) that the privacy interests it seeks to protect are state interests of the highest order (infra, pp. 22-25), and that the Barnes Orders are narrowly tailored and capable of accomplishing their stated purpose (infra, pp. 25-29). Similarly, Diorio's claim that OpenCourt's publicly-accessible archive of audiovisual recordings of proceedings in his case will impact his right to a fair trial is both unsubstantiated and insufficient to overcome the presumption that the relief he seeks is unconstitutional (infra, pp. 29-37).

The technology and media employed by OpenCourt – i.e., an online archive as opposed to traditional print or broadcast media – are entirely irrelevant to the legal analysis that this Court should apply when deciding this case. The First Amendment applies with equal force to OpenCourt's conduct as it would to any other member of the media and mandates denial of the relief sought by both the Commonwealth (in Barnes) and Diorio (in Diorio) (infra, pp. 37-39).

ARGUMENT

The Conceptual Framework

Both the Commonwealth and Diorio ask the Court to prohibit one member of the media from publishing information lawfully obtained in a courtroom that was open to the public. Their petitions seek to impose strictures on OpenCourt that are neither required by law nor acceptable under the First Amendment or Article 16 of the Massachusetts Declaration of Rights.[6/]

6/ This Court has held that the Massachusetts Constitution is to be interpreted at least as broadly as the cognate provision of the U.S. Constitution. Hosford v. School Comm. of Sandwich, 421 Mass. 708, 712 n.5 (1996); Lyons v. Globe Newspaper Co., 415 Mass. 258, 268-69 (1993); Colo v. Treasurer and Receiver Gen., 378 Mass. 550, 558 (continued)

The Supreme Court has held repeatedly that the First Amendment protects truthful speech on matters of public concern. See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 527-28, 533-35 (2001) (First Amendment barred imposition of civil damages under wiretapping law for publishing contents of conversation relevant to matter of public concern); Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (First Amendment barred imposition of civil damages on newspaper for publishing rape victim's name); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103-06 (1979) (First Amendment barred prosecution under state statute for publishing names of juvenile offenders without permission of court); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-842 (1978) (First Amendment barred criminal prosecution for disclosing information from a confidential judicial discipline proceeding); New York Times Co. v. United States (Pentagon Papers), 403 U.S. 713, 714 (1971) (per curiam) (First Amendment barred injunction against publication of classified documents leaked from Defense Department).

(continued)
(1979); Commonwealth v. Sees, 374 Mass. 532, 536-37 (1978).

Together, these cases hold that if a media outlet obtains truthful information about a matter of public significance, a court can neither prohibit its disclosure nor punish such disclosure after the fact, absent a need to further a state interest of the highest order.

I. The Restrictions that the Commonwealth and Diorio Seek To Impose on OpenCourt's Archive Constitute Unlawful Prior Restraints that Violate the First Amendment.

OpenCourt was lawfully permitted to attend and record public judicial proceedings. It now seeks to exercise its First Amendment right to publish those proceedings on its website. The June 16 Barnes Order, the June 20 Barnes Order (extended by the Single Justice), and the relief Diorio seeks significantly interfere with OpenCourt's rights insofar as they bar (or, in Diorio, seek to bar) such publication altogether.[7/]

[7/] As noted supra, 2-3, and at Barnes App. 45, OpenCourt has voluntarily elected to redact the very information that the District Court ordered redacted in the June 16 Order, and has no intention of publishing that information. But OpenCourt's voluntary decision has no bearing on the fact that an order to make such redactions violates the First Amendment.

"Temporary restraining orders and permanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). Prior restraints represent "the most serious and the least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), and therefore constitute "one of the most extraordinary remedies known to our jurisprudence." Id. at 562.

Although a court may order that certain information be withheld from the public, orders silencing news organizations are presumptively unconstitutional. Id. at 558 (citing Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). This presumption applies with particular force to limitations placed on media reporting that, as in the Barnes and Diorio cases, concern criminal proceedings. George W. Prescott Publ'g Co. v. District Court, 428 Mass. 309, 311 (1998); and see Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492-93 (1975).

Because "a judicial order forbidding the publication of information disclosed in a public

judicial proceeding collides with two basic First Amendment protections: the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom," United States v. Quattrone, 402 F.3d 304, 308 (2d Cir. 2005), there is a "heavy presumption against [a prior restraint's] constitutional validity." Id. at 310 (citing Bantam Books, Inc., 372 U.S. at 70);[8/] United States v. Salameh, 992 F.2d 445, 446-47 (2d Cir. 1993) (per curiam).

In Nebraska Press, a trial judge issued a pretrial order that prohibited "publishing or broadcasting accounts of confessions or admission[s] made by the accused or facts 'strongly implicative' of the accused . . . ." 427 U.S. at 541. However, because certain implicative evidence was subsequently discussed in a public hearing, the Supreme Court ruled that a restraining order that prohibited a press organization

---

[8/] In Quattrone, the Second Circuit reversed an order barring the press from reporting the names of jurors that were recited during an open court proceeding. 402 F.3d at 308. The court reiterated the First Amendment right to "report . . . with impunity" any information spoken in open court. Id. at 313 (citing Craig v. Harney, 331 U.S. 367 (1947)). The court further stated that "[t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic

(continued)

from publishing that evidence violated the First Amendment.

Similarly here, OpenCourt reports on matters that take place in an open courtroom. The archives that the Commonwealth and Diorio seek to restrict were taken from public proceedings. The Nebraska Press court noted that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." Id. at 553. Any attempt to limit OpenCourt's reporting conflicts with its rights guaranteed by the First Amendment.

II. The June 16 Barnes Order and June 20 Barnes Order Cannot Overcome the Presumption of Unconstitutionality and Violate OpenCourt's First Amendment Rights.

A. Introduction.

The June 16 Barnes Order requires redaction of the alleged victim's name. The June 20 Barnes Order bans public access to an entire courtroom proceeding. The Commonwealth raises emotionally compelling concerns about the release of information that might identify a minor victim, but speculation is insufficient to support a prior restraint. And even if the Barnes

---

(continued)
government, to suppress, edit, or censor events which transpire in proceedings before it." Id.

Orders were not fundamentally defective, they would still fail constitutional scrutiny because they prohibit publication of harmless as well as allegedly harmful information.

The presumption of unconstitutionality may not be overcome unless the proponent of the prior restraint supports its demand with evidence that the restraint is needed to "further a state interest of the highest order." Smith, 443 U.S. at 103; Oklahoma Publ'g Co. v. District Court in and for Oklahoma Cty., 430 U.S. 308, 311-12 (1977) (injunction prohibiting publication of information secured in court violates First and Fourteenth Amendments). The proponent must further establish that the restraint is "precise" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case." Carroll, 393 U.S. at 183-84. Finally, the restraint must actually be capable of accomplishing its stated purpose. Smith, 443 U.S. at 105. The June 16 and June 20 Barnes Orders cannot meet these exacting standards.

Although a court has limited discretion to close a judicial proceeding to the public, once the public is provided access, the information revealed in court becomes part of the public record. The burden of justifying a restraint on the dissemination of that

information is, in most instances, insurmountable. George W. Prescott Publ'g Co., 428 Mass. at 311 ("There is a particularly high burden of justification where, having opened the proceedings and the court records . . . to the public, the judge sought to restrict the press from reporting fully on the cases."). That burden cannot be met in this case.

B. The Barnes Orders Do Not Fulfill a State Interest of the Highest Order.

The United States Supreme Court has long recognized that any injunction, "so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights," absent an overwhelming countervailing interest. Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971). Here, the countervailing interests fail to constitute "the highest form of state interest" that is required to sustain a restriction on publication. Smith, 443 U.S. at 102.[9/]

9/ In Cox Broad. Corp., a case involving post-publication damages, a broadcast reporter revealed a deceased rape victim's name, which he had discovered by reviewing publicly-available documents. The Supreme Court held that it was unconstitutional to sanction the media for revealing a rape victim's name in a broadcast, when that name was made available in records associated with a public prosecution of her alleged assailant. 420 U.S. at (continued)

In the Pentagon Papers case, the New York Times obtained (and intended to publish) stolen, top-secret Defense Department documents containing highly classified and damaging information relating to American involvement in Vietnam. The Supreme Court held that even such strong government interests could not overcome the established constitutional presumption against restraining the freedom of the press. 403 U.S. at 713-14.[10/]

(continued)
469. The Court further noted that while the right to privacy was important, "even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record." Id. at 494-95. Additionally, the court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and public benefit is performed by the reporting of the true contents of the records by the media.

Id. at 495.

10/ Bartnicki, another post-publication damages case, underscores this important principle. There, members of a teachers union sued a radio personality under state and federal wiretapping laws after he broadcasted an unlawfully recorded telephone conversation between the plaintiffs. The Supreme Court held that the First Amendment prohibited the recovery of damages against the broadcaster, explaining that "a stranger's illegal conduct does not suffice to remove the First Amendment shield
(continued)

It would defy common sense to argue that the concerns raised by the Commonwealth present a state interest more significant than those in the Pentagon Papers case, in which publication exposed interests that were far greater in scope, magnitude, and potential for harm. Yet the Supreme Court ruled firmly in favor of press freedom.

The prohibition on restraints against the publication of lawfully obtained information has been expressly extended to cover information obtained in public court proceedings, such as the proceedings at issue in this case. In Oklahoma Publishing Co., a state statute closed all juvenile proceedings to the public unless explicitly opened by court order. Reporters nonetheless attended a hearing. The Supreme Court held that since the judge and attorneys knew about and tacitly assented to the presence of the press in the courtroom, an injunction prohibiting publication of the defendant's name and photograph violated the press's First and Fourteenth Amendment rights to

---

(continued)
from speech about a matter of public concern." The Court noted that even though the wiretapping statutes protected valid privacy interests, "privacy concerns give way when balanced against the interest in publishing matters of public importance." 532 U.S. at 518, 534-35.

disseminate lawfully obtained news. 430 U.S. at 311-12.

The Barnes Orders compare unfavorably with Oklahoma Publishing because here, OpenCourt obtained, and seeks to publish, information communicated in an unrestricted, open, public courtroom.

C. The Barnes Orders Are Prior Restraints that Are Neither Narrowly Tailored Nor Likely to Accomplish Their Intended Purpose.

The Supreme Court and this Court have consistently ruled that restrictions upon core constitutional rights, including freedom of the press, are unacceptable unless they achieve specific and compelling objectives in the narrowest possible manner. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (a legitimate state goal "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."); Commonwealth v. Dennis, 368 Mass. 92, 99 (1975) ("In order to justify a restraint on protected expression . . . the limitation must be no greater than is necessary to protect that compelling [state] interest.").

The Commonwealth asks this Court to prohibit archiving of entire recorded proceedings rather than addressing those specific portions which allegedly cause harm. The constitutional standard requires, however, that a restraint be "couched in the narrowest terms that will accomplish the pin-pointed objective." Carroll, 393 U.S. at 183. Modern editing technology provides a variety of options for redacting or obscuring specific pieces of speech or imagery from video recordings; they are much less restrictive than a complete prohibition on broadcasting the entirety. Ex. 4, ¶ 32. OpenCourt's policy, restricting the disclosure of confidential information, accomplishes a "pin-pointed objective" and makes a court-ordered prior restraint both unconstitutional and completely unnecessary.

Broad prior restraints on media publication are even more difficult to justify when the government itself provides the information to the news media in the first place. Florida Star, 491 U.S. at 538 ("[W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech."); Cox

Broad. Corp., 420 U.S. at 496 ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.").

The Commonwealth's failure to utilize means that are more narrow, less invasive, and readily available – those described in OpenCourt's guidelines — does not justify an impairment of OpenCourt's protected rights. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995); Planned Parenthood League of Mass., Inc. v. Attorney Gen., 391 Mass. 709, 715-16 (1984).

The Commonwealth's motions, and the Barnes Orders, will fail to protect a minor victim's privacy for another reason: they target only OpenCourt. Other reporters widely disseminated information they gathered in the courtroom – including identifying information about the victim.[11/] See Smith, 443 U.S. at 104-05

11/ See, e.g., Brian Ballou, *Kidnap Suspect Denied Bail*, BOSTON GLOBE (May 28, 2011), http://articles.boston.com/2011-05-28/news/29601189_1_kidnapping-victim-prostitution (naming the street where the victim was kidnapped, the price the defendant charged customers, the color of the lingerie given to her, and the names of some of the hotels to which she was taken); O'Ryan Johnson, *Judge Declares Suspect a Danger*, BOSTON HERALD (May 28, 2011), http://news.bostonherald.com/news/regional/view/2011_0528judge_declares_suspect_a_danger_da_succeeds_in_keeping_alleged_kidnapper_locked_up/

(continued)

(statute held unconstitutional because it restricted only newspapers, not electronic media or any other form of publication, from printing the names, thereby failing to accomplish its stated purpose); Oklahoma Publ'g Co., 430 U.S. at 310 ("[T]he First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public.").

The facts the Commonwealth claims it seeks to protect — private information relating to the victim — were made available to her schoolmates and peers by other media outlets that are far more widely distributed than the recordings that OpenCourt seeks to publish in its password-protected archive. Prior restraints directed solely at OpenCourt are unlikely to achieve any compelling state interest, and therefore

---

(continued)
(mentioning the street on which the defendant allegedly met the victim, the towns she was taken to, and how her aunt and uncle found her); *No Bail for Dorchester Man Charged with Forcing Teen into Prostitution*, DORCHESTER REPORTER (May 27, 2011), http://www.dotnews.com/2011/no-bail-dorchester-man-charged-forcing-teen-prostitution. (naming the street the teen was picked up on, the towns the she was taken to and the high school she attends).

infringe impermissibly upon press freedoms protected by the First Amendment.

III. The Restraints Diorio Seeks Are Also Unconstitutional.

The broad restraints on speech Diorio seeks are unconstitutional for the same reasons that the Barnes Orders are unconstitutional.

Diorio's petition to the Single Justice claims that OpenCourt's exercise of its First Amendment right to report public pretrial proceedings threatens his right to a fair trial. He argues that because the information elicited at his hearing relied upon hearsay and was factually inaccurate, "further public dissemination of [a recording of Diorio's arraignment proceeding] pose[s] a clear and immediate threat to the Defendant's right to a fair proceeding and untainted jury pool." Diorio App. 21. Although Diorio raises valid concerns about the integrity of the criminal trial process, neither his logic nor the evidence support the broad restraints on speech that he demands.[12/]

12/ Diorio's petition to the Single Justice weaves cases addressing courtroom closure into his argument in support of limiting OpenCourt's right to publish information that has already become part of the public record. The cases are inapposite — this case

(continued)

In Nebraska Press, the Supreme Court created a three-part test for determining when the publicity surrounding a case might allow a court to restrain the press's First Amendment right to free speech in order to ensure a defendant's Sixth Amendment right to an impartial jury. 427 U.S. at 561-62. The court weighed (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial

---

(continued)
concerns prior restraints on publication, not access to the courtroom. But Diorio's argument cannot succeed: this Court has held that "[w]ithout adequate factual support, a motion to limit media presence at a trial must fail." Commonwealth v. Clark, 432 Mass. 1, 9 (2000); Boston Herald, Inc. v. Superior Court Department of the Trial Court, 421 Mass. 502, 505-06 (1995). In Clark, the defendant claimed that the presence of electronic media in the courtroom tainted his trial, and in support of that argument, adduced evidence that one witness testified that he had seen news coverage of the case on television. Because there was no evidence that the witness was prejudiced, the court rejected the claim. 432 Mass. at 9; see also Commonwealth v. Cross, 33 Mass. App. Ct. 761, 762-3 (1992) ("A recognition of the possibility that a juror might be distracted by the presence of television cameras in the courtroom cannot substitute for a showing that the defendant was actually prejudiced.") (citations omitted).

These cases are consistent with Supreme Judicial Court Rule 1:19, which promotes the presumption for openness by permitting "broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public. . . ."

publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. Id. at 562. Applying this test to the current case establishes beyond dispute that the prior restraint Diorio seeks is unlawful.

A. Diorio Cannot Show that OpenCourt's Pretrial Coverage Caused Harm

Nebraska Press involved a widely-publicized murder (and trial) in a community with 850 people. Id. at 573 (Brennan, J., concurring). In contrast, Norfolk County has nearly 700,000 residents, of whom 77.5% were at least eighteen years old. Norfolk County Quickfacts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/25/25021.html.

There is no evidence to suggest that OpenCourt's live-stream and archive have penetrated the marketplace as deeply as the mainstream media. Ex. 4, ¶¶ 33-37. And, because OpenCourt is accessible to anyone in the world with a computer or mobile device, it is impossible to determine if these unique users would be part of the jury pool. Diorio's argument that the

OpenCourt archive taints the jury pool is unsupportable.[13]

B. Alternatives to a Prior Restraint Are Available

The second part of the test to be applied before allowing the prior restraint Diorio seeks requires consideration of alternatives that mitigate the theoretical adverse effects of OpenCourt's reporting. In Nebraska Press, the Supreme Court concluded that there were numerous less restrictive methods that assure a defendant's Sixth Amendment right to a fair trial. Those methods included:

> (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic

---

[13] Recently this Court considered the effect of pretrial publicity on a defendant's ability to secure a fair trial in a sparsely-populated community. In Commonwealth v. Toolan, 460 Mass. 452 (2011), this Court reversed the conviction of a man tried for murder on the island of Nantucket, citing evidence of prejudice and partiality, plus extensive media coverage. But the Court also noted that it was unaware of any case in which a conviction was overturned due to "presumptive bias in the jury pool." Id. at 463 n.17. Here, the absence of evidence of bias as a result of the OpenCourt archive is fatal to Diorio's challenge.

> and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.

427 U.S. at 563-64. The trial judge may also "limit what the contending lawyers, the police, and witnesses may say to anyone." Id. at 564.

Diorio may seek to use all of these methods to ensure a fair trial. But he does not provide any evidence that he has attempted any of these less restrictive alternatives, or that he cannot locate at least twelve impartial Norfolk County jurors. As the Ninth Circuit stated in Hunt v. National Broadcasting Co., Inc., "even in cases as heavily publicized as Watergate and Abscam, 'many, if not most, potential jurors are untainted by press coverage.'" 872 F.2d 289, 294 (9th Cir. 1989) (citing CBS v. United States District Court, 729 F.2d 1174, 1179-80 (9th Cir. 1984).

C. A Prior Restraint Directed to OpenCourt Will Not Protect Diorio's Right to a Fair Trial.

The third part of the test also weighs against allowing the relief Diorio seeks because the prior restraint against OpenCourt would not protect his right to a fair trial. In Nebraska Press, the Supreme Court held that such an order would be ineffective for three

reasons: first, the court's sovereignty is limited, and it cannot prevent all news organizations from reporting on the case. 427 U.S. at 565-66. Second, "a court can anticipate only part of what will develop that may injure the accused," and thus the order likely would not include everything necessary to protect the accused. Id. at 567. Third, the trial court could not prevent the community as a whole from discussing the case, and rumors would be more damaging and less accurate than reports from a news organization. Id. Here, the order Diorio seeks would likely fail to protect him for the same reasons.

Perhaps the most important reason the relief Diorio requests will fail to protect his right to a fair trial is that (like the relief the Commonwealth seeks in Barnes) it is targeted solely at OpenCourt. Other news organizations and members of the community are free to discuss the case. Indeed, like the factual information that the Commonwealth seeks to prevent OpenCourt from reporting in Barnes, Diorio's name, photograph, alleged crimes, and out-of-state criminal history have been widely reported by the media, and can

be uncovered by simply inserting his name and a few basic facts into an Internet search engine.[14/]

So much information about Diorio is already in wide distribution through other channels that efforts to conceal it from potential witnesses and jurors by restricting OpenCourt's archive cannot meaningfully succeed. Given these problems, it is clear that this prior restraint would not effectively protect Diorio's right to a fair trial.

[14/] See, e.g., Stewart Bishop, *Chelsea Man Held After a Standoff Faces Charge of Kidnapping,* BOSTON GLOBE (July 4, 2011), 2011 WLNR 13206304; Laurel J. Sweet, *Suspect Arrested in Shooting of Elderly Man,* BOSTON HERALD (July 4, 2011), 2011 WLNR 13225810; *Man Wanted in 2 States Surrenders After Standoff in Braintree,* CBS BOSTON.COM (July 3, 2011), http://boston.cbslocal.com/2011/07/03/man-wanted-in-3-states-surrenders-after-standoff-in-braintree/; *Braintree Standoff with Sex Offender with Gun,* PATRIOT LEDGER.com (July 3, 2011), http://www.patriotledger.com/mobile/x1860258315/braintree-standoffwith-sex-offender-with-gun#comments; Adam Gaffin, *DA: Fugitive Living Under Assumed Name Far From Home Goes on Violent Rampage,* UNIVERSALHUB BLOGS (July 21, 2011), http://www.universalhub.com/2011/da-fugitive-living-under-assumed-name-far-home-goe. Some of the information at issue may be found in a press release issued by the Suffolk County District Attorney. Press Release, Suffolk County District Attorney, *Quarter-Million Bail For Alleged One-Man Crime Wave,* http://www.suffolkdistrictattorney.com/press-office/press-releases/press-releases-2011/quarter-million-bail-for-alleged-one-man-crime-wave/#more-3238 (includes Diorio's date of birth).

D. The OpenCourt Archive Does Not Create the Risk of a Suggestive Identification.

Diorio's challenge to OpenCourt's live-stream and archive must fail because the media is largely beyond the purview of the rule against unnecessarily suggestive identification evidence. Commonwealth v. Sylvia, 456 Mass. 182, 190 (2010); Commonwealth v. Otsuki, 411 Mass. 218, 235 (1991); Commonwealth v. Colon-Cruz, 408 Mass. 533, 542 (1990). Nor can Diorio persuasively argue that OpenCourt's live-stream and archive give rise to that risk: most viewers would conclude that the low-resolution live-stream recording of courtroom proceedings makes it difficult to discern facial features or any identifying marks. And, as noted supra, n. 14, Diorio's photograph – in much sharper focus — has appeared in traditional, local news media.

The cases Diorio cites to support his claim to the Single Justice that he was denied the right to challenge suggestive identification are inapposite. In Commonwealth v. Napolitano, 378 Mass. 599, 605 (1979), the police surreptitiously brought an eyewitness to one crime into the courtroom to make an identification of the defendant during his arraignment for another crime. And in Commonwealth v. Silva-Santiago, 453 Mass. 782,

794-95 (2009), the court rejected the challenge to a photo array shown to three eyewitnesses, finding that, under a totality of circumstances, the identifications were not unnecessarily suggestive. Here, there is no record of any identification procedure and, certainly, none took place in the First Session of the Quincy District Court (see, e.g., Exhibit 48 to Diorio's Petition for Relief Pursuant to G.L. c. 211, sec. 3, **impounded**). These cases add no traction to Diorio's argument.

IV. Internet News Media Enjoy the Same Constitutional Protections as Traditional News Media.

OpenCourt does not minimize the challenges posed by the development of new and alternative media and rapidly-changing forms of communication. But the fact that OpenCourt is neither print, nor television, nor radio, but is, instead, entirely Internet-based, does not alter the constitutional analysis. Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."); see also Brown v. Entertainment Merchants Ass'n, 131 S.Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic

principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears.") (citation omitted). The medium does not change the calculus.[15/]

In cases involving the tension between the media's right to communicate and a defendant's Sixth Amendment right to a fair trial, other courts have been reluctant to allow a prior restraint if there is any possible way to secure an impartial jury. See, e.g., Hunt, 872 F.2d at 295-96 (affirming trial court's denial of prior restraint because defendant failed to demonstrate that

---

[15/] See also Courtroom View Network v. Justices of the Superior Court, SJ-2010-0522 2010 WL 4942139 at *1 (Mass. Dec. 3, 2010) (commercial website selling video recordings of trials "is consistent with, and promotes, the public's First Amendment right to know how its government performs.")

In Hollingsworth v. Perry, the Supreme Court acknowledged the "qualitative differences" between a public appearance and one that is broadcast over the internet, but explicitly avoided "express[ing] any views on the propriety of broadcasting court proceedings generally," and confined its analysis "to a narrow legal issue: whether the District Court's amendment of its own local rules to broadcast this trial complied with federal law." 130 S.Ct. 705, 709 (2010).

Hollingsworth involved the question of whether to permit audio and video broadcasting of a bench trial relating to California's gay marriage proposition. Id. at 706-07. But the decision, based on the narrow issue of the lower court's failure to follow procedures when changing its rules, has no applicability to the case before this Court.

the "broadcast would inflame and prejudice the entire San Mateo County community"); CBS, 729 F.2d at 1178 (reversing trial judge's order as an impermissible prior restraint because further press coverage would not "so distort the views of potential jurors that 12 could not be found who would . . . render a just verdict exclusively on the evidence presented in open court"); United States v. Corbin, 620 F. Supp. 2d 400, 405-06 (E.D.N.Y. 2009) (same). This Court should follow the well-trod path, and reject Diorio's petition for relief.

CONCLUSION

"As a general proposition, [Massachusetts courts] have long recognized that the public should have access to [the] courts." Doe v. Sex Offender Registry Bd., 459 Mass. 603, 624 (2011). This Court articulated the policy justification more than 125 years ago: "[i]t is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility . . . ." Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.).

Absent a compelling countervailing interest, a judge, having opened the courtroom to the public and media, does not have the authority to issue a prior restraint prohibiting the publication of lawfully obtained facts from the public proceeding. See George W. Prescott Publ'g Co., 428 Mass. at 311("Prior restraints on media reports about criminal proceedings have long been held presumptively unconstitutional . . . . Any effort to restrict the press must be justified by a compelling State interest.") (citation omitted).

The Commonwealth and Diorio have failed to show actual or likely harm. They request that this Court override the protections mandated by the First Amendment to uphold (in Barnes) and issue (in Diorio) a prior restraint that both sweeps too broadly and fails to achieve their purported goals. The record contains absolutely no evidence to justify the drastic relief requested, or to overcome the presumption of unconstitutionality inherent in prior restraints. OpenCourt's exercise of its First Amendment right to

communicate information lawfully secured in a public forum should not be circumscribed.[16/]

REQUEST FOR RELIEF

WHEREFORE, Trustees of Boston University, d/b/a WBUR-FM and OpenCourt, respectfully requests that this Court (1) DISSOLVE the June 16 Barnes Order and the June 20 Barnes Order (Ex. 1, Ex. 2) and (2) AFFIRM the District Court's July 29 Order in Commonwealth v. Diorio (Diorio App. 58).

Respectfully Submitted,

Intervenor
Trustees of Boston University,
d/b/a WBUR-FM and OpenCourt,
By its attorneys,

Lawrence S. Elswit
(BBO # 153900)
Boston University
Office of the General Counsel
125 Bay State Road
Boston, MA 02215
(617) 353-2326
<lelswit@bu.edu>

16/ OpenCourt thanks Boston University School of Law students William J. Bussiere, Alex P. Garens, and Artem Shatnov; Harvard Law School Cyberlaw Clinic students Alan Ezekiel, Xiang Li, Matt McDonell, and Tom Spencer and Cyberlaw Clinic intern and New York University School of Law student Ava McAlpin; and Northeastern University School of Law student Lawrence C. Fleming for their valuable contributions to this brief.

Christopher T. Bavitz
(BBO # 672200)
Harvard Law School
Cyberlaw Clinic
Berkman Center for Internet
& Society
23 Everett St., 2nd Floor
Cambridge, MA 02138
(617) 495-7547
<cbavitz@cyber.law.harvard.edu>

October 17, 2011

CERTIFICATION

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, counsel for intervenor certifies that this brief complies with the relevant rules that pertain to the filing of briefs, specifically Mass. R. A. P. 16(b), 16(d), 16(g), 16(h), 16(k), 17, 19(a), 19(b), and 20, as applicable.

Respectfully Submitted,

Trustees of Boston University,
d/b/a WBUR-FM and OpenCourt

Lawrence S. Elswit
(BBO # 153900)
Boston University
Office of the General Counsel
125 Bay State Road
Boston, Massachusetts 02215
(617) 353-2326
<lelswit@bu.edu>

October 17, 2011

CERTIFICATE OF FILING AND SERVICE

I, Lawrence S. Elswit, hereby certify that, on October 17, 2011, the foregoing Brief for Intervenor Trustees of Boston University, d/b/a WBUR and OpenCourt, was served by hand delivery on the individuals listed below:

John Fennel, Esq.
Committee for Public Counsel Services
Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108

Varsha Kukafka, Esq.
Assistant District Attorney
Office of the District Attorney
45 Shawmut Road
Canton, Massachusetts 02021

October 17, 2011

Lawrence S. Elswit

ADDENDUM

United States Constitution
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution
Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution for the Commonwealth of Massachusetts

Declaration of Rights

Article XVI

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Rules of the Supreme Judicial Court
Rule 1:19 Cameras in the Courts

A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public, subject, however, to the following limitations:

(a) A judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.
(b) A judge should not permit broadcasting, televising, electronic recording, or taking photographs of hearings of motions to suppress or to dismiss or of probable cause or voir dire hearings.
(c) During the conduct of a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client. Frontal and close-up photography of the jury panel should not usually be permitted.
(d) A judge should require that all equipment is of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Only one stationary, mechanically silent, video or motion picture camera, and, in addition, one silent still camera should be permitted in the courtroom at one time. The equipment and its operator usually should be in place and remain so as long as the court is in session, and movement should be kept to a minimum, particularly, in jury trials.
(e) A judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session. In the absence of such notice, the judge may refuse to admit them.
(f) A judge may permit, when authorized by rules of court, the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, for other purposes of judicial administration, or for the preparation of materials for educational purposes.
(g) A judge should not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom.
(h) Any party seeking to prevent any of the coverage which is the subject of this Rule may move the court for an appropriate order, but shall first deliver written or electronic notice of the motion to the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston, as seasonably as the matter permits. The judge shall not hear the motion unless the movant has certified compliance with this paragraph; but compliance shall relieve the movant and the court of any need to postpone hearing the motion

and acting on it, unless the judge, as a matter of discretion, continues the hearing.

(i) A judge entertaining a request from any news medium pursuant to paragraph (e) may defer acting on it until the medium making the request has seasonably notified the parties and the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston.

(j) A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.