Courts Parse First Amendment Protections for Anonymous Critics Online

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The Supreme Court has long recognized that the freedom of speech enshrined in the First Amendment extends to anonymous speech, noting that "persecuted groups and sects … throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[1] Today, the right to speak anonymously is most frequently exercised via the Internet, including through email, message boards and social media websites. But even though the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds,"[2] it also creates unprecedented tools with which to unmask an anonymous speaker's identity.

Internet providers such as Comcast and Verizon, email and search companies such as Google and Yahoo, and social media platforms such as Facebook and Twitter all regularly track and monitor users' activities online. No matter the steps an Internet "speaker" may take to remain anonymous, the target of Internet criticism frequently needs only to file a defamation lawsuit against a "John Doe" defendant and issue a subpoena to one of these entities to learn the speaker's identity. Many Internet providers do notify users of requests for such information. Nevertheless, First Amendment groups have criticized these "John Doe subpoenas," asserting that "plaintiffs file John Doe lawsuits against anonymous Internet users only to expose their identities, not because they want to pursue a legally valid claim against them."[3]

Due to the increased use and potential abuse of such John Doe subpoenas, the job of sorting out claims involving the right to speak anonymously increasingly has fallen to the judiciary. State courts, in particular, have been quick to react to developments in this area. Recognizing the need to balance an Internet speaker's "right to anonymous free speech" with the government's "justifiable interests in preventing certain evils" such as defamation,[4] state courts have responded to the proliferation of John Doe subpoenas by crafting balancing tests that require the plaintiff to make some showing on the merits before ordering compliance with a subpoena requesting the disclosure of the John Doe defendant's identity.

Dendrite International, Inc. v. Doe No. 3 has been particularly influential in this regard.[5] In *Dendrite*, an anonymous individual posted a series of comments critical of changes in Dendrite's revenue recognition accounting on a Yahoo bulletin board. Dendrite, a New Jersey company, sued the anonymous commenter for defamation and misappropriation of trade secrets and sought discovery regarding the commenter's identity. On appeal, the New Jersey Superior Court held that a court may not compel disclosure of an anonymous speaker's identity until the plaintiff makes a three-part threshold showing. The plaintiff must:

1. Attempt to notify the speaker of the request to discover his or her identity,

2. Specifically identify the allegedly actionable speech at issue, and

3. Produce evidence supporting each element of the defamation claim.[6]

If the plaintiff can meet these three requirements, the court must then balance the defendant's First Amendment rights against the strength of the plaintiff's evidentiary showing before ordering disclosure.[7]

In addition to New Jersey, jurisdictions that have adopted or applied judicially crafted balancing tests include, but are not limited to, Arizona, California, Delaware, the District of Columbia, Indiana, Kentucky, Maryland, Michigan, New Hampshire, Pennsylvania and Texas.[8] Similar requirements have been prescribed by statutes or court rulings in other jurisdictions, including Illinois, New York, Virginia and Wisconsin.[9] The facts underlying those cases are as diverse as the types of Internet speech themselves at issue, and include anonymous comments regarding the financial fitness of a mortgage lender,[10] anonymous criticism of corporate officers in an online financial message board,[11] anonymous claims of copyright infringement made to a trade association,[12] and anonymous emails alerting government officials to a business competitor's improper conduct.[13]

Companies or individuals that anticipate taking legal action against anonymous Internet critics would do well to familiarize themselves with the standards applicable in their jurisdiction. Even if there is no precedent directly on point, potential plaintiffs may need to be prepared to meet a summary judgment or similar standard, given the strong trend toward balancing tests such as the one imposed in *Dendrite*. Moreover, to the extent they have not already done so, Internet providers and other companies that maintain identifying information about their customers should consider adopting notification policies that will allow *Dendrite*-type objections to be raised by anonymous Internet speakers. Finally, where the anonymous defendant has received notice of the action, defense counsel should be prepared to hold the plaintiffs to their burden.

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[1] *Talley v. California*, 362 U.S. 60, 64 (1960).

[2] *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

[3] Digital Media Law Project, *Potential Legal Challenges to Anonymity, available at* http://www.dmlp.org/legal-guide/potential-legal-challenges-anonymity.

[4] *Melvin v. Doe*, 836 A.2d 42, 47 (Pa. 2003).

[5] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[6] *Id.* at 760.

[7] *Id.* at 760–61.

[8] *See Mobilisa, Inc. v. Doe No. 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Krinsky v. Doe No. 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *In re Ind. Newspapers, Inc.*, 963 N.E.2d 534 (Ind. Ct. App. 2012); *Doe v. Coleman*, 436 S.W.3d 207 (Ky. Ct. App. 2014); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Ghanam v. Does*, 845 N.W.2d 128 (Mich. Ct. App. 2014); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011); *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007). A few federal courts have also applied First Amendment balancing tests when faced with John Doe subpoenas. *See, e.g.*, *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010); *Doe v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

[9] *See Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666 (Ill. Ct. App. 2010) (declining to adopt a judicial balancing test in light of 134 Ill. 2d R. 224); *Varrenti v Gannett Co., Inc.*, 929 N.Y.S.2d 671 (N.Y. Sup. Ct. 2011) (holding that the court did not need to decide whether to apply balancing test or convert request into proceeding for pre-action disclosure pursuant to CPLR 3102 (c) because common factor in all tests was needed to state a *prima facie* cause of action for defamation, which plaintiffs failed to do); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554 (Va. Cir. Ct. 2014) (declining to adopt a judicial balancing test in light of § 8.01–407.1 of the Code of Virginia); *Lassa v. Rongstad*, 718 NW 2d 673 (Wis. 2006) (interpreting § 802.03 of the Wisconsin Statutes, which requires defamation to be pleaded with particularity, to require a court to address a pending motion to dismiss a defamation action against an anonymous defendant before compelling discovery).

[10] *See Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005).

[11] *Krinsky v. Doe No. 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

[12] *See Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009).

[13] *See Kuwait & Gulf Link Transp. Co. v. Doe*, 92 A.3d 41 (Pa. Super. Ct. 2014).