Ninth Circuit Report

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KRINSKY VS. DOE 6 (CAL. CT. APP., FEB. 6, 2008)

Standards for Quashing a Subpoena to Message Board to Obtain the Identity of Anonymous Internet Bulletin Board Poster

THIS CASE, BY A CALIFORNIA appellate court, provides an excellent summary of the state and federal law governing the right of an anonymous poster of allegedly libelous or defamatory material on an Internet message board to prevent identification from the offended target of the anonymous posting, through the use of a subpoena.

The scenario is a familiar one: Allegedly false and clearly offensive statements are made about an individual or a company on an Internet message board, by an anonymous poster using a "screen name" to hide his or her identity, such as on the Yahoo! Finance Message Board involved here. Procedurally, the Internet or hosting service providers, such as Yahoo!, have within their records information, such as the actual Internet address or other identifying information for the anonymous poster, and a suit is filed in a federal or state court alleging a law violation such as defamation or interference with contractual or business relationships, and a subpoena, as here, is issued against the Internet service provider, Yahoo!, to obtain information regarding the identity of the poster.

In this situation, Yahoo! sends an email notice to the poster informing of its receipt of a subpoena, and Yahoo!'s intention to reveal the identity information, unless the poster brings a motion to quash the subpoena. Such a motion may be brought, in the name of a "John" or "Jane Doe," by an attorney representing an anonymous client, in order to prevent revealing the identity of the poster.

Like many Internet hosts or service providers, Yahoo! has a Terms of Service notice agreement with its subscribers, which provides that it may disclose account information if required to do so by law, or in a good faith belief that disclosure is necessary to comply with legal process, or to respond to claims that posted content violates the rights of third parties.

Anonymous postings using vague or false names have become the norm on many message boards. On financial message boards, often the intent of the poster may be to give false information in order to drive a stock price up or down, so the poster can make money on the false news. These are referred to "pump and dump postings." While such allegations were included below, and may provide an additional basis for generally obtaining such identity information, the California Court of Appeals here found that plaintiff had not pled claims relating to state or federal securities laws, so such a cause of action was not part of the ruling.

The Facts Here

The plaintiff, Lisa Krinsky, was president, chairman, and chief operating officer of SFBC International, Inc., a publicly traded global development drug service company. Without going into detail, a Yahoo! poster using the pseudonym "Senior_Pinche-Way," derided Krinsky and a male executive Seifer, and made a veiled claimed reference to Ms. Krinsky in the context of "boobs, losers, and crooks," and referred to Ms. Krinsky in a posting describing "Seifer's New Year's resolution," including the statement "I will reciprocate felatoin [*sic*] with Lisa even though she has fat thighs, a fake medical degree, 'queefs' and has poor feminine hygiene."

Ms. Krinsky was notably offended and, claiming defamation, *inter alia*, filed suit, seeking to subpoena the custodian of records at Yahoo! for identity information. After Yahoo!'s notice to Doe, Doe moved in California Superior Court to quash the subpoena on the grounds that: (1) plaintiff had failed to state a claim sufficient to overcome Doe's First Amendment rights, for either defamation or interference with a contractual or business relationship; and (2) plaintiff's request for injunctive relief was an invalid prior restraint.

The Superior Court initially had granted the subpoena, on the basis of alleged stock price manipulation, "pump and dump," and also expressed the view that:

> [a]ccusing a woman of unchastity and calling somebody a crook...saying that they have a fake medical degree, accusing someone of a criminal act, accusing someone—impinging [*sic*] their integrity to practice in their chosen profession, historically have been libel *per se.*

The standard of review where the appellate issue is whether a particular communication falls outside the protection of the First Amendment, is one of "independent review." The Court of Appeals noted that this is not equivalent to a *de novo* review of the ultimate judgment itself, but the court must "examine...the statements in issue and the circumstances under which they were made to see...whether they are of a character which the principles of the First Amendment, as adopted by the

Due Process Clause of the Fourteenth Amendment, protect," citing *New York Times Co. v. Sullivan*.[1] In other respects, the abuse-of-discretion standard is appropriate, and where evidentiary disputes, credibility determinations, or findings of fact are not relevant to the First Amendment issues, these are upheld if they are supported by substantial evidence.

The First Amendment and Speech on the Internet

The court discusses in great detail the standards to be used in assessing an alleged Internet defamation in the context of a First Amendment defense claim. An author's decision to remain anonymous is an established aspect of freedom of speech protected by the First Amendment. As the court noted: "The use of a pseudonymous name offers a safe outlet for a user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior, without fear of intimidation or reprisal." It also allows individuals of different economic, political, or social status to be heard without criticism or oppression because of their class.

But as the court noted, when vigorous criticism descends into defamation, constitutional protection is no longer available. The right of free speech is not absolute at all times and available under all circumstances. Several well-defined and narrowly limited classes of speech harmful to others do not raise any constitutional problem: "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Internet speech is no different, and the court noted that through the use of web pages, mail postings, and newsgroups, individuals using the Internet become equivalent to "pamphleteers."

What is the Applicable Balancing Test?

The court provides a treatise discussion of the few state and federal cases dealing with the balancing protecting an individual's First Amendment right to speak anonymously, against the plaintiff's interest in discovering a Doe's identity in order to pursue her claim, and the appropriate weighing of the standards. Several of the cases dealt with defamation, the publication of trade secrets, alleged trademark infringement, and other intellectual property issues. The decision provides an excellent extensive discussion of the prior cases and standards.

The Court Adopts a Four-Part Test

Building upon prior state and federal cases, the court adopts the following test: First, the plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena, giving a reasonable time for the poster to file an opposition. This is not unduly burdensome, and unless the message board no longer exists, making it unrealistic to do so, posting such a message or, as here, the service host notifying the defendant that disclosure of his or her identity is sought, is sufficient.

Secondly, if they are not clear, the plaintiff must set forth the specific statements alleged to be actionable. Here this was set forth.

Third, the plaintiff must produce sufficient evidence to state a *prima facie* cause of action being violated, in this case for defamation, showing the case for liability exists. As the court noted, requiring at least this much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism. The court noted the tug here: That a plaintiff need only produce evidence of the material facts which are accessible to the plaintiff. In an Internet libel case, the burden should not be insurmountable because, as here, the plaintiff knows the statements that were made and produced evidence of their falsity and the effect such statements had upon her. The court recognized that the difficulty often comes about when more information is needed, such as the poster's identity or purpose, the motives of the poster, and the extent of knowledge of the poster of the falsity, but the court left this and the "pump and dump" allegations, for another day. In the libel context, the court held that the plaintiff needs to make a *prima facie* showing of the elements of libel to overcome the First Amendment defense for, the fourth element, the appropriate balancing of the plaintiff's case against the right of the defendant to remain anonymous.

The Northern District Standard is Generally Adopted

The court discussed at length a case in the Northern District of California, *Highfields Capital Management L.P. v. Doe*.[2] The court there dealt at length with the issues of the extent to which a plaintiff has to produce evidence to state its case, and the balancing of the strength of the plaintiff's case against the defendant's First Amendment right to speak anonymously, the third and fourth elements considered in whether to prevent a subpoena from being quashed in this context.

The court in *Highfields* held that:

> (1) the plaintiff must adduce competent evidence to support a finding of each fact essential to the cause of action; and (2) *if* the first requirement

is satisfied, the court must compare the magnitude of the harm to each party's interests that would result from a ruling in favor of either.

But what is the standard? Must plaintiff establish a *prima facie* showing of each element at the pleading stage, as in *Highfields*, or a "good faith standard for disclosure," or the "standard applicable to a plaintiff opposing summary judgment"?

The court here found it "unnecessary and potentially confusing to attach a procedural label," particularly because in Internet libel cases, California subpoenas may relate to actions filed in other jurisdictions with other standards. The court thus agreed generally with courts that have compelled the plaintiff to make a *prima facie* showing of the elements of libel, relying upon the information available to the plaintiff, in order to overcome a defendant's motion to quash a subpoena seeking identity information

Prime Facie Case for Defamation is Not Established

The court noted that when defamation arises, as here, from debate or criticism that has become heated and caustic, as often occurs in Internet chat rooms and message boards, a key issue before the court is often first whether the statement constitutes fact or opinion, or may amount to "mixed opinion." Mixed expression of opinion occurs when a comment is made which is based upon facts regarding a plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication, and the communicator is implying that a concealed and undisclosed set of defamatory facts would confirm his opinion. In making this determination the court must examine the statement in its totality and the context in which it is uttered or published, considering all of the words used and the context, medium, and audience.

While noting its distain for such comments, the court concluded, as had the Federal District Court in *Highfields*, that many of the messages viewed in the context of the communications, consisted of sardonic commentary on a public corporation, through irony and parody, expressing dissatisfaction with stock performance or the company executives, which "fall into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, constituted protected opinion under the First Amendment." As the court noted, "the fact that society may find speech offensive is not a sufficient reason for suppressing it." Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. Accordingly, because plaintiff has stated no viable cause of action to overcome Doe's First Amendment right to speak anonymously, the subpoena to obtain identifying the information is quashed. ▪

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Endnotes

1. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).
2. *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). Note that the author was counsel for Highfields in this case.