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NEW YORK STATE E-DISCOVERY LAW

BY MARK A. BERMAN

'Electronic' Defamation: Difficulties Identifying Source

The electronic age has changed the nature of the tort of defamation in that one can now more easily defame another without having to reveal one's identity.

While previously, unsigned, defamatory statements often were circulated, for instance, through the mail or posted on a workplace bulletin board, and directed at a limited audience, now anonymous defamatory communications, with the touch of a button, can be sent instantly via e-mail to multiple recipients.

Further, with electronic "blogs" or forums,[1] "posted" defamatory communications can be read by thousands, and such statements remain in the public domain unless affirmatively removed by the "host" of such site.

As a result, defamation cases predicated upon anonymous, electronic statements are becoming more prevalent. But, to be successful in such action, one must be able to identify the defaming party. The source of such statements, however, is often disguised through unidentifiable user names, and unmasking the identity of the senders is often not easy to accomplish. New York courts are thus grappling with plaintiffs who are unable to identify the name of the alleged defamer, and developing procedures for a party to be able to discover such identities through commencing a special proceeding against or subpoenaing an Internet service provider (ISP) for such information.

Guidance as to what identification information an ISP may produce can be found in the "so ordered" stipulation in *In the Matter of Berk*.[2] Concomitantly, courts are addressing whether a person, who has been *electronically* defamed and asserts that her reputation has been damaged by such defamation, may bring an action anonymously to

mitigate any damage that may result through the further identification of her name in court documents.

First Amendment

• ***Does Not Protect Anonymous Defamers.*** New York courts have held that the right to anonymous speech is not absolute and it will not shield one from committing defamation.[3] Courts perform a balancing test between the interest of the plaintiff seeking redress for protection of her reputation and the First Amendment interest of the speaker in anonymity, when deciding how to address a party's inability to specifically identify the name of a putative anonymous defamer.[4]

In *Ottinger*, disclosure of the name of anonymous bloggers was sought from the nonparty host of a "blog." Acknowledging the lack of New York precedent, a trial court looked to the New Jersey case of *Dendrite Intl. Inc. v. Doe*,[5] which analyzed the following four factors in deciding whether to compel an ISP to disclose the identity of anonymous Internet posters sued for defamation:

• The trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application. 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;

• The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitute actionable speech;

• The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously named defendants. In addition to establishing that its action can withstand a motion to dismiss…the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis; and

• 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 properly to proceed.[6]

In *Ottinger*, the court found that plaintiff had met the first *Dendrite* factor through timely notice posted on certain forums[7] and then, after holding a hearing, held that the complaint set forth a prima facie cause of action for defamation against the "fictitiously named" defendants, but did not require plaintiff, a public figure, from having to allege "constitutional malice," because plaintiff could not have had "discovery of the defendant's identity, [and] satisfying this element may be difficult, if not impossible."[8] The court ordered the nonparty "blog" host[9] to:

> disclose to petitioners such information, if any, in its possession or control that could reasonably lead to the identification[10] of the Anonymous Posters using the screen names 'hadenough,' 'SAVE10543,' and 'aoxomoxoa,' including posters' names,

Mark A. Berman, *a partner at Ganfer & Shore, has extensive experience in securities and general commercial litigation.*

mailing addresses, any e-mail addresses or other registration information that it may have for them including the IP address from which the blogs were posted, the corresponding Internet service provider, [and] other such information which will allow plaintiffs to identify the person(s) posting the blog entries.[11]

Notwithstanding the issuance of any court order, subpoena or discovery request, such does not mean that the entity that is supposed to possess such identification information: (i) ever possessed, in the first instance, all the called-for information or (ii) retained some of it and, then, even if some still exists, that the putative defamer may not have provided accurate and/or current information on his identity.

Obtaining Identity Details From an ISP

In *Berk*, petitioner, in contemplation of the filing of a defamation action, commenced a pre-action special proceeding against Google[12] seeking information concerning the identity of an anonymous creator of a "blog." Google objected, and a "so ordered" stipulation was thereafter entered into, which, inter alia, provided:

> Google shall collect all registration information including, without limitation, any electronic mail address(es) (the "Registration Information") that it may have from the creator(s) of the Blog. Google shall also collect any recent "IP address" login information for the Blog (the "IP Address Information" and together with the Registration Information, the "Pre-Action Discovery Information").
>
> By June 13, 2008, in accordance with its standard notification policy, and using the electronic mail address supplied in the Registration Information, Google shall attempt to inform the creator(s) of the Blog that the Pre-Action Discovery Information has been sought pursuant to the Petition, and that Google will produce the Pre-Action Discovery Information to Petitioners unless the Blog's creator(s) appear(s) and contest(s) the production by July 3, 2008.
>
> Google will produce the Pre-Action Discovery Information to Petitioners unless the creator(s) appear(s) in this Action to contest the production on or before July 3, 2008. In the event that a creator does appear on or before July 3, 2008, Google will not produce any Pre-Action Discovery Information pending a further order of the Court. If the creator(s) appear(s) in this Action to contest the production, Google shall take reasonable steps to preserve the Pre-Action Discovery Information until further order of the Court.

Pursuing Action Anonymously

In *Jane Doe v. Szul Jewelry Inc.*,[13] a woman responded to an advertisement that sought an actress to perform in a Web commercial. Plaintiff was filmed, but alleged that the footage was heavily edited to create a video depicting her simulating a sexual act. The company released the video on YouTube and plaintiff alleged that, thereafter, a "media frenzy occurred" with the video receiving more than 699,000 Internet user hits.[14] Plaintiff commenced suit using a pseudonym and defendant, although plaintiff had consented to the use of her name for discovery purposes, moved to compel the use of her legal name in court papers. The court, in denying defendant's motion, ruled that:

> Among the factors[15] considered in permitting the use of a pseudonym are: "whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature"; whether the party seeking anonymity has an illegitimate ulterior motive; the extent to which the identity of the litigant has been kept confidential; whether identification poses a risk of mental or physical harm, harassment, ridicule or personal embarrassment; whether the case involves information of the utmost intimacy; whether the action is against a governmental entity; the magnitude of the public interest in maintaining confidentiality or knowing the party's identity; whether revealing the identity of the party will dissuade the party from bringing the lawsuit; whether the opposition to anonymity has an illegitimate basis; and whether the other side will be prejudiced by use of the pseudonym.[16]

Use of a Pseudonym

In holding that plaintiff was justified in the use of a pseudonym, the court ruled:

> Plaintiff has voiced concern for her privacy, her reputation and her livelihood prior to the start of proceedings, has kept her identity confidential throughout and has complained of harassment, ridicule and embarrassment…. [D]efendant is a private commercial enterprise and has gained financially by the publicity. Defendant…is not prejudiced at this time. The only purpose revelation of plaintiff's name could have would be to further discomfort plaintiff and perhaps deter her from litigating the matter. In fact, revelation of plaintiff's identity would undermine the litigation by denying a portion of the relief ultimately requested in the action.[17]

Simply stated, putative anonymous defamers are not immune from suit or discovery, but a defamed plaintiff will need to work hard to uncover the identity of such person, who seeks to retain his electronic anonymity, and will need to meet her burden to convince a court to order specific discovery of such person's identification.

1. The differences between electronic "blogs," "forums" and "listservs" are set forth in the Techlex column by Barbara Beauchamp in the State Bar News, New York State Bar Association, at 26, July/August 2008. See http://www.nysba.org/techlexarticle.

2. Index No. 107316/08 (N.Y. Co. Sup. Ct. June 30, 2008).

3. *Greenbaum v. Google*, 18 Misc3d 185, 187, 845 N.Y.S.2d 695, 698 (N.Y. Co. Sup. Ct. 2007).

4. *Matter of Ottinger v. Non-Party The Journal News*, Index No. 08-03892 (Westchester Co. Sup. Ct. July 7, 2008).

5. 775 A.2d 756, 760 (N.J. Super. Ct. 2001).

6. *Ottinger*, at 4.

7. The anonymous commentators have not sought leave to intervene. [Plaintiff] Orthomom has represented that she voluntarily posted notice of the adjourned date on the blog, thus giving the commentators notice. The preferable procedure would have been for Google to have requested, and the court to have ordered, that notice of the proceeding be given not only to Orthomom but also to the anonymous commentators by e-mail to Orthomom as well as posting on the Orthomom blog. *Greenberg* at 187 n.1, 845 NYS2d at 698 n.1.

8. *Ottinger*, at 5 (quoting *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005)).

9. See *In re Subpoena Duces Tecum to AOL, LLC*, 550 FSupp.2d 606 (E.D. Va. April 18, 2008) (Electronic Communications Privacy Act, 18 U.S.C. §2701-3 (2000), prohibits Internet service provider from producing nonparty e-mails pursuant to civil discovery subpoena).

10. The court in *Wendler & Ezra P.C .v. American Intern. Group Inc.*, 521 F.3d 790, 791 (7th Cir. 2008), rejected an affidavit, which stated that, through the use certain software, affiant was able to identify that the alleged electronic defamatory posting originated from an IP address registered at AIG, noting that the affidavit failed to state "what software had been employed, how it worked, what data had been provided to the program, and what if anything had been done to find out whether the poster had spoofed one of AIG's addresses" and "what results [the program] produced, and how alternative explanations (including spoofing) were ruled out."

11. *Ottinger*, at 6.

12. In *Greenbaum*, the court held that the proponent of pre-action disclosure must demonstrate that it "has a meritorious cause of action and the information being sought is material and necessary to the actionable wrong." Id. at 188, 845 N.Y.S.2d at 699.

13. Index No. 604277/07 (N.Y. Co. Sup. Ct. May 13, 2008).

14. Id. at 3.

15. In the recent decision in *Sealed Plaintiff v. Sealed Defendant #1*, 2008 WL 3294864 (2d Cir. Aug. 12, 2008), the Second Circuit identified certain "non-exclusive" factors that should be taken into account when determining whether a plaintiff may be permitted to maintain an action under a pseudonym.

16. *Doe*, at 11.

17. Id. at 12.