MAYER·BROWN

How Anonymous is "Anonymous"?

Privacy Rights, Responsibilities and Obligations

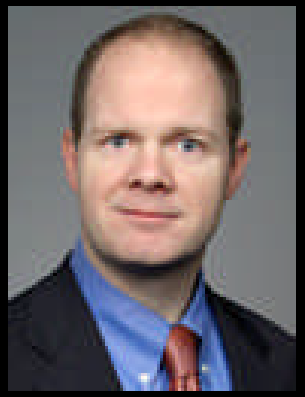
Reginald R. Goeke
Partner
+1 202 263 3241
rgoeke@mayerbrown.com

Charles E. Harris, II
Partner
+1 312 701 8934
charris@mayerbrown.com

February 2012

How Anonymous is "Anonymous"?

Privacy Rights, Responsibilities and Obligations



Reginald Goeke
Partner, Washington, DC
+1 202 263 3241
rgoeke@mayerbrown.com

Charles E. Harris , II
Partner, Chicago
+1 312 701 8934
charris@mayerbrown.com

Overview of Presentation

- Courts are increasingly faced with actions seeking identification of anonymous Internet posters.
- Courts evaluate these claims by balancing the rights of the plaintiff against the First Amendment right of the defendant/poster. In doing so, courts typically apply multifactor tests that consider, among other things:
  - the strength of the plaintiff's claim,
  - the need to identify the poster, and
  - the nature of the speech at issue.
- The standard applied by courts varies considerably by jurisdiction, and also based on the type of claims at issue.
- Given the variation by jurisdiction, and the evolving state of the law, potential plaintiffs and defendants can take a number of steps to improve their litigating position.

Courts Have Historically Protected Anonymous Speech

Supreme Court Precedent

- *Talley v. California*, 362 U.S. 60 (1960)
- *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)
- *Buckley v. American Con. Law Found.*, 525 U.S. 182 (1999)
- *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150 (2002)

Historical Precedent

- *Common Sense*
- *Federalist Papers*

Policy Arguments

- Shield speaker from tyranny of the majority
- Provide for authorial autonomy
- Anonymity fosters communication and open debate

But, Policy Favoring Anonymity Has Limits

Courts are willing to identify anonymous posters to effectuate strong legal rights

"Where speakers remain anonymous there is . . . A great potential for irresponsible, malicious, and harmful communication, and . . . lack of accountability . . . . This is particularly true where the speed and power of Internet technology make it difficult for the truth to 'catch up' to the lie."

Quixtar Inc. v. Signature Mgmt. Team, 566 F. Supp. 2d 1205 (D. Nev. 2008)

Courts evaluate rights in many contexts, including:

- Defamation Claims
- Tortious Interference Claims
- IP claims (copyright and trade secret claims)
- Requested Discovery from third party witnesses

What is the context of disputes?

Third Party Subpoenas

- "TMRT is a [P]onzi scam that Charles Ponzi would be proud of . . . The company's CEO, Magliarditi, has defrauded employees in the past."
- "They were dumped by their accountants . . . These guys are friggin liars"

Doe v. 2TheMart Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001)

- *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010) (subpoena to website owner to identify blog posters who may be witnesses in employment discrimination claim)
- *Mobilisa, Inc. v. Doe*, 217 Ariz. 103 (Ariz. Ct. App. 2007) (seeking identity of author of anonymous email regarding Mobilisa management team)
- *Lefkoe v. Jos. A. Bank Clothiers, Inc.,* 577 F.3d 240 (4th Cir. 2009) (upholding order permitting deposition of anonymous speaker in securities class action) ("a higher standard should apply when a subpoena seeks the identity of an anonymous Internet user who is not a party to the underlying litigation.").

What is the context of disputes?

Intellectual Property

- *Sony Music Entm't v. Does 1-40,* 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (Action by Sony against 40 "Does" allegedly using peer-to-peer network to distribute copyrighted music).
- *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 U.S. Dist. LEXIS 23560 (S.D.N.Y. 2004) (action by recording companies against peer-to-peer network to distribute copyrighted music).
- *Art of Living Found. v. Does*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal. Aug. 10, 2011) (permitting disclosure of identity of poster in copyright and trade secret claim)

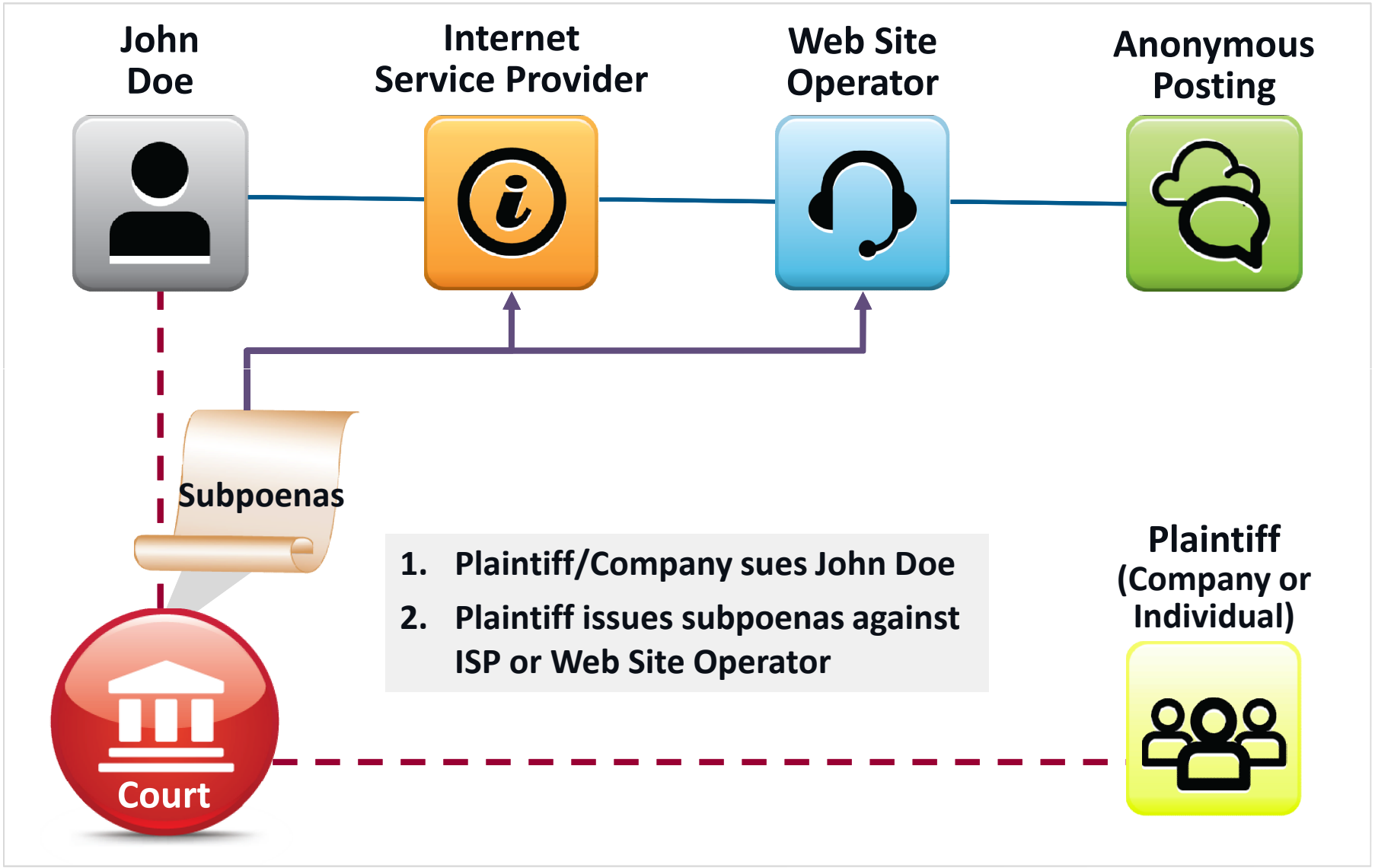
Plaintiffs more successful in copyright infringement matters.

What is the context of disputes?

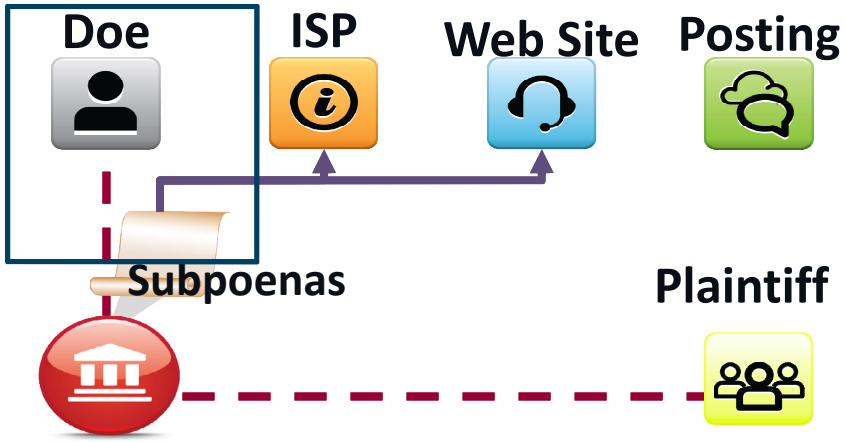
Defamation

- *Dendrite Int'l, Inc. v. John Doe, No. 3*, 342 N.J. Super. 134 (N.J. App. Div. 2001) (denying discovery of anonymous poster where plaintiff failed to show harm from alleged defamatory statements)
- *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) (dismissing Cahill's defamation claim where Cahill could not show statements were defamatory)
- *In re Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487 (9th Cir. Jan. 7, 2011):
  - Permitting disclosure of identity where Quixtar alleged that team orchestrated an Internet smear campaign against Quixtar
  - Statements included: "Quixtar currently suffers from systemic dishonesty," "Quixtar . . . Facilitates the systematic noncompliance with the FTC's Amway rules," and "Quixtar refused to pay bonuses to IBOs in good standing."

How Does This Work In Practice?

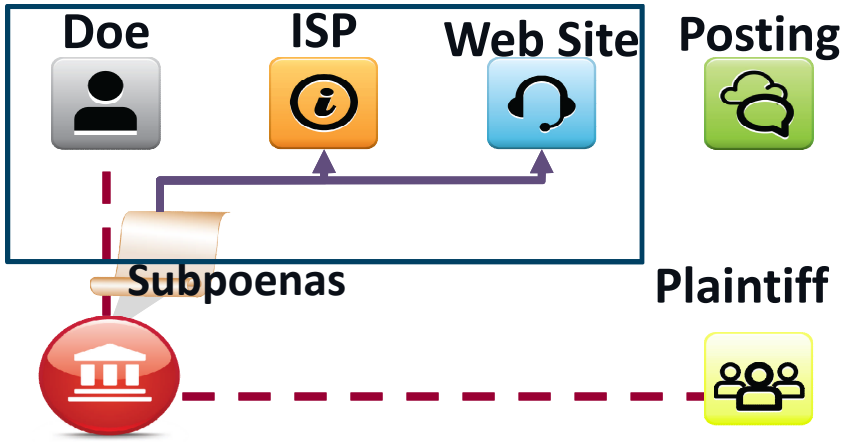


How does John Doe find out about the suit?



- Most courts require some effort to notify John Doe.
- Usually, ISP or OSP notify John Doe directly:
  - Terms of Service may require notice;
  - ISP/OSP have business interest to ensure John Doe receives notice.
- Absent direct notification, courts will require plaintiff to attempt best means of notice:
  - Through the same medium (e.g., posting, email);
  - Through publication.

Who Defends Against Subpoena?



- Courts have found that John Doe has standing to oppose subpoena even if issued to ISP or OSP.
- Courts have held that ISP and OSP have standing to assert interests of John Doe in opposing subpoena.
- Some ISPs/OSPs have opposed the subpoenas themselves.
- Often, John Doe moves to quash subpoena through attorney, and also moves to appear anonymously.

How Do Courts Decide?

Balance of Rights

John Doe

Company or Individual

Plaintiff

First Amendment Rights

- Nature of the communication

Need for Identity

- Strength of claim
- Specificity of evidence
- Relevance of information sought
- Alternative means to obtain information

Strength of Case

How Strong Must the Case Be?

Good Faith Belief

- *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (Va. Cir. Ct. 2000) (defamation).

Survive a Motion to Dismiss

- *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (trademark infringement).

How Strong Must the Case Be?

Prima Facie Case

- *Dendrite International, Inc. v. Doe*, 775 A. 2d 756 (N. J. Super. Ct. App. Div. 2001) (defamation).
- *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).
- *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (copyright).
- *Art of Living Found. v. Does*, No. C10–05022 LHK (HRL), 2011 WL 3501830 (N.D. Cal. Aug 10, 2011) (copyright).

Able to Survive SJ Motion

- *Doe No. 1 v. Cahill*, 884 A. 2d 451 (Del. 2005) (defamation).
- *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011) (lower court applied *Cahill* standard; 9th Cir. thought may be too strict, but not clear error).

Strength of Case: Other Issues

Some Courts require allegations to be specific:

- *In re Subpoena Duces Tecum to America Online, Inc.,* 52 Va. Cir. 26 (Cir. Ct. 2000) (defamation).
- *Dendrite International, Inc. v. Doe,* 775 A. 2d 756 (N.J. Super. Ct. App. Div. 2001) (defamation).

Many courts do not require proof of malice or other facts that require knowledge of the identity of the speaker:

- *Mobilisa, Inc. v. Doe 1,* 170 P. 3d 712 (Ariz. Ct. App. 2007).

Identifying Doe

Need for the Court to Assist

Relevance of Identity

- *In re Subpoena Duces Tecum to America Online, Inc.*,
  52 Va. Cir. 26 (Cir. Ct. 2000)
  (subpoenaed information must be "centrally needed to advance the plaintiff's claim.")

- *Doe v. 2TheMart Inc.*,
  140 F. Supp. 2d 1088 (W.D. Wash. 2001)
  (information must be "directly and materially relevant to a core claim or defense.")

- *Autoadmit.com*,
  561 F. Supp. 2d 249 (D. Conn. 2008) **(must be a "central need" for subpoenaed information)**

Exhaustion of Alternative Means

- *Columbia Ins. Co. v. Seescandy.com*,
  185 F.R.D. 573 (N.D. Cal. 1999)
  (trademark) (plaintiff must "identify all previous steps taken to locate the elusive defendant.")

- *Doe v. 2TheMart Inc.*,
  140 F. Supp. 2d 1088 (W.D. Wash. 2001)
  (plaintiff must show that information to establish or disprove claim is unavailable from any other source)

Balancing of Interests

First Amendment vs.

Legal Rights

Some Courts Apply Test

- *Dendrite International, Inc. v. Doe,*
  775 A. 2d 756 (N. J. Super. Ct. App. Div. 2001)
  (court must "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure.")

- *Mobilisa, Inc. v. Doe*,
  217 Ariz. 103 (Ariz. Ct. App. 2007)
  (balancing test to factor in "the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker, the need for the identity of the speaker to advance the party's position, and the availability of alternative discovery methods.")

- *Autoadmit.com*,
  561 F. Supp. 2d 249 (D. Conn. 2008) **("Balancing analysis ensures that *First Amendment* rights . . . are not lost unnecessarily," and that discovery not used to harass or silence critics)**

Others Reject Balancing Test

- *Doe No. 1 v. Cahill*,
  884 A. 2d 451 (Del. 2005)
  (balancing test "adds no protection above and beyond that of summary judgment test and needlessly complicates the analysis.")

Balancing test explicitly applied only in minority of cases.

Recent Developments

Nature of the Speech

- Several recent decisions have focused on the "nature of the speech" when deciding the proper disclosure standard to apply.
  - *E.g., Art of Living Foundation v. Does 1-10*, No. 10-CV-05022-LHK, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011); *S103, Inc. v. Bodybuilding.com, LLC,* No. 10-35308, 2011 WL 2565618 (9th Cir. June 29, 2011).

- A strict disclosure standard may be applicable where the defendant's speech falls into categories of speech that have traditionally been afforded full protection:
  - *E.g.*, political, religious or literary speech.

Nature of the Speech

In cases involving traditionally less-protected categories of speech, such as commercial speech, a less-protective standard for disclosure should apply

- Courts have said that the *Cahill* "bar extends too far" in the context of less-protected speech but they have not clearly defined the less-protective standard that should apply in these circumstances.
  - *E.g., In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011).

Allegedly Defamatory Speech on the Internet

Courts have set a high standard for identifying an anonymous Internet poster when allegedly defamatory speech is published on an Internet message board or similar forums

Examples:

"Seems like you're very willing to invite a man you only know from the internet [sic] over to your house—have you done it before, or do they usually invite you to their house"

- *Stone v. Paddock Publications, Inc.*, No. 1-09-3386, 2011 WL 5838672 (Ill. App. Ct. Nov. 17, 2011).

Allegedly Defamatory Speech on the Internet

More Examples:

"The two top people at [USA Technologies, Inc.] have skimmed over $30M from the hugely unprofitable venture. Management, with little to nothing at risk, promotes a 'story' to lure investors and then the board approves massive pay packages which are in no way tied to company performance."

- *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010).

"Officer Masseti broke into a home thru [sic] a basement window (without a warrant) and arrested the residents. The case was thrown out of court, and no discipline given to officer. Why?"

- *Varrenti v. Gannett Co., Inc.*, 929 N.Y.S. 2d 671 (N.Y. Sup. Ct. 2011).

Actions Not Limited to Speech-Based Claims

More plaintiffs are now filing actions where the underlying claims are:

- Tortious interference
- Copyright infringement
- Misappropriation of trade secrets

Court have generally applied *Dendrite/Cahill*-type disclosure approaches in deciding whether to unmask an anonymous Internet user in these actions.

Actions Not Limited to Speech-Based Claims

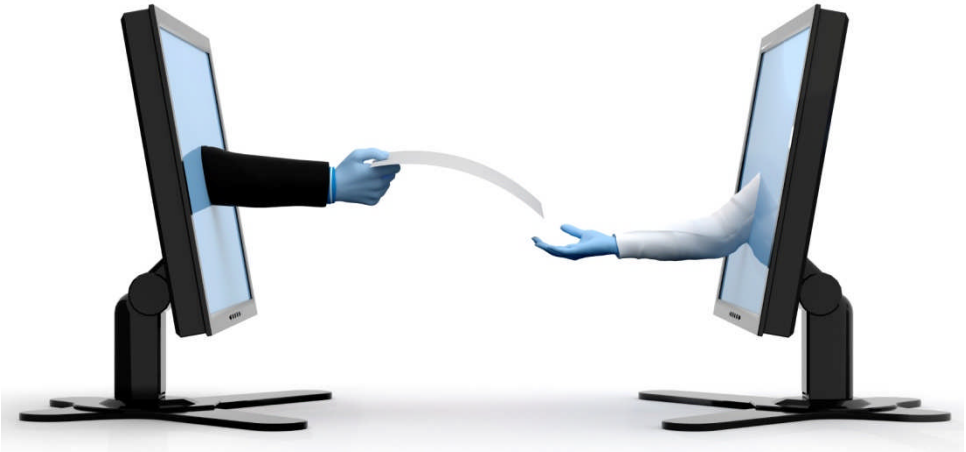
- Plaintiffs have been particularly successful in obtaining the names of anonymous Internet users in actions alleging colorable copyright infringement claims.
- These matters generally concern plaintiffs seeking to indentify anonymous Internet users who shared files over peer-to-peer networks as opposed to speech-based claims.

Actions Not Limited to Speech-Based Claims

Courts have said that peer-to-peer file sharing is "speech" that is protected by the First Amendment:

"Copyright infringement is not protected by the First Amendment, and in order to protect one's interest in a copyright, a 'defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims.'"

- *Third Degree Films, Inc. v. Does 1-2010*, Civ. No. 4:11 MC 2, 2011 WL 4759283 (N.D. Ind. Oct. 6, 2011).



Standard Not Applicable in Criminal Matters

A least one court has said that anonymous defendants in criminal matters in which the government is seeking disclosure are not entitled to invoke the strict disclosure approaches.

An individual who believes that an government subpoena issued during an investigation will infringe his First Amendment rights must make a "prima facie showing of arguable first amendment infringement" after which the burden shifts to the government to show "that the information sought . . . is rationally related to a compelling government interest" and "the government's disclosure requirements are the least restrictive means of obtaining the desired information."

– *Doe v. SEC, No. C 11-80209-CRB, 2011 WL 5600513 (N.D. Cal. Nov. 17, 2011).*

Standard Not Applicable in Criminal Matters

Two Main Reasons:

- The governmental interests in criminal matters are "sufficiently compelling to outweigh" the infringement of a private citizen's First Amendment rights.

- It would be inappropriate to apply a standard that would "cut off the investigative legs of federal crime enforcement agencies."

Practical Considerations For Companies

Deciding Whether to Seek the Identity of an Anonymous User

- Whether you are willing to draw public attention to the statement or matters at issue;
- Whether you need to identify an anonymous poster in order to protect a legitimate pecuniary or proprietary interest rather than the goal simply being to harass or silence the poster;
- Whether you can allege a colorable claim for trademark or copyright infringement as opposed to simply alleging a claim for defamation;
- Who you should sue? Have no indentifying information about an anonymous Internet user could lead to jurisdictional issues.

Deciding Whether to Seek the Identity of an Anonymous User

Consider the strengths of your case on the merits:

- The disclosure standard applied in the relevant jurisdiction (*e.g.*, *Dendrite-Cahill* standard);
- Which jurisdiction provides the substantive law;
- The requisite defamation elements in that jurisdiction (or the elements for the other underlying torts);
- Whether the plaintiff can provide evidence supporting each element;
- The nature of speech and context of the complained-of statement;
- Whether the plaintiff would be required to show actual malice (*i.e.*, knowledge of falsity or reckless disregard of falsity);
- Whether the statement is subject to a privilege;
- Whether the plaintiff can allege actual damages;
- Whether the plaintiff company is willing to draw public attention to the statement.

Companies That Have Been Subpoenaed

Decide whether you want the public to view your company as one that protects the privacy of anonymous Internet users.

Companies that generate profits from Internet users interacting with their website have an incentive to protect the identities of Internet users because a perception among these users that the company has failed to adequately protect their anonymity could lead to lower website traffic.

Companies That Have Been Subpoenaed

- If you are a company that is not particularly invested in protecting the anonymity of Internet users you may want to include a disclosure similar to the following on your website or in service agreements with customers:
  - *E.g.*, "We may, where permitted or required by law, provide personal identifying information to third parties . . . without your consent . . . "[t]o comply with court orders, subpoenas, or other legal or regulatory requirements."
- Consider the strengths of your case on the merits

Q & A

How Anonymous is "Anonymous"?

Privacy Rights, Responsibilities and Obligations

Reginald R. Goeke
Partner
+1 202 263 3241
rgoeke@mayerbrown.com

Charles E. Harris, II
Partner
+1 312 701 8934
charris@mayerbrown.com