

## Social Media Law Update

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### [Businesses May Have Some Legal Recourse For Anonymous Smear Campaigns On The Internet](#)

By [Michelle Sherman](#)

Businesses are using Facebook fan pages and interactive ad campaigns to market their products and services on social media. One sided banner ads are making room for advertising that is more engaged with consumers. With this exchange of information also comes the risk of negative comments being posted that could be damaging to the company's brand.

And, in some instances, a business may believe that the comments by an anonymous consumer have gone beyond constructive criticism and have risen to the level of defamation or other actionable conduct. The business may want to pursue a legal action to try and put an end to the negative attacks on its products, or at least have some legal means to put the speech in context. For example, the anonymous mud slinger may be a disgruntled former employee or a marketing person for a competitor. And, the business wants to identify that person so its customers can put the negative reviews in context.

There is a legal means for businesses to try and identify the anonymous poster. For example, there are two fairly recent cases in which plaintiffs sued Google for pre-action discovery, and Google was ordered to turn over the names of the anonymous bloggers. Google does not have any legal obligation to identify someone who may be liable for defamation arising from their use of the Internet. In fact, the Communications Decency Act of 1996, Section 230, gives immunity to Internet companies such as Google so they are not liable for the possibly libelous posts of a third party. This immunity was designed in part to foster growth of the Internet by not discouraging companies such as Google, Facebook and YouTube from offering a forum for social media.

And, there is legal precedent for letting people speak anonymously. While the United States Supreme Court has yet to address anonymous Internet posts and blogs, the public policy behind the First Amendment is advanced by allowing bloggers to post anonymously. However, even the First Amendment has its limitations. There is not an unbridled right to speak if laws are being broken.

Along these lines, New York state courts have ordered the disclosure of anonymous bloggers when the party seeking the information has demonstrated a good chance of prevailing in an action against the anonymous blogger and, therefore, deserves the name of the blogger so she can be sued in court. The standard for pre-action discovery may vary from state to state. However, the reported cases are in accord with New York law. Namely, "[w]hen a party seeks pre-action disclosure to secure additional information necessary to frame a complaint or to identify the proper defendant with respect to a known cause of action, 'courts traditionally require a strong showing that a cause of action exists.'" [Cohen v. Google, Inc.](#) And, for states in which there is no specific statute that addresses pre-action discovery, there are alternative ways to seek this information which can be explored

with legal counsel who is well versed in social media law and litigation.

Based on the recent case of [Franklin v. Google](#), the anonymous blogger will have the burden of trying to maintain his anonymity. In that case, YouTube and its owner Google did not file a substantive opposition, but left it for the blogger to oppose the motion for pre-action discovery. "The parties have entered into a Joint Stipulation dated 8/27/10 which, *inter alia*, provides for the 'user' to be notified of these proceedings."

The blogger did not file any papers opposing the discovery, and the Court issued an order for Google to provide the name within 15 business days of the Order. The Court held that Franklin "has made a proximate showing that the info is needed to frame a complaint." Google has the court order it needs in order to identify the cyber ciphers, who Carrie Franklin said was posting unauthorized videos of her, and making online comments that hurt her reputation.

As with many Internet service providers, Google's Terms of Service provide that: "You agree that Google may access or disclose your personal information, including the content of your communications, if Google is required to do so in order to comply with any valid legal process or governmental request (such as a search warrant, subpoena, statute, or court order)..." And, in fact, it is recommended that Internet service providers have similar language in their Terms of Service so that users know upfront that there is some risk they may be identified, or other personal information may be disclosed.

Thus, if an anonymous blogger tries to turn a social media ad campaign into a platform by which to smear and defame the brand and reputation of the business, the business can seek relief through the courts.

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