Actions to Identify Anonymous Internet Posters on the Rise

Technology that provides a platform for Internet users to express their views on a range of topics has proliferated over the past several years. Many of these technologies, such as financial message boards, blogs, social networking websites and e-mail, allow users, or "posters," to express themselves anonymously by using pseudonyms traceable only through the hosts of the sites or their Internet service providers. As such speech has increased, so to have actions against Internet-based companies—such as Yahoo!, Facebook, Twitter and Microsoft—seeking to discover the identity of someone who posted allegedly defamatory material. But courts have adopted a standard that creates challenges to obtaining this information.

Although some plaintiffs bring defamation actions to redress a legitimate injury to reputation, courts have recognized that the primary goal of many plaintiffs in the "new breed" of defamation actions is to ridicule, harass and silence an anonymous speaker and hopefully silence others like him or her as well.[1] Internet-based companies have an incentive to protect their users from such baseless and harmful attacks as many of these companies generate a significant portion of their revenue through users browsing and interacting with their website. A perception among Internet users that a company has failed to adequately protect their anonymity would likely lead to lower website traffic and ultimately adversely impact that company's revenue. On the other hand, individuals and companies may sometimes need to identify an anonymous poster in order to protect their legitimate pecuniary and proprietary interests against defamatory speech posted on the Internet.

The US Supreme Court has held that the First Amendment protects a person's right to speak anonymously and that those protections fully extend to speech on the Internet.[2] The right to speak anonymously, however, is not absolute. An anonymous speaker, like a known one, has no First Amendment right to engage in defamation,[3] and parties certainly have a right to seek redress for defamatory communications. In light of these competing interests, courts have sought to adopt an approach that appropriately balances a person's right to speak anonymously on the Internet against another person's right to protect his or her reputation.

One approach, adopted by the New Jersey Supreme Court in *Dendrite International Inc. v. Doe No. 3*,[4] and later modified by the Delaware Supreme Court in *Doe v. Cahill*,[5] has become the benchmark that courts consider when deciding whether to reveal the name of an anonymous Internet poster who allegedly defamed a plaintiff. This is now commonly known as the *Dendrite-Cahill* standard.

The *Dendrite* court adopted a four-part test. A plaintiff must (i) provide sufficient notice to anonymous posters that they are the subject of an application to disclose their identity; (ii) identify the exact statements that purportedly constitute actionable speech; and (iii) provide the court with sufficient evidence to establish a *prima facie* case. Thereafter, (iv) the court must balance the

defendant's First Amendment right against the strength of the prima facie case presented.[6]

The *Cahill* court adopted a modified *Dendrite* standard consisting only of *Dendrite* requirements one and three: a defamation plaintiff must make reasonable efforts to notify the defendant about the action and must support his or her claim with *prima facie* evidence sufficient to defeat a motion for summary judgment.[7] The *Cahill* court said that the other two *Dendrite* requirements were subsumed in the summary judgment inquiry.[8]

The most recent decisions considering whether to allow discovery into an anonymous Internet poster's identity have adopted approaches consistent with the *Dendrite-Cahill* standard.[9] For instance, in *USA Technologies, Inc. v. Doe*,[10] the Northern District of California applied a "streamlined version" of the *Dendrite* standard in quashing a subpoena seeking the identity of an anonymous poster. Under that standard, a plaintiff must, among other things, adduce competent evidence to support a *prima facie* defamation claim.[11] The court found that the plaintiff technology company failed to satisfy this requirement because the statements someone posted on its Yahoo! message board—that its CEO was "fleecing humanity" and a "known liar," and that the company's practices were "legalized highway robbery" and a "soft Ponzi" scheme—constituted mere "rhetorical hyperbole" and were thus non-actionable.[12]

The Western District of Washington also adopted a "*Dendrite*-style test" requiring a plaintiff to produce *prima facie* evidence to support all of the elements of a defamation claim.[13] Applying this standard, the court quashed a subpoena seeking the identity of an anonymous owner and operator of an Internet "gripe site" dedicated principally to disparaging the plaintiff marketing company.[14]

Courts that have not adopted an approach consistent with *Dendrite-Cahill* have adopted approaches that could be considered just as demanding. For example, in *Maxon v. Ottawa Publishing Co.*,[15] the Appellate Court of Illinois recently held that a petition seeking the identity of an anonymous defamation defendant must (i) be verified; (ii) state, with particularity, facts that would establish a cause of action for defamation; and (iii) seek only the identity of the potential defendant. Also, (iv) the court must hold a hearing at which it determines that the petition sufficiently states a defamation claim. The petition is subjected to the same level of scrutiny afforded the sufficiency of a complaint under Illinois's motion to dismiss statute.[16] The court applied this standard in granting the plaintiffs' petition, which sought the identity of several anonymous posters who suggested that the plaintiffs bribed public officials. The court found that the complained-of statements "clearly [went] beyond rhetorical hyperbole and opinion" and were therefore actionable.[17]

The *Dendrite-Cahill* standard and similar approaches have proven to be a significant obstacle to defamation plaintiffs obtaining the identity of anonymous posters. Both the *Dendrite* and *Cahill* courts declined to unmask an Internet poster,[18] and in decisions published since *Cahill*, only a few courts, such as *Maxon*, have ordered that the identity of a poster be revealed.[19] So it appears that courts are carefully reviewing requests to discover anonymous Internet posters' identities and giving significant consideration to these posters' constitutional right to speak anonymously.

When faced with a legal action seeking the identity of an anonymous Internet poster, a company should first determine whether it actually has information that could be used to identify the poster. If so, the company should then consider the following:

- The standard applied in the relevant jurisdiction when considering whether to reveal the identity of an anonymous poster;
- Which jurisdiction provides the substantive law;

- The requisite defamation elements in that jurisdiction;
- Whether the plaintiff can provide evidence supporting each element;
- The defamatory character[20] 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; and
- Whether the company is willing to draw public attention to the statement.

After considering these factors, the company will then be able to properly assess whether to challenge the action.

An individual or company deciding whether to seek the identity of an anonymous Internet poster's identity should consider these same factors, plus: (i) whether the person or company that has identifying information for the anonymous poster is readily identifiable; (ii) whether the anonymous poster can be identified in a specific manner (e.g., by his or her "screen name"); (iii) whether the exact poster of the allegedly defamatory statement can be clearly identified; and (iv) whether the statement can be set forth with specificity.

Endnotes

[1] *See, e.g., Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (quoting Lyrissa B. Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 Duke L.J. 855, 890 (2000)).

[2] *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-51, 357 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

[3] *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) ("Libelous utterances [are] not . . . within the area of constitutionally protected speech . . . ."); *Cahill v. John Doe-Number One*, 879 A.2d 943, 950 (Del. Super. Ct. 2005).

[4] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[5] 884 A.2d 451.

[6] *Dendrite*, 775 A.2d at 760-61.

[7] *Cahill*, 884 A.2d at 460-61. The court also recognized that it was unreasonable to expect a plaintiff at an early stage in the litigation to prove actual malice where this condition is required to sustain a defamation claim (*e.g.*, where the plaintiff is a public figure). Thus, it found that a plaintiff must only introduce evidence "for all elements of a defamation claim *within the plaintiff's control*." *Id*. at 463.

[8] *Id*. at 461.

[9] *See, e.g., Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 192-93 (N.H. 2010); Solers, Inc. v. Doe, 977 A.2d 941, 954 (D.C. 2009*); Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 450-51 (Md. 2009); *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 243-45 (Cal. Ct. App. 2008); *Mobilisa*, 170 P.3d at 719-21; *Reunion Indus., Inc. v. Doe* 1, 80 Pa. D. & C.4th 449, 453-56 (Pa. Ct. Com. Pl. 2007); *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328, 335-42 (Pa. Ct. Com. Pl. 2004).

[10] 713 F. Supp. 2d 901, 907 (N.D. Cal. 2010).

[11] *Id.*

[12] *Id*. at 905-06, 908.

[13] *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1215 (W.D. Wash. 2010).

[14] *Id.* at 1212-13, 1218.

[15] 929 N.E.2d 666, 673 (Ill. App. Ct. 2010).

[16] *Id.* at 674; *see also Cohen v. Google*, 887 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 2009) (requiring the plaintiff's petition seeking the identity of an anonymous blogger to "demonstrate[ ] . . . a meritorious cause of action and that the information sought is material and necessary to the actionable wrong").

[17] *Id*. at 677-78.

[18] *See Dendrite*, 775 A.2d at 771-72; *Cahill*, 884 A.2d at 467-68.

[19] *Compare SaleHoo Group, Ltd*, 722 F. Supp. 2d 1218, *USA Techs., Inc.*, 713 F. Supp. 2d at 909, *Indep. Newspapers*, 966 A.2d at 456 (denial of motion to quash reversed), *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 133-34 (D.D.C. 2009) (dismissing complaint), *Krinsky*, 72 Cal. Rptr. 3d at 251-52 (denial of motion to quash reversed), and *Reunion Indus.*, 80 Pa. D. & C.4th at 456-57 (motion for protective order granted) with *Maxon*, 929 N.E.2d at 677-78, and *Cohen*, 887 N.Y.S.2d at 427-30 (petition granted).

[20] The "defamatory character" includes whether the statement is obviously defamatory on its face, whether the statement is true or substantially true, whether the statement constitutes an expression of opinion and whether the

statement is reasonably capable of an innocent construction.

For more information about the topics addressed in this Legal Update, please contact any of the following lawyers.

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

Victoria D. McCoy
+1 312 701 8994
VMcCoy@mayerbrown.com