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In Tort Pursuit of Mass Media: Big Tobacco, Big Banks, and Their Big Secrets

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In Tort Pursuit of Mass Media: Big Tobacco, Big Banks, and Their Big Secrets

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Abstract

This article examines potential civil liability under the multistate norms of tort and closely related areas in the common law of the United States for the mass media re-publisher of leaked corporate secrets. The examination employs two fact patterns derived from real cases: one, contemporary, an international bank's grievance, never resolved on the merits in court, against the online publisher WikiLeaks; and second, conventional, a tobacco manufacturer's grievance, feared but never filed, against the television newsmagazine 60 Minutes. *The study assumes jurisdiction arguendo and examines liability theories in tortious interference; unfair-competition law; and conversion, trade-secret appropriation, and related theories of theft. The Article concludes that direct liability under any of these theories is unlikely, but that claims for associative liability might well succeed. In reaching these conclusions, the study analyzes the strengths and weaknesses of the claims and the vulnerabilities of the defenses, including the freedom of speech. Ultimately, the Article demonstrates how nuanced questions of fact would prove dispositive of liability, such that the liability exposure of the media defendant increases in proportion*

to its entanglement with an unscrupulous source. The discernible risk of liability counsels against an absolutist stance on the freedom of information when media contemplate the republication of leaked corporate secrets.

The beginning of strife is as when one letteth out water: therefore leave off contention, before it be meddled with.
—Proverbs 17:14 (King James Bible, Cambridge ed.)

I. RE-PUBLISHING CORPORATE SECRETS

A. Introduction

Neither governments nor corporations care to see their secrets published online. Both expend resources to keep files under wraps, whether the government in protecting its national security plans or the corporation in protecting its proprietary product formulae. And both secret-keepers have long enjoyed resort to domestic courts to enjoin or punish unwanted revelations.[1]

The global reach of the Internet has thrown a wrench in the works for these information owners.[2] The Internet brought global publication within reach of the ordinary person with a laptop, regardless of originating locale. Secrets can be leaked more easily and quickly than in conventional media, and genies out of the bottle are difficult to recapture.[3]

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1. *Cf. Transcript of Secret Meeting Between Julian Assange and Google CEO Eric Schmidt*, WIKILEAKS (Apr. 19, 2013), http://www.wikileaks.org/Transcript-Meeting-Assange-Schmidt.html ("There is one difference about the deployment of coercive force but even there we see that well connected corporations are able to tap into the governmental system and the court system and are able to deploy . . . effectively deploy coercive force, by sending police to do debt requisition or kicking employees out of the office." (alteration in original)).

2. *E.g.*, Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 796–99 (2007) (discussing vulnerability of trade secrets to Internet innovations).

3. *Cf.* Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 OHIO N.U. L. REV. 717, 743–45 (2008) (describing Internet properties of accessibility, longevity, and dynamism).

The law has been slow to catch up. Today, worldwide publishers manage to evade the jurisdiction of domestic courts,[4] sometimes by escaping the reach of personal jurisdiction to initiate a cause of action,[5] and sometimes by placing technology beyond the reach of interlocutory and remedial court orders.[6] Much of the difficulty in online enforcement has arisen from international political disagreement over appropriate jurisdictional and free-expression norms where online publishing is concerned.[7] These disagreements do persist. Fretting over the phenomenon of "libel tourism," by which defamation plaintiffs forum-shop among nations for weak free-expression defenses,[8] the United States recently adopted legislation at the national level to block the enforcement of foreign defamation judgments.[9] Iceland unveiled an ambitious

4. *See, e.g.*, Jonathan Stray, *Iceland Aims to Become an Offshore Haven for Journalists and Leakers*, NIEMAN JOURNALISM LAB (Feb. 11, 2010, 9:00 AM), http://www.niemanlab.org/2010/02/iceland-aims-to-become-an-offshore-haven-for-journalists-and-leakers/ (reporting proposals in Icelandic parliament to create haven for whistleblowing through combination of source protection, free speech, and libel-tourism prevention laws).

5. *See, e.g.*, *Developments in the Law – The Law of Media*, 120 HARV. L. REV. 1031, 1032–33 (2007) (comparing case law from United States and Commonwealth countries concerning jurisdiction over online-media defendants).

6. *See, e.g.*, Adam Liptak & Brad Stone, *Judge Shuts Down Web Site Specializing in Leaks*, N.Y. TIMES (Feb. 20, 2008), http://www.nytimes.com/2008/02/20/us/20wiki.html?_r=0 ("The feebleness of the [injunction granted to plaintiff bank] suggests that the bank, and the judge, did not understand how the domain system works, or how quickly Web communities will move to counter actions they see as hostile to free speech online.").

7. *See, e.g.*, *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 20 (2009) (statement of Bruce D. Brown, Partner, Baker Hostetler LLP) (positing threat to free speech in U.S. recognition of foreign defamation judgments).

8. *E.g.*, Steven M. Richman, John F. Stephens, & Mark E. Wojcik, Remarks at Libel Tourism in the Internet, Continuing Legal Education Program at the Annual Meeting of the American Bar Association (Aug. 9, 2013).

9. Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111–223, 124 Stat. 2380 (2010) (codified as amended at 28 U.S.C. §§ 4101–4105 (2012)).

plan to situate itself as a shelter for web hosting with near legal impunity.[10]

But these cases are exceptional. Overall, impediments to cross-border enforcement of laws governing publishing are giving way to advances in law and technology. Nations operating in the western legal traditions are converging on norms surrounding Internet-based personal jurisdiction since the Australian High Court more than a decade ago, in *Dow Jones & Co. v. Gutnick*,[11] extended its nation's long arms, and viable analyses and proposals now abound.[12] Technologically and legally, nations have reached their wits' ends with Internet piracy and are at the national level frequently blocking access to offending services, such as torrent downloads.[13] Publishers' insurers similarly are demanding that

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10. *E.g.*, Wes Ritchie, Note, *Why IMMI Matters: The First Glass Fortress in the Age of WikiLeaks*, 35 SUFFOLK TRANSNAT'L L. REV. 451, 453–54 (2012) (explaining Icelandic Modern Media Initiative Proposal); *see also* Afua Hirsch, *Iceland Aims to Become a Legal Safe Haven for Journalists*, GUARDIAN (July 11, 2010), http://www.theguardian.com/media/2010/jul/12/iceland-legal-haven-journalists-immi (discussing activist efforts to bring about legislative reforms to make Iceland haven for media freedom).

11. (2002) 210 CLR 575 (Austl.).

12. *E.g.*, Derek J. Illar, *Unraveling International Jurisdictional Issues on the World Wide Web*, 88 U. DET. MERCY L. REV. 1, 9–16 (2010); Milana S. Karayanidi, *Internet Presents No Truly New Jurisdictional Challenges*, LAW TECH., Apr. 1, 2011, at 1, *available at* 2011 WLNR 17326034; Kevin A Meehan, Note, *The Continuing Conundrum of International Internet Jurisdiction*, 31 B.C. INT'L & COMP. L. REV. 345, 355–61 (2008). *Compare* Hague Convention on Choice of Court Agreements, concluded on June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (promulgating uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters), *with* Richard Leder, *Social Media Explosion Leaves Defamation Law at the Starting Gate*, MONDAQ (July 18, 2012), http://www.mondaq.com/australia/x/187256/Social+Media/Social+Media+Explosion+Leaves+Defamation+Law+at+the+Starting+Gate (lamenting that advances to protect intellectual property across borders have outpaced development of defamation law, allowing social media to defy accountability).

13. *See, e.g.*, Lisa O'Carroll, *Online Piracy: ISPs Ordered to Block Access to Three File-Sharing Websites*, GUARDIAN (Feb. 28, 2013), http://www.theguardian.com/media/2013/feb/28/online-piracy-isps-block-access (reporting a U.K. court order to Internet service providers to block access to pirate websites); *Researchers Study National Efforts to Censor Traffic on the Internet*, UNIV. OF N.M. SCH. OF ENG'G (Apr. 29, 2010),

clients employ geo-blocking technology to reduce liability exposure.[14] Ultimately, the reach of the online publisher may be limited by law and technology on the receiving end, regardless of the location of servers. And even so, convergence on norms of free expression and consumer privacy will render domestic courts more willing to entertain the enforcement of foreign court orders, restoring conventional principles of comity. Refuge for the online publisher is slowly shrinking.[15]

B. Problem

The focus of this Article is the potential for civil liability for the online re-publisher of leaked corporate secrets. That focus has three key components—(1) *civil* liability, (2) *re*-publisher liability, and (3) *corporate* secrets—and in these respects departs from the substantial body of research already published in the legal literature related to the broad theme of liability for leaking secrets. The literature to date has focused on criminal liability for the leak-

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http://www.unm.edu/~soe/latest/jan-june10/Internet_Censorship.html (describing Chinese government's efforts to censor Internet, including filtering at the national level); K.J. Shashidhar, *Can't Censor; People Will Find New Ways to Torrent*, TIMES OF INDIA (May 29, 2012), http://articles.timesofindia.indiatimes.com/2012-05-29/internet/31887453_1_bittorrent-torrentz-pirate-bay (asserting ease by which use of proxy server can subvert Indian court order to Internet service provider to block access to torrent downloads).

14. Blake Keating, Vice President, Media Claims, OneBeacon Professional Ins., Remarks at New Media Economy: Legal and Insurance Perspectives on New Business Models and Evolving Exposure, Panel of Media & the Law Seminar at the University of Kansas (Apr. 18, 2013); *see also* Michael Geist, *'Geo-Blocking' Websites is a Business Rather Than Legal Issue*, TORONTO STAR (July 5, 2010), http://www.thestar.com/business/2010/07/05/geist_geoblocking_websites_is_a_business_rather_than_legal_issue.html; Anick Jesdanun, *Geolocation Tech Slices, Dices World Wide Web*, USA TODAY (July 10, 2004), http://usatoday30.usatoday.com/tech/news/2004-07-10-web-geolocation_x.htm. *See generally* Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 104–23 (2011) (discussing geo-location mandates); Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 586–98 (2012) (discussing use and operation of geo-location tools).

15. *See* Geist, *supra* note 14. *But see supra* text accompanying note 10.

er of government secrets, and to a lesser extent criminal liability for the re-publisher of government secrets.

Much literature in law has studied the problem of liability for leaking, usually the problem of criminal liability for the leaker of government secrets.[16] A classic case in American jurisprudence demonstrates this fact pattern in the context of leaked records about the U.S. war in Vietnam. Applying the rule against prior restraint—a cornerstone free-speech doctrine documented by Blackstone in the British common-law tradition[17]—the U.S. Supreme Court in the 1971 *Pentagon Papers* case cleared the way for major daily newspapers in the United States to publish leaked records unflattering to the U.S. government.[18] But that fact pattern is narrow in two critical respects. First, publication of the records, inarguably upon hindsight at least, did nothing to imperil troops then deployed at war because the records were historical in nature.[19] Second, the newspapers were not complicit in the theft of

16. *See, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 8–16 (2013) (analyzing theories of criminal liability in U.S. federal law for persons who leaked classified national security information); Kellie C. Clark & David Barnette, *The Application of the Reporter's Privilege and the Espionage Act to WikiLeaks*, 37 U. DAYTON L. REV. 165, 179–83 (2012) (discussing the possibility of prosecution under the Espionage Act of 1917, absent the First Amendment qualified privilege); Richard J. Peltz-Steele, *U.S. Business Tort Liability for the Transnational Republisher of Leaked Corporate Secrets*, 1 AMITY J. MEDIA & COMM. STUDS. 68, 71 (2011), *available at* http://ssrn.com/abstract=1947129 (examining potential liability under U.S. business tort law for WikiLeaks as a transnational re-publisher of leaked corporate secrets); Janelle Allen, Comment, *Assessing the First Amendment as a Defense for WikiLeaks and Other Publishers of Previously Undisclosed Government Information*, 46 U.S.F. L. REV. 783, 791–97 (2012) (discussing criminal prosecution under the prior-restraint test and under the Espionage Act).

17. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 651 (1955) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52), *available at* http://digitalcommons.law.yale.edu/fss_papers/2804.

18. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

19. *Id.* at 722 n.3 (Douglas, J., concurring); *see id.* at 726–27 (Brennan, J., concurring) ("Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.").

the secrets from government offices, though they knew of the theft.[20] Rather, the records had been taken and delivered by government contractor Daniel Ellsberg.[21] The original "publisher," invoking the legal term of art to mean merely a transmitter to a third party, Ellsberg, was criminally prosecuted.[22] The government later abandoned the prosecution amid revelations of its own misconduct.[23]

An ongoing analogous case also concerns criminal liability for a leaker of government secrets but holds the potential to push past the narrow facts of the *Pentagon Papers* and past the uncomplicated rule against prior restraint.[24] Bradley Manning,[25] a soldier

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20. *See id.* at 754 (Harlan, J., dissenting) (stating that the factor of complicity within the theft should have been given consideration in the case).

21. *See generally* DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 299–409 (2002) (describing author's removal and copying of Pentagon records); THE MOST DANGEROUS MAN IN AMERICA: DANIEL ELLSBERG AND THE PENTAGON PAPERS (First Run Features 2009) (dramatizing Ellsberg biography at time of Pentagon Papers scandal).

22. *See, e.g.*, Douglas O. Linder, *Famous Trials: Pentagon Papers (Daniel Ellsberg) Trial: An Account*, UNIV. OF MO.-KAN. CITY SCH. OF LAW, http://law2.umkc.edu/faculty/projects/ftrials/ellsberg/ellsberghome.html (last visited Nov. 18, 2013) (recounting the criminal prosecution, ultimately abandoned, of Ellsberg in Pentagon Papers).

23. *See, e.g.*, Heidi Kitrosser, *What if Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89, 89–90 (2011) (discussing government decision to abandon Ellsberg prosecution); Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 327–33 (1974) (discussing legal issues left unresolved because the government abandoned Ellsberg prosecution).

24. *See, e.g.*, Derek E. Bambauer, Essay, *Consider the Censor*, 1 WAKE FOREST J.L. & POL'Y 31, 33–34, 46–47 (2011) (challenging wisdom of comparison between *The New York Times* and WikiLeaks); Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1472–1503 (2012) (analyzing WikiLeaks case in relation to *Pentagon Papers*); Kyle Lewis, Note, *Wikifreak-Out: The Legality of Prior Restraints on WikiLeaks' Publication of Government Documents*, 38 WASH. U. J.L. & POL'Y 417, 434–39 (2012) (applying prior restraints doctrine of *Pentagon Papers* to WikiLeaks).

25. Since his court-martial concluded, Manning has assumed a feminine name and publicly stated his transgender identity. Emmarie Huetteman, *'I Am a Female,' Manning Announces, Asking Army for Hormone Therapy*, N.Y. TIMES (Aug. 22, 2013), http://www.nytimes.com/2013/08/23/us/bradley-manning-says-he-is-female.html?_r=1&.

in the U.S. Army, was court-martialed for leaking records of U.S. war conduct in Afghanistan and Iraq,[26] including the infamous video of a Baghdad airstrike that killed Reuters journalists and likely innocent civilians.[27] Manning was also charged with leaking a vast reservoir of secret U.S. diplomatic cables.[28] Ellsberg identified himself with Manning and called for his release.[29] The prosecution of Manning on the most serious charges of aiding the enemy—on which he was found not guilty[30]—focused on the requisite culpability under U.S. law, that is, specifically, whether he knew that the releases would be harmful to U.S. interests.[31] There can be little doubt that Manning is culpable for some criminal offenses for having leaked government secrets;[32] he was convicted on multiple counts under the Espionage Act for copying and disseminating classified documents.[33] The more difficult question for legal scholars, and a question contemplated by the Congressional Re-

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26. *See, e.g.*, David Gespass, *The Bradley Manning Case: Executive Power vs. Citizens' Rights*, 69 NAT'L LAW. GUILD REV. 186, 187 (2012) (recounting alleged conduct of Manning).

27. *Collateral Murder*, WIKILEAKS, http://www.collateralmurder.com (last visited Nov. 18, 2013).

28. *E.g.*, Kate Kovarovic, *When the Nation Springs a [Wiki]Leak: The "National Security" Attack on Free Speech*, 14 TOURO INT'L L. REV. 273, 300–01 (2011) (linking Manning leaks with diplomatic cable scandal). *See generally* Geoffrey Schotter, *Shouting Fire in a Burning Theater: Distinguishing Fourth Estate from Fifth Column in the Age of WikiLeaks*, 2 CASE W. RES. J.L. TECH. & INTERNET 117, 117–22 (2011) (explaining impact of cable releases).

29. *E.g.*, Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks*, 34 HASTINGS COMM. & ENT. L.J. 27, 90 (2011) (reporting Ellsberg's arrest at protest of Manning prosecution); *see also The Colbert Report: International Manhunt for Julian Assange - Daniel Ellsberg* (Comedy Central television broadcast Dec. 9, 2010), *available at* http://www.colbertnation.com/the-colbert-report-videos/368131/december-09-2010/international-manhunt-for-julian-assange---daniel-ellsberg (interviewing Daniel Ellsberg).

30. *E.g.*, Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST (Aug. 21, 2013), http://articles.washingtonpost.com/2013-08-21/world/41431547_1_bradley-manning-david-coombs-pretrial-confinement (reporting sentencing).

31. Davidson, *supra* note 29, at 28–35, 80–87.

32. *Id.* at 87.

33. *See* Tate, *supra* note 30.

search Service,[34] is the potential criminal responsibility of WikiLeaks, the online re-publisher of the leaked materials.[35] According to reports at the time of this writing, WikiLeaks founder, spokesperson, and apparent head Julian Assange remains in the Ecuadorian embassy in London in resistance to a request for extradition by Swedish authorities investigating an alleged sexual assault.[36] Assange has asserted that the investigation is a mere ruse in furtherance of his eventual extradition to the United States to face criminal charges for WikiLeaks publications.[37] For the time, then, jurisdiction over WikiLeaks, which has servers in Europe and a largely anonymous workforce,[38] remains a stubborn procedural impediment to U.S. prosecution. Were that prosecution to occur, it would pose the *Pentagon Papers* dilemma in a context in which jeopardy of troops and complicity in theft offer more nuanced inquiries of fact.

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34. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 8–16 (2013).

35. *See Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 39 (2010); *see also* Davidson, *supra* note 29, at 90; James Freedman, Note, *Protecting State Secrets as Intellectual Property: A Strategy for Prosecuting WikiLeaks*, 48 STAN. J. INT'L L. 185, 207–08 (2012).

36. Kevin Rawlinson & Sam Masters, *Don't Forget About My Rights, Says Julian Assange 'Sex Victim,'* INDEPENDENT (May 23, 2013), http://www.independent.co.uk/news/uk/home-news/dont-forget-about-my-rights-says-julian-assange-sex-victim-8630046.html. *See generally* Schotter, *supra* note 28, at 122–25 (describing U.S. congressional will to have Assange extradited to U.S. for criminal prosecution); Molly Thebes, Note, *The Prospect of Extraditing Julian Assange*, 37 N.C. J. INT'L L. & COM. REG. 889, 889–98 (2012) (describing Assange's predicament in relation to journalism and extradition law).

37. *E.g.*, Robert Mackey, *Swedish Prosecutor Raises Possible Extradition of WikiLeaks Founder to U.S.*, LEDE BLOG (Dec. 14, 2010, 2:43 PM), http://thelede.blogs.nytimes.com/2010/12/14/swedish-prosecutor-raises-possible-extradition-of-wikileaks-founder-to-u-s/ (reporting the Swedish prosecutor's explanation of legal maneuvers that would permit extradition of Assange to the United States).

38. *See generally* David Corneil, *Harboring WikiLeaks: Comparing Swedish and American Press Freedom in the Internet Age*, 41 CAL. W. INT'L L.J. 477, 491–96 (2011) (describing WikiLeaks' connection to Sweden).

While both *Pentagon Papers* and a hypothetical WikiLeaks prosecution raise the compelling possibility of re-publisher culpability under law, neither case varies the problem in the two other dimensions that are key to this study: *civil* prosecution by a *corporate* plaintiff. To date, such cases have been deterred by the unwieldiness of the Internet, specifically the aforementioned disparities in norms of free speech and jurisdiction.[39] But as law and technological controls catch up with global online communication, the path to civil prosecution will be cleared. Already, the global corporate plaintiff is no stranger to international forum-shopping.[40] Converging legal norms will ease the way for court orders to cross borders, and technological measures at the level of national infrastructure, wielded by governments and demanded by insurers, will block the receipt of online information even when electronic points of origin defy control.

In much of the world, corporate control of information flow is already a problem on par with government control of information. Otherwise said, the distinction between government and corporations should not matter in global policy as much as it does in national laws. Organizations, such as Transparency International, promote the freedom of information in public and private sectors alike, recognizing that secrecy breeds corruption in both.[41] As the recent world economic crisis has demonstrated, corruption, irresponsibility, and unaccountability in the private sector—as much as in the public sector—threaten security, stability, and the welfare even of individuals with no close connection to national

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39. *See Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 20 (2009).

40. *See, e.g.*, Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1006–09 (2011) (overviewing international forum-shopping); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 506–16 (2011) (analyzing the occurrence of transnational litigation in U.S. courts).

41. *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1341–42 (2011) (emphasizing private-sector transparency); *see also Corruption by Topic: Private Sector*, TRANSPARENCY INT'L, http://www.transparency.org/topic/detail/private_sector (last visited Nov. 19, 2013).

governments or big banks.[42] American involvement in the Middle East in the decade after September 11 was at times undermined by public procurement scandals[43] and private contractors' misconduct.[44] Multinational corporations have born responsibility for human and environmental disasters from Bhopal[45] to the Gulf oil spill.[46] In the developing world, corporations conduct quasi-military operations to commercial ends upon dubious arrangements that enrich local governments.[47] Understandably, whistleblowers

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42. *See, e.g.*, Kerry Skyring & Kyle James, *UN's New Anti-Corruption Academy Aims Spotlight at Financial Crime*, DEUTSCHE WELLE (June 9, 2010), http://www.dw.de/uns-new-anti-corruption-academy-aims-spotlight-at-financial-crime/a-5971657 (citing World Bank estimate of cost to world economy of corruption at two trillion dollars and quoting European economic official: "People no longer believe that there is equality, that the law applies to everyone . . . .").

43. *See, e.g.*, Richard Baker, *Wheat is War, and U.S. Enjoys a Triumph Without Scrutiny*, THE AGE (Nov. 25, 2006), http://www.theage.com.au/news/national/wheat-is-war-and-us-enjoys-a-triumph-without-scrutiny/2006/11/24/1164341396678.html (describing jockeying of U.S. and Australian businesses, reportedly aided by governments and questionable tactics such as kickbacks and subsidies, to capture the Iraqi wheat market).

44. *See, e.g.*, Tom Allard, *Beware of the Protectors*, SYDNEY MORNING HERALD (Sept. 22, 2007), http://www.smh.com.au/news/world/beware-of-the-protectors/2007/09/21/1189881777362.html?page=fullpage#contentSwap2 (describing reports of misconduct by U.S. private security contractors in Iraq, including multiple reports of firing on civilians and consequent anger of Iraqis).

45. *See, e.g.*, Fergus M. Bordewich, *The Lessons of Bhopal; The Lure of Foreign Capital is Stronger than Environmental Worries*, ATLANTIC, Mar. 1, 1987, at 30, *available at* 1987 WLNR 2001184 (describing an environmental disaster in Bhopal, India, and how the lure of foreign capital from multinational corporations in third-world countries overrides the negative environmental implications caused by the lack of safety precautions and standards).

46. *See, e.g.*, Chris Watt, *BP Faces £3.6bn Bill as Oil-Spill Environmental Disaster Unfolds*, HERALD (Scotland) (May 1, 2010), http://www.heraldscotland.com/news/transport-environment/bp-faces-3-6bn-bill-as-oil-spill-environmental-disaster-unfolds-1.1024513 (describing BP's response to massive oil spill and acceptance of financial responsibility for damages).

47. *E.g.*, James Rupert, *Diamond Hunters Fuel Africa's Brutal Wars*, WASH. POST (Oct. 16, 1999), http://www.washingtonpost.com/wp-srv/inatl/daily/oct99/sierra16.htm (describing ties and trades of money and gems for services between the Sierra Leone's government and private corporations with quasi-military forces). *See generally* P.W. SINGER, CORPORATE

such as WikiLeaks profess allegiance to people, rather than to institutions, and do not discriminate between governmental and corporate targets when publishing revelations of public importance.[48]

Of great interest, then, is an assessment of the current potential for civil liability for the re-publisher of leaked corporate secrets. This question is both similar to—and different from—the problem of criminal prosecution of the re-publisher of leaked government secrets. To be sure, analysis of the civil question in many respects overlaps with the criminal analysis, especially where common facts form the evidentiary basis for a defendant's culpability. But the criminal question is far from easily resolved, as indicated by the narrow reach of the *Pentagon Papers* decision. As in the Manning prosecution, criminal prosecution presents challenges of scienter even where the original leaker is concerned, problems that are compounded in the case of the re-publisher. The complexity of prosecution is compounded again when the frame of reference changes from criminal to civil, because civil liability, especially associative liability with joint tortfeasors, may rest upon a lesser state of culpability and a lesser burden of proof than criminal conviction. Thus, tort remedies may be available upon strict liability or negligence proved to a preponderance of the evidence, rather than specific intent proved beyond a reasonable doubt. Moreover, the key re-publisher's defense of freedom of expression does not operate the same in civil and criminal contexts. The freedom's contours as an affirmative defense are ill defined in both contexts, but arguably the freedom of expression, as a right of the individual against the state, should have no application at all when the complainant is a private party.

C. Method

This study examines civil liability in the context of two fact patterns, drawn from real cases, which neatly illustrate the problem

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WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 191–229 (updated ed. 2008) (describing the role of private firms in contemporary military conflicts).

48. *E.g.*, *Transcript of Secret Meeting Between Julian Assange and Google CEO Eric Schmidt*, *supra* note 1 ("I don't see a different [sic] between government and big corporations and small corporations, actually this is all one continuum, these are all systems that are trying to get as much power as possible.").

of corporate leaker and subsequent publisher. One pattern arises in the conventional world of sources, journalists, and news, and the other in the frontier paradigm of electronic data and the seeming anarchy of online publishing. The problem is analyzed in U.S. tort law, including common law and the law of unfair competition and trade-secret appropriation. The analysis employs multistate common-law precedents from U.S. statutes, court decisions, and secondary sources to generalize the relevant body of law in the fifty states. The study assumes that procedural obstacles—namely, personal jurisdiction, subject-matter jurisdiction, and extraterritorial application of law—can be overcome and advances the analysis to the merits of the two cases that U.S. courts never decided.

The first defendant is CBS, a national U.S. broadcaster and one of the only three networks that were identified with TV news in the early decades of U.S. television. CBS in the mid-1990s feared a lawsuit by tobacco giant Brown & Williamson over investigation by the broadcast newsmagazine *60 Minutes* into damaging allegations by scientist Jeffrey Wigand about smoking and public health.[49] 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.[50] Brown & Williamson never sued CBS, the re-publisher of leaked corporate secrets in this scenario,[51] though fear of a lawsuit for tortious interference caused turmoil within the corporation and

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49. Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR (May 1996), http://www.vanityfair.com/magazine/archive/1996/05/wigand199605; *see also 60 Minutes: Wigand: 60 Minutes' Most Famous Whistleblower* (CBS television broadcast Aug. 21, 2011), *available at* http://www.cbsnews.com/video/watch/?id=7377558n. For a transcript of the original 1996 broadcast, see *Jeffrey Wigand on 60 Minutes, February 4, 1996*, JEFFREYWIGAND.COM, http://www.jeffreywigand.com/60minutes.php (last visited Nov. 19, 2013).

50. *See* Brown & Williamson Tobacco Corp. v. Wigand, 913 F. Supp. 530, 531 (W.D. Ky. 1996) (remanding to state court); *see also Brown & Williamson Tobacco Corp. v. Wigand*, TOBACCO DOCUMENTS, http://tobaccodocuments.org/profiles/litigation/wigand.html (last visited Nov. 19, 2013) (referencing the 1995 suit in Kentucky Circuit Court).

51. *Cf.* Brown & Williamson Tobacco Corp. v. Wigand, 643 N.Y.S.2d 92, 93 (App. Div. 1996) (affirming quash of subpoena of CBS documents collateral to Kentucky litigation).

news operation.[52] The whole affair was documented in a *Vanity Fair* story, *The Man Who Knew Too Much*,[53] and became the subject of the critically acclaimed 1999 movie—fictionalized to a disputed degree—*The Insider*.[54] This study will consider whether Brown & Williamson could have sued CBS successfully.

The second defendant is WikiLeaks, the web provider that became famous worldwide for its publication of leaked records implicating controversial U.S. conduct in the wars in the Middle East.[55] WikiLeaks and its one-time U.S.-based Internet service provider, Dynadot, were sued in federal district court in California by Swiss-based Bank Julius Baer[56] after WikiLeaks posted leaked records revealing customer information and suspicious business practices in the Cayman Islands branch of the bank.[57] The records identified multiple accountholders, and critics of the bank asserted that the records provided evidence of wrongdoing, including money laundering.[58] Baer 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.[59] The bank's victory, however, was Pyrrhic. Recognizing the threat of an injunction in U.S. courts, websites around the

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52. *E.g.*, Brenner, *supra* note 49 (recounting tense interactions between CBS News and CBS corporate officials as the Wigand story developed).

53. *Id.*

54. THE INSIDER (Spyglass Entertainment & Touchstone Pictures 1999), *shooting script available at* http://www.dailyscript.com/scripts/the-insider_shooting.html.

55. *See* Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 325–30 (2011) (reviewing the history of WikiLeaks). *See generally* James P. Kelly, Jr., *WikiLeaks: A Guide for American Law Librarians*, 104 LAW LIBR. J. 245, 245–57 (2012) (overviewing law and policy related to WikiLeaks).

56. Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980, 982 (N.D. Cal. 2008).

57. Olesya Dmitracova & Chris Vellacott, *Swiss Whistleblower Hands Bank Data to WikiLeaks*, REUTERS (Jan. 17, 2011, 1:32 PM), http://www.reuters.com/article/2011/01/17/us-wikileaks-swissidUSTRE70F0TF20110117.

58. Henry Weinstein, *Swiss Bank Pulls WikiLeaks Lawsuit*, L.A. TIMES (Mar. 6, 2008), http://articles.latimes.com/2008/mar/06/local/me-briefs6.S6.

59. *Bank Julius Baer & Co.*, 535 F. Supp. 2d at 982–83 (recounting the procedural background and terms of the injunctions).

world mirrored wikileaks.org. The leaked information could not be contained by the court injunction, and Baer Bank learned a hard lesson on "the Streisand effect,"[60] by which efforts to remove online information inadvertently multiply the dissemination.[61] Then faced with an outcry from free-expression advocates and the effective mootness of its order, the court dissolved the injunction.[62] This study will consider whether Baer Bank could have succeeded in a civil prosecution of WikiLeaks.

The study is limited to U.S. tort law, including common law and the law of unfair competition and trade-secret appropriation.[63] Certainly tort law in the United States is neither a necessary starting point nor an essential ending point for this analysis when multinational corporations have access to courts around the world. Indeed, analyzing the problem in U.S. law risks returning a false negative; that is, if civil prosecution is found not possible in U.S. law, that conclusion does not necessarily infer comparable results in other nations' courts, nor even in the courts of other common-law countries. However, exploring potential liability in U.S. courts, owing to the renowned liberal tradition of press freedom in the United States, is unlikely to signal a false positive. In fact, considering the capacity of multinational plaintiffs to forum-shop for permissive regimes, the expansive long-arm personal jurisdiction of the United States, and the global interconnectedness of the U.S. economic market and communications infrastructure, potential liability in the United States would signal a major vulnerability for publishers. At a minimum, exploration of the issue in the United States is *a* place to start and may provide a pattern for analysis

60. The term comes from American entertainer Barbara Streisand, whose attempt in 2003 to suppress aerial photographs of her private residence inadvertently generated worldwide publicity. Peltz-Steele, *supra* note 16, at 71.

61. *Id.*; *see also* Mike Masnick, *Bank Julius Baer Drops Lawsuit Against WikiLeaks*, TECH DIRT (Mar. 5, 2008, 4:34 PM), http://www.techdirt.com/articles/20080305/152959451.shtml.

62. *Bank Julius Baer & Co.*, 535 F. Supp. 2d at 984–85; *see also* Thomas Claburn, *WikiLeaks Wins Back Its Domain*, INFO. WK. (Feb. 29, 2008, 8:00 PM), http://www.informationweek.com/wikileaks-wins-back-its-domain/206901172.

63. Trade secrets and unfair-competition law lie at the fuzzy border of tort and intellectual property, but the line must be drawn somewhere. For a full-on immersion in the potential of copyright law to wrangle WikiLeaks, see Freedman, *supra* note 35, at 193–204, 207–08.

in other jurisdictions, especially in countries observing comparable civil rights norms.

A further limitation of this study is its focus on substantive rather than procedural law. The problems of personal and subject-matter jurisdiction have already been alluded to, and they, as well as extraterritorial application of law, merit their own study. Jurisdiction has been and remains a problem in all aspects of law that touch on the Internet, from intellectual-property piracy, to criminal incitement to violence, to civil liability for defamation. These problems arise from divergent national norms that are suddenly juxtaposed when communications technology races ahead of developments in international law and technological controls. Experience indicates, though, that such problems are surmountable over time as legal norms converge and nations negotiate disparities. Thus, owing to commercial incentives and hard lobbying by intellectual-property owners, governments and corporations together are developing and deploying countermeasures to combat piracy. Legal and technological means are coming into use both within and across borders to track and unmask anonymous Internet users in criminal and civil cases. In time, it is similarly expected that corporate plaintiffs will surmount the procedural and technological barriers to re-publisher liability, whether through the enforcement of imported foreign judgments to reach defendants where they reside or do business, or through controls on the flow of information such as geo-blocks. Accepting that jurisdiction will play out as a technological arms race between governmental and private pursuers, on the one hand, and defendant publishers who seek to stay one step ahead, on the other hand, this paper focuses on the substantive law of civil liability, whether for injunctive relief or damages.

II. ANALYSIS OF CORPORATE PLAINTIFF VS. MEDIA DEFENDANT

Though *Baer Bank* was never decided on the merits,[64] the complaint in that case provides a starting point to examine the con-

64. *See* Notice of Dismissal, *Bank Julius Baer & Co.*, 535 F. Supp. 2d 980 (No. CV08–0824), *available at* https://www.eff.org/files/filenode/baer_v_wikileaks/wikileaks105.pdf (stating that plaintiffs voluntarily dismissed action without prejudice).

temporary problem of corporate plaintiff, victim of an information leak, versus media defendant, re-publisher of the information. Baer Bank sued WikiLeaks for (1) tortious interference with contract and with prospective economic advantage, (2) violation of unfair-competition law, and (3) conversion (civil theft).[65] In its standoff with Brown & Williamson, CBS focused on tortious interference with contract.[66]

Defamation is not available in the ordinary case of a corporate leak because the data disclosed is not false.[67] In the tobacco case, CBS was not worried about falsity: the network had evidence to corroborate Wigand's assertions,[68] and by the time of broadcast the network had the advantage of the fair report privilege,[69] which can protect even false reports.[70] Furthermore, invasion of privacy is not available in the ordinary case of a corporate leak because the information disclosed is not personal or intimate.[71] The *Baer Bank* complaint incorporated allegations of privacy invasion within the unfair-competition claim, citing disclosure of customer data in violation of banking and consumer law,[72] but even if that data were sufficiently intimate to warrant protection in tort, the bank would be a co-defendant, not a plaintiff.

Following on the *Baer Bank* model, this study examines (1) tortious interference, (2) unfair competition, and (3) theories

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65. Complaint at 15, 21–25, *Bank Julius Baer & Co.*, 535 F. Supp. 2d 980 (No. CV–08–00824), *available at* http://www.jdsupra.com/legalnews/complaint-for-unlawful-amp-unfair-bus-94309/. Additional counts addressed remedies, seeking declaratory and injunctive relief in equity. *Id.* at 19–20, 25–28.

66. *See, e.g.*, Brenner, *supra* note 49 (recounting focus of CBS counsel on liability expense for tortious interference).

67. *See, e.g.*, ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2.1.1 (rev. 4th ed. 2013) (detailing falsity as element of defamation tort).

68. Brenner, *supra* note 49.

69. *See, e.g.*, DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 3:4 (2013) (detailing privilege of fair report on judicial proceedings).

70. *See id.* § 3:1.

71. *See, e.g.*, J.D. LEE & BARRY LINDAHL, 5 MODERN TORT LAW: LIABILITY AND LITIGATION § 48:9 (rev. 2d ed. 2013) (explaining that public disclosure of private facts is a form of invasion of privacy); *see also id.* § 48:6 (explaining that intrusion upon seclusion is a form of invasion of privacy).

72. Complaint, *supra* note 65, ¶ 34.

related to the theft of plaintiff's secrets. Tortious interference was common to the tobacco and WikiLeaks cases, so that claim is treated first. That treatment introduces points of law and fact that are relevant to the subsequent analyses. Appropriation of trade secrets, a statutory tort arising in unfair-competition law, is considered in the third part of the analysis rather than the second because it is essentially a theory of civil theft. The third part of the study also expands the analysis beyond the limited scope of conversion to consider additional theories predicated on the theft of plaintiff's secrets—namely, trespass to chattels and breach of confidence. The analyses also consider theories of associative, or joint, liability, as the key to the plaintiff's success might lie in tying the defendant to the misconduct of the leaker, or original publisher. The core doctrine of associative liability is set out in the examination of tortious interference.

The possibility always exists that a state or national government passes a statute specifically creating liability for a republisher. In that situation, the plaintiff's prima facie case would be made, and the relevant point of inquiry would be constitutional defenses alone. Free-speech defenses are considered in relation to each of the following analyses with the core doctrine set out in the examination of tortious interference.

A. Tortious Interference

Baer Bank filed two counts of tortious interference against WikiLeaks;[73] accordingly, at common law in the United States, there are two interference torts: (a) intentional interference with contract, and (b) intentional interference with prospective economic advantage.[74] As the names suggest, both torts require intent.[75] In short, tortious interference occurs when an actor engages in conduct with the purpose of interfering with the performance of a contract or with the coming to fruition of an economic advantage,

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73. *Id.* ¶¶ 49–59.

74. *See, e.g.*, LEE & LINDAHL, *supra* note 71, § 45:1 (introducing tortious interference with contractual relations).

75. *See id.* §§ 45:3, 45:11 (explaining tortious interference with contractual relations and tortious interference with prospective contractual relations, respectively).

or the actor should know that interference is substantially certain to occur, and interference results.[76]

1. Intent and Impropriety

The *Restatement (Second) of Torts* provides a starting point for study, as it represents the common law of the various state jurisdictions of the United States.[77] The *Restatement* articulates two avenues to reach interference with contract—a basic rule and an alternative formulation. Section 766 provides the basic rule on tortious interference:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[78]

The plaintiff's burden under this standard is manifold. The plaintiff must prove the existence of a valid contract and that the defendant induced or otherwise caused the third party to breach or not perform; the causal link is indispensable.[79]

Furthermore, the plaintiff must prove that defendant acted both intentionally and improperly.[80] The former requirement, intentionality, is a subjective state-of-mind inquiry,[81] never easy to prove in non-physical tort cases absent the rare smoking gun. Intent is more than volitional conduct; it is present when an actor

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76. For a short history and modern statement of tortious interference, and a thorough literature review to its time, see Elisa Masterson White, Comment, *Arkansas Tortious Interference Law: A Proposal for Change*, 19 U. ARK. LITTLE ROCK L.J. 81, 82–88, 93–100 (1996).

77. *See generally* Herbert Wechsler, *Introduction* to RESTATEMENT (SECOND) OF TORTS, at VII–IX (1965) (discussing changes in the common law between the first two *Restatements of Torts*).

78. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

79. *See id.* § 766 cmt. k.

80. *See id.* § 766 cmt. j.

81. 86 C.J.S. *Torts* § 22 (2006).

"desires to cause consequences of his act, or . . . he believes that the consequences are substantially certain to result from it."[82] Intent in interference comprises knowledge of the economic relation interfered with and a substantial certainty that interference will result, though some courts require more specificity of intent.[83] Implicit in intentionality is that defendant is in some measure cognizant of the existence of plaintiff's contractual interest, else there would be nothing for defendant to intend interference with.[84] In an effort to aid in the intent analysis, many courts have examined the interfering act for "malice" or "maliciousness," though it is well settled that the term refers to legal malice—that is, intent to do harm without justification, rather than to malice in the historic common-law sense of spite or ill will.[85] For example, the Connecticut Court of Appeals in *IN Energy Solutions, Inc. v. Realgy, L.L.C.*, construed the element of "malice" not to mean ill will but defendant's lack of justification, a proof charged to the plaintiff.[86] Nevertheless, ill will may go to the element of impropriety,[87] a term of art discussed below.

An alternative formulation of the rule for interference with contract offers plaintiffs on some facts an easier avenue to liability. Section 766A of the *Restatement* describes as actionable the burdening of a plaintiff's performance on plaintiff's own contract, as by greater expense, rather than inducement of breach or nonperformance.[88] The Wyoming Supreme Court found the 766A

82. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

83. White, *supra* note 76, at 85 (citing RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979)).

84. RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1979).

85. *Id.* § 766 cmts. r, s.

86. 969 A.2d 807, 815 (Conn. App. Ct. 2009).

87. RESTATEMENT (SECOND) OF TORTS § 766 cmt. r, § 767 cmt. d (1979).

88. *Id.* § 766A.

avenue too permissive and susceptible to abuse so disallowed it,[89] and the question remains open elsewhere.[90]

Interference with prospective economic relations, which requires no extant contract at the time of interference, is further described by *Restatement* section 766B.[91] The section contemplates liability resulting from interference on the plaintiff or on the third-party side of the prospective relationship. A threshold question arises as to whether the economic relationship was so likely to come to fruition that the plaintiff fairly may be afforded legal protection in the prospective interest.[92] The Third Circuit once characterized prospective economic advantage as "something less than a right and something more than hope"[93] and exemplarily required that the relationship stand upon a "reasonable probability."[94] Stated in terms of causation, tortious interference with prospective economic advantage occurs when there is a reasonable probability that a benefit or opportunity would have been conferred on the plaintiff *but for* the defendant's interference.[95] Some courts have required flatly that a business relationship *would have* occurred but

89. Price v. Sorrell, 784 P.2d 614, 616 (Wyo. 1989) (opining, where debtor's attorney allegedly interfered with contractual relationship between creditor and its attorney by sending a letter to hospital questioning its hiring of a debt collector for the hospital, that the court was "convinced that such an element of proof is too speculative and subject to abuse to provide a meaningful basis for a cause of action").

90. *See, e.g.*, Gemini Physical Therapy & Rehab., Inc. v. State Farm Mut. Auto. Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994) (deciding issues of Pennsylvania law).

91. RESTATEMENT (SECOND) OF TORTS § 766B (1979). *See generally* James B. Sales, *The Tort of Interference with Contract: An Argument for Requiring a "Valid Existing Contract" to Restrain the Use of Tort Law in Circumventing Contract Law Remedies*, 22 TEX. TECH. L. REV. 123, 154–55 (1991) (concluding that interference upon prospective economic relations improperly blurs line between tort and contract law).

92. *See* RESTATEMENT (SECOND) OF TORTS § 766B cmt. c (1979).

93. Nathanson v. Med. Coll. of Pa., 926 F.2d 1368, 1392 (3d Cir. 1991) (quoting Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979)).

94. *Id.* (quoting Gen. Sound Tel. Co. v. AT & T Commc'ns, Inc., 654 F. Supp. 1562, 1565 (E.D. Pa. 1987)).

95. *See* Catskill Dev., L.L.C. v. Park Place Entm't Corp., 217 F. Supp. 2d 423, 440 (S.D.N.Y. 2002).

for the interference.[96] Merely speculative expectation of an economic advantage never suffices.[97]

The plaintiff's burdens as to intentionality and impropriety persist in all permutations of interference. Even after surmounting the manifold hurdles of intent, a plaintiff typically faces the weightiest challenge in proof of impropriety.[98] Impropriety at common law marks one side of a coin, and the opposite side bears the affirmative defense of "justification."[99] The duplication, affording the defendant both conventional and affirmative defenses, emphasizes the weight of the plaintiff's burden. Either way, impropriety, or lack of justification, may be determined by a balancing of interests under the circumstances.[100] As articulated in the *Restatement*, factors to be balanced include:

> (a) the nature of the [defendant's] conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the [plaintiff] with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and

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96. *See* Garshman v. Universal Res. Holding, Inc., 641 F. Supp. 1359, 1374 (D.N.J. 1986); Robbins v. Ogden Corp., 490 F. Supp. 801, 811 (S.D.N.Y. 1980).

97. 44B AM. JUR. 2D *Interference* § 49 (2007).

98. RESTATEMENT (SECOND) OF TORTS § 767 cmt. a (1979).

99. *Id.* § 767 cmt. b; *see also* A. F. Arnold & Co. v Pac. Prof'l Ins., Inc., 104 Cal. Rptr. 96, 99 (Ct. App. 1972) (suggesting that some courts have treated lack of justification as an element of the tort, rather than as a defense, because of the historic use of the word "unjustified" in describing tort, as in such statements as recovery may be had for unjustified interference with prospective economic advantage).

100. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmts. a, j (1979).

(g) the relations between the parties.[101]

Nature is the "chief factor" in the analysis, and liability may result from defendant's improper "manner" of conduct, even if defendant acted justifiably.[102]

Improper conduct, as regarded variously by the states, may range from conduct that is criminal or independently tortious[103] to conduct more morally than legally objectionable.[104] The latter extreme reaches economic coercion and violation of business ethics or custom.[105] When the defendant exercises persuasion, short of intimidation, to have its way, interference cases diverge.[106] Interference with prospective economic relation might require the more concrete wrong to compensate for the more tenuous nature of the injury.[107] A New Jersey court described the broad view:

> The very nature of . . . [tortious interference] prohibits a "rule of thumb" . . . . But where it appears to the judge . . . from sufficient facts and the legitimate inferences therefrom, that the elements of the tort may be present, including conduct which was both injurious and transgressive of generally accepted standards of common morality or of law, it is

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101. *Id.* § 767. The factors might be falling out of favor, but courts are not settling on a consistent alternative. A 2012 survey found that thirty-seven states have declined to use the *Restatement* factors. Larry Watkins, Note, *Tort Law—Tortious Interference with Business Expectancy—A Trap for the Wary and Unwary Alike*, 34 U. ARK. LITTLE ROCK L. REV. 619, 637–38 (2012). But twenty-two of those states refer to case precedents to define impropriety, where precedents might have used the factors, and only fifteen states have adopted the standard of an independent wrong in tort or criminal law. *Id.* at 638.

102. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979).

103. *See, e.g.*, Watkins, *supra* note 101, at 640–41 (describing Texas law).

104. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979).

105. *Id.*

106. M.C. Dransfield, Annotation, *Liability for Procuring Breach of Contract*, 26 A.L.R.2D 1227, 1255 (1952).

107. *See, e.g.*, Watkins, *supra* note 101, at 639 (describing California law).

> then for the jury or the fact finder to decide the issue.[108]

The focus in determining wrongfulness "should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct."[109] Thus, lawful conduct that is "motivated by a black desire to hurt plaintiff's business" does not necessarily constitute wrongful conduct for tortious interference.[110]

Though objective, the circumstance-heavy inquiry demonstrates the fuzzy nature of interference. The same conduct may be tortious in one context and not in another. "If unlawful means are employed, such as fraud or intimidation," or if the defendant acts without justification and causes economic loss, then the plaintiff is entitled to a remedy.[111] The defendant's ill will may evidence, but cannot by itself conclusively establish, impropriety. But profit motive is justification and therefore should relieve from liability the defendant whose means do not violate "standards of 'socially acceptable conduct.'"[112] The line is fine. In a Georgia interference case by an employer against a former employee, the court found improper interference in a subsequent employer's inducement of its employee to break a non-disclosure contract with the former employer.[113]

2. Common-Law Defenses and Associative Liability

If the plaintiff meets its burdens, then a range of affirmative defenses also bears on interference cases. Of course, the defendant can endeavor to prove justification, the inverse of impropriety,[114] and might well force a jury question on the point. The courts rec-

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108. C.R. Bard, Inc. v. Wordtronics Corp., 561 A.2d 694, 698 (N.J. Super. Ct. Law Div. 1989) (first alteration in original) (citations omitted) (quoting Leslie Blau Co. v. Alfieri, 384 A.2d 859, 866 (N.J. Super. Ct. App. Div. 1978)).

109. Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co., 54 Cal. Rptr. 2d 888, 895 (Ct. App. 1996).

110. *Id.*

111. *Leslie Blau Co.*, 384 A.2d at 865.

112. *Id.* at 867.

113. Fine v. Commc'n Trends, Inc., 699 S.E.2d 623, 633 (Ga. Ct. App. 2010).

114. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979).

ognize other privileges that may also be described as inverses of impropriety: a general (and ill-defined) privilege to act in the public interest,[115] a privilege to further one's own economic or legal interests in the absence of improper means,[116] a privilege to compete commercially with the plaintiff in the absence of improper means,[117] a privilege to protect the welfare of a third person for whom the defendant is responsible,[118] a privilege to give honest counsel in good faith and upon request,[119] and narrow privileges to execute organizational leadership or employment obligations.[120] Cases exemplifying the general public-interest privilege all involve government defendants or defendants employing the right to petition government officials.[121]

Interference is said to police the boundary between legitimate marketplace competition and tortious conduct.[122] As such, precise legal language is only so effective to describe what is essentially a civil wrong. Therefore, impropriety is the lynchpin of the determination. The unavoidable consequence of context-dependent analysis is a discomforting degree of inconsistency in what constitutes tortious conduct from case to case, court to court, and state to state.[123]

Tort law provides broad grounds for an actor's associative liability—that is, liability upon the tortious conduct of another when harm results to a third party. In their sweep, the three disjunctive provisions of *Restatement (Second) of Torts* section 876 subsume civil analogs to criminal conspiracy and criminal aiding and abetting, imposing liability when the actor:

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115. 44B AM. JUR. 2D *Interference* § 28 (2007).

116. *Id.* § 29; RESTATEMENT (SECOND) OF TORTS § 773 (1979).

117. 44B AM. JUR. 2D *Interference* § 30; RESTATEMENT (SECOND) OF TORTS § 767 (1979).

118. 44B AM. JUR. 2D *Interference* § 32; RESTATEMENT (SECOND) OF TORTS § 770 (1979).

119. 44B AM. JUR. 2D *Interference* § 33; RESTATEMENT (SECOND) OF TORTS § 772 (1979).

120. 44B AM. JUR. 2D *Interference* § 34.

121. *See id.* § 28.

122. *See* Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc., 116 Cal. Rptr. 2d 358, 363–64 (Ct. App. 2002).

123. *See* Robert B. Gigl, Jr., *The Murky World of Tortious Interference: What Are the Rules of the Game?*, N.J. LAW. MAG., Feb. 2008, at 10, 13–14, *available at* http://www.njsba.com/images/content/1/0/1002005/Feb08.pdf.

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[124]

Actors in tortious interference are subject to associative liability as in any tort of negligence or intent.[125] Thus, for example, a complaint for aiding and abetting tortious interference was properly alleged against a supervisor for his role in "directing and supervising" an associate in what the plaintiff alleged to be a scheme to defraud and interfere with prospective economic advantage.[126]

3. Liability Theories in *Baer Bank* and Big Tobacco

The interference-with-contract claim in *Baer Bank*[127] was the same as what one could imagine in the tobacco case: that the leak re-publisher knew of the leaker's confidentiality agreement with the corporation and induced the leaker to break the agreement. Baer Bank alleged that WikiLeaks knew or should have known of the confidentiality agreement between the bank and the leaker, former bank employee Rudolf Elmer.[128] Perhaps indisput-

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124. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

125. *See* Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 446 (Ct. App. 1994) (aiding and abetting); *see also* Hart, Nininger & Campbell Assocs. v. Rogers, 548 A.2d 758, 765 (Conn. App. Ct. 1988) (conspiracy).

126. Forum Fin. Grp., v. President & Fellows of Harvard Coll., 173 F. Supp. 2d 72, 96–97 (D. Me. 2001); *see also* Dube v. Likins, 167 P.3d 93, 100 (Ariz. Ct. App. 2007) (finding lack of evidence to support plaintiff's allegation that university officials aided and abetted a thesis advisor in interfering with plaintiff's bid for post-graduate degree).

127. Complaint, *supra* note 65, ¶¶ 49–54.

128. *Id.* ¶¶ 50–51. Certainly WikiLeaks disavows knowledge of its sources initially. *See, e.g.*, Davidson, *supra* note 29, at 80 (quoting Assange:

ably, the bank further alleged that WikiLeaks learned of the confidentiality agreement from bank counsel and still refused to remove the postings.[129] The bank characterized WikiLeaks' maintenance of a website that avowedly provided an "uncensorable" and "untraceable" avenue for "mass document leaking" as a "tortious scheme to solicit the submission or upload" of confidential records by Elmer.[130] The bank further alleged that as Elmer continued leaking documents in subsequent uploads, WikiLeaks "knowingly and intentionally" became a "joint-tortfeasor[] with Elmer."[131]

In the tobacco case, an interference-with-contract claim would have focused on *60 Minutes* producer Lowell Bergman's cultivation of Jeffrey Wigand as a source.[132] In terminating his Brown & Williamson employment, Wigand had signed a broad agreement to say nothing about the company.[133] In the movie version of the tobacco case, Bergman (Al Pacino) repeatedly told Wigand (Russell Crowe) that whether to talk to *60 Minutes* was a decision for Wigand alone to make.[134] At the same time, Bergman

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"We do not know whether Mr. Manning is our source or not. . . . [O]ur technology does not permit us to understand whether someone is one of our sources or not because the best way to keep a secret is to never have it." (alteration in original)). Elmer was convicted in Switzerland for violating banking secrecy laws and fined 6,000 Swiss francs. *WikiLeaks Banker Escapes Jail*, IRISH EXAMINER (Jan. 19, 2011), http://www.irishexaminer.com/breakingnews/world/wikileaks-banker-escapes-jail-489967.html.

129. Complaint, *supra* note 65, ¶ 29.

130. *Id.* ¶¶ 52–53.

131. *Id.* ¶ 53.

132. *See* Brenner, *supra* note 49. In a favorite scene in *The Insider*, a CBS lawyer (Gina Gershon) endeavored to explain "tortious interference" to *60 Minutes* staff, and a perplexed producer (Philip Baker Hall) responded for the journalists, "Interfering? That's what we do." THE INSIDER, *supra* note 54.

133. Brenner, *supra* note 49; *see also Smoke in the Eye: Anatomy of a Decision*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/smoke/cron.html (last visited Nov. 20, 2013).

134. THE INSIDER, *supra* note 54. Of course, only Bergman and Wigand know for sure what they said to one another. Writers for the movie did conduct extensive factual investigation to render a realistic, if dramatized, portrayal of events, so the movie is informative, for sake of hypothesis, as to what might have occurred. *See A Talk with Lowell Bergman*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/smoke/bergman.html (last visited Oct. 24, 2013); *see also* Bill Carter, *TV Notes; Mike Wallace Getting Over It*, N.Y. TIMES (Nov. 3, 1999), http://www.nytimes.com/1999/11/03/arts/tv-notes-mike-

wanted the story; he walked a fine line. He impressed Wigand with the public-health interest in the confidential information; he appealed to Wigand on a personal level; and he arranged for Wigand to tell his story in part under the purported shield of a litigation privilege in a collateral state investigation into Big Tobacco by the Mississippi Attorney General (who played himself, Michael Moore).[135] When Wigand did give an interview, Bergman initially agreed to withhold it from broadcast pending Wigand's permission.[136] CBS broadcasted a version of the interview with Wigand's identity obscured.[137] Once Wigand had given testimony on the record consistent with his interview, CBS broadcasted the interview with Wigand's identity made plain.[138]

Both the movie and the real-life record are ambiguous on another key point: whether Bergman promised Wigand that CBS would pay his legal fees in the event he was sued by Brown & Williamson for breach of confidence.[139] *Vanity Fair* reported that a discussion occurred, prompted by Wigand's counsel, but did not state the outcome.[140] PBS *Frontline* reported only a negotiation

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wallace-getting-over-it.html?pagewanted=all&src=pm. Because the lawsuit discussed here is hypothetical anyway, the analysis will benefit by borrowing some facts from Hollywood.

135. THE INSIDER, *supra* note 54. These facts are consistent with the *Vanity Fair* report, Brenner, *supra* note 49.

136. Brenner, *supra* note 49.

137. *Id.*

138. *Id.*

139. In *The Insider*, *supra* note 54, CBS counsel observed to *60 Minutes* staff, "I'm told unusual promises were made to Wigand." Probably, she was referring to this issue because it could mark a significant threshold in liability exposure for tortious interference.

140. Brenner, *supra* note 49; *accord Frontline: Smoke in the Eye* (PBS television broadcast Apr. 2, 1996), *transcript available at* http://www.pbs.org/wgbh/pages/frontline/smoke/smokescript.html (quoting Daniel Schorr referring to "insistence of Wigand's lawyer that CBS pay for his client's defense if airing the interview led to a lawsuit"). Another account said CBS did promise to pay Wigand's legal fees. Paul Starr, *What You Need to Beat Goliath*, AM. PROSPECT (Dec. 19, 2001), http://prospect.org/article/what-you-need-beat-goliath. A textbook in business law cited the *Wall Street Journal* for a report that CBS paid Wigand a $12,000 consulting fee and promised "full indemnification." MARIANNE M. JENNINGS, BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT 315 (9th ed. 2010); *see also infra* note 143.

over legal fees in the event of a libel suit.[141] Certainly CBS counsel was troubled by the prospect of any agreement.[142] CBS might have come around later, perhaps emboldened by Wigand's litigation privilege. Or the network might have reasoned that once Wigand's identity was public record, there was nothing left of the confidentiality agreement for the tobacco company to enforce.[143] By the time Wigand testified, CBS itself was taking a beating in the press for its in-fighting over how to handle the story.[144] In any event, it is worthwhile in this analysis to consider the impact of a hypothetical fee-indemnity agreement between CBS and Wigand.

The prospective-economic-advantage claim in *Baer Bank* focused on the bank's relationships with its customers.[145] Private and institutional consumers of financial services would see the public dissemination of confidential records and conclude that Baer Bank could not be trusted with their business, the bank reasoned.[146] Baer Bank understandably declined to mention that revelation of questionable business practices in the Cayman Islands might have also undermined consumer confidence. WikiLeaks intended such impact, the bank alleged, pointing again to the website's provision of an avenue for anonymous leaking without regard for confidentiality agreements.[147] Indeed, WikiLeaks boasts

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141. *Smoke in the Eye: Anatomy of a Decision*, *supra* note 133.

142. *Smoke in the Eye: Interview [with] Victor Kovner*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/smoke/interviews/kovner.html (last visited Nov. 20, 2013).

143. According to one report, CBS President Eric W. Ober announced "full indemnification" of Wigand after airing the interview in which he was identified. Alicia C. Shepard, *Fighting Back*, AM. JOURNALISM REV., Jan.–Feb. 1996, at 34, 39.

144. Brenner, *supra* note 49.

145. *See* Complaint, *supra* note 65, ¶¶ 55–59.

146. *Id.* ¶¶ 56–58.

147. *Id.* ¶ 57. To date, there is no love lost between WikiLeaks and big banks, which blocked donor funding for the organization. WikiLeaks explained: "The most powerful players in the banking industry have shown themselves to be a politicized arm of Washington. This collusion has occurred outside of any judicial or administrative process. The reach of these companies is global and violates the most basic principles of sovereignty." *Banking Blockade*, WIKILEAKS, http://wikileaks.org/Banking-Blockade.html (last visited Oct. 24, 2013); *see also* Edward Wasserman, *Blame Bankers for WikiLeaks' Demise*,

of its past publication of confidential reports that contributed to the downfall of the Iceland-based bank, Kaupthing.[148]

Prospective economic advantage may be alleged in the tobacco case in a slightly different cast. Under a theory similar to Baer Bank's, Brown & Williamson could have alleged that CBS intended to jeopardize the manufacturer's future sales of cigarettes to wholesalers and consumers. But the theory would put the tobacco company in the same untenable position as Baer Bank complaining of the revelation of its financial practices, arguing in essence that consumer ignorance is a business staple. The better interference argument in the tobacco case would shift focus from confidentiality vis-à-vis customers to confidentiality vis-à-vis competitors, predicating interference on the wrongful disclosure of trade secrets.[149] It is not clear that the Wigand tobacco case would have supported the claim, because upon seeing documents *60 Minutes* had obtained from tobacco manufacturer Philip Morris, Wigand reportedly expressed surprise at how far Brown & Williamson lagged behind in research and development.[150] But the Philip Morris documents themselves had been leaked to CBS,[151] so one easily can imagine a leaker revealing to competitors proprietary product formulae or business methods. Those revelations may

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PRESS OF ATLANTIC CITY, Nov. 18, 2011, at A15, *available at* 2011 WLNR 23974411.

148. *See, e.g.*, Simon Bowers, *Icelandic Bank Kaupthing's Top Executives Indicted Over Market Rigging*, GUARDIAN (Mar. 19, 2013), http://www.guardian.co.uk/business/2013/mar/19/kaupthing-executives-indicted-for-market-rigging?INTCMP=SRCH (describing the collapse of Kaupthing and prosecution of executives for fraud).

149. *See, e.g.*, Carolina Bolado, *Ex-Tea Marketer Accused of Leaking Trade Secrets*, LAW360 (Mar. 6, 2013, 8:34 PM), http://www.law360.com/articles/421510/ex-tea-marketer-accused-of-leaking-trade-secrets (citing SereniGy Global Inc. v. Mendoza, No. 2013-08243-CA (Fla. Cir. Ct. filed Mar. 6, 2013)) (reporting suit by tea and coffee maker against ex-marketer for revealing maker's trade secrets, in addition to wooing customers); *Business Contracts & Tortious Tortious Interference Claims in Texas*, MEYER & COLGROVE (Oct. 24, 2012, 5:12 AM), http://colegrovelaw.com/blog/business-contracts-tortious-interference-claims-in-texas/ (listing among circumstances that may be tortious interference in Texas, causing corporate employee to leak in violation of covenant).

150. Brenner, *supra* note 49.

151. *Id.*

be alleged to interfere with a company's prospective economic relations with consumers and investors.

At the outset in an interference claim, Baer Bank or Brown & Williamson would have to prove that WikiLeaks or CBS interfered with a business relationship in existence or in reasonably probable expectancy, and that the defendants had some cognizance of the business relationship with which they are alleged to have interfered. The proof is manageable. Both plaintiffs had existing contracts for the sale of services or products, and both likely suffered some loss of business after the revelation of their secrets. Nor should it be difficult for either plaintiff, as worldwide leaders in their industries at the time, to pull together evidence of lost prospective business. Lost clients or lost prospects are more likely to go to the quantum of damages than to the dispositive question of liability. And insofar as causation is a question of fact, a plaintiff with plausible evidence should be able to beat dispositive defensive motions to reach a jury.

The challenging elements of interference in the leaking case are intentionality and impropriety, including the privilege-inverse of the latter, justification. Both defendants are well positioned to prevail on these elements. As to intent, the plaintiffs probably can prove that CBS and WikiLeaks had knowledge to a substantial certainty that their publications would result in lost business. It makes sense that consumers informed of dangerous tobacco additives would smoke less; that banking customers desirous of famous Swiss secrecy would be alienated by identity leaks; and that investors in either case would be put off by revelations of trade secrets.

As a court requires greater specificity of intent, the plaintiff's case weakens. CBS and WikiLeaks might be described aptly as reckless or indifferent to the plight of their plaintiffs, but these terms imply a passivity that falls short of intent to interfere. The WikiLeaks mission is "to bring important news and information to the public" and "to publish original source material alongside our news stories so readers and historians alike can see evidence of the truth."[152] Similarly, CBS News presumably purports to publish in accordance with contemporary ethical standards of journalism

152. *About: What is WikiLeaks?*, WIKILEAKS, http://wikileaks.org/About.html (last visited Dec. 11, 2013).

concerning truth, objectivity, and news judgment.[153] Thus, both defendants conduct themselves in furtherance of freedom of information, democratic participation, and public education—not specifically the disruption of private business.

Nevertheless, plaintiffs may argue that defendants' journalistic motives are incidental to other objectives. CBS is a for-profit business, and the exposed in-fighting over the Wigand story revealed an uncomfortable interplay between CBS News and CBS executives.[154] Though allegations were purely speculative, based on circumstances, critics pointed out that the same CBS executives who were fearful of a Brown & Williamson lawsuit later made big money upon a CBS merger with Westinghouse.[155] A lawsuit would have cut into profits if not killed the merger. Also, CBS investor and CEO Larry Tisch was the father of Andrew Tisch, one of the tobacco company CEOs whom Wigand accused of lying when they swore before Congress in 1994 to their ignorance of the addictive or carcinogenic properties of nicotine and cigarettes.[156] Though the incentives for CBS executives seem to have been aligned with Brown & Williamson's as to Wigand, the implication is that CBS made decisions based on enhancing its financial worth, whether or not at others' expense, rather than based on journalistic ideals. A skeptic could have argued that Bergman and *60 Minutes* were no less self-serving.

For its part, WikiLeaks disavows profit motive,[157] but depends desperately on financial support via donations.[158] Whether CBS television or WikiLeaks online, scandal wins eyes and money. Baer Bank found purpose in WikiLeaks' own statement proffering an outlet for leakers, and WikiLeaks boasts of its injury caused to business, however justifiable.[159] Moreover, WikiLeaks was accused of having a partisan agenda in publishing the video of

153. *See, e.g.*, Susan Paterno, *The Lying Game*, AM. JOURNALISM REV., May 1997, at 40, 43 (interviewing CBS correspondent Mike Wallace about centrality of truth in news operation).

154. Brenner, *supra* note 49.

155. *Id.*

156. *Id.*

157. *About: What is WikiLeaks?*, *supra* note 152, § 1.3.

158. *See Banking Blockade*, *supra* note 147.

159. *See About: What is WikiLeaks?*, *supra* note 152, § 2.2.

the Baghdad air strike under the title, "Collateral Murder."[160] Though WikiLeaks purports not to edit,[161] it writes "news" stories on selected content and headlines material based on potential impact.[162] Thus, WikiLeaks publishes with an intent to further the public welfare only arguably subordinate to an intent to interfere with and injure commercial interests. Bambauer found this distinction crucial in distinguishing WikiLeaks war-diary publications from *The New York Times* publication of the *Pentagon Papers* for purposes of information policy.[163]

Were WikiLeaks a bank, or CBS a cigarette manufacturer, it would fit the conventional paradigm of aggressive competitor *qua* interfering defendant. But nowhere does interference require that plaintiff and defendant be in direct competition.[164] "Indirect" interference goes to impropriety rather than to intentionality.[165] And a business model that earns revenue from schadenfreude[166] is no less liable for civil wrongs than a business that sells services or products. Viewers who tuned in to watch Bill and Hillary Clinton

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160. *See, e.g.*, *The Colbert Report: Julian Assange Extended Interview* (Comedy Central television broadcast Apr. 12, 2010), *available at* http://www.colbertnation.com/the-colbert-report-videos/260785/april-12-2010/exclusives---julian-assange-unedited-interview.

161. *About: What is WikiLeaks?*, *supra* note 152, § 1.4.

162. *Id.* § 1.2.

163. Bambauer, *supra* note 24, at 34–35, 38–42; *see also* Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 688 (2011) (concluding that for lack of journalistic function, WikiLeaks could not qualify as a journalist meriting protection under any of the proposed federal shield laws).

164. Indeed, in the absence of competition, no competition privilege pertains. *See* 44B AM. JUR. 2D *Interference* § 30 (2007); RESTATEMENT (SECOND) OF TORTS § 767 (1979).

165. Sandra S. Baron, Hilary Lane, & David A. Schulz, *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1050 (1996) (concluding that the impropriety factor of proximity or remoteness would favor a media defendant).

166. *See, e.g.*, Christopher Versace, *10 Stocks to Benefit from Hurricane Sandy*, FORBES (Oct. 29, 2012, 9:12 AM), http://www.forbes.com/sites/greatspeculations/2012/10/29/10-stocks-to-benefit-from-hurricane-sandy/ (listing, among others, Facebook).

on *60 Minutes* after the 1992 Super Bowl[167] were looking for more than just another celebrity profile. In other words, the worthiness of the defendant's motives goes to impropriety, not to intentionality. Looking again at interference from the perspective of the defense, the tort provides an affirmative defense for the defendant that acts in furtherance of its own economic interests—there is nothing wrong with profit motive per se, which is the essence of a competitive marketplace—but the scope of the affirmative defense circles back to a test for impropriety in the defendant's furtherance of its commercial interests.[168]

Thus, it is no surprise that the lynchpin of the interference cases is impropriety, or lack of justification. The defendants' journalistic, profit-driven, or malicious motives come into play again and may inure to defendants' advantage. Profit motive per se is not improper, short of the boundary of social unacceptability. Whereas multiplicity of motive might be sufficient to support the plaintiff's case for intent, a single justified motive might negate impropriety.[169] Baron, Lane, and Schulz cited two cases in which investigative reporters escaped liability for their journalistic endeavors.[170] A body-shop owner failed to show that a broadcaster bore a motive other than journalistic, such as might support an interference claim.[171] And a second case involved none other than Brown & Williamson versus CBS over an affiliate's reporting on cigarettes.[172] In what was principally a defamation case, the Seventh Circuit affirmed for the defendant on interference, finding that the affiliate intended exclusively "to attract viewers," not to injure the company.[173]

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167. *60 Minutes: Governor & Mrs. Clinton* (CBS television broadcast Jan. 26, 1992), *available at* http://www.cbsnews.com/8301-504803_162-57565887-10391709/hillarys-first-joint-interview-next-to-bill-in-92/.

168. *See* 44B AM. JUR. 2D *Interference* § 29; RESTATEMENT (SECOND) OF TORTS § 773 (1979).

169. *See* Baron, Lane, & Schulz, *supra* note 165, at 1048.

170. *Id.* at 1048 (citing Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262 (7th Cir. 1983); Dulgarian v. Stone, 652 N.E.2d 603 (Mass. 1995)).

171. *Dulgarian*, 652 N.E.2d at 609.

172. *Brown & Williamson Tobacco Corp.*, 713 F.2d at 265–66.

173. *Id.* at 274.

Analyzing the tobacco case, Baron, Lane, and Schulz in 1996 posited that newsgathering, as a public good, is nearly immune from interference liability.[174] Impropriety on the one hand considers social value, and from the defensive position, privilege may arise in public interest. The logic of this position as to a news media defendant remains viable and untested in the courts since 1996. Baron, Lane, and Schulz relied in part on courts' then extant but waning inclination to rely on *Branzburg v. Hayes*[175] for the proposition that newsgathering enjoys some First Amendment privilege.[176] It bears mention that the conventional wisdom on *Branzburg* made an about face in subsequent years, superseded by the observation in hindsight that a Court plurality held journalists subject to laws of general applicability,[177] including the laws of tort and contract.[178] But it remains a stretch to conclude that newsgathering is wrongful or improper in interference terms, short of, say, an act of violence or physical intimidation, or at least economic coercion. However hard *The Insider* was on CBS, the viewer still was left with an impression of Bergman as a hero in journalistic and ethical terms for wanting to get Wigand's story told.

Baron, Lane, and Schulz also ran the tobacco case through the *Restatement* factors to test for impropriety, concluding that the

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174. Baron, Lane, & Schulz, *supra* note 165, at 1051–57; *see also* William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, COMM. LAW., Spring 1996, at 13, 15 (favoring unlikelihood of liability based on public interest, notwithstanding the First Amendment).

175. 408 U.S. 665 (1972).

176. Baron, Lane, & Schulz, *supra* note 165, at 1053.

177. *See* McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003); *see also* Daxton R. "Chip" Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL'Y 425, 431 (2011).

178. *See* 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); Ben Battles, Note, *Terror, Tort, and the First Amendment:* Hatfill v. New York Times *and Media Liability for Intentional Infliction of Emotional Distress*, 72 BROOK. L. REV. 237, 258–76 (2006) (reviewing the history of emotional distress tort and proposing newsworthiness defense).

element could not be proved.[179] Again, no change in interference precedents since 1996 now casts doubt on the validity of that analysis. Probably the greatest vulnerability in the CBS position arises from any promise by CBS to pay for Wigand's legal fees in case of suit, especially in case of suit for breach of confidentiality.[180] Baron, Lane, and Schulz cited cases holding indemnity offers to be improper inducements in furtherance of actionable interference.[181] However, as the authors observed, the defendants' dominant interests in those cases were business-competitive.[182] If predominant justification will serve to dispel impropriety, then the defendant might prevail upon showing that journalism was its principal aim.

WikiLeaks has a good defense on impropriety, but a weaker case than CBS. WikiLeaks' absolutist position on the freedom of information and its determination to post unedited, original content temper its claim to a conventional journalistic role.[183] Without the imprimatur of mainstream journalism, WikiLeaks can be painted as anarchic; thus, arguably contra public interest.[184] Stripped of justification, WikiLeaks would be more vulnerable to proof of wrongful conduct than CBS would have been. Baer Bank asserted that WikiLeaks' revelations of private banking information, identifying specific customers and their financial data, violated banking regulations.[185] The regulations bind only bankers, but Baer Bank made a greater point: WikiLeaks' revelations were wrongful, or

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179. Baron, Lane, & Schulz, *supra* note 165, at 1043–51.

180. *See id.* at 1045; Turner, *supra* note 174, at 15.

181. Baron, Lane, & Schulz, *supra* note 165, at 1044.

182. *Id.* at 1045.

183. *See, e.g.*, Päivikki Karhula, *What is the Effect of WikiLeaks for Freedom of Information?*, IFLA, http://www.ifla.org/publications/what-is-the-effect-of-wikileaks-for-freedom-of-information (last updated Oct. 5, 2012) (describing how WikiLeaks' sometimes-absolutist position on free flow of information without principled gatekeeping has alienated civil rights supporters and might precipitate more secrecy in society rather than less).

184. *See, e.g.*, Giorel Curran & Morgan Gibson, *WikiLeaks, Anarchism and Technologies of Dissent*, 45 ANTIPODE 294, 307–08 (2012), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8330.2012.01009.x/pdf (analyzing characteristics of WikiLeaks' conduct and enterprise that do not fit a template of anarchism).

185. Complaint, *supra* note 65, ¶ 34.

improper, even if not illegal per se.[186] The claim depends on a lenient interpretation of impropriety as socially unacceptable conduct or a violation of business ethics or custom. The application of such norms to a financial institution or banker who happens not to have received the information in an official capacity seems within the scope of the rule. But extension of professional norms from within any specialized field—be it banking, journalism, medicine, or another—to any member of the general public, which WikiLeaks might as well be, seems a stretch too far.

4. Theory of Associative Liability

In a related vein, Baer Bank asserted that WikiLeaks became a joint tortfeasor with Baer Bank's former employee because WikiLeaks maintained its postings even with actual knowledge that they were acquired in violation of law. The alleged role is a civil equivalent to accessory-after-the-fact and falls within the aiding-and-abetting scope of section 876. The difficulty is that violation of banking or consumer-privacy laws is a statutory wrong, not a common-law tort, so common-law associative liability probably does not pertain unless preserved by the statute.[187] Still, the theory bolsters Baer Bank's allegation that WikiLeaks was complicit in the leaker's wrong, thus going to impropriety in the WikiLeaks case.

The better joint-liability theory would link WikiLeaks or CBS directly with tortious conduct by the leaker. Subsequent analyses will address associative liability, each in its scope; here is the possibility of aiding and abetting the leaker's own tortious interference. The case against CBS on this theory is difficult: the underlying case against Wigand for interference presents problems similar to those as against CBS for interference, namely a lack of evidence that Wigand specifically intended to interfere with Brown

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186. This theory is explained in greater detail as a possible predicate impropriety for the unfair competition claim, discussed *infra* Part II.B.

187. *E.g.*, MicroStrategy, Inc. v. Bus. Objects, S.A., 429 F.3d 1344, 1362–63 (Fed. Cir. 2005) (litigating Virginia Uniform Trade Secrets Act). *But see* Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 445–46 (Ct. App. 1994) (authorizing aiding-and-abetting and conspiracy claims for unfair business practices and interference without separate consideration, despite California Uniform Trade Secrets Act).

& Williamson's sales contracts or investor confidence. Ill will toward the company does not suffice as intent to interfere. In fact, Bergman might have sparked Wigand's willingness to violate his confidentiality agreement, and then only for public-interest reasons. An aiding-and-abetting case against CBS would have to pile inference upon inference.

The case for aiding and abetting interference is much better against WikiLeaks. Leaker Elmer was embroiled in a raging dispute against his former employer before he came into contact with WikiLeaks. In the recitation of the facts in the Baer Bank complaint, the bank alleged that Elmer was under investigation by authorities for terroristic threats against the bank and its employees.[188] If those allegations are true, then it is a short hop to conclude that Elmer sought to disrupt the bank's relationships with the clients whose identities Elmer sought to divulge. The divulgence easily constitutes impropriety. And even after the bank's counsel laid out Elmer's wrongdoing for WikiLeaks, the publisher continued to allow itself to serve as an instrument to Elmer's ends. WikiLeaks cannot disclaim the knowledge that aiding and abetting requires.

5. Defense Theories, Including Free Speech and Anti-SLAPP

A number of affirmative defenses in the common-law interference tort may be tried on tobacco or WikiLeaks facts, but insofar as any pertain, they are duplicative of justification based on journalistic purpose. Though both defendants may claim public interest, neither case comprises a government defendant or a defendant petitioning government. Neither defendant was competing in business with its plaintiff, and the privileges to advance a defendant's own interests are mitigated by, and duplicative of, impropriety anyway. Protection of a third party or the provision of good-faith counsel respectively requires a specific party to whom a right of protection is owed or requester to whom an opinion is given. Broad public-health, safety, or accountability arguments do not fit, and the privileges for persons obligated by organization or employer do not apply.

188. Complaint, *supra* note 65, ¶¶ 21–22.

Debated and unresolved is the impact of the freedom of expression in interference cases. Ostensibly, the First Amendment to the U.S. Constitution affords no particular right to gather the news.[189] Yet, at times, the U.S. Supreme Court has emphasized the importance of news media—"freedom of the press," which is textually explicit in the First Amendment—and gone so far as to void proscriptions that would silence the press.[190] In cases in which the Court extended the First Amendment as a viable affirmative defense against tort liability for defamation or invasion of privacy by false light, the Court has characterized the defendants as "media" defendants, though the import of the characterization is debated.[191]

Consequently, the online re-publisher has no more rights than a member of the general public, which is not to deny that a republisher's mass media status puts a thumb on the scale for the defense. CBS producers in the tobacco case surely believed that, as investigative journalists and members of the press, they were entitled to more latitude vis-à-vis Brown & Williamson than might be afforded a competitor in the tobacco business. WikiLeaks similarly asserts journalistic ideals:

> Publishing improves transparency, and this transparency creates a better society for all people. Better scrutiny leads to reduced corruption and stronger democracies in all society's institutions, including government, corporations and other organisations. A healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals. We are part of that media.[192]

When Baron, Lane, and Schulz considered the First Amendment question in the tobacco case in 1996, they concluded that the common-law analysis, especially on impropriety, tended

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189. *See* Fargo & Alexander, *supra* note 178, at 1101.

190. *See id.* at 1101–02 (mentioning taxation aimed at press).

191. *See generally* Francis M. Dougherty, Annotation, *Defamation: Application of* New York Times *and Related Standards to Nonmedia Defendants*, 38 A.L.R.4TH 1114, § 2[a] (1985) (summarizing incidence of courts' application of constitutional standards in defamation cases against non-media defendants).

192. *About: What is WikiLeaks?*, *supra* note 152, § 1.3.

prophylactically to preclude the First Amendment question,[193] and that insofar as it did not, a winning First Amendment claim might be found in the right to petition or the right of access.[194] The first conclusion—that common law incorporates free-expression norms—surely is correct, as reiterated in the impropriety analysis above.

The second conclusion—that First Amendment protection might be found in the rights of petition or access—looks decidedly less viable now than it might have in 1996. Whistleblowers took a big hit in the First-Amendment-in-employment decision *Garcetti v. Ceballos*, in which the Supreme Court fixed whistleblower protection in the realm of statutory rather than constitutional protection.[195] *Garcetti* involved whistleblowing on perceived misconduct in the public sector,[196] so it should inspire no confidence to the whistleblower in the private sector, where employee discipline is not state action. *Garcetti* also involved the freedom of expression,[197] not explicitly the freedom of petition; the narrower latter has always required petition to government and excluded publication in the private sphere.[198] Insofar as mass media republication of misfeasance is concerned, common-law defamation defenses, each of uncertain constitutional provenance, come to mind: the fair report privilege and the neutral reportage privilege.[199] But the fair report privilege again applies only to reports of content on the official record, which private papers are not.[200] And the neutral reportage privilege—even assuming its various technical elements could be met, including responsible source, public-figure plaintiff,

193. *Accord* Turner, *supra* note 174, at 15.

194. Baron, Lane, & Schulz, *supra* note 165, at 1053–57.

195. 547 U.S. 410, 425–26 (2006).

196. *Id.* at 413. *See generally* Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477, 481–86 (2012) (describing the First Amendment in context of leaking by public employee).

197. *Garcetti*, 547 U.S. at 413.

198. U.S. CONST. amend. I (stating, in part, "to petition the Government"); *see* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 891 (10th Cir. 2000).

199. *See generally* Peltz, *supra* note 3, at 725–34 (summarizing multistate norms of fair report privilege and neutral reportage doctrine).

200. *See* 50 AM. JUR. 2D *Libel and Slander* § 300 (2006).

newsworthy subject matter, and disinterested coverage[201]—has had a mixed reception in the courts.[202] The right to petition protects only the whistleblower who reports to public authorities; and the whistleblower had best already have exited the employment.

The right to petition might come into play in a manner not contemplated by Baron, Lane, and Schulz, through statutes such as California's anti-SLAPP (anti-strategic lawsuit against public participation) law.[203] Anti-SLAPP may amplify the First Amendment defense against any tort claim predicated on the defendant's expression, regardless of whether the expression is alleged to be false.[204] The statute authorizes a defendant to file "a special motion to strike," asserting that a private plaintiff's cause of action is based on defendant's furtherance of the freedom of speech or of petition "in connection with a public issue," including public statements "in connection with an issue of public interest."[205] The plaintiff then must establish a probability of success on the merits to overcome the motion.[206] Upon plaintiff's showing, the anti-SLAPP motion forces the court to examine whether the defendant's expression is constitutionally protected, and if so, to dismiss.[207] The plaintiff's subjective motive in filing the lawsuit is immaterial to the analysis.[208] Nevertheless, anti-SLAPP is derived from the jurisprudence of the right to petition, and the analysis sometimes bleeds into an inquiry of whether the gravamen of the litigation (a petition itself) is a legitimate pursuit of legal interest, or whether the gravamen of the litigation (a "sham" in petition par-

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201. *See* Jennifer J. Ho, Annotation, *Libel and Slander: Construction and Application of the Neutral Reportage Privilege*, 13 A.L.R.6TH 111, §§ 15–25 (2006).

202. *See id.* §§ 3-4.

203. CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2013).

204. *See generally* 123 AM. JUR. PROOF OF FACTS 3D *Establishing Proof in Filing of Anti-SLAPP Motion* § 1 (2011) (defining and explaining the purpose of strategic lawsuits against public participation).

205. CAL. CIV. PROC. CODE § 425.16(b)(1), (e).

206. *Id.* § 425.16(b)(1).

207. *See* Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 535 (Ct. App. 2005) (quoting Scott v. Metabolife Int'l, Inc., 9 Cal. Rptr. 3d 242, 253 (Ct. App. 2004)).

208. Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002).

lance) is in hindrance of the defendant's expressive freedom.[209] Thus, for example, a biopharmaceutical firm overcame an anti-SLAPP motion in pursuing injunctive relief against an animal-rights organization for conspiracy and trespass because the organization's online publication of firm employees' home addresses, in context, was a true threat or advocacy of violence unprotected by the First Amendment.[210] In contrast, in *Braun v. Chronicle Publishing*, the court struck defamation claims against a newspaper that reported on investigations into alleged misfeasance in the administration of a public-university medical program after determining that the reports were protected speech under statutory privilege for reporting on official proceedings.[211]

Like whistleblowing, access has been confined largely to the realm of common law and code.[212] The right of courthouse access to criminal trials, established since 1980 in the *Richmond Newspapers* line of cases,[213] has shown no expansion—in the Supreme Court at least—beyond that anomalous context.[214] To the contrary, the Court found no constitutional access right that would elevate equal-protection scrutiny when California statutorily favored non-commercial over commercial requesters of police rec-

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209. *See, e.g.*, Martinez v. Metabolife Int'l, Inc., 6 Cal. Rptr. 3d 494, 499 (Ct. App. 2003) (finding gravamen, or "principal thrust," to favor plaintiffs in product liability suit despite defendant's resort to anti-SLAPP upon expressive interest in product advertising and labeling). *Compare* 123 AM. JUR. PROOF OF FACTS 3D *Establishing Proof in Filing of Anti-SLAPP Motion* § 3 ("Disguise of SLAPP action"), *with id.* § 12 ("sham exception").

210. Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 50 Cal. Rptr. 3d 27, 39 (Ct. App. 2006).

211. 61 Cal. Rptr. 2d 58, 67 (Ct. App. 1997).

212. *See generally* RICHARD J. PELTZ-STEELE, THE LAW OF ACCESS TO GOVERNMENT 3–5, 125–30 (2012) (overviewing common-law history and contemporary statutory system of freedom of information).

213. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

214. *See* Kathleen K. Miller, Note, *Do Democracies Die Behind Closed Doors? Finding a First Amendment Right of Access to Deportation Hearings by Reevaluating the* Richmond Newspapers *Test*, 72 GEO. WASH. L. REV. 646, 650–52 (2004).

ords.[215] And more recently, the Court found no fundamental interest in access that would support a privileges-and-immunities claim against a state's favoritism of its own residents in FOIA requests.[216] The right of access is ill-poised to protect a leaker or republisher against direct state action, never mind the indirect state action implicated in the adjudication of civil liability.

Rather, the best argument for a First Amendment defense to interference arises from analogy to other torts. The risk of "an end-run" around the free-expression privilege of *New York Times v. Sullivan* in defamation actions[217] prompted the Supreme Court to extend *Sullivan*'s logic to invasion of privacy by false light, in *Time, Inc. v. Hill*,[218] and to intentional infliction of emotional distress, in *Hustler Magazine, Inc. v. Falwell*.[219] Baron, Lane, and Schulz quoted the Seventh Circuit's prediction that Illinois courts would do likewise in tortious interference: were the defense not extended, the court reasoned, any corporate defamation claim could be dressed in interference clothing to subvert constitutional safeguards.[220] The unprosecuted defamation would serve as the otherwise tortious conduct in support of the impropriety analysis in the interference action. The Seventh Circuit's logic remains sound. Indeed, in a dispute between a developer and a homebuyer, a district court of appeals in California applied the First Amendment to an interference claim and expressly rejected the plaintiff's assertion that the First Amendment would protect only a media defendant.[221]

However, the proposition has been no better tested in the years since Baron, Lane, and Schulz wrote. Additionally, there is a convincing contrary argument. Courts have struggled with, but

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215. L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 34–35, 40 (1999).

216. McBurney v. Young, 133 S. Ct. 1709, 1718–19 (2013).

217. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999); *see also* Fargo & Alexander, *supra* note 178, at 1112.

218. 385 U.S. 374, 389–91 (1967).

219. 485 U.S. 46, 50–56 (1988).

220. Baron, Lane, & Schulz, *supra* note 165, at 1051–52 (quoting Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273–74 (7th Cir. 1983)).

221. Paradise Hills Assocs. v. Procel, 1 Cal. Rptr. 2d 514, 521–22 (Ct. App. 1991).

often rejected, a formal First Amendment defense in the general tort of negligence. For example, plaintiffs in a series of cases alleged that the negligent media depiction of violent or dangerous conduct in disregard of the risk of imitation by the message recipient caused injury to either the message recipient himself or a third party.[222] Whether the First Amendment should burden liability, perhaps by proof of recklessness rather than mere negligence,[223] depends on whether media torts or conventional careless conduct offer the appropriate analogy to these cases. From the media defendant's perspective, the alleged actionable conduct is merely careless expression, not, for example, careless construction of a bridge, so the First Amendment should pertain. But from the plaintiff's perspective, physical injury, not the amorphous loss of reputation or privacy, is the actionable damage, so the First Amendment should have no bearing.

By extension, interference looks a bit like one, general negligence, and a bit like the other, media tort. On the one hand, the requisite culpability for interference, out of the gate, is a demanding rendition of intent, requiring at least knowledge with substantial certainty in consequences. That requirement affords far more confidence in a court's declaration of civil wrong, and, inversely, less risk of a chilling effect on speech than when liability is predicated upon mere carelessness. Indeed, the proper analogy to interference in physical torts is not negligence at all, but battery, where that confidence in adjudication allows the imposition of liability upon mere offensive contact without even the degree of physical injury required in negligence.[224] On the other hand, the injury

222. *See* Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 243–45 (1992). *See generally* 20 CAUSES OF ACTION 2D *Cause of Action Against Producer, Artist, Publisher or Author for Violence Incited by a Movie, Song or Book* (2002) (compiling theories of liability against media purveyors for alleged incitement of violence).

223. *See* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1220–21 (2000).

224. *Compare* RESTATEMENT (SECOND) OF TORTS § 18(1) (1965) (stating that a person is liable for battery if he "intend[s] to cause a harmful or offensive contact" with another person and such offensive contact results), *with* 57A AM. JUR. 2D *Negligence* § 131 (2004) (requiring some "identifiable damage" before a negligent act becomes actionable).

complained of in interference is not physical, not even contact, but merely economic loss. The economic-loss rule of negligence embodies the common law's aversion to liability upon too low a culpability threshold, lest civil wrongs overrun the chain of causation and escape the bonds of corrective justice.[225] If liability is to be imposed upon so low a threshold of injury, then arguably the First Amendment should have something to say about that.

Therefore, in its intent analysis as well as its impropriety analysis, the common law prophylactically incorporates free-expression concerns. The question thus arises: if the First Amendment pertains in interference, what does it do? In defamation, public-official or public-figure plaintiffs are charged with proving falsity, and the requisite fault standard as to proof of falsity is elevated from the usual default of negligence to actual malice, defined as knowledge of falsity or reckless disregard as to truth or falsity.[226] The same elevated burden of proof pertains to plaintiffs in false light upon "matters of public interest."[227] Interference already comes with an elevated fault standard; the requirement that a plaintiff prove intent both of action and consequence exceeds the actual-malice burden.

The real difficulty arises in connection with falsity, and it is the same difficulty that arises in considering how the First Amendment affects invasion of privacy by disclosure, rather than false light.[228] In tortious disclosure, the very truth of the matter disclosed is a condition of the injury; were the disclosure false, there would be no invasion of privacy. This conundrum has

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225. *See* 6 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 19:10 (2012).

226. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974). Moreover, fault as to falsity must be proved to a burden of clear and convincing evidence, more than the default tort burden of preponderance. *Id.* at 342.

227. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 490 (1975) (citing Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967)).

228. *See id.* at 490–91 (reserving the question by limiting holding for media defendant to situation in which information was already disclosed in public records). *See generally* 123 AM. JUR. TRIALS *Invasion of Privacy by Public Disclosure of Private Facts* § 8 (2012) (overviewing the First Amendment as a defense to the tort of invasion of privacy); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (providing a special note on the possible constitutional limitations on liability for truthful disclosure of private information of a private citizen).

prompted a stalwart (if waning) class of First Amendment absolutists to argue that invasion of privacy by disclosure is, or anyway should be, unconstitutional.[229] Though the Supreme Court has not confronted this argument head on,[230] lower courts have been approving of common-law invasion of privacy by disclosure,[231] suggesting that one day the absolutists might be bested. In interference, when the alleged interference is accomplished by expression, the expression may contain truth or falsity. It was the latter situation that prompted the Seventh Circuit to predict Illinois's extension of the First Amendment to interference, for fear that every defamation case could be recast as an interference case.[232] Likewise, the Supreme Court's extension of the First Amendment in IIED was deceptively simple because *Hustler* involved an ad parody that did not even purport to be true, instead deriving its humor from its absurd extreme of falsity.[233]

What, then, of allegedly interfering expression that is true? The common law partly anticipates this scenario in its affirmative

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229. *See, e.g.*, Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1211–18 (1990) (describing competing approaches of absolutism and balancing to the problem of free speech and privacy in High Court jurisprudence and noting the legacy of that competition in contemporary doctrine). *But cf.* Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753, 805–07 (2012) (concluding his analysis of WikiLeaks in the context of the transparency theory with doubt about the efficacy of WikiLeaks idealism); Roy Peled, *WikiLeaks as a Transparency Hard-Case*, 97 IOWA L. REV. BULL. 64, 76 (2012) ("Merely dumping masses of information does not do much. It was an error to think it would."); Christina E. Wells, *Contextualizing Disclosure's Effects: WikiLeaks, Balancing, and the First Amendment*, 97 IOWA L. REV. BULL. 51, 62–63 (2012) (expanding on Fenster's thesis).

230. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) (observing "this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment").

231. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1128–29 (9th Cir. 1975); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 767 (Ct. App. 1983). The High Court, meanwhile, has been solicitous of statutory privacy claims. *See, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160, 172–75 (2004) (construing federal Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (2002)).

232. Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273–74 (7th Cir. 1983).

233. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56–57 (1988).

defense based on truthful information and good-faith counsel. But the defense is confined to a response to specific request and does not contemplate mass media publication. The absolutist or near absolutist may argue that when interference is accomplished by truthful expression, especially by a media defendant, the First Amendment flatly precludes liability. But that argument seems as unpromising as the argument to erase the common law of tortious disclosure.

Grounds for the extreme of First Amendment inapplicability can be found in the rule of *Cohen v. Cowles Media Co.*,[234] which accords with the *Branzburg* approach. In *Cohen*, the plaintiff claimed promissory estoppel, which the Court allowed to overcome a free-speech argument by a media defendant that had broken a promise of confidentiality to a source.[235] On the one hand, contract law did not undergo the auspicious development in the civil rights era that tort law did, so tort law may be said to implicate the civil rights of the defendant to a greater degree, necessitating the interposition of free expression. On the other hand, *Cohen*, like *Branzburg* before it in rejecting a journalist's bid to resist a grand jury subpoena,[236] stands for the proposition that media are not exempt from the operation of generally applicable law, whether criminal or civil, common law or statutory.[237] Thus, tortious interference may be viewed as analogous to promissory estoppel.

Many writers have opined on the problem of newsgathering activities and tort liability.[238] A viable middle ground was mapped by a separate opinion by the Supreme Court in *Bartnicki v. Vopper*.[239] *Bartnicki* involved a test of the rule, a corollary of the rule against prior restraints, that absent a state interest of the highest order, a defendant may not be punished for the republication of truthful information that the defendant lawfully obtained.[240] In

234. 501 U.S. 663, 671–72 (1991).

235. *Id.* at 671.

236. Branzburg v. Hayes, 408 U.S. 665, 682–83, 685 (1972).

237. *Cohen*, 501 U.S. at 669.

238. The literature was recently compiled by Fargo & Alexander, *supra* note 178, at 1133–41.

239. 532 U.S. 514 (2001).

240. *Id.* at 527–28 (citing Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)); *see also* Florida Star v. B.J.F., 491 U.S. 524, 545 (1989) (White, J., dissenting) (citing *Smith* for the same proposition). *See generally* Richard J.

Bartnicki, a radio station broadcasted a telephone conversation that had been recorded in violation of wiretap law and delivered anonymously,[241] much as if Bergman had published the raw Philip Morris documents that were probably copied in breach of a confidence and then dropped at his doorstep. The Court balanced the government's interests in the wiretap law against the public concern in the subject of the broadcast conversation, regarding a high-profile labor dispute, and the rule for truthful disclosures won out, protecting the defendant.[242] The Court reserved the question of whether the balance would produce the same result were the broadcast prohibition applied to "disclosures of trade secrets or domestic gossip or other information of purely private concern."[243]

The better view might have been the Third Circuit's below and Chief Justice Rehnquist's dissent, even though they reached different conclusions. The Court agreed with both the Third Circuit[244] and the dissent[245] that the wiretap law is a content-neutral law of general applicability, "justified without reference to the content of the regulated speech," because the republication prohibition is triggered by the illegal interception of the conversation rather than the content.[246] Content-neutral laws incidentally burdening speech are tested by intermediate scrutiny, which the Third Circuit and the Chief Justice favored.[247] The Third Circuit concluded that application of the broadcast prohibition to the radio station when it had done nothing unlawful was not sufficiently narrowly tailored to satisfy intermediate scrutiny in furtherance of the government's important objective in deterring unauthorized interceptions in the first place.[248] The Chief Justice generalized the government inter-

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Peltz-Steele, *The New American Privacy*, 44 GEO. J. INT'L L. 365, 391–94 (2013) (summarizing the First Amendment rule protecting republication of truthful information lawfully obtained).

241. *Bartnicki*, 532 U.S. at 517–19.

242. *Id.* at 533–34.

243. *Id.* at 533.

244. Bartnicki v. Vopper, 200 F.3d 109, 123 (3d Cir. 1999), *aff'd* 532 U.S. 514 (2001).

245. *Bartnicki*, 532 U.S. at 544 (Rehnquist, C.J., dissenting).

246. *Id.* at 521, 526 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

247. *Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting); *Bartnicki*, 200 F.3d at 123.

248. *Bartnicki*, 200 F.3d at 129.

est to privacy more broadly, consistently with the common law, and would have reached the opposite conclusion, finding a justifiable link between penalties on republications and deterrence of interceptions.[249] The Chief Justice objected to what he viewed as the majority's elevation of scrutiny to strict based on the matter of public concern.[250]

On balance, intermediate scrutiny is an appealing middle ground to test regulations of conduct that incidentally burden speech as applied. The approach is consistent with the origin of content-neutral analysis in the expressive conduct case *United States v. O'Brien*.[251] Chemerinsky championed intermediate scrutiny as a corrective to the laissez-faire approach modeled by *Cohen*.[252] Viewed from the opposite extreme, intermediate scrutiny allows for the accommodation of state tort law without the radical federalization of the *Sullivan* doctrine, the rigidity of which is proving regrettable in retrospect.[253]

Applying heightened scrutiny to the cases at hand, tortious interference surely serves a substantial government interest in compensating civil wrongs and policing fairness in the marketplace. Just as the common law generally is prophylactically protective of free speech, the impropriety element is largely duplicative of the narrow tailoring analysis of intermediate scrutiny. Perhaps to comport with free-speech norms and accommodate the First Amendment's aversion to vagueness and overbreadth,[254] the impropriety standard should be limited to otherwise tortious or criminal conduct, as some jurisdictions limit it anyway in prospective-relations cases. In any event, this middle-ground model of First Amendment application is roughly co-extensive with the justification defense, a doctrinal convenience to be embraced by the doctrine of constitutional avoidance.

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249. *Bartnicki*, 532 U.S. at 551–54 (Rehnquist, C.J., dissenting).

250. *Id.* at 544 (Rehnquist, C.J., dissenting).

251. 391 U.S. 367 (1968).

252. Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1144–45 (2000).

253. *See* Peltz-Steele, *supra* note 240, at 384–91.

254. For example, Baron, Lane, and Schulz, *supra* note 165, at 1066, were troubled by inconsistencies in tortious interference liability from a First Amendment vagueness standpoint.

Thus, in both the tobacco and WikiLeaks cases, the role of the First Amendment is either side's to argue. In the current climate of First Amendment jurisprudence, a free-expression claim resting on the *Richmond Newspapers* right of access or on the right to petition seems unpromising. If tortious interference follows in the defamation mold, then the defendants may predicate a defense on extension of the *Sullivan* doctrine, and even argue a complete defense based on truth.[255] Plaintiffs may argue the immateriality of free speech per *Cohen* and the public concern in smokers' health and financial service practices per *Bartnicki*. An intermediate-scrutiny approach allows argument either way on the application of the civil liability rule in context, and the question is likely to follow the analysis on impropriety.

Perhaps importantly, the disclosures of customer data in *Baer Bank* could force the case in favor of the plaintiff. The public interest in specific customers' identities and financial particulars is minimal, and the government interest is at its zenith with respect to personal privacy protection. Whether in a threshold public-concern analysis per *Bartnicki* or an intermediate-scrutiny analysis per the *Bartnicki* dissent, WikiLeaks might for those data be hoisted by its own absolutist petard.

Defendants have a much improved chance of success in a state such as California with a strong anti-SLAPP law, for their business models are at least in part traditional free-speech enterprises, even if they also are profit-driven or reckless. Certainly defendants look more like the media defendants in *Braun* than like angry commercial rivals. But WikiLeaks perhaps more than staid CBS News also looks like the animal-rights activists in the case of the biopharmaceutical firm. WikiLeaks is at once heroic pamphleteer of the electronic age and anarchic scofflaw of the online frontier. And to the skeptic, considering the internal machinations of CBS executives and whatever the subjective intentions of producer Bergman, perhaps CBS too is no better than the seditious

255. In a *Sullivan* mold, however, some corporate plaintiffs, if not big banks or big tobacco, might succeed in arguing that they are not public figures, so the First Amendment does not pertain. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756–57, 763 (1985) (finding implicitly that plaintiff corporation was a private figure, thereby not triggering constitutional defamation standards).

agitator. In sum, tortious-interference liability for the media defendants cannot be ruled out.

6. Interference Liability Exposure in Sum

In interference with contract or prospective economic relations, plaintiffs probably cannot show impropriety, the keystone element of these torts. On the flip side of the same coin, defendants bear a good chance of showing justification, or lack of impropriety, whether in common law or constitutional law. CBS's journalistic motives, means, and objectives probably are sufficiently disconnected from its position as a corporate enterprise to show a lack of impropriety in its republication of tobacco company secrets on *60 Minutes*. Even WikiLeaks' purported devotion to journalistic mission, which critics say is belied in practice, probably is sufficient to prevail similarly on the impropriety analysis. In each case, public interest—in understanding the hazards of smoking, or in the role of transnational banks in the financial crisis—pushes the balance in the defendant's favor.

But the defense position weakens the more the plaintiff is able to portray the defendant as in league with the leaker, or original publisher. In the tobacco case, counsel for leaker Wigand asked CBS to pay his legal fees in the event he were sued by his former employer. The record is unclear, but CBS probably balked. Meanwhile, internal strife at CBS between management and the news division invited allegations that CBS was more interested in deriving market share from tobacco company misery than in protecting the public welfare. A staid journalistic enterprise, CBS might have been able to weather these circumstances. But they demonstrate that interference liability may indeed lurk in the shadows for the media defendant that associates too closely with a vulnerable source, or that allows its journalistic ideals to be overwhelmed by its business agenda.

B. Unfair-Competition Law

Baer Bank complained against WikiLeaks for violation of California's unfair-competition law ("UCL"),[256] or commonly, unfair business practices. The bank predicated its UCL claim on

256. Complaint, *supra* note 65, ¶¶ 32–41.

the publication of proprietary bank records that included confidential customer data, asserting furthermore that publication "constitutes an infringement of [the bank's] rights and constitutes a violation of the applicable Swiss and Cayman Islands banking and consumer protection laws, as well as California state privacy rights and laws."[257] The bank claimed reputational damage and alienation of customers as injury.[258]

1. Unfair Business Practice, Associative Liability, and Causation

The California UCL generously authorizes state officials or any private party with standing to seek injunction of "unfair competition," defined as "any unlawful, unfair or fraudulent business act or practice."[259] Whether the defendant's act is a "business" act is a question of fact with little or no statutory guidance,[260] though the term in California law is likely to be construed broadly in comportment with the purpose of the act,[261] "the right of the public to

257. *Id.* ¶¶ 27, 32–34.

258. *Id.* ¶ 35; *cf. All Things Considered: Bloomberg News Apologizes for Tracking Subscribers* (National Public Radio broadcast May 13, 2013), *available at* http://www.npr.org/2013/05/13/183715000/bloomberg-news-apologizes-for-tracking-subscribers (demonstrating alienation in business community for misuse of confidential client information).

259. CAL. BUS. & PROF. CODE §§ 17200, 17204 (West 2008 & Supp. 2013). California also has a Consumer Legal Remedies Act, codified at CAL. CIV. CODE §§ 1750–1784 (West 2009 & Supp. 2013), but it focuses on consumer transactions. Before 2004, the unfair-competition law authorized private attorney-general actions without a demonstration of injury-in-fact to the plaintiff. A ballot proposition in California in 2004 reined in the UCL by limiting private causes of action to injured plaintiffs, though the standard is applied leniently, and in some cases by compelling plaintiffs to meet class certification standards. STEPHEN J. NEWMAN ET AL., STROOCK & STROOCK & LAVAN LLP, 2013 ANNUAL OVERVIEW OF CALIFORNIA'S UNFAIR COMPETITION LAW AND CONSUMER LEGAL REMEDIES ACT 4 (2013), *available at* http://www.stroock.com/SiteFiles/Pub1321.pdf.

260. *See* NEWMAN ET AL., *supra* note 259, at 2.

261. Magdaleno v. Indymac Bancorp, Inc., 853 F. Supp. 2d 983, 996 (E.D. Cal. 2011) ("The UCL is broad in scope, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." (quoting People *ex rel.* Gallegos v. Pac. Lumber Co., 70 Cal. Rptr. 3d 501, 509 (Ct. App. 2008))).

protection from fraud and deceit," or "any act denounced by [the Code]."[262] The UCL does not require that the plaintiff and defendant are business competitors with each other; fair competition *or* public protection is key.[263] "Unlawful" is also interpreted broadly to include federal and state statutes and regulations, local ordinances, professional standards, and rules of case law and common law.[264] An "unfair" act need not be proscribed by law and may simply be the violation of the spirit of law, as with antitrust law.[265] "Unfair [business practices] are those that 'offend[] an established public policy' or are 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'"[266]

However, the breadth of the law, even in California, must not be overstated.[267] Underlying violations of law or policy must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."[268] Conjoining the elements of "business" and "unlawful," some California courts have limited the liability scope to defendants engaged in "business" within the meaning of the underlying law.[269] A challenging problem arises when there is such a mismatch between the scope of the underlying law and the identity or conduct of the defendant. The problem would have been well exemplified by *Claridge v. RockYou, Inc.*,[270] had the court not avoided the question. In *Claridge*, a computer user sued a software developer under various theories, including the UCL, claiming that the developer failed to sufficiently safeguard the plaintiff's personally identifying infor-

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262. Payne v. United Cal. Bank, 100 Cal. Rptr. 672, 676 (Ct. App. 1972).

263. Ariz. Cartridge Remfrs. Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 986 (9th Cir. 2005) (citing Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 667 (Cal. 1983)).

264. NEWMAN ET AL., *supra* note 259, at 14–15.

265. *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 544 (Cal. 1999).

266. Claridge v. RockYou, Inc., 785 F. Supp. 2d 855, 862 (N.D. Cal. 2011) (quoting Podolsky v. First Healthcare Corp., 58 Cal. Rptr. 2d 89, 98 (Ct. App. 1996)).

267. *See Cel-Tech Commc'ns*, 973 P.2d at 541 ("Although the unfair competition law's scope is sweeping, it is not unlimited.").

268. *Id.* at 544.

269. *See* NEWMAN ET AL., *supra* note 259, at 1–2, 14–15; *see also* Belton v. Comcast Cable Holdings, L.L.C., 60 Cal. Rptr. 3d 631, 639 (Ct. App. 2007).

270. *Claridge*, 785 F. Supp. 2d at 863.

mation, resulting in its compromise by a third party.[271] The court rejected a count based on a violation of the California penal code against hacking,[272] ruling that the third-party hacker, and not the defendant, was within the statutory scope as contemplated by the legislature, bearing in mind that penal laws are strictly construed.[273] On a UCL count, the court rejected plaintiff's claim for failure to show any loss of money or property flowing from the compromise of the personally identifying information.[274] Unasked and unanswered is whether software development that makes possible the third party's illegal act can support a UCL claim against the developer, whether because the developer was "unfair" in exposing consumers to risk, or because the third party's "unlawful" conduct can be counted against the developer for UCL purposes.

Observing the California Supreme Court's caution that the UCL must not be construed so broadly as to render it vague to commercial actors, a district court of appeals in California in *In re Firearm Cases*[275] limited the reach of the law when cities and counties sued handgun manufacturers, distributors, and retailers for allowing firearms to fall into criminal hands. To define the reach of the UCL and abide the direction of the state high court, the *Firearm* court borrowed modestly from causation in tort and required "a link between a defendant's business practice and the alleged harm": that "the challenged practice must be the likely cause of substantial injury."[276] Thus, in one prior case, plaintiffs appropriately had "set forth a direct causal relationship between the conduct of false advertising and the harm of purchasing sugared cereals,"[277] while in another prior case, "the court found no unfairness in a lender's financing practices where the borrowers were aware of the widely used practice," even if they were harmed by it.[278]

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271. *Id.* at 858–59.

272. CAL. PENAL CODE § 502(c) (West 2010).

273. *Claridge*, 785 F. Supp. 2d at 863.

274. *Id.* at 862–63.

275. *In re Firearm* Cases, 24 Cal. Rptr. 3d 659 (Ct. App. 2005).

276. *Id.* at 674.

277. *Id.* at 672 (citing Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668–69 (Cal. 1983)).

278. *Id.* at 672 (citing S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301, 316–17 (Ct. App. 1999)).

In another instructive case on the latter score, a state appellate court rejected vicarious, aiding-and-abetting, or otherwise associative UCL liability for VISA financial services on plaintiff's theory that VISA should have acted to stop, once it knew about, the misuse of its payment system to perpetuate illegal foreign lotteries.[279] The *Firearm* court recognized that handgun retailers and manufacturers are connected along a supply chain with their customers' subsequent buyers, who use guns in crimes, much like VISA's link in the transactional chain between lottery and victim.[280] But also like VISA, the handgun defendants "played no part in the actual wrongdoing and had not committed an unfair practice."[281] The *Firearm* court contrasted its facts and the *VISA* case with "[a]n analogous non-[UCL]" criminal case, *Direct Sales Co. v. United States*,[282] in which a pharmaceutical manufacturer was held responsible in conspiracy for supplying a doctor with large quantities of morphine, which the doctor dispensed illegally to drug addicts and dealers.[283] Mere knowledge of subsequent misuse would not necessarily have supported the conspiracy charge, but evidence showed that defendant, informed of the misuse by federal authorities, then "changed its practices to circumvent the government's proposed restrictions and affirmatively advised the doctor to do the same."[284] Evidence in the *Firearm Cases* supported neither defendants' actual knowledge nor "action to aid or encourage" subsequent illegal transfers.[285]

In tort terms, the *Firearm* court was not wholly consistent in its use of causation as a limiting concept in UCL application, if, saliently, some limit can be found. The examples of false advertising resulting in sugary-cereal purchases and of consumers borrowing despite dubious financing practices suggest that causation-in-fact is key, as often it is in fraud.[286] That is, the plaintiff would not

279. *Id.* at 675 (citing Emery v. Visa Int'l Serv. Ass'n, 116 Cal. Rptr. 2d 25, 31 (Ct. App. 2002)).

280. *Id.* at 675–76 (citing *Emery*, 116 Cal. Rptr. 2d at 31).

281. *Id.* at 676 (citing *Emery*, 116 Cal. Rptr. 2d at 37).

282. 319 U.S. 703 (1943).

283. *In re Firearm Cases*, 24 Cal. Rptr. 3d at 676 (citing *Direct Sales*, 319 U.S. at 704–08).

284. *Id.* at 676–77 (citing *Direct Sales*, 319 U.S. at 712).

285. *Id.* at 677

286. *See* 37 C.J.S. *Fraud* § 37 (2008 & Supp. 2013).

have suffered injury but for the defendant's offensive business practice. But causation-in-fact was present in both *VISA* and *Direct Sales*, in which the defendants were intermediaries in chains of transactions. The controlling principle in those cases seems to have been legal causation. VISA's payment-system practices and the pharmaceutical manufacturer's sales practices were less and more attenuated in causal connection with the injuries plaintiffs complained of, the former standing-by in passive disregard of outcome, the latter more proactively facilitating outcome. So the business practices are said, respectively, not to have substantially caused, and to have substantially caused, the injuries complained of. Whether more evidence might sufficiently strengthen the connection alleged in the *Firearm Cases* as to sustain a UCL suit is unknown and might be a question inevitably entwined with public policy.[287] Likely as in tort law, factual and legal causation both are prerequisite to liability: "Without evidence of a causative link between the unfair act and the injuries or damages, unfairness by itself merely exists as a will-o'-the-wisp legal principle."[288]

2. Affirmative Defenses of Business Justification, Free Speech, and Anti-SLAPP

The UCL is further limited in scope by affirmative defenses, which include, of pertinence, "business justification," preemption, and the First Amendment. The business-justification defense overlaps substantially with defense on the merits against an "unfairness" claim.[289] The defendant may establish "that the challenged conduct is an essential part of its business operations or that it is acting consistent[ly] with industry practice for an important reason."[290] For example, a customary collateral payment to a mortgage broker in a financing transaction is not "unfair" to a

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287. *See generally* William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 130–31 (1983) (discussing the potential problem that occurs when defendants are liable for unrelated harm but "cause comes to the rescue").

288. *In re Firearm Cases*, 24 Cal. Rptr. 3d at 672.

289. NEWMAN ET AL., *supra* note 259, at 20.

290. *Id.* (citing Walker v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 2d 79, 91 (Ct. App. 2002)).

lender.[291] Preemption may mitigate UCL liability, for example, insofar as credit card account convenience checks carry sufficient disclosures under federal banking regulations.[292]

The First Amendment operates in defense against the UCL, though not necessarily dispositively.[293] In the furthest advancing case on point, the California Supreme Court upheld the UCL as a commercial-speech regulation, but that case implicated the UCL as a regulation of false or misleading advertising.[294] One authority noted an earlier California Supreme Court case, from 1986, in which the court on free-speech grounds rejected a UCL claim against *The New York Times* for an asserted slight in its bestseller book list.[295] The court did not regard the list as "commercial speech" but also construed the plaintiff's complaint as an assertion of falsity.[296] Thus to prevent an end-run of free-speech protections born in the civil rights era, the Court analogized to defamation doctrine.[297] With the First Amendment thus implicated, the UCL claim failed; fatally, UCL liability required neither specific identification of the plaintiff in the offending expression, nor a fault standard greater than strict liability.[298] The court also rejected the plaintiff's claim of tortious interference for the former First Amendment deficiency, for whatever the name of the cause, "the gravamen of the claim is injurious falsehood."[299] Left unclear is First Amendment application to UCL or interference claims when there is no allegation of falsehood in the expression alleged to have injured the plaintiff. The discussion in Part II.A regarding *Bartnicki v. Vopper*[300] and tortious interference accomplished by truthful expression pertains here as well.

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291. *Id.* at 20 n.125 (citing Byars v. SCME Mortg. Bankers, Inc., 135 Cal. Rptr. 2d 796, 806 (Ct. App. 2003)).

292. *Id.* at 28–29 & n.163 (citing Rose v. Chase Bank U.S.A., N.A., 513 F.3d 1032, 1038 (9th Cir. 2008)).

293. *Id.* at 24–25.

294. Kasky v. Nike, Inc., 45 P.3d 243, 250–55, 262 (Cal. 2002).

295. NEWMAN ET AL., *supra* note 259, at 24 n.146 (citing Blatty v. N.Y. Times Co., 728 P.2d 1177 (Cal. 1986)).

296. *Blatty*, 728 P.2d at 1186–87 & n.3.

297. *Id.* at 1181–84.

298. *Id.*

299. *Id.* at 1184–86.

300. 532 U.S. 514 (2001).

An anti-SLAPP motion may also defeat a claim under the UCL. For example, a court granted an anti-SLAPP motion as to a UCL claim, but not as to defamation and interference claims in the same case, in an employer's action against former employees and a community activist.[301] Defendant labor advocates had organized against the firing of workers without valid social security numbers, accusing the plaintiff of, *inter alia*, unfairness, racism, and exploitation.[302] The trial court rejected the UCL claim "because there was no evidence to support the conclusion that defendants were engaged in a 'business' act or practice."[303]

The California UCL is a version of the model Unfair Trade Practices and Consumer Protection Act "developed by the Federal Trade Commission and published by the Council of State Governments in 1967."[304] In adaptation, California law—including the UCL—is drafted and construed broadly relative to the states, furthering a tradition of consumer protection in California. Considering that tradition and the concentration of high technology and communication industries in California, the UCL is useful to model a maximally expansive liability potential. Multistate law on unfair competition in the United States is not as generous. The *Restatement (Third) of Unfair Competition* sets the boundary between "the freedom to compete" and liability at five disjunctive thresholds: (1) deceptive marketing; (2) trademark or similar infringement of identity; (3) appropriation of trade value or right of publicity; (4) actionable misconduct under common, state, federal, or international law; or (5) a catch-all, "other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public."[305] Of

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301. Overhill Farms, Inc. v. Lopez, 119 Cal. Rptr. 3d 127, 132–33 (Ct. App. 2010).

302. *Id.* at 133–35.

303. Minute Order at 2, Overhill Farms, Inc. v. Lopez, No. 30-2009-00125409-CU-BT-CJC (Ca. Sup. Ct. Nov. 13, 2009).

304. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 statutory note (1995) (citing COUNCIL OF STATE GOVERNMENTS, 29 SUGGESTED STATE LEGISLATION 141 (1970)).

305. *Id.* § 1. The annotation to the section lists the controlling statutory enactments in each state, including CAL. BUS. & PROF. CODE §§ 17000–17101 (West 2008 & Supp. 2013). *Id.* § 1 statutory note.

those theories, the only with potential application here are appropriation, predicate wrongful conduct, and the catch-all. Appropriation of trade secrets will be considered in connection with civil theft in Part II.C. Predicate wrongful conduct, which includes copyright or patent infringement, breach of contract, and commission of tort,[306] incorporates other law by reference, so it is in that respect coextensive with, and otherwise eclipsed by, the broad California UCL. Under the catch-all, or so-called residual rule, the *Restatement* opined that "a definitive test" is impossible to divine.[307] The authors further explained:

> It is impossible to state a definitive test for determining which methods of competition will be deemed unfair in addition to those included in the categories of conduct described in the preceding Comments. Courts continue to evaluate competitive practices against generalized standards of fairness and social utility. Judicial formulations have broadly appealed to principles of honesty and fair dealing, rules of fair play and good conscience, and the morality of the marketplace. The case law, however, is far more circumscribed than such rhetoric might indicate, and courts have generally been reluctant to interfere in the competitive process. An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law.[308]

The authors provided only examples that wholly overlap with the underlying wrongs requisite for tortious interference (encompassed by the *Restatement* and discussed in Part II.A): physical interference, bad-faith institution of legal proceedings, defamation and disparagement, and unlawful restraint of trade.[309] In ex-

306. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. h (1995).
307. *Id.* § 1 cmt. g.
308. *Id.*
309. *Id.* § 1 reporters' note.

amining social utility, the actor's conduct may be tested for "propriety," again invoking the balance of tortious interference.[310] Further:

> A competitor who diverts business from another by means of fraudulent misrepresentations or through the wrongful use of confidential information, for example, may in some circumstances be subject to liability for unfair competition even if the conduct is not specifically actionable under the rules relating to deceptive marketing or the appropriation of trade secrets.[311]

But the authors were quick to reiterate the circumscription of the residual rule. If "an important policy of the law" is the impediment to liability for the underlying wrong, then "the conduct should not be actionable as unfair competition."[312]

A bank's unauthorized disclosure of customer data violates both U.S. federal law[313] and the California Financial Information Privacy Act.[314] Those laws mostly bind financial institutions.[315] The provisions governing subsequent disclosures by recipients of confidential information, read in context, apply only in cases of authorized disclosures by the originating financial institution.[316] The federal statute, codified at 15 U.S.C. § 6802(c), controls subsequent disclosures by "a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section."[317] Other parts of § 6802 outline exceptions to the prohibition on disclosures, so "this section" extends disclosure

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310. *Id.* § 1 cmt. g.

311. *Id.*

312. *Id.*

313. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. §§ 6801–6809 (2012)).

314. CAL. FIN. CODE §§ 4050–4060 (West 1999 & Supp. 2013).

315. *See id.* §§ 4052(c), 4052.5, 4057.

316. *See id.* § 4053.5.

317. 15 U.S.C. §6802(c). *See generally* 9 C.J.S. *Banks and Banking* § 270 (2008 & Supp. 2013) (summarizing regulation of disclosure of customer information by financial institutions under the Gramm-Leach-Bliley Financial Modernization Act).

prohibitions only along with those authorized disclosures by the originating financial institution. California law similarly refers to "an entity that receives nonpublic personal information from a financial institution under this division."[318] This division includes the totality of the act and permits disclosure upon exceptions parallel to the federal statute.[319]

3. Liability Theories in *Baer Bank* and Big Tobacco

Baer Bank and Brown & Williamson have standing to claim unfair competition against WikiLeaks and CBS, respectively. Plaintiffs might be required to generate evidence of money damages more specific than Baer Bank's claim of reputational injury and customer alienation. But it is conceivable that, if pressed, plaintiffs could point to specific lost accounts and lost income. Depending on the exact nature of the information leaked, plaintiffs, especially Brown & Williamson, may also point to a monetary loss through the devaluation of revealed trade secrets. Even if unfair-competition remedies are limited to equity, plaintiffs could be entitled to injunctive relief and restitution.

The obstacle for plaintiffs is the ill-defined requirement that the defendant be engaged in a "business" practice. Under broad readings of unfair-competition law, the defendant need not be in business competition with the plaintiff.[320] Surely it is arguable that neither WikiLeaks nor CBS is in business at all for purposes of republication as an unfair business practice. The California UCL analyzes the problem alternatively from policy perspectives of fair competition and public protection; here, the cases might diverge. Brown & Williamson has no greater public policy argument in non-disclosure other than the general policies supporting trade-secret and contract law; CBS has a powerful public-health argument working in its favor. But Baer Bank has going for it the disclosure of customer banking data. Thus, viewed from a policy perspective, WikiLeaks, which trades in information and relies on

318. CAL. FIN. CODE § 4053.5.

319. *Compare id.* §§ 4050–4060, *with* 15 U.S.C. § 6802(e).

320. *Cf.* E. H. Schopflocher, Annotation, *Actual Competition as Necessary Element of Trademark Infringement or Unfair Competition*, 148 A.L.R. 12, 55–58 (1944) (showing that many jurisdictions dispense with the competition requirement even on fact patterns of trademark or trade-name appropriation).

Internet traffic to support its fundraising efforts, may be viewed as in "business" for unfair-competition purposes. Though WikiLeaks is not a financial institution, it thrives at the bank's expense, each in its trade. CBS's case, in turn, is weakened if it is true that executives acted strategically to preserve their position in a Westinghouse takeover. Brown & Williamson would argue that CBS, like WikiLeaks, is in the profit-making business, whether the product is entertainment or news.

There is a possibility that "business" will be defined in connection with the alleged underlying wrongs; that approach might be beneficial to both defendants but does not resolve the matter dispositively. Whether or not violation of customer rights in banking can support an unfair-competition claim as a separate wrong, WikiLeaks is not engaged in the business practices of financial institutions as contemplated by banking regulations. At the same time, though, one might regard banking privacy as principally about privacy, and WikiLeaks is in the "business" of attracting readers with salacious information. Similarly, CBS is not even in the "business" of product manufacture for purposes of trade-secret law. But even as a news enterprise, CBS is in the "business" of kept and broken promises with respect to information; maybe facilitating information transfer in violation of contract is part of the CBS information "business."

The causation approach of the *Firearm Cases* aggravates this tension. Unfair-competition law rejects associative forms of liability, but association and direct liability exist along a chain of causation and are not separated by a bright line. Both defendants may argue that causation-in-fact is lacking, that Wigand and Elmer would have found a way to publish their information regardless of defendants' platforms. But on the facts, both defendants did provide the avenues of publication, and thus scientifically caused the injury to the plaintiffs, advancing the question to legal causation. In this respect, if the allegations against WikiLeaks and CBS were simply that they operated websites employed by reckless leakers, at arm's length, then the defendants could not be said to have substantially caused the injury complained of (and they would enjoy statutory immunity[321]). But Baer Bank and Brown & Williamson

321. The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 230), creates federal immunity "to any

alleged more proactive roles for their defendants. Were the defendants VISA, a neutral observer on the sidelines of unfair transactions, or were they a pharmaceutical manufacturer working to keep the money flowing by maneuvering around law enforcement counsel? The defendants surely had actual knowledge, but whether they aided or encouraged is a disputed question of fact that cannot be ducked on insufficient pleadings, as in the *Firearm Cases*. If the question ultimately is driven by public policy, then the court's perception of the problem as one of corrective or distributive justice might weigh heavily for or against causation.

"Business" will be an uphill argument for the plaintiffs, but clearly the question bleeds into the analysis of the alleged underlying wrong. Here, the salient analysis duplicates the search for an underlying wrong in tortious interference. If WikiLeaks can be said to have been complicit in the Baer Bank leak, or CBS can be said to have been complicit in Wigand's breach of confidence, then the conversion or appropriation of trade value is an underlying wrong sufficient to support an unfair-competition theory. No separate law controls CBS publication of trade secrets revealed.

Baer Bank, however, also alleged violations of banking and privacy laws in Switzerland, the Cayman Islands, and California. It seems likely that the "violation" to which Baer Bank referred is actually Baer Bank's inadvertent own, for which the bank sought to blame WikiLeaks. Neither federal nor California law on confidentiality in banking can be read so broadly as to suggest that prohibitions follow the information wherever it goes, so neither law binds WikiLeaks or would bind CBS today.[322] Other California privacy laws are similarly circumscribed in application;[323] for example, California privacy law constrains businesses, including

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cause of action that would make computer service providers liable for information originating with a third-party user of the service." Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1064 (C.D. Cal. 2002).

322. As to a covered entity, the federal confidentiality law survived intermediate scrutiny upon a First Amendment challenge. Trans Union L.L.C. v. F.T.C., 295 F.3d 42 (D.C. Cir. 2002).

323. *See Privacy Laws*, CAL. DEP'T OF JUST.: OFFICE OF THE ATT'Y GEN., http://oag.ca.gov/privacy/privacy-laws (last visited Dec. 12, 2013) (providing a summary of California's privacy laws).

banks, in the maintenance of their own customer records[324] and restricts the use of consumer medical information in marketing.[325]

Unresolved is the question in *Claridge* concerning whether the defendants' disclosures, even if legal, might be "unfair" within the meaning of unfair competition. With regard to the defendants' conduct in arguably facilitating the appropriation of trade value or conversion of confidential records, plaintiffs may argue that "unfairness" should close any gap in certainty over associative culpability for the underlying wrong. Certainly the defendants published with knowing disregard for the rights of the plaintiffs, and in the WikiLeaks case, for the rights of banking customers. The latter implication of public rights especially might push the court to find unfairness short of unlawfulness, whether predicated on the near tort or on the violation in spirit of banking laws.

The substantive law of Switzerland or of the Cayman Islands is beyond the expertise of this author to analyze. But a word is warranted on the Data Protection Directive[326] of the European Union and the proposed EU privacy regulation that would supersede it.[327] In EU law, consumers are permitted a measure of control over the privacy or non-privacy of their information even after they part with it.[328] The proposed regulation would expand this consumer authority and expand radically the scope of the law by applying it to foreign entities that only do business with EU citizens.[329] The EU system imposes obligations on data "controllers" and "processors" and is not confined to specific contexts such as

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324. CAL. CIV. CODE §§ 1798.80–84 (West 2009 & Supp. 2013).

325. *Id.* § 1798.91.

326. Directive 95/46, of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF.

327. *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

328. Peltz-Steele, *supra* note 240, at 407.

329. *Id.* at 373.

bank-client or seller-buyer.[330] WikiLeaks might not become a data processor merely by receiving information that contains personal information, but the simple organization of its data stores, perhaps indexing persons referenced, could bring WikiLeaks into the regulatory purview. Similarly, news organizations like CBS worry about the implications of privacy regulation for their news databases; the scope of a journalist exception to the proposed regulation is a subject of ongoing contentious discussion.[331] Violation of EU privacy law may result in injunctive relief and damages in the legal systems of participating nations.[332]

If a defendant can be shown subject to and in violation of foreign law—both Baer Bank and WikiLeaks have physical and financial presence in the EU—then that violation may serve as a predicate wrong for unfair competition in the manner that supports Baer Bank's claim. With the EU setting the trend in privacy law and moving the world away from the weaker rights model of the United States,[333] the viability of such a liability theory is enhanced. This threat has already caused considerable handwringing by U.S. media institutions and set the stage for a transatlantic showdown like the one unfolding in libel tourism.[334] As defendants in the United States, WikiLeaks and CBS would resist liability affirmatively by claiming that EU privacy regulation is repugnant to U.S. law and policy of free speech.[335]

4. Unfair Competition and the First Amendment

Whether as a defense against the operation of foreign law or the enforcement of foreign judgment, or directly as an affirmative defense, the First Amendment will necessitate analysis in an unfair-competition claim in the United States. As in the interfer-

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330. *Id.* at 366 & n.3.

331. *See id.* at 379–83.

332. *Id.* at 377.

333. *See generally id.* at 409–10 (summarizing the gravitational influence of EU balancing approach on U.S. privacy law and policy).

334. *See id.* at 370 & n.24.

335. *Cf.* Uniform Foreign-Country Money Judgments Recognition Act, CAL. CIV. PROC. CODE § 1716(b)(3) (West 2007 & Supp. 2013) (stating that a California court is not required to recognize a foreign-money judgment "repugnant to the public policy of this state or of the United States").

ence area with regard to impropriety and justification, the defense of privileged speech is functionally the same as pleading "not unfair" if the unfair-competition claim is predicated on unfairness.

The problem of whether the First Amendment applies to an unfair-competition claim, and the impact if it does, is analogous to the problem in tortious interference. As in tortious interference, a strong anti-SLAPP law could win the day for the defense before an appeals court ever passes on the free-speech arguments. On the merits, the *New York Times* booklist case suggests that the WikiLeaks and CBS enterprises are both entitled to protection as non-commercial speech, indicating that the First Amendment from the back end may push the "business" analysis to defendants' favor. But where truth and not falsity is at issue, it seems unlikely that the First Amendment would simply negate the unfair-competition claim. Perhaps the First Amendment has no application when the gravamen of the claim is truth, or perhaps the First Amendment precludes liability upon a matter of public concern. In the latter case, WikiLeaks again might be vulnerable for the revelations of customer data. Unfair-competition law should survive intermediate scrutiny for the important government interests of a fair marketplace and consumer protection. But an approach such as the Third Circuit's in *Bartnicki* might conclude that application of the law to a non-competitive journalistic "business" fails narrow tailoring. Or a Rehnquist approach might generalize the consumer-protection interest at least to condemn WikiLeaks for re-publishing the customer data. In sum, it is possible to chart a course to unfair-competition liability.

5. Unfair-Competition Liability Exposure in Sum

The same pattern of a winning defense case on the precipice of forfeit as found in interference can be found again in the analysis of unfair competition. Unfair-competition law seems an unlikely foundation for publisher liability, but broad conceptions of the doctrine are increasingly willing to embrace a defendant that is not in direct competition with the plaintiff if the defendant's own business model is nonetheless injurious to the plaintiff's business. Whether or not the theory formally adopts the language of associative liability, unfair-competition claims may be analyzed as problems in causation, where the defendant's volitional intercession between a bad actor and the plaintiff renders the defendant liable

for its role in bringing about the injurious result. Again, the court, in essence, asks after the defendant's culpability. Closer association with the bad actor—here, the leaker—is incriminating, and a defendant's ordinary business practices, such as intermediating products or services, may draw liability when the defendant proceeds with the knowledge of a benefit furnished to the bad actor. Thus, a media defendant may be characterized as enriching itself at the expense of the plaintiff's business. The First Amendment might or might not operate as a defense, following the uncertain model in interference.

C. Actions Related to the Theft of Trade Secrets: Conversion, Trespass to Chattels, Breach of Confidence, Further Associative Liability, and Trade Secret Appropriation

Common-law theories of civil theft, namely conversion and trespass, at least in their current iterations, probably cannot support liability for the leaked publisher. But a viable civil-theft theory may be found in the law of trade-secret appropriation, and the predicate theory of impropriety that operates there may also support a theory of breach of confidence.

1. Conversion and Trespass

In many states, common-law conversion and trespass to chattels have no application in a case of leaked corporate secrets because those torts historically make no allowance for intangible property interests. Conversion is the "intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."[336] Closely

336. RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965). The *Restatement* listed factors that guide the assessment of seriousness of interference:

> (a) the extent and duration of the actor's exercise of dominion or control;
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
> (c) the actor's good faith;
> (d) the extent and duration of the resulting interference with the other's right of control;
> (e) the harm done to the chattel;
> (f) the inconvenience and expense caused to the other.

related is the tort of trespass to chattels, effected by intentionally dispossessing another by "using or intermeddling with" the owner's exclusive possession.[337] The requisite intent here is intent in its simplest form, as in battery or false imprisonment.[338] In the modern era, the *Restatement* authors explained that "the difference between [trespass and conversion] becomes almost entirely a matter of degree,"[339] manifesting in the quantum of damages.[340]

The *Restatement* admonished that the concept of personal property in common-law conversion and trespass is expanding,[341] even where it does not yet embrace intangibles,[342] such as to customer lists, confidential information, or ideas.[343] Even in conservative jurisdictions, common-law countenances a conversion claim when document and property interest merge, as in a deed, which represents ownership.[344] Texas law, for example, disallows actions for conversion of copyrights and trademarks, but allows an action for conversion of software insofar as the wrongful act is theft of written code.[345] Ohio courts found sufficient physicality in domain names and email addresses to find a conversion claim.[346]

2. Appropriation of Trade Secrets and Breach of Confidence

Nevertheless, there is certainly civil liability for the theft of trade secrets, whether denominated as a common-law action for conversion, trespass, appropriation, or unfair competition, or contemplated by statute. Pollack compiled sources of law for misappropriation of trade secrets and explained that the Uniform Trade Secrets Acts ("UTSA"), as variously construed in the states, is es-

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Id. § 222A(2).

337. *Id.* § 217.

338. *Id.* § 217 cmt. c.

339. *Id.* § 222A cmt. a.

340. *Id.* § 222A cmt. c.

341. *Id.* § 242 cmt. f.

342. *Id.* § 242 cmt. b.

343. *Id.* § 242 reporter's notes (citing various cases).

344. *Id.* § 242(1).

345. Quantlab Techs. Ltd. (BVI) v. Godlevsky, 719 F. Supp. 2d 766, 778 (S.D. Tex. 2010).

346. *See, e.g.*, Eysoldt v. ProScan Imaging, 957 N.E.2d 780, 786 (Ohio Ct. App. 2011).

pecially important.[347] Insofar as the UTSA applies, state courts generally regard it as superseding other tort remedies, including conversion and trespass,[348] and absorbing their associative wrongs such as civil conspiracy.[349] The definition of a "trade secret" as information reasonably safeguarded in business for its economic advantage is broad enough to encompass more than just proprietary formulae or invention as one imagines in the usual scope of intellectual property.[350] Trade secrets may include customer lists, but do not include simply any information held close, such as the anticipated date of a new product launch.[351]

The elements of a UTSA in California, as representative, are: "(1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff."[352] The statutory definition is further illuminating, as the second element can be satisfied, at its pertinent extreme, by an actor's

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347. 127 AM. JUR. TRIALS *Litigating Misappropriation of Trade Secret* §§ 5–6 (2012). The *Restatement (Second) of Torts* did not fully cover unfair competition, and the *Restatement (Third) of Unfair Competition*, at least as of yet, is not widely cited. *Id.* § 5. Criminal remedies are also available for theft of trade secrets in both state and federal law, *see* 18 U.S.C. § 1832 (2012), the latter when the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, is satisfied.

348. *See* Julie Piper, Comment, *I Have a Secret?: Applying the Uniform Trade Secrets Act to Confidential Information that Does Not Rise to the Level of Trade Secret Status*, 12 MARQ. INTELL. PROP. L. REV. 359, 371 (2008) (citing R.K. Enter., LLC v. Pro-Comp Mgmt., 158 S.W.3d 685, 690 (Ark. 2004)). The question has added wrinkles when confidential information that is not necessarily a trade secret is at issue. *See, e.g.*, Charles Tait Graves & Elizabeth Tippett, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59, 64–85 (2012) (discussing scope of UTSA such that a state tort might not survive).

349. *See* Theranos, Inc. v. Fuisz Pharma L.L.C., 876 F. Supp. 2d 1123, 1138 (N.D. Cal. 2012) (holding civil conspiracy theory viable where UTSA did not preempt all common-law claims); *see also* ProductiveMD, L.L.C. v. 4UMD, L.L.C., 821 F. Supp. 2d 955, 967 (M.D. Tenn. 2011).

350. 127 AM. JUR. TRIALS *Litigating Misappropriation of Trade Secret* § 15.

351. *See id.*

352. Sargent Fletcher, Inc. v. Able Corp., 3 Cal. Rptr. 3d 279, 283 (Ct. App. 2003) (citing CAL. CIV. CODE § 3426.1 (West 1997)).

un-consented disclosure of a trade secret with knowledge or reason to know that the actor's possession of the secret was:

> (i) [d]erived from or through a person who had utilized improper means to acquire it;
>
> (ii) [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (iii) [d]erived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use . . . .[353]

Disclosure is thus deliberately placed in the disjunctive, and intentionality is weakly formulated to mean, minimally, a volitional act with reason to know the circumstances. "The fact that the defendant learned the secret from a third person will not prevent liability from attaching if the defendant had notice that the information was secret and that the third party had acted improperly."[354]

Injunctive relief is the ordinary remedy for trade-secret misappropriation,[355] but compensatory damages may also be awarded upon plaintiff's lost profits or business goodwill, defendant's profits, or reasonable royalties.[356] Furthermore, some jurisdictions authorize punitive multipliers and attorneys' fees in cases of willful and malicious misappropriation.[357]

"Improper" appears again as a key concept. Here, it is not limited to unlawful or tortious conduct[358] and may include lawful

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353. CAL. CIV. CODE § 3426.1(b)(2)(B); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b) (1995).

354. 14 AM. JUR. PROOF OF FACTS 3D *Misappropriation of Trade Secrets Under the Restatement of Torts* § 5 (1991) (citing RESTATEMENT (FIRST) OF TORTS § 757(c) (1939)).

355. 127 AM. JUR. TRIALS *Litigating Misappropriation of Trade Secret* § 47.

356. *Id.* § 48; *see also* 14 AM. JUR. PROOF OF FACTS 3D *Misappropriation of Trade Secrets Under the Restatement of Torts* §§ 19–22 (discussing remedies).

357. 127 AM. JUR. TRIALS *Litigating Misappropriation of Trade Secret* §§ 49–50.

358. CAL. CIV. CODE § 3426.1 legislative committee cmt. (citing E.I. duPont deNemours & Co., v. Christopher, 431 F.2d 1012 (5th Cir. 1970) (lawful

spying or inducement of a breach of duty of secrecy.[359] As usual, the term "improper" defies comprehensive definition.[360] No intent to acquire a trade secret is required for liability, though Wasson explained that this "theoretical irrelevance . . . is frequently contradicted in practice," as "[t]he defendant's intent, or lack of intent, is often inextricably bound up with the issue of his or her good faith, which may play a major, if often unacknowledged, role in determining the outcome of trade secrets litigation."[361] Also, as usual, an affirmative defense of propriety is available and may be substantively indistinguishable from a lack of proof of impropriety.[362]

Nothing about the rule of impropriety requires that the plaintiff and defendant be in commercial competition. Nevertheless, impropriety via lawful action to induce breach of confidence usually plays out in fact patterns involving commercial competition, such as when one company poaches a valuable employee from another and then "induces" the new acquisition to share secrets from the previous workplace.[363] Commercial ethics animate the rule,[364] so a company may misappropriate trade secrets simply upon knowingly accepting them when offered from the disgruntled former employee of a competitor.[365]

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aerial reconnaissance)); *accord* RESTATEMENT (FIRST) OF TORTS § 757 cmt. h (1939) ("If the actor procures the secret by a voluntary disclosure by such third person in breach of his duty and the actor employs no improper means to cause the disclosure, he is not subject to liability under the rule [of acquiring secrets improperly], though he may be liable under the rule [of disclosing secrets improperly]."). *See generally* Michael A. Rosenhouse, Annotation, *Proper Measure and Elements of Damages for Misappropriation of Trade Secret*, 11 A.L.R.4TH 12 (1982 & Supp. 2013).

359. CAL. CIV. CODE 3426.1(a); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. c (1995).

360. 14 AM. JUR. PROOF OF FACTS 3D *Misappropriation of Trade Secrets Under the Restatement of Torts* § 15 (1991) (citing RESTATEMENT (FIRST) OF TORTS § 757 cmt. f (1939)).

361. *Id.*

362. *Id.* § 18.

363. *See* Mixing Equip. Co. v. Phila. Gear, Inc., 312 F. Supp. 1269, 1273 (E.D. Pa. 1970), *modified*, 436 F.2d 1308 (3d Cir. 1971).

364. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. c (1995) (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (1974)).

365. *Id.* § 43 cmt. c., illus. 4.

Breach of a fiduciary duty of confidence pertains here because aiding and abetting a breach of fiduciary duty as a civil wrong under common-law tort[366] is interchangeable with predicate impropriety under the UTSA. As stated in the *Restatement (Third) of Agency*, an agent must not "use or communicate confidential information of the principal for the agent's own purposes or those of a third party."[367] Violation is an intentional tort,[368] so the associative roles of *Restatement (Second) of Torts* section 876[369] may give rise to liability.

As mentioned in Part II.A regarding tortious interference, indemnification to incentivize breach of a fiduciary duty is actionable in tort[370] as long as the inducement in fact resulted in interference with plaintiff's economic position.[371] The inducement to violate a known duty comes easily within the ambit of the agency rule of duty supplemented by the tort rule of "aiding and abetting."[372] Baron, Lane, and Schulz countered by pointing to cases in which the defendant was permitted to indemnify a party alleged to have breached a duty as long as the defendant bore "a legitimate interest."[373] A bank ensuring that an agent did not receive a commission to which he was not entitled bore a legitimate interest, so the bank was able to indemnify without creating a predicate wrong for

366. *See* Television Events & Mktg., Inc. v. Amcon Distrib. Co., 488 F. Supp. 2d 1071, 1075–78 (D. Haw. 2006). However, there is authority that an actor may not be held civilly liable for breach of fiduciary duty upon an associative theory if the actor personally was not bound by the duty. *Cf.* Wigington v. Will, No. D042489, 2005 WL 3276351, at *6–7 (Cal. Ct. App. Dec. 5, 2005).

367. RESTATEMENT (THIRD) OF AGENCY § 8.05(2) (2006).

368. *See* Zastrow v. Journal Commc'ns, Inc., 718 N.W.2d 51, 62 (Wis. 2006).

369. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

370. *See* Baron, Lane, & Schulz, *supra* note 165, at 1044 (citing Edward Vantine Studios, Inc. v. Fraternal Composite Serv., Inc., 373 N.W.2d 512, 515 (Iowa Ct. App. 1985)); *see also* Bayside Carting, Inc., v. Chic Cleaners, 660 N.Y.S.2d 23, 24 (App. Div. 1997).

371. Kan. State Bank of Manhattan v. Harrisville Volunteer Fire Dep't, 886 N.Y.S.2d 278, 279 (N.Y. App. Div. 2009).

372. *See, e.g.*, S&K Sales Co. v. Nike, Inc., 816 F.2d 843, 849 (2d Cir. 1987) (allowing possibility of section 876 "aiding and abetting" liability for breach of fiduciary duty where manufacturer entered into relationship with sales executive knowing of executive's employment obligation to competitor).

373. Baron, Lane, & Schulz, *supra* note 165, at 1045.

interference purposes,[374] and the authors asserted that newsgathering would fit the bill as well.[375]

3. Appropriation and Free Speech

Like its criminal counterpart, theft, conversion and its civil siblings involve non-expressive conduct. Therefore, the catalog of affirmative defenses against civil liability for the theft of trade secrets is unsurprisingly devoid of mention of the freedom of speech.[376] The expansion of the protected sphere in intellectual property, including trade-secret protection, has drawn critics who decry a corresponding shrinkage in the sphere of protected expression. First Amendment application in trade secrets cases has therefore become a controversial topic and generated abundant literature.[377] As usual, a range of arguments has emerged. In many cases, such as those in which a defendant has acted illegally to obtain trade secrets, the First Amendment does not appear at all; this approach is in line with *Cohen v. Cowles Media Co.*[378]

Samuelson argued in favor of the rule against prior restraint to offer a heavy presumption against injunctive relief in the rare case in which (1) liability claims are "secondary," i.e., the defendant was a re-publisher; (2) the defendant was not in league with the appropriator; (3) the defendant intended the publication as newsworthy, even with knowledge of the wrongful appropriation; and (4) the defendant did not mean to exploit the information in com-

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374. *Id.* at 1045 (citing Hursey Porter & Assocs. v. Bounds, No. 93C-01-091, 1994 WL 762670, at *14 (Del. Super. Ct. Dec. 2, 1994) (mem.)).

375. *Id.*

376. *See, e.g.*, CAL. CIV. PRACTICE BUS. LITIG. § 66:28 (2013) (summarizing defenses to trade secret appropriation).

377. The literature was compiled in Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 777–78 & n.8 (2007). *See also* Lindsey Furtado, *Protecting Your Secrets from the Media: A Case for California's Content-Neutral Approach to Trade Secret Injunctions*, 15 INTELL. PROP. L. BULL. 123, 133–39 (2011); Mary-Rose Papandrea, *Where Intellectual Property and Free Speech Collide*, 50 B.C. L. REV. 1307 (2009); Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is it Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1435–40 (2009).

378. 501 U.S. 663, 671 (1991); *see also* Samuelson, *supra* note 377, at 780–81.

petition with the plaintiff.[379] This approach is in line with the majority approach to the wiretap problem in *Bartnicki v. Vopper* as well as some other weighty precedents. Riding circuit, Justice Blackmun refused, per the rule against prior restraints, to enjoin CBS preliminarily from broadcasting video taken undercover inside the plaintiff's meatpacking facility for fear of prior restraint of the media.[380] When documents under seal in commercial litigation came into the possession of *Business Week* magazine, the Sixth Circuit viewed the case as a problem of prior restraint and refused to allow injunction of publication in the magazine upon litigants' merely commercial interests.[381]

Tantalizingly, in *Ford Motor Co. v. Lane*, a federal district court in Michigan refused to enjoin web publication of manufacturer Ford's misappropriated trade secrets, which were given to publisher Lane by Ford employees in violation of their duty of confidentiality.[382] Ford relied specifically on the knowing-disclosure approach to UTSA violation.[383] Lane conceded his knowledge of Ford employees' breach of duty as to at least some of the documents, but maintained that he was ignorant of their personal identities.[384] Despite allegations that Lane used the threat of publication to extort Ford, the court regarded itself as bound by the Sixth Circuit ruling in the *Business Week* case, viewing the problem as one of prior restraint, and accordingly refused to uphold the injunction against media defendant Lane.[385] The court acknowledged that Ford had protected its confidential information better than the litigants had in *Business Week* or the government had in the *Pentagon Papers*, but reasoned that Ford's secrets were "not more volatile" than those at issue in the *Pentagon Papers* and "not more inflammatory than the anti-Semitic tabloid" that the U.S. Supreme Court famously refused to allow enjoined in *Near v. Minne-*

379. Samuelson, *supra* note 377, at 833.

380. CBS, Inc. v. Davis, 510 U.S. 1315, 1318 (Blackmun, Circuit Justice 1994).

381. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 224–27 (6th Cir. 1996).

382. 67 F. Supp. 2d 745, 746–77 (E.D. Mich. 1999).

383. *Id.* at 750.

384. *Id.* at 747–48.

385. *Id.* at 751–53 (discussing *Proctor & Gamble Co.*, 78 F.3d 219).

sota.[386] Significantly, though, the rule against prior restraint does not preclude an action after the fact for damages.

A middle ground, in the mold of the Third Circuit-Rehnquist approach to the *Bartnicki* problem, is to test trade-secret injunctions or damages under heightened scrutiny. When a court recognizes that an injunction, whether under trade-secret law or otherwise, operates as a restraint of free expression, the injunction must be tested as a content-neutral (or, if appropriate, content-based) regulation of speech.[387] Like tortious interference, trade-secret law may be a content-neutral regulation, or incidental burden, of speech, and the protection of trade secrets easily suffices as an important state interest. For example, in *DVD Copy Control Ass'n v. Bunner*, the Supreme Court of California upheld a preliminary injunction against the proliferation of software that could bypass the encryption protecting copyrighted content on DVDs.[388] The Court distinguished *Bartnicki* by concluding that no public concern was at stake;[389] the injunction survived intermediate scrutiny for being no broader than necessary to protect the plaintiff's property interest.[390] *Bunner* rejected Oregon's "literalistic analysis of content neutrality" and declined to follow the Sixth Circuit's lead,[391] feeding a persistent division of authority.

One commenter criticized *Bunner* for its conclusion on public concern and posited that strict scrutiny would have been the more appropriate analysis.[392] In Oregon, the state Supreme Court struck under strict scrutiny the prior restraint of publication of a complainant's trade secret in a newsletter, *Sports Management News*, despite the applicability of the Oregon UTSA.[393] Ruling only under the Oregon Constitution, the Court referenced the UTSA definition of a trade secret in concluding that the statute is a

386. *Id.* at 752–53 (citing Near v. Minnesota, 283 U.S. 697 (1931)).

387. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

388. 75 P.3d 1, 19–20 (Cal. 2003).

389. *Id.* at 15–16.

390. *See id.* at 17.

391. *Id.* at 19.

392. Alex Eaton-Salners, Note, DVD Copy Control Association v. Bunner*: Freedom of Speech and Trade Secrets*, 19 BERKELEY TECH. L.J. 269, 282–85 (2004).

393. State *ex rel.* Sports Mgmt. News v. Nachtigal, 921 P.2d 1304, 1308–10 (Or. 1996).

content-based speech restriction, focusing on the content proscribed rather than the harmful effects that the state meant to avert through trade-secret law.[394]

Trade-secret law has also run into the First Amendment enhancing procedure of anti-SLAPP statutes. In *World Financial Group, Inc. v. HBW Insurance and Financial Services, Inc.*, competitor sued competitor alleging the appropriation and misuse of confidential information to solicit customers.[395] HBW Insurance moved for protection under the California anti-SLAPP statute and attempted to characterize its customer communications as in the public interest.[396] The court handily rejected the characterization, pointing to a line of cases in which a union and various commercial companies portrayed themselves with "noble language" as advancing the public interest in the free exchange of labor, products, and consumer information.[397] Deriding the "so-called 'synecdoche theory of public issue in the anti-SLAPP statute,' where '[t]he part [is considered] synonymous with the greater whole,'"[398] the court explained that a conclusion in that vein "would effectively 'eviscerate the unfair business practices laws,' a result the Legislature plainly did not intend."[399] *World Financial Group* was subsequently distinguished in a decision with consistent reasoning. In a defamation suit, *Anderson v. Staples*, a California court allowed a defendant critical of the plaintiff's business to generalize the defendant's comments as being an issue of public interest when the defendant was speaking in the context of a consumer-protection broadcasted on local news.[400]

394. *Id.* at 1307–09.

395. 92 Cal. Rptr. 3d 227, 231–32 (Ct. App. 2009).

396. *Id.* at 232.

397. *Id.* at 235–38.

398. *Id.* at 235 (alterations in original) (quoting Commonwealth Energy Corp. v. Investor Data Exch., Inc., 1 Cal. Rptr. 3d 390, 395 (Ct. App. 2003)).

399. *Id.* at 236 (quoting Jewett v. Capital One Bank, 6 Cal. Rptr. 3d 675, 682 (Ct. App. 2003)).

400. No. D056796, 2010 WL 3936051, at *7–8 (Cal. Ct. App. Oct. 8, 2010).

4. Liability Exposure in *Baer Bank* and Big Tobacco on Civil Theft and Related Theories

Baer Bank alleged a count of conversion against WikiLeaks, pointing to the bank's property interest and "intrinsic business value" in its stolen documents and to defendants' use of and refusal to return the documents.[401] In its recitation of facts, the bank alleged that WikiLeaks knew the documents were "unlawfully obtained" and disclosed by a source, Elmer, who violated banking privacy law.[402] If WikiLeaks did not know the circumstances when the documents were posted, then it learned them from plaintiff's counsel and refused to take down the postings.[403]

Though WikiLeaks' knowledge and refusal to return documents fit the mold of conversion, the claim is a stretch for lack of physicality in the stolen goods. Original documents were copied, not removed, from the bank, so the theft really was one of customer lists and confidential information. Despite the claim of intrinsic value, the documents merged with no intangible right. They did not represent physical property in the manner of a deed or proof of ownership. While the customer lists and confidential information might aid an identity thief, the data alone did not empower WikiLeaks or its users to deprive the bank or its customers of dominion over their money. As conversion and trespass to chattels continue to grow in accommodation of the electronic era, it is imaginable that they will encompass the copying and disclosure of confidential information. The Ohio rulings on domain names and email accounts point in this direction, but still suggest deprivation of access to virtual spaces. At present, then, conversion and trespass are not the best fit for the facts.

The same conclusion is inescapable in the tobacco case, in which Brown & Williamson's claim went only to information in Wigand's mind, to be revealed through testimony. However, CBS's interest in big tobacco was spurred at the beginning of the *Insider* story by Bergman's receipt of confidential Philip Morris documents, anonymously delivered. Interpreting those documents is what spurred Bergman to seek out Wigand. Likely a Philip

401. Complaint, *supra* note 65, ¶¶ 61–64.
402. *Id.* ¶¶ 6, 29.
403. *Id.* ¶ 29.

Morris insider copied the documents, like Ellsberg copied the Pentagon Papers. Ellsberg in fact removed the Pentagon Papers, volumes at a time, from his office for copying. Were he caught with the documents off-site, he would have been liable for conversion or trespass, though returning the documents without compromising them physically probably would have precluded recovery. It bears remembering that damage or theft of original documents—imagine the attempt to steal Ellsberg's psychiatric file, had it been found and removed—may still implicate trespass or conversion, and if the re-publisher is complicit in the act, then associative tort liability may attach.

Conversion and trespass might be a stretch, but appropriation of trade secrets fits both cases nicely. Within its unfair-competition claim, Baer Bank made essentially the same allegations as it did on the conversion count.[404] The Baer Bank files included customer lists as well as confidential information about both customers and business methods, all data within the modern scope of trade-secret protection.[405] In the tobacco case, what manufacturers knew about cigarette production and nicotine addiction is classic fodder for trade-secret protection, evidenced by Wigand's confidentiality agreement.[406] Much would qualify over the definitional hurdles as a trade secret, if not every leaked datum. Both Baer Bank and Brown & Williamson could be expected to prove damages as well, caused and amplified by the mass dissemination of their secrets; loss of business goodwill alone may serve as a starting point.

The key is the second element of trade-secret appropriation: acquisition, disclosure, or use through improper means. Plaintiffs' cases are strong. In both cases, the confidential nature of the information was obvious.[407] Wigand's violation of duty was known to CBS, prompting the internal discussion about potential liability. Were there any doubt in the WikiLeaks case, bank counsel gave the publisher actual knowledge of Elmer's wrongdoing,[408] and still WikiLeaks provided Elmer a microphone and amplifier. The

404. *Id.* ¶¶ 33–39.
405. *Id.* ¶¶ 36, 44–45.
406. TOBACCO DOCUMENTS, *supra* note 50.
407. *See id.*
408. *See* Complaint, *supra* note 65, ¶¶ 25–26.

known, underlying breaches of duty leave the defendants little room to argue propriety.

Both WikiLeaks and CBS might face claims as well for trade-secret appropriation upon allegations of the defendants' very own improprieties in acquiring and using confidential information, besides disclosure-based liability. Here again, as in tortious interference, WikiLeaks' deliberate provision of an "uncensorable" and "untraceable" avenue for "mass document leaking" is the operative factual allegation, framing WikiLeaks as an actor in league with Elmer.[409] The allegation against CBS that Bergman offered Wig- and indemnity against Brown & Williamson legal action similarly supports an impropriety theory against CBS. UTSA "preemption" of common-law and other statutory tort causes of action renders section 876 liability theories null, but does not necessarily close the door to these theories of appropriation. WikiLeaks and CBS need not be in competition with their plaintiffs. As with claims of tortious interference, any evidence that WikiLeaks capitalized on the salaciousness of Elmer's leaks or that CBS executives were manipulating news coverage for commercial advantage fuels at least a faint argument that the defendant was improperly using confidential information, right alongside the leaker, for purposes of trade-secret appropriation.

Section 876 liability is broad enough to support this theory as either civil conspiracy or aiding and abetting, especially after WikiLeaks acquired actual knowledge of Elmer's breach. Civil conspiracy liability[410] requires that the actor's conduct be tortious in itself,[411] and WikiLeaks may argue that it committed no tort in furtherance of a common design with Elmer. But common design may be inferred,[412] and WikiLeaks' persistence in publication belies its position. The case is a high-tech equivalent to a *Restatement* illustration:

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409. *See id.* ¶¶ 7, 52, 57.

410. *See generally* RESTATEMENT (SECOND) OF TORTS § 876(a) (1979) (omitting language that would remove the possibility of bringing a misappropriation claim).

411. *Id.* § 876 cmts. b–c.

412. *Id.* § 876 cmt. a.

> A and B are driving automobiles on the public highway. A attempts to pass B. B speeds up his car to prevent A from passing. A continues in his attempt and the result is a race for a mile down the highway, with the two cars abreast and both travelling at dangerous speed. At the end of the mile, A's car collides with a car driven by C and C suffers harm. Both A and B are subject to liability to C.[413]

A's initial act in passing is not a tort, just like WikiLeaks' provision of a web platform is not a tort. However, as A and B compete for primacy on the road, a common design emerges as to C. WikiLeaks' conduct becomes tortious upon the knowledge that supports the appropriation-by-disclosure theory. Even though Elmer and WikiLeaks did not consult in advance on their undertaking, each becomes aware of a common scheme and capitalizes on the participation of the other, ultimately to the detriment of Baer Bank.[414]

The aiding-and-abetting theory is a better fit and is not dependent on the disclosure theory. Section 876 liability may arise when one gives "[a]dvice or encouragement to act," even in the form of "moral support," knowing that the act is tortious.[415] WikiLeaks was at best reckless as to the possibility that Elmer would use its forum to post confidential information, and the Baer Bank complaint suggested greater culpability. The bank alleged a relationship between Elmer and WikiLeaks pre-dating the release of the confidential information, involving disclosures of non-confidential information related to Elmer's dispute with the bank, including an order from Swiss authorities evidencing Elmer's duty of confidentiality.[416] Therefore, the bank alleged that WikiLeaks already knew about Elmer's duty of confidentiality when it allowed the posting of confidential information from the same

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413. *Id.* § 876 cmt. a, illus. 2.

414. The allegations of the Baer Bank Complaint can be reduced to a tort as simply as the prior illustration. *C.f.* Complaint, *supra* note 65.

415. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

416. Complaint, *supra* note 65, ¶¶ 17, 25–26.

source.[417] The allegation pointed to aiding and abetting even in the absence of an independently tortious act by WikiLeaks.

If in fact Bergman had granted Wigand's request for indemnity against breach of confidence liability, then the liability theory against CBS would be even cleaner under section 876 aiding-and-abetting joined with breach of confidence. Causation as a matter of fact would have been debatable prospectively, as Wigand seemed intent on leaking; however, in hindsight he did not authorize disclosure of his identity absent CBS's denial of his request for expanded indemnity. CBS may analogize to cases of "legitimate interest," such as when a bank insisted on its legal position in a dispute over commission payment. The argument carries more weight in defense of the CBS indemnity for libel liability because CBS may argue that its business is the publication of truth, even as against the chilling effect of threatened lawsuits that lack merit in the absence of falsity. CBS interests in a libel suit would align with those of the source upon the common-law plaintiff's maxim that the talebearer is as responsible as the tale maker. But CBS would not have been as clearly defending its own legal interests had it indemnified Wigand for breach of confidence, where the *prima facie* case against the source was solid.[418] CBS would have had to turn to Baron, Lane, and Schulz's plausible but novel theory that a public-interest purpose may serve as a legitimate interest to escape associative tort liability for breach of confidence, even if admitting that the tort in fact resulted from the indemnity incentive.[419]

Obviously, the plaintiff's case grows stronger as more evidence is found of a defendant re-publisher's complicity with the leaker. The difference between associative and direct liability is again a gauge of attenuation in causation in the *Firearm* concep-

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417. *Id.* ¶ 25.

418. Such a promise raises ethical hackles in journalism. *See, e.g.*, David Brewer, *Fairness in Journalism*, MEDIA HELPING MEDIA, http://www.mediahelpingmedia.org/training-resources/editorial-ethics/239-fairness-in-jour (last visited Dec. 13, 2013) (counseling suspicion of indemnity demands by sources on journalists); *see also Smoke in the Eye: Anatomy of a Decision*, *supra* note 133 (explaining how CBS arrived at indemnity agreement with Wigand and nuanced problems of legal strategy and journalism ethics).

419. *See generally* Baron, Lane, & Schulz, *supra* note 165.

tion.[420] And Baer Bank's allegations against WikiLeaks went further. The bank alleged that WikiLeaks, after learning of Elmer's breach of duty from bank counsel, "posted misstatements of the conversation and all of [bank] counsel's contact information and email address on the website, and at the same time, removed the contact information for its own counsel,"[421] and "sought to draw attention to [the bank documents] elsewhere on the Website to further capitalize on and exploit [WikiLeaks'] conduct to increase the Website's notoriety and traffic."[422] In trade-secret appropriation, these facts, if true, would support a claim in multistate law for punitive damages, which the bank sought upon tortious interference, though not upon unfair competition or conversion.[423] The same evidence may serve, as Wasson explained, to enhance the case for bad faith,[424] thus impropriety, even though the element in theory, does not turn on defendant's subjective intentions. That impropriety supports the liability theory for trade-secret appropriation in the re-publisher's own use of information, disclosure besides, and alternatively augments the case for associative liability for civil conspiracy to breach confidence.

5. Free-Speech Defense to Civil Theft and Related Theories

With respect to these various theories of re-publisher liability—conversion and trespass notwithstanding as likely not viable, but namely breach of confidence, associative breach of confidence, and trade-secret appropriation—all predicated on the theft of trade secrets, the freedom of speech again acts as a wild card. The free-speech card might be worth naught or trump. At the latter extreme, WikiLeaks and CBS portray themselves bearing the mantle of the free press. They characterize an injunction as a prior restraint, prohibited absent extreme conditions and certainly not justified when merely commercial interests machinate behind a thin veneer

420. *See generally In re Firearms Cases*, 24 Cal. Rptr. 3d 659 (Ct. App. 2005). For a more detailed description and analysis of these cases, see *supra* Part II.B.1.

421. Complaint, *supra* note 65, ¶ 29.

422. *Id.* ¶ 37.

423. *See id.* ¶¶ 7–10 (prayer for relief).

424. 14 AM. JUR. PROOF OF FACTS 3D *Misappropriation of Trade Secrets Under the Restatement of Torts* § 7 (1991).

of state action through civil courts.[425] As against tortious interference, the defendants invoke the rules of *Sullivan* to negate damages liability in the absence of falsity.[426]

At the other extreme, plaintiffs maintain that trade-secret appropriation and breach of confidence constitute tortious conduct and communicate no message more deserving of constitutional protection than a thrown fist in a barroom brawl. Conspiring to breach confidence or aiding and abetting breach of confidence can be accomplished through speech, but that speech is no more worthy of constitutional protection than speech that accomplishes bribery, extortion, or the breach of confidence itself. The facts offer a fair amount of support for this position, in that the conduct by the re-publisher that is alleged to draw liability in relation to stolen secrets on some theories is conduct and not speech. The best case for First Amendment application is on a disclosure-based theory of trade-secret appropriation. In contrast, conspiring to breach confidence or encouraging breach of confidence by operating an anonymized web forum looks more like driving the getaway car from the bank robbery than an op-ed critiquing the robbers' technique. Encouraging breach of confidence by incentivizing a leaker looks more like bad-faith bribery than good-faith counsel.

Bartnicki and *Bunner* charted a salient line between the extremes with intermediate scrutiny.[427] Though *Cohen* was cited earlier in support of the no-protection-for-newsgathering doctrine, it can be massaged to yield a position consistent with intermediate scrutiny.[428] The *Cohen* Court described the state doctrine of promissory estoppel as "a law of general applicability" with "no more than . . . incidental . . . consequence[s]" for the press.[429] Just like the decryption controls in *Bunner*, laws of general applicability

425. *See id.* § 5.

426. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (providing that, absent falsity and the knowledge thereof, sufficient safeguards are in place).

427. *See* Bartnicki v. Vopper, 532 U.S. 514, 545 (2001) (providing that content-neutral expression need only be examined under intermediate scrutiny rather than a more rigorous strict-scrutiny standard); DVD Copy Control Ass'n, Inc. v. Bunner, 4 Cal. Rptr. 3d 69, 83 (Cal. 2004) (same).

428. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (noting that the press is not subject to a stricter level of scrutiny than the general public).

429. *Id.* at 670, 672.

with incidental burdens on speech are treated as content-neutral regulations, furthering the government's asserted interest in constraining conduct rather than speech, and accordingly triggering intermediate scrutiny.[430] The problem in drawing this conclusion from *Cohen* is that the Court further described the consequences for the press as "constitutionally insignificant," and thus plodded through no heightened-scrutiny analysis.[431] But ten years later, *Bartnicki* did subject the application of wiretap laws to a re-publisher to heightened scrutiny,[432] so the approach made sense to the *Bunner* court and is defensible here. Eaton-Salners made a fair argument that the *Bunner* court erred and strict scrutiny should have been applied instead; accordingly, the same argument pertains here.[433] If that argument is right, it moves the analysis, as in the Sixth Circuit and Oregon approaches, exemplified in *Lane*, almost in alignment with the prior restraint extreme.

With *Cohen*, *Bartnicki*, and *Bunner* as guides, it is impossible to opine definitively on an outcome for a WikiLeaks or CBS defendant in a trade-secret appropriation or breach-of-confidence case in which the tort rule is tested by intermediate scrutiny.[434] The UTSA and fiduciary-duty laws are both supported by important public policies aligned with intellectual-property protection and fairness in business, almost certainly satisfying the substantial-state-interest prong of intermediate scrutiny. The crucial question of narrow tailoring asks whether the laws' protections extend too far when applied to a mass media re-publisher. *Bartnicki* made clear that a defendant crosses the dividing line from protected to unprotected speech when acting unlawfully.[435] That standard seems appropriately analogous to the tort line of "impropriety" when defined as unlawful or otherwise tortious conduct. Section 876-based associative tortious conduct might mark the extreme

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430. *E.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289–90 (2000) (applying intermediate scrutiny to ban on public nudity).

431. *Cohen*, 501 U.S. at 671–72.

432. *See Bartnicki*, 532 U.S. at 527–28 (noting that intermediate scrutiny is provided for wiretap analysis).

433. *See* Eaton-Salners, *supra* note 392, at 283–89.

434. *Compare Bartnicki*, 532 U.S. 514, *with Cohen*, 501 U.S. 663, *and* DVD Copy Control Ass'n, Inc. v. Bunner, 4 Cal. Rptr. 3d 69 (Cal. 2004).

435. *See Bartnicki*, 532 U.S. at 524–25 (accepting the petitioner's assumption that the interception was intentional, thereby making it unlawful).

reach of *Bartnicki* unlawfulness, though the point is arguable, especially with respect to aiding-and-abetting liability when the conduct is not independently tortious. Surely the standard is stretched too far if it must reach unlawful conduct, such as surveillance, which trade-secret appropriation law condemns.

Thus, extrapolating the *Bartnicki* line, there is room for WikiLeaks or CBS liability despite the First Amendment defense. Conspiracy to breach confidence, based on WikiLeaks' road race with Elmer, can survive intermediate scrutiny. Aiding and abetting breach of confidence, based on WikiLeaks' provision of a publication forum to a known leaker, or hypothetically on CBS's use of an indemnity promise to incentivize a would-be leaker, is close to the *Bartnicki* line but offers the plaintiff a possibility of overcoming a free-speech defense.[436] The First Amendment per *Bartnicki* disallows liability based on a theory of disclosure with mere knowledge of another's wrong.[437] But evidence that defendants maneuvered to take their own commercial advantage of the leaked information might revive the appropriation theory with some vitality against the free-speech defense. Ultimately, there is a specter of liability for defendants upon theories arising from civil theft.

6. Liability Exposure on Civil Theft and Related Theories in Sum, and the First Amendment in Sum

Though theories of conversion and trespass will not support liability here, civil theft may be actualized in theories of associative liability for encouraging the leaker's breach of confidence and of trade-secret appropriation. The associative liability for breach of confidence again looks to proximity in the relationship between the defendant and the leaker. Applying the civil logic parallel to accessory after the fact in criminal law, the media defendant's position is not improved when plaintiff shows that the defendant persisted in republication with full knowledge of the leaker's breach. And as in tortious interference, a promise to pay the leaker's legal fees bolsters the coziness of the defendant's relationship with the

436. *See id.*

437. *Id.* at 517–18 (reciting facts of case such that defendant broadcaster "did know—or at least had reason to know—that the interception [of the recording] was unlawful").

bad actor and thus the case for associative liability in encouragement. Paralleling the logic of criminal responsibility for the accessory after the fact, the media defendant's position is worsened when the plaintiff can show that the defendant proceeded in the relationship with full knowledge of the leaker's breach. Meanwhile, the defendant's role in the breach of confidence can serve as a predicate for liability for trade-secret appropriation. Statutory appropriation liability arises not only from the acquisition of confidential information, but also from its improper use or subsequent disclosure. Impropriety in this analysis is flexible, like in tortious interference, so it may arise from the defendant's knowing encouragement of the leaker's acquisition of trade secrets in breach of confidence or contract.

In conventional, civil rights era First Amendment thinking, freedom of speech would bar civil liability upon these theories of civil theft, as well as unfair competition. But the First Amendment has never been so expansive, remains largely untested in these veins, and is no longer the bulwark of the liberal press that it became fifty years ago. The affirmative defense of free speech in these tort claims is a wild card, to be fair. Precedent may be argued to support the First Amendment as a bar to liability, or as a nullity. A middle-ground course has been stubbornly pervasive in the more recent case law. Under this approach, the First Amendment extends in the tort sphere, beyond its established applications in defamation, false light, and infliction of emotional distress, to require that liability be tested according to intermediate scrutiny. If some heightened scrutiny pertains, it might prove to be no more than duplicative of the various safeguards, namely intentionality and impropriety, as they already play in the tort theories considered here. Certainly sufficient state interests support these tort theories that are historically well ingrained in common law. The question of narrow tailoring might in practice reduce to consideration of the culpability manifested in the defendant's conduct, a question again of defendant's coziness with the leaker, or bad actor, and the relative purity of defendant's avowed fealty to journalistic norms and ideals. Thus, the First Amendment is not necessarily a bar to liability, and might in fact add little to the analysis.

It makes sense that this civil-liability question in the end reiterates similar questions of facts no matter what the vehicle of liability. After all, tort law aims to define that which is a *civil wrong*, whatever the name it bears. Analyses of civil wrongs aris-

ing from intentional torts in cases of non-physical harms—in nuisance and emotional distress as prime examples—typically express as fact-intensive balances, where the ultimate game is proof that defendant was in the *wrong*. The contemporary use of intermediate scrutiny, when the First Amendment is applied as against generally applicable laws that do not inherently mean to restrain speech, is a natural extension of the public-policy sensitive balancing approach, albeit with a classic First Amendment thumb on the scale to favor the defendant by presumption. Thus, the end-game is a fact-intensive inquiry into the culpability of the media defendant, viewed in the context of social norms and values such as favoritism for free speech. The more the defendant is able to divorce its actions from those of the leaker as bad actor—or better, to show that the leaker is not so bad after all—the less the defendant's liability exposure. Inversely, the less the defendant is able to portray itself as journalist-editor, standard bearer of professional norms and ethics that elevate public interest above self and wealth, the greater the defendant's liability exposure.

III. CONCLUSION

It might be an overstatement to conclude that a successful tort suit is likely in U.S. courts against a media re-publisher of leaked corporate secrets. On the hypothetical merits of *Brown & Williamson Co. v. CBS* or *Baer Bank v. WikiLeaks*, the defendants are likely to prevail. But the fact patterns of those cases allow the charting of defense vulnerabilities. It is possible, then, to chart a course to liability on any of the three theories posited here—tortious interference, unfair competition, or civil theft—and *en route* to overcome even the affirmative defense of free speech.

In interference with contract or prospective economic relations, plaintiffs probably cannot show impropriety, the keystone element of the torts, while defendants bear a good chance of showing justification, or lack of impropriety, whether in common law or constitutional law.

However, liability lurks in the shadows for the media defendant that associates too closely with a vulnerable source, or that allows journalistic ideals to be overwhelmed by a business agenda. The same pattern of a winning defense on the precipice of forfeit repeats in unfair competition and civil theft. Civil theft may be actualized in theories of associative liability for encouraging the

leaker's breach of confidence, and of trade-secret appropriation. Close association with a bad actor—here, a leaker—may draw liability for having enriched the media defendant at the plaintiff's expense.

There are, then, two lessons here for the media defendant: First, it is not invulnerable to civil prosecution. Complicity in the underlying unlawful or merely wrongful conduct of a source is a sliding scale, and greater involvement means greater liability exposure. Second, the professional norms and ethics that emerged in twentieth-century journalism still matter, and freedom-of-information absolutism is an ideal to be pursued at your own risk. The re-publisher that exercises news judgment and harm minimization in separating content of public concern from the merely salacious will be in better stead in the liability analysis than the absolutist who damns the consequences.

And there is a lesson for plaintiff corporations too. Liability for a media defendant remains a hard row to hoe, and pursuit of a leaker usually offers little or no consolation or compensation. Meanwhile, effective injunction in the Internet era remains elusive, and money is never worth as much as a bottled genie. The best way to keep a secret is still to keep it secret.