

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
- vs -)	
)	
ZACARIAS MOUSSAOUI,)	Criminal No. 01-455-A
)	
Defendant,)	
)	
GANNETT SATELLITE INFORMATION)	
NETWORK, INC.)	
)	
Movant-Intervenor.)	

**BRIEF OF GANNETT SATELLITE INFORMATION NETWORK, INC. OPPOSING
THE GOVERNMENT’S MOTION FOR PROTECTIVE ORDER
REGARDING COCKPIT VOICE RECORDERS**

Gannett Satellite Information Network Inc. respectfully submits this brief in opposition to the government’s motion (Docket No. 399) for a protective order regarding its anticipated use of cockpit voice recorders.

STATEMENT OF FACTS

Gannett Satellite Information Network Inc. publishes USA Today newspaper through traditional means and through its website, usatoday.com. USA Today has reported on the events of September 11 and its aftermath, including the FBI’s disclosure, to relatives of those who tragically died on United Flight 93, of some or all of the tapes at issue on this motion.

Although some relatives apparently turned down the FBI’s invitation, the reactions of those who listened to the tapes (as quoted by USA Today on April 19, 2002) were profound:

- § “This was another Normandy,” said Hamilton Peterson, whose father, Donald, of Spring Lake, N.J., was on the flight. “These people were informed of the unthinkable, they digested it and acted on it in no time at all. . . . The American spirit is alive and well.”
- § Alice Hoglan, whose son Mark Bingham was on the flight, described a "muddle of voices" and said "it was hard to hear, even when they were yelling." ... "I am so proud of my son," said Hoglan, sobbing. "It was an excruciating and incomparable experience, one I'm grateful to have had."
- § Deena Burnett, whose husband, Tom, is thought to have helped lead the charge toward the cockpit, said the tape contained "a beautiful secret" that would become apparent when it was played in court. "You just know from listening that each person had a task and they did it well," she said. Burnett said she found "peace and joy" from listening to the tape -- so much so that she asked to hear it a third time.

The tape recordings may be of central importance to the government's case. The tapes may reinforce, as no other evidence can, the horror of the acts of which defendant is accused. The tapes will no doubt simultaneously reveal that the passengers and crew of Flight 93 did not die in vain, and that their acts represent unconquerable American courage and determination.

For the reasons below, once the tapes are admitted into evidence USA Today, on behalf of itself and the American people, should be permitted to copy and disseminate them. The motion for protective order should be denied.

ARGUMENT

POINT I: MOVANT AND THE PUBLIC HAVE A RIGHT TO COPY THE AUDIO TAPES ADMITTED INTO EVIDENCE IN THIS CASE

This Court has recognized the strong First and Sixth Amendment interests in open and public judicial proceedings. Docket 170; see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-14 (1986) (“Press-Enterprise II”); In re State-Record Co., Inc., 917 F.2d 124, 127 (4th Cir. 1990). The constitutional right to a public trial right belongs not only to a criminal defendant, but to the public and to the press as well. Richmond Newspapers, Inc. v. Virginia,

448 U.S. 555, 572-73 (1980). The First Amendment right to attend and observe trials “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (“Press-Enterprise I”).

The government’s motion for protective order does not specifically seek to close the courtroom to the public when the recordings are played to the jury. Indeed, the motion suggests the contrary. To the extent that closure is sought, however, the government’s motion is constitutionally unacceptable. A courtroom closure would frustrate:

the “community therapeutic value” of openness. ... Criminal acts ... provoke public concern, outrage, and hostility. “When the public is aware that the law is being enforced ... an outlet is provided for these understandable reactions and emotions.”

Press-Enterprise II, 478 U.S. at 13 (quoting Press-Enterprise I, 464 U.S. at 509). Closure cannot take place without specific, on the record findings demonstrating that it is “essential” to preserve higher values than the constitutional rights at stake, and that there are no alternatives available.

Press-Enterprise II, 478 U.S. at 13-14. There is simply no legitimate basis upon which to exclude the public and press from the trial when the tapes are played, and the government suggests none.

Moreover, when the audio tapes are admitted into evidence or played in open court, USA Today – on behalf of itself, its readers and the public at large – has the right to obtain a copy of them.

“A First Amendment right of access applies to a criminal trial, including documents submitted in the course of a trial.” In re Time, Inc., 182 F.3d 270 (4th Cir. 1999). If USA Today is permitted to attend and listen to the tapes at trial, its constitutional right of access to the tapes may be satisfied if USA Today is provided with a copy of any transcript of the recordings that

may have been prepared. Fisher v. King, 232 F.3d 391, 396 (4th Cir. 2000). In addition to the rights afforded by the First Amendment, however, the common law independently gives USA Today (on behalf of any media pool) the right to copy the audio tapes as they are introduced into evidence.

“What transpires in the court room is public property.” Craig v. Harney, 331 U.S. 367, 374 (1947). “It is clear that the courts of this country recognize a general right to inspect and copy ... judicial records and documents.” United States v. Criden, 648 F.2d 814, 819 (3rd Cir. 1981), citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). Where, as here, the public’s opportunity to observe the trial proceeding is subject to space limitations, the values served by public trials “can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person.” Criden, 648 F.2d at 822. Accordingly, “there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination.” Criden, 648 F.2d at 823.

Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

In re National Broadcasting Co. (Meyers), 635 F.2d 945, 952 (2nd Cir. 1980). This is so because listening to the actual audio tapes admitted into evidence “contributes a dimension which cannot be fully provided by second-hand reports,” including tone of voice, inflection, emotion and background sounds and noises. Criden, 648 F.2d at 824. Most assuredly the government’s tapes in this case do not contain statements of the defendant, and it is highly unlikely that they contain

statements of others that bear directly upon defendant's guilt or innocence. The government therefore likely seeks to offer the audio tapes into evidence not for their textual content, but precisely because they contain an emotive impact which cannot adequately be described in words. The common law right to copy is therefore at its most intense with respect to these tapes.¹

We do not contend that the common law right to copy the audio tapes is absolute.² There are clear countervailing values at stake. USA Today does not want to intensify the pain already inflicted on the innocent victims of this awful crime. Such a result should not be the effect of this opposition, and it is not the purpose of USA Today. For this reason, the Court should make a discriminating assessment of what, if any, portions of the tape should be withheld from copying to avoid any such injury.

In its assessment, the Court must of course take into account the statute upon which the government places its singular reliance.³ By its terms, that statute seeks to prevent use of cockpit voice recordings for purposes "other than for the [trial]." 49 U.S.C. 1154(a)(4)(B). Here, however, the recordings have already been used for other purposes, and have already been disclosed to select members of the public. Thus, the Court should consider that some or all of the tapes at issue were evidently

¹ This Court rejected a request to televise the trial. Docket No. 47. This motion, however, presents a distinct issue. The copying of physical evidence "has no bearing on the continuing issue ... as to whether the live testimony of witnesses should be broadcast or telecast. With physical evidence, there is no concern that awareness of dissemination of sight and sound beyond the courtroom might have some distorting impact upon the content of the evidence or the manner in which it is presented to the jury." Meyers, 635 F.2d at 952, n. 5.

² For example, the copying procedures must not unreasonably interfere with the court process or damage or impair the physical records themselves or their contents. Criden, 648 F.2d at 824.

³ "A court may allow a part of a cockpit or surface vehicle recorder transcript not made available to the public under section 1114(c) or 1114(d) of this title or a cockpit or surface vehicle recorder recording to be admitted into evidence in a judicial proceeding, only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding." 49 U.S.C. 1154(a)(4)(B).

disclosed by the National Transportation Safety Board to the FBI, and perhaps to other governmental agencies. In turn, the FBI disclosed some or all of the tapes to at least the relatives of the victims of Flight 93. The government's disclosures have in turn led to public disclosures and discussions by some who heard the audio recordings. Because the tapes have already been disclosed, the statute's mandate simply does not apply.⁴ In that regard, although the order cited by the government, US Airways v. Parker Hannifin Corporation, Civ. No. 99-917 (W. D. Pa. June 19, 2002), supports its protective order motion, the indispensable factual predicate for that order was the Court's clear understanding that – unlike the tapes at issue in this case – the audio tapes before it had not been otherwise disclosed. US Airways v. Parker Hannifin Corporation, Civ. No. 99-917 (W. D. Pa. June 12, 2002) (Transcript at 121: “the cockpit recording has not been released publicly.... [O]riginally I thought this had been released publicly. I was going to let them have it...” (Attached as Appendix to this Brief.)

For all of these reasons, the government's motion should be denied at this time. The Court should not issue a broad protective order, based on the statute. Instead, before the tapes are admitted into evidence, the Court should perform the individualized “delicate balancing” which is required by the common law, and should weigh “the strong common law presumption of access and ... the educational and informational benefit which the public would derive from broadcast of evidence introduced at a trial” against any countervailing interests that may apply to particular portions of the tapes. Criden, 648 F.2d at 829.

⁴ The purpose of the statute was to protect the privacy of airline crew members. “All parties to an accident investigation recognize both the rights to privacy of the individual crewmembers and the need to conduct a full and fair investigation. This section seeks to maintain a balance between those interests.” S. Rep. No. 101-450 (1990), reprinted in 1990 U.S.C.C.A.N. 6370, 6381. To the extent that crew members' voices are heard, therefore, a protective order as to the portion of the tapes upon which the voices appear might be appropriate.

Dated: August 19, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie P. Arrington, hereby certify that on this 19th day of August, 2002, I caused to be served true and correct copies of the foregoing Brief by hand delivery or by fax and first class U.S. Mail, postage pre-paid, as indicated below, on the following:

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