



First Amendment Right To Anonymous Speech Trumps Right To Discover Identity Of Blogger Alleged To Have Infringed Copyrighted Works of Art Of Living Foundation

November 22, 2011

by [Phillip Barengolts, Trademark Attorney](#)

“Skywalker’s First Amendment right to anonymous speech outweighs the need for discovery at this time.” *Art of Living Foundation v. Does 1-10*, No. 10-cv-05022 (N.D. Cal. Nov. 9, 2011).¹ This statement and the decision in *Art of Living Foundation* has significant consequences for intellectual property owners pursuing claims against defendants hiding behind privacy services, pseudonyms, or using other identity blocking methods – an increasingly common obstacle to enforcing intellectual property rights.

But first, a few words about the parties. The Art of Living Foundation (“AOLF”) is an international “educational and humanitarian” organization dedicated to teaching the spiritual lessons of “His Holiness Ravi Shankar.”² Technically, the plaintiff in this case is the U.S. branch of AOLF. The defendants, who go by the pseudonyms “Skywalker” and “Klim,” write blogs that criticize AOLF. Allegedly, they are disgruntled former participants in AOLF.

After filing a complaint for defamation, trade secret misappropriation, trade libel, and copyright infringement, AOLF sought expedited discovery to learn the true identities of Skywalker and Klim. The magistrate in the case granted this request and AOLF issued subpoenas to Google and Automattic – the companies that host the defendants’ blogs. AOLF’s stated purpose for the subpoenas was to serve the complaint upon the defendants. The defendants made special

¹ Available at: http://scholar.google.com/scholar_case?case=9580014106370623493.

² Yes, for those old enough to remember, this is the same Ravi Shankar who is famous for playing the sitar. See <http://us.artofliving.org/content-sri-sri-ravi-shankar>.



PATTISHALL
McAULIFFE
NEWBURY
HILLIARD &
GERALDSON LLP

311 South Wacker Drive, Suite 5000 • Chicago IL 60606 • T (312) 554-8000 • F (312) 554-8015 • www.pattishall.com

These materials have been prepared by Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP for general informational purposes only. They are not legal advice. They are not intended to create, and their receipt by you does not create, an attorney-client relationship.

appearances through counsel to move to quash these subpoenas, among other motions that ultimately left only the copyright and trade secret misappropriation claims pending.³

Through his special appearance, Skywalker admitted to publishing AOL's *Breathe Water Sound Manual* – and to taking it down in response to a notice under the Digital Millennium Copyright Act. Skywalker further argued that AOL's claims were filed, essentially, for the purpose of stifling Skywalker's speech and to prevent others from engaging in similar speech. The magistrate denied Skywalker's motion to quash because of the alleged copyright infringement, so Skywalker asked for relief from the magistrate's order granting AOL the right to discover Skywalker's identity.

The district court started from the position that the First Amendment protects the right to anonymous speech. Citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("An author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").⁴ However, that right is bounded by the speaker's engagement in unlawful speech such as defamation or copyright infringement.

Skywalker contended that the magistrate applied the wrong standard to determine whether Skywalker's identity should be revealed.⁵ Specifically, the magistrate relied upon *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), to find that:

- (1) AOL had alleged a *prima facie* case of copyright infringement because Skywalker had admitted to publishing the *Breathe Water Sound Manual*,
- (2) the subpoenas were targeted to obtain information to identify Skywalker,
- (3) AOL had no other means to obtain Skywalker's identity,
- (4) without having Skywalker's identity, it would be prohibitively difficult for AOL to conduct discovery, and
- (5) even if Skywalker had engaged in protected speech, he had no expectation of privacy because "the First Amendment does not shield copyright infringement."

Sony concerned allegations of copyright infringement against anonymous defendants who used peer-to-peer file sharing to illegally download copyrighted music.

But Skywalker asserted that the proper standard was articulated in *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005).⁶ Skywalker had a little help from his *amici*

³ If you're curious: http://scholar.google.com/scholar_case?case=10812188760193953860.

⁴ A nice discussion about the development of the First Amendment right to anonymous speech can be found in *In Re Anonymous Online Speakers*, No. 09-71265 (9th Cir. Jan. 7, 2011), available here: http://scholar.google.com/scholar_case?case=367976962523359560.

⁵ Of great interest is the unfortunately brief discussion about the many standards courts have applied to such actions. See also *In Re Anonymous Online Speakers* for a much better discussion.

curiae, Public Citizen, the American Civil Liberties Union, and the Electronic Frontier Foundation. *Highfields* concerned trademark infringement, unfair competition, and defamation claims against a defendant who posted sarcastic remarks criticizing plaintiff's investment abilities on a message board.

In choosing between *Sony* and *Highfields*, the district court readily analogized Skywalker's comments to those at issue in *Highfields* to reach its conclusion that protection of Skywalker's identity would be analyzed under the *Highfields* standard.

The *Highfields* standard for obtaining the identity of an anonymous speaker on the Internet differs from *Sony* in one significant respect: *Highfields* requires that a plaintiff adduce competent evidence of its claims, rather than merely alleging a *prima facie* case, to obtain discovery of a defendant's identity. That is, a plaintiff seeking discovery must submit evidence as if it was trying to defeat a summary judgment motion on the underlying claim.

Although the district court in *Art of Living Foundation* found that AOLFF made out a *prima facie* claim of copyright infringement by asserting authorship and a copyright registration,⁷ and that Skywalker's declaration about alleged retaliation and harassment was "not particularly reliable," the court held that the balance of the harms nevertheless weighed in favor of Skywalker. AOLFF, the court explained, could not articulate much harm to its interests from allowing Skywalker to remain anonymous. Specifically, the court noted that AOLFF could obtain all of the discovery it needed without identifying Skywalker. The court also discounted AOLFF's need for a face-to-face deposition at this stage in the litigation because Skywalker appeared through counsel and responded to interrogatories and requests for documents. Moreover, Skywalker's identity was not necessary to effect service.⁸

Additionally, Skywalker had filed a motion for summary judgment on AOLFF's copyright infringement claim, which was fully briefed. The court stated, however, that, should Skywalker fail in his motions for summary judgment, AOLFF likely could obtain Skywalker's identity to conduct a pre-trial deposition and enforce any judgment against him. Thus, AOLFF could renew its request for Skywalker's identity later in the litigation.

Under the unique circumstances of this case, this author understands why the district court granted Skywalker's motion to quash. Skywalker's speech, even the publication of the copyrighted manual, arguably concerned matters of religion or, at least, public interest. Skywalker was engaging in the dispute and not avoiding it. Allegedly, he even removed the work from his blog after receiving a DMCA takedown notice. Finally, the court left the door open for AOLFF to seek Skywalker's identity at a later stage in the proceeding without prejudicing AOLFF's ability to assert its claims. Skywalker's

⁶ See http://scholar.google.com/scholar_case?case=11481667046851158125.

⁷ According to the court, AOLFF claimed that copyright infringement automatically eviscerated any First Amendment protection, but the court found that the fair use defense to copyright infringement incorporated First Amendment protections. It went on to explain that Skywalker appears to have published copyrighted materials as part of his criticism of AOLFF, thereby raising a "substantial question" as to whether the fair use doctrine applies.

⁸ Although effecting service was the original purpose of the subpoenas all of the defendants answered the amended complaint, thereby waiving any service deficiencies.

conduct offers a roadmap to other defendant's who want to remain anonymous during the early stages of litigation.

On the other hand, a not-so-careful reading of the specific facts of this case by a subsequent court could lead to greater expense in other contexts involving routine claims of intellectual property infringement against anonymous or pseudonymous infringers. For example, a now-common practice among typosquatters⁹ and other domain name infringers is to post "commentary" along with the typical advertising appearing on their websites, which generate revenue for the infringers when users click on the ads. The "commentary" often consists of irrelevant statements about a product or company posted merely to provide a viable fair use argument for the choice of domain name, and it often barely resembles English. Such defendants now arguably have a viable precedent endorsing a motion to quash a subpoena to identify them for purposes of effectuating service.

Ultimately, this author believes that the district court's decision in *Art of Living Foundation* will not be followed often because few defendants will behave as scrupulously in litigation as Skywalker did here. However, this decision could result in unnecessary expense to trademark, copyright, and trade secret owners that assert legitimate claims against anonymous infringers on the Internet.

* * *

[Phillip Barengolts](#) is a partner with [Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP](#), a [leading intellectual property law firm](#) based in Chicago, Illinois. Pattishall McAuliffe represents both plaintiffs and defendants in [trademark](#), [copyright](#), and [unfair competition trials and appeals](#), and advises its clients on a broad range of domestic and international intellectual property matters, including [brand protection](#), [Internet](#), and [e-commerce](#) issues. Mr. Barengolts' practice focuses on litigation, transactions, and counseling in domestic and international [trademark](#), [trade dress](#), [Internet](#), and [copyright law](#). He teaches trademark and copyright litigation at John Marshall Law School, and co-authored [Trademark and Copyright Litigation](#), recently published by Oxford University Press.

⁹ Domain name infringers who use a mistyped version of a trademark or trade name for their domain names to drive Internet traffic.