

Unmasking Anonymous Posters To Your Website

Kathleen A. Kirby

WILEY REIN LLP

Businesses are increasingly faced with a “new” kind of subpoena – one that seeks the identity of persons who have posted information anonymously to the company’s website, blog or chat room. Typically, these subpoenas seek the names, addresses and IP addresses of commenters. The reasons for doing so vary. Perhaps a plaintiff – who is barred by Section 230 of the Communications Act from suing the website – wants to name an anonymous poster as a defendant in a libel suit. Sometimes, prosecutors or law enforcement authorities may seek information about criminal matters or find potential witnesses.

While the law in this area is in its nascency, courts are gradually developing tests to determine when to grant these “John Doe” subpoenas. State courts and federal district courts have come up with a variety of approaches to subpoenas seeking to unmask anonymous speakers, some more protective of anonymity than others. Neither the Supreme Court nor any federal appellate court has weighed in on the issue, although the Supreme Court clearly has endorsed the notion that the First Amendment confers upon speakers the right to do so anonymously.

Certain companies have chosen to fight subpoenas seeking the identities of anonymous posters. In a case out of Pennsylvania, *Enterline v. Pocono Medical Center*, the *Pocono Record* published an article about a lawsuit for harassment and hostile work environment against a woman’s former employer. Certain anonymous posters who commented on the story claimed to have information about the plaintiff’s allegations. She subpoenaed the newspaper looking to identify these commenters. The district court judge denied the request, stating that disclosing the commenters’ identities would violate the First Amendment, and that the plaintiff could obtain such information through other means. Moreover, the court found that the newspaper had standing to advocate on behalf of the anonymous commenters.

Similarly, a Maryland court allowed a news website to withhold the identities of the anonymous commenters. In *Brodie v. Independent Newspapers, Inc.* the plaintiff subpoenaed a website looking for identifying information about individuals who posted allegedly defamatory comments. The trial court refused to quash the subpoena and ordered the news organization to produce the information. On appeal, that decision was reversed. The appellate court adopted a

Kathleen A. Kirby represents media clients, including major radio and television group owners, on regulatory and transactional matters before the Federal Communications Commission (FCC). She has additional expertise in newsgathering, content regulation and First Amendment issues. She can be reached at (202) 719-3360.

Please email the author at kkirby@wileyrein.com with questions about this article.



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five-part test, one first used by a New Jersey court in 2001, that, among other things, requires the court to balance the commenter’s free speech rights against the strength of the defamation case presented by the plaintiff. As the court noted, “posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity” and that, in finding a balance, “setting too low a threshold would inhibit free speech on the Internet.”

The District of Columbia Court of Appeals followed suit in *Solers v. John Doe* holding that a plaintiff must overcome a high threshold before obtaining the identity of an anonymous individual who sent allegedly injurious information over the Internet. The court ruled that before trial judges order disclosure of an anonymous speaker’s identity, they must conduct a five-part analysis to:

- 1) Ensure that the plaintiff has adequately pleaded the elements of the defamation claim.
- 2) Require reasonable efforts to notify the anonymous defendant.
- 3) Delay further action for a reasonable time to allow the defendant to come forward with a motion to quash.
- 4) Require the plaintiff to provide evidence creating a genuine issue of material fact on each element of the claim that is within its control.
- 5) Determine that the information sought is important enough to enable the plaintiff to proceed with his lawsuit.

News organizations sometimes have invoked state shield laws to fight John Doe subpoenas. Generally, they argue that in the digital age, receiving information via an anonymous online commenter is no different from anonymous tips provided to newspaper reporters telephonically or in written form. In a recent Texas case, for example, a newspaper received a subpoena from law enforcement officials investigating the murder of a child asking for identifying information about five individuals who had posted comments accusing the arrested suspect of a history of child abuse. The newspaper challenged the subpoena, and the Texas court decided to protect the posters’ identities under the Texas shield law. Courts in Montana, Kentucky, Oregon and Florida have ruled similarly.

Conversely, in *Illinois v. The Alton Telegraph* an Illinois court upheld the issuance of a grand jury subpoena seeking information about anonymous newspaper blog commenters who had, the court concluded, relevant information about the defendant in a murder case. The newspaper argued that the Illinois reporter’s shield law protected the identity of the anonymous commenters, that the prosecutor had not shown that all other sources of information had been exhausted, and that the disclosure was essential to the protection of the public interest. The prosecutor argued that the commenters were not “sources” for the newspaper or its reporters because the comments were posted after the newspaper’s article on the topic was published, and the commenters were not “individuals who approved a reporter as an anonymous or confidential source.”

The court sided against the newspaper, arguing that the commenters were not “sources” for a story that had already been written and published, and therefore the identity of the commenters fell outside the protection of the shield law. But the court did recognize the importance of newspaper commenters and their potential to serve as future leads for reporters, and suggested that arguments that they should be protected should be directed to the state legislature.

It should also be noted that while certain companies have taken the position that they have a duty to conceal the names of people who post comments anonymously online, there is a line of thinking that anonymous posters should not be equated with confidential sources. In many cases, of course, comments posted are either hyperbole or pure opin-

ion. And no one attempts to verify the information, unlike with a confidential source. Some have suggested that protecting anonymous posters may result in the demise of source protections. Typically, a site’s online terms of use, terms of service, privacy policy or similar document will address the issue by reserving the right to provide information on website users in response to legal process, with no promise that they will even notify a user whose information is sought by law enforcement. In the Illinois case, for example, the newspaper’s website required commenters to read and assent to a user agreement stating that comments submitted to the website “are not private,” and its privacy policy stated that the newspaper reserved the right to disclose user information “when the law requires it.” And the court ultimately required it.

Certainly, this is an emerging area of First Amendment law in the Internet era. Anonymous speech of course has a revered place in our democratic society. So state and federal courts appear to be trending in the direction of providing that would-be plaintiffs must make at least a substantial legal and factual showing that his or her claim has merit before a court will unmask an anonymous or pseudonymous Internet speaker. Practically speaking, now might be a good time to evaluate your terms of service and privacy policies with potential subpoenas for anonymous posters in mind, including whether you will voluntarily notify any anonymous poster if your organization receives a subpoena. (If your company discloses such information in violation of these terms, for example, you could be sued for breach of contract.)

Partners Notes

New Wiley Rein Publication Addresses Obama Administration’s Environment, Energy Initiatives

In the third of a series of publications addressing environmental issues high on the Obama administration’s agenda, Wiley Rein’s Environment & Safety Practice has released a compilation of articles, “Obama Year Two: Environment and Energy Initiatives Accelerate.”

The timely new analysis covers a range of topics that are of particular interest to companies concerned about the regulatory environment.

Topics include:

- The fate of cap-and trade legislation;
- The aggressive expansion of Department of Energy (DOE) and Environmental Protection Agency (EPA) programs to encourage and, increasingly, enforce tighter energy efficiency standards;
- EPA’s significantly expanded list of enforcement targets;
- The complexities arising from attention to controlling exports of used electronic products; and
- The unfolding and, perhaps, coming resolution of the pesticide/Endangered Species Act (ESA) regulatory morass.

David B. Weinberg, chair of the group, commented, “While yesterday’s result in Massachusetts may force recon-

sideration of some of the administration’s high-profile initiatives, it is unlikely to affect ongoing regulatory activity. With policy appointees almost completely in place, 2010 is going to be a very active year.”

Wiley Rein represents a broad range of clients whose interests are likely to be impacted by the acceleration of President Obama’s vision for environmental and energy reform. Its lawyers are national experts on the actual operation of climate change-oriented regulatory programs and have expertise in rulemakings and enforcement actions in such areas as the National Emissions Standards for Hazardous Air Pollutants, National Pollutant Discharge Elimination System, Emergency Planning and Community Right-To-Know Act, Toxic Substances Control Act, Occupational Safety and Health Administration, Federal Food, Drug and Cosmetic Act, the Federal Insecticide, Fungicide and Rodenticide Act and the ESA. Wiley Rein attorneys are also involved daily in Consumer Product Safety Commission recalls and policy matters and are leading industry’s response to proposed new U.S. air transportation safety regulations that could adversely impact electronic product importation and distribution.