Wikileaks: Information terrorism or the last stand for freedom of speech?

Gabe F. Scelta
School of Oriental and African Studies, University of London

Abstract: Headquartered on the internet and able to share vast quantities of information very quickly, Wikileaks poses new challenges to national governments and existing legal systems. Taken at its most basic level the issue of WikiLeaks is a case of conflicting legal codes—press freedom and concerns about international security. The problem is new only in its current form and unparalleled global scope.

Ultimately WikiLeaks should be viewed as the purest form of press—unbiased, unanalysed and open for all interpretations. It is true that the nature of information published on WikiLeaks tends to have a decidedly anti-authoritarian slant, however such is the nature of any "leaked" information, whether it is broadly published on it's own website or covertly handed over to a reporter in a brown manila envelope.

The global nature of the Internet has created many confusing problems for previously nation-specific organisations. Web restrictions in China are the easiest examples to reference, but many smaller scale restrictions and conflicts have quietly made their way into all of our lives. I will admit that as an American living in the UK, I frequently flout international copyright law by masking my browser's IP address in order to watch US television shows that are licensed a season ahead of Britain (which is possibly more embarrassing than shirking international law in the first place). I have yet to receive a subpoena from the Glee marketing team. With any new technology come new problems as well as new solutions and interpretations.

Every information-disseminating technology has faced scrutiny, usually going up against whichever organisation or entity stands as having the most to lose by new methods. From the printing press to airfare price aggregators, the further, faster and cheaper information travels, the more panicked the sources of that information become. Ultimately, understanding WikiLeaks as a global news

entity necessarily frames the debate in a way that lends itself to the application of existing precedents. Without such framing, both sides of the argument are floating in legal limbo.

If we were to look at the issue in reference to private internet-based international libel lawsuits, the case could take place "in virtually any court anywhere under the laws that apply in that jurisdiction" (Thompson 2011). However, citing libel cases as precedent would not be actionable for a prosecutor as WikiLeaks would inevitable be classified as "the operator of or provider of access to a communications system by means of which the statement is transmitted" as they simply provide a secure drop box and site on which to access the submitted information. It would be akin to taking legal action against a printing press itself. As a service they are therefore subject to the immunity guaranteed to Internet Service Providers by many international regulations including those in the US and UK (Lilian 1997).

To take legal action on a national level is the logical option since much of the inflammatory content deals with the actions of governments (and indeed they seem the most bothered by it). While the information on WikiLeaks is wholly international in nature, a large part of the current documentation concerns US International relations and foreign policy. In US law, allegations would likely be divided between two existing, and sometimes competing, precedents.

In 1971, the Supreme Court case of New York Times Co. vs. United States (403 US 713) ruling in favour of the New York Times allowed it to publish the classified Pentagon Papers. It established that in such cases, the First Amendment (Freedom of the Press) was superior to the right of the US government to keep such classified information secret. To counter any such claims, the government would have to show sufficient evidence that the publication would cause a "grave and irreparable injury to the public interest" (Sievert 2000:109). In this case, the question becomes whether the content of WikiLeaks causes a danger that is sufficiently "grave and irreparable." In the case of NYTCo. vs. US, it was the opinion of the court that the actual content of the Pentagon Papers was immaterial (US 403:714-20) which, considering the scope of WikiLeaked documents, must be applicable to the monumentally bureaucratically detailed US documents as well concluding that, "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints" (US 403:717). Possibly of more importance, Justice Thurgood Marshall claimed that the specific term "national security" was far too broad to constitute the terms of the threat (US 403:719).

On the other side of the argument, Freedom of Press superiority could go up against various contemporary anti-terrorism legislative elements, including the USA PATRIOT Act (Scheppler 2005:39), Executive order 13224 (US EO 13224 2001) and the Homeland Security Act—which has been criticised specifically for heightening issues of increased government secrecy (Talanian

2003). Most US terrorism-specific legislation has not yet been tested in this way, but considering the Freedom of Press precedent set forth in NYTCo. vs. US, any allegations would face significant difficulty establishing themselves as above the first amendment right in the hierarchy of legislation. However, in one of the only such cases to date, Holder vs. Humanitarian Law Project (561 U. S. ____ 2010), the ruling upheld the governments right to prohibit "advice or assistance" to terrorist organisations (US 561). The argument could be made that WikiLeaks provides information to any number of organisations and nations that may be classified as terrorist in nature. In framing WikiLeaks as a press entity, I believe this argument would be difficult to prove as it provides information to all parties, regardless of national or organisational affiliations. The alternative, framing WikiLeaks as an entity that is non-press related (as a private publisher, or as a terrorist organisation in itself, etc.) is also unlikely as it would create a potentially devastating legislative free-for-all on all internet content including individual personal data.

At an international level, the debate could be similar, though legislation at the international level tends to be more open to interpretation. Considering the fully international reality of the Internet, WikiLeaks host country, multinational mirror site locations, and various nations' documents contained within the site—the debate hinges on the Charter of Fundamental Rights of the European Union's Article 11, which highlights Freedom of Expression and Freedom and Pluralism of the Media (EU 2007/C 303/01). Importantly, legal action could potentially take place in the European Court of Justice, whose rulings are binding not only to member nations but also to "supranational institutions of the EU" (Hunt 2001:104). At this level, there are virtually no standards to base a decision on. As "the Court is bound to draw inspiration from constitutional traditions common to the Member States," (deWitte 2000) the interpretation of both the Freedom of Expression and anti-terrorism laws are entirely open localised debate.

I view WikiLeaks as a media outlet and as a tool. Both the US and European Union have established that freedom of the press is guaranteed as an inalienable right of a democratic society, with immunity established for the mode of information dissemination. There is no case to be made against WikiLeaks, neither within the US or EU. In the words of Justice Stewart in NYTCo. vs. US, "an informed and critical public opinion… alone can here protect the values of democratic government" (US 403:728) As for watching American TV shows, I hereby promise not to skip over the commercials.

References

—. Charter of Fundamental Rights of the European Union (2007/C 303/01)

—. Executive Order 13224 of September 23, 2001: Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism.

—. Holder v. Humanitarian La Project, 561 U.S.

—. *New York Times Co. v. United States, 403 U.S.*

de Witte, B. "The Past and Future Role of the European Court of Justice in the Protection of Human Rights," The EU and Human Rights. (2000) New York: Oxford University Press pp. 859-897

Hunt, Jo. (2001) "The European Court of Justice and the Court of First Instance," Understanding European Union Institutions ed. Alex Warleigh. New York: Routledge.

Lilian, Edwards. (1997). Defamation and the Internet: Name-Calling in Cyberspace. Law and the Internet: Regulating Cyberspace. Oxford: Richard Hart Publishing.

Scheppler, Bill. (2005). The USA Patriot Act: Antiterror Legislation in Response to 9/11. New York: Rosen Publishing.

Sievert, Ron. (2000). Cases and Materials on U.S. Law and National Security. Buffalo, New York: William S. Hein.

Talanian, Nancy. (2003) The Homeland Security Act: The Decline of Privacy; the Rise of Government Secrecy. Bill of Rights Defense Committee.

Thompson, Mark. "Lawyers Alarmed by International Lawsuit Trend," Online Journalism Review (2 Nov 2004) Retrieved from http://www.ojr.org/ojr/law/1099435840.php Accessed: 5 March 2011

Awarded First Place, 2011, Taylor Wessing Prize
School of Oriental & African Studies Law Society