

Anonymous Posts Of Alleged Trade Secrets: Free Speech?

By **Michael Weil** (April 23, 2018, 12:06 PM EDT)

Imagine you are an employer. Someone has anonymously posted your trade secrets or other improper content on Glassdoor, which publishes anonymous employee reviews about employers. While Glassdoor and similar online publishers typically prohibit this, suppose Glassdoor disagrees that the content is improper and will not take it down. What then? Interests collide.

On the one hand, the internet has significantly advanced the cause for the sharing of ideas and free speech. For that reason, Congress has attempted to protect and preserve the vibrant free market that exists on the internet by protecting website publishers, like Glassdoor and Yelp, from liability based on their publication of third-party content. Courts have also recognized the free speech rights of anonymous posters to remain anonymous.

On the other hand, Congress has recognized the importance of American innovation and has passed laws, including the Defend Trade Secrets Act, to protect against the misuse of trade secrets information. Similarly, courts have recognized the concerns of private businesses and citizens to be free of harassing and defamatory statements on the internet.

In 2017, several California appellate courts issued decisions that bear directly on this conflict. And, in *Hassell v. Bird*, the California Supreme Court is poised to issue a key decision that pits the rights of internet publishers against those who claim their rights have been violated by anonymous posters. This article explores some frequent issues both employers and publishers face when they cannot agree on the appropriateness of an online post, including the alleged publication of trade secret information.

The Communications Decency Act Creates a Strong Layer of Protection for Publishers

While filing a lawsuit against a publisher who refuses to depublish an anonymous post containing trade secrets (or other offending content) seems like a logical first resort, it is a tough row to hoe. The Communications Decency Act, 47 U.S.C. § 230(c), creates certain immunities for publishers. Principally, it shields website operators from being "treated as the publisher or speaker" of material posted by the site's users.[1] This means that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred." [2]



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Nonetheless, the CDA contains several immunity carveouts. One carveout provides that nothing in the CDA “shall be construed to limit or expand on any law pertaining to intellectual property.”[3] Accordingly, one might think that trade secrets owners could still, notwithstanding the CDA, pursue state or federal trade secrets claims against a publisher that will not take down trade secret information that was posted by a user. It is not that simple.

In *Perfect 10 Inc. v. CCBill LLC*,[4] the Ninth Circuit held that this intellectual property law carveout only applies to federal laws, not state laws. Thus, in the Ninth Circuit, only claims under federal intellectual property law can proceed against the publisher based on content published by a user. At least one district court has held that a publisher was immune from state trade secrets laws based on a third party’s post.[5] (Some district courts outside the Ninth Circuit have declined to follow *Perfect 10*’s holding (e.g., *Atlantic Recording Corp. v. Project Playlist Inc.*).[6]

The DTSA, on the other hand, presumably is a federal intellectual property law; it protects trade secrets after all. One might think, therefore, that the DTSA provides an avenue for pursuing trade secrets claims against publishers. In an easily overlooked section of the DTSA, however, the DTSA provides that it “shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.”[7] Perhaps it is counterintuitive, but Congress has effectively declared that trade secrets are not intellectual property. If Congress meant to preserve a trade secrets misappropriation immunity for internet publishers who publish content created by third parties — as set forth in *Perfect 10* — then Congress may have succeeded.[8]

Discovering the Identity of Anonymous Posters First Requires Prima Facie Proof of Liability

Rather than sue the publisher, aggrieved parties may attempt redress against the poster. Because the poster is often anonymous, plaintiffs often sue an unknown “Doe” defendant and try to discover the poster’s identity. Internet publishers typically have information that could lead to the poster’s identity, although publishers frequently fight any subpoenas seeking that information.

In 2017, the California Courts of Appeal issued three decisions pertaining to these issues: *Glassdoor Inc. v. Superior Court*,[9] *ZL Technologies Inc. v. Does 1-7*,[10] and *Yelp Inc. v. Superior Court*. [11]

In March 2017, the *Glassdoor* court first held that internet publishers have standing to assert the First Amendment rights of an anonymous speaker in maintaining his or her anonymity. It then held that the standard for discovering the identity of an anonymous person who posts alleged trade secrets/confidential information is the same as for discovering the identity of anonymous poster of defamatory speech.

In July 2017, *ZL Technologies* elaborated on this standard. First, reasonable efforts must be made to provide notice to the anonymous poster that a plaintiff seeks to learn the poster’s identity. *ZL Technologies* held that the party responsible for providing this notice is left to the trial court’s discretion.[12] In *Yelp*, issued in November 2017, the court held that placing the burden on the website publisher opposing the discovery makes better sense because it more likely knows the identity of the anonymous poster, and the publisher is relying on rights of that anonymous poster to defend against the discovery request.

Second, to discover the identity of an anonymous poster, a plaintiff must present a prima facie case that the speech is actionable. Specifically, the employer must (1) specify the alleged actionable statements, (2) state the actionable meanings allegedly conveyed by them, and (3) set forth evidence sufficient to

sustain a finding that the statements were capable of conveying those meanings. In the trade secrets context, this means showing that the statement itself discloses trade secret information or confidential information, as defined in an agreement. The Glassdoor court likened the disclosure requirement to California's Code of Civil Procedure Section 2019.210, which requires a trade secrets plaintiff to disclose its trade secrets with "reasonable particularity" prior to commencing discovery.

The ZL Systems court rejected a final requirement advocated by the publishers: a separate "final balancing" of the importance of the defamation claim versus the poster's constitutional right to remain anonymous. Although other states have implemented this requirement (see, e.g., *Dendrite Intern. v. Doe No. 3*),^[13] ZL Systems declined to adopt an explicit "final balancing test," holding that libelous (or unlawful) speech is not entitled to constitutional protection.

The Glassdoor court's careful analysis of the trade secrets alleged in that case underscores the standard for discovering the identity of an anonymous poster. The court analyzed whether the statements themselves actually disclosed trade secrets and whether the plaintiff submitted sufficient evidence to support such an assertion. In several instances, the court doubted the statement itself revealed confidential information or held that the plaintiff failed to provide sufficient evidence demonstrating that the information itself was, in fact, trade secret or confidential. In the end, the Glassdoor court held that the plaintiff failed to demonstrate a prima facie case and, therefore, refused to permit discovery into the poster's identity.

Will the California Supreme Court Shut Down a Loophole?

Imagine that you have discovered the identity of the anonymous poster of alleged trade secrets. A plaintiff may seek a preliminary or permanent injunction requiring the poster to take down the speech. But what if the poster refuses? Or, alternatively, the poster fails to even show up in court, as it would be expensive and perhaps not worth it for individuals to defend their posts?

This was the case presented by *Hassell v. Bird*, now pending before the California Supreme Court. A lawyer, Dawn Hassell, sued her former client, Ava Bird, for defamation in state court because of a negative Yelp review. Bird never responded to the lawsuit, so the trial court entered default. The court ordered Bird and Yelp to remove her the reviews, even though Yelp was not a party to the lawsuit. Yelp appealed.

The Court of Appeal affirmed rejecting most of Yelp's substantive arguments. Yelp first argued that trial court's order denied it due process because Yelp was not a party to the lawsuit and was not provided an opportunity to assert its own First Amendment rights. Relying on California Supreme Court precedent, the court rejected this argument holding that a trial court may enjoin third parties through whom the enjoined party to the lawsuit may act. The court also rejected Yelp's argument that the order was an improper prior restraint because, according to the court, the speech was already held to be unlawful. Finally, Yelp argued that the trial court's removal order was void because Yelp had immunity under the CDA. The court rejected this argument, holding that an order directing Yelp to remove reviews that are covered by the injunction does not impose any liability on Yelp.

The Supreme Court case has drawn significant attention from the community. Amicus briefs lined up on each side. Internet publishers argued that, among other things, the Court of Appeal's decision provides an improper avenue to take down lawful speech by sidestepping the publisher's rights to defend against an injunction. Proponents of the decision argue that reversing the decision would deny victims' ability to seek redress for unlawful content.

Oral argument occurred on April 3, 2018. It was a “hot bench.” Based on the questions, a unanimous decision seems unlikely. Whatever the result, the court’s decision is sure to be just the next chapter of an ongoing battle between the free speech rights of internet publishers and the rights of allegedly aggrieved individuals or companies.

Michael D. Weil is a partner in the San Francisco office of Orrick Herrington & Sutcliffe LLP.

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[1] 47 U.S.C. § 230(c).

[2] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[3] 47 U.S.C. § 230(e)(2).

[4] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007).

[5] Stevo Design, Inc. v. SBR Mktg., 919 F. Supp. 2d 1112 (D. Nev. 2013) (applying Florida trade secrets law).

[6] Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

[7] See Section 2(g) of the DTSA.

[8] See Eric Goldman, The Defend Trade Secrets Act isn’t an “Intellectual Property” Law, 33 Santa Clara High Tech. L.J. 541 (2016).

[9] Glassdoor, Inc. v. Superior Court, 9 Cal. App. 5th 623 (2017).

[10] ZL Technologies, Inc. v. Does 1-7, 13 Cal. App. 5th 603 (2017).

[11] Yelp Inc. v. Superior Court, 17 Cal. App. 5th 1 (2017).

[12] 13 Cal. App. 5th at 615.

[13] Dendrite Intern. v. Doe No. 3, 342 N.J. Super. 134, 775 A.2d 756 (2001).