# ONLINE COPYRIGHT ACTIVITIES AND FIRST AMENDMENT INTERNET ANONYMITY RIGHTS

*by PETER AFRASIABI*

Does the First Amendment allow Internet users involved in potential copyright infringement activities to remain anonymous and hence free from discovery? Perhaps not surprisingly, the cases from around the country are all over the map and, within the Ninth Circuit, different district courts have adopted different tests. The Ninth Circuit has not yet weighed in on copyright infringement-related anonymity rights, although it has established a framework that balances First Amendment anonymity rights with discovery rights. Navigating the case law is critical for practitioners seeking to take discovery from anonymous online posters of information, and for those defending against such efforts.

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### Balancing First Amendment Anonymity Rights in the Copyright Infringement Context

Thus far, the Second Circuit is the first circuit to have adopted a framework that balances anonymity rights with discovery rights for copyright cases. In *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 112 (2d Cir. 2009), plaintiff Arista Records sought a discovery order for the identity of alleged copyright infringers. It served a subpoena on the Internet Service Provider (ISP), and the ISP notified the underlying user. That user sought to quash based on a First Amendment right to anonymity and the district court refused. The Second Circuit affirmed and settled on a five-part test: (1) a showing of plaintiff's prima facie case; (2) specificity of the discovery request; (3) availability of alternate means to secure the identity; (4) the need for the subpoenaed information; and (5) the anonymous party's privacy expectations. *Id.* at 119.

The court held that "to the extent that anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected by the First Amendment." *Id.* at 118. In short, there is no right to hide "behind a shield of anonymity." *Id.* at 124. Balancing the factors, discovery thus flowed. *See also Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (finding copyright infringement conduct counts as speech "but only to a degree.").

*Arista* treated as foundational the idea that a First Amendment anonymity right could not be used to mask copyright infringement. *Arista Records*, 604 F.3d at 118. Indeed, the Supreme Court has long held that the First Amendment offers no blanket defense to copyright infringement. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (holding use of another's copyrighted work even for public, political purposes is still copyright infringement notwithstanding fair use defense). As such, copyright law, both on the scope of infringement and the scope of the fair use defense, itself balances all First Amendment issues. *See, e.g., Golan v. Holder*, 132 S. Ct. 873, 890 (2012) ("First Amendment protections are 'embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas,' and in the 'latitude for scholarship and comment' safeguarded by the fair use defense.") (Internal citation omitted).

Under an *Arista* balancing test, there is no anonymity right for an alleged infringer—and full discovery for the putative injured copyright owner—because there should be no First Amendment anonymity shield. All First Amendment concerns are balanced by substantive copyright law itself. Thus, the question should be analyzed no differently from any other discovery question: Is there good cause and is the material relevant?

### District Courts in the Ninth Circuit Use a Variety of Tests Providing Varying Levels of Protection

District courts in the Ninth Circuit have generated a variety of tests providing varying levels of protection for alleged copyright infringers who do their acts on the Internet and claim the mantel of the First Amendment when their identities are sought.

One case is *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004). There, plaintiff sued in defamation and commercial disparagement torts/trademark based upon the anonymous defendant's posting of Internet commentary. When plaintiff sought the anonymous poster's identity, the Doe defendant appeared anonymously and sought to quash discovery. The court applied a test that requires the plaintiff to make an actual factual showing for its case, and, if so made, then the court would balance the harms to each party. *Id.* at 975-76. The court then assessed in the discovery context the strength of the plaintiff's case, and found that the plain-

tiff's case was weak because it failed to produce evidence to show consumer confusion (for the trademark claim). *Id.* at 977-78. For the defamation claim, it held that it was unlikely that anyone would view the message and not understand it to be false. *Id.* at 979. Accordingly, the net result was that, because the claim was perceived as weak, discovery was denied and the anonymity of the third party was preserved. Notably, the court effectively employed a summary judgment-type review, which is a much higher showing than generally required to secure discovery.

Another case is *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal., Nov. 9, 2011). There, plaintiff filed a Doe lawsuit for copyright infringement based upon anonymous blog postings. It sought the identity of the alleged infringer (of a spiritual manual). The court quashed the subpoena as to the identity because the speech at issue involved heated blog commentary on the plaintiff's spiritual practices. *Id.* at *6. Specifically, the court concluded that the magnitude of the harm to would-be bloggers was great because, once unmasked, expressive conduct would be chilled. *Id.* at **9-10. Reciprocally, the court found that the plaintiff could gather any material that was needed if the Doe defendant participated in an anonymous capacity. *Id.* at *10. The net result was that the alleged infringer provided discovery but was allowed to remain anonymous. This result is hard to reconcile with the *Arista* balancing approach and is even more onerous on the party seeking the discovery. *See also Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145, 1156-59 (N.D. Cal. 2013) (applying *Art of Living* to a copyright claim and holding that discovery was permitted notwithstanding anonymous speech rights where plaintiff proffered evidence in fact to support its allegations).

Uber's newfound ubiquitous role in society even plays a role here too! In *Uber Technologies, Inc. v. Doe*, 2015 WL 1926291 (N.D. Cal. Apr. 27, 2015), Uber served a subpoena on an ISP for the identity of a Doe service user that had allegedly hacked its servers. Although not a copyright case per se, the court analogized the data hacking/theft to copyright more than true First Amendment speech activities and ordered the ISP to produce the anonymous person's identity. Significantly, the court specifically held the ISP did not need to notify the anonymous user because the alleged conduct approached criminal conduct by its nature. *Id.* at *3. In so concluding, the court held Uber to a "good cause" standard to justify the discovery. *Id.* *1-2.

Finally, in a copyright case, one court required the plaintiff to make efforts in giving notice to anonymous moderators of a website where infringing materials resided in order to proceed with discovery, finding that the right to anonymity for the website moderators was critical. There, plaintiff sought to ascertain the identity of the defendant website's anonymous moderators who participated in the decision of which material would be posted publicly on the website. The district court cited the presence of First Amendment anonymity rights, and concluded that because the plaintiff did not afford adequate notice to the anonymous moderators, they could remain cloaked and immune to discovery. *See Mavrix Photographs LLC v. LiveJournal, Inc.*, SACV 13-00517 CJC (JPRx) Order of July 22, 2014 & Order of June 12, 2014 (C.D. Cal. 2013).

### The First Amendment Right to Anonymity in the Ninth Circuit: The Degree of Scrutiny Depends on the Nature of the Speech

This jigsaw puzzle gets more complicated when one considers the Ninth Circuit's most recent decision on anonymous speech and the First Amendment. In *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), the Ninth Circuit addressed a district court's order requiring discovery into the identity of a non-party anonymous online speaker. There, plain-

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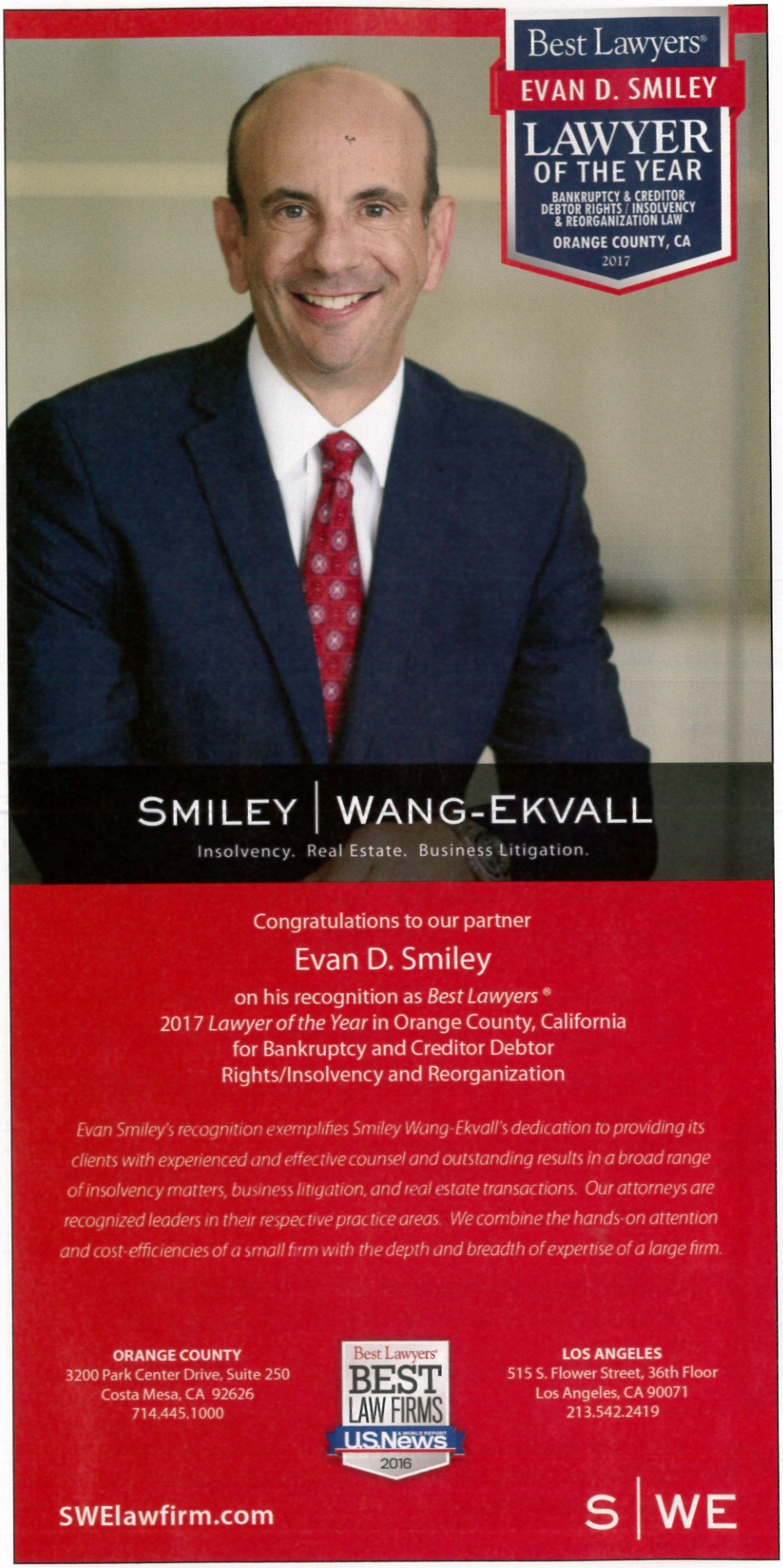


tiff sought to require the defendant to identify five anonymous speakers who allegedly posted online defamatory comments. *Id.* at 1171. Applying a heightened standard that typically applies to highly protected core political speech—essentially, asking whether the plaintiff would be able to prove a summary judgment—the district court found the material had to be produced. *Id.* at 1172.

The Ninth Circuit started its analysis by positing that the fundamental, central question as to which standard should apply—heightened or less exacting—turns on the "nature of the speech" as the "driving force in choosing a standard." *In re Anonymous Online Speakers,* 661 F.3d at 1177. The court noted that commercial speech gets less protection than political, religious, or literary speech. Even so, the court held that the district court's use of a more exacting standard was not clear error because the district court ultimately required full discovery disclosure anyway. *Id.* In other words, a heightened standard was harmless.

*In re Anonymous Online Speakers* was not a copyright case. But that does not mean copyright litigators are left without any clues. Significantly, the court believed improper the use of an elevated test when the speech at issue was low-level speech. Thus, even if copyright infringement activity is viewed as somewhat expressive within the First Amendment (as in *Arista-Sony*, based on the theory that the act of selecting particular items for online reproduction is itself an expressive act), it should still yield the conclusion that a heightened, restrictive test against discovery disclosures is improper.

The contrasting case on the spectrum involves political speech. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995), the Supreme Court held there is "a respected tradition of anonymity in the advocacy of political causes." Indeed, perhaps the most famous anonymous American political advocacy is found in *The Federalist Papers,* penned by James Madison, Alexander Hamilton, and John Jay, but published under the pseudonym, "Publius." From there, it has become well established that an author's right to remain anonymous is akin to other decisions about the content of the publication, and thus protected by the First Amendment. *Id.* at 342.

"The right to speak, whether anonymously or otherwise, is not unlimited, however, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue." *In re Anonymous Online Speakers,* 661 F.3d at 1173. Thus, the fundamental question for litigators seeking discovery of anonymous putative copyright infringers (or

alleged tortfeasors whose torts are speech-related), then, is how a court will marry *In re Anonymous Speakers* with the case law's admonition that copyright infringement is, by definition, outside the First Amendment or at the edge of it. If allegiance is paid to that principle, then the discovery should flow upon the typical relevancy/good cause showing. But if a court believes that copyright infringement is still protected speech/expression, albeit at the low end of the speech/expression spectrum, then a balancing test will follow. And within that balancing test cauldron, *In re Anonymous Online Speakers* offers a partial framework and strongly implies limited anonymity rights for the putative infringer along with some sort of plaintiff's prima facie showing requirement.

And so, going full circle, the Second Circuit's attempt to balance First Amendment rights in the Internet copyright arena is the most apt test to date, if there is to be some level of protection for anonymous Internet participants in potential copyright infringements. It affords discovery for the aggrieved party upon a basic showing of need, but also allows some anonymity right to protect the user from unnecessary discovery. At the same time it requires close analysis of the anonymous user's actual expectations of privacy vis-à-vis the Internet service used to conduct the acts in question. For example, where the anonymous user posted material on a given website, the Terms and Conditions that the user agreed to when he signed up, albeit anonymously, define, in part, a level of privacy expectation. For example, often those Terms and Conditions specifically inform users that their actions on the website will be unmasked in the event of a subpoena.

Until the Ninth Circuit answers the ultimate question, practitioners must grapple with an incomplete jigsaw puzzle of case law that affords litigators on each side ample room to maneuver.

Note: The author represented the plaintiff in *Mavrix Photographs*, and has argued the matter on appeal in the Ninth Circuit now. *See Mavrix Photographs v. LiveJournal, Inc.*, 14-56742 (9th Cir., argued 10/7/16), argument located at https://www.youtube.com/watch?v=FuJEcH6n7gc.

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