RECENT DEVELOPMENTS IN MEDIA, PRIVACY, AND DEFAMATION LAW

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III. INTERNET LAW DEVELOPMENTS 2011

A. *Subpoena to Unmask Anonymous Speakers*

Courts generally continued on the path of providing significant protection to anonymous online speakers over the past year. For example, several more courts adopted variations of the popular *Dendrite* test,[44] requiring a subpoenaing plaintiff to "set forth a prima facie cause of action" and make other showings before the plaintiff may obtain the identity of one

44. *See* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

anonymously engaged in expressive speech. But a few recent developments may take this fast-developing area of law in a new direction, affording less protection to some anonymous speakers.

Some courts declined to apply the *Dendrite* formulation[45] in the cases before them, including the New Jersey court that decided *Dendrite* itself.[46] The most significant of these cases was the Ninth Circuit's decision in *In re Anonymous Online Speakers*.[47] In one of the first federal appellate decisions in this area, the Ninth Circuit reasoned that those who anonymously engage in "commercial speech" are entitled to less constitutional protection than those who anonymously engage in political speech, and therefore should not receive the benefit of the high bar to disclosure imposed under the *Dendrite* and *Cahill* tests.[48] After the panel's initial determination that the speech at issue in that case, criticism of a company's business practices, was "commercial speech" drew heavy criticism, the panel withdrew its original ruling and issued a new opinion that reached the same result (affirming the trial court's order to unmask three speakers) without determining whether their speech constituted "commercial speech." If other courts follow the panel's reasoning—that commercial speech is not entitled to the benefit of the *Cahill* and *Dendrite* tests—it may lead courts to develop a new test for (or to apply an existing lesser-burden test to) cases involving anonymous speech about commercial matters, including many matters of importance to consumers and policymakers.

Media companies continued to invoke reporter's privilege statutes in motions to quash subpoenas for anonymous posters' identities, with mixed

45. *See, e.g.*, SaleHoo Groups, Ltd. v. ABC Co., 722 F. Supp. 2d 1210 (W.D. Wash. 2010) (adopting elements of *Dendrite* and quashing subpoena in action alleging defamation, trademark infringement, false designation of origin, and unfair competition); USA Techs., Inc. v. Doe, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (adopting streamlined version of *Dendrite* to quash subpoena in action for securities fraud and defamation); Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 193 (N.H. 2010) (adopting *Dendrite* in defamation action); Swartz v. Doe #1, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009) (applying *Dendrite* test to factual findings made by court after hearing).

46. *See* Maxon v. Ottawa Publ'g, 929 N.E.2d 666, 675–76 (Ill. App. Ct., 3d Dist., 2010) (rejecting trial court's application of *Dendrite/Cahill* standard and holding that Illinois Supreme Court Rule 224, which authorizes independent actions for the discovery of the "identity of one who may be responsible in damages," coupled with the motion to dismiss standard, provides the same level of protection given that Illinois is a fact pleading state); Too Much Media, LLC v. Hale, 993 A.2d 845, 861–62 (N.J. Super. Ct. App. Div. 2010) (rejecting named-defendant blogger's attempt to invoke *Dendrite*, in addition to shield law, in defamation action to protect identity of her sources, and more broadly asserting that the *Dendrite* standard is limited to "evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards" and has "never been extended beyond ISPs"); Hester v. Doe, No. 10-CVS-361 (N.C. Sup. Ct., Vance County, Jun. 28, 2010) (purporting to apply *Dendrite* in a defamation action but mistakenly asserting that the standard required only a "Rule 12(b)(6) motion to dismiss analysis").

47. 2011 WL 61635 (9th Cir. Jan. 7, 2011) (withdrawing and replacing 611 F.3d 653 (9th Cir. 1010)).

48. *Id.* at *6.

success. Colorado and North Carolina joined the growing list of jurisdictions in which courts have quashed such subpoenas under state shield laws, bringing the list to six (along with Oregon, Montana, Florida, and Illinois).[49] However, a court in Kentucky *rejected* the invocation of that state's shield law, on the ground that the statute was not meant to apply in the anonymous poster context.[50]

Another issue that is increasingly being litigated is whether website privacy policies are relevant to the decision whether to unmask anonymous posters. Several of those seeking anonymous posters' identities have argued that website owners' privacy policies, which generally ensure user privacy but provide that a user's identity may be revealed under certain circumstances, diminish anonymous speakers' expectations of privacy or even constitute a waiver of their First Amendment rights to remain anonymous altogether. Although one court in Tennessee declined to quash a subpoena on this basis,[51] two other courts found these arguments meritless. In *McVicker v. King*, a federal court in Pennsylvania held that the privacy policy at issue, although containing boilerplate language allowing for disclosures under certain circumstances, actually created an expectation of privacy in the user when taken as a whole.[52] In *Sedersten v. Taylor*, a Missouri federal court refused to find that users were contracting away their constitutional rights in the absence of any express waiver in the privacy policy.[53]

B. *Immunity Under § 230 of the Communications Decency Act*

The Ninth Circuit's 2008 holding in *Fair Housing Council v. Roommates.com, LLC*[54] continues to have fairly limited impact, as courts throughout the country have distinguished it and have continued to extend immunity to websites hosting content provided by third parties.[55] In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*,[56] the Fourth Circuit affirmed the district court's

49. People v. Bruce, No. 09M3247 (Colo. Springs Mun. Ct. Oct. 27, 2009) (applying Colo. Rev. Stat. § 13-90-119(2) to quash a subpoena issued to a newspaper website for the identity of an individual alleged to be an exculpatory witness to allegedly criminal conduct); People v. Mead, No. 10 CRS 2160 (N.C. Super. Ct., Gaston County, Aug. 16, 2010) (applying the North Carolina shield law, N.C. Gen. Stat. § 8–53.11, to grant a newspaper's motion to quash a subpoena issued by a criminal defendant).

50. Clem v. Doe, No. 08-CI-1296, at 3 (Ky. Cir. Ct., Madison County, Mar. 26, 2010).

51. *See* Swartz v. Doe #1, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009).

52. 266 F.R.D. 92 (W.D. Pa. 2010).

53. No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009).

54. 521 F.3d 1157, 1174 (9th Cir. 2008).

55. *See, e.g.*, Milo v. Martin, 311 S.W.3d 210, 216–217 (Tex. App. 2010); Shiamili v. Real Estate Grp. of New York, Inc., 68 A.D.3d 581, 583 (N.Y. App. Div. 2009); Intellect Art Multimedia, Inc. v. Milewski, 2009 WL 2915273, at *7 (N.Y. Sup. Ct. 2009); Blockowicz v. Williams, 675 F. Supp. 2d 912, 914 (N.D. Ill. 2009); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009); Reit v. Yelp!, Inc., 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010); Black v. Google, Inc., No. 10-2381, 2010 WL 3746474 (N.D. Cal. Sept. 20, 2010).

56. 591 F.3d 250 (4th Cir. 2009).

dismissal of defamation and tortious interference with business expectancy claims against a consumer complaint site. The Chevy dealer contended that Consumeraffairs.com should be liable because it " 'solicit[ed]' its customers' complaints, 'steered' them into 'specific categor[ies] designed to attract attention by consumer class action lawyers, contact[ed]' customers to ask 'questions about' their complaints and to 'help' them 'draft or revise' their complaints, and 'promis[ed]' customers would 'obtain some financial recovery by joining a class action lawsuit.' "[57] None of those activities was enough to make Consumeraffairs.com responsible for its users' postings, the Fourth Circuit held. There is nothing illegal about developing or joining a class action lawsuit, and a "website operator who does not 'encourage illegal content' or 'design' its 'website to require users to input illegal content' is 'immune' under § 230 of the CDA."[58] In *Johnson v. Arden*,[59] the Eighth Circuit upheld dismissal of defamation, trademark, and other claims brought by a couple who bred cats, also based on derogatory postings about their business on a consumer complaint site. The court held that the ISP that hosts complaintsboard.com could not be held liable for allegedly defamatory postings on that website.[60] "Because InMotion was merely an ISP host and not an information content provider, the Johnsons' claims against InMotion fail as a matter of law" under § 230.[61]

A California state court addressed the issue of whether someone who forwards an allegedly defamatory e-mail after adding their own comments can claim § 230's protection. The Fourth District Court of Appeals went beyond *Barrett v. Rosenthal*,[62] which had provided § 230 protection to a woman who posted another person's mail to Internet newsgroups without adding her own comments.[63] The appeals court held that § 230 protected a veteran of the South Vietnamese military who relayed an allegedly defamatory e-mail to fellow veterans with his own neutral comments attached.[64] The defendant had forwarded a Vietnamese-language e-mail accusing the

57. *Id.* at 256–57.

58. *Id.* at 257 (citing *Roommates.com*, 521 F.3d at 1175). Nemet's allegations also weren't enough to show Consumeraffairs.com was a content provider, since they didn't "show any alleged drafting or revision by Consumeraffairs.com was something more than a website operator performs as part of its traditional editorial function." *Id.* at 258.

59. 614 F.3d 785 (8th Cir. 2010).

60. *Id.* at 791–92. The Johnsons did not serve as the operators of complaintsboard.com.

61. *Id.* at 792.

62. 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55, 146 P.3d 510 (Cal. 2006).

63. In an unpublished opinion in 2008, another California Court of Appeals panel held that § 230 barred a defamation claim based on an e-mail's embedded link to a website containing allegedly defamatory statements. McVey v. Day, No. B205465, 2008 Cal. App. Unpub. LEXIS 10462, at *45–46 (Cal. Ct. App. Dec. 23, 2008).

64. Phan v. Pham, 182 Cal. App. 4th 323 (Cal. Ct. App. 2010), *review denied*, Case No. G041666, 2010 Cal. LEXIS 4419 (Cal. May 12, 2010).

plaintiff of having been disciplined by the South Vietnamese Navy for abusive behavior,[65] and he introduced the e-mail with his introductory comment: "Everything will come out in the daylight, I invite you and our classmates to read the following comments."[66] Citing *Roommates.com*, the appellate court held that the introductory statement didn't materially contribute to the alleged defamation. "All [the defendant] said was: The truth will come out in the end. What will be will be. Whatever."[67]

Not all courts, however, have extended § 230 immunity to website operators, finding sufficient involvement in generating or developing the offensive content to treat the website operator as an "information content provider." The U.S. District Court in Connecticut refused to provide § 230 immunity for videos entered in a contest sponsored by the Quiznos sandwich chain that criticized Subway's offerings, saying Quiznos may have "actively solicited disparaging representations about Subway and thus [may have been] responsible for the creation or development of the offending contestant videos."[68] Quiznos' contest websites had encouraged video entries showing "why you think Quiznos is better" as part of an advertising campaign touting the claim that some Quiznos subs had more meat than similar Subway sandwiches. The case settled shortly after the judge's ruling.[69] A U.S. district court in Idaho ruled that plaintiffs' assertion that a moderator for a bodybuilding website had posted a disparaging statement about plaintiffs' dietary supplements was sufficient to overcome a § 230 immunity claim in a motion to dismiss.[70]

C. *Personal Jurisdiction*

This year saw a strong trend toward loosening the standards for applying personal jurisdiction in Internet-related defamation cases, with two federal appeals courts and two state supreme courts holding that statements directed at people or businesses based in the forum state are sufficient to provide personal jurisdiction.

In a case involving a dispute over software used to trace the lineage of purebred dogs, the Seventh Circuit held that defendants in Colorado, Michigan, Ohio, and Canada could be sued in Illinois for allegedly defaming the Illinois-based businessman who developed and sold the software.[71]

65. *Id*. at 324.
66. *Id*.
67. *Id*. at 328.
68. Doctor's Assocs. v. QIP Holder LLC, No. 3:06-cv-1710(VLB), 2010 U.S. Dist. LEXIS 14687, at *69–71 (D. Conn. Feb. 19, 2010).
69. *See* Doctor's Assocs. v. QIP Holders LLC, No. 3:06-cv-1710(VLB), 2010 U.S. Dist. LEXIS 62667 (D. Conn. June 23, 2010).
70. Cornelius v. Deluca, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010).
71. Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. Ill. 2010).

The fact that defendants knew Tamburo lived in Illinois (and even included his Illinois address in some messages urging readers to harass him) was enough to establish a prima facie case of personal jurisdiction in Illinois, the court held.[72] In *Silver v. Brown*,[73] the Tenth Circuit favorably cited *Tamburo* in ruling that a New Mexico court had jurisdiction over a Florida man who created a blog criticizing a New Mexico consulting firm and its founder. The Floridian, a dissatisfied former customer of the New Mexico firm, expressly aimed his conduct at New Mexico and knew the primary effects would be felt there, the court said.[74]

The highest state courts in Ohio and Florida also ruled that personal jurisdiction may be exercised over individuals who post statements online about domiciliaries of those states. In *Kauffman Racing Equip., L.L.C. v. Roberts*,[75] the Ohio Supreme Court found jurisdiction over a disgruntled Virginia customer who complained online about an allegedly defective engine block he had purchased from an Ohio racing engine manufacturer. Jurisdiction was proper because the disgruntled customer targeted his efforts—postings on various racing and automotive websites—at Ohio, and the plaintiff company produced evidence that five Ohioans had read those postings.[76] Notably, the defendants in *Silver* and *Kauffman Racing* were both disgruntled former customers of the plaintiffs who had a contractual relationship with the plaintiff (even if the claims were not contractual ones).[77]

The Florida Supreme Court, answering a certified question from the Eleventh Circuit, ruled that the tort of defamation is completed when the allegedly defamatory online material about a Floridian is accessed in Florida (and thus is "published" there).[78] Under Florida's long-arm statute, a person commits the tort of defamation in Florida when someone in Florida reads the allegedly defamatory material.[79] The court repeatedly said, however, that it was answering only the question of when a court could exercise personal jurisdiction under Florida's long-arm statute, not whether it would be a violation of due process to do so.[80]

72. *Id.* at 697.
73. 382 F. App'x 723, 730–31 (10th Cir. 2010).
74. *Id.*
75. 930 N.E.2d 784 (Ohio 2010).
76. *Id.* at 794.
77. Similar cases involving alleged defamation in the context of soured contractual relations include *Noble Roman's, Inc. v. French Baguette, LLC*, 684 F. Supp. 2d 1065 (S.D. Ind. 2010) (franchisor suit over online gripes by former franchisee), and *Northwest Voyagers, LLC v. Libera*, No. CV09-378-C-EJL, 2009 U.S. Dist. LEXIS 96618 (D. Idaho Oct. 19, 2009) ("adventure tour" company suit over negative comments on travel websites and in e-mails by defendants, who got sick on a company-led tour to Mount Kilimanjaro).
78. Internet Solutions Corp. v. Marshall, No. SC09-272, 2010 Fla. LEXIS 943, at *38–39 (Fla. June 17, 2010).
79. *Id.*
80. *Id.* at *40–43.

In contrast to the above cases, the Eighth Circuit held that posting an allegedly defamatory or trademark-infringing comment about a Missouri business (and mentioning its location) does not subject the poster to personal jurisdiction there.[81] The court held that Missouri did not have jurisdiction over California and Colorado residents alleged to have posted defamatory complaints about the Missouri cat breeding business: "We therefore construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction."[82] Similarly, the Third Circuit upheld the dismissal of a defamation action by a Pennsylvania attorney over defendants' claims, picked up by Russian-language news sites, that the lawyer had participated in a smear campaign against their businesses.[83] Absent more specific contacts, Pennsylvania does not have personal jurisdiction over those who make allegedly defamatory statements about its residents, the court held.[84]

D. *Single Publication Rule*

Courts throughout the country have continued to apply the "single publication rule" to information posted on the Internet.[85]

Adding a new wrinkle to this body of case law, a federal court in Kentucky held that providing hyperlinks to a document posted earlier was not republication.[86] The plaintiff, an attorney, claimed he was defamed by a

81. Johnson v. Arden, 614 F.3d 785, 796–97 (8th Cir. 2010).

82. *Id*. at 797.

83. Marks v. Alfa Group, 369 F. App'x 368, 370–71 (3d Cir. 2010).

84. *See also* Scott v. Lackey, No. 1:02-CV-1586, 2010 U.S. Dist. LEXIS 4350, at *34–37 (M.D. Pa. Jan. 20, 2010); Stubbs v. Collins, No. 08-cv-1567, 2010 U.S. Dist. LEXIS 17984 (W.D. Pa. Mar. 1, 2010); Nasuti v. Kimball, No. 09-cv-30183-MAP, 2010 U.S. Dist. LEXIS 65629 (D. Mass. June 29, 2010); Diagnostic Devices, Inc. v. Pharma Supply, Inc., No. 3:08-cv-149-RJC, 2009 U.S. Dist. LEXIS 101633 (W.D.N.C. Oct. 30, 2009); Martin v. Dobson, No. 3:09cv00208, 2010 U.S. Dist. LEXIS 16607 (S.D. Ohio Feb. 5, 2010); Xcentric Ventures, LLC v. Bird, 683 F. Supp. 2d 1068 (D. Ariz. 2010).

85. *E.g.*, Yeager v. Bowlin, No. Civ. 2:08-102-WBS-JFM, 2010 U.S. Dist. LEXIS 718, at *38–39 (E.D. Cal. Jan. 6, 2010) (plaintiff test pilot could not maintain privacy and publicity action against operators of website selling signed lithographic prints because repeated sales of identical products are subject to the single publication rule); Roberts v. McAfee, Inc., No. C 09-4303 PJH, 2010 U.S. Dist. LEXIS 20455, at *29–30 (N.D. Cal. Mar. 8, 2010) (dismissing defamation claim of company's former general counsel over news release announcing his firing and holding, "Under California law, website postings are subject to the single-publication rule for purposes of accrual of the statute of limitations, notwithstanding the fact that the website may operate/exist on a continuous basis."); Young v. Suffolk County, 705 F. Supp. 2d 183, 212–13 (E.D.N.Y. 2010) (plaintiff's libel claims barred by statute of limitations because under single publication rule, the fact an article remains accessible online does not constitute republication); Ladd v. Uecker, 780 N.W.2d 216, 220 (Wis. Ct. App. 2010) (adopting the single publication rule in Wisconsin for the first time and holding, "We reject the notion that each 'hit' or viewing of the information should be considered a new publication that retriggers the statute of limitations.").

86. Salyer v. S. Poverty Law Ctr., Inc., 701 F. Supp. 2d 912 (W.D. Ky. 2009).

passage in a 2006 report called "A Few Bad Men" that said he had been dishonorably discharged and barred from practicing in military courts because of his membership in a white supremacist organization. The court rejected his argument that a 2008 hyperlink to the 2006 report republished the allegedly defamatory material, explaining: "The hyperlinks, while adding a new method of access to 'A Few Bad Men,' did not restate the allegedly defamatory statements and did not alter the substance of that article in any manner."[87]

A New York state trial court also held that hyperlinks to other websites do not constitute republication of the content posted there.[88] The case is related to the libel action against producers of the movie *American Gangster* thrown out earlier by the Second Circuit.[89] The plaintiffs, a group of law enforcement officers, claimed they were defamed by accusations in a magazine article (on which the movie was based) that they stole from a convicted drug trafficker. The plaintiffs also argued that the release of a digital edition of a book with the allegedly defamatory material was a republication for statute-of-limitations purposes. The court rejected both arguments: "Although there does not appear to be any governing caselaw regarding digital 'Kindle Editions' of books, pursuant to the holding of *Firth v State of New York* [*supra*], such editions should be treated as merely 'a delayed circulation of the original edition,' rather than as a republication thereof."[90]

87. *Id*. at 918.
88. Haefner v. New York Media, 2009 WL 6346547, at *4–5 (N.Y. Sup. Ct. 2009) (citing Firth v State of New York, 775 N.E.2d 463 (N.Y. 2002)).
89. Diaz v. NBC Universal, Inc., 337 F. App'x 94 (2d Cir. 2009).
90. *Haefner*, 2009 WL 6346547, at *6.