

***Chevron Corp. v. Berlinger* and the Future of the Journalists' Privilege for Documentary Filmmakers**

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Abstract

The documentary film *Crude*, directed by award-winning filmmaker Joseph Berlinger, tells the story of a class action lawsuit brought by thousands of Ecuadorians against the oil company Chevron. The lawsuit alleges that the company's contamination of a portion of the Amazon jungle increased disease, birth defects, and other health problems for the indigenous people of the region. Berlinger and his crew spent three years filming with the plaintiffs' legal team, but captured only a small portion of the ongoing fight between the Ecuadorians and Chevron. After the film premiered in 2009, Chevron and, separately, two of Chevron's lawyers who were facing criminal charges in Ecuador for falsifying documents moved to subpoena nearly 600 hours of raw footage, or "outtakes," that Berlinger did not include in the completed film. Chevron argued that the outtakes would prove that the plaintiffs' lawyers exerted improper influence over judges and experts involved in the proceedings in Ecuador through ex parte communications. Berlinger attempted to quash the subpoenas on the ground that he was protected by the journalists' privilege.

The district court ordered Berlinger to turn over all of his outtakes—the largest mandate to turn over outtakes ever ordered by a U.S. court. The Second Circuit slightly narrowed but nonetheless affirmed the order. The Second Circuit further ruled that because Berlinger appeared to be subject to the influence of his filmmaking subjects, he lacked the editorial independence necessary to qualify for the journalists' privilege.

This comment argues that the Second Circuit erred in inserting an "independence" requirement into the journalists' privilege and dealt a blow to non-institutional media by finding that Berlinger—who was neither bankrolled by his film's subjects, nor subject to their editorial control—was not sufficiently independent. The comment considers the challenges that now face documentary filmmakers who want to protect their footage and their subjects from litigation.