

Getting Even or Getting Skewered: Piercing the Digital Veil of Anonymous Internet Speech as a Corporate Public Relations Tactic (*Vengeance is Not Yours, Sayeth the Courts*)

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Vengeance has no foresight

Napoleon Bonaparte

Who said that? Asking that simple question when the vitriol flows across the Web is natural and human, especially when one's secrets are publicly aired, or when the criticism stings, whether well founded or not. Defamation, interference with business and personal relationships, exposure of trade secrets, business plans and other less business-like information, gossip, and harassing speech by unknown persons with a screen name and Internet connection all occupy "the dark side of anonymous online speech."¹

Memorialized and amplified by technology, this dark speech takes on a much longer life and potency than mere rumors spread by word-of-mouth or the occasional letter campaign or pamphlet. The dark speech can traverse the globe, for years, eluding countervailing efforts to correct the record. Responding to the unknown sources of destructive or mischievous speech is the public relations equivalent of fighting a guerilla war. What then is the target to do? Demands to unmask the critics, malcontents, and digital provocateurs are not only understandable, they are logical and even necessary in some cases.

INTRODUCTION

The public relations profession has been accused at times of many different things, some bad and some good, and on the subject of anonymous

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¹ Nathaniel Gleicher, *NOTE: John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L. J. 320, 324 (2008).

speech the profession is at times on both sides of the issue. Perhaps most troublesome is a public relations practitioner or firm accused of acting through a front group, masquerading as a disinterested party in promoting or commenting on a topic of self concern. This is neither new nor is it necessarily wrong as a matter of ethics or law. Public relations professionals have for years “fronted” through groups and in many instances they have chosen strategically important opinion leaders and had them “front” for whatever cause or product they might be promoting. The practice of providing opinion leaders with key message points or background information while remaining anonymous has been a staple of public relations for years. It has its advantages and its disadvantages and can be traced back to Edward Bernays and George Washington Hill of the American Tobacco Company in the modern use of public relations – the so-called “Lucky Strikes Campaign.”²

The concept of a “front group” took on a legal dimension in 1942 when Carl Byoir’s agency was indicted along with the A&P grocery chain under the antitrust laws and in the context of their use a “third party technique” through which sponsoring groups were counseled to establish common cause groups or “common fronts” to oppose a tax on chain stores.³ The line of legal attack against front groups –antitrust law and deceptive commercial speech practices— ultimately reached the U.S. Supreme Court, resulting in a landmark ruling on February 20, 1961, in a case that pitted Carl Byoir and the railroads against a group of truckers seeking a change in weight and safety restrictions. In *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, the court recognized public relations as a form of constitutional speech and held that no violation of those laws “can be predicated upon mere attempts to influence the passage or enforcement of laws.”⁴ Justice Black, writing for the Court, specifically addressed the use of front groups and other third-party techniques in the political arena:

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the

² S. M. Cutlip, *The unseen power: Public Relations: A history*. Hillsdale, NJ; Lawrence Erlbaum (1994).

³ *Id.*

⁴ *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961).

appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations, is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.⁵

The Court concluded that both sides in this “no-holds-barred dispute” engaged in similar conduct and that “deception, reprehensive as it is, can be of no consequence so far as the Sherman Act is concerned.”⁶ Other controversial uses of front groups have included the Hill & Knowlton Tobacco Industry Research Committee (for which the Hill & Knowlton was removed from the tobacco litigation on basically the same grounds as Byoir).⁷

The use of a front group or third party technique continues to this day, though it has taken new turns. As the authors have demonstrated previously, the use of the Internet as a public relations tool has at times become controversial in similar contexts.⁸ A protagonist in this regard has been Edelman Public Relations Worldwide, a major player in employing technology to position clients or influence public opinion. In one controversy the Edelman client was Wal-Mart and the criticized tactic was a blogging campaign involving “customers” who visited Wal-Mart and commented positively about their experiences.⁹ In reality the “customers” were Edelman employees writing key messages in the blogs. A second Edelman controversy dealt with Microsoft and its Vista operating system. Employing a third party technique, Edelman sent important technology bloggers a laptop loaded with Vista OS in the hope they would blog positively about the product.¹⁰ Reaction by the bloggers was fast and furious. They saw themselves

⁵ *Id.* at 140-41.

⁶ *Id.* at 144-45; see Cutlip, 1994, at 580.

⁷ Richard Pollay, *Propaganda, Puffing and the Public Interest*, 16 PUBLIC RELATIONS REVIEW 89 (1990).

⁸ Samuel A. Terilli, Paul D. Driscoll, & Don W. Stacks, *Business Blogging in the Fog of Law: Traditional Agency Liability Principles and Less-Than-Traditional Section 230 Immunity in the Context of Blogs About Business*, PUBLIC RELATIONS JOURNAL, Public Relations Society of American, Spring 2008 [<http://www.prsa.org/prjournal/spring08.html>].

⁹ H. Nolan, *Edelman Acknowledges Mistakes in Blog Matter*, PR WEEK, Oct. 23, 2006, at 3; L. Sullivan, *Hard-Lessons-As-Always; Wal-mart's Cybereducation*, INFORMATION WEEK, Oct. 30, 2006, at 17.

¹⁰ K. O'Brien, *Edelman Defends Ethics of Vista PC gifting Tactic*, PR WEEK, Jan. 8, 2007, at 6.

as journalists, not bloggers hawking a product on the behalf of a public relations firm and its client. CEO Richard Edelman quickly pointed out that while the techniques being employed were time-tested practices, the new technology added certain ethical concerns that might change perceptions.¹¹

This corporate use of blogging raises the question of the identification – that is, transparency – of the blogger who is communicating on behalf of the company or product.¹² A public relations firm that employs a blog as a front without identifying the actual source of the blog runs the risk not only of public criticism, but possible legal action to force disclosure of the identifying information. The flipside of this issue has surfaced on the Internet – easily transmitted and at times devastating anonymous Internet speech directed not by, but at public relations firms and their clients. This issue arises not only when the anonymity of the Internet is used as a front or third party technique, but also when customers or others launch grassroots campaigns to inflict public injury upon a business, prompting legal action to force the Internet Service Provider (ISP) to disclose the identity of the anonymous speaker or relevant ISP account information.

This paper examines the legal standards applied by U.S. courts to attempts to force disclosure by ISPs of the names of their account holders. By understanding the rules, though they remain in flux, one can better understand what one must show in court before getting to the names and thus better assess the possible positive or additionally negative impact of launching a judicial quest to know. The paper concludes that effective responses to anonymous speech demands a careful assessment of the limits of the legal remedies and will often involve either more speech or silence and less litigation, unless the damage is so bad that there is, as Janis Joplin once mournfully sung, nothing left to lose.

Anonymous Speech and the First Amendment

One might logically question the value of speech to which the speaker is unwilling to attach his or her name, but there is no doubt that the anonymous speech, often in the form of protests, organizational campaigns and disclosure of secrets, has played a role in both American history and the development of First Amendment law. Anonymous pamphleteers spoke out against King George and the English Parliament as the American Revolution gathered steam. Moderate Whig-turned-patriot John Dickenson secretly penned the *Letters from a Farmer in Pennsylvania* in 1767 to galvanize colonial opposition to British taxes, advocate colonial control over internal affairs and to avoid a future violent conflict. James Madison, Alexander Hamilton and John Jay wrote the famous Federalist Papers under the *Publius* pseudonym and helped win ratification by the states of the new

¹¹ *Id.*

¹² See Samuel A. Terilli & Liney Arnorsdottir, *The CEO as Celebrity Blogger: Is there a Ghostwriter in the Machine?*, 2 PR JOURNAL 4; Fall 2008, available at <http://www.prsa.org/prjournal/fall08.html>.

federal Constitution.¹³ No wonder courts have found at least a limited First Amendment interest in anonymous speech.¹⁴

The courts have not limited this constitutional protection of anonymity to purely anonymous political speech. Courts have protected anonymous speakers publishing unsigned pamphlets urging economic boycotts of allegedly discriminatory stores.¹⁵ Courts have also recognized the value and tradition of anonymity in the arts and literature, quite apart from economics and politics.¹⁶ Thus, the decision of a speaker to remain anonymous out of a fear of economic, political or other consequences is protected no less than the decision of the speaker to disclose his or her identity by displaying a political sign in his or her front lawn.¹⁷

The right to anonymity in speech is not absolute, however. Courts balance it against other interests, including for example a person's interest in his or her reputation, a person's interest in remaining free of harassment and threats, and a person's countervailing property or business interests.¹⁸ The key case from which much of the jurisprudence regarding anonymity has grown, *Talley v. California* (which was actually a prior restraint case), suggested that had the city ordinance in question not simply prohibited all anonymous handbills, but required some means of identifying those "responsible for fraud, false advertising and libel," then the ordinance might have been constitutional.¹⁹ In a later elections speech case involving an Ohio prohibition of anonymous campaign publications, the Court struck down the ordinance while reaffirming the protection of anonymous speech; in doing so, the Court explained that the unconstitutional Ohio prohibition applied even when there was no suggestion of falsity, libel or other wrongful speech and specifically stated that other statutes and common law claims (e.g., defamation) were an appropriate remedy when anonymous speech injured other rights.²⁰ Similarly, courts have recognized in the context of illegal peer-to-peer digital

¹³ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 359-67 (Thomas, J., concurring).

¹⁴ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

¹⁵ See, e.g., *Talley v. California*, 362 U.S. 60 (1960).

¹⁶ See *McIntyre*, 514 U.S. at 341-342, n. 4 (citing, among others, Mark Twain, O. Henry, George Eliot and Voltaire as examples of writers who published under assumed names).

¹⁷ See *City of Ladau v. Gilleo*, 512 U.S. 43 (1994).

¹⁸ Lyrissa B. Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007); David L. Sobel, *The Process that "John Doe" Is Due: Addressing the Legal Challenge to Internet Authority*, 5 VA. J. L. & TECH. 3 (2000); Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OREGON L. REV. 795, 824-31 (2004).

¹⁹ *Talley*, 362 U.S. at 64.

²⁰ *McIntyre*, 514 U.S. at 344; see also *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (holding unconstitutional Colorado law that mandated identification badges for people circulating election initiative petitions and balancing state interest in regulating elections with the individual's interest in avoiding harassment); *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (holding unconstitutional an ordinance requiring permit for any solicitor entering private property, but also acknowledging the importance of the interests underlying the ordinance – including the prevention of fraud and protection of privacy and other interests).

copying of copyrighted works of music that anonymity is not an absolute right, but one that will at times yield to the protection of property interests.²¹ Anonymity is not, therefore, an absolute right. Persons or businesses injured by anonymous speech may have an interest in piercing the cloak of anonymity to vindicate their rights, even if those interests are not sufficient as a general matter to uphold laws that prohibit all anonymous speech.

The Developing Legal Standard: Law Trailing Technology and Society

As the Internet grew in the 1990s, so did attempts to unmask various speakers hidden by the cloak of electronic anonymity. The cases ranged from the former – employee harassing his ex-manager through anonymous emails or chat rooms to corporate efforts to protect trademarks and confidential business information to defamation claims. Before the courts began to take serious notice of the potential abuses, lawyers for inquiring clients typically either approached the ISPs directly to see if they might just disclose or they filed lawsuits against an unknown John Doe in order to issue a subpoena to the ISP that would then either disclose, go to court, or more likely contact its customer to give the customer time to object. Rarely did these early requests or subpoenas result in detailed judicial review in published opinions.

The level of judicial attention began to increase as the Internet became more significant. In the context of a request for an injunction against claimed anonymous trademark infringements (i.e., a request for a prior restraint of publication) a court explained that the plaintiff would first need to identify the anonymous speakers.²² Then without resolving the issues, the court added that in the context of a request to force disclosure of the identities of the anonymous or pseudonymous speakers the court would have to balance the rights of the allegedly injured plaintiffs with the rights of the speakers to participate anonymously in online forums. In sum, the court in this case said that before it required disclosure of an anonymous poster's identify or ISP account information (leading to likely discovery of the identity) that the plaintiff must first show the court had jurisdiction over the anticipated defendants, show all steps plaintiff took to identify the unknown defendants, show the plaintiff's lawsuit would survive a motion to dismiss (a relatively low standard), and explain the reasons the information sought would identify the defendants.²³

This was not an illogical start, given the court was obviously improvising in the face of a relatively new twist on the anonymous speech problem, but the court's approach hardly resolved the issue of how best to balance speech and other rights. For example, most well-drafted lawsuits can survive a motion to dismiss, which does not test the evidence supporting a case and is generally a

²¹ *Arista Records LLC v. Does 1-16*, 2009 U.S. Dist. LEXIS 12159 (N.D. N. Y. Feb. 18, 2009; Civ. No. 1:08-CV-765 (GTS/RFT)).

²² *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D.Cal. 1999) (federal trademark infringement case involving registration by defendants of plaintiff's claimed domain names).

²³ *Id.* at 578-80.

matter of just correctly stating the elements to state a claim. Application of this factor and the others would no doubt weed out the weakest or most abusive attempts to obtain identities, but these factors hardly provided a true, substantive mechanism for balancing the First Amendment interests of the anonymous speakers with the rights of the person who is the subject of the speech.

The published judicial decisions appearing since this early trial court order have developed more nuanced approaches, but failed to resolve the issue with a single, generally accepted test or standard.²⁴ The trend in these cases, when read together, is toward (i) greater judicial scrutiny of requests to force disclosure of account information or identities by ISPs and (ii) recognition that some plaintiffs truly have serious legal claims (e.g., copyright and defamation) that might override any First Amendment claims and require disclosure. To balance these interests the courts have required particularized demonstrations (i.e., actual evidence) by the plaintiffs seeking disclosure.

The first three common requirements or judicial criteria involve an examination of the plaintiff's status, actions and alleged claims. First, courts will typically want the plaintiff to show that he or she has, through the ISP or by publication, attempted to provide the anonymous speaker with notice and opportunity to be heard and object – at least through counsel. Second, courts will require some specific evidence supporting the legitimacy of the plaintiff's alleged claim or case and will often evaluate at least preliminarily the strength of the plaintiff's case. In other words, the courts will require the production of some evidence showing that the claim is real and not merely a device for outing the anonymous speaker – to facilitate retaliation, legal harassment through litigation, or other forms of punishment or intimidation. Third, some courts may require the plaintiffs to show they have exhausted reasonable alternative means of securing the information or protecting their rights. This requirement, though grounded in other judicial approaches to sensitive discovery demands for compelled disclosure, can be problematic depending on the court's meaning. Surely, these courts do not mean to require the hiring of private investigators to sift through trash or the use of cyber-hackers as a form of self-help. The better reading would require that public figures, major businesses, public companies and possibly

²⁴ The number of courts addressing the issue of anonymity has grown not merely as a result of defamation and business-related cases, but also as a result of litigation over anonymous blogs and the peer-to-peer illegal copying of music and other copyrighted materials. See, e.g., *Arista Records LLC v. Does 1-16*, 2009 U.S. Dist. LEXIS 12159 (N.D. N. Y. Feb. 18, 2009; Civ. No. 1:08-CV-765); *Sinclair v. TubeSockTedD*, 2009 U.S. Dist. LEXIS 9641 (D.C. D.C. Feb. 10, 2009; Civ. No. 08-0434); *Doe v. 2TheMart.com, Inc.*, 140 F.Supp. 2d (W.D. Wash. 2001); *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Krinsky v. Doe 6*, 159 Cal. App. 1154 (Ct. App. 2008); *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *In re Subpoena Duces Tecum to AOL, Inc.*, 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd on other grounds*, *AOL, Inc., v. Anonymous Publicly Traded Co.*, 542 S.E. 2d 377 (Va. 2001); see also *O'Grady v. Superior Court and Apple Computer, Inc.*, 139 Cal. App. 4th 1423 (Ct. App. 2006) (the infamous Apple – blogger litigation).

even some private figures resort to responsive speech through the Internet before invoking the legal system.

The final two common judicial criteria involve a relative comparison of the plaintiff's interests and the defendant's interests and conduct. If the plaintiff has come forward with at least a colorable claim and need for disclosure, many courts will balance the competing interests (e.g., reputation or property interests and freedom of speech). This balancing gives the courts some leeway to do justice and often begins with an examination of just what the anonymous speakers were doing through their Internet- posted comments or conduct. It should come as no surprise that people trying to manipulate stock prices, harass and intimidate, or trade in illegally copied music and movies fare less well than those who engaged in political speech or criticism of the products or policies of a business or government. Motives matter. Since the speaker is unknown, at least at the start of the process, the evidence of the motive will generally be the words as published on the Internet. Thus, context matters, too. Some commentators have even argued that in close cases a plaintiff's status as a public figure or public official under the law of defamation ought to count against attempts to compel disclosure because public persons are expected to weather criticism as a result of their choices and access to the news media generally.²⁵

What's In A Name: Not the Communication, At Least Not Under Federal Law

There is a basic conceptual distinction between identifying information (e.g., ISP account information) and the content of otherwise confidential or undisclosed communications (e.g., emails sent from a source to a blog or other publication). Apple Computer ran into the wall of this legal distinction in its California litigation over the alleged leaking by someone of trade secrets and confidential information to two blogs.²⁶ This distinction is worth noting because the failure to heed it could lead to disastrous legal and public relations results.

The Apple litigation arose when Jason O'Grady, owner and publisher of "O'Grady's Power Page" (a self-described online news magazine focused on information about Apple computers, hardware and software since 1995) and another website, "Apple Insider" (described by someone known as Kasper Jade – a pseudonym – in much the same terms as O'Grady described PowerPage) beginning on November 4, 2004 published several articles about a rumored new, then-secret Apple product.²⁷ The secret product related to Apple's GarageBand application and digital audio recordings. The articles included drawings, details

²⁵ See Gleicher, *supra* n. 1, at 332-335.

²⁶ O'Grady v. Superior Court and Apple Computer, Inc., 139 Cal. App. 4th 1423 (Ct. App. 2006); see also Associated Press, *News media back bloggers in Apple trade-secrets case*, Apr. 12, 2005, available at www.firstamendmentcenter.org/news.aspx?id=15107 (retrieved Jan. 28, 2009); Ryan Paul, *Apple dealt loss in Apple v. Does trade secret case*, May 27 2006, ARS Technica, available at <http://arstechnica.com/old/content/2006/05/6933.ars> (retrieved Jan. 28, 2009).

²⁷ O'Grady v. Superior Court and Apple Computer, Inc., 139 Cal. App. 4th 1432-35.

and technical information. They continued to appear, with more and more information and speculation, for several weeks on both sites.

Apple concluded that much of the information had come from one of its own confidential electronic presentation files. The company demanded that the sites remove the references to the product because that information constituted trade secrets owned by Apple and published without its authorization.²⁸ Apple filed its complaint against “Doe 1, an unknown individual,” and “Does 2-25,” who Apple “described as unidentified persons or entities” that had misappropriated and distributed confidential information about an unreleased product. Apple also sought court orders allowing it to serve subpoenas on various websites, including the two discussed above as well as others, for the “true identities” of the persons who leaked the information.²⁹ A few days later, O’Grady, “Kasper Jade” and another person identified as a publisher of the “MacNewsNetwork” that hosts AppleInsider and other sites moved for protective orders. They successfully asserted that the reporter’s privilege under California law, and the First Amendment, protected their confidential sources; and, under the federal Stored Communications Act³⁰ they argued that the subpoenas issued against a company that had hosted email accounts for PowerPage were illegal because they called for illegal disclosure of communications by demanding the identity of senders of emails with key words related to the leaks.³¹

Aside from losing the reporter’s privilege argument and cementing the likely status of many bloggers as protected journalists under various state shield laws, Apple also managed to generate negative publicity and a negative ruling under the federal law that protects stored email communications as confidential. News media organizations jumped in the case on the side of the blogs and anonymous sources or speakers.³² Other bloggers and news organizations wrote negative articles. Perhaps, Apple thought any publicity was good publicity for a new product, but no credible argument was made to that effect at the time.

More significantly, the case made clear that one cannot under federal law obtain access to confidential, stored electronic communications (e.g., e-mails) as a means of identifying the culprits. Apple argued that the federal law protecting stored emails from disclosure was not meant to apply in the context of civil litigation and attempts to identify people who misappropriated trade secrets. The court disagreed and did so in part because it concluded Congress meant to deny

²⁸ *Id.* at 1435-36.

²⁹ *Id.*

³⁰ 18 U.S.C. § 2702(a)(1) (2008).

³¹ *Id.* at 1437-38.

³² See Brief of *Amici Curiae* of The Reporters Committee For Freedom of the Press, The Associated Press, The California First Amendment Coalition, The California Newspaper Publishers Association, The Copley Press, Freedom Communications Inc., The Hearst Corporation, Los Angeles Times Communications, The McClatchy Company, et al., *O’Grady v. Superior Court and Apple Computer, Inc*, Case No. 1-04-CV-032178, Santa Clara County Sup. Court, filed Apr. 7, 2005.

both government and private interests access to information that it could not have obtained before the digital age:

It bears emphasis that the discovery sought here is theoretically possible only because of the ease with which digital data is replicated, stored, and left behind on various servers involved in its delivery, after which it may be retrieved and examined by anyone with the appropriate “privileges” under a host system's security settings. Traditional communications rarely afforded any comparable possibility of discovery. After a letter was delivered, all tangible evidence of the communication remained in the sole possession and control of the recipient or, if the sender retained a copy, the parties. A telephone conversation was even less likely to be discoverable from a third party: in addition to its intrinsic privacy, it was as ephemeral as a conversation on a street corner; no facsimile of it existed unless a party recorded it—itself an illegal act in some jurisdictions, including California.

If an employee wished to disclose his employer's trade secrets in the days before digital communications, he would have to either convey the secret orally, or cause the delivery, by mail or otherwise, of written documents. In the case of oral communications there would be no facsimile to discover; in the case of written communication, the original and any copies would remain in the hands of the recipient, and perhaps the sender, unless destroyed or otherwise disposed of. In order to obtain them, a civil litigant in Apple's position would have had to identify the parties to the communication and seek copies directly from them. Only in unusual circumstances would there be any third party from whom such discovery might be sought.

Given these inherent traits of the traditional media of private communication, it would be far from irrational for Congress to conclude that one seeking disclosure of the contents of e-mail, like one seeking old-fashioned written correspondence, should direct his or her effort to the parties to the communication and not to a third party who served only as a medium and neutral repository for the message. Nor is such a regime as restrictive as Apple would make it sound. Copies may still be sought from the intermediary if the discovery can be brought within one of the statutory exceptions—most obviously, a disclosure with the consent of a party to the communication.³³

In other words, the court made clear that it would not allow Apple to use digital communications technology to achieve what Apple could not have achieved in

³³ O'Grady at 1445-46 (citations omitted).

the days before e-mail. Furthermore, the court ruled that even mere identification of the names or account information related to the senders of the emails that included the key words would breach the law's confidentiality requirements.³⁴ Apple thus lost the case at its very core.

CONCLUSION

An old adage of questionable derivation says two people can keep a secret if one of them is dead. Of course, some people can't keep any secrets. The Internet transmission protocol, with its IP addresses, servers and confused electronic trails, makes the keeping of secrets and maintenance of anonymity even more difficult. There are lessons here for anyone engaged in the practice of public relations, law and Internet speech. The use of front groups may lead to unanticipated legal actions and possible disclosures with unintended and negative public relations as well as legal consequences.

The attempt to flush out the anonymous rascals ravaging one's business or personal reputation may not be received as well in court as one might expect. The curious litigant must be prepared to show the case is good one and the relevant hands – corporate or otherwise – are clean and reasonable. Vengeance is not an acceptable legal argument, even if it is entirely understandable in light of the frustration. Finally, as Apple experienced, the courts may be downright hostile at times to efforts to find these anonymous speakers and disclose their underlying electronic communications. Sometimes the aggrieved party might be better off grinning and bearing it, jumping into the speech fray, or just walking away until the din quiets and another topic arises.

The lessons for the public relations practitioner are both subtle and often counterintuitive. The advantages of using anonymous speakers, third parties or fronts may be offset by the potential damage such a strategy may cause as a result of possible legal action to determine the identity of any unknown speakers. Counter-intuitively, when attacked by an anonymous critic, one may be better served by reacting to the anonymous critic without regard to or concern for his or her identity. Either refute or ignore the statements, depending on the strategic value of the Internet with regard to reputation, and do not bother pursuing a name, unless one is certain the court's discovery standards can be satisfied. The legal questions are certain to continue given the willy-nilly and wholehearted love of the Internet by many public relations practitioners as both a cheap medium for getting messages out and as a way to quickly – perhaps too quickly – answer challenges or correct misreporting. The question is whether anonymous Internet speakers will take as long as the users of the original third party technique and fronts took to find their way to the Supreme Court of the United States.

³⁴ *Id.* at 1448.

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