

ANONYMOUS IN THE INTERNET AGE

Think you're protected under a cloak of anonymity when you're online? Think again

It was supposed to be a momentous day for Google. In June 2011, the world's No. 1 Internet search engine unveiled its new social networking site, Google Plus, to the world. Google's vice-president of products praised the new website for allowing users to control how they communicate information, and to whom, on the web.

But Google faced the wrath of Internet users, who tried to sign up to use the site anonymously. Google forbade participation in Google Plus with anything but "the name you commonly go by in the real world"—this in a cyber world where many people choose to use pseudonyms to remain anonymous.

Internet outrage ensued. Message boards, online news articles, status updates and tweets criticized Google Plus's identity rules. In response, Google Chairman Eric Schmidt told journalist Andy Carvin of National Public Radio, "there are people who do really, really evil and wrong things on the Internet, and it would be useful if we had strong identity so we could weed them out."

While this wasn't the first time a website developer or host has taken a stand against anonymous users and comments on the Internet, the divide between those for and against Internet anonymity seems to have intensified recently. Over the last year and a half in Canada, the debate over anonymous commenting has extended beyond the offices of web hosts and anonymous bloggers' websites to the House of Commons and Canadian courtrooms.



By Danielle Stone

In late 2010, former Charlottetown MP Shawn Murphy blasted local websites, including those of CBC News and Charlottetown's *The Guardian*, for allowing anonymous comments on their sites.

"I am actually shocked at some of the anonymous comments that are posted online," Murphy said in a news release after noticing several local organizations and religious groups were the target of disparaging online comments. "Some are hateful, many times untrue and potentially defamatory...I think if you're going to make a comment, you have to be prepared to put your name behind it."

More recently, in January 2012, Associate Minister of National Defence Julian Fantino warned that anonymous use of the Internet "has not escaped the attention of the criminal element, who have quickly adapted to make use of the Web for committing fraud, producing and distributing child pornography and much more."

The following month, Minister of Public Safety Vic Toews introduced Bill C-30, the *Investigating and Preventing Criminal Electronic Communications*

Act, commonly referred to by its short title, the *Protecting Children from Internet Predators Act*. If enacted, it would force Internet service providers (ISPs) to support investigations and give the police access to a customer's private data without a warrant. In exceptional circumstances, "any police officer" could request customer information from an ISP, bypassing the courts and identifying the "anonymous" Internet poster.

Toews told the House of Commons that the legislation "is necessary in order to stop the proliferation of child pornography on the Internet," and to prevent individuals from committing illegal acts behind a cloak of anonymity.

Eva Galperin, an activist with the Electronic Frontier Foundation, which advocates for online anonymity around the world, says there's a cost to this sort of policy. "It's very easy to scare people by saying 'people are doing bad things on the Internet,'" Galperin says. "They say, 'Think of the children.' But...to use broader, more draconian tools [such as Bill C-30] would come at an enormous cost to free speech."

For Galperin and other proponents of online anonymity, recent efforts to eliminate online obscurity are ominous. Restricting the ability to speak anonymously on the Internet will affect the most marginalized members of society, Galperin argues.

Remember the Arab Spring? The ability to post anonymous comments on the Internet helped activists organize the movement without fear of being tar-

geted by government supporters. In particular, protests organized and discussed via Facebook played a key role in the overthrow of the Egyptian government.

Closer to home, Galperin says anonymity allows would-be whistleblowers to deliver important messages without facing harassment, embarrassment or other repercussions at work and in their communities.

For example, in 2011 and 2012, the CBC broadcast a series of reports on sex abuse scandals within Scouts Canada. Rachel Nixon, director of digital media for CBC News, says the ability to comment anonymously on the CBC's website allowed people who were either victims of the abuse, or otherwise involved with Scouts Canada, to reach out to others. Their comments also helped the CBC advance the story.

"Our view around anonymous commenting is that it really allows people to share their experiences without fear of retribution," Nixon says. "There are a number of difficult stories that we cover on a daily basis... We hear all the time from people who would be very unlikely to share their opinions if they were forced to give their real name. So we see that there is significant value not only in allowing people to express themselves but also in giving further context to the stories that we cover."

Galperin suggests that if individuals can no longer rely on Internet anonymity in such circumstances, they will stop reaching out altogether.

Proponents of online anonymity also point to the necessary divide between personal and professional lives. For instance, there are aspects of yourself that you show to your friends, but not your employer. In the cyber world, an employer or client can search your name and see every comment you've ever made online, and where your personal interests lie. The ability to speak out personally, but anonymously, without jeopardizing professional affiliations or

other relationships, is crucial.

This is not a debate affecting but a few individuals. Anonymous comments make up a large portion of expression on the Internet.

In January 2012, a study by Disqus, a company providing global comment platforms to website owners, suggested that people who use pseudonyms participate in greater numbers on message boards and make higher quality comments than those who use real names. The study evaluated half a billion comments made by more than 70 million users on the Disqus comment platform. However, it should be noted that Disqus does have an interest in website owners allowing anonymous comments; it competes with Facebook, which also offers a message board platform, but requires the use of real names.

Part of the difficulty in this debate is that while we have historically revered anonymous speech (countless authors have written under pseudonyms, for example), online anonymity is by no means a guaranteed component of free expression in Canada.

In the United States, the courts have confirmed that anonymous speech is a cornerstone of the *Bill of Rights* and the *First Amendment*. Courts have protected anonymous speech because "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," because "it is an honorable tradition of advocacy and of dissent," and because "anonymity is a shield from the tyranny of the majority" (McIntyre v. Ohio Elections Commission, 1995, United States Supreme Court).

In Canada, however, the courts have been less generous. In *Harper v.*

Canada (2001), the Court had to decide whether certain provisions of the *Canada Elections Act* violated Section 2(b) of the *Charter*. One of the considered provisions requires a third party to identify itself when it places election advertising. The plaintiff, Stephen Harper, argued that this requirement deprived third parties of the privacy that underlies freedom of expression, and that it deterred third parties from exercising that freedom. Justice Cairns, of the Alberta Court of Queen's Bench, suggested that while Harper had not provided any Canadian authority for the proposition that anonymous speech is protected by Section 2(b) of the *Charter*, and while the proposition did not apply to the specific expression at issue in this case, "this argument should not be foreclosed upon" in the future.

In the case of *Warman v. Wilkins Fournier* (2010), the Ontario Superior Court of Justice went so far as to support American courts, and the proposition that "the removal of an individual's right to remain anonymous may constitute an unjustified breach of freedom of expression." However, the Supreme Court of Canada has never officially granted *Charter* protection to anonymous speech.

While there may not yet be a solid *Charter* right to anonymous speech,



ABOVE: Editorial cartoon by Liza França, courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF).

there are general freedom of expression and privacy rights. So finding out the real identity of an anonymous commenter is not easy. A complainant has to go to the website host to obtain the IP address of the anonymous commenter. The complainant then has to take that IP address to the website owner's ISP to obtain billing information (real identity information) for the associated user. It's an arduous process, and many web hosts implement policies where they refuse to turn over identifying information without a court order to avoid being sued by the anonymous commenter for invasion of privacy. As a result, people wanting to find out the identity of an anonymous Internet user have to launch a lawsuit and obtain a court order. Law enforcement officers investigating criminal activity need to obtain a warrant for the information.

This, understandably, places a high burden on Canadian courts. In 2010 the Ontario Divisional Court confirmed in *Warman v. Wilkins Fournier* that courts must balance the interests of those harmed by anonymous Internet comments with the freedom of expression and privacy interests of anonymous posters. In the 2011 case of *Crookes v. Newton*, the Supreme Court of Canada further confirmed that "the Internet's capacity to disseminate information has been described by this Court as 'one of the great innovations of the information age' whose 'use should be facilitated rather than discouraged.'" (For more on *Crookes v. Newton*, see page 18.)

As a result, there have recently been cases where Canadian courts have refused to order the disclosure of an anonymous Internet user's identity.

In 2011, former Aurora, Ont., mayor Phyllis Morris filed a lawsuit for defamation against a group of anonymous individuals who wrote critical comments about her on *auroracitizen.ca*. At the time, Morris was running for re-election in the small Ontario city. She claimed the statements falsely made her the subject of

"ridicule, hatred and contempt." But in order to have her day in court, Morris had to be able to name the individuals who had harmed her. So she brought a motion to the Court to compel the website moderators, their lawyer and the web host to reveal the identities of the anonymous speakers. The Court refused to order the disclosure of the information. In denying the request, Justice Carole Brown, of the Ontario Superior Court of Justice, relied on earlier case law to conclude that while the right to free expression does not confer a license to ruin reputations, there must be a robust standard before the Court will order the disclosure of a person's identity. Justice Brown confirmed that before being entitled to obtain identifying information, a plaintiff has to prove a *prima facie* case of defamation against the anonymous speaker—in other words, it has to appear that the plaintiff has been defamed. In this case, because Morris had not established a *prima facie* case of defamation, the Court found disclosure of the Internet users' names "clearly does not outweigh the legitimate interests in freedom of expression and the right to privacy of the persons sought to be identified."

But there are also cases where the courts have ordered the disclosure of an anonymous user's name. For example, there's the August 2010 case of *Mosher v. Coast Publishing Ltd.*, in which a Nova Scotia court ordered weekly newspaper *The Coast*, and Google, to provide information about the identities of several anonymous users who had posted critical comments on *The Coast's* website about Halifax's fire chief and deputy fire chief. In her ruling, Justice M. Heather Robertson explained that she was granting the chief and deputy chief's application "because the court does not condone the conduct of anonymous Internet users who make defamatory comments." Then in *Manson v. Doe*, Ontario Justice J. Pepall held that "anonymity should not be uniformly expected or ensured simply because the Internet is used as

the defamatory communication tool."

As Bill C-30 makes its way through the House of Commons and Canadian courts try to balance the rights of individuals in the cyber world, anonymous users are unsure of their privacy rights, and web hosts, ISPs and others who have a part in the publishing of a website are left to deal with the issue on a day-to-day basis.

Some websites, such as *cbc.ca* (which relaunched its Internet platform in 2011) have decided to continue allowing anonymous comments on their sites, but they set strict user terms and policies prohibiting incivility and warning users that illegal activity will not be tolerated.

Website publishers, to avoid being associated with incivility or illegal activity, have taken measures to eliminate the ability to post anonymous comments. For example, in September 2011, the *San Diego Union-Tribune* implemented new rules requiring all users to post comments using their Facebook account; Facebook requires users to provide their real names. (While many users ignore this rule, they run the risk of being caught by Facebook's random checks.)

But Google Plus changed their tune.

In October 2011, Google announced that it was revising its "real names" policy to allow pseudonyms on the site. It may have been a business decision, ensuring increased use of the platform. Or perhaps Google decided to support all forms of expression on the Internet. Either way, Yonatan Zunger, chief architect of Google Plus said, "We thought... that people would behave very differently when they were and weren't going by their real names. After watching the system for a while, we realized that this was not, in fact, the case. And in particular, bastards are still bastards under their own names."

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