Shielding Jane and John: Can the Media Protect Anonymous Online Speech?

ASHLEY I. KISSINGER AND KATHARINE LARSEN

Subpoenas to reporters for their sources and other unpublished information have long threatened important speech and press interests. The reporter's privilege has done a fair job of moderating the battle between those interests and the competing needs of parties in civil and criminal actions. But a new kind of subpoena has complicated this carefully negotiated balance, bringing a distinct type of source and a different constitutional speech interest into the equation.

Media companies are receiving with dramatically increasing frequency subpoenas seeking the identifying information of those who have posted comments anonymously to the companies' websites. Consider this scenario: A newspaper publishes an article on its website reporting on a newly filed sexual harassment and defamation lawsuit. Within hours, a broad and heated debate roars in the comments section. Within days, the plaintiff serves the newspaper with a subpoena seeking all identifying information about various individuals who, using pseudonyms, participated in the debate. The plaintiff wants to name some of the anonymous posters as defamation defendants. She claims the others appear to be witnesses with important information relevant to her claims.

The posters have a qualified constitutional right to anonymity: the U.S. Supreme Court has held on numerous occasions that the First Amendment grants substantial protection to anonymous speech.[1] So how should the company respond? One rational course is to remain neutral and let the other parties, including the posters, argue over whether disclosure is appropriate. The company is immune from liability for the allegedly defamatory remarks of the posters, so why should it expend resources urging protection of their identities?[2] On the other hand, anonymous posters bring valuable information to media websites that can enhance not only public dialogue, but also the company's own reporting.

For these reasons, many media companies are choosing to fight subpoenas seeking the identities of anonymous posters with the same vigor they use to fight subpoenas seeking more traditional unpublished information. They view protecting the right to speak anonymously as important for both normative and practical reasons. Anonymous commentary—both online and off—is credited with identifying solutions for political, social, and cultural challenges; promoting unconventional ideas; and catalyzing community development and transformation.[3] The vitality such speech brings to online forums can increase online readership. Advocacy in this arena can protect that growing readership and new digital revenue streams as well.[4] And the media are obviously well equipped to articulate and advance the posters' speech rights.[5]

But the law in this area remains in relative infancy, and media companies fighting these battles are still addressing numerous open questions. How should the law accommodate the speech rights of the anonymous posters while safeguarding plaintiffs' right to a remedy for reputational or other injury? Is the reporter's privilege equipped to balance the interests? Or are other balancing tests necessary? What can media companies do to influence the outcome of these questions? And do they have standing to do so? This article explores the legal landscape in an effort to answer these questions and aid media companies in formulating successful and cost-effective responses to subpoenas for information regarding anonymous posters.

Form of the Subpoenas

A subpoena seeking the identity of an anonymous poster may arise in various ways. Most frequently, a plaintiff commences a lawsuit against a Jane or John Doe defendant and then moves for issuance of a pre-service discovery subpoena on the owner of the website on which the offending material was posted, the anonymous poster's Internet service provider (ISP), or both.[6] Alternatively, the suit is filed only against, or also against, the website or ISP, and the plaintiff serves a simple discovery request on those parties.[7] In a copyright dispute, a plaintiff may obtain issuance of a prelitigation subpoena under the Digital Millennium Copyright Act (DMCA).[8] While most of the subpoenas litigated thus far have sought the identity of the posters in order to name them as defendants, parties in some cases have issued subpoenas seeking the identity of nonparty anonymous posters—individuals whose speech is not alleged to have caused any harm but who are considered potential witnesses in an ongoing lawsuit.[9]

The subpoena typically requests "all identifying information" regarding the poster and often identifies that person by the pseudonym under which he or she posted, or by the date and time of the post. Some subpoenas specifically seek the IP address[10] of the computer from which the person posted the comments to the website, as well as the information obtained from the poster when he or she registered with the website, which often includes the person's name and e-mail address.[11] Because many people register using fake names and nondescript e-mail addresses, the IP address is often the most valuable piece of information sought.[12]

Does a Media Company Have Standing to Assert an Anonymous Poster's Rights?

The primary defense asserted by media companies that challenge these subpoenas is that compliance would violate the First Amendment right of the posters to speak anonymously. But does a media company have standing to assert that right? Although there is very little case law addressing the issue, the trend among those courts presented with the question is to hold that entities such as newspapers, ISPs, and website hosts may, under the principle of *jus tertii*

Ashley I. Kissinger is a partner in the Denver office of Levine Sullivan Koch and Schulz, L.L.P. Katharine Larsen is an associate in the firm's Philadelphia office.

standing, assert the rights of their readers and subscribers.

In December 2008, in *Enterline v. Pocono Medical Center*, a federal district court expressly held, as a matter of first impression, that a newspaper had standing to assert the constitutional rights of anonymous posters to its website.[13] The court concluded that "the relationship between [the newspaper] and readers posting in the [n]ewspaper's online forums is the type of relationship that allows [the newspaper] to assert the First Amendment rights of the anonymous commentators."[14] The court further held that (1) "the anonymous commentators to the [newspaper] website face practical obstacles to asserting their own First Amendment rights" because doing so would require revelation of their identities; (2) the newspaper itself "displays the adequate injury-in-fact to satisfy Article III's case or controversy requirements"; and (3) the newspaper "will zealously argue and frame the issues before the Court."[15]

Similarly, in *In re Subpoena Duces Tecum to AOL, Inc*., a Virginia appellate court held that an ISP had standing to assert the First Amendment rights of anonymous posters who were its subscribers because if the ISP "did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that [its] subscribers would look to AOL's competitors for anonymity."[16]

There are few decisions on this issue, however, and the requisite nature of the relationship between the subpoena recipient and the anonymous speaker has not been well developed by the courts. While some decisions appear to require that the recipient risk financial loss or demonstrate a "close relationship" with the speaker,[17] others do not.[18] Thus, a media company defending against a charge that it lacks standing to assert the rights of the anonymous poster should consider supporting its argument with analogous cases outside the Internet context.[19]

How Do Courts Balance the Competing Rights?

The First Amendment right to speak anonymously is not absolute and must be balanced against an aggrieved party's right to seek redress for injury.[20] Neither the U.S. Supreme Court nor any federal circuit court[21] has considered in a published decision the proper calculus for balancing the conflicting rights of an anonymous online speaker and an allegedly injured party.[22] In the absence of such guidance, federal and state trial courts have developed a range of standards that plaintiffs must satisfy in order to obtain information related to the speaker's identity.[23]

The critical element in each of the tests articulated by the courts is the degree of burden imposed on the plaintiff to demonstrate the viability of his or her case before the anonymous poster will be unmasked. Various other procedural and substantive requirements are typically included, but the battleground in the cases is whether the burden should be high or low. As set forth below, a somewhat unified high-burden test has recently begun to emerge: the prima facie case or summary judgment test. A number of distinct low-burden tests remain, however, including motion to dismiss, good cause, and good faith.[24]

Although general rules are difficult to divine in this emerging area of the law, it can be fairly said that courts primarily consider the type of speech at issue in determining what degree of burden to apply to a particular plaintiff. Thus, where expressive speech is at issue, as in defamation cases, courts tend to apply a high-burden test, and where the speech is alleged to constitute a copyright or trademark infringement, courts tend to apply a low-burden test.[25]

The application of a stringent standard in cases involving expressive speech is consistent with the Supreme Court's recognition of the "honorable tradition of advocacy and of dissent" that is anonymous speech[26] as well as the nation's historical practice of "accord[ing] greater weight to the value of free speech than to the dangers of its misuse."[27] Equally so, the application of a decidedly lower bar in infringement actions accords with the fact that copyright owners' rights are also rooted in the Constitution,[28] as well as the view that allegedly infringing activities only minimally constitute speech, if at all.[29] As media companies increasingly find themselves bringing infringement suits for online content, the maintenance of this general dichotomy will be important in permitting them to unmask infringing posters while, at the same time, asserting the rights of anonymous posters engaged in expressive speech.

Fortunately, courts have demonstrated a willingness to look beyond the plaintiff's characterization of its claims in evaluating how to categorize the type of speech at issue. At least one court focused on the gravamen of the case in deciding which standard to apply when a variety of claims were asserted.[30] And another squarely rejected "the notion of adopting standards that depend on the manner in which a plaintiff has framed its claim" because doing so "could encourage assertion of non-defamation claims simply to reap the benefit of a less-stringent standard."[31]

There have been very few cases in which the anonymous poster is sought simply as a witness—that is, where the poster is alleged to possess information relevant to the case and is not sought as a potential party—and it remains unclear how courts will handle such cases. Whereas one court concluded that the same high-burden test should apply regardless of the anonymous speaker's role in the action,[32] another court crafted a lower-burden test akin to the federal qualified reporter's privilege to be applied solely in situations in which the anonymous speaker is a nonparty.[33]

The vitality that anonymous speech brings to online forums can increase readership and revenue for the company.

Expressive Speech: The Prima Facie Case or Summary Judgment Test

The prevailing view among courts called upon to consider what test should apply in cases involving expressive content is that the plaintiff should be required to put forth sufficient evidence to support a prima facie case, or, put differently, to withstand a hypothetical summary judgment motion. The most often cited decisions in this category are *Dendrite International, Inc. v. Doe No. 3*[34] and *Doe v. Cahill*.[35]

In *Dendrite*, a New Jersey appellate court held, in a defamation action, that "[t]he complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action."[36] Several courts have applied this standard in cases alleging defamation

and other torts.[37] In *Cahill*, another defamation case, the Supreme Court of Delaware expressly adopted this element of the *Dendrite* test, but framed it in terms of defeating a hypothetical summary judgment motion: "[B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion."[38] The court made clear that the plaintiff need not produce evidence on a particular element if that evidence is not "within the plaintiff's control," such as evidence of actual malice.[39] This case, too, has been followed by several courts in defamation and other tort actions.[40]

The *Cahill* court's articulation of the test in summary judgment terms has generated both confusion and criticism. Despite the fact that the court in *Cahill* plainly believed this element of its test was the same as that of *Dendrite*—the court spoke in the same breath of "the *prima facie* or 'summary judgment standard'"[41]—some courts have viewed *Cahill* as setting forth a different standard, one that has been viewed by some courts as less burdensome[42] and by others as more burdensome[43] than *Dendrite*. In *Krinsky v. Doe 6*, a California appellate court concluded it was "unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required."[44] Hinging the standard to a procedural device was fraught with difficulty, the court concluded, given that "subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleadings and motions."[45]

Perhaps as a result, it appears that the groundswell is moving slightly away from the summary judgment formulation of *Cahill* and in the direction of the prima facie test announced by the *Dendrite* court. The latter is the standard adopted by a California appellate court last year in *Krinsky*.[46] And Maryland's high court recently settled on the prima facie standard in an exhaustive opinion issued in February 2009 in *Independent Newspapers, Inc. v. Brodie*.[47] At bottom, however, the prima facie and summary judgment tests impose similar burdens in terms of how strong a case the plaintiff must present to the court,[48] essentially requiring sufficient evidence to create a jury issue on the underlying claim, and both tests are very speech protective.

Some courts, beginning with *Dendrite*, have held that, once the plaintiff has satisfied its burden, the court should then balance the First Amendment rights of the anonymous poster against the strength of the plaintiff's case and the necessity of the disclosure.[49] The *Cahill* court and others have deemed this additional step unnecessary, concluding that either the substantive law of defamation, or the summary judgment test itself, already achieves this balancing of the competing rights of the anonymous poster and the plaintiff.[50]

But at least one court has expressly criticized the elimination of this element in *Cahill*, asserting that such balancing "is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech."[51] In *Mobilisa, Inc. v. Doe*, the Arizona Court of Appeals noted that "surviving a summary judgment on elements not dependent on the anonymous party's identity does not necessarily account for factors weighing against disclosure," such as where the anonymous poster is a nonparty witness with the same information that is in the control of other witnesses.[52] The court also concluded that, without the balancing step, a court "would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the party to advance the requesting party's position, and the availability of alternative discovery methods."[53] As discussed below, however, other courts account for these factors by expressly including them as additional elements of their analysis.

Infringing Speech: The Motion to Dismiss and Good Cause Tests

Where the speech at issue is challenged on grounds that it infringes intellectual property rights or otherwise constitutes a business tort, many courts have applied—or at least nominally applied—either a motion to dismiss standard or a good cause standard.

Motion to Dismiss

In *Columbia Insurance Co. v. Seescandy.com*, a federal district court in California held that discovery of an anonymous defendant's identity in an action for trademark infringement and other business torts would be allowed when the plaintiff "establish[ed] to the Court's satisfaction that plaintiff's suit against [the speaker] could withstand a motion to dismiss."[54]

Despite the court's reference to "withstand[ing] a motion to dismiss," it in fact set a higher bar than the basic Rule 12(b)(6) standard. The court explained that a plaintiff should not be permitted to rest on a well-pleaded complaint but rather must make "some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act."[55] Indeed, the court likened the standard "to the process used during criminal investigations to obtain warrants," i.e., a probable cause standard, and examined evidence in the record before reaching the conclusion that the plaintiff had satisfied it.[56]

Other courts have similarly purported to apply a motion to dismiss-type standard while actually requiring something more than just stating a viable claim. For example, in a case involving claims for unfair and deceptive trade practices, unfair competition, tortious interference with business relations, and defamation, a federal district court in North Carolina adopted a motion to dismiss standard but then appeared to assess the credibility of the plaintiff's averments.[57] And the Supreme Court of Wisconsin adopted a motion to dismiss standard in a defamation case, observing that such a standard would provide more protection in Wisconsin than it would in other jurisdictions because Wisconsin law requires all plaintiffs alleging a defamation claim to plead with particularity.[58]

One oft-cited case from the Southern District of New York, *Sony Music Entertainment Inc. v. Does 1–40*,[59] sets forth a slightly less speech-protective motion to dismiss test that, with very few exceptions, has been applied only in copyright infringement actions involving peer-to-peer file-sharing networks.[60] In *Sony*, the court examined several factors it said other courts had considered—and should consider—when evaluating subpoenas seeking identifying information from ISPs regarding subscribers, including whether the plaintiff made "a concrete showing of a prima facie claim of actionable harm."[61] Although the court's use of the term "prima facie" makes the *Sony* test appear at first blush to be more speech protective than the *Seescandy* test, it is not. The court held that a plaintiff could satisfy

How to Minimize the Risk of Liability for Subpoena Responses

The appropriate response to a subpoena seeking information about the identity of an anonymous speaker necessarily will vary from case to case. But media companies always should take the following steps to minimize legal risk associated with such responses.

Preserve the Information Sought

The company should immediately seek to preserve the electronic and other information sought by a subpoena, including electronic information that ordinarily would be stored only temporarily.[1] The failure to do so may result in sanctions for spoliation.[2]

Review Terms of Service and Privacy Policies

When a company employs privacy policies, terms of service, or any other policy or agreement governing the disclosure of information that could identify anonymous posters, it should comply with those policies—or face the real possibility of being sued by an anonymous poster for breach of contract.[3] Accordingly, the company should evaluate and update such policies with potential subpoenas for anonymous website posters in mind.

Consider Notifying the Anonymous Speaker

The subpoena recipient should consider voluntarily notifying the anonymous poster of the existence of the subpoena.[4] The poster has the greatest interest in protecting her right to anonymity, and notification will provide her the opportunity to respond directly.[5] Such notice also may head off a potential claim by the anonymous poster that the subpoena recipient's release of her identity breached a contract or resulted in reputational or other injury.[6] The Virginia legislature has created a notification form for use in such cases, as has at least one federal court.[7]

Endnotes

1. *See* Columbia Pictures Indus. v. Bunnell, No. CV06-1093FMCJCX, 2007 WL 2080419, at at *3, 7–8, 14 (C.D. Cal. May 29, 2007) (ordering preservation and production of server log data that was usually stored on the defendants' website server for approximately six hours).

2. *See id.* at *13–14 (declining to impose sanctions in the absence of precedent imposing duty to preserve information temporarily stored in RAM).

3. *See*, *e.g.*, Wargo v. Lavandeira, No. 1:08-cv-02035-LW (N.D. Ohio Oct. 3, 2008) (Dkt. No. 15) (dismissing for lack of personal jurisdiction an action seeking $25 million in damages for publishing an anonymous poster's name and work e-mail address, along with the poster's previously anonymous comments, in violation of the blog's privacy notice); *compare* Meyer v. Christie, No. 07-2230-JWL, 2007 WL 3120695, at *4 (D. Kan. Oct. 24, 2007) (denying motion to dismiss breach of contract claim and finding that "bank's privacy policy constituted part of [plaintiff's] bargained-for exchange with the bank"), *with* Dyer v. Nw. Airlines Corps., 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (granting motion to dismiss breach of contract claim because, *inter alia*, "broad statements of company policy do not generally give rise to contract claims").

4. Where the company intends to file a motion to quash, it may be more appropriate simply to urge the court to adopt a procedure to notify the anonymous posters of their rights and permit them to assert those rights in the event the court denies the company's motion to quash. *See*, *e.g.*, Bizub v. Paterson, No. 2007CV1960 (Colo. Dist. Ct., El Paso County, motion filed May 27, 2008) (where the plaintiff issued an overbroad subpoena seeking thirty-eight individuals' identities, newspaper moved to quash and urged the court to require notification only in the event the motion was to be denied, and the court quashed the subpoena, rendering notification unnecessary).

5. When appropriate, the Doe defendant or witness can be referred to an organization that may provide or help obtain representation, such as Citizens Media Law Project (http://www.citmedialaw.org); Electronic Frontier Foundation (http://www.eff.org); Public Citizen (http://www.citizen.org); or the American Civil Liberties Union (http://www.aclu.org). Alternately, the court may appoint *pro bono* counsel. *See*, *e.g.*, Doe I v. Individuals, 561 F. Supp. 2d 249, 252 (D. Conn. 2008).

6. *See* Gallucci v. New Jersey On-Line, LLC, No. L-001107-07 (N.J. Super. Ct., filed on or about Feb. 5, 2007) (anonymous poster, who alleged his identifying information was revealed without notice by website in response to subpoena, sued website but later dismissed action); *see also* Jessup-Morgan v. AOL, Inc., 20 F. Supp. 2d 1105 (E.D. Mich. 1998) (awarding summary judgment in favor of defendant on one claim and dismissing all others in action for disclosure of identity information pursuant to subpoena without notice to plaintiff); *see also supra* note 3.

7. *See* Va. Code Ann. § 8.01-407.1(B); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008) (containing, in Appendix A, a court-directed notice providing file sharers with information about their rights and instructions on how to secure counsel).

that requirement merely by alleging the elements of ownership and copying in some detail in the complaint, a lower burden it justified by noting that, "[i]n contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression."[62]

Good Cause

The good cause test is the weakest standard created by the courts. It provides no special protection for anonymous speech; it is essentially the same test employed by federal courts for authorizing expedited discovery in any ordinary civil action under Federal Rule of Civil Procedure 26(d).[63] One court noted that this standard should apply only in cases either in which "'First Amendment rights are not implicated because the information sought by the subpoena does not infringe [the Doe defendants'] rights to engage in protected speech'" or the speaker's First Amendment interests are "exceedingly small."[64] And courts have, indeed, employed this standard only in actions alleging copyright infringement for the use of peer-to-peer file-sharing networks.[65] These courts, which reject the *Sony* court's view that file sharers' speech is entitled to at least "'some level of First Amendment protection,'"[66] hold that good cause exists where there are "allegations of copyright infringement," there is a "danger that the

ISP will not preserve the information sought," the information sought is narrow in scope, and expedited discovery "would substantially contribute to moving the case forward."[67]

Notification and Other Additional Elements

Beyond the degree of burden placed on the plaintiff, courts often have included various other factors in their tests. The most significant of these is the notification requirement. Courts routinely require that the anonymous poster be notified of the subpoena and provided time to respond. Generally, this process begins with the court ordering the plaintiff to undertake efforts to inform the poster that a suit has been filed or a subpoena has been issued.[68] The Virginia General Assembly codified this obligation in the statute it enacted to govern the adjudication in civil cases of subpoenas for anonymous online posters' identities.[69]

The invocation of reporter's privilege in some [contexts] may undermine the privilege itself.

In some instances, however, the recipient of the subpoena may be obligated to provide notice to the anonymous posters. Some courts have held that it is within their inherent authority to order the party from whom the information is sought to inform the anonymous speaker about the pending discovery request.[70] Virginia's statutory scheme also requires the subpoena recipient to notify the anonymous poster via e-mail of the receipt of the subpoena and to forward a copy of the subpoena via registered mail or commercial delivery service.[71]

In addition to notification, courts also have imposed a number of other requirements in their tests. For example, in *Dendrite*, the court "require[d] the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."[72] In *Seescandy*, the court required that the plaintiff identify the anonymous speaker "with sufficient specificity," set forth "all previous steps taken to locate" the anonymous speaker, and "file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible."[73] And in *Sony*, after surveying various factors applied by other courts, the court considered the "specificity of the discovery request," the "absence of alternative means to obtain the subpoenaed information," whether there was "a central need for the subpoenaed information" to advance the claim, and the anonymous speaker's "expectation of privacy."[74]

Alternate Approaches to Balancing

The 2TheMart Test

Some courts have opined that the same test should apply whether the anonymous poster is sought as a defendant or merely as a witness.[75] In *Doe v. 2TheMart.com*, however, a federal district court in Washington created a separate test, one akin to the federal qualified reporter's privilege, for a subpoena seeking the identifying information of anonymous posters who were sought solely as witnesses.[76] Under the *2TheMart* test, the subpoenaing party must demonstrate, "by a clear showing on the record," that

(1) the subpoena seeking the information was issued in good faith and not for any improper purpose,
(2) the information sought relates to a core claim or defense,
(3) the identifying information is directly and materially relevant to that core claim or defense, and
(4) information sufficient to establish or disprove that claim or defense is unavailable from any other source.[77]

Although the court spoke in terms of "good faith," it explained that its test imposed a "high burden," one that was "higher" than those that had been applied by other courts at that time and that could only be overcome in "exceptional" cases.[78] The court quashed the defendant's subpoena, holding that its "extremely broad" nature evinced an "apparent disregard for the privacy and the First Amendment rights of the online users" and that the information sought from the nonparty posters did not relate to any of the defendant's core affirmative defenses.[79] Another federal district court recently employed this standard in similar circumstances, but noted that application of this standard, which was advocated by the subpoenaing plaintiff, "allow[ed] the Court to resolve the present issue on narrow grounds and [did] not require the Court to determine the full extent of the First Amendment right to anonymity" at issue in the case.[80]

It is important to recognize that *2TheMart* was one of the earliest published decisions in this area of law. Now that many other courts have imposed higher-burden tests, even in situations where an anonymous poster is a party defendant, it would seem incongruous to impose the lower-burden *2TheMart* test to civil cases in which an anonymous poster is sought merely as a third-party witness.

Virginia: The Good Faith Test

In one of the earliest decisions on the subject, a Virginia court provided only minimal protection for anonymous speech in a defamation case, imposing a test in which the court merely asked whether the "pleadings or evidence" demonstrate that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and . . . the subpoenaed identity information is centrally needed to advance that claim."[81] This decision has been largely distinguished or rejected by courts addressing claims involving expressive speech.

The good faith test lives on in Virginia, however, and by its terms it applies to all cases, whether they involve expressive speech or not. In 2002, the Virginia General Assembly codified a version of the good faith test that appears on its face to be as weak as that employed two years earlier by the circuit court. The statute requires the subpoenaing party to show *either* that "one or more communications that are or *may be* tortious or illegal have been made by the anonymous communicator, *or* that the party requesting a subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed."[82] No court has yet interpreted or applied this statute in a published decision, but the statute cannot be dismissed as an outlier because AOL's corporate headquarters are in Virginia.[83]

Other Tests

A few courts have developed tests that are dissimilar from the standards described above. In what is perhaps the oddest example, one federal magistrate judge created a test that distinguishes between speech on matters of private concern and speech on matters of public concern, and confoundingly imposes a greater burden on the plaintiff in the former context. For speech on matters of private concern, the plaintiff must show a "reasonable *probability*" of prevailing on the merits. Where the speech touches upon a matter of public concern and the plaintiff is a public figure (and thus required to demonstrate actual malice), the plaintiff need only show a "reasonable *possibility*" of success on the merits.[84] And while the "reasonable probability" standard appears to require the production of some evidence, the court's application of the "reasonable possibility" standard suggests that reliance on the pleadings alone is sufficient.[85]

Additional Grounds for Quashing the Subpoena

A comprehensive defense against a subpoena for an anonymous poster's identity will often incorporate other arguments as well. In addition to the procedural arguments applicable to any subpoena,[86] a subpoena recipient might, for example, assert the reporter's privilege, move to strike the subpoena under laws designed to protect participation in public dialogue, challenge jurisdiction, invoke federal or other laws as a shield, or argue that enforcement of the subpoena would be futile.

Reporter's Privilege

Depending on the contours of the reporter's privilege in a particular jurisdiction, media companies may have grounds to defend against a subpoena for an anonymous poster's identity by asserting that privilege. In *Doty v. Molnar*, an action for defamation and false light invasion of privacy, the plaintiff subpoenaed a Montana newspaper for identifying information about various persons who had anonymously posted comments to articles in the newspaper's online edition.[87] The newspaper moved to quash the subpoena on the ground that it was privileged from providing the information by Montana's Media Confidentiality Act, which broadly provides, in pertinent part:

> [N]o person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.[88]

The court granted the motion, becoming the first court to quash a subpoena to a media entity seeking the identities of anonymous website posters on the ground that a state shield law afforded a privilege from disclosure of the information.[89] The following month, state courts in Florida and Oregon reached the same result under their respective shield laws.[90]

More recently, an Illinois trial court applied its state's shield law to partially quash a subpoena in a criminal prosecution for the murder of a child.[91] There, the government subpoena sought, from a local newspaper, records leading to the identity of five anonymous posters to the newspaper's website. Finding that two of the posters' comments related to "the Defendant's prior conduct, his propensities for violence, and relationship with the child," the court concluded that the prosecution had overcome the shield law privilege as to those two posters because "the information sought is relevant, . . . all sources of information have been exhausted" since the prosecution had already conducted 117 interviews, "and first degree murder of a child impacts the public interest."[92] The court quashed the subpoena as to the remaining three posters because it found their comments "appear[ed] to be nothing more than conversation/discussion."[93]

Despite applying Illinois's shield law, the court strongly suggested that the statute's definition of "source" did not include individuals who voluntarily post information "*in response* to" an article, and the court invited the legislature to clarify the issue.[94] In this regard, the decision is similar to that of a California appellate court in *O'Grady v. Superior Court*, which suggested, in dicta, that anonymous website posters are not "sources" of news protected by California's shield law.[95]

The invocation of the reporter's privilege in this context at least theoretically could undermine it. The combination of shield law protection for the anonymous poster and § 230 immunity for the website host could leave legitimate plaintiffs without a remedy. Legislators might seek to narrow shield laws to rebalance the poster's and plaintiff's competing rights, and such legislative fiddling may well have the unintended consequence of encroaching on the protection presently enjoyed by the press for keeping its more traditional sources of important public information confidential. This scenario seems more realistic in those jurisdictions where shield law protection is absolute. Plaintiffs with meritorious claims against anonymous posters should be able to overcome a shield law offering qualified protection.

Anti-SLAPP Statutes

If the anonymous speech concerns an issue of public interest, an anti-SLAPP statute—a statute designed to curb Strategic Lawsuits Against Public Participation—may provide the defendant both immunity from suit and attorney fees.[96] California recently amended its anti-SLAPP statute in a manner that should deter frivolous efforts from outside California to unmask anonymous posters inside the state. Although the statute previously could be used only to strike a complaint, cross-complaint, petition, or other pleading filed in a California court,[97] on January 1, 2009, the law was expanded to permit motions to strike requests for subpoenas that originate outside the state.[98]

Lack of Subject Matter Jurisdiction

At least two federal courts have dismissed diversity actions against John Doe anonymous posters for lack of subject matter jurisdiction because the citizenship of the defendant posters was unknown.[99]

Other Laws

The Torture Victim Protection Act (TVPA) and other laws may impose an obligation on the recipient of a subpoena not to disclose the identity of the anonymous speaker. In *Xiaoning v. Yahoo! Inc.*, two Chinese dissidents sued Yahoo pursuant to the TVPA, alleging that Yahoo's disclosure of their identifying information to the Chinese government upon its request aided or abetted torture and other

injuries inflicted on the dissidents.[100] In addition, in the wake of the *Yahoo* action, Congress drafted the Global Online Freedom Act, which, if enacted, would bar U.S. companies from disclosing personally identifiable information about online users to foreign governments except for "legitimate foreign law enforcement purposes."[101] Separately, technology companies and nongovernmental organizations have launched the Global Network Initiative, a coalition that has formulated a code of conduct and a forum designed to protect online free speech and privacy.[102]

Futility

A subpoena recipient also may argue that enforcement of the subpoena—even against an ISP—may be futile. With the increased use of open networks as well as anonymizers, IP disguisers, MAC spoofing, and similar technological tools, the IP address sought by a plaintiff may not conclusively identify the anonymous speaker.[103] As one court aptly analogized, just as a telephone number is not necessarily indicative of the person using a phone at any given time, an IP address may bear no relation to the anonymous speaker; in fact, it may even mistakenly identify an innocent third party.[104]

Conclusion

When a person has entrusted a media company with her identity as she takes a stand in public debate, there is significant social and economic value in defending against attempts by others to pierce the veil of anonymity that emboldened her to speak in the first place. An evaluation of whether the company is well positioned to advocate for a particular poster's right to anonymity raises numerous questions. Is the company in possession of information that could identify the poster? Does the company have the legal, financial, and practical ability to oppose the subpoena? Do business considerations weigh in favor of asserting the rights of the poster? What type of speech is at issue? What test will a court in that jurisdiction apply to account for the First Amendment right of the poster? Can and should the poster be notified of the subpoena? Does the poster's identity come within the ambit of a state shield law? Even if it does, should that law be invoked? What other grounds can be asserted in support of a motion to quash?

Given the nascent state of the law, the answers to these questions are not entirely clear, either in the abstract or in any particular case. But they are inarguably important because they may change how, and to what degree, people communicate on the Internet. An industry that increasingly must rely on Web-generated revenues—and is experimenting with citizen journalism efforts in part to do so—can ill afford to ignore those changes. More importantly, it cannot afford to ignore the evolution of jurisprudence defining a First Amendment speech right, jurisprudence that could well end up influencing how that Amendment applies in other contexts of importance to the press.

Endnotes

1. *See*, *e.g.*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999) (striking down the requirement that petition circulators wear identification badges stating their names because it "compels . . . identification at the precise moment when the circulator's interest in anonymity is greatest"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."); *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (holding that subpoenas seeking names of NAACP members raise First Amendment concerns). It is also well settled that First Amendment protections apply fully to speech on the Internet. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

2. Section 230 of the Communications Decency Act immunizes website providers from liability for content posted on their websites so long as they did not create or develop the content and did not expressly encourage or incite unlawful or tortious posts. *See* 47 U.S.C. § 230; Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008) (concluding that § 230 did not apply when website required subscribers to provide certain information because website thereby became a "developer, at least in part, of that information"). Section 230 has its share of critics. If website providers step into the fray between anonymous posters and the aggrieved persons who wish to sue them, will they ultimately see legislative efforts to retract their immunity?

3. *See McIntyre*, 514 U.S. at 342–43 (observing that the works of Mark Twain, Voltaire, Charles Dickens, Benjamin Franklin, and other great thinkers were published under assumed names); Talley v. California, 362 U.S. 60, 64–65 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.").

4. *See* Enterline v. Pocono Med. Ctr., No. 08-cv-1934-ARC, 2008 WL 5192386, at *3 (M.D. Pa. Dec. 11, 2008) (stating that lack of such advocacy could "compromise the vitality of the newspaper's online forums, sparking reduced reader interest and a corresponding decline in advertising revenues").

5. *See*, *e.g.*, *id*. at *4 (holding that a newspaper has both the type of relationship that enables it to assert the First Amendment rights of anonymous posters and a desire to maintain the trust of its readers that will make it a strong advocate of those rights).

6. *E.g.*, Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. July 25, 2006) (plaintiff filed suit against John Doe defendants then sought court order allowing expedited discovery as to third-party ISPs); *see also*, *e.g.*, New Jersey Rules of Court 4:26-4 (authorizing use of fictitious party names). Because the subpoenaing party is usually the plaintiff, this article speaks in those terms throughout. Defendants also may wish to unmask anonymous posters, however, either to file claims against them or to contact them as potential witnesses. Similarly, this article generally speaks of anonymous "posters" even though the anonymous person whose identity is being sought might have been communicating in a fashion other than posting comments, such as by sharing music files.

7. *E.g.*, Pub. Relations Soc'y of Am. v. Road Runner High Speed Online, 799 N.Y.S.2d 847 (N.Y. Sup. Ct. 2005) (naming ISP as defendant); Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007) (naming ISP and anonymous speaker as defendants). In some cases, the suit is commenced as an independent discovery action under state law. *E.g.*, La Societe Metro Cash & Carry France v. Time Warner Cable, No. CV-03019740S, 2003 WL 22962857, at *2–3 (Conn. Super. Ct. Dec. 2, 2003); *see also*, *e.g.*, 134 Ill. 2d R. 224 (authorizing independent actions for discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages").

8. *See* 17 U.S.C. § 512(h) (authorizing issuance of form subpoena to "provider of online services" for identifying information about an alleged infringer even where there is no pending lawsuit); *see also In re* Subpoena Issued Pursuant to the Digital Millennium Copyright Act to 43SB.com, LLC, No. MS07-6236-EJL,

2007 WL 4335441 (D. Idaho Dec. 7, 2007) (pre-suit DMCA subpoena served on owner of website hosting allegedly infringing content); *but see* Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003) (holding that DMCA subpoena provision does not apply where recipient merely acts as conduit for peer-to-peer exchanges, such as file sharing).

9. *E.g.*, *Enterline*, 2008 WL 5192386, at *4; Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

10. An Internet protocol address—or IP address—is a number assigned to a computer as it navigates the Internet. Under most circumstances, this number can be used to identify the user of that computer to a reasonable degree of certainty. *But see* notes 103–04 and accompanying text *infra* (discussing reasons why an IP address may not always identify the anonymous person sought).

11. *E.g.*, *2TheMart*, 140 F. Supp. 2d at 1090 (describing subpoena as seeking, "among other things, '[a]ll identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online message boards,' concerning a list of twenty-three InfoSpace users, including Truthseeker, Cuemaster, and the current J. Doe, who used the pseudonym NoGuano").

12. The IP address identifies the poster's ISP. If the other registration information is not authentic, the plaintiff generally serves a second subpoena on the ISP seeking the identifying information of the subscriber associated with the IP address.

13. No. 08-cv-1934-ARC, 2008 WL 5192386, at *3 (M.D. Pa. Dec. 11, 2008) (citing, *inter alia*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988)).

14. *Id*.

15. *Id.* at *4; *see also* Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001) (court invited nonmovant website host to brief substantive issues related to rights of anonymous posters).

16. No. 40570, 2000 WL 1210372, at *5 (Va. Cir. Ct. Jan. 31, 2000) (citing NAACP v. Alabama, 357 U.S. 449 (1958), and *Am. Booksellers Ass'n*, 484 U.S. at 392)), *rev'd on other grounds*, Am. Online, Inc. v. Anonymously Traded Pub. Co., 542 S.E.2d 377 (2001).

17. *See* Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1213 n.8 (D. Nev. 2008) ("the inquiry into whether there is a 'close relationship' is functional in nature, and it is not necessarily required that the parties know, work or associate with one another"); *In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 258 (D.D.C.) (finding that ISP had standing to assert the rights of its anonymous subscribers because "a failure to do so could affect [its] ability to maintain and broaden its client base"), *rev'd on other grounds*, RIAA v. Verizon, 351 F.3d 1229 (D.C. Cir. 2003); Matrixx Initiatives, Inc. v. Doe, 32 Cal. Rptr. 3d 79 (Ct. App. 2006) (holding that hedge fund that merely owned office from which allegedly defamatory posting was made did not have standing to assert First Amendment rights of anonymous poster); In re Subpoena Duces Tecum to AOL, Inc., 2000 WL 1210312 (discussed in text *supra*); *see also NAACP*, 357 U.S. at 459–60 ("The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.").

18. *See* Mobilisa, Inc. v. Doe, 170 P.3d 712, 716 n.2 (Ariz. Ct. App. 2007) (holding that court need not address issue of ISP's standing to assert rights of anonymous speaker because speaker also appeared on his own behalf); AOL, Inc. v. Nam Tai Elecs., Inc., 571 S.E.2d 128 (Va. 2002) (allowing without discussion ISP to assert First Amendment rights of subscriber although subscriber did not join ISP's motion to quash subpoena).

19. *See*, *e.g.*, Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984) (holding that professional fund-raiser may assert First Amendment rights of its client charities); *NAACP*, 357 U.S. at 458–60 (NAACP has standing to assert First Amendment right of its members in their anonymity); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988) (bookstore had standing to assert First Amendment rights of patrons because of potential chilling effect of statute at issue on other patrons); Rancho Publ'ns v. Super. Ct., 81 Cal. Rptr. 2d 274, 275 (Ct. App. 1999) ("draw[ing] upon a well-established body of California case law which allows nonparties to civil litigation (such as a newspaper) to assert the constitutionally protected rights of an author to remain unknown" to grant motion to quash subpoena issued by defamation plaintiff seeking information identifying anonymous persons who purchased advertorials in newspaper); Denari v. Super. Ct., 264 Cal. Rptr. 261, 266 (Ct. App. 1989) ("In several different situations the courts have accorded standing to litigants who are the recipients of discovery demands to assert the privacy rights of third persons not present who would be affected by the litigant's obedience to the order."); Bd. of Trs. v. Super. Ct., 174 Cal. Rptr. 160, 164 (Ct. App. 1981) ("'The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted.'") (citation omitted; alterations in original); *cf*., *e.g.*, NBC, Inc. v. Cooperman, 501 N.Y.S.2d 405, 406 (Ct. App. 1986) (media have standing to contest gag order on trial participants because order "infring[es] on its constitutionally guaranteed right to gather the news").

20. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 353 (1995) (balancing the right to anonymity and right to protection from fraud); Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *3–4 (D. Ariz. July 25, 2006) ("Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrong-doers from hiding behind an illusory shield of purported First Amendment rights") (citation and internal quotation marks omitted).

21. Although two federal appellate courts have considered subpoenas served upon ISPs for information regarding the identity of anonymous online speakers, these decisions ultimately turned on the proper application of the DMCA and did not address the conflicting rights of the speakers and the plaintiff. *See In re* Charter Commc'ns, Inc., Subpoena Enforcement Matter, 393 F.3d 771 (8th Cir. 2005); RIAA v. Verizon, 351 F.3d 1229 (D.C. Cir. 2003).

22. It appears that the Ninth Circuit may be the first. On February 10, 2009, a federal district court stayed enforcement of its order requiring a website operator to reveal the identities of anonymous posters pending completion of an appeal to the Ninth Circuit. Ecommerce Innovations L.L.C. v. Does 1–10, No. 2:08-MC-00093-DGC (D. Ariz. Feb. 10, 2009) (Dkt. No. 22); *see also* Ecommerce Innovations L.L.C. v. Does 1–10, No. 09-15488 (9th Cir., notice of appeal filed Mar. 6, 2009).

23. *See*, *e.g.*, Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008) (collecting and analyzing cases).

24. The tests discussed in this article were developed in and apply to civil actions involving private parties. Courts have distinguished (1) subpoenas issued in criminal actions, *see State v. Reid*, 945 A.2d 26 (N.J. 2008) (finding that state and federal constitutional standards were satisfied in criminal prosecution for theft when law enforcement officers obtained subscriber information by serving grand jury subpoena on ISP without notice to subscriber); *see also* United States v. D'Andrea, 497 F. Supp. 2d 117, 120 (D. Mass. 2007) ("[F]ederal courts [have] uniformly conclude[d] that

internet users have no [Fourth Amendment-based] reasonable expectation of privacy in their subscriber information, the length of their stored files, and other noncontent data to which services providers must have access."); and (2) disclosure requests made by government agencies, *see* Electronic Communication Privacy Act of 1986, 18 U.S.C. § 2510, *et seq.* (allowing disclosure to governmental entity by provider of electronic communication services of contents of communications pursuant to enumerated tests); Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.* (allowing disclosure of information regarding cable subscriber to governmental entity pursuant to court order if entity offers "clear and convincing evidence" that subject of information is "reasonably suspected of engaging in criminal activity" and information sought would be material evidence). *See also In re* Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d), 157 F. Supp. 2d 286 (S.D.N.Y. 2001) (holding that Cable Act's subscriber notice requirements do not apply to disclosure of information to governmental entities by cable companies providing Internet services).

25. *Compare Krinsky*, 72 Cal. Rptr. 3d at 245 (reviewing previous decisions in which low-burden good faith basis and motion to dismiss tests were applied and concluding that, in a defamation action, the high-burden summary judgment test best protects anonymous speech while allowing plaintiffs to seek remedies for alleged injuries), *and* Doe v. Cahill, 884 A.2d 451 (Del. 2005) (same), *with* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (finding that "the use of [peer-to-peer] file copying networks to download, distribute, or make sound recordings available qualifies as speech entitled to First Amendment protection," but "[t]hat protection . . . is limited"), *and* Arista Records LLC v. Does 1–19, 551 F. Supp. 2d 1, 7 n.6 (D.D.C. 2008) (applying low-burden good cause standard to copyright claim and noting that cases involving "First Amendment-protected speech" could be legally or factually distinguished). *See also* Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 339–43 (Nov. 2008) (summarizing "[t]he seven major John Doe subpoena standards" and noting that recent decisions in non-IP cases have imposed high-burden standards irrespective of claim asserted); Citizen Media Law Project, *Legal Protections for Anonymous Speech*, *available at* http://www.citmedialaw.org/legal-guide/legal-protections-anonymous-speech (last visited Mar. 29, 2009) ("The recent and growing trend in anonymity cases is for courts to apply a high-burden [*i.e.*, summary judgment-type] test."). As the discussion below makes clear, however, a few courts have applied high-burden tests in infringement actions and others have applied low-burden tests in actions involving expressive speech.

26. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

27. *See id.* at 347.

28. *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

29. *See Sony*, 326 F. Supp. 2d at 564 (concluding that using P2P file-copying networks to share music files "qualifies as speech, but only to a degree"); *see also Arista*, 551 F. Supp. 2d at 8–9 (contrasting file sharing with "*actual* speech") (emphasis in original).

30. *See* Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006) (describing speech in question as "purely expressive" and entitled to substantial First Amendment protection even though plaintiff asserted claims for breach of contract, breach of fiduciary duties, trademark infringement, revealing confidential information, and unfair competition in addition to the defamation claim).

31. Mobilisa, Inc. v. Doe, 170 P.3d 712, 719 (Ariz. Ct. App. 2007).

32. *See id.* at 719 n.7 ("[T]he potential for chilling speech by unmasking the identity of an anonymous or pseudonymous internet speaker equally exists whether that party is a defendant or a witness. For that reason, we reject our dissenting colleague's view that courts should apply a different test when the identity of a witness is at issue."); *id.* at 720 (where anonymous poster is a nonparty witness "along with a number of known witnesses with the same information," however, that factor "weigh[s] against disclosure" when a balancing test is performed).

33. Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); *see also* Enterline v. Pocono Med. Ctr., No. 08-cv-1934-ARC, 2008 WL 5192386, at *4 (M.D. Pa. Dec. 11, 2008) (explaining that, because the plaintiff could not even satisfy the relatively low-burden test imposed in *2TheMart* that she herself advocated, the court was not required "to determine the full extent of the First Amendment right to anonymity" in this context).

34. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

35. 884 A.2d 451 (Del. 2005).

36. *Dendrite*, 775 A.2d at 760.

37. *See*, *e.g.*, Mobilisa, Inc. v. Doe, 170 P.3d 712, 719–21 (Ariz. Ct. App. 2007) (trespass to chattel and violations of federal communications laws); Maxon v. Ottawa Publ'g Co., No. 18-MR-125 (Ill. Cir. Ct., LaSalle County, Oct. 2, 2008) (defamation), *appeal pending*; Donato v. Moldow, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (defamation); Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001) (breach of loyalty and contract, among other claims); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 697–98 (N.Y. Sup. Ct. 2007) (defamation); Swartz v. John Doe 1, No. 08C431 (Tenn. Cir. Ct., Davidson County, Mar. 13, 2009) (video of ruling available at http://blip.tv/file/1879086) (defamation and invasion of privacy). At least two courts have applied the *Dendrite* standard to infringement claims as well. *See* Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005) (trademark infringement and unfair competition); Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006) (trademark infringement).

38. *Cahill*, 884 A.2d at 460.

39. *Id.* at 463–64 (holding that public figure plaintiff need not produce evidence as to actual malice because "without discovery of the defendant's identity, satisfying this element may be difficult, if not impossible"); *accord Best W. Int'l*, 2006 WL 2091695, at *4; *Mobilisa*, 170 P.3d at 720; Reunion Indus. Inc. v. Doe 1, 80 Pa. D. & C. 4th 449, 456 n.5 (Ct. Comm. Pl. 2007); *In re* Does 1–10, 242 S.W.3d 805, 822 (Tex. App. 2007).

40. *See*, *e.g.*, Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008) (business torts); Doe I v. Individuals, 561 F. Supp. 2d 249, 253–57 (D. Conn. 2008) (defamation and other claims); McMann v. Doe, 460 F. Supp. 2d 259, 266–70 (D. Mass. 2006) (defamation, privacy, and copyright); *Best W. Int'l*, 2006 WL 2091695, at *4 (defamation and other claims); *Reunion Indus., Inc.*, 80 Pa. D. & C. 4th at 456 n.5 (commercial disparagement); In re Does 1–10, 242 S.W.3d 805 (defamation).

41. Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005).

42. *See* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 242–43 (Ct. App. 2008) (characterizing the *Cahill* standard as more stringent than a motion to dismiss test, but less stringent than a prima facie case test).

43. *See* Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456–57 (Md. 2009) (inaccurately characterizing the *Cahill* summary judgment test as requiring plaintiffs to provide enough evidence to *affirmatively* establish their

entitlement to summary judgment, and observing that such a test "[s]et[s] the bar too high" by "undermin[ing] personal accountability and the search for truth, by requiring claimants to essentially prove their case before even knowing who the commentator was").

44. *Krinsky*, 72 Cal. Rptr. 3d at 243–44.

45. *Id.*

46. *Id.* at 245–46.

47. *Brodie*, 966 A.2d at 456–57.

48. *See*, *e.g.*, Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (equating this aspect of the *Dendrite* and *Cahill* tests).

49. *See* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001); *accord*, *e.g.*, Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (balancing the "magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant").

50. *See*, *e.g.*, Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) (finding a balancing test unnecessary because the "summary judgment test is itself the balance"); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 245–46 (Ct. App. 2008) (rejecting balancing step because where plaintiff's proffer demonstrates "there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment").

51. Mobilisa, Inc. v. Doe, 170 P.3d 712, 720 (Ariz. Ct. App. 2007).

52. *Id.*

53. *Id.*

54. 185 F.R.D. 573, 578–80 (N.D. Cal. 1999).

55. *Id.* at 580; *accord* Rocker Mgmt., LLC v. Does 1–20, No. 03-MC-33-CRB, 2003 WL 22149380, at *1 (N.D. Cal. May 29, 2003); *see also Krinsky*, 72 Cal. Rptr. 3d at 245 (noting that "[e]ven the decisions imposing a motion-to-dismiss obligation nonetheless require some showing that the tort took place") (internal quotation marks and citations omitted).

56. *Seescandy*, 185 F.R.D. at 579–80.

57. Alvis Coatings, Inc. v. Does 1–10, No. 3L94-CV-374-H, 2004 WL 2904405, at *3 (W.D.N.C. Dec. 2, 2004). Although the court stated that the plaintiff must make "a prima facie showing that an anonymous individual's conduct on the Internet is otherwise unlawful," it cited cases employing motion to dismiss and even lower-burden standards in its discussion of what that means.

58. Lassa v. Rongstad, 718 N.W.2d 673, 687, *reconsideration denied*, 297 Wis. 2d 325 (2006), and *cert. denied*, 127 S. Ct. 2251 (2007) (noting that *Cahill*, which applied a summary judgment test, was decided in a notice pleading state). In the wake of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–64 (2007), which "retired" *Conley v. Gibson*, 355 U.S. 41 (1957), and held that "[f]actual allegations must be enough to raise a right to relief above the speculative level," a motion to dismiss standard might provide at least some degree of greater protection in a federal case than it would in a court in a notice pleading state.

59. 326 F. Supp. 2d 556, 556 (S.D.N.Y. 2004).

60. *See*, *e.g.*, UMG Recordings, Inc. v. Does 1–4, No. 06-0652 SBA (EMC), 2006 WL 1343597 (N.D. Cal. Apr. 19, 2006).

61. *Sony*, 326 F. Supp. 2d at 564–66.

62. *Id*. at 564–65. Only two courts have applied the *Sony* test outside of the file-sharing context. In *Public Relations Society of America v. Road Runner High Speed Online*, a New York court applied the test in a defamation action. 799 N.Y.S.2d 847, 853–54 (N.Y. Sup. Ct. 2005). The court's analysis of the First Amendment issue was perfunctory, however, and the decision's predictive value is further diminished by the fact that another New York court has since approved of the *Dendrite* test in dicta. *See* Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698–99 (N.Y. Sup. Ct. 2007) (finding *Dendrite* to be "persuasive authority" in pre-action proceeding for discovery, but concluding that it "need not reach the issue of the quantum of proof that should be required on the merits because, here, the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law"). In *General Board of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc.*, a federal district court applied the *Sony* test to an action brought under the Stored Communications Act, in which a corporate plaintiff sought from an ISP the identity of an individual who allegedly hacked into the e-mail accounts of seven of the company's employees and sent a message from one account. No. CV-06-3669 (DRH) (ETB), 2006 WL 3479332 (E.D.N.Y. Nov. 30, 2006). The court relied on *Sony* to conclude that there was "a minimal expectation of privacy in the alleged tortious conduct set forth in the petition." *Id.* at *5.

63. *See* Fed. R. Civ. P. 26(d) (providing that parties generally may serve discovery only after Rule 26(f) conference, "except . . . when authorized by . . . court order"); *see also*, *e.g.*, Monsanto Co. v. Woods, No. 4:08-CV-00137-CEJ, 2008 WL 821717, at *2 (E.D. Mo. Mar. 25, 2008) (court required showing of good cause before granting plaintiffs' *ex parte* motion for expedited discovery).

64. Arista Records LLC v. Does 1–19, 551 F. Supp. 2d 1, 8, 9 (D.D.C. 2008) (citation omitted).

65. *E.g.*, *id.* at 6–7; LaFace Records, LLC v. Does 1–5, No. 2:07-CV-187, 2007 WL 2867351 (W.D. Mich. Sept. 27, 2007).

66. Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (quoting *In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 260 (D.D.C. 2003) (concluding that "there is some level of First Amendment protection that should be afforded anonymous expression on the Internet, even though the degree of protection is minimal where alleged copyright infringement is the expression at issue")).

67. *LaFace*, 2007 WL 2867351, at *1; *see also Arista*, 551 F. Supp. 2d at 4 (allowing expedited discovery on the sole basis that "'Defendants must be identified before this suit can progress further'" (citation omitted)).

68. *See*, *e.g.*, Mobilisa, Inc. v. Doe, 170 P.3d 712, 719–20 (Ariz. Ct. App. 2007) (requiring that plaintiff attempt to notify anonymous speaker via same medium used to send or post speech at issue); Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005) ("[w]hen First Amendment interests are at stake we disfavor *ex parte* discovery requests"); *accord*, *e.g.*, Doe I v. Individuals, 561 F. Supp. 2d 249, 254 (D. Conn. 2008); Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *6 (D. Ariz. July 25, 2006); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (all imposing notification requirement).

69. *See* Va. Code Ann. § 8.01-407.1(A)(1)(b) (requiring, *inter alia*, that the party issuing the subpoena make reasonable efforts to identify the anonymous communicator), discussed in text *infra*.

70. *See* UMG Recordings, Inc. v. Does 1–4, No. 06-0652 SBA (EMC), 2006 WL 1343597, at *3 (N.D. Cal. Apr. 19, 2006) (using its "authority under the Federal Rules" to order a third-party ISP to notify subscribers of plaintiffs' subpoena for their identities); *Mobilisa*, 170 P.3d at 721 (affirming trial court's order requiring defendant e-mail service provider to notify John Doe co-defendant about the proceedings where plaintiff had tried but failed, and noting that where a cost is involved, plaintiff may be ordered to pay that cost); Polito v. AOL Time Warner, Inc., 78 Pa. D. & C. 4th 328, 342 (Ct. Com. Pl. 2004) (requiring ISP to notify the anonymous subscribers before disclosing their identities "to afford them a reasonable opportunity to petition the court to vacate, reconsider or stay the discovery order").

71. Va. Code Ann. § 8.01-407.1(A)(3).

Also, federal law provides that "cable operators"—including cable content providers, Internet service providers using cable modems, and wire and radio communications service providers—generally must notify a subscriber before disclosing personally identifiable information in response to a court order. *See* 47 U.S.C. § 551(c) (but exempting court orders obtained by government entities).

72. 775 A.2d at 760.

73. 185 F.R.D. at 578–80.

74. Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564–66 (S.D.N.Y. 2004).

75. *See supra* note 32 and accompanying text.

76. 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (shareholder derivative suit).

77. *Id.* at 1097.

78. *Id.* at 1095 (discussing the low-burden tests applied in *Seescandy* and *In re Subpoena Duces Tecum to AOL* and asserting that "[t]he standard for disclosing the identity of a non-party *witness* must be higher than that articulated in [those cases]. When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.") (emphasis in original).

79. *Id.* at 1095–96.

80. Enterline v. Pocono Med. Ctr., No. 08-cv-1934-ARC, 2008 WL 5192386, at *4 (M.D. Pa. Dec. 11, 2008).

81. *In re* Subpoena Duces Tecum to AOL, Inc., No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000). One court has combined good faith and motion to dismiss concepts in the same analysis. *See* Polito v. AOL Time Warner, Inc., 78 Pa. D. & C. 4th 328, 336 (Ct. Com. Pl. 2004) (plaintiff must "satisfactorily state[] a cognizable claim under Pennsylvania law" and demonstrate that she "is seeking the requested information in good faith and not for some improper purpose such as harassing, intimidating or silencing her critics," among other requirements).

82. Va. Code Ann. § 8.01-407.1(A)(1)(a) (emphasis added).

83. The California Legislature considered enacting, but ultimately did not enact, a similar provision. *See* Julia Scheeres, *Making It Harder for Prying Eyes*, Wired, May 5, 2003, *available at* http://www.wired.com/politics/law/news/2003/05/58720.

84. *In re* Baxter, No. 01-00026-M, 2001 WL 34806203 (W.D. La. Dec. 20, 2001).

85. *See id.* at *12–17.

86. For example, subpoenas issued under the DMCA may be defective if they are not issued in accordance with the Act's specific requirements. *See* 17 U.S.C. § 512(h).

87. No. DV 07-022 (Mont. Dist. Ct., Yellowstone County, Sept. 3, 2008).

88. Mont. Code Ann. § 26-1-902, *et seq.*

89. The court held that the shield law not only affords a statutory privilege to journalists, but also, in effect, codifies the First Amendment rights of news sources to speak anonymously, reflecting a legislative determination that those rights outweigh the rights of civil litigants to obtain their identities. *See* Transcript of Hearing on Motion to Quash at 28–29, *Doty* (No. DV 07-022).

90. *See* Beal v. Calobrisi, No. 08-CA-1075 (Fla. Cir. Ct., Okaloosa County, Oct. 9, 2008) (applying the Florida Shield Law, Fla. Stat. § 90.5015, to grant a third-party newspaper's motion to quash a subpoena seeking the identifying information of an anonymous poster to the newspaper's website); Doe v. TS, No. 08030693 (Or. Cir. Ct., Clackamas County, Sept. 30, 2008) (applying the Oregon Media Shield Law, Or. Rev. Stat. § 44.510, *et seq.*, to deny plaintiff's motion to compel production of information identifying the author of an anonymous blog comment).

91. Alton Tel. v. Illinois, No. 08-MR-548 (Ill. Cir. Ct., Madison County, May 15, 2009).

92. *Id.* at 3, 6–7. The relevant portions of the shield law provide that "[n]o court may compel any person to disclose the source of any information obtained by a reporter" unless "all other available sources of information have been exhausted . . . [and] disclosure of the information sought is essential to the protection of the public interest involved." 735 Ill. Comp. Stat. §§ 5/8-901, 907(2).

93. *Alton Tel.*, No. 08-MR-548, at 7.

94. *Id.* at 5–6 (emphasis in original). A "source" is defined by the shield law as "the person or means from or through which the news or information was obtained." 735 Ill. Comp. Stat. § 5/8-902(c).

95. 44 Cal. Rptr. 3d 72, 99 (Ct. App. 2006).

96. *See*, *e.g.*, Global Telemedia Int'l Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1269–71 (C.D. Cal. 2001) (granting defendants' motion to strike pursuant to California's anti-SLAPP statute in a defamation action against those who had anonymously posted comments to a securities dealers' message board); Paterno v. Super. Ct., 78 Cal. Rptr. 3d 244, 250 (Ct. App. 2008) (citing *Krinsky*, 72 Cal. Rptr. 3d at 231) ("The [California] anti-SLAPP statute reinforces the self-executing protections of the First Amendment.").

97. *See* Tendler v. www.jewishsurvivors.blogspot.com, 79 Cal. Rptr. 3d 407, 411 (Ct. App. 2008).

98. Cal. Civ. Proc. Code §§ 1987.1–1987.2 (West 2009) (amended subpoena provisions); *see also id.* §§ 425.16–425.18 (West 2009) (provisions related to motions to strike pleadings). The text of the bill can be found at http://www.casp.net/statutes/AB2433.html (last visited Mar. 31, 2009); *see also* Corynne McSherry, *California Governor Signs Off on New Protections for Free Speech*, http://www.eff.org/deeplinks/2008/10/california-governor-signs-new-protections-free-spe (posted on Oct. 2, 2008, last visited Mar. 31, 2009) (discussing impact of the law's terms).

99. *See* Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132–33, 134 (D.D.C. 2009) (also noting lack of personal jurisdiction); McMann v. Doe, 460 F. Supp. 2d 259, 265 (D. Mass. 2006).

100. *See* No. 4:07-CV-02151-CW (N.D. Cal. filed July 30, 2007), *complaint available at* http://humanrightsusa.org (follow "Accountability for Torturers" hyperlink; then follow "Corporate Accountability A" hyperlink); Dan Nystedt, *Yahoo Sued Again by Chinese Dissidents*, Wash. Post, Feb. 29, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022901240.html. The case was settled in November 2007.

101. *See*, *e.g.*, Jacqui Cheng, *Bill Would Penalize Companies for Aiding Internet Censorship*, Ars Technica, May 1, 2008, *available at* http://arstechnica.com/tech-policy/news/2008/05/bill-would-penalize-companies-for-aiding-internet-censorship.ars (summarizing pertinent provision of Act). The bill, H.R. 275, cleared three House committees and was awaiting a floor vote, but objections by the Department of State and the Department of Justice ultimately derailed it. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00275:@@@L&summ2=m& (detailing congressional activity on the bill) (last visited June 8, 2009); Declan McCullagh, *"Internet Freedom" Bill Targeting China Cooperation Faces Rough Road*, CNet, May 28, 2008, *available at* http://news.cnet.com/8301-13578_3-9952815-38.html (describing objections by State and Justice Departments).

102. *See* Miguel Helft & John Markoff, *Big Tech Companies Back Global Plan to Shield Online Speech*, N.Y. Times, Oct. 27, 2007, *available at* http://www.nytimes.com/2008/10/28/technology/internet/28privacy.html.

103. *See* London-Sire Records Inc. v. Does 1–4, No. 1:04-cv-12434 (D. Mass. Nov. 24, 2008) (quashing subpoena and holding that IP address insufficient to identify

alleged infringers with reasonable degree of technical certainty). Although contained in a sealed letter and thus not available in the public record, the arguments advanced by the subpoena recipient in *London-Sire Records* are discussed in Wendy Davis, *Judge Ruling Protects IP Address Identities*, Dec. 1, 2008, MediaPostNews, *available at* http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=95689. *See also* Bennett Haselton, *Virginia High Court Wrong About IP Addresses*, Slashdot, Oct. 1, 2008, *available at* http://news.slashdot.org/article.pl?sid=08/10/01/1526235&from=rss (describing ways in which an Internet user can render an IP address insufficient to identify her).

104. *See* Columbia Pictures Indus. v. Bunnell, No. CV06-1093FMCJCX, 2007 WL 2080419, at *2 n.7 (C.D. Cal. May 29, 2007).