IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LARRY DOMINICK, in his Official Capacity as President of the TOWN OF CICERO,	)	
Petitioner/Plaintiff,	)	**Docket No. 2008-L-005191**
vs.	)	
MYSPACE, INC., a Delaware corporation,	)	
Respondent/Defendant.	)	

THE ELECTRONIC FRONTIER FOUNDATION'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN RESPONSE TO PETITION FOR DISCOVERY

I. INTRODUCTION

The Electronic Frontier Foundation ("EFF") respectfully requests that this Court grant leave to file the attached Brief of Amicus Curiae in Response to Petitioner Dominick's Petition for Discovery. While EFF recognizes that amicus briefs are rare in the Circuit Courts of Illinois, EFF seeks leave to file because no one currently before this Court represents the interests of the anonymous speaker(s) Petitioner seeks to unmask and because we strongly believe that the Court would benefit from a thorough explanation of (a) the relevant federal statute protecting records (including the identities) of users of remote computing services such as Respondent MySpace, Inc. ("MySpace") and (b) the Constitutional standard pertaining to civil attempts to unmask anonymous speakers on the Internet.

II. INTEREST OF AMICUS

EFF is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco, California. EFF has members all over the United States and maintains one of the most-linked-to Web sites (http://www.eff.org) in the world. Currently,

EFF is supported by over 400 paying members in Illinois. In addition, over 2,000 Illinois residents subscribe to EFF's weekly e-mail newsletter, EFFector.

As part of its mission, EFF has served as counsel or amicus in key cases addressing people's right to remain anonymous when they post comments on the Internet, as well as making sure that anonymous speakers' due process rights are respected. See e.g., Sony Entertainment Inc. v. Does, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004); Doe v. Cahill, 884 A.2d 451, 33 Media L. Rep. 2441 (Del. 2005); H.B. Fuller Co. v. Doe, 60 Cal. Rptr. 3d 501 (Ct. App. 2007) and Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007). EFF has also been at the forefront of key cases addressing the Electronic Communications Privacy Act ("ECPA") and its component the Stored Communications Act ("SCA"), as both amicus and counsel. See, e.g., Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F.3d 457 (5th Cir. 1994); U.S. Telecom Ass'n v. F.C.C., 227 F.3d 450 (D.C. Cir. 2000); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002), cert denied, 537 U.S. 1193 (2003); U.S. v. Councilman, 418 F.3d 67 (1st Cir. 2005); O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

III. AMICUS' INTEREST IN THIS PETITION

EFF seeks leave to file its amicus brief in this action because the Petitioner – in his official capacity as the Town President of the Town of Cicero, Illinois – seeks to use the authority of this Court to unmask an anonymous speaker, in contravention of (1) the right to speak anonymously guaranteed by the First Amendment and (2) federal law explicitly protecting the identity of users of computer services (like that of Respondent MySpace) from civil discovery requests issued by government entities such as the Town of Cicero.

A ruling from this Court that did not fully consider the Constitutional and statutory protections aimed at protecting the rights to privacy and anonymity of Internet users could negatively impact the rights of Internet users throughout the state. Especially as there is no indication that the targets of the Petition have been made aware of these proceedings, EFF respectfully requests that it be permitted to appear in order to submit to the Court a discussion of the legal landscape that Petitioner invoked.

As explained in detail in the attached brief, "[a]gainst the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns." Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004). Accordingly, "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." Doe v. 2themart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001).

Courts have determined that strict procedural safeguards must be imposed "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001). Mr. Dominick's Petition, however, fails to satisfy these Constitutional protections. EFF seeks leave to file so it may provide the Court with the relevant case law addressing the Constitutional requirements that Petitioner must meet.

The Stored Communications Act, 18 U.S.C. § 2701 et seq., provides a second and independent basis as to why the Town of Cicero may not yet obtain the identify of the anonymous MySpace user(s) targeted in Mr. Dominick's Petition. The SCA regulates when an electronic communications service ("ECS") or a remote computing service ("RCS") provider may disclose records pertaining to a customer's use of the service. MySpace is an RCS pursuant to the SCA. See 18 U.S.C. § 2711. Section 2702 of the SCA generally prohibits an RCS from disclosing identifying records to the government, unless explicit statutory exceptions are met. Petitioner has not met the requirements of any of these statutory exceptions.

While the SCA allows government entities to obtain certain basic subscriber information with an "administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena," a petition pursuant to Illinois Supreme Court Rule 224 is not one of the authorized methods for government entities to identify users. 18 U.S.C. § 2703(b)(1)(B)(i); see also, Fed. Trade Comm'n v. Netscape Commc'ns Corp., 196 F.R.D. 559, 561 (N.D. Cal. 2000) (finding that Section 2703's allowance for "trial subpoenas" did not

authorize the FTC's use of a civil discovery subpoena to obtain non-content subscriber information from Netscape).

IV. CONCLUSION

EFF respectfully requests leave to file the attached memorandum explaining the Constitutional standard for unmasking online critics and the federal law that prohibits MySpace from disclosing (and the Town President of Cicero from obtaining) identity information pursuant to the Petition at issue. In addition, EFF respectfully requests that it be permitted to appear at oral argument to present these matters to the Court.

Respectfully submitted,

Date 6/4/08

By _____

Charles Lee Mudd Jr.
Mudd Law Offices
3114 West Irving Park Road, Suite 1W
Chicago, Illinois 60618
(773) 588-5410
Cook County Attorney No.: 38666
ARDC: 6257957
cmudd@muddlawoffices.com

Matt Zimmerman (pro hac vice application pending)
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333 x127
mattz@eff.org

Attorneys for Amicus Curiae Electronic Frontier Foundation

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LARRY DOMINICK, **in his Official Capacity as President of the TOWN OF CICERO,**	)	
Petitioner/Plaintiff,	)	**Docket No. 2008-L-005191**
vs.	)	
MYSPACE, INC., **a Delaware corporation,**	)	
Respondent/Defendant.	)	

[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

This cause was heard before the undersigned Circuit Court Judge on the Motion of the Electronic Frontier Foundation ("EFF") to appear as amicus curiae in this proceeding. After reviewing the Motion and all pertinent documents of record, the Court is of the opinion that such motion should be granted.

IT IS THEREFORE ORDERED that the Electronic Frontier Foundation may appear as amicus curiae in the above-captioned proceeding, including oral argument, under such conditions as the Court may impose.

Ordered this ____ day of June, 2008.

_____

Circuit Court Judge

Proposed Amicus Memorandum

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LARRY DOMINICK, in his Official Capacity as President of the TOWN OF CICERO, Petitioner/Plaintiff, vs. MYSPACE, INC., a Delaware corporation, Respondent/Defendant.	)	Docket No. 2008-L-005191

BRIEF OF AMICUS CURIAE THE ELECTRONIC FRONTIER FOUNDATION IN RESPONSE TO PETITIONER'S PETITION FOR DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS 1

III. ARGUMENT 2

A. As a Governmental Entity, Petitioner Is Barred By the Stored Communications Act From Obtaining Identity Information Through the Use of the Civil Discovery Process. 3

1. The SCA Prohibits the Disclosure of Customer Records and Related Information. ... 4

2. The SCA Does Not Permit the Use of the Civil Discovery Process to Obtain Contents of Communications or Customer Records and Related Information. 5

B. Petitioner Has Not Met the First Amendment Requirements Regarding Attempts to Unveil Anonymous Online Speakers. 7

1. Anonymous Speech Enjoys a Qualified Privilege Under the First Amendment That Requires the Evaluation of Multiple Factors Prior to Discovery of Identity Information.. 8

2. Plaintiff's Discovery Request Cannot Survive the Scrutiny Required By the First Amendment. 10

IV. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Am. Intern. Hosp. v. Chi. Tribune Co., 483 N.E.2d 965 (Ill. App. Ct. 1985) 12

Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) 9

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) 8, 9

Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) ..... passim

Doctors Convalescent Ctr., Inc. v. East Shore Newspapers, Inc., 244 N.E.2d 373 (Ill. App. Ct. 1968) 13

Doe v. 2theMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) 8, 9

Doe v. Cahill, 884 A.2d 451 (Del. 2005) 10, 13

Doe v. MySpace Inc., __ F.3d __, 2008 WL 2068064, (5th Cir. May 16, 2008) 1

Fed. Trade Comm'n v. Netscape Commc'ns Corp., 196 F.R.D. 559 (N.D. Cal. 2000) 6

Gibson v. Fla. Legislative Investigative Comm'n, 372 U.S. 539 (1963) 8

Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) 2

Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987) 9

Greenbaum v. Google, Inc., 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007) 10

Hafer v. Melo, 502 U.S. 21 (1991) 4

Highfields Capital Mgmt. L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005) 10

In re Subpoena Duces Tecum to AOL, LLC, __ F.Supp.2d __, 2008 WL 1956266 (E.D. Va. April 18, 2008) 7

Kentucky v. Graham, 473 U.S. 159 (1985) 3

Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007) 12, 13

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 8

Mobilisa, Inc. v. John Doe 1, 170 P.3d 712 (Ariz. App. 2007) 12

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 14

O'Grady v. Super. Ct., 44 Cal. Rptr. 3d 72 (Ct. App. 2006) 6, 7

People v. Heinrich, 470 N.E.2d 966 (Ill. 1984) 13

Reno v. ACLU, 521 U.S. 844 (1997) 8

Roth v. St. Elizabeth's Hosp., 607 N.E.2d 1356 (Ill. App. Ct. 1993) 3

Scott v. O'Grady, 975 F.2d 366 (7th Cir. 1992) 4

Shutes v. Fowler, 584 N.E.2d 920 (Ill. App. Ct. 1991) 2

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) 9

Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) 9

Steve Jackson Games, Inc. v. U.S. Secret Service, 816 F. Supp. 432 (W.D. Tex. 1993) 4

Talley v. California, 362 U.S. 60 (1960) 8

Wilson v. Civil Town of Clayton, 839 F.2d 375 (7th Cir. 1988) 4

Statutes

18 U.S.C. § 2510 (15) 4

18 U.S.C. § 2701 3

18 U.S.C. § 2702 (a)(1) 4

18 U.S.C. § 2702(a)(2) 4

18 U.S.C. § 2711 (2) 4

47 U.S.C. § 230 1

Constitutional Provisions

H.R. Rep. No. 99-647 (1986) 4

S. Rep. No. 99-541 (1986) 4

I. INTRODUCTION

Petitioner Larry Dominick asks this Court to authorize discovery from MySpace, Inc., (operator of the Internet site MySpace.com) ("MySpace")[1] in order to identify individual(s) who allegedly posted defamatory "imposter profiles." Petitioner's request is Constitutionally deficient as well as prohibited by federal statute. While Petitioner may (or may not) be able to cure these serious defects, his Petition does not comply with existing law that protects users who utilize the Internet to engage in anonymous speech. Consequently, his Petition must be denied.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On May 12, 2008, Petitioner Larry Dominick – in his "official capacity as President of the Town of Cicero" – moved for an order "pursuant to Illinois Supreme Court Rule 224 to obtain discovery[2] from Respondent, MySpace, Inc., for the purpose of identifying responsible parties" relevant to a potential future lawsuit that may include defamation, invasion of privacy, and "related torts arising from the publication of various statements on a social networking website known as Myspace.com." Petition for Discovery ("Petition") at 1. The request did not identify any of the allegedly actionable content at issue.

Petitioner alleges that a third party (or parties) created one or more profiles of Petitioner and included defamatory statements in the profile. Petition at ¶ 3. Petitioner does not specify the

---

[1] MySpace is "a popular social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music and videos for teenagers and adults internationally." See Wikipedia, MySpace, http://en.wikipedia.org/wiki/MySpace (last visited June 4, 2008); see also MySpace, http://www.myspace.com (last visited June 4, 2008).

[2] Mr. Dominick's Petition is further deficient to the extent that it asks this Court to authorize the issuance of interrogatories to MySpace. See Petition at ¶ 4. Interrogatories are discovery vehicles reserved for use against parties. See Illinois Supreme Court Rule 213. While document requests can be issued to non-parties, interrogatories may not. To the extent that Petitioner does in fact intend to include MySpace as a Defendant in a future lawsuit, note that MySpace is immune from liability for otherwise actionable statements made by its users. See 47 U.S.C. § 230 ; see also, e.g., Doe v. MySpace Inc., __ F.3d __, 2008 WL 2068064, (5th Cir. May 16, 2008) (Case No. 07-50345) (holding that 47 U.S.C. § 230 protected MySpace from liability), available at http://www.ca5.uscourts.gov/opinions/pub/07/07-50345-CV0.wpd.pdf (last visited June 4, 2008).

allegedly defamatory statements, nor explain how the Town President's privacy was invaded, nor specify the "related torts" Petition asserts. It is unknown whether the statements in question were asserted as statements of fact or, for example, were part of a parody designed to comment on and criticize the Town and its President. Indeed, there is no evidence in the record to indicate what the statements were or the context in which they were made.[3]

III. ARGUMENT

Illinois Supreme Court Rule 224 – invoked by the Petitioner as the basis of his request – provides a procedural mechanism by which litigants may engage in discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." In part, Rule 224 requires a petition filed pursuant to Rule 224 to set forth: "(A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." Rule 224 also "requires a hearing on the petition for discovery and thus involves the trial court in the process. The trial court must issue an order for discovery before discovery can occur. This involvement of the circuit court protects against abuses of the discovery process." Shutes v. Fowler, 584 N.E.2d 920, 923 (Ill. App. Ct. 1991). While Rule 224 sets forth a default rule regarding the pre-complaint discovery of the identity of a potential defendant, both federal

[3] Statements to the Chicago Tribune by a Cicero spokesperson raise doubts regarding whether the statements at issue were actionable at all: "'It was silly juvenile stuff, but it was defamatory,' Cicero spokesman Dan Proft said. 'We want to know who is responsible so we can go after them.'" Josh Noel, Cicero Town President Wants MySpace Poser's Identity Revealed, Chicagotribune.com, May 17, 2008, available at http://www.chicagotribune.com/news/local/chi-myspace-imposters_bdmay18,0,3460074.story (last visited June 4, 2008). See, e.g., Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (allegedly defamatory message board posting "lack[ed] the formality and polish typically found in documents in which a reader would expect to find facts .... In short, the general tone and context of these messages strongly suggest that they are the opinions of the posters.").

statute and the U.S. Constitution require more in cases such as this in which a government official attempts to identify an anonymous Internet speaker.[4]

Mr. Dominick's Petition must be denied on at least two grounds. First, the federal Stored Communications Act categorically bars government actors from obtaining customer records (such as subscriber information) from online services like MySpace through the use of the ordinary civil discovery process. Second, Petitioner fails to meet the heightened First Amendment requirements demanded of litigants seeking the identities of anonymous Internet speakers. In short, Petitioner has not met his burden imposed by the First Amendment and simply cannot (petitioning the Court in his official capacity as the President of Cicero) use civil discovery requests to obtain customer records held by MySpace.

A. As a Governmental Entity, Petitioner Is Barred By the Stored Communications Act From Obtaining Identity Information Through the Use of the Civil Discovery Process.

The federal Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq., prevents Petitioner from using the civil discovery process to obtain the information he seeks. The SCA, passed as part of the Electronic Communications Privacy Act of 1986, prohibits unauthorized access of electronic communications stored with online services. It also limits the ability of providers of communications and computing services to disclose records pertaining to users of such services, including the identity of those users. While Petitioner may be able to use other procedural devices to obtain access to information relevant to its case, the SCA flatly prohibits a governmental entity like the Town of Cicero[5] from using civil discovery tools such as

---

[4] See, e.g., Roth v. St. Elizabeth's Hosp., 607 N.E.2d 1356, 1361 (Ill. App. Ct. 1993) (citing August 1, 1989 Committee Comments) ("The rule is not intended to modify in any way any other rights secured or responsibilities imposed by law.").

[5] In the Petition's description of the allegations, the Petitioner appears to conflate himself as an individual with his official capacity. Nevertheless, Petitioner sued in his official capacity and when a person is a party in his official capacity, the real party-in-interest is the underlying governmental entity. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("Official-capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"); see also Hafer v. Melo, 502 U.S. 21, 25 (1991); Scott v. O'Grady, 975 F.2d 366 (7th Cir. 1992); Wilson v. Civil Town of Clayton, 839 F.2d 375, 381-82 (7th Cir. 1988).

interrogatories and document requests to gain access to the kinds of information and materials it seeks from MySpace.

1. The SCA Prohibits the Disclosure of Customer Records and Related Information.

The SCA prohibits, subject to specific statutory exceptions that are inapplicable here, the disclosure of certain types of electronic information by two categories of service providers, providers of "electronic communication services"[6] ("ECS providers") and providers of "remote computing services"[7] ("RCS providers"). See 18 U.S.C. § 2702 (a)(1) and 2702(a)(2), respectively. While prohibitions and exceptions vary somewhat depending on ECS or RCS provider characterization, the protections applied to each type of provider are indistinguishable for purposes of this discussion. MySpace qualifies as an RCS[8] provider for the information sought by Petitioner's discovery request, and no statutory exception exists that would permit the lawful disclosure of that information by MySpace to the Petitioner, even through the use of an otherwise valid discovery request.[9]

---

[6] "'[E]lectronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications ..." 18 U.S.C. § 2510 (15).

[7] "[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system ..." 18 U.S.C. § 2711 (2). Roughly speaking, a remote computing service is provided by an off-site computer that stores or processes data for a customer. See S. Rep. No. 99-541, at 10-11 (1986), reprinted in 1986 U.S.C.C.A.N 3555, 3568. For example, a service provider that processes data in a time-sharing arrangement provides an RCS. See H.R. Rep. No. 99-647, at 23 (1986). So can operators of electronic bulletin board systems. See Steve Jackson Games, Inc. v. U.S. Secret Service, 816 F. Supp. 432, 443 (W.D. Tex. 1993).

[8] MySpace qualifies as an RCS provider for the information sought by Petitioner as the subpoena seeks information and materials in connection to Doe's use of its social networking site, a service with which users can, among other things, create blogs and allow comments by third parties. See, infra, Steve Jackson Games, Inc.

[9] As it (through offering e-mail, message posting, and other services) "provides to users thereof the ability to send or receive ... electronic communications," MySpace also qualifies as an ECS provider.

Section 2702 (a)(3) explicitly prevents, unless an appropriate exception applies, the disclosure by an ECS or RCS provider to a governmental entity of a customer "record" or "other information pertaining to" a subscriber or customer:

> [A] provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

Petitioner's request seeks precisely this kind of information[10] and is therefore not permitted under 18 U.S.C. § 2702. While sections 2702 and 2703 offer several explicit exceptions to the general rules preventing disclosure of the material covered by the SCA, none apply here.

2. The SCA Does Not Permit the Use of the Civil Discovery Process to Obtain Contents of Communications or Customer Records and Related Information.

Subsection 2702(a) enacts a blanket prohibition on disclosure – providers "shall not knowingly divulge to any person" the contents of communications or records or other information pertaining to a subscriber or customer – unless they meet the strict and specifically articulated exceptions. Thus, a governmental entity like the Town of Cicero may only obtain identity information if it uses one of the specific methods provided by the federal statute. While subsections 2703(b) and (c) affirmatively permit governmental entities to obtain identity information through the use of "administrative subpoenas," "grand jury subpoenas," or "trial subpoenas," this exception does not permit the use of interrogatories, document requests, or other civil discovery methods.

The few courts to examine this aspect of the SCA have come to this same conclusion. In Fed. Trade Comm'n v. Netscape Commc'ns Corp., 196 F.R.D. 559 (N.D. Cal. 2000), the Northern District of California ruled on a motion to compel by the Federal Trade Commission – a government entity – which was seeking to enforce a discovery subpoena seeking identity-

[10] Section 2703 specifically identifies the "name" and the "network address" (i.e. IP address) of a subscriber or customer as a type of "record" protected by section 2702 from disclosure.

related information about users of Netscape's e-mail service. The court held that the SCA's authorization for the disclosure of certain information to governmental entities under a trial subpoena did not permit disclosure under a civil discovery subpoena. Noting the well-recognized distinctions between trial and discovery subpoenas, the court found "no reason . . . to believe that Congress could not have specifically included discovery subpoenas in the statute had it meant to." Id. at 561.

Similarly, in O'Grady v. Super. Ct., 44 Cal. Rptr. 3d 72 (Ct. App. 2006), a case in which a non-government litigant (Apple Computer) issued civil subpoenas to an ECS operator seeking the e-mail communications of an online journalist who allegedly was in communication with a Doe defendant, the California Court of Appeals found that discovery subpoenas could not be used to obtain the material sought: "Few cases have provided a more appropriate occasion to apply the maxim expressio unius exclusio alterius est, under which the enumeration of things to which a statute applies is presumed to exclude things not mentioned." Id. at 86. The court concluded:

> Since the Act makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable the [discovery] subpoenas . . .

Id. at 89 (holding that a protective order must issue to protect against such subpoenas).

Last month, the U.S. District Court for the Eastern District of Virginia expressly adopted the holdings of the Netscape and O'Grady courts. In In re Subpoena Duces Tecum to AOL, LLC, __ F.Supp.2d __, 2008 WL 1956266 (E.D. Va. April 18, 2008), the court affirmed a lower court ruling quashing a civil discovery subpoena issued by State Farm Fire and Casualty Company to America Online seeking the e-mails and other information relating to the accounts of non-party witnesses:

> Applying the clear and unambiguous language of § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of the [witness's] electronic communications to State Farm because the statutory language of the [Stored Communications Act] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.

Id. at 4.

Even if the Petitioner's discovery request had merit, the SCA renders it – and any future discovery requests similarly seeking materials covered by the Act – unenforceable.

B. Petitioner Has Not Met the First Amendment Requirements Regarding Attempts to Unveil Anonymous Online Speakers.

Even if this Petition were submitted in Mr. Dominick's personal capacity, it would still be barred by the First Amendment's broad protections for anonymous speakers. Speakers have not only a right to criticize public policies and governmental officials – speech that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"[11] – but also the right to do so anonymously. In order to protect these rights, the First Amendment requires that those who seek to unmask vocal critics demonstrate a compelling need for such identity-related information before proceeding with discovery. See, e.g., Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (discussed in detail below).

The Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority ... [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation ... at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); see also id. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); Gibson v. Fla. Legislative Investigative Comm'n, 372 U.S. 539, 544 (1963) ("[I]t is ... clear that [free speech guarantees] ... encompass[] protection of privacy association ..."); Talley v. California, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, and noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

[11] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

These fundamental rights enjoy the same protections whether their context is an anonymous political leaflet or an Internet website. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet); see also, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("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.").

1. Anonymous Speech Enjoys a Qualified Privilege Under the First Amendment That Requires the Evaluation of Multiple Factors Prior to Discovery of Identity Information.

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce anonymity are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." Dendrite, 775 A.2d 756 at 761. Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. See, e.g., Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004), ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.").[12] Otherwise, "[i]f Internet users could be stripped of that anonymity by a civil

[12] See also, e.g., Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987) , citing Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure."); Columbia Ins. Co., 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("People who have committed no wrong should be able to participate online

subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." 2theMart.com, 140 F. Supp. 2d at 1093.

The Constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation. Seescandy.com, 185 F.R.D. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.").

However, litigants may not use the discovery power to uncover the identities of people who have simply made statements the litigants dislike. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a claim.

The seminal case setting forth First Amendment restrictions upon a litigant's ability to compel an online service provider to reveal an anonymous party's identity is Dendrite Int'l, Inc. v. Doe No. 3, supra, in which the New Jersey Appellate Division adopted a test for protecting anonymous speakers that has been followed by courts around the country.[13] Recognizing the Supreme Court's long support of the First Amendment right to speak anonymously, the Dendrite court underscored the ongoing need for vigorous protection of that right:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works

---

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.").

[13] See, e.g., Mobilisa, Inc. v. John Doe 1, 170 P.3d 712, 717-721 (Ariz. App. 2007); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); Doe v. Cahill, 884 A.2d at 459-60 (applying a modified Dendrite test); Highfields Capital Mgmt. L.P. v. Doe, 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005).

> enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

Id. at 765. Taking these protections into account, the court described "the appropriate procedures to be followed and the standards to be applied by courts in evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards" (Id. at 140) as follows:

> (1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
>
> (2) set forth the exact statements that Petitioner alleges constitutes actionable speech;
>
> (3) allege all elements of the cause of action and introduce prima facie evidence within the litigant's control sufficient to survive a motion for summary judgment; and,
>
> (4) "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

Id. at 141-42.

As this decision accurately and cogently outlines the important First Amendment interests raised by Mr. Dominick's Petition, and as the opinion remains the touchstone for online anonymity jurisprudence around the country, the holding and reasoning of Dendrite and its progeny should be applied here.

2. Plaintiff's Discovery Request Cannot Survive the Scrutiny Required By the First Amendment.

The Petitioner fails at least the first three steps of this First Amendment test; consequently, his discovery authorization request should be denied.

First, Petitioner has apparently not attempted to notify the Does of his request. (He makes no such indication in his Petition.) As their First Amendment rights to speak

anonymously will be irreparably harmed if Petitioner is permitted to obtain their identities from MySpace, due process dictates that they be given an opportunity to respond to this proceeding. See, e.g., Dendrite, 775 A.2d at 761 ("These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board."); Mobilisa, Inc. v. John Doe 1, 170 P.3d at 717-21 (applying the Dendrite standard) ("The requesting party should make reasonable efforts to inform the anonymous party of the pending discovery request, including the pertinent case information, and inform that party of the right to timely and anonymously file and serve a response to the request.").

Second, Petitioner has not quoted – verbatim or otherwise – the allegedly actionable speech at issue.[14] Assuming Doe's statements are lawful, they (and the identities of the speaker(s)) would be afforded Constitutional protection under the First Amendment. "Accordingly, the discovery of [Doe's] identity largely turns on whether his statements were defamatory or not." Dendrite, 775 A.2d at 766. Only by examining the allegedly actionable statements will the Court be able to determine whether or not the Petitioner has a valid cause of action at all, let alone whether he can meet the other First Amendment requirements.

A conclusory assertion that an unidentified statement is actionable is insufficient to warrant the discovery that Petitioner seeks. Indeed, the Petition's primary allegation — that the anonymous speaker made a false profile of the Town of Cicero's president — may very well be a protected parody of a political figure. For example, in Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007), a student made a false profile of Eric Trosch, the principal of his high school on MySpace. In that case:

> [I]n response to the question "in the past month have you smoked?," the profile says "big blunt." In response to a question regarding alcohol use, the profile says "big keg behind my desk." In response to the question, "ever been beaten up?," the profile says "big fag." The answer to the question "in the past month have you gone on a date?" is "big hard-on." The profile also refers to Trosch as a "big

[14] "In a defamation action, a complaint must clearly identify the specific defamatory material complained of." Am. Intern. Hosp. v. Chi. Tribune Co., 483 N.E.2d 965, 968 (Ill. App. Ct. 1985) (citing Heying v. Simonaitis, 126 Ill. App. 3d 157, 163(Ill. App. Ct. 1984)).

> steroid freak" and "big whore." The profile also reflected that Trosch was "too drunk to remember" the date of his birthday.

Id. at 591. The Layshock court found the speech in the profile protected by the First Amendment, granting summary judgment on the student's First Amendment claim against the school district.

Third, Petitioner has neither alleged the elements of his purported causes of action, nor has he introduced any evidence in his control to demonstrate that he could survive a motion for summary judgment. See Dendrite, 775 A.2d at 770 ("[A]pplication of our motion-to-dismiss standard in isolation fails to provide a basis for an analysis and balancing of Dendrite's request for disclosure in light of John Doe[]'s competing right of anonymity in the exercise of his right of free speech."); Doe v. Cahill, 884 A.2d 451, 463 (Del. 2005) ("[T]he defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within the plaintiff's control" in order to obtain discovery of an anonymous speaker's identity.). Petitioner alludes generally to potential "defamation, invasion of privacy and related torts" that he may choose to bring if he is able to obtain the identities of the anonymous speakers in question, but he does not identify the elements of those causes of action, let alone support those elements with any evidence.

For example, Petitioner has neither alleged nor submitted any evidence in his control (such as an affidavit) to indicate that the statements in question are false. He has furthermore failed to allege that any such false statements were made with actual malice as required of public figures alleging defamation.[15] See, e.g., People v. Heinrich, 470 N.E.2d 966, 970 (Ill. 1984)) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)) ("[T]he burden is on the 'public official' plaintiff to plead and prove either knowing falsity or reckless disregard for the truth."). Even more problematic is Petitioner's vague assertion to potential "invasion of privacy

[15] See, e.g., Doctors Convalescent Ctr., Inc. v. East Shore Newspapers, Inc., 244 N.E.2d 373, 376 (Ill. App. Ct. 1968) ("[O]ne is a public official if he, the alleged defamed, is carrying out a function of government or is participating in acts relating to matters in which the government has a substantial interest.").

and related torts": his Petition does not give the slightest indication of the basis for such claims.[16]

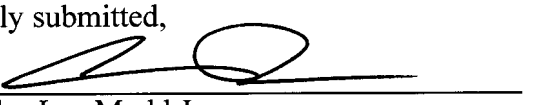
The First Amendment requires a litigant or potential litigant to demonstrate that it has a legitimate need to pursue discovery when free speech rights would be harmed as a result. Petitioner has not met this standard. Consequently, the Petition must be denied.

IV. CONCLUSION

The Town President of the Town of Cicero has asked this Court to approve of an illegal and unconstitutional discovery request expressly aimed at exposing anonymous speakers who posted information to MySpace. The Court should decline to do so. While Petitioner may ultimately be able to meet the requirements imposed by the First Amendment and the Stored Communications Act, he has not done so with the Petition currently before the Court.

Respectfully submitted,

Date 6/4/08

By 

Charles Lee Mudd Jr.
Mudd Law Offices
3114 West Irving Park Road, Suite 1W
Chicago, Illinois 60618
(773) 588-5410
Cook County Attorney No.: 38666
ARDC: 6257957
cmudd@muddlawoffices.com

Matt Zimmerman (pro hac vice application pending)
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333 x127
mattz@eff.org

Attorneys for Amicus Curiae Electronic Frontier Foundation

[16] While the Petition was specifically filed in Petitioner's official capacity, presumably Mr. Dominick is not asserting that the Town itself has its own privacy interest. However, it remains difficult to reconcile this "official capacity" privacy lawsuit with Illinois open government laws and public policy. See e.g., 5 ILCS 140/1 ("...it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government.").