Media, Privacy and Defamation Law Committee

ON BUSINESS TORTS AND THE FIRST AMENDMENT

By: Richard J. Peltz-Steele

A gaping question in free speech law surrounds the application of the First Amendment defense in business torts. The pervasiveness of communication technologies, the flourishing of privacy law, and the mere passage of time have precipitated an escalation in tort cases in which communication, and what the defendant may allege is free speech, lies at the heart of the matter.

WikiLeaks and the “Streisand Effect”

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

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

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2 535 F. Supp. 2d 980 (N.D. Cal. 2008).
Welcome to the first issue of the year of the Media, Privacy, and Defamation Law Committee Newsletter. We hope you enjoy the articles, and many thanks to our authors and Chair-Elect and Newsletter Vice-Chair Shannon M. Zmud Teicher for writing and editing them.

Our committee has big plans for the coming year. In addition to keeping you abreast of recent developments in the law through our quality newsletters, we are working on two CLE programs. The first will take place on April 24 in Kansas City, Mo., at the annual Media & The Law conference and will focus on the reduction in coverage provided by commercial general liability policies for advertising, social media, websites, and other corporate communications. The second, titled Big Data, Privacy, and Publicity: The Class Action Landscape, will take place at the ABA Annual Meeting in Boston in August. We are also co-sponsoring the ABA Forum on Communications Law, scheduled for February 6–8 in Aventura, Fla.

In addition, we are working on growing the committee’s membership, including by reaching out to the broad spectrum of individuals who comprise the media- and privacy-law bars to ensure our committee reflects diversity in all its forms. And we are taking steps to improve the committee’s social media presence—watch for us on Facebook soon.

Many thanks to Joe Larsen, Tom Curley, Richard Peltz-Steele, and others for their assistance with these efforts. We are always looking to increase committee members’ involvement, so if you are interested in helping with the committee in any way, please do not hesitate to let us know.

Sincerely,

Leita Walker, Chair
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Review websites and user-generated content can mean big business as consumers look to peers for suggestions on where to eat, what to buy, and who the best medical professionals are in their area. But in an instant, a negative online review or two can also scare away consumers in droves.

The fear of the impact a negative review could have on business has led to a flurry of defamation lawsuits by plaintiff businesses and individual professionals against review websites like TripAdvisor and individuals who posted content to websites such as Yelp and Angie’s List. These efforts have been overwhelmingly rejected by Courts, resulting in some businesses getting creative with other ways to combat negative online reviews like flooding review sites with fake good reviews or anti-disparagement provisions in company terms of use policies. It is important, however, that businesses and professionals are aware that these “solutions” can raise other legal and business concerns.

Online Reviews as Protected Opinion

In its 1990 landmark decision in Milkovich v. Lorain Journal Co., the U.S. Supreme Court established what constitutes opinion protected under the First Amendment. The Court held statements employing “loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining” an assertion of fact deserve strong protection under the First Amendment. Both reviewers and websites have successfully defended defamation lawsuits under the doctrine of opinion.

Sixth Circuit Finds Online List of Dirtiest Hotels to be Protected Opinion

In one of the most recent decisions involving negative online reviews, the U.S. Court of Appeals for the Sixth Circuit held that placing a hotel at the top of an online list of the “Dirtiest Hotels in America” was protected opinion under the First Amendment and the Tennessee Constitution.

The case, Seaton v. TripAdvisor LLC, arose after online travel website TripAdvisor published its “2011 Dirtiest Hotels” list based on cleanliness ratings provided by the site’s users. Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee, owned by plaintiff Kenneth Seaton, landed at #1 on the list. Seaton filed suit against the website, alleging that TripAdvisor’s rankings were false because they did not accurately reflect user data. TripAdvisor argued that the list constituted a statement of opinion that could not be proven true or false because the user rankings and the concept of the “dirtiest” hotel were inherently subjective and therefore was protected under the First Amendment. The U.S. District Court for the Eastern District of Tennessee sided with TripAdvisor and granted its motion to dismiss in August 2012. Seaton appealed to the Sixth Circuit.

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CAN’T HANDLE THE TRUTH? THE TRUTH DEFENSE IN THE TEXAS SUPREME COURT

By: Paul C. Watler

A decades-long string of libel opinions by the Texas Supreme Court in favor of media defendants came to a resounding halt this summer. In Neely v. Wilson, the Court reversed summary judgment for an Austin television station. At first blush, the majority opinion seemingly cast a shadow over much of the defendant-friendly case-law of the past quarter-century. A closer look reveals an unfortunate outcome in an opinion reaffirming principles of defamation law important to media libel defendants.

The History of the Third Party Allegation Rule

Neely revisited McIlvain v. Jacobs, the Court’s 1990 decision that established the parameters of the “substantial truth” defense in libel cases. McIlvain held that an allegedly defamatory report is substantially true if it is no more damaging to a plaintiff’s reputation in the mind of an ordinary person than a truthful report. Some Texas courts of appeal and the Fifth Circuit had interpreted McIlvain to find that media reporting of third-party allegations under investigation is substantially true if the media accurately reports the allegations and the existence of any investigation. However, the five-justice majority in Neely spurned that reading of McIlvain by those courts.

McIlvain was the first of nine consecutive libel opinions by the Court over a 15-year period decided in favor of media defendants in whole or substantial part. Along the way, the Court spelled out interpretations of substantial truth, actual malice and public figure law that readily lent themselves to positive outcomes for media defendants in subsequent lower court decisions.

Although Neely brought this streak to an end, it did not overrule any of the Court’s precedents made during that run, notwithstanding its refinement of McIlvain. As Neely points out, the Court had never ordained the “third party allegation rule.” So, its rejection hardly heralds a seismic shift in Texas law.

An Examination of Neely

Make no mistake, Neely is a bad result for the media defendants. But its negative impact lies in misapplying the substantial truth doctrine, not in rewriting any core defamation concept enunciated by the Court since 1990.

The Neely majority simply got it wrong when it came to applying the substantial truth doctrine. In Neely, the broadcast report at issue asked viewers whether they would want to know if their surgeon had performed surgery while under the influence of controlled substances. When the plaintiff surgeon sued for libel, the station moved for summary judgment on substantial truth because it had accurately reported third-party allegations in the form of patient complaints to the medical board. In fact, the plaintiff physician had been disciplined by the medical board for self-prescribing controlled substances, but there was no finding that he had used drugs while performing surgery. The Neely majority, however, noted that the broadcast report at issue only asked whether viewers would want to know, and then found that the report was so damaging to the surgeon’s reputation that it was not substantially true. Make no mistake, Neely is a bad result for the media defendants.

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4. 794 S.W.2d at 16.
5. After McIlvain, the Court decided Herald-Post Publishing Co. v. Hill, 891 S.W.2d 638 (Tex. 1994); BFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998); Huckabee v. Time Warner Entm’t Co., 19 S.W.3d 413 (Tex. 2000); Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000); Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002) (Bentley was a qualified media victory as it affirmed a jury finding of actual malice against a local-access cable program host but vacated an excessive $7 million damages verdict); New Times v. Isaacks, 146 S.W.3d 144 (Tex. 2004); Hearst Corp. v. Steen, 159 S.W.3d 633 (Tex. 2005); Freedom Newspapers v. County, 168 S.W.3d 847 (Tex. 2005).
7. The only decisions disapproved were treatments of third-party allegations by Texas courts of appeal and the Fifth Circuit. Neely at *8 n.17.
surgery. The Neely majority used that fine distinction to deny summary judgment.

The majority held that the fact finder “may conclude that the gist results in a less favorable view of Neely to ordinary viewers than an accurate broadcast would have.”9 The Neely majority missed the notion that the harm differential must be material. An insignificant difference to reputation, which most assuredly was the case in Neely, does not defeat the substantial truth defense.10

Three dissenting justices excoriated the majority’s flawed application of the substantial truth doctrine.

If the news report is damning, it is because it conveys substantial truth. The doctor performed brain surgeries during a time he was ingesting seven narcotics, eight other medications, and alcohol…The medical board investigator concluded that the doctor was subject to discipline based on his “[i]nability to practice medicine with reasonable skill and safety because of illness or substance abuse.”11

Chief Justice Wallace Jefferson’s dissenting opinion dismissed the majority’s view that the doctor’s denials about his drug issue during surgery were sufficient to raise a fact issue on substantial truth. The dissent found no material distinction between the literal and substantial truth. “Because the broadcast did not create a different effect on the average viewer’s mind than the truth would have, I would hold that it is substantially true,” Jefferson wrote.12

The dissent parried the majority’s rejection of the third-party allegation rule, calling it an unduly restrictive view of McIlvain.13 Yet, other than disparate treatment of the allegation doctrine, the majority and dissent restated and relied on the same well-established principles of modern Texas libel jurisprudence.

Conclusion

First Amendment scholar Alexander Meiklejohn declared the U.S. Supreme Court’s 1964 decision of New York Times Co. v. Sullivan was “an occasion for dancing in the streets.” No First Amendment advocates broke out their dancing shoes over Neely v. Wilson this summer. A motion for rehearing by the media defendants remains pending before the Texas Supreme Court. It is hoped that the Court will correct its error and withdraw its June opinion. However, practitioners and jurists who ponder the June majority opinion in Neely in future cases must pay careful heed that the majority did not disturb the legal tenets that protect freedom of the press – even if it glaringly misapplied one of them. 57

9 Neely at *10.
10 See e.g., Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993) (a “news report that contains a false statement is actionable only when significantly greater opprobrium results from the report containing the falsehood than would result from the report without the falsehood.”) (emphasis added; internal quotations and citation omitted).
11 Neely at *21.
12 Neely at *28.
13 Neely at *29.
If you know your Internet memes, you may already have rolled your eyes at the title above. If you don’t get the (dated, I admit) reference, you can, of course, just google it. That “of course” is Google’s strategic vision in action—to render as much of the world as possible easily searchable. Google’s pursuit of that vision recently got a big boost when Judge Denny Chin of the Second Circuit Court of Appeals, sitting by designation in the Southern District of New York, granted summary judgment to Google in a long-running copyright suit arising out of Google’s “Google Books” service.2

The Authors Guild Objects to Google’s Industrial-Scale Copying

The suit arose out of Google’s “Library Project,” in which it reached agreements with a number of research libraries to permit Google to digitize effectively their entire book collections. In return, the libraries would obtain digital versions of their books at no costs to themselves, which they could then use for research, to back-up their collections, to protect fragile books, or to create disabled-accessible versions that did not exist in the marketplace. In all, Google accumulated digital copies of more than 20 million books, both in and out of print, including more than 4 million English-language books still in copyright.

Google then combined these digital copies with other books it had obtained with the permission of the rights holders to create its publicly accessible “Google Books” database. Using Google Books, any Internet user may conduct full-text searches of all the books scanned by Google. In response to queries, Google Books displays a list of books in which the search terms appear. A further click shows the viewer an “About the Book” page, with more specific information about the book, and frequently includes an image of a “snippet” from the book, part of a page that shows the context in which the search term occurs. For works still in copyright, Google does take some security measures to prevent recovery of the entire book—only a limited number of snippets are viewable, at least 10 percent of the work’s pages are blacklisted, with no snippets on those pages viewable, and Google claims that it will not show snippets of books if it receives an opt-out request from the rights holder. Nonetheless, Google Books uses a complete copy of each book to search for matches to user-generated search terms.

Unsurprisingly, the Authors Guild, a nonprofit promoting the interests of authors and publishers, brought a class action lawsuit against Google in 2005 over its copying and partial display of its members’ copyrighted works. (The Authors Guild also sued the libraries cooperating with Google in a separate action; it lost that case a year ago, also on summary judgment, and is appealing it to the Second Circuit.3)

The Court Refuses to Approve the Parties’ Settlement and the Second Circuit Directs Early Consideration of the Fair Use Issue

Although Google took the position that its use of the plaintiffs’ books was protected fair use, the parties spent several years in settlement talks and eventually proposed a complicated class settlement (166 pages of heavily cross-referenced legalese counts as complicated in anyone’s book). It was based on an opt-out class of rights holders and granted Google a release from future liability that, some critics thought, went well beyond the claims raised by the Authors Guild and would have granted Google privileges that other search engines would not share. Among those disapproving critics was Judge Chin, who refused to approve the settlement and instead certified a class of authors for trial. Google,

1 William J. Brennan is an Associate at Sedgwick LLP and represents corporate clients in a broad array of insurance coverage and commercial litigation matters. Mr. Brennan’s experience includes evaluating and litigating complex coverage disputes in both federal and state courts involving commercial property and casualty insurance, general liability insurance, and professional indemnity.
however, appealed the class certification to Judge Chin’s colleagues on the Second Circuit, arguing that its fair use defense should be given a hearing before trial. The Second Circuit panel agreed with Google, vacated the class certification, and remanded the case with instructions to consider Google’s fair use defense. It likely didn’t hurt Google’s arguments that the Second Circuit panel included Judge Pierre Leval, who authored a seminal work on the fair use doctrine.4

Accordingly, the parties filed cross-motions for summary judgment before Judge Chin, addressing the statutory fair use defense. The Authors Guild emphasized the obvious point that Google was, undeniably, engaging in the wholesale copying and verbatim reproduction of large sections of literally millions of copyrighted works for a commercial motive. Google’s response was very simple—its Google Books search engine did not substitute or supplant the reading of the plaintiffs’ books; to the contrary, it facilitated that goal by creating an enormously powerful index/card catalog that allowed readers to find books that matched their interests. According to Google, no one could read all of an in-copyright book on Google Books, so readers still needed to obtain an authorized copy of the book, but the public could now quickly identify books that contained the keywords that interested them and then see how those books used those books in context.

Google Books Is Transformative Because It’s Incredibly Useful—But Not for Reading Books

In short, Judge Chin assumed that the Authors Guild had proven a prima facie case of copyright infringement, but then agreed with Google on every important point of its fair use defense. His opinion carefully considers each of the (non-exclusive) statutory factors in 17 U.S.C. § 107—the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole, and the use’s effect on the potential market for the original—but the outcome was clear when Judge Chin devoted several pages of his opinion’s fact section to a detailed list of Google Books’ many benefits to society. In fact, Judge Chin even noted that Google Books would benefit authors and publishers because it offers users links to sellers of books still in print or libraries that own the book, potentially expanding the market for the plaintiffs’ creations. Legally, however, the crucial underpinning of Judge Chin’s fair use reasoning was his finding that Google’s use of copyrighted works was “highly transformative” because it transformed expressive text into “a comprehensive word index that helps readers, scholars, researchers and others find books” but was nonetheless “not a tool to be used to read books.”

Judge Chin found particular support for his decision in two fair use decisions from the Ninth Circuit dismissing claims against search engines that had shown “thumbnail images” of copyrighted material in response to searches.5 In those cases, however, the search engines were locating and reproducing digital materials that the rights holders had uploaded to the Internet. Google’s conduct, however, arguably went a step further in that Google actively sought out non-digitized materials under copyright, digitized them (in job lots), and then made them available (albeit in partial form) to anyone with an Internet connection. Judge Chin’s decision is therefore another step down a road leading to Google’s vision of a digitized and searchable world—even copyright law, it seems, is no obstacle to Google’s Borg-like tendencies.

Resistance Is Futile (So Far); You Will Be Assimilated

The Authors Guild will undoubtedly appeal this decision to the Second Circuit and it seems plausible that the Supreme Court may eventually weigh in as well on whether such fair use allows the reproduction of copyrighted material on such a massive scale. In the interim, however, those who create, own, or use copyrighted material of any kind should expect that Google and other search engines will continue to copy and repurpose anything that appears on the Internet—and if any rights holders carelessly fail to upload a searchable digital version of their creations, some helpful business is likely to go ahead and do it for them. And while it remains to be seen whether this trend will benefit authors and publishers as much as Judge Chin suggests, Google Books and similar projects will certainly prove popular with those who use or consume copyrighted material, which is, by most counts, all of us. 5

5 See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
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bank’s Cayman Islands branch. The records identified multiple accountholders, and critics of the bank asserted that the records contained evidence of wrongdoing, including money laundering.

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

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

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

New Variation on an Old Question

While the electronic-era glamor of the WikiLeaks problem is new, the tort-and-First Amendment question is not. The problem is not unlike that of the case famous in journalism circles recounted in Vanity Fair in 1996 and dramatized in the 1999 movie, The Insider. CBS feared a lawsuit by tobacco giant Brown & Williamson over an investigation by the broadcast newsmagazine 60 Minutes into damaging allegations by scientist Jeffrey Wigand about smoking and public health. Brown & Williamson later did sue Wigand, a former employee, asserting theft, fraud, breach of contract, breach of fiduciary duty of confidentiality, and appropriation of trade secret. But Brown & Williamson never did sue CBS for its re-publication of Wigand’s assertions. In a classic Insider scene, a CBS lawyer (Gina Gershon) endeavored to explain “tortious interference” to 60 Minutes staff, including Mike Wallace (Christopher Plummer). A perplexed producer (Philip Baker Hall) responded for the journalists, “Interfering? That’s what we do.” The possibility of interference liability for CBS in the Insider case was cause for much handwringing in journalism and civil liberties communities, and the question never has been resolved definitively.

Well-known is the expansion of the First Amendment as a defense to defamation and false light invasion of privacy in the civil rights era, first through the seminal New York Times Co. v. Sullivan3—which celebrates its fiftieth anniversary in 2014—and then through Time, Inc. v. Hill4 in 1967 (false light) and Gertz v. Robert Welch, Inc.5 in 1974 (defamation of public figures). In Hustler v. Falwell,6 the case beloved by media law students of Larry Flynt’s fun at the Reverend Jerry Falwell’s expense, the Supreme Court extended the First Amendment defense to a claim of intentional infliction of emotional distress accomplished by parody. The Court signaled its unwillingness to have the Sullivan doctrine subverted by an alternative theory in tort when the gravamen of the alleged wrong still was reputational injury. But the High Court then and since has provided little guidance on exactly how and when such aversion of subversion is to be accomplished.

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

4 385 U.S. 374 (1967).
false light invasion of privacy. While the First Amendment formally operates as an affirmative defense in such cases, the legal landscape has been so overwhelmingly constitutionalized that only in the rarest private-figureplaintiff, non-media-defendant case might federal and state constitutional questions go unmentioned.

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

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

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

Potential Theories and a Prediction for the Future

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

8 408 U.S. 665 (1972).
10 194 F.3d 505, 522 (4th Cir. 1999).

The conduct-cum-expression of the web outlet that thrives on leaked corporate secrets exemplifies the problem. To the corporate plaintiff, the publisher looks like nothing more than an accessory after the fact of a crime . . . . Meanwhile the publisher-defendant sees itself as a journalistic actor in the heroic tradition of Woodward and Bernstein . . . .
At the other end of the range, free speech absolutists posit that the First Amendment more or less bars liability when the alleged civil wrong is predominantly journalistic speech. This position accords with the anti-subversion principle of *Hustler v. Falwell*. Moreover, some courts have gotten hung up on remedies, drawn back to this position when their injunctive orders ran aground on the rule against prior restraints, à la *Pentagon Papers*.\(^\text{11}\) Some support for this position also comes from *Bartnicki v. Vopper*, in which the Court protected truthful disclosure after balancing the public interest in a broadcast about a high-profile labor dispute against the government interest in wiretap laws.\(^\text{12}\) Though *Bartnicki* was a balancing, the heavy weight afforded truth suggests a kinship to the *Sullivan* doctrine. Despite the *Branzburg*-inspired dichotomy of journalistic conduct and expression, Professors Anthony L. Fargo and Laurence B. Alexander made a compelling case for First Amendment protection of newsgathering in a 2009 law review article,\(^\text{13}\) which countered the hegemony of *Cohen v. Cowles*.

A middle-ground position, and one I believe the Court likely in time to adopt despite the balancing example of *Bartnicki*, is intermediate scrutiny. Rehnquist suggested intermediate scrutiny in a separate opinion in *Bartnicki*, and the lower court had employed it. Intermediate scrutiny occasionally has been called on to resolve cases in the imitative violence family, where the First Amendment runs up against general negligence and causation in the personal injury system, and intermediate scrutiny has an established track record for testing injunctions. The theory is straightforward. The First Amendment already has the intermediate-scrutiny doctrine of *United States v. O’Brien*\(^\text{14}\) to deal with the problem of free expression and generally applicable laws. Thus intermediate scrutiny may be employed to test any liability upon mere expression or predominantly expressive conduct, whether the liability arises in general negligence, unfair competition, trade secret appropriation, or breach of fiduciary duty.

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

**Conclusion**

Many other issues come into play in business tort liability for a media defendant, including and beyond the uncharted First Amendment waters. In the online age, jurisdiction presents a troublesome threshold problem for plaintiffs. On the far end of the case, remedy and enforcement tender equally thorny deterrents to litigation. Then the whole picture is complicated by evolving international norms, especially in privacy, which are driving changes in domestic law and even constitutional interpretation. Still, with burgeoning channels of communication increasingly accessible to soapbox publishers, business torts and free speech will only become more entangled.\(^\text{15}\)

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\(^{12}\) *Pentagon Papers*.


\(^{15}\)
The Sixth Circuit affirmed the district court’s dismissal of Seaton’s claims under the doctrine of opinion, finding that TripAdvisor’s judgments were inherently subjective and that the list was “rhetorical hyperbole.” The Court held that the list could not “reasonably be interpreted as stating, as an assertion of fact, that Grand Resort is the dirtiest hotel in America.” The Court also compared the list to other online polls and lists like Reader’s Digest’s poll of the “100 Most Trusted People in America” and a website’s list of the “Top Ten Dumb Asses”, suggesting that a top-ten list is not only subjective but inherently frivolous.

The Court also rejected Seaton’s argument that TripAdvisor’s ranking system is flawed because the percentage of negative reviews received by the hotels on the “dirtiest” list did not directly correspond to their final ranking of 1 through 10. Even if the ranking system was flawed, the Court wrote, the defamation claim still failed because TripAdvisor’s method of compiling reviews and surveys was inherently subjective in nature.

Minnesota Supreme Court Rules Online Review of Doctor was Protected Opinion

In *McKee v. Laurion*, the Minnesota Supreme Court held that statements made by Dennis Laurion on an online doctor review website about neurologist Dr. David McKee were not defamatory statements of fact. Laurion wrote the review after he was displeased with McKee’s examination of Laurion’s father following a stroke. He posted comments about McKee and the examination on two “rate-your-doctor” websites. In one comment, Laurion said that a nurse told him that McKee was a “real tool.” McKee filed suit against Laurion for defamation and interference with business. A Minnesota district court dismissed McKee’s suit, finding that none of the statements were defamatory but rather appeared to be nothing but statements of “shock” of the way he and his family were treated. McKee appealed the decision to the Minnesota Court of Appeals, which reinstated the lawsuit, sending it back to the trial court with instructions that a jury should decide whether six of the statements harmed McKee’s reputation. Laurion appealed the ruling to the Minnesota Supreme Court.

Much of the case focused on the “real tool” portion of the review. McKee argued that Laurion’s statement that the doctor was a “real tool” was not a protected opinion. The Court said, “Referring to someone as ‘a real tool’ falls into the category of pure opinion because the term ‘real tool’ cannot be reasonably interpreted as stating a fact and it cannot be proven true or false.” The court dismissed McKee’s claim for defamation, reversing the Minnesota Court of Appeals and upholding the district court’s ruling.

Other Online Review Cases Raise Prior Restraint Concerns; Show Potential Exposure for Plaintiff Liability under Anti-SLAPP Statutes

Two other recent online review defamation cases involving former disgruntled consumers highlight the risk of raising free speech concerns beyond that of protected opinion and illustrate that filing a weak claim could expose a business to liability in states that have strong anti-SLAPP statutes. In *Perez v. Dietz Development LLC*, the Virginia Supreme Court vacated a trial court’s preliminary injunction against a homeowner who had posted negative reviews of a contractor on AngiesList and Yelp. Contractor Christopher Dietz

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10 *TripAdvisor*, 728 F.3d at 598.
11 Id.
12 Id. at 600.
13 Id.
14 Id.
15 825 N.W.2d 725 (Minn. 2013).
16 Id. at 734.
17 Id. at 728.
18 Id.
19 Id.
20 Id. at 729.
21 *McKee*, 825 N.W.2d at 729
22 Id.
23 Id.
24 Id. at 733.
25 Id.
26 Id. at 733-34.
filed a defamation lawsuit against former client and homeowner, Jane Perez, after she posted a number of reviews accusing Dietz of damaging her home, stealing her jewelry, and employing deceitful billing practices.28 A Virginia Circuit Court issued a preliminary injunction requiring that Perez delete the critical posts, with the exception of the comments specifically related to Dietz’s work on her home.29

After the ruling, the Public Citizen Litigation Group and the American Civil Liberties Union (ACLU) of Virginia joined Perez’s legal team and appealed the order to the Virginia Supreme Court, asserting that the injunction amounted to an unconstitutional prior restraint, in violation of the First Amendment.30 In a brief order vacating the injunction the Court said that the injunction “was not justified and the respondents have an adequate remedy at law.”31

In Rahbar v. Batoon, the California Supreme Court refused to revive a dentist’s lawsuit against a patient who had posted a critical online review on Yelp.com.32 The patient, Jennifer Batoon, wrote “DON’T GO HERE, MOST PAINFUL DENTIST EVER,” and voiced her displeasure with her dentist’s billing practices, communication skills, and treatment choices.33 The dentist, Gelareh Rahbar, sued Batoon in San Francisco Superior Court for defamation and invasion of privacy.34

Batoon moved to strike the claims under California’s anti-SLAPP statute, which provides “a cause of action against a person arising from any act of that person in the furtherance of the person’s right of petition or free speech … in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”35 The trial court granted Batoon’s motion and awarded the defendant $43,035 in attorney fees.36 Rahbar did not appeal the decision, but filed a second lawsuit against Batoon.37 Again, the patient filed an anti-SLAPP motion, and the court again ruled she was entitled to fees.38 Both the California Court of Appeals and the California Supreme Court upheld the trial court’s awards.

Importance of Online Reviews Push Businesses and Professionals to get Creative

Although there has been an uptick in defamation cases filed in reaction to negative online reviews, Yelp, for example, reports that 80% of its online reviews are three to five stars out of five.39 Likewise, TripAdvisor reports that 75% of its reviews are “very good” or excellent.”40 But a Harvard study showed that a one star increase in rating on Yelp yields a 5-9% increase in revenue for a company, suggesting that online reviews are increasingly important to a company’s reputation and financial success.41 If one of the first reviews consumers stumble upon is critical of a business, or even more harshly negative, a Forbes article on the trend in lawsuits said this can result in a company’s revenue dropping as much as 70%.42

With statistics like that, it is no surprise that companies and professionals are looking to fight back against negative posts online. But so far, litigation has not been wildly successful for frustrated plaintiffs. Professor Eric Goldman, an associate professor at Santa Clara University School of Law in California, who tracks Internet-based review defamation cases, said of the 28 defamation lawsuits filed against health care providers, 16 were dismissed, six settled, and the remainder are pending.43 In six of the cases Goldman followed, the defendants who posted the reviews were

34 Id.
36 Rahbar, 2012 WL 4883236, at *1, *9
37 Id. at *2.
38 Id.
40 Id.
41 Id.
42 Id.
43 Komperda, Courts confront online reviews, RCFP: THE NEWS MEDIA AND THE LAW (Fall 2012).
able to utilize state anti-SLAPP statutes to dispose of the lawsuits early.\textsuperscript{44}

Businesses and professionals generally choose to go after the individual generator of the content because review website receive strong protection under § 230 of the Communications Decency Act which shields most websites from liability for user-generated content.\textsuperscript{45} But with the growing trend of unsuccessful suits, some professionals and businesses have attempted to get creative in the fight against negative reviews.

Dentist Stacy Makhnevich attempted to use forms from a company called Medical Justice to make patients agree to assign the copyright on any online reviews they might write over to the doctor or dentist.\textsuperscript{46} After patient, Robert Lee, posted a critical review, Makhnevich sent him an invoice for $100/day, claimed $85,000 in damages, and asked for $25,000 in general damages for fraud.\textsuperscript{47} Lee responded by filing a class action lawsuit.\textsuperscript{48} Makhnevich also requested that Yelp take down the review with a Digital Millennium Copyright Act notice (DMCA), but the company refused to do so.\textsuperscript{49} In allowing the class action to go forward against the dentist, the U.S. District Court for the Southern District of New York called Makhnevich’s actions taken against her patients “ridiculous.”\textsuperscript{50} The case is ongoing.

Recently, a web retailer garnered backlash from consumers after it tried adding an anti-disparagement provision to its terms of use and sought to enforce it.\textsuperscript{51} KlearGear.com threatened to impose a $3,500 fine if customer Jen Palmer did not take down the critical remarks she had posted about the company on RipoffReport.com.\textsuperscript{52} After Palmer did not pay the fine, KlearGear reported her as delinquent to credit agencies, which one news station reported, has made it difficult for Palmer and her husband to get financing for a car and to fix their furnace.\textsuperscript{53}

The anti-disparagement provision stated in part: “In an effort to ensure fair and honest public feedback, and to prevent the publishing of libelous content in any form, your acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.”\textsuperscript{54}

News of KlearGear’s attempt to enforce this provision quickly received a negative reaction amongst the blogging community and led to the company deleting its Twitter and Facebook accounts.\textsuperscript{55} The company reportedly also removed its anti-disparagement provision from its terms of use.\textsuperscript{56} But KlearGear is not the only company that has adopted such a provision.

“There’s a number of businesses around the country that are starting to put this language in their agreements; where they say ‘if you post anything detrimental there’s a cost to be paid,’” Phil Catlett, President of the Better Business Bureau of West Michigan. “Whether it’s legal or not is a different issue.”\textsuperscript{57} Based on the case law in this area and strong free speech doctrine, it is unlikely that these provisions would be upheld if challenged in court on First Amendment grounds.

Because options to control what consumers say often look grim, some businesses have turned to hiring individuals to write positive reviews online, even if the “customer” did not actually use the service or eat at the

\begin{footnotesize}
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\item[44] Id.
\item[45] 47 U.S.C. § 230 (“No provider or use of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”)
\item[46] Lee v. Makhnevich, 2013 WL 1234829, at *1 (March 27, 2013). The provision stated: “In consideration for treatment ... Patient agrees to refrain from directly or indirectly publishing ... commentary upon Dentist and his practice, expertise and/or treatment If Patient does prepare commentary for publication about Dentist, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Dentist for any written, pictorial, and/or electronic commentary.... This agreement shall be operative and effective at the time of creation (prior to publication) of the commentary.... In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Dentist; and ... will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity.”
\item[47] Id. at *2.
\item[48] Id. at *1.
\item[49] Id. at *2.
\item[50] Id. at *3.
\item[52] Id.
\item[53] Id.
\item[54] Id.
\item[55] Id.
\item[56] Id.
\item[57] Neil, Customer zapped with $3.5K charge for critique of Web retailer; its terms of use ban ‘disparagement’, ABA Journal (Nov. 20, 2013).
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restaurant.58 Other companies have tried to incentivize customers to write good reviews by offering free products to consumers.59 But these deceptive reviews have drawn attention from governmental agencies in both state and federal governments. Phony reviews singing a company’s or product’s praises may run afoul to Federal Trade Commission (“FTC”) rules and other state regulations.

This year, the FTC released an updated version of its .comDisclosures guide for digital advertising, originally published in 2000.60 The guide contains some new information for bloggers and social media users and mirrors the endorsement guides put out by the FTC in 2009.61 The guides explain that the FTC has the power to fine both bloggers and companies for not disclosing an arrangement where the company pays the blogger for a review, positive mention, or sponsored post. An arrangement exists if a customer (1) receives a free product to review it; (2) links to the company’s or product’s website for a commission; (3) receives money, product or services for posting about a product; and (4) reviews a product or service that comes from an advertiser on the blogger’s own website. The FTC does not require disclosure if the consumer uses a coupon for a more expensive brand than he or she would normally buy and then writes about it or if the consumer reviews products from a “swag” bag or giveaway bag that they received at a conference.62

The new FTC guide also described a more specific definition of “disclosure,” which requires the disclosure to be contained within the individual post itself, rather than a general disclosure somewhere on a website or social media profile. Under the rules even a Tweet promoting a blog post or review should likely include some kind of disclosure such as “#sponsored” or “#paid ad.” In addition, even if these requirements are satisfied a company could still be fined if a paid blogger or review’s content contains misleading or unsubstantiated representations. This puts companies at risk for liability if the consumer wrote about a product he or she never tried, the consumer was paid to try it and thought it was terrible, but wrote a positive review anyway, or the consumer made claims about the product that cannot be substantiated.

Beyond federal regulations, New York regulators announced the most comprehensive crackdown on deceptive reviews online to date in September of 2013.63 According to The New York Times, agreements were reached with 19 companies to pay a total of $350,000 in penalties for creating fake reviews or for purchasing them.64 Among the companies signing the agreements were a charter bus operator, a teeth-whitening service, a laser-hair removal chain, and an adult entertainment club.65 Several reputation-enhancement firms that are paid to write fraudulent reviews on websites like Google, Yelp, Citysearch, and Yahoo also signed agreements with the state regulators.66

“What we’ve found is even worse than old fashioned false advertising,” New York Attorney General Eric T. Schneiderman said. “When you look at a billboard, you can tell it’s a paid advertisement – but on Yelp or Citysearch, you can assume you’re reading authentic consumer opinions, making this practice even more deceiving.”67

The investigation focused on New York-based businesses, but it will likely have a broader impact, the Times said.68 “This shows that fake reviews are a legitimate target of law enforcement,” Aaron Schur, senior litigation counsel for Yelp said.69 Yelp works to screen false reviews and recently sued a California law firm for writing fake reviews of itself – demonstrating even the legal profession is not immune from getting caught up in the quest for a positive reputation online.70

59 Id.
60 FTC Report, .comDisclosures: How to Make Effective Disclosures in Digital Advertising (March 2013).
64 Id.
65 Id.
66 Id.
68 Id.
69 Id.
Legal Counsel Should Advise Business Clients to Proceed with Caution; Reviewers Should Also Be Advised of Best Practices

When business and professional clients seek the advice of legal counsel related to negative reviews posted online, the following may prove helpful in talking through options available to them:

- Litigation against the individual consumer for defamation or another related tort must be carefully considered as it is often costly, unsuccessful, and can open up a business to liability in states with strong anti-SLAPP statutes.

- Companies and professionals should be cautious in employing creative legal tactics such as the use of forms assigning copyrights of consumer reviews to the business or adding anti-disparagement provisions to terms of use. Not only are these measures not likely legally enforceable, they can also lead to consumer backlash that is much worse than any that would stem from an occasional negative review.

- Any efforts by clients to encourage positive consumer reviews should follow all related FTC guidelines and related state regulations. Businesses who engage in consumer partnerships should develop practices and procedures to ensure the consumers are complying with these rules.

- Business and professional clients can also be advised to seek out other business remedies that do not run afoul of the law such as proactively responding to negative reviews by implementing creative customer service practices. For example, some businesses reach out to consumers who have had a bad experience and send replacement products, offer them a gift certificate to return for another meal, or other solutions that may address the issue and result in the retraction or alteration of the review.

It is also important to note that while there is strong protection for online speech related to consumer experiences with businesses, professionals, and products, consumers can still be held liable for defamation or other related torts when the content is no longer opinion, but rather provable false accusations.
## 2014 TIPS CALENDAR

### January 2014
16-18  **40th Annual Midwinter Symposium on Insurance Employee Benefits**  
The Driskill  
Contact: Ninah F. Moore – 312/988-5498  

21-25  **Fidelity & Surety Committee Midwinter Meeting**  
Waldorf~Astoria Hotel  
Contact: Felisha A. Stewart – 312/988-5672  
Speaker Contact: Donald Quarles – 312/988-5708  

27  **A Day at Lloyd’s of London II 2014 and Alternative Dispute Resolution**  
St. John’s University  
Contact: Ninah F. Moore – 312/988-5498  

### February 2014
5-11  **ABA Midyear Meeting**  
Swissotel Chicago  
Contact: Felisha A. Stewart – 312/988-5672  
Speaker Contact: Donald Quarles – 312/988-5708  

20-22  **Insurance Coverage Litigation Committee Midyear Meeting**  
Arizona Biltmore Resort & Spa  
Contact: Ninah F. Moore – 312/988-5498  

### March 2014
13-15  **Workers’ Comp & Labor Law Joint CLE Program**  
Conrad Chicago Hotel  
Contact: Donald Quarles – 312/988-5708  

20-22  **Ethics CLE Program & Golf Tournament**  
Loews Ventana Canyon Resort  
Contact: Donald Quarles – 312/988-5708  

### April 2014
3-4  **Emerging Issues in Motor Vehicle Product Liability Litigation National Program**  
Arizona Biltmore Resort & Spa  
Contact: Donald Quarles- 312/988-5708