

Anonymous Online Speech: Considerations for Victims and Speakers

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In today's world — where social media has become a source of news for many — companies and individuals often find themselves the subject of negative and anonymous online comments. These comments can give rise to legal claims — defamation, copyright and trademark infringement, unfair competition, and more — but unmasking an anonymous critic and holding them responsible is no small challenge.

Conversely, companies and individuals may choose to speak anonymously to protect themselves from retaliation, to safeguard their reputations when discussing sensitive issues or, in the case of companies, to prevent harming their relationships with other businesses when blowing the whistle on bad practices. Anonymous speech is protected by the First Amendment, but these protections are not boundless.

In the closely watched case of *Glassdoor Inc. v. Andra Group, LP*, the Texas Supreme Court was expected to provide further guidance as to when a plaintiff can unmask an anonymous online speaker. In that case, an online clothing company sought to depose Glassdoor to unmask 10 anonymous critics who left reviews on its site, for possible defamation and business disparagement claims. They did so under a Texas procedural rule that allows a party to obtain discovery before actually initiating a lawsuit but does not toll the statute of limitations.

The trial court held that the plaintiff could depose Glassdoor regarding two of the critics. A Texas court of appeals affirmed, holding that the plaintiff could unmask the critics because it raised a genuine issue that it had a potentially viable business disparagement claim and because it showed that each review made at least one disparaging statement of fact. The Texas Supreme Court reversed, holding that Glassdoor did not have to reveal the identities, but only because the possible claims were moot based on an expired statute of limitations. The court explained that, because the plaintiffs only sought to discover the critics' identities, without actually filing a "John Doe lawsuit" against them, the statute of limitations kept running and ultimately expired. In so ruling, the Texas Supreme Court sidestepped addressing the merits of the free speech issues and did not provide any further clarity regarding when a plaintiff can unmask an anonymous speaker.

Whether you are the victim of anonymous speech or you intend to speak anonymously, understanding the factors courts consider in deciding whether to unmask anonymous speakers is critical. As cases seeking to challenge anonymous speech have proliferated, courts around the country have created several tests to determine whether the identity of an anonymous online critic should be disclosed. Although the tests vary from jurisdiction to jurisdiction, most require that the plaintiff (1) make some attempt to notify the anonymous defendant that the plaintiff is seeking his or her information, (2) make a showing of the elements of the claims being asserted against the defendant, and (3) specifically identify the challenged statements and explain why they are legally actionable. If a plaintiff satisfies these requirements, many courts will then weigh the defendant's First Amendment right to speak anonymously against the plaintiff's need to obtain the information to protect against or remedy a wrong.

While the likelihood of success of any particular effort to unmask a critic will depend on the facts of the case, the court and the applicable unmasking test, case law to date suggests general traits that are common to successful unmasking attempts:

- **Notification to Anonymous Critic.** The anonymous critic typically must have an opportunity to be heard. This can be done, among other ways, by posting the complaint or a notice of the complaint online as a response to the comment in question.

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- **Specificity.** It generally is not enough for a plaintiff to say that a critic's statements were defamatory, infringed a copyright or otherwise violated the law. A plaintiff typically must show that the statements are actionable — for example, by showing that they are provably false (for defamation) or pointing to copyrighted material that the critic used and demonstrating that the plaintiff has a valid copyright for the material (for copyright infringement).
- **Supporting Evidence.** Most courts require supporting evidence of the plaintiff's claims — not just allegations — before they will unmask an anonymous critic.
- **Nature of Legal Claim.** Many courts evaluate the legal claim being asserted by the plaintiff. Copyright infringement claims typically are more powerful than defamation claims.
- **Type of Speech.** Many courts consider the nature of the critic's speech. Commercial speech — advertisements, references to specific products and other speech with an economic motivation — typically receives less protection than political, religious or literary speech. Similarly, expressions of opinion typically are protected while statements of fact ordinarily are not.
- **Forum.** Many courts analyze the online forum where the speech appeared. These include job review sites, local business review sites, news site comment sections, product-specific discussion forums, message boards, social networking sites, blogs and fake websites. If a website states that users should post facts and information, or if users typically use the website in that way, a court may be more likely to find that negative comments are factual — and possibly defamatory — assertions. On the other hand, if a website states that it is a forum for users to express their opinions, a court may be more likely to find that the comments are nonactionable opinions. If a website is silent on the issue, a court likely will closely examine the totality of the comments and how the users generally utilize the website.

- **Context.** Courts also may look at how the information is presented by examining, for example, whether it is grammatically correct or riddled with spelling errors, and what type of language is being used. For example, are the users posting factual information, or venting or otherwise voicing their opinions? If a statement looks and feels like a rant, a court may be more likely to find it nonactionable.

Although demanding, the criteria for unmasking an anonymous critic show that it is not impossible. If you are the victim of anonymous online speech, you may be able to unmask the responsible critic and pursue legal claims. Before initiating such an action, assess your prospects for success and carefully balance that against the potential risks — legal, reputational, commercial and financial — of bringing suit.

If you engage in anonymous online speech, you may be able to remain anonymous. Before speaking, ensure that your speech is legally protected — that it is not defamatory and does not disclose protected or private information, infringe on any intellectual property rights, or otherwise violate the law.

While each case depends on its specific facts, different types of speech receive different levels of protection under the First Amendment. Political speech — which includes ideas for bringing about social and political change — receives extensive constitutional protection; commercial speech — which involves a speaker trying to obtain a commercial benefit — receives intermediate protection; and obscene speech — which concerns offensive, and often sexual content — receives no protection. Even if you are very careful, the target of your speech may try to uncover your identity and take legal action against you.