Volume 28 • Number 2 2015

California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA

Where First Amendment Internet Anonymity Rights Collide with Copyright

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Does the First Amendment allow Internet users to engage in acts of anonymous copyright infringement free from discovery of their identity? How do litigators on either side of this question engage in such discovery?

Perhaps not surprisingly, cases from around the country diverge, and cases within the Ninth Circuit conflict. The Ninth Circuit has not yet addressed copyright infringement anonymity rights, although it has established a framework that balances First Amendment anonymity rights with discovery rights. Navigating the case law is critical for practi-

tioners seeking discovery from alleged anonymous infringers and for those defending against such efforts. It is likewise critical for practitioners seeking discovery in non-copyright cases where the actor is cloaked in anonymity because of the inherent privacy the Internet affords.

Balancing Anonymity Rights in Copyright Cases

The Second Circuit has developed an approach that balances anonymity rights with discovery rights in copyright cases. In *Arista Records, LLC v. Doe 3* (2d Cir. 2009) 604 F.3d 110, 112, plaintiff sought a discovery order for the identity of alleged copyright infringers who downloaded copyrighted music files. Arista Records subpoenaed the Internet Service Provider, which in turn notified the underlying user. The user unsuccessfully sought to quash the subpoena on the basis of a First Amendment right to anonymity. The Second Circuit affirmed and created a test examining five factors: (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.

The court held that Arista made a prima facie showing of copyright infringement by virtue of alleging ownership of the music files and their downloading in violation of the Copyright Act's exclusive reproduction right. That alone sufficed, and the anonymous defendant's privacy assertions were rejected because any right to privacy related to the acts of infringement could not be asserted where the anonymous person hides "behind a shield of anonymity." (*Id.* at 124.) Specifically, "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.) Accordingly, the party seeking discovery secured the discovery, and the anonymous Internet user could not shield itself from discovery or from the consequences of the anonymous acts of copyright infringement. Other Second Circuit cases applying the *Arista* balancing test to copyright infringement questions have answered the ultimate discovery question similarly: the discovery flows. (See, e.g., *Sony Music Entertainment v. Does 1-40* (S.D.N.Y. 2004) 326 F.Supp.2d 556, 564 [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*, 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 v. Nation Enterprises* (1985) 471 U.S. 539, 568 [use of another's copyrighted work even for public, political purposes is still copyright infringement notwithstanding fair use defense].) Or, as the Eleventh Circuit held, "the First Amendment is not a license to trammel on legally recognized rights in intellectual property." (*In re Capital Cities/ABC* (11th Cir. 1990) 918 F.2d 140, 143.) Thus, 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* (2012) 132 S.Ct. 873, 890.)

District Courts in the Ninth Circuit: Various Tests and Levels of Protection

These issues have not evolved as simply among district courts in the Ninth Circuit. Rather, courts have generated a variety of tests providing varying levels of protection for alleged copyright infringers who do their acts on the Internet and claim First Amendment protection when their identities are sought.

In *Highfields Capital Management L.P. v. Doe* (N.D.Cal. 2004) 385 F.Supp.2d 969, plaintiff sued for defamation, commercial disparagement, and infringement based on an

anonymous defendant's posting of Internet commentary. When plaintiff sought the poster's identity, the Doe defendant appeared anonymously and sought to quash discovery. The court applied a test that required 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. The court then assessed the strength of the plaintiff's case and found it was weak because it failed to produce evidence to show consumer confusion for the trademark claim. For the defamation claim, it held that it was unlikely that anyone would view the message and not understand it to be false. 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 used a summary-judgment-type review, a much higher showing than generally required to secure discovery information.

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In *Art of Living Foundation v. Does 1-10* (N.D.Cal. 2011) 2011 WL 5444622, plaintiff filed a lawsuit for copyright infringement based on anonymous blog postings. It sought the identity of the alleged infringer of a spiritual manual. The court quashed the subpoena to discovery the poster's identity because the speech at issue involved heated blog commentary on the plaintiff's spiritual practices. Specifically, the court concluded that the magnitude of the harm to would-be bloggers was great because, once unmasked, expressive conduct would be chilled. Reciprocally, the court found that the plaintiff could gather any material that was needed if the Doe defendant participated in an anonymous capacity. The result was that the alleged infringer provided discovery but was allowed to remain anonymous. This is hard to reconcile with the Arista balancing approach.

A more recent case adopted the Second Circuit's approach. In *Signature Management Team, LLC v. Automattic, Inc.* (N.D.Cal. 2013) 941 F.Supp.2d 1145, 1156-1159, the court applied *Arista* to a copyright claim and held that discovery was permitted notwithstanding anonymous speech rights.

Finally, another recent case required the plaintiff to make efforts in giving notice to the putative infringer in order to proceed with discovery, finding that the right to anonymity for the website moderators was critical. The

plaintiff sought to ascertain the identity of the defendant website's anonymous moderators. (See *Mavrix Photographs LLC v. LiveJournal, Inc.* (C.D.Cal. 2013, SACV-13-00517-CJC-(JPRx), Orders of July 22 and June 12, 2014 [currently on appeal by the plaintiff, represented by this article's author].) The court cited First Amendment anonymity rights in the political speech context and concluded that, because the plaintiff did not afford adequate notice to the anonymous moderators, the moderators could remain cloaked and immune to discovery.

The First Amendment Right to Anonymity in the Ninth Circuit

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* (9th Cir. 2011) 661 F.3d 1168, the court addressed a district court's order requiring discovery into the identity of a nonparty anonymous online speaker. There, two companies were fighting, and the plaintiff sought to require the defendant to identify five anonymous speakers who allegedly posted online defamatory comments. The district court ordered the defendant to reveal identity information 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 — and finding that the material had to be produced.

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." (*Anonymous 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 — a standard reserved for core political speech, not commercial speech between competitors — was not clear error because the district court ultimately required full discovery disclosure anyway.

'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 copyright infringers.'

Thus, in *Anonymous Online Speakers*, the Ninth Circuit noted that the district court's use of an elevated test — one that required the party seeking discovery to show

more than just relevancy but a prima facie showing of a summary-judgment-worthy case — was essentially improper (yet harmless, given the outcome of requiring disclosure anyway). *Anonymous Online Speakers* was not a copyright case. The court did not have the opportunity to consider the exact test that should apply when discovery is sought from anonymous Internet users alleged to be involved in copyright infringement. But that does not mean copyright litigators are left without any clues. Significantly, the court believed that the use of an elevated test was improper when the speech at issue was low-level speech. This should cast a long shadow over providing blanket anonymity in infringement cases because, even if copyright infringement is viewed as somewhat First Amendment-worthy expression (as in *Arista*) and not simply outside the First Amendment, it would still yield the conclusion that a heightened, restrictive test is improper.

In contrast, consider cases involving core political speech. For example, in *McIntyre v. Ohio Elections Commission* (1995) 514 U.S. 334, 343, the Supreme Court held that there is "a respected tradition of anonymity in the advocacy of political causes." Indeed, perhaps the most famous anonymous American political advocacy is The Federalist Papers by James Madison, Alexander Hamilton, and John Jay, but published pseudonymously by "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.

"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." *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) is how a district court will marry *Anonymous Online Speakers* with the admonition of case law that copyright infringement is, by definition, outside the First Amendment. If allegiance is paid to that principle, then the discovery should flow instantly simply upon the typical relevancy 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. Within that balancing test cauldron, *Anonymous Online Speakers* offers a partial framework and strongly implies limited anonymity rights for the putative infringer.

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 copyright infringers. It affords discovery for the aggrieved party upon a 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 to which the user agreed when he signed up, albeit anonymously, define, in part, a level of privacy expectation. The Second Circuit's test allows consideration of all these factors before simply ordering discovery. For the most part, in Second Circuit cases where anonymous persons have engaged in conduct that is potentially subject to liability for copyright infringement, discovery is allowed to proceed when the balancing test is applied.

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.

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