



You've Been Served: Potential Liability for Companies Suing Anonymous Bloggers and Subpoenaing their Identities

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You just started your job as an in-house counsel at a publicly traded company and got the following voicemail from your boss: "Someone who used to work here is posting on Yahoo that 'I used to work for the company. They don't know what they are doing. Their websites rarely worked. The content was so boring and stale that no one even noticed we existed. The production values sucked because the equipment was cheap and the majority of the production staff were interns... it was the most miserable, sleazy, cheap operation I have ever worked for....The production department bought studio equipment that couldn't be used (because it was bought on the gray market somewhere and all the operating manuals are in FRENCH, for crying out loud. No one could read them!). During a shoot one day, the VP of programming stole a Razor scooter from the company who was marketing the toy (he has triplets and tried to steal three – how cheap is that?).' Legal, what do we do?"

If you were the in-house lawyer at Ampex Corporation, you would have filed a libel suit against the anonymous poster. The company then would have been hit with a special motion to strike under California's anti-SLAPP (strategic lawsuit against public participation) statute, Code of Civil Procedure section 425.16, and had to pay attorney's fees since the company lost. The above facts are based on *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569.

On an anti-SLAPP motion, the Internet posting must be made in connection with a matter of public interest. Acts in furtherance of a person's free speech or right to petition in connection with a "public interest" must fall into one of the four categories: "(1) any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public form in connection with an issue of public interest; [and] (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free

Prior to the amendment, the prevailing party on a motion to quash a subpoena was entitled to an award of attorney's fees only if the motion was made or opposed in bad faith or without substantial justification or a requirement of the subpoena was oppressive. Effective, January 1, 2009, section 1987.2(b) now requires the court to award reasonable attorney's fees to a party who successfully moves to quash or modify a subpoena for personally identifying information for use in an out of state action if: (1) the subpoena has been served on an Internet service provider; (2) the underlying action arises from the moving party's exercise of free speech rights on the Internet; and (3) the subpoenaing party has failed to make a prima facie showing of a cause of action. In this context, the prevailing party no longer needs to show bad faith, lack of substantial justification or the oppressive nature of the subpoena to recover attorney's fees.

Prior to this amendment to the subpoena statute, a company could consider suing outside of California for defamation and issue a subpoena to uncover the identity of the anonymous poster. Now, a company or person subpoenaing identifying information from California Internet companies are subject to attorney's fees awards if the subpoena is quashed or modified pursuant to a motion under 1987.1.

However, anonymous Internet posters do not necessarily have blanket protection under section 1987.2(b). Recent case law suggests that a poster's identity must be completely anonymous to qualify for an attorney's fees award under section 1987.2(b). In *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, the court held that a person who posts an article on myspace.com could not state an invasion of privacy cause of action against a person who submitted that article to a newspaper for republication. The poster's MySpace page mentioned her first name and included her photograph. Her identity therefore was not private, and in a cause of action especially sounding in disclosure of private facts, there was no cognizable cause of action.

The above considerations should cause the in-house lawyer in Ampex (or other companies) to

speech in connection with a public issue or an issue of public interest." Code of Civil Procedure section 425.16(e). In examining whether the internet postings about corporate activities constitute an issue of public importance, the court in *Ampex* looked at "(1) whether the company is publicly traded; (2) the number of investors; and (3) whether the company has promoted itself by means of numerous press releases." *Ampex, supra*, 128 Cal.App.4th at 1576; citing *Global Telemedia Int'l, Inc. v. Doe 1* (C.D. Cal. 2001) 132 F. Supp. 2d 1261, 1265; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4th 993, 1007-08.

In the wake of the economic downturn, recently laid off employees may desire to "sound off" against their former employers in cyberspace. Companies should be careful in analyzing whether a lawsuit arising out of anonymous criticism on Internet websites, chat rooms and message boards would face early dismissal if the court granted an anti-SLAPP motion to strike, especially since losing an anti-SLAPP motion warrants a mandatory award of fees.

If the in-house lawyer's strategy is to subpoena Yahoo!, MySpace, Facebook or similar internet service companies to obtain the identity of the blogger or poster, California passed AB 2433 on September 30, 2008, amended Code of Civil Procedure section 1987.2, to award fees to the prevailing party on the motion to quash the subpoena.

pause and think twice about the ramifications of subpoenaing records from a California Internet company to discover the identity of an anonymous poster of critical statements on the Internet, or about filing a complaint in California that arises from the anonymous internet postings. Confronted with an attorney's fees award to the party who successfully moves to quash the subpoena, the party seeking the subpoena should first carefully analyze whether the allegedly defamatory postings constitute an exercise of free speech rights on the Internet. If the company decides to file a defamation or invasion of privacy complaint in California for anonymous posting, the company should carefully analyze the issues arising under the anti-SLAPP statute, and weigh the legal as well as business decisions for pursuing such an action, if the lawsuit is not successful.

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