

Infospace Brief

Infospace urges Court to adopt balancing test

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re 2TheMart.com, Inc. Securities Litigation,	NO. MS01-016 Case Pending in C.D. Cal. SACV-9901127 DOC (AMx) NON-PARTY INFOSPACE, INC.'S MEMORANDUM IN RESPONSE TO MOTION OF J. DOE TO QUASH SUBPOENA ISSUED TO SILICON INVESTOR/INFOSPACE, INC. DECLARATION OF STEPHANIE CARPENTER
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IV. INTRODUCTION

This motion presents an important question of constitutional law: May the constitutionally protected speech, association, and privacy rights of non-litigant internet users be invaded by litigants without prior judicial review? InfoSpace, Inc., which owns and operates the siliconinvestor.com Web site (hereafter "InfoSpace" or "Silicon Investor"), submits that the answer to that question, mandated by decisions of the United States Supreme Court and other courts, is "No."

InfoSpace hosts online message boards on the siliconinvestor.com Web site where third parties may speak to each other—often anonymously—on a wide range of issues, including the financial markets, publicly traded companies, and other financial topics. InfoSpace receives a significant volume of subpoenas from litigants who seek identity information about the anonymous authors of messages posted to these message boards.

InfoSpace seeks clarification from this Court with regard to whether a litigant should be required to

make a threshold showing to a court of its need for a user's identity information, prior to seeking that information from InfoSpace. Given the important constitutional freedoms of speech and association as well as user privacy interests that are implicated by attempts to seek those users' identities, InfoSpace urges this Court to adopt a test that would require litigants to make a preliminary showing to a court—*before* issuance of a subpoena to InfoSpace—that their need for the identity information of online speakers outweighs those speakers' countervailing constitutional rights. A subpoena would issue to InfoSpace (or similar companies) only if the litigant first makes this preliminary showing.

A number of benefits would result from requiring litigants to establish that their subpoenas are issued in good faith and based on a legitimate need to discover relevant evidence. First, such a requirement likely would decrease the volume of subpoenas being issued, thereby minimizing the deleterious effect that such subpoenas have on users' desire to participate in online fora. Unmeritorious attempts to unmask the identities of online speakers very likely have a chilling effect on participation on the message boards,¹ as users may limit their use of the message boards for fear that their identities will be disclosed. The potential chilling effect imposed by the unmasking of anonymous speakers would diminish if litigants first were required to make a showing in court of their need for the identifying information. Thus, requiring litigants to make such a showing would allow InfoSpace's message boards to thrive as a forum for speakers to express their views on topics of public concern.

Second, litigants would be discouraged from issuing unmeritorious or overbroad subpoenas if they knew that their request first would be the subject of judicial review. Litigants therefore would be more likely to narrowly tailor the scope of their subpoenas to seek only relevant evidence.

Third, requiring litigants to establish a legitimate need for identity information prior to its discovery would discourage the issuance of subpoenas intended to chill speech, rather than to rectify any actionable wrong.

For these reasons, and as set forth in more detail below, InfoSpace urges this Court to adopt a balancing test requiring litigants to demonstrate to this Court that their need for identity information outweighs anonymous online speakers' First Amendment rights, prior to issuing a subpoena to InfoSpace forcing disclosure of the speakers' identity information.²

IV. STATEMENT OF FACTS

InfoSpace owns and operates the siliconinvestor.com Web site (available on the Internet at www.siliconinvestor.com), which hosts message boards where third parties may post messages on a wide variety of topics (the “Site”). (Declaration of Stephanie Carpenter (“Carpenter Decl.”) at ¶ 2.) The message boards are the online equivalent of a bulletin board, where persons may post comments for public viewing. Message board participants discuss financial information, publicly traded companies, and other topics. (*Id.*) The exchanges on these boards are often opinionated, and the debate is robust.

Although some participants identify themselves in their posts, many choose to post messages under a pseudonymous “username.” (*Id.* at ¶ 3.) In order to obtain a username, a visitor to the Site must complete a registration form that requires the user to provide a password, e-mail address, and birth date, in addition to username, and also requests that the user provide his or her zip code and gender. (*Id.*) After registration is complete, a user may submit postings to the online message boards. (*Id.*) A typical reader of the user’s messages posted online will see only the poster’s username, not any of the other identifying information provided by the poster to InfoSpace at registration. InfoSpace generally will not disclose such identity information unless disclosure is required to comply with legal process seeking such information, or as otherwise stated in its privacy policy. (*Id.* at ¶ 4.)

On January 24, 2001, counsel for 2TheMart.com, Inc. served a subpoena directed to Silicon Investor (hereafter, the “Subpoena”), requesting “all identifying information and documents, including but not limited to, computerized or computer-stored records and logs, electronic mail (E-mail), and postings on [Silicon Investor’s] online message boards” concerning 23 usernames. (*See id.* at ¶ 5, Exhibit A to Motion to Quash.)

This is by no means the first third-party subpoena served on Silicon Investor for identity information about its users. InfoSpace is a frequent recipient of such subpoenas. (Carpenter Decl. at ¶ 6.) Indeed, the volume of such subpoenas is so high that one InfoSpace employee devotes more than ten hours of her work week to processing and responding to such subpoenas, in addition to the regular time and efforts of other employees in gathering responsive documents. (*Id.*)

Upon receipt of the Subpoena, InfoSpace provided notice via e-mail to the account holders of the 23 usernames, informing them that a subpoena had been issued seeking information about them. (*Id.* at ¶ 7.) One of these account holders (who has posted messages under the username “NoGuano”) has since filed this motion to quash. After reviewing the motion, this Court issued a minute order on March 6, 2001, ordering

InfoSpace to file this responsive pleading. InfoSpace has not yet provided any documents responsive to the Subpoena, pending a ruling on this motion. (*Id.* at ¶ 8).

IV. ARGUMENT

IV. INFOSPACE URGES THE COURT TO ADOPT A BALANCING TEST, REQUIRING 2THEMART.COM TO SHOW THAT ITS NEED FOR IDENTITY INFORMATION OUTWEIGHS THE ANONYMOUS SPEAKERS' FIRST AMENDMENT RIGHTS

IV. The First Amendment Protects the Right to Speak Anonymously on the Internet.

The U.S. Supreme Court has held that the right to freedom of speech under the First Amendment encompasses the right to speak anonymously. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (“an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment”).

The two leading U.S. Supreme Court cases that uphold the right to speak anonymously both deal with speech distributed by leaflet or pamphlet. *See McIntyre*, 514 U.S. at 337, 357 (holding unconstitutional a state law prohibiting distribution of anonymous campaign literature, which had been applied to the distribution of leaflets at a public school meeting); *Talley v. State of California*, 362 U.S. 60, 65-66 (1960) (holding unconstitutional a state law prohibiting distribution of anonymous handbills).

A speaker on the Internet is the modern-day equivalent of a pamphleteer, as the U.S. Supreme Court has recognized:

Through the use of [online] chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, 521 U.S. 844, 870 (1997). Thus, speech on the Internet is entitled to the highest degree of First Amendment protection. *Id.*

Numerous courts have recognized that the right to speak anonymously extends to speech on the Internet. *See ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (recognizing a First Amendment right to communicate and access information anonymously through the Internet); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 34 (Va. Cir. 2000) (“To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court

precedent or the realities of speech in the twenty-first century”) (copy attached hereto as Exhibit A), reversed on other grounds in America Online, Inc. v. Anonymous Publicly Traded Co., 2001 Va. LEXIS 38 (Va. S. Ct., Mar. 2, 2001) (copy attached hereto as Exhibit B); Dendrite Intl’ v. Does, No. MRS C-129-00, slip op. at 18-19 (N.J. Sup. Ct., Morris Cty., Nov. 23, 2000) (“Inherent in First Amendment protections is the right to speak anonymously in diverse contexts,” including on the Internet) (copy attached hereto as Exhibit C).

IV. The Constitution Protects Freedom of Association on the Internet.

The Constitution protects not only freedom of speech but also freedom of association. See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 558 (1963) (holding unconstitutional a subpoena to intended to discover alleged co-conspirators by compelling release of member identities of NAACP); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (recognizing that a constitutional right to freedom of association protected privacy of NAACP’s membership list).

Protection from compelled disclosure of one’s private associations is a central tenet of the Constitution. As explained by the U.S. Supreme Court in Gibson,

It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when [it] tends to impinge upon such highly sensitive areas of freedom of speech . . . freedom of . . . association, and freedom of communication of ideas.

Gibson, 372 U.S. at 558 (citation omitted).

One of the most valuable aspects of the Internet is its ability to bring people together from all over the globe, to share thoughts and opinions on a shared topic of interest. Without the Internet, communities of people may not discover their common interests or find a means by which to communicate with each other on topics of mutual interest. Online message boards effectively create associations of people who share the same interests—whether those be financial interests, health interests, relationship interests, or some other hobby or passion.

Simply by typing in a username at a Web site, it is in many cases possible to discover posts under that username to a wide variety of message boards on a wide variety of subjects. Unmasking the identity of a person who has chosen an online username may mean automatically disclosing the people with whom the user at issue has chosen to associate online. The speaker, on the other hand, may have chosen anonymity out of the reverse desire to protect his or her freedom to associate with persons in a certain community or with

regard to a certain topic, without fear of exposure. One can imagine many groups related to sensitive subjects—communities of HIV-infected people, or users with other illnesses; communities of people seeking to criticize a company’s practices without fear of retaliation; communities in favor of particular political positions such as pro- or anti-abortion—and a host of other communities with which a person might wish to keep his or her association confidential. Such a desire for the right to anonymity and freedom of association should not be disregarded absent a compelling need.

IV. The Court Should Require Litigants Such as 2TheMart.com to Show That Their Need for Identity Information Outweighs These Constitutional Rights, Prior to Issuance of a Subpoena Seeking Such Information.

As described above, speakers on the Internet have a First Amendment right to speak anonymously, and a constitutional right of freedom of association. InfoSpace concurs with Movant J. Doe’s argument that the Court should require a litigant to show that its need for identifying information about such speakers outweighs those constitutional rights, *before* a subpoena is issued to InfoSpace seeking that information.³

Several trial courts recently have applied such a test (with slightly different variations) in deciding whether the identity information of an anonymous online speaker should be revealed. See Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) (adopting four-part test that plaintiff must meet prior to obtaining discovery into identity of anonymous online domain name registrant); Varian Medical Sys. Inc. v. Delfino, et al., Case No. CV 780187 (Cal. Super. Ct., Santa Clara Cty., March 7, 2001) (granting Does’ motion to quash subpoena seeking identity of anonymous online speakers where party issuing subpoena failed to show a compelling need for the information that outweighed the speakers’ constitutional rights to free speech and privacy) (copy attached hereto as Exhibit D); Dendrite Int’l, slip. op. at 19 (no discovery into Does’ identity allowed where plaintiff failed to prove that anonymous online speakers used their constitutional right to speak anonymously in a manner that is unlawful or that would warrant the court to revoke their constitutional protections; following Columbia Ins. Co. four-part test); In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. at 36 (adopting two-part test that plaintiff must meet prior to obtaining discovery into identity of anonymous online speaker).

In Columbia Ins. Co., a litigant sought the identity of an online domain name registrant. Balancing the individual’s constitutional right to act anonymously online against plaintiff’s need for such information, the Northern District of California held that such discovery is inappropriate unless the plaintiff meets a four-part test:

1. the plaintiff should identify the missing party with sufficient specificity so the court can determine that defendant is a real person or entity who could be sued in federal or state court;
2. the plaintiff should identify all previous steps taken to locate the defendant;
3. the plaintiff should establish that plaintiff's suit against defendant could withstand a motion to dismiss; and
4. the plaintiff should file a request for discovery with the court along with a statement of reasons justifying the specific discovery requested as well as identification of those persons or entities on whom discovery might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible.

Columbia Ins. Co., 185 F.R.D. at 578-80.

The necessity for such a test was aptly articulated by the court in Columbia Ins. Co.:

[T]his need [for identity information] must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

Id. at 578. And as the Superior Court for the State of California has expressed, absent a showing of a compelling need to reveal the speakers' identities, the speakers "have constitutional rights to free speech and privacy which allow them to express themselves in a public forum, such as the internet, while keeping their identities secret." Varian, slip op. at 3.

InfoSpace takes no position on the merits of 2TheMart.com's need for identifying information in this case. Indeed, InfoSpace is not in a position to evaluate the merits of the litigants' need for the information. That evaluation can and should be made by this Court, not InfoSpace, giving proper weight to the important constitutional interests at issue. InfoSpace strongly believes that this Court should require a litigant to establish a legitimate need for such information prior to its discovery, to avoid the issuance of subpoenas whose primary purpose is to chill speech, rather than to rectify any actionable wrong.

InfoSpace therefore urges this Court to adopt a balancing test that requires 2TheMart.com and future litigants in this Court to first show a need for user identity information that outweighs the users' constitutional rights, before the litigant may issue any subpoena directing InfoSpace to produce such

information.

IV. 2TheMart.com's Document Request is Overly Broad and Impinges on the Privacy Rights of InfoSpace Users.

InfoSpace also believes that the scope of the subpoena is overly broad, in that it seeks “*all* identifying documents and information” with regard to 23 user names, including but not limited to all computer-stored records and logs, e-mail, and postings.

That is, rather than just seeking basic identity information provided by InfoSpace's users upon registration (such as e-mail address and zip code), 2TheMart.com seeks *all* logs, records and e-mails that in any way relate to the 23 usernames at issue.

The scope of this document request is dramatically overly broad. First, 2TheMart.com is requesting information that impinges on the privacy rights of InfoSpace subscribers.⁴ Indeed, disclosure of some information sought by the Subpoena is prohibited under federal law. The Electronic Communications Privacy Act (ECPA) prohibits disclosure of the contents of private e-mail communications except under very limited circumstances, none of which apply here. See 18 U.S.C. § 2702. Silicon Investor allows its members not only to post public messages on the message boards, but also to exchange private e-mail messages with other registered users of the service. (Carpenter Decl. at ¶ 3.) By seeking *any* e-mail communications, public or private, of the 23 usernames in the subpoena, 2TheMart.com's document request is overbroad and contrary to ECPA.

Second, 2TheMart.com requests *all* records and logs pertaining to any of the 23 usernames. InfoSpace logs a remarkable amount of information every day about uses of its service, most of which is not easily segregable by particular username. Requiring InfoSpace to search for *all* records and logs that might contain any bit of information about these 23 usernames would be overwhelmingly burdensome for InfoSpace—particularly because most of this data would not be relevant. For example, much log information is purely of a technical nature. Or it may relate to a subscriber's use of other services available through the Site that do not appear to relate to the underlying lawsuit. For example, a registered user of the Site can pay bills online, create a stock portfolio, and engage in many other services in addition to the message boards. InfoSpace should not be required to produce such personal financial information for the 23 usernames at issue, without a showing by 2TheMart.com that its need for such information outweighs the subscribers' constitutional privacy and freedom of speech and association rights related to such information.

Thus, InfoSpace respectfully requests that if this Court denies J. Doe's Motion to Quash, that it limit the scope of 2TheMart.com's document request to require disclosure only of (1) basic identity information related to the subscribers' initial registration for the siliconinvestor.com service, and (2) copies of messages that were publicly posted to the siliconinvestor.com message board about 2TheMart.com (ticker symbol TMRT), excluding messages posted to other message boards about other companies and topics, and excluding private e-mail communications of the subscribers.

IV. CONCLUSION

For the reasons set forth above, InfoSpace respectfully requests that this Court adopt a balancing test requiring litigants to show that their need for information identifying anonymous online speakers outweighs the speakers' countervailing constitutional rights, before a litigant subpoenas identity information from InfoSpace. In addition, if the Court denies J. Doe's Motion to Quash, InfoSpace respectfully requests that the Court limit the scope of 2TheMart.com's document request to require disclosure only of (1) basic identity information related to the subscribers' initial registration for the siliconinvestor.com service, and (2) copies of messages that were publicly posted to the siliconinvestor.com message board about 2TheMart.com (ticker symbol TMRT), excluding messages posted to other message boards about other companies, and excluding private e-mail communications of the subscribers.

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¹ See footnote 4, *infra*.

² InfoSpace otherwise takes no position as to the Court's resolution of the Motion to Quash.

³ An online service provider may assert the First Amendment rights of its users. See *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. at 32 (AOL has standing to assert First Amendment rights of John Does whose identities were sought by plaintiff). See also *NAACP*, 357 U.S. at 458-59 (NAACP has standing to assert constitutional rights of its members whose

identities were sought).

⁴ Protecting the privacy interests of its subscribers is of primary importance to InfoSpace. The Privacy Policy applicable to users of the Site, available at <http://www.siliconinvestor.com/misc/privacy.html>, states that it is “strongly committed to protecting the privacy of its user community.” If users’ identities are released on a regular basis, its subscriber base might simply move elsewhere. See, e.g., In re Subpoena Duces Tecum to America Online, 52 Va. Cir. at 32 (“It cannot be seriously questioned that those who utilize the ‘chat rooms’ and ‘message boards’ of AOL do so with an expectation that the anonymity of their postings and communications generally will be protected. If AOL did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that AOL subscribers would look to AOL’s competitors for anonymity”).

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