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March 18, 2018



Weather Forecast for March 25: Stormy on 60 Minutes?

March 18, 2018
Edward Fitzpatrick

David A. Logan, professor of law and former dean of the RWU School of Law, who has studied and written extensively about First Amendment issues:

While CBS' *60 Minutes* is apparently deciding whether to [use its March 25 broadcast](#) to air an interview with “adult film star” Stormy Daniels, who claims to have had an affair with Donald Trump and was paid \$130,000 to keep quiet about it, the legal threats raised by Trump-affiliated lawyers are undoubtedly causing the network to experience a deep sense of déjà vu.

In 1995, *60 Minutes* taped a bombshell interview with Dr. Jeffrey Wigand, an executive from Brown & Williamson, a major tobacco company. Wigand was the first insider to reveal the industry's decades-long conspiracy to mislead the public and U.S. government about the dangers of cigarette smoking.

When tipped off about the taping, lawyers for Brown & Williamson knew they couldn't get a judge to grant an order prohibiting the broadcast because the First Amendment almost never allows the government to impose a "prior restraint" on publication. However, the canny tobacco lawyers had another tactic that didn't raise constitutional concerns: Rely on Wigand's own voluntary "restraint on speech" — the nondisclosure agreement he signed when he went to work for Brown & Williamson, which he violated by talking to reporters.

Brown & Williamson could sue Wigand for breach of *that* contract, as well as CBS for "inducing" the breach. The tactic worked, at least for a while. CBS delayed the broadcast, with corporate lawyers fearing that regardless of the legal merits of its position, litigation with a relentless foe, backed by the deep pockets of the entire tobacco industry, would be too costly to justify the news value of the show.

Months later, *60 Minutes* aired the interview — but only after the *Wall Street Journal* had the backbone to publish the basic story.

The parallels between then and now are striking: Both situations involve CBS holding a story of great public interest and a highly motivated and well-resourced foe trying to find a legal argument to keep the lid on. But while the applicable legal principles haven't changed, I suspect that for a number of reasons CBS won't wait much longer to air Stormy's story.

First, CBS came off very badly when Hollywood portrayed the network's cowardice in *The Insider* (a terrific movie, by the way).

In any event, the company has since [admitted](#) that it "mishandled" the tobacco story, and it is possible that the current institutional structure at CBS makes such corporate interference in editorial decisions less likely.

Second, changes in the media associated with the “24-hour news cycle” mean that CBS’ fear of Stormy taking the story to another network is now imposing a greater competitive pressure to publish without delay.

Third, while lawyers for Trump interests are as well-resourced and relentless as those representing tobacco companies, Ms. Daniels apparently has a [strong argument](#) that the nondisclosure agreement is not valid.

If that is correct, then CBS can’t be liable for inducing the breach of what is an unenforceable agreement.

Finally, even if the agreement is considered enforceable, CBS may well conclude that the story itself — the amazing tale of a presidential candidate, on the eve of the election, arranging to pay hush money to a porn star to cover up an affair he had while newly married to his current wife — is simply too important to not be released.

Stay tuned...

[Postscript: President Trump’s personal attorney filed a lawsuit against Stormy Daniels, and his legal team now includes lawyer Charles Harder, who represented Hulk Hogan in the Gawker case, which I wrote about last year for the RWU First Amendment blog.]