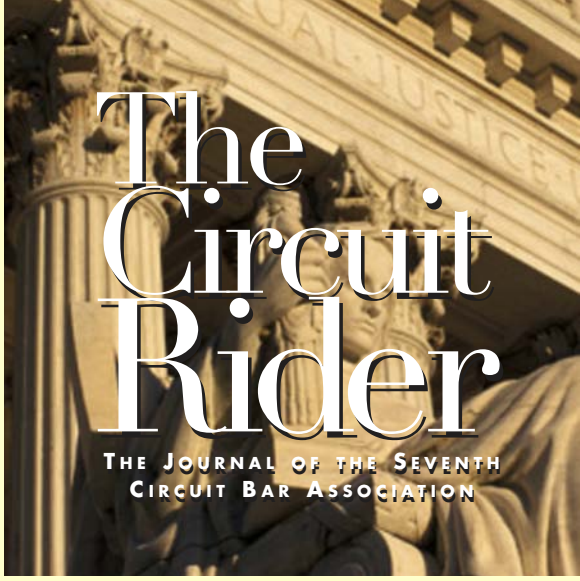
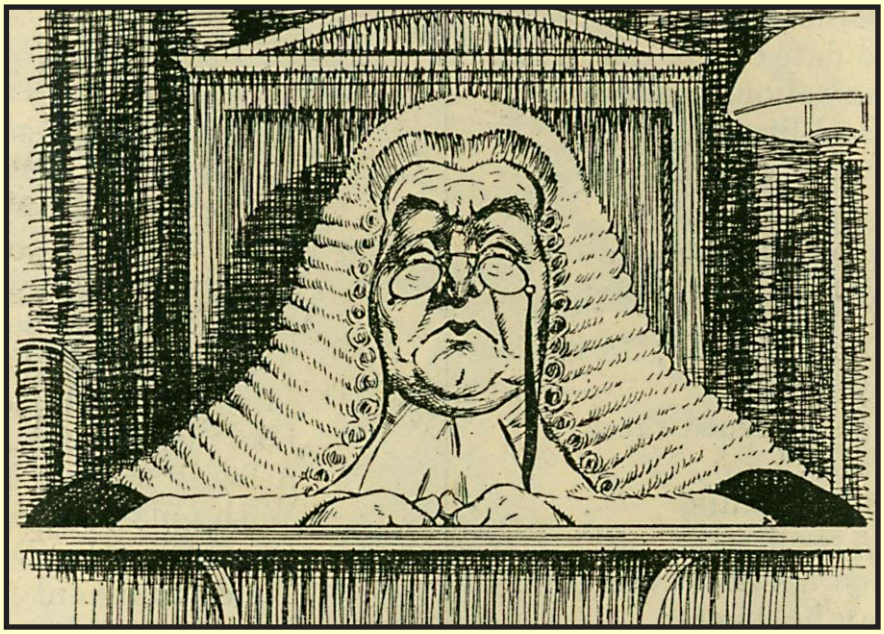
November 2015



Featured In This Issue

Reforms



Unmasking Internet Posters:

Balancing the Parties' Interests with the First Amendment Right of Anonymity

By Charles D. Tobin and Julia R. Milewski

Whether you view the chatty environment of the Internet as a robust town square for public debate, or an unruly Wild West of lawless behavior, more and more jurists and litigators are confronting the rights of anonymous speakers. On the civil side, many defamation, copyright and trade secret cases now arise from postings in chatrooms and on social media by people using pseudonyms. On the criminal side, the cases range from alleged assaults to obscenity to computer crimes.

The alleged wrongdoers post their expressions under pseudonyms through accounts that are often difficult, but typically not impossible, to trace. *See generally,* Jeffrey Cole, *Admissibility of Internet Evidence Under the Federal Rules of Evidence,* 22, 25 (May 2015). The hosts of the Internet environment of the posting – a newspaper's or a digital media's web site, for example – have registration data in their files that can help a litigant trace the putative defendant's identity.

So how does a plaintiff find the correct person to sue? Does that person have a right not to be found?

The Internet Makes It Hard to Find the Defendant

The discovery path that comes to most litigators' minds in this context is a subpoena. File a lawsuit captioned *Plaintiff v. Jane Doe,* issue a subpoena to the Internet service provider or web host, and ask for all information identifying the defendant. Many Internet hosts, however, won't divulge the information even under subpoena.

Continued on page 5

Unmasking Internet Posters

Continued from page 4

In their view and under their business models, they can't. Rightly or wrongly, the New York Times and Yahoo!s of the world now depend on the interactivity of their digital patrons as a source of both free expression and revenue. The Internet clearly has made it easier for millions of citizens to engage in political debate and commentary. And just as print advertising has always turned on readership numbers and broadcast advertising has turned on Nielsen ratings, Internet advertising now turns on the number of visitors to a web page and clicks on an advertisement. There's real money to be made by encouraging free-wheeling digital discussion.

Congress gave the Internet hosts a major business boost with the Communications Decency Act of 1996, 47 U.S.C. § 230, and the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512, which provide near-absolute immunity for Internet hosts arising out of the wrongful posts of third parties. Congress did this expressly to promote maximum, sustained growth for the Internet economy.[1]

Routinely revealing posters' names in response to discovery requests chills the willingness of people to engage in the digital environment. Less participation means less public debate and business growth. For a number of hosts, then, resisting subpoenas for posters' identities has become a part of the ordinary course of their businesses since protecting posters' identities promotes people to participate in and patronize their web services.

The Constitutional Right to Remain Anonymous

Along with the business model, the First Amendment to the U.S. Constitution promotes anonymous speech under certain circumstances. Indeed, anonymous speakers have been a part of the American political and legal tradition since the Founders wrote the *Federalist Papers* using pseudonyms, and colonial New York publisher John Peter Zenger risked being jailed for publishing criticisms of the king for an anonymous author.

"It is well-established that rights afforded by the First Amendment remain protected even when engaged in anonymously." *Buckley v. American Constitutional Law Found,* 525 U.S. 182, 197-99 (1999). The Supreme Court in *Buckley* held that a Colorado statute requiring that initiative petition circulators wear identification badges bearing the circulator's name violated the free speech guarantee.

In another anonymous speech case where the Court struck down Ohio's ban on distribution of any anonymous campaign literature, Justice Clarence Thomas noted that at its core, the First Amendment was designed to protect both those with the courage to affix their names to their views, and those whose feared reprisals too much to risk exposure:

> When Federalist attempts to ban anonymity are followed by a sharp, widespread Anti-Federalist defense in the name of the freedom of the press, and then by an open Federalist retreat on the issue, I must conclude that both Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

District courts in the Seventh Circuit have applied the right of anonymity in a number of contexts. *See e.g., Hard Drive Prods. v. Does 1-48,* No. 11 CV 9062, 2012 WL 2196038, at *5-6 (N.D. Ill. June 14, 2012) (copyright infringement case brought by "producer of adult entertainment content" seeking users' IP addresses); *Tamburo v. Dworkin,* No. 04 CV 3317, 2011 WL 2693357, at *1 (N.D. Ill. July 11, 2011) (libel and unfair competition case requesting names and chats from Yahoo! discussion group).

Continued on page 6

Unmasking Internet Posters

Continued from page 5

Balancing Anonymity and Litigants' Needs: The *Dendrite* Test

Over the past two decades, as Internet speakers and web hosts have invoked their right to remain anonymous, the courts have developed variations of a First Amendment test designed to provide access to the identities of speakers where the parties have a demonstrable overriding interest. Where the parties have not demonstrated an appropriate interest, the courts will quash the subpoenas under the First Amendment.

The seminal case cited in all of these decisions arose out of *Dendrite Int'l., Inc. v. Doe No. 3,* 775 A.2d 756 (N.J. Super. 2001). There, the court affirmed a trial court's denial of a discovery request to compel an ISP to disclose the identity of anonymous posters on a Yahoo! Message board. The poster claimed that Dendrite International was not competitive and was being "shopped" around to potential buyers. The court found that although plaintiff "would survive a motion to dismiss under the traditional application," this standard "in isolation fails to provide a basis for an analysis and balancing of [plaintiff's] request for disclosure in light of [anonymous posters'] competing right of anonymity in the exercise of [their] right of free speech." *Id.* at 770. The appellate court agreed and held that to obtain a poster's identity, a party must:

1. Undertake efforts to notify the anonymous poster, and the court will withhold action to afford the anonymous defendant a reasonable opportunity to oppose the subpoena;

2. In defamation cases, like *Dendrite,* set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech;

3. Satisfy the *prima facie* or "motion to dismiss" standard;

4. Finally, after the trial court concludes that the party has presented a *prima facie* cause of action, it must balance the poster's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure.

Different courts have adopted variations of what is commonly known as the "Dendrite test." The Delaware Supreme Court, for example, felt the second prong – laying out the exact words alleged to be actionable – was subsumed by the summary judgment standard it imposed on the party issuing the subpoena, and that the final balancing of *Dendrite* was unnecessary. *Doe v. Cahill,* 884 A.2d 451 (Del. 2005). Similarly (in a case litigated by one of the authors of this article), the District of Columbia Court of Appeals also felt the final balancing was unnecessary, but articulated two other requirements: that "the plaintiff [must] proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control"*; and the court must "determine that the information sought is important to enable the plaintiff to proceed with his lawsuit." *Solers, Inc. v. Doe,* 977 A.2d 941, 955 (D.C. 2009).

There are literally dozens if not hundreds of district courts around the country that have addressed the issue discussed in this article, and several Circuit Courts of Appeals have grappled with the need to balance First Amendment rights and the anonymity of Internet posters. *See, e.g., SI03, Inc. v. Bodybuilding.com, LLC,* 441 F. App'x 431, 432-33 (9th Cir. 2011) (vacating motion to compel disclosure of identities of anonymous posters on Internet message boards and finding *in camera* disclosure of identities was necessary prior to ruling because the court must determine the nature of speech in question when deciding what standard to apply because "the rigorous *Cahill* standard is "understandable" in a case "involv[ing] political speech." *In re Anonymous Online Speakers,* 2011 WL 61635, at *6 (9th Cir. Jan. 7, 2011). But in the context of less-protected speech such as commercial speech, "Cahill's bar extends too far." *Id.* By the same token, the district court's even stricter two-part test is appropriate only, if ever, in a case concerning core areas of free speech, *Arista Records, LLC v. Doe 3,* 604 F.3d 110, 123 (2d Cir. 2010) (finding defendant's First Amendment right to anonymity did not warrant quashing record company's subpoena to ISP for alleged copyright violations through online music downloads because plaintiff's complaint and supporting declaration were

Continued on page 7

Unmasking Internet Posters

Continued from page 6

"clearly sufficient" to make a *prima facie* showing of actionable harm and "Doe 3's expectation of privacy for sharing copyrighted music through an online file-sharing network [is] simply insufficient to permit him to avoid having to defend against a claim of copyright infringement").

Applications of the *Dendrite* Test Within the Seventh Circuit

The Seventh Circuit has not yet announced a standard the parties must meet to unmask an anonymous Internet speaker. A number of district courts in the Circuit have, however, applied versions of the *Dendrite* test. Most of the contests have arisen out of the copyright context involving allegedly illegal downloads. Not surprisingly, the district courts have been less receptive to arguments that First Amendment protections extend to what, on their face, appear to be blatant cases of copyright infringement.

In *First Time Videos, LLC v. Does 1-500,* 276 F.R.D. 241, 247 (N.D. Ill. 2011), the District Court denied a motion to quash and upheld a subpoena to internet service providers seeking the identities of people who were, allegedly unlawfully, using the service BitTorrent to download pirated content. The court held that even though "a BitTorrent user may be expressing himself or herself through the video and photographic files selected and … may be entitled to some level of First Amendment protection," the plaintiff had made a *prima facie* showing of copyright infringement, demonstrated that a discovery request is likely to lead to identifying information, and made alternative efforts to learn the anonymous user's identity. The court held that, with this record, "arguments for a First Amendment-protected right to anonymous speech on the Internet cannot overcome FTV's exclusive rights under copyright law."

Similarly, in *Purzel Video GmbH v. Does 1-108,* No. 13 C 0792, 2013 WL 6797364, at *4 (N.D. Ill. Dec. 19, 2013), the district court denied a motion to quash filed by an alleged copyright infringer. Interestingly, however, in light of the First Amendment and practical realities of Internet use, the court required the plaintiff "to refrain from publishing the Doe defendants' identities without further leave of the court" and "deem[ed] it prudent to allow defendants to proceed by pseudonym during preliminary stages of copyright infringement proceedings, given the 'substantial possibility that the names turned over by ISPs will not accurately identify the individuals who actually downloaded or shared the copyrighted material.'" (citations omitted).

Additionally, one district court in the Seventh Circuit found that responses to discovery requests that maintained Internet user's anonymity by redacting contact information sufficiently addressed First Amendment concerns. *See Tamburo v. Dworkin,* No. 04 CV 3317, 2011 WL 2693357, at *1 (N.D. Ill. July 11, 2011) (concluding, in response to a document request for Yahoo! discussion group's membership list and all messages circulated among the membership group, that the court "need not decide whether the speech was misleading or related to unlawful activity" because plaintiff can produce the requested information without revealing identities of group members by redacting email addresses).

State Courts within the Seventh Circuit

State courts in the geographic region within the Seventh Circuit have taken still different approaches to the issue. Some have been more solicitous to the First Amendment concerns. Others less so.

The Illinois Appellate Court, for example, in *Maxon v. Ottawa Pub. Co.,* 929 N.E.2d 666 (3rd Dist. 2010), concluded that Illinois Supreme Court Rule 224 renders the *Dendrite* test unnecessary. Rule 224 permits "[a] person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages" to file a verified petition outlining "the reason the proposed discovery is necessary" and "the nature of the discovery sought."

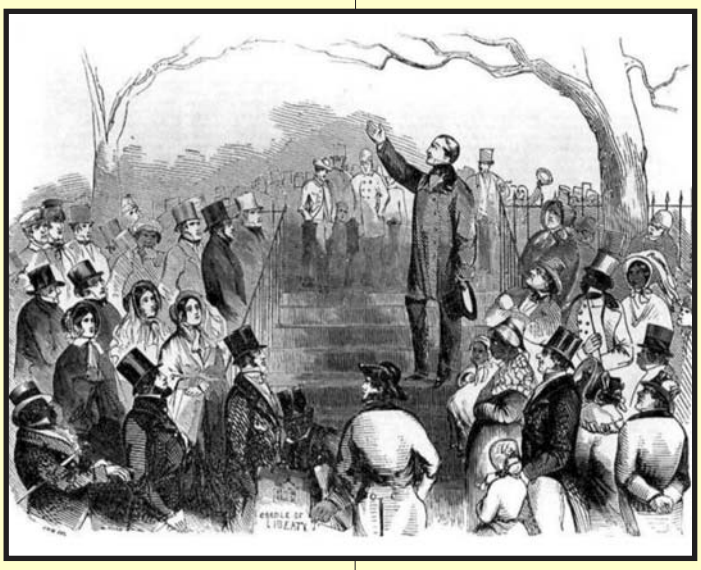
In *Maxon,* a divided court reversed after finding citizens stated a claim for defamation and were entitled to disclosure of identities of anonymous posters on the defendant newspaper's website. The trial court had applied the *Dendrite* test and found plaintiffs "had not satisfied the hypothetical summary judgment test because the literary and social context of the statements rendered them nonactionable opinions as a matter of law." *Id.* at 672.

Continued on page 8

Unmasking Internet Posters

Continued from page 7

On appeal, the Illinois Appellate Court found that "all rights of the potential defendant are protected" by Illinois Supreme Court Rule 224 because a trial court must insure that any petition "(1) is verified; (2) states with particularity facts that would establish a cause of action for defamation; (3) seeks only the identity of the potential defendant and no other information necessary to establish the cause of action of defamation; and (4) is subjected to a hearing at which the court determines that the petition sufficiently states a cause of action for defamation against the unnamed potential defendant, i.e., the unidentified person is one who is responsible in damages to the petitioner." *Id.* at 674. The court emphasized that "Illinois is a fact-pleading jurisdiction" and if a complaint can survive a motion to dismiss, "it is legally and factually sufficient and should be answered." *Id.* at 674, 676 (applying the same standard as a motion to dismiss under 2-615 will "address any constitutional concerns").[2]



But the Illinois courts have diverged in their application of Rule 224. Some have ordered the disclosure of the identity of an anonymous internet poster. For example, recently the Illinois Supreme Court in *Hadley v. Doe,* 34 N.E.3d 549 (2015) affirmed an order requiring disclosure of identity of user who posted a comment that a local politician was a "Sandusky waiting to be exposed" on newspaper's internet message board because the comment was defamatory per se where it imputed commission of a crime, was not capable of innocent construction, and could not be considered an opinion.

Prior to *Hadley,* various Districts of the Illinois Appellate Court denied Rule 224 petitions and reaffirmed the need to protect anonymous speech on the Internet. For example in *Stone v. Paddock Publications, Inc.,* 961 N.E.2d 380, 394 (1st Dist. 2011), the court reversed an order requiring disclosure of identity of commentator who allegedly made defamatory statements on newspaper's comment board about local election because no reasonable person would find that statement presented a fact and even if it constituted a factual representation, it is entitled to innocent construction.

> While the law is clear that there is no right to defame another citizen, we cannot condone the inevitable fishing expeditions that would ensue were the trial court's order to be upheld. Encouraging those easily offended by online commentary to sue to find the name of their "tormenters" would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously on the countless comment boards for newspapers, magazines, websites and other information portals. Putting publishers and website hosts in the position of being a "cyber-nanny" is a noxious concept that offends our country's long history of protecting anonymous speech.

See also, Guava LLC v. Comcast Cable Commc'ns, LLC, 10 N.E.3d 974, 991 (5th Dist. 2014) (reversing order to discover identity of user who improperly accessed online content after finding Rule 224 petition "fails to apprise the circuit court of the fact that further discovery would be necessary in order to identify an ISP subscriber as the alleged hacker"); *Brompton Bldg., LLC v. YelpA, Inc.,* 2013 WL 416185 at *8 (1st Dist. 2013) (unreported) (concluding trial court did not err in dismissing petition to discover identity of poster of negative

Continued on page 9

Unmasking Internet Posters

Continued from page 8

Yelp review because challenged statements were "non-actionable opinion" and were directed at building owner's former managing agent not plaintiff).

Indiana adopted a modified version of the *Dendrite* test requiring "plaintiff to produce *prima facie* evidence of every element of his defamation claim that does not depend on the commenter's identity before the news organization is compelled to disclose that identity." *In re Indiana Newspapers Inc.,* 963 N.E.2d 534 (Ind. App. 2012) (reversing and ordering modified *Dendrite* test in case where anonymous commenter on online news article made statement against former president of civic organization implying misappropriation of funds). Indiana courts emphasize the importance of a "summary judgment standard and a balancing of interests" including factoring in "the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of other discovery methods." *Id.* (citations omitted). *See also Third Degree Films, Inc. v. Does 1-2010,* No. 4:11 MC 2, 2011 WL 4759283, at *6 (N.D. Ind. Oct. 6, 2011) (denying Doe 26's motion to quash subpoena served on Purdue University seeking the identifying information of alleged copyright infringer because "[i]n weighing these factors, the circumstances reflect that [copyright holder's] right to judicial process outweighs Doe 26's right to remain anonymous … Doe 26 has not shown that he has any interest in the privacy of the information, that disclosure of his identity is protected by the First Amendment, or that the information is subject to any other privilege").

Conclusion

Courts in the Seventh Circuit will continue to grapple with the legal implications of new technological developments on the rights of parties to seek discovery of anonymous internet posters. Ultimately, the Seventh Circuit will be presented with a case requiring it to examine the First Amendment underpinnings of anonymous speech and test and devise a standard to balance those interests. With frequent adjudications of this issue around the country, the Court certainly will have many models to inform that analysis.

Notes:

[1] Congress wrote in the Communications Decency Act: "It is the policy of the United States — (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . ."

[2] Notably, the dissent disagreed, writing that "[f]act pleading is insufficient to address the problem" and has not "eliminated frivolous lawsuits in Illinois." *Id.* at 679. The dissent concluded that the *Dendrite/Cahill* test "adds a crucial extra layer of protection to anonymous speech" and is "designed to protect the identity of those participating in non-actionable anonymous speech" because "[o]nce an anonymous speaker's identity is revealed, it cannot be 'unrevealed.'" *Id.*