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## Outing Anonymous Online Speakers In The 9th Circ.

Law360, New York (August 18, 2011) -- Companies suffering Internet defamation or the publication of their confidential information online have faced an increasingly difficult battle in the courts that until recently protected the anonymity of online speakers at the expense of injured corporate plaintiffs.

Earlier this year, the Ninth Circuit Court of Appeals made a significant adjustment to the legal framework when it held that the identities of anonymous speakers making online “commercial speech” deserve significantly less protection than that normally accorded to core areas of free speech. (*In re Anonymous Online Speakers*, No. 09- 71625, — F.3d —, 2011 at \*2, \*6 (Jan. 7, 2011, Ninth Cir. (Nev.)).)

The court did not explain what this means, however, or whether anonymous commercial speakers could maintain their anonymity in the face of a lawsuit or subpoena. It merely affirmed on the ground that the appellant failed to establish “clear error,” and then let the trial court fashion its own parameters to balance the rights of plaintiffs against Internet speakers’ competing rights to remain anonymous. (*Ibid.*)[1]

While never directly explaining what protections remain for anonymous online posters of commercial speech, the court hinted that it might affirm an “attorneys' eyes only” protective order that permitted disclosure of the anonymous poster’s identifying information to the attorneys but not to their clients in order to protect the speaker’s anonymity and allow plaintiffs to pursue legal remedies. (*Id.*, at \*7 and fn. 2.)

On June 29, 2011, a different panel of the Ninth Circuit decided whether to shield the identifying information of several individuals who posted allegedly defamatory messages about S103 Inc. and its bodybuilding products on an online message board. *S103 Inc. v. Bodybuilding.com LLC*, 2011 (June 29, 2011, Ninth Cir. (Idaho).)

In its opinion, the Ninth Circuit articulated the insurmountable problem plaintiffs faced under the constitutional framework where they are required to establish a prima facie case against an anonymous speaker before learning his or her identity — namely, that it is often impossible to state a valid cause of action without knowing the speaker’s identity.

To characterize the speech at issue here, we must know the true identities of the speakers. If the pseudonymous speakers indeed work for S103's competitors, there is good reason to suspect that their harsh criticisms were intended to promote other, competing products, many of which are discussed in the messages S103 has identified. In that case, a less-protective disclosure standard for commercial speech may be appropriate. S103 Inc., supra., at \*1; see, e.g., *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and *Dendrite International Inc. v. Doe*, 775 A.2d 756 (N.J.Super.Ct.App.Div. 2001).[2]

The circuit court panel reversed the lower court and ordered it to determine “whether the anonymous speakers were acting as agents of S103's competitors ... without disclosing the identities of the pseudonymous speakers to the public or to S103.”

At the same time, the panel recognized the lower court would most likely have to disclose the poster's identities to S103's “attorneys' eyes only,” so they could determine whether the individuals were employed by S103's competitors. (Id. at \*1 and fn. 1.) If they were, the court would then apply “a less-protective standard” before fully disclosing the speakers' identities and allowing the lawsuit to proceed. (Id. at \*1.)

Although S103 Inc. v. Bodybuilding.com LLC is unpublished and therefore not precedent, it nonetheless may be cited as persuasive nonbinding authority where the Ninth Circuit devised a solution to allow plaintiffs to pursue legal remedies while protecting the identities of anonymous speakers online.[3]

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[1] A lawsuit is normally at an end once the trial court refuses to order the disclosure of the defendant's identity.

[2] Compounding this problem, if the court grants the anonymous speaker's motion to quash the corporate plaintiff's subpoena, the corporation might then be forced to pay the anonymous speaker's attorneys fees under California law if the subpoena was served on a California ISP such as [Yahoo](#) or [Google](#). (Cal. Code Civ. Proc. § 1987.2(b).)

[3] S103 Inc. v. Bodybuilding.com Inc. is an unpublished opinion; therefore, while it is not considered precedent, it may be cited as persuasive nonbinding authority from the Ninth Circuit under F.R.A.P. 32.1 and Ninth Circuit Rule 36-3.

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