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On Business Torts and the First Amendment

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Media, Privacy and Defamation Law Committee



ON BUSINESS TORTS AND THE FIRST AMENDMENT

By: [Richard J. Peltz-Steele](#)¹

A gaping question in free speech law surrounds the application of the First Amendment defense in business torts. The pervasiveness of communication technologies, the flourishing of privacy law, and the mere passage of time

have precipitated an escalation in tort cases in which communication, and what the defendant may allege is free speech, lies at the heart of the matter.

WikiLeaks and the “Streisand Effect”

Consider for example *Bank Julius Baer & Co. v. WikiLeaks*,² a civil claim in the U.S. District Court of the Northern District of California, ultimately abandoned by the plaintiff when jurisdiction over the defendant became a practically insurmountable problem. WikiLeaks (lately in the news for the court-martial of its source, soldier Chelsea Manning) is the web provider that earned worldwide fame, or infamy, depending whom you ask, for publication of leaked

records implicating controversial U.S. conduct in the wars in the Middle East. WikiLeaks and its one-time U.S.-based Internet service provider, Dynadot, were sued by Swiss-based Bank Julius Baer (“Baer Bank”) after WikiLeaks posted records that revealed customer information and questionable business practices in the

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² [535 F. Supp. 2d 980 \(N.D. Cal. 2008\)](#).

ON BUSINESS TORTS AND...

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bank's Cayman Islands branch. The records identified multiple accountholders, and critics of the bank asserted that the records contained evidence of wrongdoing, including money laundering.

Baer Bank sued WikiLeaks for, *inter alia*, tortious interference with contract and with prospective economic advantage, violation of unfair competition law, and conversion. The bank sought and obtained a permanent injunction from the court to shut down the WikiLeaks domain "wikileaks.org," maintained by Dynadot; WikiLeaks did not appear in the case. Recognizing the threat of an injunction in U.S. courts, websites around the world mirrored wikileaks.org. The leaked information could not be contained by the court injunction, and Baer Bank learned a lesson on the "Streisand effect," by which efforts to remove online information inadvertently multiply the dissemination (named for diva Barbara's backfired effort to suppress aerial photographs of her opulent coastal home). Faced with an outcry from free expression advocates and the effective mootness of its order, the court dissolved the injunction.

Had Baer Bank gone forward, a central question would have been the viability of the First Amendment as a shield against tort claims with little or no resemblance to their mundane brethren, defamation and privacy.

Had *Baer Bank* gone forward, a central question would have been the viability of the First Amendment as a shield against tort claims with little or no resemblance to their mundane brethren, defamation and privacy. As a federal constitutional right, the First Amendment must trump state tort theories, whether common law, such as conversion, or statutory, such as unfair competition and trade secret appropriation. But that's so only when the First Amendment comes into play. And even when in play, the First Amendment is not necessarily a trump card.

New Variation on an Old Question

While the electronic-era glamor of the WikiLeaks problem is new, the tort-and-First Amendment question is not. The problem is not unlike that of the case famous in journalism circles recounted in *Vanity Fair* in 1996

and dramatized in the 1999 movie, *The Insider*. CBS feared a lawsuit by tobacco giant Brown & Williamson over an investigation by the broadcast newsmagazine *60 Minutes* into damaging allegations by scientist Jeffrey Wigand about smoking and public health. Brown & Williamson later did sue Wigand, a former employee, asserting theft, fraud, breach of contract, breach of fiduciary duty of confidentiality, and appropriation of trade secret. But Brown & Williamson never did sue CBS for its re-publication of Wigand's assertions. In a classic *Insider* scene, a CBS lawyer (Gina Gershon) endeavored to explain "tortious interference" to *60 Minutes* staff, including Mike Wallace (Christopher Plummer). A perplexed producer (Philip Baker Hall) responded for the journalists, "Interfering? That's what we do." The possibility of interference liability for CBS in the *Insider* case was cause for much handwringing in journalism and civil liberties communities, and the question never has been resolved definitively.

Well-known is the expansion of the First Amendment as a defense to defamation and false light invasion of privacy in the civil rights era, first through the seminal *New York Times Co. v. Sullivan*³—which celebrates its fiftieth anniversary in 2014—and then through *Time, Inc. v. Hill*⁴ in 1967 (false light) and *Gertz v. Robert Welch, Inc.*⁵ in 1974 (defamation of public figures). In *Hustler v. Falwell*,⁶ the case beloved by media law students of Larry Flynt's fun at the Reverend Jerry Falwell's expense, the Supreme Court extended the First Amendment defense to a claim of intentional infliction of emotional distress accomplished by parody. The Court signaled its unwillingness to have the *Sullivan* doctrine subverted by an alternative theory in tort when the gravamen of the alleged wrong still was reputational injury. But the High Court then and since has provided little guidance on exactly how and when such aversion of subversion is to be accomplished.

From a First Amendment perspective, allegations of tort liability may be viewed as along a spectrum. On one end are classic tort cases of physical injury, such as battery in a bar fight or negligence in a car accident. Those cases do not implicate the First Amendment at all. No court applies heightened scrutiny before entering a jury verdict. On the other end are those cases that directly implicate expression as the civil wrong, namely, defamation and its close relation (too close, say jurisdictions that reject it),

³ 376 U.S. 254 (1964).

⁴ 385 U.S. 374 (1967).

⁵ 418 U.S. 323 (1974).

⁶ 485 U.S. 46 (1988).

false light invasion of privacy. While the First Amendment formally operates as an affirmative defense in such cases, the legal landscape has been so overwhelmingly constitutionalized that only in the rarest private-figure-plaintiff, non-media-defendant case might federal and state constitutional questions go unmentioned.

While the notion of a spectrum is sometimes helpful, it breaks down quickly upon close scrutiny, as myriad problems defy simple classification. Often cited in this vein are cases of “imitative violence,” or inspired wrongdoing, such as violent crimes said to be inspired by the movie *Natural Born Killers*. Such cases, in which the operative theory usually is the general tort of negligence, were cataloged masterfully by Andrew B. Sims in a 1992 law review article.⁷ While Sims might today add more cases to his rubric, the fundamental liability problems persist, including the cloudiness of the First Amendment defense. The plaintiff’s perspective focuses on the outcome, the physical injury, to say that such cases are more like the car crash. But from the defendant’s perspective, the only alleged wrong is expression, so the cases seem more like defamation. As Sims’s survey showed, the analyses in such cases vary almost as much as the facts. I hypothesize moreover that the outcomes wax and wane with the civil-libertarian inclinations of the courts. What is clear is a lack of consensus about how to resolve the problem.

The interference tort, as well as its close relatives unfair competition and trade secret appropriation, plays along the same line. Interference can be accomplished by conduct that is at best minimal, or blunt, in its expressive quality, as when an organized crime syndicate beats up a business owner who refuses to pay protection money. Facing criminal charges or a civil suit, the perpetrators will make little headway claiming a First Amendment right to communicate their message. At the same time, interference is often accomplished by conduct of predominantly expressive quality, as when a defendant accuses a business owner of fraud so as to cause the business to fail. The plaintiff business owner will face a First Amendment defense, and its appropriateness is bolstered by the overlap between interference and defamation theories on the facts.

The conduct-cum-expression of the web outlet that thrives on leaked corporate secrets exemplifies the

problem. To the corporate plaintiff, the publisher looks like nothing more than an accessory after the fact of a crime, a receiver of stolen goods who seeks thereby to profit. Meanwhile the publisher-defendant sees itself as a journalistic actor in the heroic tradition of Woodward and Bernstein, sporting an unprecedented fidelity to freedom-of-information absolutism. To say that the plaintiff and defendant disagree over whether the First Amendment applies understates their conflict.

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Potential Theories and a Prediction for the Future

In recent years, a range of theories has emerged to address the problem. At one end of the range, the First Amendment arguably has no application. Indeed, many cases in interference and unfair competition law are resolved in comfortable avoidance of the First Amendment problem, because the common law already builds free speech into the equation. Interference and unfair competition require that defendant’s conduct have been “improper,” or “unfair,” and the defendant moreover is entitled to assert privilege or justification, which includes ordinary business competition, in defense. If the defendant is a journalistic entity and not in direct competition with the plaintiff, those facts weigh in the defendant’s favor. The anti-constitutionalization position asserts that these common law formulae already sufficiently safeguard free speech in business tort cases. Support for this position can be found in the *Branzburg v. Hayes*⁸ doctrine of journalist non-exceptionalism, played out in cases such as *Cohen v. Cowles Media Co.*⁹ and *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹⁰ which bound journalists like anyone else to their promises in contract and employment law. The likely but not yet certain acceptance by the U.S. Supreme Court of liability for invasion of privacy by disclosure in state tort law also lends important support here, as the tort posits liability for truthful utterances despite the sanctity of truthfulness embodied in *Sullivan* burden-shifting.

⁷ Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 *Ariz. L. Rev.* 231, 235-55 (1992).

⁸ 408 U.S. 665 (1972).

⁹ 501 U.S. 663 (1991).

¹⁰ 194 F.3d 505, 522 (4th Cir. 1999).

At the other end of the range, free speech absolutists posit that the First Amendment more or less bars liability when the alleged civil wrong is predominantly journalistic speech. This position accords with the anti-subversion principle of *Hustler v. Falwell*. Moreover, some courts have gotten hung up on remedies, drawn back to this position when their injunctive orders ran aground on the rule against prior restraints, à la *Pentagon Papers*.¹¹ Some support for this position also comes from *Bartnicki v. Vopper*, in which the Court protected truthful disclosure after balancing the public interest in a broadcast about a high-profile labor dispute against the government interest in wiretap laws.¹² Though *Bartnicki* was a balancing, the heavy weight afforded truth suggests a kinship to the *Sullivan* doctrine. Despite the *Branzburg*-inspired dichotomy of journalistic conduct and expression, Professors Anthony L. Fargo and Laurence B. Alexander made a compelling case for First Amendment protection of newsgathering in a 2009 law review article,¹³ which countered the hegemony of *Cohen v. Cowles*.

A middle-ground position, and one I believe the Court likely in time to adopt despite the balancing example of *Bartnicki*, is intermediate scrutiny. Rehnquist suggested intermediate scrutiny in a separate opinion in *Bartnicki*, and the lower court had employed it. Intermediate scrutiny occasionally has been called on to resolve cases in the imitative violence family, where the First Amendment runs up against general negligence and causation in the personal injury system, and intermediate scrutiny has an established track record for testing injunctions. The theory is straightforward. The First Amendment already has the intermediate-scrutiny doctrine of *United States v. O'Brien*¹⁴ to deal

with the problem of free expression and generally applicable laws. Thus intermediate scrutiny may be employed to test any liability upon mere expression or predominantly expressive conduct, whether the liability arises in general negligence, unfair competition, trade secret appropriation, or breach of fiduciary duty.

Intermediate scrutiny is an elegant solution, but not one that satisfies the media defense bar. The state-interest prong of intermediate scrutiny is easily satisfied upon extant bodies of tort precedent. And the narrow tailoring prong, while arguably well suited to constrain the potentially vast scope of injunctive remedy, might seem too much to submit free speech to the predilections of the courts and the times. Mitigating such skepticism, the at-least-formal process of a presumption-and-rebuttal approach, with the civil plaintiff bearing the burden to demonstrate the government interest, should be more speech-protective than a bare balancing, and certainly is preferable to the *Branzburg-Cohen* doctrine.

Conclusion

Many other issues come into play in business tort liability for a media defendant, including and beyond the uncharted First Amendment waters. In the online age, jurisdiction presents a troublesome threshold problem for plaintiffs. On the far end of the case, remedy and enforcement tender equally thorny deterrents to litigation. Then the whole picture is complicated by evolving international norms, especially in privacy, which are driving changes in domestic law and even constitutional interpretation. Still, with burgeoning channels of communication increasingly accessible to soapbox publishers, business torts and free speech will only become more entangled. ⚖️

¹¹ [New York Times Co. v. United States](#), 403 U.S. 713 (1971).

¹² [532 U.S. 514 \(2001\)](#).

¹³ Anthony L. Fargo & Laurence B. Alexander, [Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts](#), 32 *Harv. J.L. & Pub. Pol'y* 1093, 1101 (2009).

¹⁴ [391 U.S. 367 \(1968\)](#).