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Anonymous Internet Free Speech and a Company's Right to Obtain the Speaker's True Identity through Discovery

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The advent, proliferation and growth of the Internet, along with its blogs, chat rooms and message boards, has significantly increased the number of alleged "defamatory" statements that concern certain corporate entities. Further, since these postings are typically done anonymously, there is a tension between the "speaker's" First Amendment right to anonymous free speech and the allegedly defamed corporation's right to "discover" the true identity of the speaker and recover damages. In this regard, the company typically initiates a defamation action against John or Jane Doe defendants, and then issues a subpoena to the relevant Internet Service Provider ("ISP") to discover the true identity of the speaker. The court is then faced with the task of balancing these two legitimate interests -- which often presents itself as the proverbial Gordian Knot. This article provides a short summary of the law that relates to this issue.

1. Individuals Have A Fundamental, First Amendment Right To Speak Anonymously On The Internet.

It is well settled that the First Amendment protects the right to engage in anonymous speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent"); *Buckley v. American* Constitutional *Law Foundation, Inc.* 525 U.S. 182, 204 (1999) (striking down law requiring those who circulate political petitions to wear name tags); *Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (describing anonymity as more than just a form of protected speech, but rather as part of "our national heritage and constitutional tradition.")

The Supreme Court first documented the historical value and importance of anonymous speech, especially anonymous critical speech, in *Talley v. California*, 362 U.S. 60 (1960):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Id. at 65.

The Supreme Court subsequently explained that the right to anonymity is necessary to encourage a diversity of voices and to shield unpopular speakers:

> Anonymity is a shield from the tyranny of the majority.... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation ... at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

Mclntyre, 514 U.S. at 357 (citation omitted).

It is further well settled that First Amendment protections, including the right to speak anonymously, extend to speech via the Internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (through the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox"; there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."); *Doe v. 2TheMart.com, Inc.* 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); *Dendrite Int'l., Inc. v. Does*, 342 N.J. Super. 134 (2001); s*ee also, Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("Seescandy.com") (acknowledging right of persons who have done nothing wrong to speak anonymously via the Internet).

Another unique feature of the Internet, however, is that all Internet speakers leave behind an electronic footprint that can be traced back to the original sender. *See Kang, Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1225, 1233 (1998). In order to access the Internet, would-be participants must register (typically with a variety of personal, identifying information) with an ISP. A subpoena directed to that provider will uncover the identity of almost any anonymous speaker. Many companies have, unfortunately, tried to take advantage of this powerful and previously unavailable weapon over the past few years, by filing scores of lawsuits - and accompanying subpoenas - designed to uncover the names of their anonymous Internet critics. *See, e.g,*. Lyrissa Barnett Lidsky, *Silencing John Doe. Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 858 n.6 (Feb. 2000) (listing numerous

examples of such cases); Miller, *"John Doe" Suits Threaten Internet Users' Anonymity*, L.A. Times, June 14, 1999, at A1 ("the growing volume of these suits - and the subsequent dropping of them in some cases after identities have been disclosed - makes some experts fear that the legal process is being abused by organizations seeking only to 'out' online foes"); Elstein, *Defending Right to Post Message. 'CEO Is a Dodo,'* Wall St. J., Sept. 28, 2000, at B1 (discussing cases).

Unlike traditional media speakers, Internet speakers typically do not have professional training to judge the credibility of the information they post, do not have editors to peruse their posts for problems, do not have lawyers to advise them of the complexities of the multitude of laws possibly implicated by their statements, or do not have insurance to protect themselves from potential lawsuits. Faced with the threat of having to defend against costly litigation, many legitimate speakers simply decide that using the Internet as a forum for their communications is not worth the risk of being accused of defamation or business disparagement. In addition, for many online speakers, the protection of anonymity is essential to their willingness to speak. *See McIntyre*, 514 U.S. at 342 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation or by concern about social ostracism"); *State v. Doe*, 61 S.W.3d at 103 ("Anonymity allows individuals to discuss matters of public importance without fear of reprisal."). The threat of losing anonymity could, therefore, have a substantial chilling effect on the free exchange of ideas. *See, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d at 1093 ("The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. at 896 ("Many participants in cyberspace discussions employ pseudonymous identities ... this unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity, and age which allow elite speakers to dominate real-world discourse").

These issues and considerations play a significant role in most court's determination of whether it will quash or enforce the subpoena.

2. Before A Motion To Compel Can Be Granted, The Moving Party Must First Demonstrate That A Valid Cause of Action Exists

Although the right to speak anonymously is not absolute, it is well settled that before the right may be abridged through means of case-related discovery, a heightened standard of pleading and proof must be satisfied. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (an order compelling production of individuals' identities in a situation that would threaten the exercise of fundamental rights is "subject to the closest scrutiny"); *see also McIntyre*, 514 U.S. at 347 ("exacting scrutiny" required). Courts that have considered anonymity issues concerning Internet-related speech have consistently applied a higher level of scrutiny. *See 2TheMart.com*, 140 F. Supp. 2d at 1093 ("[D]iscovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts."); *Seescandy.com*, 185 F.R.D. at 578 ("[L]imiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted."); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 36 (2000) ("AOL"), rev'd on other grounds sub nom. *America Online, Inc. v. Anonymous Publicly Traded Co.* 542 S.E.2d 377 (Va. 2001) ("[B]efore a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made.")

Although the courts have articulated various factors to be considered when determining whether a party should be allowed to overcome a speaker's right to remain anonymous, all have required that the party seeking disclosure make a prima facie showing that it could prevail on its claims against the anonymous speaker. For instance, in *Seescandy.com*, the court stated that among other things, "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." 185 F.R.D at 579. Explaining this factor, the court made clear that "[a] conclusory pleading will never be sufficient to satisfy this element." *Id*. Rather "plaintiff must make some showing that an

act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." *Id*. at 580.

Likewise in *AOL*, the court stated that before an anonymous speaker's identity may be disclosed, the court must first be satisfied by the pleadings and evidence that the party seeking the discovery "has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" and that the information is centrally needed to advance that claim. *See AOL*, 52 Va. Cir. at 37. In making its determination, the court does not simply rely on the plaintiff's pleadings, but rather, must conduct a further examination of the claims and evidence to determine whether the plaintiff's subpoena is reasonable under the circumstances. *See id.; see also Dendrite*, 342 N.J. Super. at 154-158 (analyzing the *Seescandy.com* and *AOL* decisions and explaining that in those cases, the courts conducted a more probing inquiry of the plaintiff's claims in order to determine whether discovery seeking an anonymous speaker's identity should be allowed.)[1]

3. The "Totality Of The Circumstances" Test Govern The Analysis

To determine whether a statement is fact or opinion, Arizona, California and several other jurisdictions employ a flexible "totality of the circumstances" approach which recognizes that "[s]ensitivity to the values of free debate requires an analysis not only of the words used but also the context in which they appear, as well as the entire circumstances surrounding the publication." *Amcor*, 158 Ariz. at 569. Generally, in conducting a totality of the circumstances analysis courts consider (1) the context in which each allegedly defamatory statement was made; (2) whether the challenged statement is capable of being objectively characterized as true or false; and (3) whether the words used can be understood in a factually defamatory sense. *See id.*; *see also*, *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001) (stating that the court must put itself in place of the average reader and determine the natural and probable

[1] These tests are closely akin to the test set forth in California Code of Civil Procedure section 425.16 concerning Strategic Lawsuits Against Public Policy ("SLAPP"). Section 425.16 allows a defendant who asserts that a lawsuit has been lodged solely in an effort to impinge his or her free speech rights to bring a special motion to strike the offending claims. To defeat a Section 425.16 motion to strike, the plaintiff must "[establish] that there is a probability that the plaintiff will prevail on the claim." C.C.P. § 425.16(b)(1).

effect of the statement, considering both the language and the context); *SPX Corp. v. Doe*, 253 F. Supp 2d 974 (N.D. Ohio 2003) (using totality of the circumstances test in determining that allegedly defamatory statements posted on message board were not defamatory); *Global Telemedia Int'l., Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (totality of the circumstances includes the general tenor of the entire work, the subject of the statement, the setting, the format of the work, and whether it is susceptible of being proved true or false.)

A number of courts have considered whether postings on Internet message boards constitute fact or opinion under the totality of the circumstances. For instance, in *SPX Corp., supra*, the plaintiff corporation alleged that the anonymous Doe defendant had defamed it by posting statements on the Yahoo! message board, and issued a subpoena seeking the defendant's identity. *Id.* at 977. The postings included statements such as "TIMBER!!!!! Account Fraud!!!!!!", "SPX = Massive SEC and FBI Investigation" and "Overleveraged, lots of insider selling, shit businesses, and cooking the books." *Id.* In granting the Doe defendant's motion to dismiss, the court found that although the language used favored the plaintiff, the other totality of the circumstances factors weighed against it. Regarding the context in which the statements were made, the court found that the tenor of the statements, including the fact they appeared in a piece characterized by subjective hyperbole rather than objective facts, weighed against liability. *Id.* Likewise, the court found that the broader social context in which the statements were made, namely the uncontrolled Yahoo! message board, did not support finding liability because "[a] reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum." *Id.* The court noted that the Yahoo! message board included a disclaimer at the bottom of every post alerting readers that the statements made on the board are only the authors' opinions. The court also found that the statements were not verifiable because the defendant gave no indication that he possessed materials that could substantiate his statements. *Id.* at 981.

Likewise, in *Rocker Management LLC v. Does*, 2003 U.S. Dist. LEXIS 16277, the plaintiff company issued a subpoena seeking the identity of an anonymous defendant who had allegedly posted libelous messages about the plaintiff on the Yahoo! message board. The messages stated that plaintiff "threatens analyst[s] who are bullish on certain stocks" and that plaintiff spread lies about those stocks, as well as claiming that plaintiff was the subject of a Securities and Exchange Commission investigation. *Id.* at *2. In granting the defendant's motion to quash the subpoena, the court found that on the whole, the defendant's messages were merely "free flowing diatribes" in which he did not use proper spelling, grammar or capitalization. *Id.* at *6. The court also found fatal to plaintiff's claim the plaintiff's failure to even attempt to show that the defendant's posts were sufficiently factual to be susceptible of being proved true or false. *Id.* at *7. *See also, ComputerXpress, Inc.* 93 Cal. App. 4th at 1013 (finding allegedly libelous Internet postings that accused plaintiff of being a stock scam and of illegally manipulating the company's value, were hyperbolic, informal opinions that "lacked the characteristics of typical fact-based documents"); *Global Telemedia Int'l., Inc.*, 132 F. Supp. 2d. at 1267 (finding allegedly libelous message board posts opinions in part because they were posted in the "general cacophony of an Internet chat-room in which about 1,000 messages a week are posted . . . . They were part of an on-going, free-wheeling and highly animated exchange about [plaintiff] and its turbulent history.")

4. Practice Points For General Counsel

- Institute a procedure whereby a designated person or department is responsible for a periodic (*e.g.*, weekly, monthly) sweep of the entire virtual world to identify any mention of your company's name, products or employees.
- In the event of any potentially defamatory statements, first, consider whether some counter-corrective statement is warranted and possible.
- In the event that the management team orders an all out Jihad against the speaker, you should first examine the substance of the totality of the circumstances test, if any, in your jurisdiction.

- You should also be prepare to make a good faith prima facie showing to the court that you possess a substantively viable claim for defamation or business disparagement should you file a claim and issue a subpoena to the ISP.