INTERNATIONAL LIBEL & PRIVACY HANDBOOK

A Global Reference for Journalists, Publishers, Webmasters, and Lawyers

THIRD EDITION

Charles J. Glasser, Jr., Esq.
Global Media Counsel
Bloomberg News

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Edited by

CHARLES J. GLASSER JR., ESQ.
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BLOOMBERG PRESS
An Imprint of
WILEY

Cover Design: Jeff Faust

Published by John Wiley & Sons, Inc., Hoboken, New Jersey.
First and second editions published by Bloomberg L.P.
Published simultaneously in Canada.

Library of Congress Cataloging-in-Publication Data:

International libel and privacy handbook : a global reference for journalists, publishers, webmasters, and lawyers / Edited by: Charles J. Glasser Jr. —3rd ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-118-35705-7 (cloth); ISBN 978-1-118-41689-1 (ebk);
ISBN 978-1-118-42049-2 (ebk); ISBN 978-1-118-51821-2 (ebk)
1. Libel and slander. 2. Privacy, Right of. 3. Freedom of speech. 4. Mass media—Law and legislation. I. Glasser, Charles J., Jr.
K930.158 2013
346.03'4–dc23

2012036593

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

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Preface: Understanding Media Law in the Global Context

There is no single body of "international law" that explains the risks a reporter, editor, or webmaster faces. There is no such unified theory of law in securities litigation or in environmental or health care law, so why should there be one in publishing?

Spend five minutes at the United Nations or any international congress where arguing about the shape of a meeting table can go on for a day and it will come as no surprise that media law around the world is a crazy patchwork quilt of laws, with each square reflecting a nation's cultural biases, political history, and economic structure.

Most of us in the mass media—and especially in newsrooms—believe that free speech isn't merely an economic or political activity, but is one rooted in basic and transnational human rights. The desire to express one's self is a part of who we are. Indeed, many jurisdictions recognize this by making free expression a constitutionally protected right.

In the United States, those of us who practice media law often echo the language of Supreme Court Justice William O. Douglas, who referred to the "preferred position" of the First Amendment in order to "bring fulfillment to the public's right to know."[1]

Americans tend to believe that it is the First Amendment, because the right to speak freely is the right from which all other freedoms stem. One can't make informed decisions about the virtues of legalizing marijuana, the right or wrong of abortion, the illegal activities of Wall Street CEOs, or the wanton sex lives of movie stars without the right to speak openly. Free speech is part of—and maybe even responsible for—the American culture.

For better or worse, "everyone has a right to their opinion" is a concept learned at an early age by Americans. As thick-skinned as we are, we also learn on the playground that "sticks and stones may break my bones, but names will never hurt me."

In short, it takes a lot in America to say something so hurtful, in such a context, and with such loudness that the law will punish it.

But punishment does occur, even in the home of free speech. Libel cases, even those in which the press is victorious, are long, expensive, and often emotionally painful experiences.

Susan Antilla, now an award-winning columnist for Bloomberg News, was sued by businessman Robert Howard over a 1994 story Antilla wrote when she was a reporter for the *New York Times*.[2] Howard was the chairman of two publicly traded companies whose stock price had been fluctuating enough to draw Antilla's attention. After extensive investigation and research, Antilla determined that the market may have been reacting to rumors that Howard may have been a dual identity, the "other" identity being Howard Finklestein, a convicted felon.

Antilla, after interviewing more than 30 people during the course of a month, wrote an article that didn't adopt as "fact" that Howard had a dual identity. Instead, it simply reported that the rumor was being passed around Wall Street and that it may have had an impact on the companies' share prices. The article also contained Robert Howard's unequivocal denial.

In 1997, three years after the publication, Howard brought a libel and privacy suit not against the *Times*, but against Antilla. Although the eventual outcome—at the appellate level—vindicated Antilla's reporting on First Amendment grounds, the trial was a grueling and abusive experience for Antilla

Antilla tried to be fair and clear in her story, which she knew was reported thoroughly, but the experience of being sued scared her and shook her confidence, and it took a long time for her to recover from it.

"From the very beginning, the plaintiff did everything to grind me down. He wanted revenge," said Antilla. Even before Howard filed his suit, a burly private investigator showed up at her house and questioned her about her sources and the way she reported the story.

Things didn't improve. The trial process, including two days of depositions and six days of trial, made her feel "picked apart." "They had looked at everything I had ever written, even going back to where I grew up," said Antilla. "They questioned my competence and training as a reporter. In the end you feel so naked and like there's nothing that's safe to write ... you lose your confidence. It's the worst thing I've ever gone through."

Afraid that the jury might sympathize with Antilla, Howard's lawyer began his arguments by saying, "Sometimes good people can do bad things." The jury believed him.

Even though Antilla and her reporting were vindicated on appeal, the experience took its toll not just on Antilla's confidence, but on the way she felt back in the newsroom.

"After the trial, I went to writing and having tremendous complications working with an editor again because I was quadruple reporting everything," she said. "The way journalists look at you after being sued is never the same.

Even though 15 people approved the story, the shame really hung around my neck. You don't end up being a hero: Everyone runs for the hills and you have a sense of it being your fault. My lawyers were great, very supportive, but you're the one holding the bag. I still get defensive about it."

The financial consequences of being sued for libel can be more devastating than the emotional toll. Newspapers have been put out of business by the cost of libel litigation and the subsequent monetary judgments.

In the late 1990s, Barricade Books, a division of Lyle Stuart, published *Running Scared*, a book about Steven Wynn, one of the best-known and most highly regarded casino operators in the world. The book and its advertisements alleged that Wynn had improper connections to the Genovese crime family, and ostensibly based some of that writing on reports from England's Scotland Yard, generated when Wynn applied for a casino license in London.

Long and arduous litigation followed. In 1997, a jury found those allegations false and defamatory, and awarded Wynn $3.2 million. That judgment was litigated throughout Nevada's legal system. The Nevada Supreme Court eventually overturned the judgment and ordered a new trial. Wynn declined to prosecute his case further, saying through his lawyers that he felt vindicated.

By that time, the damage had been done, and not just to Wynn's reputation. The libel suit forced Lyle Stuart into bankruptcy.

There may be good reason to argue that the damage to Lyle Stuart was self-inflicted. The case raised questions of whether a UK police report qualified to be protected under Nevada law or if UK law regarding police reports could, or should, be applied in Nevada. It seems that this international aspect was never fully examined.

Even discounting these episodes as aberrant, there is no doubt that being sued for libel is something to avoid. When questions of international law appear, they raise the stakes even higher.

The threat of libel litigation is now exacerbated by the reach of the Internet. Today, bloggers are breaking news that is chased down by mainstream media. They are now credentialed at national political conventions and even at the White House. Acting as self-appointed mass media watchdogs, bloggers have claimed credit in ending the careers of a famous television news commentator and various news executives.

More news media are distributing their content across borders. Bloomberg, the news provider for whom I am fortunate to work, is American-owned, but its success is built on global reach. In more than 100 newsrooms around the globe, headlines and stories are flashed on desktops at the speed of light. There is no telling where the next story will come from or what it will say. A reporter in Milan is working on a story about a deal between an Italian bank, a Spanish executive, and a Japanese bond issuer. A New York–based reporter is moving a story about a Russian oil company

headed by a British resident and his battles in a U.S. bankruptcy court with French investors. These stories will be read in Hong Kong, London, and Kansas City, and places the reporter may not even be able to locate on a map.

So, given that libel suits are often ruinous, if not emotionally grueling, given that words are sent instantly around the world and archived forever, are there guidelines that should be used by reporters and editors?

What is needed is a global approach requiring that reporters and editors review their practices and philosophy toward global newsgathering, and that they develop an understanding for the basic moral engine that drives a nation's media laws.

American editors and their lawyers generally review news stories from a solely U.S. perspective: publish stories conforming to a level of risk under U.S. law, and hope that either the facts are good enough to win a libel suit, or, in the alternative, that either their publisher has no assets to attach in a foreign country or that an adverse judgment won't be enforced in the United States.

In essence, the U.S. model is based on the press-friendly moral engine that drives American media law. As a democracy, constitutionally derived rights (like the right to speak freely) transcend other rights rooted in common law or statute. As mentioned previously, the right to publish is embedded in the First Amendment of the U.S. Constitution and is considered paramount. The "personal" rights of privacy, to enjoy a good reputation, to be free from defamation or other assault on personal identity aren't constitutionally protected in the United States. Thus, under U.S. law, the press's rights trump these "personal" rights.

I once attended a libel law conference where I sat next to the general counsel of a large media conglomerate. The panel was discussing a libel case in Europe where the press had enormous burdens to meet in court.

"Haven't they ever heard of the First Amendment?" asked this lawyer.

The answer is that they may have heard of it, but don't give it any weight. In many nations, there is no constitutional right to press freedom, but the constitution does recognize the personal rights (also called *dignitary rights* in some jurisdictions). In many of these nations, there simply is no "First Amendment" that trumps other rights. Yet other nations' press law represents a balance of the two: a constitutional right of a free press on an equal footing with the personal rights. In balancing the two, courts weigh the rights of the press against the responsibilities to avoid harming dignitary interests.

The danger of taking a strictly American approach is highlighted by the British case of *Berezovsky v. Forbes Magazine*.[3]

From an American perspective, everything seemed right about this hard-hitting story. In December 1996, a *Forbes* magazine story about Boris Berezovsky retold stories about the Russian media, oil, and finance oligarch's

rise to riches.[4] Introduced with a headline that read "Power, Politics, and Murder. Boris Berezovsky can teach the guys in Sicily a thing or two," the story was the result of months of reporting by a team of some of the most experienced journalists in the world. They spoke to dozens of firsthand witnesses who alleged that they knew that Berezovsky left behind "a trail of corpses, uncollectible debts and competitors terrified for their lives."

The article called Berezovsky a "powerful gangland boss," and basing their reporting on police reports, corporate documents, and interviews, the reporters strongly suggested that Berezovsky was behind the murder of Vladislav Listyev, a popular television host and top official at Russian Public Television.

In the United States, such reporting would be protected by a plethora of privileges, and *Forbes*' editors didn't expect that a libel case would be brought, let alone brought in the UK. Berezovsky filed a libel claim in Britain, where few privileges protect the press, and sued-upon stories are assumed by the court to be false. Since Russian prosecutors never charged Berezovsky for Listyev's murder, how could a magazine on the other side of the world conduct a criminal investigation to convict Berezovsky of murder?

Forbes fought the case the best way they knew how: challenge the location of the suit in London. The House of Lords disagreed with their American cousins, and allowed the case to continue, because Berezovsky convinced the court that even though the story was published by an American newsroom, and was about a Russian citizen, enough Britons had read the article (published simultaneously on *Forbes*' website) to damage Berezovsky's reputation in England.[5]

The case dragged on, and millions of dollars later, *Forbes* was finally forced to relent, reading a statement in open court that apologized to Berezovsky, and issuing a detailed retraction.[6]

Following the American model may place reporters and news organizations at risk in other ways. For example, American reporters are often shocked to learn that the UK (and most of Europe) often places considerable restriction on the ability to quote arguments and documents in court cases.

Where American law presupposes the right of access to court proceedings, the UK and many other nations restrict the ability of the press to publish many parts of court proceedings. On the theory that juries might be unfairly persuaded by "evidence" they read in the newspapers but do not examine in court, these jurisdictions set out strict limits as to what can and cannot be published.

This problem was underscored in 2005 when a publication ban was issued in a trial about corruption in Canada's Liberal Party. The court banned publication of testimony on the Internet. American webmasters, especially those with nothing to lose and no assets at risk in Canada, began to publish

articles about the trial. Canadian news organizations then linked their websites to the U.S.-based websites. Although some of those Canadian news organizations later removed the links for fear of contempt of court prosecution, the court did not try to punish the U.S. webmasters.[7]

Although the webmasters may have struck a blow for Canadians' right to know, the problem remains and looms large for bona fide news organizations, especially those who do business or maintain offices in Canada. While the webmasters might have been too small for the courts to go after, it is by no means certain that large, well-established news organizations will not come in the courts' crosshairs.

The global model suggests that the right guidelines might satisfy some of the international constants. In other words, if the highest standards of accuracy, clarity, and fairness are met, then a story should be suitable for publication anywhere. Distilling those universal constants to a few principles, global publishers should consider the following:

Put Accuracy Ahead of Style and Speed. Unlike U.S. law, the laws of many nations assume that a sued-upon story is false, and place the burden of proof on the publisher. This means that every fact should withstand close scrutiny prior to publication, and should be subject to exacting proof with notes, interviews, documents, and other primary source material prior to publication. It is also worth noting that some nations, like France, do not allow reporters to prove the truth of their stories with information gathered in the course of a lawsuit. If the reporter did not have it to rely upon while writing the story, then the reporter may not rely upon it at trial. There's a world of difference between a story that you "know" is correct and one you can prove is correct.

Publishers should also be aware that the rush to publish is a nearly fatal accusation in many nations. In those countries without a First Amendment analogue, courts give less weight to the public's need to know than to a person's dignitary right, especially in light of an error committed because the reporter did not have time—or take the time—to adequately research a story and seek comment. Many of these same nations do not recognize competitive pressures and deadlines as reasons that justify a damaging and allegedly inaccurate story.

Make Fairness an Obvious and Primary Element of All News Stories. Failure to provide a meaningful opportunity to comment is often the most damaging element of a libel claim in Europe. In a 2003 English case, George Galloway, a politician known for pro-Arab views and opposition to the Iraq War, won a libel judgment of almost $300,000, plus attorney's fees, against the *Daily Telegraph* after the paper published an article the court found fundamentally unfair.[8]

The paper's reporter, who was in Iraq after the 2003 invasion, claimed to have found a set of documents showing that Galloway had been receiving

illicit payments from Saddam Hussein and had meetings with Iraqi intelligence officers. The reporter telephoned Galloway on the evening of April 21, and in that conversation, Galloway denied the allegations and told the reporter he had never seen the documents in question.

The next morning, the *Telegraph* published a five-page spread with the headline SADDAM'S LITTLE HELPER and a story that began: "George Galloway, the Labour backbencher, received money from Saddam Hussein's regime, taking a slice of oil earnings worth at least £375,000 a year, according to Iraqi intelligence documents found by the *Daily Telegraph* in Baghdad."

Under English law, the seriousness of the allegations has to be met with an equal zeal to allow a meaningful opportunity to respond. This was the failure that most damaged the *Telegraph's* case. Reviewing the facts of the case, Justice Eady pointed out that the *Telegraph* admitted it did not have the documents examined for authenticity prior to publication, and did not read the documents to Galloway when asking him for comment.

The reporter did not tell Galloway that the story would be published the next morning, or that it would be a five-page spread. The reporter refused to tell Galloway where and how the documents by which his reputation would be harmed were obtained. Instead of presenting Galloway with the specific allegations that he would surely have to answer later, the reporter merely told Galloway that the documents had "come to light."

Given that Galloway was accused of nearly treasonous acts that would surely damage his career, the court found that Galloway was not given a reasonable and meaningful attempt to comment.

Although as of this writing the case is on appeal, the lesson should not be lost, whatever outcome occurs: the more serious the allegation, the more detailed must be the attempt to reach the subject.[9] One phone call may not be enough, and asking people to comment on documents they have never seen is even more troublesome. Consider follow-up e-mails, faxes, and, if necessary, hand-delivered letters setting out the details of what a subject is going to be accused of, and asking for comment.

More often than not, doing less simply looks unfair. In nations without a rich tradition of a First Amendment, facts that look like a cheap shot usually work against the press.

Serve the Public Interest. In many nations, especially those without a constitutional counterweight to dignitary rights, even truth is not an absolute defense to libel claims. These courts require that such intrusions serve the public interest. American law is on the whole very generous to the media in determining what is and isn't in the public interest, and guided by the First Amendment's marketplace of ideas theory, generally defers to that marketplace.[10] Editors, after all, know what interests the public, and they try to provide that kind of story. If the story isn't of interest to the public,

then readership and circulation decline. This free market approach assumes that the public interest is indicated by what the public consumes.

But in most of the world, courts don't grant such deference to journalists, and what is of interest "*to*" the public is not the same thing as what is "*in*" their interest. For example, Italian courts ask whether journalists are "fulfilling their mission to inform the public about news it needs to protect itself."

Bloomberg's editor-in-chief Matt Winkler says that a fundamental element in all news stories is "what's at stake." In his handbook *The Bloomberg Way*, Winkler explains that "people need a sense of what's at stake in order to know why they ought to care about an event."

When reporting a story, the "what's at stake" underscores the public interest by asking and answering the same questions: Is there an effect on public health? Is there a risk of harm to a nation's economic or physical security? Is there a chance that an act of wrongdoing might go unpunished and repeated? Are society's more vulnerable members likely to become victims?

Reporters and editors should be encouraged to find the angle in each story where society can be said to benefit from publication of information that can be used to protect itself. The merely prurient and prying—although popular—may not meet the court's standards of public interest.

Cultural Sensitivity Counts. Phrases that may be innocuous in one culture are often offensive—and even libelous—in others. For example, in the United States, to say that someone was "fired" is not by itself defamatory. Yet the same statement in France or Japan will almost always raise eyebrows and get the libel lawyers' sabers rattling. Why the difference? The answer is cultural.

In the United States, people are used to the notion of an unfair dismissal. People can be fired in many states for no reason at all, or for reasons that people think are unfair. In isolation, it doesn't imply that the former employee did something wrong.

By contrast, French unions and employment law makes it next to impossible to "fire" people without a strong showing that the employee violated some duty. Thus, if people were "fired" they must have done something wrong or, at best, been incompetent.

Similarly, in Japan, where people are expected to work for one company their entire adult lives, being fired is a shameful event. This is why Asian and European publishers often use the phrase "made redundant" to describe persons who are laid off for reasons of economic savings.

Assuming the public interest, one can report that an executive was fired, but the publisher of that statement had better be prepared to prove it with direct quotes or documentary evidence.

Cultural differences are reflected in the varying definitions of defamatory meaning. What is offensive or worthy of ridicule in one place might make

no difference in another. To be called "gay" in San Francisco would not raise contempt, hatred, or scorn, while using the same term in Hong Kong may cause an uproar.

It's not just rude or imperialistic to assume that your nation's moral values are the appropriate yardstick; it may be considered intrusive or libelous.

Similarly, iconographic figures or political doctrines may be so ingrained in the culture that the laws specifically proscribe attacks upon them. Statements that question the integrity and political wisdom of Chairman Mao will almost certainly set alarms ringing in China, and endorsements of an independent Taiwan are expressly criminalized.

In the United States, some might characterize Singapore's Lee Kwan Yew as a plutocrat. Yet in that nation, he is genuinely revered by most of the populace as a founding father and strong, benevolent leader. Reporters and editors should at the very least be aware of these potential pitfalls.

Translations in reporting also raise problems. In reviewing a story about warring Mexican shareholders in a takeover bid, I noticed the original draft had one side accusing the other of actions that were "illegal."

Although I'm not a securities lawyer, it seemed farfetched to say that offering a certain price for stock was a criminal act, so I asked the reporter to check back and see if the sources meant against the law (*contrario a la ley*) or instead merely not legally binding (*sin precedente vinculante*). It turned out to be the latter, not the former, and we accurately described ordinary business litigation, rather than accusing a party of committing a crime.

Don't Confuse the Right to Publish with What's Right to Publish. Common sense and good taste will almost never steer you wrong. Reporters' competitive nature leads them to use facts that are "exclusive" without asking if any of those facts move the story forward. But should we?

A reporter's job is not to gratuitously inflict damage. Nor is it to be hard-hitting. It is to seek truth and report it. In order to do that, the truth has to be contextualized, and presented in a fair manner. That some detail may or may not be true is not always an ethical justification for publishing it. The more sensitive the fact, the closer reporters and editors must look at whether the public truly needs to know that fact. Asking whether the fact is gratuitous or if it answers a question the public needs answered is a good start. These are not often easy or pleasant choices, yet asking these questions helps guide us to a more ethical outcome that also serves the public interest.

In the early days of the Enron collapse and scandal, we obtained through entirely legal and ethical means a copy of a suicide note left by an executive who had taken his own life. The note was addressed to his wife, and did not discuss Enron. Should we publish the contents of the note?

We had to ask ourselves the same questions outlined above. Sure, it was interesting, even sensational, made more so by the fact that we had it

exclusively. But did it move the story forward? Did it answer a question that the public needed to know, or was it voyeurism?

After a close look and a lot of discussion, we realized that the larger public debate was whether the executive had actually committed suicide or was instead killed by people afraid he would disclose damaging information. Publishing the note helped answer that question. But our inquiry could not end there. Did the note disclose personal details about the surviving family? Would disclosing those details move the story forward, or merely subject the family to intrusive examination? Fortunately, the note did not contain that kind of detail.

We believed that our decision to publish the suicide note helped answer the debate about the executive's death. But this kind of inquiry is exhaustive and soul-searching.

In conclusion, we do well to avoid terse justifications for publishing sensitive material. Phrases like "he deserves it" or "that's his tough luck" are not substitutes for thoughtful analysis. Putting ourselves in the position of the subject, and asking ourselves if we are really being fair—how would we like it if the roles were reversed—goes a long way to answering these questions.

There's often no single "right" answer, but we have an ethical obligation, as well as a legal one, to ask the right questions.

Charles J. Glasser Jr.

Notes

1. *Branzburg v. Hayes*, 408 U. S. 665, 721 (1972).
2. *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002).
3. *Berezovsky v. Micheals and Others*, http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000511/bere-1.htm.
4. http://www.forbes.com/forbes/1996/1230/5815090a_print.html.
5. Since the Berezovsky case, British courts have become less of the libel tourist's destination. See Laura Handman and Robert Balin, "It's a Small World After All: Emerging Protections for the U.S. Media Sued in England," http://www.dwt.com/related_links/adv_bulletins/CMITFall1998USMedia.htm.
6. http://www.carter-ruck.com/articles/200306-Berezovsky.html.
7. The problems of publication bans are discussed at http://www.dcexaminer.com/articles/2005/04/20/opinion/op-ed/10oped19adamson.txt.
8. *Galloway v. Telegraph Group Limited*, [2004] EWHC 2786 (QB); Case No. HO03X02026.
9. It is worth noting that the *Galloway* court took a dim view of the publisher's argument that time constraints justified the meager opportunity to respond, and when pressed, the publisher admitted that it was not so much the public's need

to know that drove the rush to publish, as it was a sense of competitive pressure for fear of losing a big scoop. The Court found that this hurt rather than helped the *Telegraph*.

10. See, e.g., *Huggins v. Moore*, 94 N.Y.2d 296, 303 (1999) ("Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern.").

Acknowledgments

Many people deserve a public thank you for their help to me, as professionals and as friends. Many in the legal and academic worlds were kind enough to nurture my passion for Media Law, and deserve my thanks: Sandra Baron, executive director of the Media Law Resource Center, who gave me my first legal job and taught me how to really read cases; Professors Burt Neuborne and Dianne Zimmerman of New York University School of Law, who were so generous with their knowledge and experience; Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia, who taught me to trust myself to argue persuasively; Judge Robert D. Sack of the U.S. Court of Appeals for the Second Circuit, who in writing *Sack on Defamation* inspired me to try to contribute to the literature of Media Law; and Slade Metcalf who gave me the opportunity to prove myself as a lawyer on the briefs and in the courtroom. The attorneys at Willkie Farr & Gallagher are due thanks not only for their contributions to this book, but for my relying on them day in and out for so much hard work and common-sense advice. I cannot understate the quality and quantity of learning I received working under the late Rick Klein. In particular, Willkie's Tom Golden deserves credit for being the best sounding board, reality-check, and consultant that an in-house lawyer could have.

Matthew Winkler, editor-in-chief of Bloomberg News, is central to why I believe I have the best job in the best news organization in the world. When there is the slightest question about a story, Matt's default query is always "what is the right thing to do?" Matt puts clarity, fairness, and accuracy ahead of legal defenses, making my job all that much easier. He has given me the moral and intellectual breathing room to be a lawyer, ombudsman, journalist, researcher, psychologist, advocate, and ethics coach to a great newsroom, and I am deeply in his debt. In addition, I am honored to work with the executive editors at Bloomberg News, including Chris Collins, Laurie Hays, Amanda Bennett, Ron Henkoff, John McCorry, Dan Hertzberg, Tim Quinson, and others, who place accuracy and fairness above all else.

On a personal level, some friends and family are owed a large thanks: Cyndi Johnson, who has had to put up with so many dinners interrupted