

Anonymous Bloggers And The First Amendment: When And How Your Company Can Identify Its John Doe Defendants

07-29-2011 by [Michelle Sherman](#)

The exponential growth of the internet is also seeing an increase in the number of legal actions against “John Doe” defendants. John Doe is really synonymous with an anonymous speaker (blogger), who may be liable for claims such as copyright infringement, trademark infringement, or defamation. Fortunately, there is guidance from the courts so your company can increase its chances of identifying these anonymous bloggers, if necessary.

If you are fortunate enough to have the anonymous blogger’s [IP address](#), then there are online services through which you can get more information concerning the computer, tablet or smartphone from which the post was made, such as the city, and possibly the name of the organization. However, to get the name on the account with the internet service provider (ISP) (such as WordPress, or Google), your company will need to get a court order. The ISPs are not required to connect the dots for you.

The most common approach for identifying an anonymous blogger is typically a motion for leave to take discovery prior to the Federal Rules of Civil Procedure Rule 26(f) conference of the parties, and an order allowing discovery from the ISP through a subpoena served on the ISP. In the discovery order, courts generally require the ISP to give notice to its subscriber (the anonymous

blogger) before turning over their contact information. The discovery order will typically include a cutoff date for the notice to be given, and for the subscriber to file a motion to quash the subpoena.

It cannot be overemphasized that the First Amendment protections afforded anonymous speech on the internet present a tremendous hurdle for getting relief from the courts. At the same time, courts are issuing discovery orders in recognition that speech is not absolutely protected. Political speech receives the highest level of protection as the essence of the First Amendment. Speech that can be characterized as “commercial” speech does not receive the same protections, and is protected only so long as “the communication is neither misleading nor related to unlawful activity.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). Fighting words and obscenity are not a protected form of speech. Thus, how the speech is characterized will affect the merits of your discovery motion.

5 FACTORS IN FAVOR OF IDENTIFYING THE ANONYMOUS BLOGGER

1. Your company can make a prima facie showing of its claim against the anonymous speaker. There is not a single standard that is applied uniformly by all of the federal district courts. However, the prima facie case standard is applied by many courts, including California district courts. The most rigorous standard that some courts apply is that the legal claim, on which the discovery motion is based, could survive a motion for summary judgment. The lowest standard is the motion to dismiss or good faith standard. Thus, where you file your action may affect your chances of identifying the anonymous blogger. The Ninth Circuit, citing to a Supreme Court decision, has held that the type of speech at issue (political vs. commercial) should be considered in deciding what standard to apply, with a more relaxed standard being applied to commercial speech: “[W]e suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in

discovery disputes.” *In re Anonymous Online Speakers*, 2011 WL 61635, *6 (9th Cir. Jan. 7, 2011).

2. The anonymous blogger is a defendant (as opposed to a non-party).
3. The nature of the claim, and the interest being protected. For example, courts have held that when a plaintiff has made a prima facie claim of copyright infringement, the plaintiff’s need for disclosure outweighs any First Amendment rights. *Arista Records LLC v. Does 1-19* (“a defendant’s First Amendment privacy interests are exceedingly small where the ‘speech’ [at issue] is the alleged infringement of copyrights”). Cases involving the disclosure of confidential insider information online is another area in which courts seem more inclined to issue a discovery order. In defamation cases, it is more difficult to overcome the First Amendment protections. However, discovery orders are being issued in these cases as well.
4. The identity of the anonymous blogger is not available from other, less intrusive sources, such as deposing the person who is reasonably believed to have posted the objectionable material.
5. There has been some effort to give the blogger notice of the subpoena before filing the motion.

5 FACTORS THAT CONTRIBUTE TO COURTS DENYING THESE DISCOVERY MOTIONS

1. The anonymous blogger is being sued for speech that can be characterized as political speech, which is entitled to the highest level of First Amendment protection.
2. The blogger is someone whose identity should be protected under the relevant state shield law – reporter’s privilege. Blogs, chat rooms, websites can potentially be encompassed within the spectrum of a shield law extended to the news media. For example, the electronic publication called the Drudge Report

has successfully asserted the reporter's privilege.

Media companies have also asserted the reporter's privilege in response to subpoenas seeking the identity of anonymous posters, with some success in states such as Colorado, North Carolina, Oregon, Montana, Florida and Illinois.

3. The basis for the subpoena is stated in a cursory manner without any evidence to support the elements of the claim on which it is based.

4. The subpoena is overbroad, and does not specifically seek information that is necessary to identify the anonymous blogger.

5. The subpoena seeks information that is cumulative of other evidence. For example, your company has a reasonable idea about who posted the speech at issue and can confirm its suspicions by deposing the person, or serving less intrusive discovery.

For further information, please contact [Michelle Sherman](#) at (213) 617-5405.
([Follow me on Twitter!](#))