

# Virginia Supreme Court Unmasks Anonymous Online Poster

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Balancing the First Amendment interests of anonymous posters of online messages against a plaintiff's need to discover the identity of an individual who posted allegedly defamatory messages to an Internet message board, the Virginia Supreme Court relied upon the principle of comity between states to compel the identification of an America Online (AOL) subscriber.

## Litigation Background

The case, *America Online, Inc. v. Nam Tai Electronics, Inc.*, 2002 WL 31454120 (Va.), involved allegations in a complaint filed in a California Superior Court action alleging that 51 individuals had committed libel, trade libel, and violated the California unfair business practices statutes. Plaintiff Nam Tai alleged that the unknown individuals had posted "false, defamatory, and otherwise unlawful messages" on an Internet message board devoted to discussion of its stock. During discovery, Nam Tai learned that one of the anonymous posters, "scovey2," obtained his Internet access through America Online. Having gained the IP protocol used to access Yahoo, Nam Tai sought a subpoena *duces tecum* which would compel America Online to produce documents sufficient to identify the subscriber. The initial subpoena was issued by the California court. Through procedures designed to recognize the orders and decisions of foreign courts, the Loudoun County Circuit Court (trial court) issued a Virginia subpoena essentially compelling AOL to comply with the California subpoena.

## AOL Resists Identifying its Subscriber

AOL filed a motion to quash the subpoena, maintaining that identifying the subscriber would infringe on well-established First Amendment rights to speak anonymously. In defending the subpoena, Nam Tai contended that AOL sought both review of the procedural process already approved in California and review of the substantive merits. Nam Tai asserted that principles of comity required that the Virginia trial court give deference to the California procedures. The Virginia trial court determined that it could not evaluate whether California law had been complied with or the substance of the merits and therefore sought guidance from the California court. After receiving such guidance, the Virginia trial court concluded that "AOL's First Amendment concerns were not applicable to the claim" and, therefore, denied AOL's motion to quash.

On appeal, the Virginia Supreme Court reviewed the trial court's decision to determine whether an "abuse of discretion" had occurred. Citing its decision in *AOL v. APTC*, 542 S.E.2d 377, 383 (2001), a case involving similar issues, the Court recognized the primacy of comity between sovereigns, with the caveat that it would

be limited so as not to prejudice the rights of Virginia or its citizens. The Court then identified four principles that would guide its decision whether to respect the California subpoena.

### **Supreme Court Comity Analysis**

Thus, in reviewing the trial court's decision for abuse of discretion, the Virginia Supreme Court determined that comity should be afforded where:

- the foreign court has personal and subject matter jurisdiction;
- the procedural and substantive law applied by the foreign court is reasonably comparable to Virginia's law;
- the foreign order must not have been falsely or fraudulently obtained; and
- the order must not be contrary to Virginia public policy, or prejudice the rights of Virginia or her citizens.

Applying these factors, the Virginia Supreme Court concluded that the Virginia trial judge had not abused his discretion.

AOL had argued that because the defendant had not been identified, there could be no determination as to whether the California court had personal jurisdiction. However, the Virginia Supreme Court agreed with *Nam Tai* that because California permitted John Doe suits where it was understood that upon discovery of the identity of the subscriber jurisdictional issues could be raised, that concern had been met.

As to whether the substantive law of California had been followed, the Virginia Court observed that it was not Virginia's role to decide the question but rather the courts must "afford a high degree of deference" to the California court's judgment. With regard to AOL's First Amendment concerns, the Virginia Supreme Court concluded that while those issues were similar to those found in Virginia, they would be more properly raised and decided in California courts. For these reasons, the Court concluded that the trial court had not abused its discretion and upheld the denial of AOL's motion to quash.

### **New Virginia Statute**

Because AOL, the nation's largest ISP, is headquartered in Virginia, Virginia law in this area is of national interest. In *Nam Tai*, the Virginia Supreme Court has laid out a formula for how it will afford comity to the discovery practices of other jurisdictions. However, although the issue was not raised by the parties, subsequent to the filing of the case, Virginia enacted a new statute which affords certain procedural protections to ISP subscribers and sets out specific procedures for their identification which might affect applications of the fourth prong of the *Nam Tai* test. The Virginia Supreme Court acknowledged this statute in a footnote, stating that it provided a method for users to oppose discovery. Code § 8.01-407.1 does provide significant procedural protections to subscribers. But, the text of the statute, as well as its legislative history, is unclear as to how the statute may apply to foreign subpoenas. *Nam Tai*, however, may provide some useful guidance. Enforcement of foreign subpoenas sought in Virginia will have to be evaluated under the same principles of comity articulated in *Nam Tai*. If the foreign jurisdiction does not provide the same legal protections as the new Virginia statute, the outcome of the case could be different, as Virginia would be loathe to compromise the rights of its citizens.