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Defamation and John Does: Increased Protections and Relaxed Standing Requirements for Anonymous Internet Speech

I. INTRODUCTION*

With the onslaught of blogging and discussion forums on the Internet, the marketplace of ideas has undergone a dramatic expansion.¹ One commentator has suggested that “the Internet may . . . be the greatest innovation in speech since the invention of the printing press.”² Another has praised the democratizing effects of the Internet, observing that “[t]he Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers’ Corner in England’s Hyde Park, where ordinary people may voice their opinions”³ One reason that the Internet facilitates speech so effectively may be that it makes it incredibly easy for a speaker to veil his or her identity while simultaneously reaching a vast audience, which was previously difficult, or even impossible with a traditional flier or handbill. At least one court has noted the value of anonymity on the Internet.

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. . . . Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. . . . For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.⁴

* I thank Associate Professor RonNell Andersen Jones for her guidance and helpful input on earlier drafts.

1. See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 21 (2007) (estimating that there were over fifty million blogs on the Internet by the end of July 2006).

2. Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 88 (2000).

3. Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy Information Center as Amici Curiae at 5, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002); see also *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (“The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale.”).

4. *2TheMart.com*, 140 F. Supp. 2d at 1091–93, 1097.

However, other commentators have argued that anonymity decreases speaker accountability and therefore increases the potential for “irresponsible, malicious, and harmful communication.”⁵

The flash flood of anonymous speech that has surged into the cyber marketplace of ideas has brought with it complex legal issues that have challenged existing First Amendment doctrines in many areas, particularly in regards to the issue of potentially defamatory anonymous speech. One commentator noted, “[A]s the Internet turns more ordinary John Does into publishers, it is also turning them into defamation defendants.”⁶ These defamation cases have ranged from derogatory sexual comments directed at unsuspecting college students,⁷ to political criticism of company policies.⁸ In such cases, aggrieved plaintiffs have sought to unveil the identity of the allegedly defamatory speakers through a court order. However, the difficulty in making such a determination about a speaker’s identity is that “the decision is usually made at the outset of litigation, before a full record may be developed,” and this is a “critical, and often outcome-determinative, decision.”⁹

In light of these issues, this Comment seeks to address two important questions that the Supreme Court has yet to answer. First, what must a private plaintiff do in order to discover the identity of a speaker through the use of a civil subpoena in a defamation action;¹⁰ and second, which parties have standing to assert the rights of

5. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008).

6. Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 945 (2000).

7. *Doe I v. Individuals*, 561 F. Supp. 2d 249, 251 (D. Conn. 2008).

8. *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (Cir. Ct. 2000), *rev’d, on other grounds sub nom.* *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); *see also* Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger’s Identity before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 2; Konrad S. Lee, *Hiding From the Boss Online: The Anti-Employer Blogger’s Legal Quest for Anonymity*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 135 (2006).

9. Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 799 (2004). Furthermore, Vogel points out: “What is worse, the decision will often be subject to only limited appellate review” *Id.* For this reason, some courts have argued that there ought to be heightened appellate review for the determination of whether to disclose a speaker’s identity. *See, e.g., Melvin v. Doe*, 836 A.2d 42 (Pa. 2003).

10. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001).

anonymous speakers on the Internet? This Comment answers these questions by proposing a new test to balance the competing interests presented in this area of the law and by arguing that third-party standing requirements should be relaxed to prevent speech from being chilled.

In Part II, this Comment analyzes the legal development of defamation law and the most recent case law dealing with anonymous Internet speech. In Part III, this Comment argues that current standards are insufficient to protect the rights of anonymous speakers and, further, that third-party standing requirements should be relaxed so that more powerful organizations, like Internet service providers (“ISPs”), trade organizations, communication forums, or even press organizations are able to assert the protections that are afforded to anonymous Internet speakers. Part III also proposes solutions to meet the competing interests presented in this area of the law. Part IV provides a brief conclusion.

II. LEGAL DEVELOPMENT

This Part proceeds in four Parts. Part A discusses First Amendment protections of anonymous speech. Part B looks at the evolution of defamation law. Part C considers the unique challenge of protecting potentially defamatory anonymous speech on the Internet. Part D concludes this Part by setting forth the current standards of protection for anonymous Internet speakers.

A. First Amendment Protections of Anonymous Speech

The Supreme Court has clearly recognized a First Amendment right to speak anonymously.¹¹ The Court has found that the freedom of conscience is housed in the First Amendment and that this freedom includes the freedom to speak, as well as the freedom to choose not to speak.¹² The right to not speak includes the right of a speaker not to disclose his or her identity. For instance, in *Talley v. California*, the Court found an ordinance prohibiting distribution of anonymous handbills invalid on its face.¹³ The Court explained that

11. *E.g.*, *Watchtower Bible & Tract Soc’y of N.Y., Inc., v. Vill. of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

12. *Wooley v. Maynard*, 430 U.S. 705 (1977).

13. 362 U.S. 60 (1960).

“[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”¹⁴

Similarly, in *McIntyre v. Ohio Elections Commission*, the Court invalidated an election law that prohibited the anonymous circulation of leaflets.¹⁵ The Court explained that “[a]nonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind . . . the First Amendment,” which is to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”¹⁶ In Justice Thomas’s concurring opinion, he provided historic evidence that the Framers felt the right to speak anonymously was a critical component of the freedom of speech. Thomas cited examples of the Federalist Papers that were published under the pseudonym of “Publius,”¹⁷ as well as the famous Zenger trial of 1735, which involved a printer who refused to reveal the “anonymous authors of published attacks on the Crown governor of New York.”¹⁸ When the governor could not retrieve the identity of the speakers, he prosecuted the printer for libel.¹⁹ However, the jury refused to convict the defendant. Thomas also cited the example of the Anti-Federalist attack on the Federalist editors’ policy against allowing writers to publish anonymous works. Thomas argued that this “historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities.”²⁰ Thus, the Supreme Court very clearly protected First Amendment rights of speakers who wished to remain anonymous.²¹

Furthermore, the Supreme Court has not held that there is anything unique about speech on the Internet that should qualify this right to speak anonymously. The Supreme Court found that its precedent “provide[d] no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”²²

14. *Id.* at 64.

15. *McIntyre*, 514 U.S. at 334.

16. *Id.* at 357.

17. *Id.* at 360–61 (Thomas, J., concurring).

18. *Id.* at 361.

19. *Id.*

20. *Id.*

21. *Id.* at 363–64.

22. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

B. The Evolution of Defamation Law

The freedom of speech, however, is not absolute. Certain types of speech, such as defamation, have long been considered to be, to some extent, outside the realm of First Amendment protection. According to the Restatement of Torts, the elements of an actionable defamation claim include first, a false and defamatory statement concerning another; second, an unprivileged communication to a third-party; third, fault amounting to at least negligence on the part of the publisher (though the amount of fault changes depending on the status of the individual who was targeted by the defamatory speech); and fourth, some sort of damages or harm caused.²³

After overcoming the obstacle of presenting a prima facie defamation case, the plaintiff must then overcome First Amendment protections. Originally, in *Chaplinsky v. New Hampshire*, the Court provided no protection for libelous speech, explaining that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which ha[ve] never been thought to raise any Constitutional problem. These include . . . *the libelous . . .*”²⁴ The Court explained that because libelous or defamatory speech was viewed as having such “slight social value,” it was not entitled to First Amendment protection.²⁵

The Court provided much more generous protections for potentially libelous speech in *New York Times v. Sullivan* when it articulated a standard that swept libelous speech into the realm of First Amendment protection, with specific limitations.²⁶ The countervailing interests that the Court identified were the need to protect the reputations of individuals, versus the strong First Amendment interest in free expression, which could be chilled or limited if tort liability were too strong.²⁷

In an attempt to strike a balance between these competing interests, the Court articulated a standard that varied depending on the status of the individual targeted by the speech. If the individual is a public official, he or she cannot recover damages for a defamatory

23. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

24. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (emphasis added).

25. *Id.* at 572.

26. 376 U.S. 254 (1964).

27. *Id.* at 281; *id.* at 301 (Black, J., concurring).

falsehood relating to official conduct unless he or she proves that the statement was made with actual malice, which is defined as willful falsity or reckless disregard of whether the statement was false.²⁸ Later cases found that if the target of speech is a private figure who has not voluntarily thrust himself or herself into the public sphere or achieved a great deal of fame and notoriety, then the plaintiff need only prove that the speech was negligent by a preponderance of the evidence.²⁹

The *Sullivan* Court explained that the justification for giving such strong First Amendment protections to libelous speech was based on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks”³⁰ Furthermore, the Court reasoned that even false statements were deserving of protection at times, because “erroneous statement is inevitable in free debate and [must] be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”³¹

*C. The Unique Challenge of Protecting Potentially Defamatory
Anonymous Speech on the Internet*

The Supreme Court has not articulated a clear rule or balancing test to determine when the government may pierce the veil of anonymity of speakers on the Internet who have posted allegedly defamatory statements. This type of speech presents its own set of unique challenges. First, it is important to note that when a court forces a speaker to disclose his or her identity, the court is going beyond the ordinary civil punishment for defamatory speech; the

28. *Id.* at 280 (majority opinion). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Associated Press v. Walker*, 389 U.S. 28 (1967), the Court extended this malice standard to persons who were not public officials, but who were public figures in issues in which the public has an important and justified interest.

29. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

30. *Sullivan*, 376 U.S. at 270.

31. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This combination of tort and constitutional hurdles that a plaintiff must overcome to establish a defamation claim makes it incredibly difficult for defamation claims to succeed. Indeed, as Professor Lidsky notes, “Empirical studies confirm that the practical effect of these labyrinthine doctrines is to make it almost impossible for any plaintiff to succeed in a defamation action. Statistics show that only 13% of plaintiffs ultimately prevail in libel litigation” Lidsky, *supra* note 6, at 875.

court is actually compelling the anonymous individual to speak his or her identity, thereby directly interfering with the individual's freedom of speech. Thus, even though defamatory speech loses some of its First Amendment protection, the speaker's identity is separate from defamatory speech and ought to carry separate First Amendment protections.

Second, at least one court has observed that "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics."³² Indeed, one commentator suggests that Internet defamation actions are often "not really about money," but are rather motivated by a belief in the social, psychological, or symbolic benefits.³³ In other words, many plaintiffs bring these suits purely for vindictive reasons and literally have nothing to lose should their suit not be successful. This observation raises particular concerns in the area of anonymous speech because if plaintiffs are able to bring superfluous lawsuits, regardless of the validity of the claim, then they could do so merely to strip the speaker of anonymity. Plaintiffs could then bring an Internet SLAPP suit (Strategic Lawsuits Against Public Participation) solely to harass and silence critics.³⁴ Thus, if the standards for protecting the identity of an anonymous speaker were no greater than the requirements for a prima facie libel case, many speakers could be stripped of their anonymity, literally, as a punishment for unappreciated speech that is not necessarily defamatory.

The Internet in particular provides a dramatic setting to contrast these competing interests. Courts have recognized the democratizing power of the Internet, in that "through the use of [the Internet], any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."³⁵ As one commentator notes:

The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to "publish" their views on matters of public concern. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the

32. Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Del. 2005).

33. Lidsky, *supra* note 6, at 872, 876.

34. *Id.* at 865. SLAPP suits are illegal in about half of the states, as noted in *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d. 231, 245 n.13 (Cal. Ct. App. 2008), but this still leaves quite a large number of states where anonymous speakers can be harassed for their speech.

35. Reno v. ACLU, 521 U.S. 844, 870 (1997).

disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy.³⁶

If strategic or superfluous suits are engaged in by “powerful corporate Goliaths [who] sue their critics for speaking their minds,” then this promise of equalizing power will be lost and the “hierarchies of power” that exist in other media forms will be reestablished.³⁷

On the other hand, the Internet can be a dangerous tool in the hands of an irresponsible speaker determined to ruin reputations. One court observed that

where speakers remain anonymous there is . . . a great potential for irresponsible, malicious, and harmful communication, and . . . lack of accountability This is particularly true where the speed and power of Internet technology make it difficult for the truth to ‘catch up’ to the lie.³⁸

One example of an individual who abused the right to speak anonymously was the CEO of La Jolla Club, who posted over one hundred negative messages about La Jolla’s competitor, Callaway Golf Company, while simultaneously trading in Callaway’s stocks.³⁹ Thus, by establishing too strong of First Amendment protections for anonymous Internet speakers, the law will leave individuals or organizations that have been victimized by scathing speech, which spreads at the click of a mouse, with little or no remedy.

Furthermore, other commentators have observed that it may be difficult for a plaintiff to know if litigation is worth pursuing without

36. Lidsky, *supra* note 6, at 860–61.

37. *Id.* at 861; *see also* Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy Information Center as Amici Curiae at 8–9, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002) (“In a lawsuit filed over anonymous speech, the identification of the speaker provides an important measure of relief to the plaintiff because it enables the plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff’s self-help efforts to restrain or oppose his speech. In our system of laws, we ordinarily do not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.”).

38. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008).

39. Vogel, *supra* note 9, at 820.

knowing the identity of the speaker.⁴⁰ In *Melvin v. Doe*, the court explained that a plaintiff “needs to know the identity of the Doe defendants prior to incurring the expenses and other burdens of a trial, because it is questionable whether [a] plaintiff would wish to proceed with a trial if John Doe turned out to be, for example, an [incarcerated] inmate”⁴¹ Thus it is clear that there are strong competing interests both against and in favor of disclosing the identity of the anonymous speaker.

D. Current Standards of Protection for Anonymous Internet Speakers

Laws relating to anonymous Internet speakers have evolved to provide greater protections over time. In the 1990s, it was common practice for Internet service providers (“ISPs”) to simply provide companies or other aggrieved individuals with the identifying information of anonymous speakers upon request.⁴² In other situations, attorneys would draft invalid subpoenas (not issued by the court) to obtain anonymous identities, and even in cases where subpoenas were issued by the court, “the discovery was almost uniformly granted.”⁴³

Both courts and legislatures, however, began to recognize a need for heightened protection for the identity of anonymous speakers. A few states statutorily protected the rights of anonymous speakers through use of state shield laws by finding the comments made were a portion of the press’s “news gathering” function,⁴⁴ while other states used different statutes to protect the speakers’ rights.⁴⁵ Quite a few states and lower federal courts began to address the actual First Amendment right of the speakers and tried to determine what the

40. *Id.* at 808.

41. 49 Pa. D. & C.4th 449, 453 (2000), *appeal quashed on other grounds*, 789 A.2d 696 (Pa. Super. Ct. 2001), *rev’d*, 836 A.2d 42 (Pa. 2003).

42. Vogel, *supra* note 9, at 802.

43. *Id.* at 802–03.

44. O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006); *Beal v. Calobrisi*, No. 08-CA-1075 (Fla. Cir. Ct. Oct. 9, 2008); *Alton Tel. v. People*, No. 08-MR-548 (Ill. Cir. Ct., Madison County May 15, 2009); *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Ct., Yellowstone County Sept. 3, 2008); *Doe v. TS*, No. 08030693 (Or. Cir. Ct. Sept. 30, 2008).

45. *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 157 F. Supp. 2d 286 (S.D.N.Y. 2001); *Interscope Records v. Does 1–7*, 494 F. Supp. 2d 388 (E.D. Va. 2007); *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

appropriate balance should be between protecting speakers' First Amendment rights while still providing an adequate remedy to individuals who had potentially been defamed, and a few cases have arisen as seminal.

The first seminal case is *Columbia Insurance Co. v. Seescandy.com*, which, though not dealing with defamation, was a case on which many later defamation cases relied.⁴⁶ The plaintiff in *Seescandy.com* sued for trademark infringement and other business torts,⁴⁷ and the court held that in order for the plaintiff to uncover the identity of the anonymous speakers, the plaintiff should first, "identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court";⁴⁸ second, the plaintiff must describe the steps taken to locate the defendant and demonstrate a good faith effort to comply with service of process;⁴⁹ third, the plaintiff must present a prima facie case that could withstand a motion to dismiss;⁵⁰ and fourth, plaintiff must file a motion for request of specific discovery with the court, accompanied by reasons for the request as well as identification of a limited number of persons on whom discovery should be served.⁵¹ One commentator noted that although the court in this case mentioned a motion to dismiss standard, the standard that was applied was actually quite a bit higher.⁵²

In *Dendrite International, Inc. v. Doe, No. 3*, a subsequent defamation case in New Jersey, the court relied upon the reasoning in *Seescandy.com*, and it specifically incorporated the motion to dismiss prong of the test.⁵³ *Dendrite* involved a defamation action in

46. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). Although not directly dealing with defamatory, anonymous speakers on the Internet, *Seescandy.com* did provide a helpful discussion of the competing interests applicable in such a case. *See id.* at 578.

47. *Id.* at 576.

48. *Id.* at 578.

49. *Id.* at 579.

50. *Id.*

51. *Id.* at 580.

52. "While the *Seescandy.com* opinion uses the phrase 'motion to dismiss,' implying a minimal level of scrutiny, the court makes clear that it means to require more than that, although how much more is left unsaid. In particular, the court holds that '[a] conclusory pleading will never be sufficient' but, instead of analyzing the complaint under Federal Rule of Civil Procedure 8(a)(2)'s 'short and plain statement of the claim' requirement, it suggests an inquiry analogous to the 'probable cause' inquiry in criminal procedure." Vogel, *supra* note 9, at 805.

53. *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

which a corporation sought the identity of an anonymous speaker who had made defamatory statements about the company on a Yahoo! bulletin.⁵⁴ The court denied the plaintiff's request to obtain the identity of the speaker and set forth the steps that must be taken before disclosing the speaker's identity. The plaintiff must first, make an effort to notify the anonymous speaker and give a reasonable period to allow him to file an opposing position; second, the plaintiff must identify the exact statements alleged to constitute actionable speech; third, the plaintiff must set forth a prima facie cause of action that is sufficient to withstand a motion to dismiss; and fourth, if the prima facie case is presented, the court must "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."⁵⁵

Another important standard that was developed near the time of *Dendrite* was articulated in *Doe v. 2TheMart.com*.⁵⁶ This court required first, that the subpoena be issued in good faith and not for an improper purpose; second, that the identifying information sought be directly and materially related to a core aspect of the claim or defense; and third, that the subpoena be unavailable from other sources.⁵⁷ In this case, a company sought the identity of anonymous speakers who participated on Internet message boards and made statements that were critical of the company. Because the company failed to prove that the identifying information sought was directly relevant to a core defense, the court found that the speakers' identities were not needed for the litigation to proceed.⁵⁸

The most recent major case was *Doe No.1 v. Cabill*, which first articulated the summary judgment standard.⁵⁹ In this case, a local politician filed a defamation claim against a plaintiff who had made comments about the politician's performance on a website related to public issues.⁶⁰ The court set forth a standard that requires plaintiffs to support their claims with facts sufficient to defeat a summary

54. *Id.* at 762.

55. *Id.* at 760–61.

56. 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

57. *Id.* at 1095.

58. *Id.* at 1096.

59. 884 A.2d 451 (Del. 2005).

60. *Id.* at 454.

judgment motion,⁶¹ except that plaintiffs need not produce evidence of things like actual malice, which are outside their control.⁶² The *Cahill* court rejected the balancing test set forth in *Dendrite* because it argued that this test added an unnecessary additional protection that was already provided by the summary judgment standard. The court explained that the summary judgment analysis itself provides a balance, and an additional balancing prong would unnecessarily complicate the analysis.⁶³

III. ANALYSIS

This Part proceeds in Part A by discussing the inadequacy of current standards of protection for anonymous Internet speakers. Part B argues for what the author believes to be the appropriate standard of protection for anonymous Internet speech. Part C concludes the Part by considering the possibility of additional protections that could be created by third-party standing asserted on behalf of anonymous Internet speakers.

A. The Inadequacy of Current Standards of Protection for Anonymous Internet Speakers

Although many of the tests articulated in the seminal cases discussed above contain valuable portions of a standard to protect speech, none of them clearly articulated a framework that adequately meets the competing interests of protecting free expression and remedying damaged reputations. This section will analyze the shortcomings of each of the tests in turn.

While in many respects *Dendrite* has led to great progress in the protections for anonymous Internet speakers,⁶⁴ the test still has

61. *Id.* at 457.

62. *Id.* at 464.

63. *Id.* at 461.

64. Vogel explains that, “On the whole, though statistics are difficult to come by, there appears to be a substantial reduction since *Dendrite* in lawsuits targeting anonymous Internet posters.” Vogel, *supra* note 9, at 812. Other commentators have described *Dendrite* as “a tremendous victory for free speech.” *Id.* at 810–811 (citing Mary P. Gallagher, *Court Erects Roadblocks to Flagging Cyberspammers on the Internet: Four-Step Process Must Be Followed Before Forcing ISP to Disclose*, 165 N.J. L.J. 203 (2001)). Others have referred to it as “a ‘fair, workable test that stems the tide of using the threat of the subpoena power to punish people for criticizing others online’ . . . [but that] ‘doesn’t close the courthouse door to those with meritorious claims.’” Stephen R. Buckingham & Alix R. Rubin, *Anonymous ‘Posters’ Complicate Discovery*, Nov. 19, 2001 N.Y. L.J. s4, (col. 3) (citation omitted).

significant room for improvement. Though the first two prongs of the *Dendrite* standard (notice and setting forth exact defamatory statements) are fairly uncontroversial,⁶⁵ the next two prongs have raised eyebrows among various commentators. Arguably, the most interesting and unique aspect of the test is the fourth prong, which embodies a typical balancing test. This prong allows the court more leeway to analyze the competing interests of the speaker and plaintiff on a case-by-case basis, but the test also leaves courts with a great deal of discretion (and very little guidance) to determine whether the First Amendment right or prima facie case is more important.

Some scholars find this prong quite troubling, because the court is in effect saying that even if plaintiffs have alleged a viable legal claim against the anonymous speaker and supported the claim with sufficient evidence, the court may still dismiss the claim. For example, Vogel said, “This is an exceedingly broad level of authority to grant to a single, trial-level judge, and is inconsistent with the spirit of such rights as due process and the right to trial by jury”⁶⁶ Indeed, this high level of discretion is illustrated even by the *Dendrite* court, which held that the plaintiffs had insufficiently proved damages to support their claim, whereas in a parallel case decided by the same court, the court did not even require a showing of damages.⁶⁷

The third prong of this test may also be problematic in that the ability of a plaintiff to present sufficient evidence to support a prima facie case sufficient to survive a motion to dismiss “will often depend dispositively on the identity of the defendant.”⁶⁸ In addition, since “proving damages may involve complicated (and expensive) expert testimony concerning matters such as the effect of postings on stock prices, a plaintiff has a strong interest in knowing whether the

65. Though some courts have noted that the notice requirement should only be completed if possible and/or necessary. *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d. 231, 244–45 (Cal. Ct. App. 2008). For example, the chat room may no longer be in existence, or the defendant may have already been notified by the ISP.

66. Vogel, *supra* note 9, at 808.

67. *Id.* at 809.

68. *Id.* at 807. “For example, when ‘actual malice’ is an element of a defamation claim, the plaintiff will need to know the defendant’s identity, and in all likelihood take the defendant’s deposition, to meet that burden. Likewise, where the poster is a competitor, discovery may be focused on the competitor’s efforts to lure customers or employees away from the plaintiff. Where stock manipulation is suspected, the defendant’s trading records will be essential to proving damages.” *Id.* at 807–08 (footnote omitted).

defendant has the financial means to satisfy a judgment before investing the resources in gathering such evidence.”⁶⁹ Furthermore, basing First Amendment protections on a procedural hurdle that varies among jurisdictions seems like a risky and unpredictable practice, as will be discussed in greater detail below.

As for the test in *2TheMart.com*, though it provides valuable standards for analysis in the second and third prongs, its first requirement that the suit need merely be brought in good faith does not provide enough protection to anonymous speakers. Commentators have observed that

[t]he problem with this type of test is the ease with which it can be abused. Because it is so deferential, a plaintiff whose real interest is in identifying the speaker to embarrass or harass him or her has to show very little before the court will unmask the speaker.⁷⁰

One court noted that the good faith requirement is an inadequate standard of determination because “a plaintiff may well be in actual subjective good faith in filing the suit believing he has a strong case when, in fact, he may have no case at all.”⁷¹ Conversely, a plaintiff who has a strong defamation case with a good chance of winning may care very little about winning the case and care much more about the social, psychological, and symbolic benefits of bringing a defamation case.⁷² Thus, there should be some objective legal standard to determine whether the claim brought is sufficient to justify piercing the veil of anonymity.⁷³

69. *Id.* at 808.

70. Jonathan D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?*, 7 FIRST AMEND. L. REV. 421, 426 (2009).

71. *In re Baxter*, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, at *37 (W.D. La. Dec. 19, 2001).

72. Lidsky, *supra* note 6, at 872, 876.

73. At least one court has argued that the determination of discovery of an anonymous speaker’s identity should not require “consideration of the *merits* of the underlying defamation action.” *Melvin v. Doe*, 836 A.2d 42, 46 (Pa. 2003). “Rather, the [analysis should be] strictly a legal [question], entailing consideration of what threshold requirements must be imposed as a prerequisite to discovery in an anonymous defamation case” This inquiry, the court argued, should be “plainly separable from the defamation action.” *Id.* However, it is highly debatable whether completely separating the inquiry from the merits of the case would be wise, or even possible. Even the most basic civil procedures, such as pleadings, must give at least some weight to the merits of a case. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545–46 (2007). Thus, while the legal standard must be objective, it cannot exist in a vacuum, isolated from the merits of the plaintiff’s claim.

The *Cabill* summary judgment standard, at first glance, may appear to be the optimal solution. It has increased protections for anonymous speakers by raising the bar from the usual motion to dismiss standard to requiring a factual showing sufficient to create a material issue of fact for elements of the claim within the plaintiff's control. Yet the *Cabill* standard still allows for a speaker to obtain remedies through the clear procedure of meeting the evidentiary requirements to survive a summary judgment motion. Since this test rejects the subjective balancing test set forth in *Dendrite*, the *Cabill* test implements a clear, categorical rule, which almost without exception provides more predictability and clarity in the law. The justification for removing the balancing test set forth in *Dendrite* is that the underlying substantive defamation law already includes a balancing test, which is true when you consider that public figures must overcome the heavier First Amendment "thumb on the scale" by proving actual malice (intentional false statements or reckless disregard of the falsity of statements).⁷⁴ Private figures must also overcome a presumption against them, albeit a smaller presumption, by proving that the speech was at least negligent.⁷⁵

However, examining the underlying "balancing test" in the summary judgment standard unveils a serious flaw in the analysis set forth by *Cabill*: this test requires only that plaintiffs support their claims with the elements within their control, and this category *excludes* things like actual malice or negligence, which are outside the plaintiff's control. By excluding the requirement that a plaintiff prove these motives, the summary judgment test has effectively gutted all First Amendment hurdles that weighed down the scale in favor of the speaker, and thus the underlying "balancing test" is shown to be, in fact, non-existent. However, it would be impossible to require the plaintiff to prove actual malice or negligence without the identity of the speaker, and thus this aspect of the test seems to have reached a constitutional impasse.

In addition, one court has criticized the use of a procedural hurdle as a method of First Amendment protection. This criticism applies to both the *Dendrite* motion to dismiss hurdle as well as the *Cabill* summary judgment hurdle. One court seeking to apply the divergent standards said, "We find it unnecessary and potentially

74. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964).

75. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353–54 (1974).

confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet.”⁷⁶ The court pointed out that the standards governing pleadings and motions differ among jurisdictions, and consequently, using a procedural hurdle to define First Amendment protections can cause both confusion as well as inconsistency in application.⁷⁷ For example, the court pointed out that in a notice pleading state the second requirement of *Dendrite*, that the defamatory statements must be set forth with particularity, will be essential, whereas in jurisdictions where pleading is more rigorous, such a requirement will be superfluous because specific statements will need to have already been included in the pleadings.⁷⁸

The deficiencies in these various tests led the *Krinsky* court to argue that heightened standards of protection for anonymous Internet speakers actually lead to more harm than good and that current litigation procedures are sufficient for protecting anonymous speakers.⁷⁹ However, a standard that relies purely on current litigation procedures for defamation claims suffers from the same issue as mentioned in the above paragraph: namely, First Amendment protections rely upon procedural labels that differ among jurisdictions, creating an inconsistent and confusing application of the law. Furthermore, failing to give additional protections to the identity of anonymous speakers ignores the fact that a speaker’s identity is separate from the defamatory speech, and while courts are able to levy penalties for defamatory speech through following the guidelines of *New York Times v. Sullivan*, compelling an anonymous individual to speak his or her identity is a separate instance of speech that deserves a separate First Amendment analysis.

*B. The Appropriate Standard of Protection for Anonymous
Internet Speech*

While it would be impossible to come up with a perfect categorical rule that properly balances the competing interests in

76. *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d. 231, 244 (Cal. Ct. App. 2008).

77. *Id.*

78. *Id.*

79. *Id.* at 244–45, 245 n.12 (relying on views expressed by attorney and scholar Michael S. Vogel).

each case, this Comment argues that the following steps of analysis would be most effective in providing adequate protection for the identity of an anonymous speaker in a discovery request, while still allowing aggrieved plaintiffs to obtain a deserved remedy without facing undue burdens. First, the court must determine whether the speaker spoke in a reasonably anonymous manner; second, the plaintiff must present sufficient facts and evidence that the claim is fairly plausible; third, the identity of the speaker must be materially related to a core claim or defense of the plaintiff, and the plaintiff must not be able to obtain that information from any other source; and finally, the plaintiff must attempt to provide reasonable notice to the anonymous speaker. The first two prongs of the proposed test are new steps of analysis, not currently utilized in any seminal cases. The second two prongs of the proposed test have been incorporated from existing tests in a new way. Each prong of the test will be discussed in turn.

First, as a threshold matter, the court should determine whether the anonymous speaker spoke in a forum and in a manner that made it reasonable for the speaker to believe the speech was anonymous.⁸⁰ This prong is likely easily met, but it is important to address because if the speaker has already disclosed his or her identity, allowed his or her identity to be disclosed, or spoken in a forum or manner where the speaker knew or should have known that his or her identity would be disclosed, then there is no need for the courts to provide heightened protections to the anonymous speaker's identity. This issue was raised in *Polito v. AOL Time Warner, Inc.*, where the plaintiff argued that the defendant had already waived his constitutional right to anonymity by voluntarily contacting the recipient in a misleading manner with harassing e-mails concerning the plaintiff's mental health and other private matters.⁸¹ The court found that in this case it was justifiable to unveil the identity of the anonymous speaker.⁸²

80. "It is difficult to speak anonymously in electronic communication without leaving a small piece of identifying information behind—in the case of internet speech it is the speaker's internet protocol (IP) address, which is unique to each user. The address can be masked, but often people who speak anonymously on the internet are unaware they are leaving a digital fingerprint behind and fail to cover their tracks." Jones, *supra* note 70, at 424 (footnote omitted).

81. *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328, 331, 343 (Ct. C.P. Pa. 2004).

82. *Id.* at 351–52.

Second, rather than rely on a procedural label like surviving a motion to dismiss or a summary judgment, or subjectively requiring the case to be brought in “good faith,” the plaintiff’s pleading should allege sufficient facts to support a fairly plausible (rather than a merely conceivable) claim for relief in order to pierce the veil of anonymity.⁸³ This requirement is similar to a standard set forth by a Louisiana court attempting to apply a workable standard for defamation actions against anonymous speakers.⁸⁴ The court argued that rather than applying overly burdensome and inconsistent procedural hurdles as a First Amendment protection, the requirement should be “a showing of at least a reasonable probability or a reasonable possibility of recovery on the defamation claim.”⁸⁵ The reason such a requirement is necessary in the realm of defamation actions against anonymous speakers is because “libel suits are hard to win but easy to bring.”⁸⁶ Thus, this requirement would avoid inconsistent and unduly burdensome procedural hurdles or subjective good faith requirements but still require a sufficient showing to ensure that the claim being brought is valid and not merely superfluous.

Of course, as in *Cahill*, the plaintiff will only be able to plead the elements of the claim that are within the plaintiff’s control—specifically that the statements are false, that the communication was viewed by unprivileged third parties, and that some sort of harm was caused.⁸⁷ Notably, it is not possible to require the plaintiff to prove negligence or malice at this stage of the litigation. If this test were the only protection for the identity of anonymous speakers that this Comment offered, then this test would suffer from the same shortcomings as *Cahill*, since the requirement of showing malice is no longer present, and thus a substantial First Amendment

83. This is essentially the heightened pleading standard recently set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (explaining that this heightened standard is not “a probability requirement . . . it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” of the alleged facts). Because this standard is only applicable to federal courts, it will be useful to require this heightened pleading standard as an element of the anonymous speech analysis in order to ensure consistent heightened protection for anonymous speech in all jurisdictions, particularly ones that only require notice pleading.

84. *In re Baxter*, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, at *38 (W.D. La. Dec. 19, 2001).

85. *Id.*

86. Lidsky, *supra* note 6, at 883.

87. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

protection of speech is no longer present. However, as discussed in the subsequent paragraph, there are additional First Amendment protections that should be put in place in order to ensure that separate consideration is given to the importance of preserving the anonymous identity of a speaker.

Third, even if the plaintiff has sufficiently pled the elements of the claim within the plaintiff's control, the plaintiff should be required to go a step further in order to pierce the veil of anonymity. He or she should have to prove that the knowledge of the anonymous speaker's identity is directly and materially related to a core claim or defense and that this information is unavailable from any other source. This is essentially the test that comes from *2TheMart.com*.⁸⁸ This test is, in essence, a variation of a strict scrutiny requirement, in that it requires a strong interest on the part of the plaintiff (the central need for the information) and that the request be narrowly tailored to that need (in that there must be no other alternative to retrieve the information). It is important that some variation of strict scrutiny be applied when unmasking a speaker's anonymity because, as previously discussed, the government is compelling speech through a court order in such an instance. Thus, this is a government action that goes beyond merely punishing defamatory speech, and thus deserves a separate analysis. As the Court has explained in *McIntyre*, when the government interferes with the content of speech by compelling an individual to speak his or her identity, such action must be subjected to strict scrutiny.⁸⁹

Some courts have criticized the *2TheMart.com* requirement that identifying information be unavailable from other sources. For example, one court stated, "the requirement . . . in *2TheMart.com* that the information is unavailable from any other source, is, it seems to me, irrelevant."⁹⁰ The court argued that it makes no difference whether the "plaintiff attempts to learn the identi[ty] by some other 'available means' or [whether] he attempts to learn it by subpoena."⁹¹ However, it is important to note that "[a] court order,

88. *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

89. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

90. *In re Baxter*, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, at *36 (W.D. La. Dec. 19, 2001).

91. *Id.* at 37.

even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations.”⁹² Thus, requiring a showing of a compelling interest (that the identity is materially related to a core claim) and narrow tailoring (that the information cannot be obtained otherwise), courts ensure that the government is intervening only when necessary, and such a limitation on government action is exactly the purpose of the Constitution.

Finally, a plaintiff must make reasonable efforts, if necessary, to notify the anonymous speaker of the litigation and provide a reasonable period to allow for filing an opposing position as suggested in *Dendrite*.⁹³ Thus, if speakers wish to intervene and defend their own rights in the litigation, they will have that option.⁹⁴ However, as suggested by the *Krinsky* court, this requirement need only be fulfilled if possible and/or necessary.⁹⁵ For example, the forum of speech may no longer be in existence to notify the speaker, or the speaker may have already been notified by the ISP.⁹⁶

In summary, this proposed test, unlike *Dendrite*, does not leave an excessive amount of discretion with the courts. Furthermore, it requires consistency in application, unlike the procedural mechanisms of *Dendrite* or *Cabill*, while still requiring a slightly increased showing on the part of the plaintiff at the pleading stage of the litigation. Finally, it requires that some variation of strict scrutiny be applied to ensure that the anonymous individual is not compelled to reveal his or her own identity unless the plaintiff has a compelling interest in the information (it is related to a core claim or defense) and is narrowly tailored to the interest (it cannot be obtained from another source). However, in addition to this standard of protection, there is one other procedural mechanism necessary to satisfactorily

92. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that “the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State . . . is a proposition which has long been established by decisions of this Court.”). See also *TheMart.com, Inc.*, 140 F. Supp. 2d at 1091–92; see also, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

93. *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

94. See, e.g., *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 WL 22962857, at *1 (Conn. Super. Ct. Dec. 2, 2003) (allowing the speaker to choose to intervene in a case when the ISP notified the speaker of the litigation).

95. *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d. 231, 244 (Cal. Ct. App. 2008).

96. *Id.*

protect an anonymous speaker's identity: allowing third-party standing, as discussed below.

C. Additional Protections Created by Third-Party Standing Asserted on Behalf of Anonymous Internet Speakers

Though the Supreme Court has never addressed the issue, it is possible that other organizations entrusted with the identity of anonymous Internet speakers could assert First Amendment rights on behalf of speakers and quash a subpoena for their identities through use of third-party standing, or *jus tertii*. These organizations might include the ISP,⁹⁷ an association,⁹⁸ the group to which the possibly defamatory speech was initially spoken,⁹⁹ a company on behalf of a subscriber,¹⁰⁰ the organization that hosts the communication forum,¹⁰¹ or even a press organization that posts stories online and allows anonymous commentary.¹⁰²

If powerful organizations such as these were able to assert First Amendment rights on behalf of an anonymous speaker, at least two very important phenomena would occur. First, in many cases, the addition of a more powerful player in defense of anonymous speakers would reduce the risk that previous regimes of power be reestablished, thus preserving the promise of equality and empowerment on the Internet.¹⁰³ It goes without saying that the groups mentioned above (associations, companies, or the press, etc.) often have many more resources—politically, financially, legally—than the average John Doe and are thus much better prepared to engage in litigation. As a result, these groups are less likely than John Doe to be intimidated by superfluous lawsuits from large companies or to cave under the pressure from such organizations.¹⁰⁴

97. *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003), *rev'd on other grounds by* RIAA, Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

98. *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. Cir. 2009); *see also, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

99. *Solers*, 977 A.2d at 941.

100. *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244; *Am. Online, Inc. v. Nam Tai Elecs., Inc.*, 571 S.E.2d 128 (Va. 2002).

101. *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

102. *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386 (M.D. Pa. 2008).

103. Lidsky, *supra* note 6, at 860–61.

104. The vast amount of influence and intimidation that plaintiffs can exert against defendants in a defamation action, even without a formal trial, is illustrated by the example of

The second phenomenon that would occur under this scheme would naturally be an increased amount of information and a decrease in self-censorship among anonymous speakers. This Comment will discuss in more detail the extensive chilling effect that forcing anonymous speakers to defend themselves in court can have on anonymous speech in general.

A prudential principle of standing is that “[i]n the ordinary case, a party is denied standing to assert the rights of third persons.”¹⁰⁵ Two traditional justifications of this principle are first that “courts should not adjudicate . . . rights unnecessarily,” as the holders of the rights may not want them adjudicated; and second, parties are usually the “best proponents of their own rights,” which makes for the most “effective advocacy.”¹⁰⁶ However, courts will allow an exception to the third-party standing prohibition in situations where three requirements have been met: first, the litigant must have suffered some sort of injury-in-fact; second, there must be some sort of relationship between the litigant and the person whose rights the litigant seeks to assert; and third, there must be some hindrance to the speaker’s ability to assert personal rights.¹⁰⁷

It is important to note that the Court has not required third-party “relationships” to be a close familial or professional bond. The required relationship is a functional relationship, such that the litigant will be an effective advocate of the rights of the third party. Indeed, it is not even necessary that the litigants or third parties know or associate with one another. The Court has, in fact, gone as far as to find the requisite relationship between many unlikely pairs, such as between a bartender and an underage drinker,¹⁰⁸ a juror and a criminal defendant,¹⁰⁹ and a bookseller and juvenile customers.¹¹⁰

Peter Krum. After a corporate plaintiff threatened Krum with a suit regarding his potentially defamatory speech, Krum, who only worked as a Fry Cook and only made about \$22,000 a year, “made no effort to contest the suit, but instead agreed to sign an apology, pay \$50 a month to a charity of the plaintiffs’ choice for a period of four years, and to perform three hours of community service every week for two years.” *Id.* at 882–83.

105. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977).

106. *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976). *See also* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

107. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

108. *Craig v. Boren*, 429 U.S. 190 (1976).

109. *Powers*, 499 U.S. at 413.

110. *Virginia v. Am. Booksellers Ass’n.*, 484 U.S. 383 (1988).

The Court also often requires that the litigant asserting third-party standing have some sort of stake in the litigation. For instance, in *Singleton v. Wulff*, the court allowed a physician to assert standing on behalf of his patients seeking abortions because their rights were tangential to his success in his practice.¹¹¹ Since the physician had much to gain by winning the suit, he was in a better position to advocate the tangential rights of others.

In some cases, it may be possible for third parties to satisfy all of the strict requirements for the third-party standing exception in order to assert the rights of anonymous speakers. The first requirement, that the third party have suffered some kind of injury,¹¹² which is related to the requirement that the litigant have some sort of stake in the litigation, may be fairly easy for a party to prove. For example, in *Solers, Inc. v. Doe*, an anonymous speaker informed a trade association that a company had committed acts of copyright infringement.¹¹³ The company filed suit against the speaker for defamation and subpoenaed the trade association to provide the identity of the speaker. The trade association asserted the rights of the anonymous speaker through third-party standing and moved to quash the subpoena. Part of the reason that the trade association chose to do so was because the company had a “long standing policy of keeping the identity of [its] sources anonymous (unless required by law to disclose the identity) [and] . . . maintain[ing] as confidential the information provided by its sources[.]”¹¹⁴ Thus, the trade association had an interest in defending the rights of the tipster in order to protect the reputation of the association in keeping the tipster’s identity anonymous.¹¹⁵ By not allowing the association to assert the speaker’s rights, the association’s reputation for upholding its policy would be damaged, and there would be less reporting by

111. *Singleton*, 428 U.S. at 106 (1976).

112. *Powers*, 499 U.S. at 411 (1991).

113. *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009).

114. *Id.* at 946.

115. It is important to note that the third-party organization would not be obligated to raise the rights of commentators on its website. Furthermore, as a result of the Communications Decency Act, Internet service providers arguably cannot be held liable for speech made by commentators on the site. See David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 174–75 (1997). Cf. Rachel Kurth, *Striking a Balance Between Section 230 of the Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007).

tipsters in the future as a result of the association's damaged reputation. Another example is *In re Verizon Internet Services, Inc.*, where the court found that Verizon had a sufficient stake in the litigation because of its interest in maintaining and broadening its client base.¹¹⁶

The second requirement—that there be some sort of relationship between the litigant and the third party¹¹⁷—is also likely easily satisfied. As noted above, this type of relationship is merely a functional relationship, such that the litigant will be an effective advocate of the rights of the third party. If the Court allows bartenders to assert the rights of unknown underage drinkers,¹¹⁸ or booksellers to assert the rights of unknown juvenile customers,¹¹⁹ it seems reasonable that an organization (such as an ISP, an association, or the press) could assert the rights of anonymous speakers who trusted that organization with their identities.¹²⁰

The third, and arguably most difficult, requirement for third parties to achieve is that there must be some hindrance to the anonymous speaker preventing him or her from asserting his or her own rights.¹²¹ At first blush, one might attempt to argue that the obvious hindrance is that through engaging in litigation, the party will risk disclosing his or her identity. However, the Court has made clear that it is possible for anonymous parties to contest the unveiling of their identities through use of pseudonyms, thus engaging in litigation while still masking their identity.¹²² At least one court has argued that the desire of a speaker to preserve his or her identity is

116. *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003), *rev'd on other grounds*, *RIAA, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

117. *Powers*, 499 U.S. at 411 (1991).

118. *Craig v. Boren*, 429 U.S. 190 (1976).

119. *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383 (1988).

120. However, it should be noted that some courts have found the relationship between organizations such as an ISP, an association, or the press and an anonymous speaker lacking, though clear justification for such a determination has yet to be given. *See, e.g.*, *Matrixx Initiatives, Inc. v. Doe*, 42 Cal. Rptr. 3d 79 (Cal. Ct. App. 2006) (finding that a hedge fund manager did not have standing to defend the rights of anonymous speakers who made potentially defamatory statements that were traced to the hedge fund).

121. *Powers*, 499 U.S. at 411 (1991); *see also, e.g.*, *Barrows v. Jackson*, 346 U.S. 249 (1953) (finding third-party standing appropriate because the homeowner brought the suit on behalf of black men excluded from the neighborhood by a homeowner's covenant and the black man would never be able to assert standing since he could never own a house in the neighborhood, which constituted a sufficient hindrance to the party from bringing his own rights before the court).

122. *Doe v. Bolton*, 410 U.S. 179, 187 (1973).

not a valid “hindrance” preventing the party from asserting his or her own rights.¹²³ The *Quixtar* court argued that the only cases where a court should find that a true hindrance existed, preventing the speaker from asserting personal rights, would be cases in which a party was never put on notice that the divulgence of his or her identity is pending in litigation.¹²⁴ However, the range of cases in which the speakers are unaware of the litigation, and thus truly unable to defend their own rights, is likely small.

In the majority of cases, it is likely that the third-party standing requirements would need to be relaxed in order to achieve the maximum protections for anonymous speakers. It would not be unusual for the Court to relax these standards because standing requirements are already interpreted quite liberally in other areas of First Amendment jurisprudence.¹²⁵ For example, the Supreme Court created an exception to the third-party standing requirements by allowing statutes to be invalidated on overbreadth or vagueness grounds.¹²⁶ In such cases, a litigant is given third-party standing to challenge the constitutionality of an overbroad¹²⁷ or vague¹²⁸ statute even if the litigant has not personally suffered an injury (meaning that the litigant has not engaged in constitutionally protected activity that the statute makes unlawful) and even if the litigant has not proven that a significant hindrance exists to other parties preventing them from asserting their own rights if affected by the statute.

According to Fallon, “[t]he most common account of the First Amendment overbreadth doctrine justif[ying] a departure from ordinary standing principles” is that “the foundation for the doctrine is prophylactic: its purpose is to combat chilling effects and other

123. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1213–14 (D. Nev. 2008).

124. *Id.* at 1216 (quoting *Powers*, 499 U.S. at 411).

125. *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003), *rev'd on other grounds*, *RIAA, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

126. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Coates v. Cincinnati*, 402 U.S. 611 (1971).

127. *Broadrick*, 413 U.S. at 615. *See also* Richard Fallon, *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 863 (1991) (“When speech or expressive activity forms a significant part of a law’s target, the law is subject to facial challenge and invalidation if: (i) it is ‘substantially overbroad’—that is, if its illegitimate applications are too numerous ‘judged in relation to the statute’s plainly legitimate sweep,’ and (ii) no constitutionally adequate narrowing construction suggests itself.”); Note, *The Chilling Effect in Constitutional Law*, 69 *COLUM. L. REV.* 808 (1969); Note, *The First Amendment Overbreadth Doctrine*, 83 *HARV. L. REV.* 844 (1970).

128. *Coates*, 402 U.S. 611.

impediments to constitutionally valuable expression.”¹²⁹ The First Amendment is viewed as enjoying “a special status in the constitutional scheme,” and “any substantial ‘chilling’ of constitutionally protected expression is intolerable.”¹³⁰ Justice Brennan articulated the need to stave off chilling effects in *Walker v. City of Birmingham*:

To give [First Amendment] freedoms the necessary “breathing space to survive,” the Court has modified traditional rules of standing and prematurity. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the “chilling effect” upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.¹³¹

As one commentator explained, “the doctrine emphasizes the need to eliminate [a] law’s deterrent impact—or ‘chilling effect’—on protected primary activity.”¹³² The reason being that “[a] chill on protected activity also means deterrence of the very litigants whose complaint is necessary under the as applied method to [challenge the law]. The results are delay in according judicial protection and irretrievable loss of exercise of fundamental rights.”¹³³

This same justification for relaxing standing requirements in the overbreadth and vagueness realm exists in regards to anonymous speakers: namely, there is a very real concern that forcing anonymous speakers to defend their rights in court, even under a pseudonym, will have a definite chilling effect upon anonymous discourse on the Internet. If anonymous speakers are forced to defend themselves in lawsuits, when their obvious goal was to avoid being noticed or heckled, then we are still effectively chilling anonymous speech.

Let us take the example of *Solers*, where the anonymous speaker was aware of the suit but chose not to intervene and allowed the trade association to litigate on his behalf.¹³⁴ If the trade association had not been allowed to assert third-party standing, and each

129. Fallon, *supra* note 127, at 867–68.

130. *Id.* at 867.

131. 388 U.S. 307, 344–45 (1967) (Brennan, J., dissenting) (citations omitted).

132. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970).

133. *Id.* at 855.

134. *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009).

anonymous tipster were forced to defend himself or herself in court, the chance that this tipster, or any other individual aware of the lawsuit, would be motivated to anonymously report possible illegal behaviors by companies in the future would be significantly diminished. Indeed, anonymous speakers would self-censor in order to avoid the hassle and expense of litigation—the essence of a chilling effect.

Another example is *Enterline v. Pocono Medical Center*, where a news organization asserted third-party standing on behalf of the anonymous speakers who had commented on a news story.¹³⁵ In this case, the court observed that preventing the news organization from asserting standing would “compromise the vitality of the newspaper’s online forums, sparking reduced reader interest.”¹³⁶ Such a phenomenon is not surprising, when one considers that the motivation for a speaker to engage in lively debate on a news forum diminishes substantially if the speaker knows he or she may have to defend his or her rights in court, rather than rely on the newspaper to do so.

Other courts and commentators have also noted the unique danger of a chilling effect occurring in this area of speech.¹³⁷ This danger “justif[ies] the relaxation of rules which inhibit the litigation of constitutional claims in the federal courts,”¹³⁸ particularly the requirement that an anonymous speaker have some true hindrance (e.g., not being aware of the litigation) preventing the speaker from

135. *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008).

136. *Id.* at *3.

137. *See, e.g.*, *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008) (“To fail to protect anonymity is, therefore, to chill speech.”); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.”); *Doe No. 1 v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (“[S]etting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.”); *see also* Lidsky, *supra* note 6, at 882 (arguing that the mere threat of being revealed may be enough to force a defendant to temper his remarks in the future); Jones, *supra* note 70, at 443 (“When the threat of later being identified exists, without a strong presumption in favor of keeping the speaker’s identity hidden, it has a chilling effect on the speaker.”).

138. Note, *The Chilling Effect and Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969).

asserting his or her own rights in court. The desire of the anonymous speaker to remain discreet and un-heckled, coupled with the determination that the third-party organization will adequately represent the speaker's rights, should be sufficient.

Furthermore, one of the traditional justifications for third-party standing, that we do not want the court to unnecessarily litigate rights of litigants, does not apply in this scenario. The rights of the anonymous speaker are going to be litigated, at least to some extent, one way or another, since the premise of these types of cases is that the plaintiff has already filed a suit and is seeking discovery of the anonymous speaker's identity. Thus, the question is not whether someone will have to engage in litigation to defend the anonymous speaker's rights, but rather *who* should be allowed to do it. The use of third-party standing is justified when the plaintiff has attempted to notify the anonymous speakers of the litigation, and the speaker is uninterested in intervening, or worse—unaware of the litigation. Such an option will provide greatly needed additional protections for anonymous speakers, while not adding any additional legal hurdles for the plaintiff to overcome in order to obtain a remedy.

IV. CONCLUSION

In order to preserve the valuable democratic and communicative nature of the Internet, anonymous Internet speech must be given full First Amendment protection. Though at times such speech may be potentially defamatory, and thus possibly deserving of civil penalties, it is important to remember that the identity of an anonymous speaker is a separate type of speech entirely and that compelling that speech requires heightened protections not sufficiently provided by any one test currently implemented by courts. This Comment argues that the proper test is as follows: first, after determining as a threshold matter that the speaker had a reasonable expectation of anonymity in his or her speech, the plaintiff must secondly be able to allege sufficient facts to support a fairly plausible, rather than merely conceivable, claim for relief. Third, the plaintiff must prove that the knowledge of the speaker's identity is materially related to a core claim or defense and that this information is unavailable from other sources; in essence, this requirement would impose a level of protection similar to that of strict scrutiny. And finally, the plaintiff must make reasonable efforts,

if necessary, to notify the speaker of the litigation so that the speaker may intervene and assert his or her own rights if he or she desires.

However, this Comment suggests that the speaker should not be the only one allowed to assert his or her First Amendment rights, but that traditional third-party standing requirements should be relaxed so that the organization entrusted with the speaker's identity can have the option of asserting standing on the speaker's behalf. Such an option would provide additional protections for anonymous speakers by preventing a chilling effect on anonymous speech and by leveling the playing field of litigation, yet this option would not require the aggrieved plaintiff to overcome any additional legal hurdles to obtain a remedy.

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