# ASSANGE INDICTMENT HIGHLIGHTS IMPORTANCE OF SHIELD LAWS FOR PROTECTING PRESS FREEDOMS

*Hodgson Russ Media Law & First Amendment Alert*
May 3, 2019

The recent indictment of WikiLeaks founder Julian Assange on a charge of conspiracy to violate the Computer Fraud and Abuse Act has raised concerns about its potential impact on press freedom. This highly publicized case presents a good opportunity to review the state of the law concerning protections for confidential sources and to whom those protections apply.

According to the indictment, Chelsea Manning — a U.S. Army Intelligence Analyst — provided Assange with a trove of top secret military documents, which WikiLeaks later published. The majority of the conduct outlined in the indictment could be characterized as simple receipt of sensitive information from a confidential source. This would be similar to Daniel Ellsberg turning over the Pentagon Papers to the New York Times in 1971.

In fact, several advocacy groups issued statements in response to the indictment, pointing out that much of the alleged conduct was not related to computer hacking, and involved routine, legitimate journalistic practices styled to protect confidential information and sources. For example, the indictment alleges efforts to conceal Manning as Assange's source by removing usernames from information disclosed to the public and sharing materials using a cloud drop box. Advocates for freedom of the press have expressed alarm at the suggestion that these practices, in and of themselves, are somehow improper or illegal.

This leads naturally to a discussion of what legal protections reporters have when working with confidential sources. In 1972, the United States Supreme Court decided *Branzburg v. Hayes*, which held that the Constitution does not provide reporters total protection from being compelled to reveal confidential information in court. Since then, forty states and the District of Columbia have passed so-called "Shield Laws," designed to protect reporters against being forced to disclose confidential information or sources in court proceedings. There is no codified federal shield law (though some federal courts recognize a qualified privilege), and the scope of state shield laws varies among jurisdictions. For example, some states provide an absolute privilege, while in other states the privilege is qualified. Some states only protect information that remains confidential, while others protect reporters even when information is disclosed in a news story and is no longer confidential. And

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depending on the state, the protection may extend beyond the reporter to other members of the newsroom, for example, editors.

New York's Shield Law is codified at Section 79-h of the Civil Rights Law. The law provides "professional journalists and newscasters" absolute protection from contempt proceedings for failure to disclose confidential information, or the source of confidential information. Information and sources not obtained in confidence are subject to qualified protection, which can be overcome by a "clear and specific" showing that the information sought is "highly material and relevant," "critical or necessary" to a party's claim or defense, and not available from any other source.

New York's protections apply to a broad range of news professionals beyond reporters, including camerapersons, photographers, and editors. New York also extends protection to supervisors of anyone collecting information, as well as the employer as an organization. However, any privilege is waived if the information at issue is disclosed to someone who does not also qualify for protection.

In the Assange case, Chelsea Manning has already been identified as the source with whom Assange was working. But a hypothetical application of New York's law to the Assange case illustrates the questions that can arise for non-traditional media. For example, assuming the government wanted to compel Assange to identify Manning as his source, consider whether Assange could assert the privilege. To qualify as a "professional journalist" subject to protection, Assange would have to establish that he is associated with a "newspaper, magazine, news agency, press association, wire service, … or other professional medium of communicating news or information to the public[.]" While WikiLeaks is certainly engaged in the collection and dissemination of information to the public, it does not fit squarely into the statute's otherwise broad definition of covered entities. WikiLeaks is not a periodical, and therefore not a newspaper or magazine. And it is not a commercial organization, association of newspapers or magazines, or an agency that syndicates news copy. Therefore it is not a news agency, press association, or wire service.

WikiLeaks would then have to qualify as an "other professional medium of communicating news." The statute does not provide a definition for that term, but New York courts interpret it liberally. Federal courts interpreting the law have looked to whether the entity at issue intended to disseminate the information to the public from the inception of the newsgathering process. WikiLeaks could certainly contend that it qualifies under such a test.

Shield Laws do not extend to some of the important press freedom questions raised by the Assange case, such as the potential criminalization of certain newsgathering conduct. Reporters should be careful not to inadvertently encourage or participate in otherwise illegal conduct such as computer hacking to obtain information. Indeed the most damning allegation in the Assange indictment is that he admitted he had been trying to hack the Department of Defense network, and requested more information from Manning in furtherance of that effort. However, Shield Laws do provide important protections against the revelation of information and sources obtained during the newsgathering process.

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