D R A F T : N O T F O R D I S T R I B U T I O N

Internet Anonymity, Reputation, and Freedom of Speech: the US Legal Landscape

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Introduction

The ability to "speak" anonymously has long been a valued component of United States political discourse [1]. From the early days of anonymous pamphleteering, courts and scholars have recognized that sometimes speech will be less hindered and be more candid where there is no demand for the speaker to identify himself. In fact, courts in the United States have explicitly recognized the right to speak anonymously as extending to speech on the Internet [2]. But not all anonymous Internet posts are speech, and not all speech is beneficial speech. In fact, some postings might fall into the criminal area, while some might be defamatory. Others, while not outright defamatory, might yet be injurious to the reputations of individuals and corporations.

This paper addresses three major concerns and analyzes the legal responses to those concerns in the United States: (a) the protection of individual and corporate reputation in the face of online anonymity, (b) the protection of online anonymity in the face of legal challenges, and (c) the effect the Internet has on jurisdiction in online anonymity litigation. The paper approaches the analytical task by legal analysis, reviewing some of the state and federal laws regarding online anonymity passed in US legislatures, as well as court opinions addressing the subject. Where available, laws within an international context are also analyzed. The laws were accessed by a search of the Westlaw legal database using focused search query strings to address the three concerns.

Findings and Analysis

(a) Protection of individual and corporate reputation in the face of online anonymity

The inherent nature of the Internet enhances potential injury because online postings can do great and wide damage in a fairly short period of time [3]. Although anonymity is protected under the First Amendment to the US Constitution, the right to speak anonymously is not absolute [4]. Protection is not uniform and runs on a continuum from strongest to weakest. The strongest protection accrues to political speech [5], while arguably the weakest protection is for commercial speech. It is not always crystal clear which speech falls under what rubric, but where there is a clear case of defamation, the courts have allowed the aggrieved parties to obtain a subpoena to unmask the anonymity veil of posters. However, because of the fear of chilling speech, courts have been cautious in issuing such subpoenas [6]. Nevertheless, the courts have recognized that just as individuals have an interest in protecting their reputation, so too do corporations in protecting their proprietary interests and reputation [7]. A significant proportion of litigation brought by corporations has been the result of postings made on "gripe sites" complaining about a service or product [8]. The pendulum for this kind of "gripe" speech might swing more towards commercial speech than political speech.

In the traditional non-digital environment, corporations have been able to fairly easily identify targets for litigation. However, the increasing use of social media network by both individuals and groups to post their expressions far and wide is presenting new challenges. Partly because of the medium and partly because they are anonymous, these expressions can cause great harm in a very short period of time.

(b) Protection of online anonymity in the face of legal challenges

As we mentioned above, there is a long history of anonymity protection in American First Amendment jurisprudence. However, the right to speak anonymously is not absolute [9]. Where anonymous speech is used to advance some criminal enterprise, for example, it will not be protected. Where, on the other hand, the speech is considered political, it will have the strongest protection as a "shield from the tyranny of the majority," and will have considerably less protection if it is considered merely commercial [10]. But anonymity

can be challenged, and corporations are constantly trying to pierce the veil of anonymity especially where the reputation of the corporation is threatened.

Section 230 of the Communications Decency Act generally immunizes Internet Service Providers (ISPs) from liability for content on their servers that they have not created, so they can freely carry anonymous posts [11]. Aggrieved parties, however, try to get the identity of the posters by filing a lawsuit against the posting individuals and then trying to get subpoenas against ISPs to force them to reveal their identities. More and more, however, these kinds of suits have come to be seen as an attempt to silence critics, and have been labeled "Strategic Lawsuits Against Public Participation (SLAPP)". The response of legislatures across the United States has been to enact the so-called Anti-SLAPP laws, which provide a defendant with a weapon to fight a SLAPP suit. These laws, however, vary in their comprehensiveness from state to state, with California perhaps having the most comprehensive legislation [12]. In enacting its statute, California declared that its legislature has found that there is a

> disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances… it is in the public interest to encourage continued participation in matters of public significance, and… participation should not be chilled through abuse of the judicial process [13].

The California law provides a special motion to strike in suits against persons exercising their constitutional right of petition and free speech [14]. This motion is frequently granted, but does not reduce the number of cases brought in that state. California has, however, made a legislative finding of a "disturbing" abuse of the special motion provision, and thus making it necessary to exempt certain parties from the application of the special motion [15].

Legislation in other states, for example Pennsylvania, is very narrowly-tailored to provide immunity to only those who complaining to a government agency about the enforcement or implementation of environmental law [16]). Arizona protects the "exercise of the right

of petition" by any written or oral statement falling within the free speech constitutional protection, made as part of an initiative, referendum or recall effort before a governmental body in connection with an issue under consideration or review, and is made for the purpose of influencing a governmental action [17].

Anti-SLAPP laws provide an expedited process for the defendant to bring a motion to strike the case, stays all discovery during the consideration of the motion, and awards the defendant attorney fees and costs [18]. In order to allow unmasking of anonymity, courts have also required the showing of a valid, good faith case by the plaintiff, as well as sufficient justification for the unmasking request [19].

An attempt has been made to pass federal legislation to address the problem of variances in Anti-SLAPP statutes among the states. Congress introduced the "Citizens Participation Acts of 2009" during the 111th Congress to protect "first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called 'SLAPPs.' In introducing the legislation in the House, Congress made the following "findings":

> The Congress finds and declares that—
>
> > (1) the framers of our Constitution, recognizing participation in government and freedom of speech as inalienable rights essential to the survival of democracy, secured their protection through the First Amendment to the United States Constitution;
> >
> > (2) the communications, information, opinions, reports, testimony, claims and arguments that individuals, organizations and businesses provide to the government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs, the credibility and trust afforded government, and the continuation of America's representative democracy;

(3) civil lawsuits and counterclaims, often claiming millions of dollars in damages, have been and are being filed against thousands of individuals, organizations, and businesses based upon their valid exercise of the rights to petition or free speech, including seeking relief, influencing action, informing, communicating, and otherwise participating with government, the electorate, or in matters of public interest;

(4) such lawsuits, called Strategic Lawsuits Against Public Participation or SLAPPs, are often ultimately dismissed as groundless or unconstitutional, but not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(5) it is in the public interest for individuals, organizations and businesses to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(6) the threat of financial liability, litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless lawsuits seriously impacts government, interstate commerce, and individual rights by significantly chilling public participation in government, public issues, and in voluntary service;

(7) SLAPPs are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets;

(8) while some courts and State legislatures have recognized and discouraged SLAPPs, protection against SLAPPs has not been uniform or comprehensive…[20].

As we have discussed above, speech on the Internet, as speech in general, does not enjoy absolute protection. In defamation cases, corporations may obtain subpoenas against ISPs to force the disclosure of the identity of a person who has posted on the Internet. However, because of the fear of chilling speech on the Internet, courts are employing a cautious approach when considering whether to issue such subpoenas to unmask Internet anonymity [21]). *Dendrite International v. Doe No. 3* [22]) sought to balance the First Amendment right to speak anonymously with the right of a corporation to protect its proprietary interests and reputation, and in the process developed some guidelines for trial courts to consider when facing requests from plaintiffs for issuing an unmasking subpoena. According to *Dendrite*, the plaintiff must

> (a) undertake efforts to notify the anonymous posters they are subject of a subpoena
>
> (b) withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application
>
> (c) identify and set forth the exact statements purportedly made by each anonymous poster that… allegedly constitutes actionable speech
>
> (d) set forth a prima facie cause of action
>
> (e) produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant [23].

The *Dendrite* guidelines are applicable to anonymous Internet posters who are parties to a lawsuit. For anonymous Internet users who are not parties to an underlying lawsuit, the *Doe 2 v. 2TheMart.com* [24] court declared that the standard for disclosing identity of a non-party witness must be higher, because the litigation can go on without disclosing their identity, as opposed to where they are defendants and the case cannot proceed without them. The court stated that it is only in the exceptional case where the First Amendment rights are outweighed by the compelling need for discovery that this type of non-party disclosure is appropriate. In making its decision, the court adopted a four-factor standard for evaluating whether to issue a civil subpoena to unmask anonymity, whether:

(1) the subpoena seeking the information was issued in good faith and not for any improper purpose,
(2) the information sought relates to a core claim or defense,
(3) the identifying information is directly and materially relevant to that claim or defense, and
(4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source [25]).

Where does this leave the corporation? We noted above that commercial speech, while protected under the Constitution, does not enjoy the same strong level of First Amendment protection as political speech. Much of the online speech that has resulted in litigation has been the kind that comes out of "griping" about products or services. This is probably characterized more as commercial, rather than political speech. The U.S. Court of Appeals for the 9th Circuit has signaled that the guidelines within the context of political speech may be too restrictive applied to commercial speech, and that the nature of the speech should be the driving factor in selecting a balancing standard [26]. This probably means that perhaps over time there will be certain speech that is so purely commercial that it will not enjoy the full protection of the Anti-SLAPP statutes, especially where the corporation is able to make a prima facie case of defamation [27].

Many of the reasons corporations sue anonymous posters are not going away, and so we can expect that suits will continue regardless of Anti-SLAPP statutes. Lidsky [28] offers several reasons why a corporation decides to bring suit against anonymous posters. Chief among these turns out to be a public relations campaign—fear that stocks will be driven down by negative comments, and that the corporation needs to counter the negative message by offering an alternative version of the comments. This is so because failure to respond may be seen as an admission of the veracity of the comments. Responding sends a message of strength and stability to the shareholders [29]. As we mentioned above, the other reason is to silence the critic—this may stem the tide of the offensive and damaging comments. A grant of a subpoena may also help to uncover the identity of the critic, who may sometimes be an insider.

The European Union, in its European Preparatory Acts of 2010 [30] specifically refers to anonymity on the Internet as something that is important and to be protected, and that Internet users should be provided privacy-enhancing tools to help protect it. However, the European Union has also recognized the challenges of anonymity, especially when protecting children on the Internet [31].

(c) Effect of the Internet on jurisdiction in online anonymity litigation

Jurisdiction is a major issue in any discussion of the Internet and the law. While the Internet is global, the law is not [32]. For operators of websites and Internet Service Providers, it may in some cases be easy to establish personal jurisdiction within the Due process Clause of the US Constitution. Some factors to look into include the degree of interaction with the forum location. The courts in the US examine whether there are sufficient minimum contacts between the non-resident defendant and the forum state. General personal jurisdiction is established by looking to see whether there is continuous and systematic contacts with the forum state. Specific personal jurisdiction is found where a cause of action has a substantial connection with the instate activities of the defendant. It is not so easy, however to establish personal jurisdiction over individual users, especially when they may have IPs in one country but are citizens of another.

References

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