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ABSTRACT

Increased litigation and rising litigation costs threaten the future of newspapers and magazines. A case study was conducted to determine the costs and effects of "United States v. 'The Progressive,'" a prior restraint case over the publication in 1979 of an article on the hydrogen bomb. "The Progressive," which operates at a deficit, spent almost a quarter of a million dollars defending itself. Costs of time and staff energy were even greater, threatening the continuation of the magazine. Although a First Amendment case, few in the media came to the aid of "The Progressive." Neither did circulation increase as much as in a normal year. Although libel and First Amendment insurance have been introduced recently, there is serious doubt whether small publications could afford such coverage, or even whether an insurance company would accept a controversial publication as a client. Civil liberties and professional organizations cannot do much more than assist in a few major cases, as they did in that of "The Progressive," providing "pro bono" work and filing "amicus" briefs. Such a state of affairs may result in newspapers and magazines too timid to risk publishing controversial material. A system of financing media litigation is needed to protect publications. (JL)

The Cost of Prior Restraint: U.S. v. The Progressive

by

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A paper presented to the Law Division of the Association for Education in Journalism, Ohio University, Athens, Ohio, July 1982.

Multi-million-dollar damage awards in recent libel cases against the National Enquirer, Penthouse and the Alton (Ill.) Telegraph have focused attention on the legal risks of publishing.[1] But it is rare for the media to pay large damage awards and none of these publications has yet paid any damages. A study of media libel cases decided by appellate courts between 1977 and 1980 found that plaintiffs have been successful in only 5 percent of the cases, compared to 66 percent for media defendants.[2] To date, the largest known payment in a libel case was an out-of-court settlement of $600,000 by the San Francisco Examiner.[3] By concentrating attention on the size of recent damage awards, the media reports have ignored the impact litigation costs have on a publication. Win or lose, publications must pay attorneys' fees, court costs and direct and indirect expenses of legal defenses.

The purpose of this paper is to consider the litigation costs of a particular media case. Using the case-study approach, we will address the following questions: What does it cost in money and time to engage in litigation? How did the publication under study meet these expenses? How did the litigation process affect the publication? The paper also addresses the adequacy of the existing means of financing media litigation. The case that will be examined is U.S. v. The Progressive,[4] a prior restraint case in which the government attempted to prevent the publication of an article on the H-bomb in 1979.

The Increase in Litigation

In the last 15 years, Americans have been turning to the courts in dramatically increasing numbers. Between 1965 and 1975, the number of cases heard by appellate courts rose by 84 percent; and, although there are no systematic records for state courts, between 1968 and 1976, the number of cases heard by California

courts rose by 90 percent.[5] It is not known whether the number of media-related cases has risen at these rates, but it is generally assumed that the number of civil suits against the media--libel and invasion of privacy, primarily--has increased significantly in recent years, and that governmental action against the media in the form of withholding information, subpoenaing of reporters and restraining publication of information has increased. As with everything else, the cost of litigation has risen. One report indicates that the cost of defending a libel case has tripled since 1960, with attorneys' fees now ranging between $60 and $200 an hour.[6] At one newspaper the cost of litigation and legal counsel increased from $7,400 to $74,400 between 1976 and 1980.[7] And a lawyer reported that his newspaper client spent $240,000 on legal fees in 1980.[8]

The cost of litigation has not gone unnoticed by those individuals who want to harass or punish the media. Larry Worral, president of Media/Professional Insurance Co., and Steve Nevas, the National Association of Broadcasters First Amendment counsel, said that many of the libel suits filed against broadcasters were aimed at harassing broadcasters.[9] Perhaps a more important consequence of the increased frequency of litigation is media self-censorship to minimize both the risks of libel and invasion of privacy suites and provocation of government action. This "chilling effect" may result in the public receiving less critical information from an overly cautious media. Also, to protect themselves, the media are increasingly relying on attorneys for pre-publication advice and review of copy. Large media organizations have hired in-house First Amendment attorneys. And the publisher of a small independent newspaper claimed he sold his paper to a newspaper chain because he could no longer afford the risks of litigation.[10] Also, there is a belief among media observers that the cost of just one big case can cause the death of a small, independently-owned medium. To appeal its case, the Alton Telegraph had to file for bankruptcy and the publisher has said that if the case is lost on appeal, the paper will fold.[11]

By examining just one case such as U.S. v. The Progressive, it is not possible to make generalizations about the impact of litigation on a medium. But the case does point out the problems a small, independently-owned publication faces when it becomes involved in a potentially expensive case. Though the legal process and related expenses do vary from case to case, the costs of all cases are based on the same elements--legal and factual research, preparation of legal documents and arguments, court costs and representation in court. Like other prior restraint cases, The Progressive case lacked the costly trial and damage awards that can make libel and invasion of privacy cases more expensive.

Figures from some media law cases indicate a range of litigation costs in recent years. In 1971 the Pentagon Papers case, which proceeded from New York and Washington, D.C., federal district courts through two appeals courts to the U.S. Supreme Court in just three weeks, cost the New York Times $150,000 for outside legal counsel alone, and the Washington Post's legal bills amounted to $70,000.[12] The Nebraska Press Association case, which challenged a court order prohibiting publication of testimony and evidence presented in open court, cost about $125,000.[13] That case bounced back and forth several times between state and federal court in eight months of 1975 and 1976. A more recent case--Richmond Newspapers v. Virginia--decided by the U.S. Supreme Court in 1980 cost between $75,000 and $100,000, according to the paper's publisher.[14] This case procedurally was a simple review by state and federal supreme courts of a judge's decision to close a trial to the press and public.

But the gross figures for the cost of a case tell only part of the story. For the New York Times Co., which had revenues of more than $290 million in 1971, $150,000 was a relatively minor expense.[15] And in the Nebraska case, several individuals devoted nearly full time for several months to raising the funds for the case. Even then, the costs were spread out among many media in the state and region.[16] But for the independently-owned Progressive, the

final cost of its case reached $240,000--a large sum compared to its 1979 annual operating budget of $600,000, which include a deficit of $126,000.

Financing of The Progressive

Like many political journals, The Progressive has been a publication of commitment, not profit. Since its founding in 1909 by Robert LaFollette, the publication has had only one profitable year, 1954; although its circulation was only 30,000, it sold over 200,000 reprints of an issue dealing with Sen. Joseph McCarthy. The Progressive's publisher, Ron Carbon, characterizes the magazine's economic history as "hard times and terribly hard times." And when the H-bomb article was published in November 1979, he said the magazine was experiencing "desperate times."[17] Carbon told subscribers in a December 1981 letter that the magazine's survival through 1982 is "in doubt."

The Progressive is a subscription magazine with limited newsstand sales. Its national newsstand distributor was not even interested in more than the usual 3,000 copies of the issue containing the then well-known H-bomb article, according to Carbon.[18] At the time of the H-bomb case, the magazine's circulation was about 40,000. The magazine has a net circulation increase of about 1,500 to 2,000 a year, but Carbon says The Progressive will never circulate enough copies to attract substantial advertising. Further, Carbon says, advertisers "recognize a hostile editorial climate when they see one."

At the beginning of the H-bomb case, syndicated columnist Jack Kilpatrick accused the magazine of provoking the government to generate publicity to boost circulation and profits. There is no doubt that the case did generate publicity--much of it incorrect and misleading. But it did not increase circulation, and the magazine continues to operate at a deficit. Carbon estimates that of the current $800,000 to $850,000 a year operating budget, circulation generates 70 to 75 percent of the income, advertising about 5 percent

and ancillary activities, particularly fundraising campaigns, the other 20 to 25 percent.

A budget deficit is a regular occurrence at The Progressive, but it is reduced to near zero each year by contributions from subscribers. According to Gordon Sinykin, chairman of the board and The Progressive's attorney, operating loses in 1978 were $92,000; in 1979, not counting legal expenses, loses were $126,000; and in 1980, the deficit reached $172,000. For 1982, the projected deficit is $135,000. Clearly, The Progressive is not in an economic position to undertake expensive litigation.

The Facts of The Progressive Case

The court case, U.S. v. The Progressive, involved an article by freelance writer Howard Morland entitled "The H-bomb Secret: To Know How Is to Ask Why."[19] The government contended that if the article were published, The Progressive would reveal secret "restricted data" about nuclear energy in violation of the Atomic Energy Act of 1954.[20] The Department of Justice argued that under the law certain information is "born secret," and is automatically restricted from the moment an individual creates the information, even if the original sources of the idea are not secret.

The case--and the seven-month prohibition on publication of the article--began after The Progressive declined to submit the article to the Department of Energy for editing or to refrain from publishing it. The Department of Justice filed a motion in federal district court for a temporary restraining order against The Progressive. U.S. District Court Judge Robert Warren conducted a hearing in Milwaukee on the motion on March 9, 1979, and issued a temporary restraining order that expired on March 26. In a second hearing, the government argued for a preliminary injunction to extend the prohibition on publication. Judge Warren proposed that the article be submitted to a panel of scientists for

review. The Progressive rejected that proposal, and Judge Warren entered a preliminary injunction on March 26. The Progressive appealed the injunction to the Seventh U.S. Circuit Court of Appeals in Chicago, but the court declined to hear the case quickly. A hearing was conducted by the Court of Appeals Sept. 13, 1979, and a decision was anticipated late in September. But on Sept. 16, a Madison newspaper published a letter by H-bomb hobbiest Charles Hansen, which revealed much of the same information about the H-bomb contained in Morland's Progressive article. The next day the Department of Justice announced that it was abandoning the case. The Court of Appeals vacated Judge Warren's injunction on Sept. 28, and The Progressive published the H-bomb article in its original form in November 1979. This was the longest prohibition on publication ordered by a federal court.

Cost of U.S. v. The Progressive

As a small journal perennially on the edge of financial oblivion, The Progressive had managed to stay clear of the law until 1979. In the six years before the H-bomb case, the magazine's total legal expenses came to about $1,000, averaging about $165 a year. Most of those expenses were incurred for processing bequests from estates of subscribers. According to The Progressive's editor, Erwin Knoll, the magazine had never been threatened with a libel suit. The only legal problem relating to editorial content that anyone could remember was an allegation of copyright infringement by Ms. magazine over the use of the department heading "No Comment," which appears in both publications. The problem was resolved in an exchange of letters between attorneys.

With this limited experience in media law, none of The Progressive staff anticipated that the actual costs of the H-bomb case would be as much as $240,000. Nor did they realize that it would take a year out of their lives and make publishing a monthly magazine difficult. And, more important, none realized how difficult it would be to raise funds to pay the legal bills. Even

Sinykin, whose law firm also represents a daily newspaper and who anticipated the case would be expensive, did not expect the case to cost as much as it did. At times during the litigation, he advised the editors that the case was jeopardizing the survival of the magazine, and he outlined alternative courses of action. Sinykin, who had been associated with the magazine for 40 years, said that in his role as chairman of the board he would have abandoned the case if a choice had to be made between the magazine's survival and fighting the injunction.

Knoll's priorities were the opposite of Sinykin's. Although Knoll says he never believed The Progressive would be destroyed, he would not have dropped the case just to save the magazine. But he admits, "We were blithely getting into something we didn't know the full scope of." And when Sinykin advised Knoll that the case would be expensive, Knoll responded, "You worry about the law, and we'll worry about finding the money." Knoll said that when he contemplated an expensive case, he thought "maybe--if we had to do something really huge--$50,000."

The legal groundwork for the case was done by the law firm of LaFollette, Sinykin, Anderson and Munson in Madison, a relatively small firm of 14 attorneys.[21] Morland, whose legal interests were expected to differ from those of the magazine and its editors, was initially represented on a fee basis by Madison attorney Tom Fox. As it became more evident that the case would be expensive, portions of the case were taken on a pro bono basis by the American Civil Liberties Union and by the Washington, D.C., office of the Wall Street law firm of White and Case.[22] In the final arrangement, LaFollette, Sinykin represented the magazine, coordinated the case and developed the scientific argument; the ACLU represented the editors Knoll and Sam Day and developed the First Amendment argument; White and Case represented Morland, and Tom Fox served as Madison liaison for Morland.

After the second hearing in U.S. District Court, Carbon, along with Sinykin and the ACLU attorney, developed a proposed budget for the entire case (Figure 1). The budget included a four-week trial, a second appeal to the Court of Appeals and, finally, an appeal to the U.S. Supreme Court. The projected total cost for all of this was $285,000, including $33,000 in attorneys' fees already incurred through the March 26 preliminary injunction. The projected budget had taken into account the pro bono representation of Knoll and Day but had not anticipated that Morland's representation would also be on a pro bono basis.

In fact, The Progressive case proceeded no further than the second phase of the projected six-phase budget. The cost estimates through the second phase had been $85,000 in attorneys' fees and $30,000 in out-of-pocket expenses. But the actual costs reached $240,000--or 109 percent more than anticipated. About $165,000 was for attorneys' services and about $75,000 was for direct, out-of-pocket expenses.

LaFollette, Sinykin billed The Progressive $158,000 for 3,287 hours of services provided by three attorneys working full time on the case and three attorneys working part time. These figures represent a fee of about $48 an hour, a rate Sinykin said was 25 to 40 percent below the firm's regular rate. LaFollette, Sinykin did not charge a premium for some 18-hour, seven-day weeks the staff worked; nor did Sinykin charge the magazine for about 200 hours of his own time on the case. Carbon estimated that The Progressive was billed about $46,000 less than the going rate by LaFollete, Sinykin. Fox billed the magazine $6,500 for his services representing Morland.

All legal counsel submitted bills for out-of-pocket expenses, and The Progressive itself accumulated between $25,000 and $30,000 in direct expenses. The most detailed figures for expenses are available from LaFollette, Sinykin, which totaled $17,500. These expenses may be considered representative of the other law firms' expenses in the case. White and Case's expenses were $16,300,

Figure 1

Projected Budget for The Progressive Case through Appeal to the U.S. Supreme Court

Attorneys' Fees

Phase 1:	Through preliminary injunction (actual cost)	$33,000
Phase 2:	Through Court of Appeals hearing	52,000
Phase 3:	Discovery and pretrial preparation	48,000
Phase 4:	District Court trial	25,000
Phase 5:	Second appeal to Court of Appeals	42,000
Phase 6:	Appeal to U.S. Supreme Court	24,000
	Subtotal	$224,000
	Direct costs, expenses	60,000
	Total	$284,000

the ACLU's were $15,000 and Fox's were about $500. The largest expenses incurred by LaFollette, Sinykin were for: travel, $4,000; copying, $3,700; research, $3,300; printing, $2,700; telephone, $2,000 and transcripts, $800. In addition, there were smaller expenses for postage, express mail, binders, a safe deposit box and miscellany.

Other than attorneys' fees, the most expensive part of The Progressive case was the development of evidence to demonstrate that Morland's article was based on information easily found in the public domain. A significant portion of the LaFollette, Sinykin expenses went to developing this argument as did The Progressive's own expenses and some of the ACLU's. The need to coordinate three or four different legal efforts resulted in some duplication of work, extra copying of materials, travel and phone expenses. But duplication of effort is not uncommon in complex cases.

The argument that the information was available to the public was based on four elements. First, LaFollette, Sinykin had research done by physicists in Madison and in other parts of the country and abroad. One physicist, Theodore Postol of the Argonne National Laboratory, worked in the LaFollette, Sinykin offices for about two weeks advising lawyers, gathering scientific information and developing a bibliography of published literature on the H-bomb. Second, Morland spent about a week in the LaFollette, Sinykin offices preparing an affidavit and being questioned on how he gathered information for the article. Third, the ACLU sent an independent researcher to the Los Alamos Scientific Laboratory's public library in New Mexico where he successfully duplicated a critical part of Morland's research. The Progressive's publisher and managing editor generated the fourth element of the argument by traveling and telephoning to negotiate with scientists to sign affidavits saying that the kind of information in the H-bomb article was available to the

international scientific community and to the general public. Extraordinary expenses for trips to gather the signed affidavits included the employment of notaries public who sometimes sat and waited hours while the scientists read the article.

By early 1982, Knoll said that the debts from the case had been reduced to about $32,000. The LaFollette, Sinykin bill was being paid on a schedule of monthly installments. Aggressive fundraising had ended, Carbon said, because the crisis was over and for most people the issue was dead. Knoll said, "It was much easier, much more dramatic, for me to go around talking to people who might be contributors as the bound and gagged editor of The Progressive than the one who fought and waged a successful struggle to publish something."

Expenses are ready measures of the impact of a lawsuit on a publication, but what may be more important is the cost in time and energy. For The Progressive's small staff, the extra time demands included assisting attorneys in preparation of defense arguments, responding to requests for information and interviews from other media, and, of course, raising money to pay the legal bills. These demands made the task of publishing the magazine much more difficult than it had been before the case.

Carbon estimated that he and the editors devoted nearly full time to the case during the first two and one-half months after the suit was filed. After that, the demands on the staff increased whenever there was court action. Knoll estimated that in the year after the case began, he spent nearly 25 percent of his time on the road speaking about the case. In the first 18 months, he had spoken in 30 states. But neither Knoll nor Carbon kept detailed records of how they spent their time or how much money each speaking engagement generated. Asked what the days were like, Knoll answered without hesitation, "Lunatic.".

Morland, an otherwise unemployed freelance writer and anti-nuclear activist, had to spend time in Madison, New York and Washington, D.C., consulting with attorneys. He also had speaking engagements and news interviews that took time away from other work he might have been doing. Except for some talk-show interviews and speeches, Morland was not paid for his activities related to the case, and only occasionally were his travel expenses paid.[23] To save money, he piggybacked necessary unpaid trips onto paid trips resulting in some very hectic days. Once during a two- or three-day period of about 10 interviews a day, Morland literally fell asleep while answering a question, according to Carbon. The only pay Morland received from The Progressive was $1,000 for two articles and another $350 for the right to publish the now valuable H-bomb article.[24] The Progressive did, however, accept financial responsibility for Morland's defense, something a free-lancer cannot routinely expect.

The demands of the media caused the most interruptions in the normal activities of The Progressive staff. The staff had decided at the beginning of the case to respond to every reasonable request for information and interviews. They wanted to counter the impression left by the judge and the government that the article did, indeed, reveal secret, dangerous information. Since the article was locked in a safe, the staff concluded that they needed to say as much as possible without violating a court order prohibiting them from discussing the scientific content of the article. At least indirectly, they wanted to show that they were not an "irresponsible bunch of crazies," in Knoll's terms, as they felt some media had portrayed them in stories and in editorials. And, Knoll said, the case was about access to information, and it would have been hypocritical to deny the media information they requested.

The consequence of trying to answer all the questions was that at times there would be several television crews waiting at the door when the staff

arrived for work, and the principals in the case did nothing but talk to reporters "for a whole day, for several days in a row," Knoll said. With first three, then four telephone lines into the office, Knoll said there were times when all of the phones would be busy for hours. And if he left the office for a few hours, Knoll would have 20 or 30 phone calls to return and he would spend the rest of the day on the phone. Staff members also tried to accommodate most requests for speeches. Eventually, a foundation was formed to help arrange speaking tours and other public relations activities.

Then there was the magazine to publish. The attention generated by the case resulted in a 50 percent increase in the number of unsolicited manuscripts. Each of the 250 or so manuscripts that arrived each month had to be read to find the one or two usable ones. The one media contribution about which Knoll speaks most warmly and passionately was the donation of the services of a copy editor by the Bergen Evening Record in Hackensack, N.J.. That newspaper sent a reporter to Madison for a few weeks during the summer of 1979. He worked through the large backlog of manuscripts and helped put out the magazine. Knoll said that his assistance "was worth thousands of dollars to us and it was a magnificent contribution."

The New Jersey newspaper was not the only volunteer to come to the aid of The Progressive, but it was the only direct media contribution. Knoll said that he and other staff members "called in every chip," every personal due bill they had ever earned. They accepted nearly every offer to answer phones, to stuff envelopes and to house out-of-town visitors. In short, Knoll said, commenting on the time and energy that the case absorbed, "It was almost as if a year had been taken out of our lives, our work, to devote to this thing." Two years later, he said, "I'm still digging out, still catching up on some of the time we lost."

When Knoll first contemplated the case and what it would mean to the magazine, he thought that the American mass media would come to its aid by providing editorial

support and contributing to the defense fund. "We thought this was a clear open-and-shut First Amendment case, and the media organizations aren't going to let us go down the tube on an issue like this," Knoll said.

This expectation was not unreasonable if previous case histories were used as a guide. Not only was The Progressive case a First Amendment case, it involved an obvious prior restraint by the government. And the U.S. Supreme Court has said most clearly that if the First Amendment protects against anything, it protects the press against prior restraint, with very few exceptions.[25] In the few prior restraint cases before The Progressive case, the media supported the defendants. The conservative publisher of the Chicago Tribune, Col. Robert R. McCormick, contributed $35,000 in legal services to the bigot Jay M. Near for his landmark prior restraint case in 1931. McCormick also convinced the American Newspaper Publishers Association to contribute $5,000 to Near's cause.[26] In the Pentagon Papers case, neither the New York Times nor the Washington Post needed financial assistance, but they did receive editorial support from most of the press in the United States.[27] In the Nebraska Press Association case, individual media and media organizations contributed most of the $125,000 needed to pursue the case, and editorial support for the Nebraska media was nearly unanimous.[28]

Based on other media's experiences with First Amendment cases, The Progressive's editors were certain that the media would come to their aid. "In that expectation, we were catastrophically mistaken. As it turned out, the major media institutions, corporations, associations weren't terribly concerned about our First Amendment rights, lest we jeopardize theirs," Knoll said. Not only did the media fail to help the magazine financially, most opposed the magazine's position in editorials. A few, however, such as the New York Times, eventually supported the magazine.[29]

The only individual mass medium to contribute money to The Progressive's legal defense fund was Playboy magazine, which gave Knoll $5,000 and a Hugh M. Hefner

First Amendment award. The Wisconsin Freedom of Information Council contributed $1,000. A number of chapters of the Society of Professional Journalists/Sigma Delta Chi contributed $25 to $50 each, and nearly two years after the case was completed, the national convention of SPJ/SDX endorsed The Progressive's stand and contributed $500.

The only remaining direct media support came in an offer of legal assistance from Clayton Kirkpatrick, publisher of the Chicago Tribune. The offer was declined because the attorneys were concerned about spreading the legal defense too thin and feared losing control over the arguments in the case. A number of magazines, weekly newspapers, professional organizations and three daily newspapers did file joint amicus curiae briefs in support of The Progressive (Figure 2). Since Judge Warren had taken judicial notice of the editorial opposition to The Progressive's stand in the case, the media participation in the amicus curiae briefs was important, but it did not help financially.

Due to the negative editorial reaction to the case, The Progressive's staff did not engage in much formal fundraising among the media, and were generally rebuffed when they did. Knoll was invited to speak at the American Society of Newspaper Editors convention a couple of weeks after the suit was filed. But he was not invited to the American Newspaper Publisher Association convention that was held about the same time in the same city, even though the convention's theme was the First Amendment.

The fundraising that was done was rather informal and amateurish, both Knoll and Carbon admitted. The efforts included a direct mail campaign, speaking tours and an appeal to subscribers as well as meetings with a few foundation representatives and wealthy individuals. The largest single contribution was $25,000, which came out of one meeting with a small group of liberal philanthropists who together contributed $70,000. Carbon estimates that the magazine's subscribers contributed $70,000, in addition to the $100,000 they contributed

Figure 2

Parties Filing Amicus Briefs with Court of Appeals in The Progressive Case

1. Nation, Columbia Journalism Review, Playboy, National Journal, New York, New West, Juris Doctor, Inquiry, Working Papers, New York Review of Books, New Republic, New Engineer, Focus, Midwest, Village Voice, St. Louis Journalism Review, Black Scholar, Rolling Stone, Editor and Publisher, The Witness, Sojourners, Texas Observer, American Lawyer, Cleveland Magazine, Seven Days, Transaction, I.F. Stone's Weekly, American Booksellers Association, Inc., Council for Periodical Distributors Associations.

2. Chicago Tribune, Reporters Committee for Freedom of the Press, Freedom to Read Foundation.

3. Scientific American.

4. New York Times, American Society of Newspaper Editors, American Association of Publishers, National Association of Broadcasters, Association of American Presses, The Globe Newspaper Co.

5. Fusion Energy Foundation.

6. Committee for Public Justice, Pen American Center, Authors League of America, Inc.

during 1979 to offset the magazine's yearly deficit. The direct mail campaign didn't quite break even. Carbon and Knoll said that the speaking tours were not effective fundraisers, either, but some speeches were indirectly responsible for contributions, including $5,000 contributed during a party after an ACLU chapter speech. The speeches by Knoll and Morland were more valuable in disseminating The Progressive's positions on the First Amendment and on nuclear development. The fees for many of the speeches just barely covered the speaker's travel expenses.

Although the magazine was accused of using the H-bomb case to boost circulation, in 1979 circulation increased by only about 700, compared to the 3,000 to 4,000 new subscribers anticipated from the annual circulation drive. The demands of the case made it impossible for the magazine to conduct its regular circulation drive. Though careful records were not kept, Carbon estimates that the magazine lost a few dozen subscriptions as a result of the case, and more were lost because the magazine accepted the Playboy award, which feminists in particular criticized.

Reducing the Risk of Litigation

Given the political issues and the legal arguments of The Progressive case, it would seem that the failure of the mass media to come to the aid of the magazine was based on a rejection of The Progressive's strong anti-nuclear stand and a fear that the U.S. Supreme Court would eventually rule in favor of the government and erode the protections of the First Amendment against prior restraint. The inaction and opposition of the media were clearly not the result of ignorance about the cost of media litigation. The media have been aware for some time of the high cost of media litigation and of the impact litigation has on a medium. Professional associations such as the American Newspaper Publishers Association and the National Association of Broadcasters have been actively developing means of reducing the costs of litigation. The development of libel

insurance and, more recently, First Amendment insurance is meant to minimize some of the risks of publishing and broadcasting. Of these, First Amendment insurance is most relevant to The Progressive's situation, but it was not available when the case began.

First Amendment insurance was developed in 1979 by the Mutual Insurance Co. of Bermuda at the request of the American Newspaper Publishers Association. It became available to ANPA members in April 1980, and by August 1980, 269 media entities had purchased the insurance.[30] In November 1980, First Amendment insurance was made available to members of the National Association of Broadcasters by the Media/Professional Insurance Co., although its protection is not as broad as the insurance provided by Mutual.[31] Mutual's insurance policy covers prior restraint, access questions, reporter's privilege, statutory limitations on publication, anti-trust involving "significant First Amendment issues, and other actions recognized as involving violations of the 'free press' guarantee of the First Amendment."[32] Coverage is limited to a maximum of $1 million per incident.

The ANPA's objective for First Amendment insurance was to provide small- and medium-sized newspaper with the financial resources to undertake First Amendment cases. In announcing the insurance program, Allen Neuharth, chairman of Gannett and then head of ANPA, called it "a great step forward in providing newspapers throughout the United States, particularly smaller newspapers, the opportunity and the means to fight for and to defend freedom of speech and the press."[33]

But an important question about First Amendment insurance is: Can the smaller media afford to buy the coverage? About half of the newspapers and broadcast stations in the United States don't carry libel insurance,[34] and there is no reason to expect that these media will buy First Amendment insurance either.[35] For The Progressive, Sinykin said, the magazine "cannot even afford libel insurance, so how can we afford First Amendment insurance?" Even if The Progressive

could afford First Amendment insurance, the only way to obtain it would be if it were an ANPA member. And Knoll said that he would oppose buying First Amendment insurance on principle. "I don't think I need to insure myself for the exercise of rights granted me by the Constitution," he said.

The rates and deductables for Mutual's First Amendment insurance increase on a sliding scale according to circulation and are based on Mutual's libel insurance rates. For a newspaper with a circulation of 5,000 or less, the annual premium is $247 for $100,000 of coverage and $504 for $1 million, with a deductable of $2,500. A newspaper with a circulation between 25,001 and 50,000 would pay a premium of $500 for $100,000 of coverage and $1,148 for $1 million, with a $7,500 deductable. For large newspapers, those with circulations between 150,001 and 200,000, the annual premium is $1,680 for $100,000 of coverage and $3,216 for $1 million of coverage, with a deductable of $15,000.[36]

The First Amendment insurance offered to broadcasters by the Media/Professional Insurance Co. is also tied to its libel coverage. For radio, the annual premiums for libel insurance are based on the advertising rate card and for television on the hourly programming rate. First Amendment coverage adds an additional 50 percent to the annual libel premium.[37]

Although Mutual has provided a list of types of cases covered by its First Amendment insurance, payment of claims is not automatic under the policy. Mutual, not the publisher, makes the final decision on whether to pursue a case or to resist government action as The Progressive did. When First Amendment insurance was in the planning stages, Arthur B. Hanson, general counsel to the Mutual Insurance Co., said, "We will tell (the publisher) whether he is going to court or not." The decision to cover a case is made by a panel consisting of Mutual's attorney, the publisher's attorney and at least three attorneys selected by the insurance company. A ruling by the majority is binding on both Mutual and the insured. But unlike Mutual's libel insurance under which the publisher's

attorney handles the case, First Amendment insurance permits the insurance company to select the attorney for the case.[38]

As an example of a case that would not be covered by Mutual's First Amendment insurance, Hanson said that it would not apply in a libel case when a reporter claims a First Amendment privilege to refuse to identify a source or provide other information necessary to the newspaper's defense. "I don't care if the reporter goes to jail," Hanson said, "But I'm not going to pay out a million dollars just because some dummy thinks he's got a privilege when the court has said he doesn't."[39] This example raises a question whether the insurance would have covered The Progressive which was clearly proposing to violate the letter of the Atomic Energy Act of 1954. And would it have covered The Progressive if the staff decided to violate the court order and publish the H-bomb article? That's an option The Progressive's editors considered, as did some New York Times executives in the Pentagon Papers case.[40]

Opportunities and decisions to publish alleged H-bomb secrets or Pentagon Papers are rare, but a common and costly problem for the media is libel. Some media people expect that the publicity surrounding large damage awards in recent libel cases will result in more suits being filed against the media. James C. Gooddale, former New York Times general counsel, said, "There is no question (that libel lawyers are going to file) more and more libel suits because they see that plaintiffs can be awarded a lot of money and it can be very lucrative."[41] But it is the defense costs that are the most debilitating and demoralizing, particularly when a publication wins a libel case. John K. Zollinger, publisher of the Gallup (N.M.) Independent, said his paper spent "nearly 2 percent of our net profit on legal costs. It's no joke any more (because) you win and still pay."[42]

Most libel insurance policies do not automatically cover legal expenses that make even winning a case costly. One insurance company representative estimated

that insurance for a magazine the size of The Progressive would cost about $650 a year for $100,000 of libel insurance and $1,200 for $1 million of coverage. There would be a $2,500 deductable and legal fees would not be covered. To have legal expenses covered would cost an additional 35 percent.[43] Of course, these estimates assume that the insurance company would be willing to insure a politically activist and editorially aggressive magazine such as The Progressive. A representative of one major insurance company said that his company likes to insure "nice publications," meaning those unlikely to be involved in controversy and litigation.[44] A study undertaken by the legal department of the National Association of Broadcasters found that stations which broadcast news, editorials, talk or call-in programs or public affairs programs are required to carry special deductables up to four times the usual deductable.[45] And some insurance companies will not sell libel insurance to small broadcast stations. The study reported that 4 percent of the stations responding to the questionnaire had "to modify or cancel types of programming or news coverage" because of possible pressure from their insurance companies.[46] The results of this survey led the NAB to develop more comprehensive insurance for its members.

It seems that libel and First Amendment insurance are most economical to large, profitable media, those that are most likely to have the financial resources and the legal counsel to engage in litigation without insurance or assistance of outside funds. Libel insurance without provisions for attorneys' fees and other legal expenses would seem to be a poor bargain for media without exceptional in-house counsel services. Although premiums and deductables for libel and First Amendment insurance do not seem high compared to annual budgets, it is likely that the premiums will rise if the volume of claims and large damage awards increases as predicted. Then insurance will not be merely an incidental expense.

Insurance is just one of the resources available to the media to help offset the cost of litigation. If a media institution has neither insurance nor individual funds to engage in litigation, it might turn to one of several organizations interested in media cases. These include the Reporters Committee for Freedom of the Press, the American Civil Liberties Union and subcommittees of the American Newspaper Publishers Association, the American Society of Newspaper Editors and the Society of Professional Journalists/Sigma Delta Chi.

The ACLU did provide valuable assistance to The Progressive, and it has provided pro bono counsel for other media in First Amendment cases. But the ACLU's purpose is to promote and protect civil liberties, broadly defined, and the media and the First Amendment are not its only or primary concerns. The ACLU does not become involved in media cases lacking First Amendment or other constitutional components. The ACLU would not be interested in an ordinary libel case, and it seems to prefer to deal with novel issues and potential landmark cases. While the ACLU provides pro bono counsel, its clients generally have to pay out-of-pocket expenses, which amounted to $16,000 in The Progressive case.

The strictly journalistic organizations address more than the constitutional problems of the media. But the ANPA, ASNE and SPJ/SDX have not committed the resources and staffs to do more than help finance a few exceptional cases or those with an obvious impact on nearly all members. The more common contributions these organizations make is to file amicus curiae briefs in cases undertaken and underwritten by other media institutions. The amicus briefs provide moral support and sometimes they make important legal arguments, but they do nothing to help pay the bills. Although the executive committee of the ASNE voted within a few weeks of the start of The Progressive case to support the magazine, the support came in the form of an amicus brief filed jointly with other media organizations. The ANPA took no action in The Progressive case. The national SPJ/SDX did not take any action until long after the case was finished.

The Reporters Committee was formed to provide legal aid to reporters and media, but it was of little assistance to The Progressive. When the case began, Knoll said that Jack Landau, head of the committee and former co-worker with Knoll in the Newhouse chain, volunteered legal and financial assistance. Within a few days, however, Knoll said that Landau changed his position and advised Knoll to compromise with the government by submitting the article to "experts" who would decide what could be published without endangering national security. That was not the sort of aid The Progressive was expecting, and Landau's recommendation drew a bitter reaction from Knoll. "Whatever the Reporters Committee is," Knoll said, "it is not a committee for freedom of the press." In the end, the Reporters Committee did join the Chicago Tribune and the Freedom to Read Foundation in filing an amicus brief.

Even if the Reporters Committee had wanted to help The Progressive, it is unlikely the committee had the financial resources to undertake an expensive case. Shortly before The Progressive case began, the Reporters Committee reported a $31,000 deficit.[47] And providing financial assistance in media cases is not its primary function. The Reporters Committee is itself dependent on the largess of media institutions, foundations and individuals for its funds.

In short, none of the organizations with a specific interest in media law issues has the resources to do more than assist in a few major cases, and more often the assistance takes the form of filing amicus briefs. But even when these organizations provide legal help, there are problems. Legal counsel provided by a third party and amicus briefs subject the media institution involved in the case to a possible loss of control over its legal arguments. The involvement of the ACLU in The Progressive case illustrates some of the problems that could arise with an amicus brief. Before the March 26 hearing on the preliminary injunction, the ACLU filed an amicus brief recommending that the court appoint a panel of scientists to review the H-bomb article. Sinykin said that when he

learned of the ACLU's argument, "we were horror-stricken." Judge Warren read the ACLU's brief along with legal documents filed by The Progressive, the government and other amici, and he initially adopted the ACLU's suggestion. Thus, a compelling amicus argument, which was contrary to the magazine's own position, supplanted The Progressive's argument against any form of prior restraint. When the ACLU subsequently offered to represent Knoll and Day, Sinykin said that the ACLU's help was accepted on condition that the ACLU abandon the idea of an independent review of the article. In the Pentagon Papers case, outside counsel for both the New York Times and the Washington Post opposed publication of the documents. The Times had to find a new lawyer the night before its first court hearing; and, after the case was completed, the Post fired its counsel because of his recommendation against publication and the Post's dissatisfaction with his arguments in the case.[48]

Conclusion

One of the obvious results of the cost of litigation is that the media will avoid situations that may result in legal problems. Floyd Abrams, an attorney who helped to represent the New York Times in the Pentagon Papers case, said, "If things develop to the point where large jury verdicts or large counsel fees on a yearly basis are the norm and not the exception, then I don't have any doubts that publications will be obliged to trim their sails . . . . The real danger is that the public will never know."[49] Since it is difficult to know when the media engage in self-censorship, it is impossible to gauge how common a practice it is or what types of stories are not published.

Even The Progressive's editor and publisher acknowledge that they would be more cautious if an issue comparable to the H-bomb secret came up again. They would plan their strategy ahead of time and raise defense money before publication. "I think we would have to go out and talk about the article with

people and try and get (financial) commitments in advance," Sinykin said. The reactions of those solicited might well determine whether the article would be published. Knoll adds, however, that in the same circumstances, he would disobey what he thought was an unconstitutional court order and publish the article, on his own if necessary.

If a media organization cannot rely on the financial support of larger media organizations and does not have insurance to cover the costs of litigation, what then are the medium's alternatives when faced with a potentially expensive case? The bottom line is that a small, independently-owned medium may have to risk its own survival in order to pursue litigation that may actually benefit all media. The Progressive did not quite reach the point where a decision had to be made between killing the magazine and dropping the case.

The increase in the amount and cost of media litigation is affecting all media. The existing means of financing media litigation are inadequate and there is a need for a comprehensive system of responding to media legal problems. Whatever form the system would take, it needs to provide:

--Information on how previous cases were managed and what successful and unsuccessful strategies were, so media participants need not develop their own strategies in a vacuum;

--Ready access to informed advice about responding to legal problems that can accommodate the medium choosing to take or defend unpopular action;

--Experienced legal counsel available on the short notice required in prior restraint cases;

--Money to pay direct expenses as well as attorneys' fees, or a guarantee of pro bono representation;

--And voluntary assistance to help the medium continue to publish or broadcast while legal problems occupy the time of the staff.