

## Courts May Refuse to Compel the BSA and SIIA to Identify their Informants

By Christopher Barnett

On January 12, 2012, the D.C. Court of Appeals held that the Software & Information Industry Association (SIIA) would not be required to disclose the name of one of its confidential informants in a civil case for defamation. Solers, Inc. had filed its lawsuit against a John Doe defendant for defamation after it resolved a software-audit investigation initiated by the SIIA. The SIIA had alleged, based on information that it previously had received from the anonymous defendant, that Solers was using a number of copies of SIIA-member software products in excess of the number of licenses it had purchased for that software. Solers had attempted to force the SIIA to disclose the name of its informant in order to proceed with the defamation action.

The Court of Appeals' decision followed an earlier holding that, in light of the informant's First-Amendment right to anonymity, Solers would be entitled to a subpoena only if it could produce evidence supporting its defamation claim. Solers' challenge was showing that had suffered damage as a result of the informant's actions. In its January 2012 opinion overturning the trial court's decision to enforce Solers' subpoena, the Court of Appeals noted that the fact Solers may have spent money in preparing a response to the SIIA's audit demand did not constitute sufficient proof of special damages to support its claims. The Court reasoned that if audit-response costs were all that was required, an audit target could create a cause of action by increasing the resources spent in responding to the SIIA. What is necessary, according to the Court, is a showing of "lost profits or customers deterred from dealing with the company," or some other type of injury outside the plaintiff's control. Solers' efforts to enforce the subpoena failed because it was unable to make that showing.

Businesses targeted for audits by the SIIA or by the Business Software Alliance (BSA) often are interested in learning the names of the informants that supplied the information to initiate the audits. While the D.C. Court of Appeals' decision is not binding precedent outside of the District of Columbia, it nevertheless is persuasive and could make it difficult for motivated companies to move forward with tort claims against anonymous audit informants. However, a business that is able to show an informant likely was an employee bound by a non-disclosure or confidentiality agreement may be able to state a claim that does not depend on the heightened damages showings in defamation cases. Companies in those circumstances should consult with counsel to determine whether there is a viable claim that is worth pursuing, given the expense of litigation.

A copy of the Court of Appeals' opinion is available from the SIIA [here](#).



### About the author Christopher Barnett:

Christopher represents clients in a variety of business, intellectual property and IT-related contexts, with matters involving trademark registration and enforcement, software and licensing disputes and litigation, and mergers, divestments and service transactions. Christopher's practice includes substantial attention to concerns faced by media & technology companies and to disputes involving new media, especially the fast-evolving content on the Internet.

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