

## DEVELOPMENTS IN *DENDRITE*

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Over the past thirteen years, judges have struggled with how to decide whether to compel Internet service providers (ISPs) to disclose identifying information about members of the public who take advantage of the apparent anonymity that the Internet affords individuals to speak about issues of public importance.<sup>1</sup> State appellate courts have continued to embrace some version of the *Dendrite*<sup>2</sup> test that New Jersey's Appellate Division first adopted in 2001.<sup>3</sup> But some of the most interesting developments have occurred as the first few Doe subpoena cases have reached the federal appellate courts.<sup>4</sup> I discussed the state appellate court cases in an article published last year;<sup>5</sup> in this Article, after summarizing the state courts' consensus and why that consen-

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<sup>1</sup> See, e.g., *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *Dendrite International v. John Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. 2000), available at <http://cyberslapp.org/documents/DendriteSuperiorCourtOpinion.pdf>, *aff'd sub nom. Dendrite Int'l, Inc.*, 775 A.2d 756; *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); see Clay Calvert et al., *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. MARSHALL L. REV. 1, 4 (2009); Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1538 (2007).

<sup>2</sup> *Dendrite Int'l, Inc.*, 775 A.2d at 760.

<sup>3</sup> *Id.*; see Calvert et al., *supra* note 1, at 26; Paul Alan Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, LITIGATION, Spring 2011, at 1, 3, available at <http://www.citizen.org/documents/litigating-civil-subpoenas-to-identify-anonymous-internet-speakers-paul-alan-levy.pdf>; Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 800 (2004).

<sup>4</sup> See *infra* Parts II-III.

<sup>5</sup> Levy, *supra* note 3, at 4.

sus developed,<sup>6</sup> I discuss some recent developments, with particular attention to cases in the Second, Fifth,<sup>7</sup> and Ninth Circuits.<sup>8</sup>

### I. THE STATE COURTS' CONSENSUS APPROACH TO DOE SUBPOENAS

In theory, the problem of anonymous speech online is no different from anonymous speech offline.<sup>9</sup> Without adopting a posture of Internet exceptionalism, we can recognize how different the online context can be, and how online speech has some characteristics that result in cases testing the limits of anonymity arising much more frequently than cases involving offline speech.<sup>10</sup>

The first distinction is that the Internet is the great leveler, which allows an ordinary person to speak with a loud voice, bypassing the intermediation of the mainstream media.<sup>11</sup> The Supreme Court waxed lyrical about the empowering characteristics of the Internet in *Reno v. American Civil Liberties Union*: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."<sup>12</sup> Both because so much Internet communication can be easily found through the use of highly effective search engines and because a given criticism may result in extensive republication if the communication goes viral, many people and businesses that were, as a practical matter, immune from effective public criticism, have been confronted with public condemnation.<sup>13</sup> The targets of obscure criticism who might have been able or willing to

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<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (discussing the similarities between traditional anonymous speech and anonymous speech online).

<sup>10</sup> Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 *FORDHAM L. REV.* 2745, 2745 (2002).

<sup>11</sup> Gabrielle Hammond & Ellis Jacobs, *The Future of Technology in Legal Services: A Time for New Advocacy*, 37 *CLEARINGHOUSE REV.* 46, 46 (2003).

<sup>12</sup> *Reno*, 521 U.S. at 870.

<sup>13</sup> See O'Brien, *supra* note 10, at 2748; Vogel, *supra* note 3, at 796.

overlook the comment do not like being held up for ridicule, and although, in many cases, the subjects of such criticism overestimate the impact of the appearance of an anonymous criticism on some otherwise obscure website or message board, they want to strike back.<sup>14</sup>

At the same time, the Internet creates an illusion of anonymity.<sup>15</sup> In many environments, it is easy to post statements on a publicly accessible message board (for example, the comment section of a newspaper's website or a popular blog), or to send an e-mail to a mailing list of those who might be interested in a given subject.<sup>16</sup> E-mail addresses may be self-identifying, for example, including the first initial of the last name at one's place of employment or using a given ISP, but they are often more cryptic, using the name of a childhood pet or simply some invented pseudonym.<sup>17</sup> Message boards may or may not require registration, but registration generally involves the creation of a screen name that may or may not have a substantial relationship to one's true name.<sup>18</sup> With a greater level of commitment, the would-be critic can establish a website or a blog.<sup>19</sup> Blogging platforms generally do not require that the author proceed using her own name, but simply require registration using a viable e-mail address.<sup>20</sup> Similarly, a critic can reserve her own domain names, registering with one of the many services that allow private registration.<sup>21</sup> Internet users who want to offer criticisms, yet fear the consequences of being identified as the critics, are thus encouraged to speak their minds through these services.<sup>22</sup>

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<sup>14</sup> See Calvert et al., *supra* note 1, at 3; O'Brien, *supra* note 10, at 2746.

<sup>15</sup> Levy, *supra* note 3, at 2.

<sup>16</sup> Jonathan D. Jones, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?*, 7 FIRST AMENDMENT L. REV. 421, 422 (2009).

<sup>17</sup> Levy, *supra* note 3, at 2.

<sup>18</sup> *Id.*

<sup>19</sup> Yang-Ming Tham, *Honest to Blog: Balancing the Interest of Public Figures and Anonymous Bloggers in Defamation Lawsuits*, 17 VILL. SPORTS & ENT. L.J. 229, 233 (2010).

<sup>20</sup> See Levy, *supra* note 3, at 2.

<sup>21</sup> Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, COMM. LAW., Fall 2000, at 3, 3 (explaining that it is easy in the virtual world to express oneself anonymously).

<sup>22</sup> Levy, *supra* note 3, at 2.

But these opportunities for anonymity go only so far; I referred above to the *illusion* of anonymity for a reason.<sup>23</sup> Registration to post in many forums commonly requires a live e-mail address—that is, an e-mail address to which the forums can send a confirmation message—and the registrant must commonly respond to the message, thus verifying that the e-mail address is, at least at that time, an address with an actual user.<sup>24</sup> Even if the e-mail address that the user provided with registration does not, itself, disclose readily identifying information (such as the initial of the user’s first name combined with a last name and a place of employment), that e-mail address may well have been obtained using a more identifiable e-mail address.<sup>25</sup> And ultimately, most users get their Internet access from an ISP that has their name and home address; users likely pay for access with forms of payment that can easily be tracked back to them.<sup>26</sup> Moreover, website hosts generally track visits by recording the Internet protocol (IP) address of the computer that the visitor was using and the precise time of the visit;<sup>27</sup> that address, in turn, identifies the ISP through which the user obtained access; and ISPs, in turn, maintain records revealing which of their users obtained Internet access using which IP address at any given time.<sup>28</sup>

In theory, then, an all-knowing body with unlimited opportunities to examine private and public computer records could use that power to track speech back to the speaker.<sup>29</sup> The power to issue subpoenas in civil litigation could, in theory, put the targets of critical

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> O’Brien, *supra* note 10, at 2745.

<sup>27</sup> Levy, *supra* note 3, at 2; *see, e.g., Do Websites Track and Record IP Addresses?*, WISEGEEK, <http://www.wisegeek.com/do-websites-track-and-record-ip-addresses.htm> (last visited Nov. 3, 2012) (explaining how IP addresses work and why websites automatically record them).

<sup>28</sup> Levy, *supra* note 3, at 2. Most users either do not contemplate concealment or lack technical sophistication to conceal their IP address records, thus it does not occur to them to employ Tor, a free program that uses proxy servers to facilitate concealment of IP addresses. *See, e.g., What is TOR?*, WHATISMYIPADDRESS.COM, <http://whatismyipaddress.com/tor> (last visited Nov. 3, 2012) (discussing why a user might want to hide an IP address and analyzing Tor as a means to do so).

<sup>29</sup> Brief on Appeal for Appellant John Doe 1 at 13, *Thomas M. Cooley Law School v. Doe 1*, No. 307426 (Mich. Ct. App. July 25, 2012), *available at* <http://www.citizen.org/documents/Cooley-v-Doe-Doe-Opening-Brief.pdf>.

speech in just that position.<sup>30</sup> Consider the Big Brotherish implications of a rule permitting access to identifying information just by asking or just by paying the price of a filing fee and then obtaining ex parte permission to take discovery. If unchecked, the broad availability of this type of power could discourage much useful speech.<sup>31</sup>

Moreover, people often have understandably good reasons to want to keep their identities separate from the content of their speech.<sup>32</sup> A speaker may want to avoid unlawful or, at least, improper retaliation from someone whom she has criticized,<sup>33</sup> or she may be worried about facing obloquy in her own community for expressing a view that is out of sync with her peers.<sup>34</sup> Or, a speaker may have a public position with an organization and want to avoid having her own views mistakenly attributed to the organization; or a speaker may want to have her words taken for what they are worth, rather than being discounted (or, indeed, overcredited) because of her social status.<sup>35</sup> To be sure, each of these identifiers has a concomitant value to the readers of a given message—knowing the writer’s institutional affiliations, social status, and the like, may help the reader put the speech in context, not to speak of applying appropriate discounts for possible bias.<sup>36</sup> But as the Supreme Court said in the leading case of *McIntyre v. Ohio Election Commission*, decisions

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<sup>30</sup> Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 325 (2008).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *E.g.*, *Swiger v. Allegheny Energy, Inc.*, No. 05-CV-5725, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of employee’s anonymity).

<sup>34</sup> *See, e.g.*, *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (Sup. Ct. 2007) (recognizing the blogger “Orthomom” was an Orthodox Jew who faced possible ostracism for herself and her children if she had been identified, because of community norms against public criticism of other members of the community—even if the criticisms were true); Memorandum of Law of Proposed Intervenor “Orthomom” in Opposition to Petitioner’s Application for Pre-Commencement Disclosure at 27-28, *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (Sup. Ct. 2007) (No. 102063/07), available at <http://www.cyberslapp.org/documents/greenbaummemotoquash.pdf>.

<sup>35</sup> *See, e.g.*, *Greenbaum*, 845 N.Y.S.2d 695.

<sup>36</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 339-40 (1995) (quoting *McIntyre v. Ohio Elections Comm’n*, 618 N.E.2d 152, 155-56 (Ohio 1993)).

about whether to supply accurate identifying details are among the choices of authorship protected by the First Amendment.<sup>37</sup>

Yet there can be a dark side to anonymity.<sup>38</sup> Even when their own speech can lead to their identification, people often say things online that they would never imagine writing down on paper or saying to somebody's face.<sup>39</sup> The illusion of online anonymity can easily lead speakers to make hurtful statements without a sufficient grounding in fact or merely out of anger or meanness; in that way, the illusion of anonymity may well encourage ill-considered speech.<sup>40</sup> Indeed, some may seek the cloak of anonymity to prevent the targets of hurtful speech from using proper court processes to vindicate their rights.<sup>41</sup>

Thus, in deciding whether to enforce civil subpoenas seeking to identify anonymous speakers, courts have had to steer between two extremes.<sup>42</sup> Setting the standard for identification so high could make it too difficult for would-be plaintiffs to identify their adversaries which would deny them a fair chance to bring online wrongdoers to justice.<sup>43</sup> But setting the standard for identification too low would make it too easy to obtain identifying information simply for the price of filing a complaint in the hope of intimidating somebody who has done no wrong and, in some cases, exposing the innocent speaker to harm.<sup>44</sup>

As we went about developing arguments about the standards for judging such subpoenas, we drew on the ample precedent dealing with whether to compel the identification of reporters' sources, beginning with cases such as *Carey v. Hume*<sup>45</sup> and *Mitchell v. Superior Court*,<sup>46</sup> although in Doe cases, the focus is not on the rights of the journalist—

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<sup>37</sup> *Id.* at 348-49.

<sup>38</sup> Stanley Fish, *Anonymity and the Dark Side of the Internet*, N.Y. TIMES (Jan. 3, 2011), <http://opinionator.blogs.nytimes.com/2011/01/03/anonymity-and-the-dark-side-of-the-internet/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Levy, *supra* note 3, at 3.

<sup>42</sup> *McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting).

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Carey v. Hume*, 492 F.2d 631, 636-37 (D.C. Cir. 1974).

<sup>46</sup> *Mitchell v. Superior Court*, 690 P.2d 625, 629 (Cal. 1984).

generally speaking the intermediaries through which the Does speak are immune from liability—but on the right of the anonymous speaker.<sup>47</sup> When, as in the reporters' source cases, the issue is whether to identify an anonymous speaker whose name a party seeks as a potential witness to the case, the test looks rather like *Carey* or *Mitchell*, focusing on considerations of heightened relevance and the exhaustion of other means of satisfying the discovering party's legitimate interests.<sup>48</sup> The leading case is *Doe v. 2TheMart*, where the defendant in a securities case sought to identify anonymous online critics on the theory that it was the anonymous critical posts, rather than the actions of the defendants, that were responsible for the decline in the stock prices that were at issue in the litigation.<sup>49</sup> The court adopted a four-part test requiring the discovering party to show that (1) the subpoena is issued in good faith, (2) the identifying information is related "to a core claim or defense," (3) the information goes to the heart of the discovering party's case, and (4) the party has exhausted other means of pursuing the point for which the identifying information is sought—that is, "information sufficient to establish or disprove that claim or defense is unavailable from any other source."<sup>50</sup>

Although *2TheMart*-type subpoenas have been litigated in several reported cases,<sup>51</sup> it is much more common for a party to seek the subpoena when the party is explicitly accusing the Doe of wrongdoing and needs to identify the Doe so that the party may serve her with process.<sup>52</sup> The *2TheMart* test does not serve a useful purpose in this con-

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<sup>47</sup> See *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

<sup>48</sup> *Carey*, 492 F.2d at 636-37; *Mitchell*, 690 P.2d at 631-34.

<sup>49</sup> *2TheMart.com, Inc.*, 140 F. Supp. 2d at 1097.

<sup>50</sup> *Id.* at 1095.

<sup>51</sup> *McVicker v. King*, 266 F.R.D. 92, 94-97 (W.D. Pa. 2010); *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, No. MISC 08 347(Arr)(MDG), 2010 WL 2219343, at \*7-11 (E.D.N.Y. Feb. 5, 2010), *adopted in relevant part*, 08-MC-347(Arr)(MDG), 2010 WL 1686811, at \*2-3 (E.D.N.Y. Apr. 26, 2010); *Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 4802567, at \*2 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 787-88 (M.D. Pa. 2008).

<sup>52</sup> See *McVicker*, 266 F.R.D. at 95.

text, in that it generally does not distinguish cases in which courts should or should not allow subpoenas.<sup>53</sup>

Knowing who the defendant is goes to the heart of the case, and generally there is no other way to pursue the litigation than to identify the defendant and serve a summons.<sup>54</sup> The challenge then is to strike the balance—is there a compelling state interest in identifying the anonymous speaker simply because the plaintiff has filed a complaint, or the plaintiff has said that she wants to file a complaint (in states that allow prelitigation discovery to identify anonymous defendants)?<sup>55</sup> Or must more be shown?

In the first years of such litigation, courts often issued and enforced subpoenas to identify anonymous Internet speakers without much consideration of the rights of the Doe defendants.<sup>56</sup> However, a coalition of public interest groups, including Public Citizen, the American Civil Liberties Union, and the Electronic Frontier Foundation, began to seek out test cases in which they could appear on behalf of Doe defendants or file amicus briefs articulating the concerns expressed

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<sup>53</sup> Cf. *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (setting forth guidelines for the trial court when deciding whether to grant a subpoena).

<sup>54</sup> See, e.g., *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) (“Ascertaining the identities and residences of the Doe defendants is critical to plaintiffs’ ability to pursue litigation, for without this information, plaintiffs will be unable to serve process.”); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (“Traditionally, the default requirement in federal court is that the plaintiff must be able to identify the defendant sufficiently that a summons can be served on the defendant.”). In *Art of Living Foundation v. Does 1-10*, the defendants actively participated in the litigation while remaining anonymous, exchanging initial disclosures and even submitting to written discovery while pursuing written discovery of their own. *Art of Living Found. v. Does 1-10*, No. 10 CV 05022 LHK, 2011 WL 5444622, at \*3 (N.D. Cal. Nov. 9, 2011). The anonymous defendants eventually obtained summary judgment dismissing most of plaintiffs’ claims, *Art of Living Foundation v. Does 1-10*, No. 5:10-cv-05022-LHK, 2012 WL 1565281 (N.D. Cal. May 1, 2012), and ultimately settled the case on largely favorable terms that included maintaining anonymity and receiving an award of attorney fees, see Skywalker, *The Lawsuit is Over . . . and We Won*, BEYOND THE ART OF LIVING (June 19, 2012), <http://aolfree.wordpress.com/2012/06/19/the-lawsuit-is-over-and-we-won/>.

<sup>55</sup> *Seescandy.com*, 185 F.R.D. at 578.

<sup>56</sup> See, e.g., *Stone & Webster, Inc. v. John Does 1 Through 10*, No. 99MS-09-0173 (Ohio Ct. Com. Pl., Franklin Cnty., Feb. 7, 2000).



above in urging courts to take the interests of both sides into account when deciding motions over such subpoenas.<sup>57</sup> With these considerations in mind, courts across the country have settled on a standard that calls for giving the Doe notice of the plaintiff's effort to obtain identifying information and then taking an early look at the merits of the plaintiff's case to make sure the plaintiff has a realistic chance of prevailing on the merits.<sup>58</sup> Although a couple of very early reported trial court decisions in Virginia<sup>59</sup> and in California<sup>60</sup> could be understood to have

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<sup>57</sup> See, e.g., *Dendrite Int'l, Inc.*, 775 A.2d at 759 (Amici Curiae brief filed by Public Citizen Litigation Group and American Civil Liberties Union of New Jersey Foundation). The groups formed the CyberSLAPP Coalition, whose website, <http://cyberslapp.org/>, provides access to briefs, affidavits, and opinions from scores of such cases, as well as a model policy for providing notices of subpoenas that the Coalition recommends to ISPs. *About this Project*, CYBERSLAPP.ORG, <http://www.cyberslapp.org/about/> (last visited Nov. 3, 2012); *ISP Letter*, CYBERSLAPP.ORG (July 9, 2002), <http://www.cyberslapp.org/about/page.cfm?pageid=6>. Many of the nation's leading ISPs have adopted such policies. See, e.g., *Facebook Terms and Policies*, FACEBOOK, <https://www.facebook.com/policies/> (last visited Nov. 3, 2012); *Twitter Privacy Policy*, TWITTER, [twitter.com/privacy](http://twitter.com/privacy) (last visited Nov. 3, 2012).

<sup>58</sup> See, e.g., *Ingenuity 13 LLC v. Doe*, No. C 12 4450 MMC (MEJ), 2012 WL 4110991 (N.D. Cal. 2012); *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241 (N.D. Ill. 2011); *Sony Music Entm't Inc.*, 326 F. Supp. 2d 566.

<sup>59</sup> In *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), a Virginia court issued a subpoena on commission from the state courts of Indiana where the underlying action for defamation and disclosure of confidential information was pending. *Id.* at \*1. The trial court began its analysis with deference to the judgment of the Indiana court about the sufficiency of the basis for the subpoena, conducting its own First Amendment analysis as an extra layer of protection for the Doe. *Id.* at \*8. And even then, the court applied a test that allows consideration of "the pleadings or evidence" that the plaintiff presents to be certain that plaintiff has a "legitimate" as well as a good faith basis for claiming to have been the victim of actionable conduct. *Id.* Moreover, the identifying information must be "centrally needed" to advance the claim, which might not be true if there is no evidence showing a basis for the claim. *Id.* The Virginia trial court judge did not address whether the court would apply a motion to dismiss or summary judgment or indeed any other standard to decide whether the plaintiff met this test. *Id.*

<sup>60</sup> *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 575 (N.D. Cal. 1999), was an early cybersquatting case where the plaintiff sued the anonymous registrant of certain domain names for infringing the plaintiff's trademark. *Id.* The court relied on the fact that defendant had sent the plaintiff copies of thirty-one e-mails that defendant had received requesting plaintiff's products: "[M]ost importantly, plaintiff can show actual confusion, courtesy of the 31 e-mails provided by defendant. [E]vidence of

required a lesser showing, state appellate courts have been fairly unanimous in following a standard that requires an evidentiary showing of merit.<sup>61</sup> New Jersey's Appellate Division was the first to take this approach in *Dendrite International, Inc. v. Doe*,<sup>62</sup> enunciating the following five-part standard for cases involving subpoenas to identify anonymous Internet speakers for the purpose of suing them as defendants:

1. **Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
2. **Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
3. **Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant;

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actual confusion is strong proof of the fact of likelihood of confusion.” *Id.* at 580 (citation omitted) (internal quotation marks omitted). “Plaintiff[']s showing is sufficient to demonstrate that the Kumar defendants have committed an unlawful act for which a federal cause of action can subsist.” *Id.* Thus, although the *Seescandy.com* case discussed the application of a motion to dismiss standard, its ultimate ruling depended on the consideration of evidence. *Id.* In this respect, it was comparable to the trial court decision in *Dendrite International v. John Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. 2000), available at <http://cyberslapp.org/documents/DendriteSuperiorCourtOpinion.pdf>, *aff'd sub nom. Dendrite Int'l, Inc.*, 775 A.2d 756, which cited *Seescandy.com* and articulated a motion to dismiss standard, *id.* at 6-7, but denied enforcement of a subpoena to identify two of the posters for lack of evidence sufficient to make out a prima facie case, *id.* at 12-13, 16, 19. One of Dendrite's arguments on appeal was that the trial court had improperly demanded evidence despite articulating the motion to dismiss standard. *Dendrite Int'l, Inc.*, 775 A.2d at 766, 769. The appellate decision confirmed that evidence is, indeed, required. *Id.* at 760, 771-72.

<sup>61</sup> See, e.g., *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009).

<sup>62</sup> *Dendrite Int'l, Inc.*, 775 A.2d at 760-61.

**4. Require an Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims;<sup>63</sup> and

**5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.<sup>64</sup>

The court in *Dendrite* was careful to note that a plaintiff could be excused from producing evidence in support of those elements of a claim that a plaintiff cannot be expected to show without the opportunity to take discovery.<sup>65</sup> The most common example arising in defamation cases is the issue of actual malice—whether a statement was published with knowledge of falsity or reckless disregard of probable falsity.<sup>66</sup> In most cases, it is unfair to expect the plaintiff to make a showing on this point without having the opportunity to identify the anonymous speaker and take discovery regarding her mental state, and holding the plaintiff to this level of proof would contradict the purpose of the *Dendrite* balancing test by making it too close to impossible for plaintiffs with sound claims to obtain judicial redress of their griev-

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<sup>63</sup> The court set forth its standard in four paragraphs at the outset of its opinion, placing parts noted here as three and four in the same paragraph, *id.*, and some courts describe *Dendrite* as setting forth a four-part standard, *e.g.*, *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005). Analytically, I find it more useful to separate parts three and four because many cases falter on the one ground and not the other. Moreover, those courts that reject the *Dendrite* balancing stage also speak of their standards as having four parts. *Id. But see, e.g.*, *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666, 675-76 (Ill. App. Ct. 2010) (plainly listing five parts).

<sup>64</sup> In the court's own words:

[B]alance 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. The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

*Dendrite Int'l, Inc.*, 775 A.2d at 760-61.

<sup>65</sup> *Dendrite Int'l*, No. MRS C-129-00, at \*15.

<sup>66</sup> *See, e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-81 (1964).

ances.<sup>67</sup> As thus understood, however, every other state appellate court has adopted the first four parts of the *Dendrite* standard in order to confront the First Amendment issue; the fifth part, calling for an express balancing, has proved more controversial.<sup>68</sup>

It took four years for another Doe subpoena case to be decided at the appellate level.<sup>69</sup> The Delaware Supreme Court set up the disagreement in *Doe v. Cahill*,<sup>70</sup> upholding the requirements of giving notice, specifying defamatory words, stating a valid claim, and presenting evidence supporting those claims (although the court used slightly different terminology, requiring a sufficient showing to defeat a motion for summary judgment on the issues appropriately allocated to the plaintiff at the Doe subpoena stage of the case).<sup>71</sup> But *Cahill* expressly rejected the final balancing stage because the court said, “The summary judgment test is itself the balance,” and the court concluded that the final balancing stage “adds no protection above and beyond that of the summary judgment test.”<sup>72</sup>

At the time of this Article, appellate courts in three states have followed *Cahill*’s lead in using a summary judgment or prima facie evidence standard, but without express balancing.<sup>73</sup> Another five states have endorsed *Dendrite*’s final balancing stage.<sup>74</sup> Appellate courts in

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<sup>67</sup> *E.g.*, *Cahill*, 884 A.2d at 464. I am reluctant to say that courts should never demand evidence regarding actual malice. One can conceive of cases where the gist of the anonymous accusation has been so widely reported as true that the Doe’s repetition of the assertion ought to be protected even if the plaintiff avers that the statement is false. Consider, for example, an anonymous statement that William Jefferson Clinton had sex with a White House intern. A sworn denial that Clinton had “sexual relations with that woman” might well create a prima facie case on falsity, but in those circumstances the Doe should be able to argue that the lack of actual malice is sufficiently clear in light of the broad public record that no subpoena should be enforced.

<sup>68</sup> *Levy*, *supra* note 3, at 3-4.

<sup>69</sup> *Cahill*, 884 A.2d 451.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 460-64.

<sup>72</sup> *Id.* at 461.

<sup>73</sup> *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 245-46 (Ct. App. 2008); *Solers v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *In re Does* 1-10, 242 S.W.3d 805, 821 (Tex. App. 2007).

<sup>74</sup> *Mobilisa, Inc. v. Doe* 1, 170 P.3d 712, 720 (Ariz. Ct. App. 2007); *In re Ind. Newspapers, Inc.*, 963 N.E.2d 534, 552 (Ind. Ct. App. 2012); *Indep. Newspapers, Inc.*

one other state adopted a *Cahill*-like standard, while not reaching the First Amendment issue, finding it unnecessary in light of the state's rules governing petitions for precomplaint discovery to identify possible defendants.<sup>75</sup> A plurality opinion in one other state, ruling outside the

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v. Brodie, 966 A.2d 432, 456-57 (Md. 2009); *Mortg. Specialists, Inc. v. Implode Explode Heavy Indus., Inc.*, 999 A.2d 184, 193 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430, 445 (Pa. Super. Ct. 2011). Before *Pilchesky* set the rule for Pennsylvania, a trial court decision in that state, *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 MARCH TERM 2004, 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006), was widely but incorrectly cited as establishing a motion to dismiss standard. A law firm sued JPA, a Philadelphia company, and its principal official, Pantelidis, for libel based on public accusations about Klehr Harrison, such as its lawyers were thieves, and that they lied to the court in the course of representing a client in litigation against JPA. *Id.* at \*1-3. Klehr Harrison alleged that in addition to accusations made in its own name, JPA had created a guestbook where JPA had itself posted additional accusations against Klehr Harrison and specifically induced others to post accusations. *Id.* In response to written discovery requests, Pantelidis refused to answer questions about whether he knew the identity of the guestbook posters and whether he himself had posted the comments. *Id.* at \*3. The court authorized discovery for that reason, indicating that, in context, "a reasonable inference can be drawn that Pantelidis either was the author of the posts and/or directed that the entries be posted to the Website." *Id.* at \*1 n.1, \*10. Even on such facts, the court decided:

[I]n the event that a plaintiff pleads a superficial claim against the defendant, the defendant may oppose the discovery request by establishing that he or she is entitled to summary judgment. This court believes there is merit to . . . this "defensive" summary judgment standard. It would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of its claim, or at least all elements which should be in the plaintiff's, rather than the defendant's possession[.] This standard would, therefore, provide an effective check that would tend to limit discovery to those cases where the plaintiff had a bona fide claim.

*Id.* at \*9 (footnote omitted) (internal quotation marks omitted). *Klehr Harrison* drew the "'defensive' summary judgment standard" from a law review article by *Dendrite* lawyer Michael Vogel, who similarly accepted the first four requirements of *Dendrite* but took exception to the balancing test because, among other reasons, it gives too much discretion to trial judges. Vogel, *supra* note 3, at 849-51.

<sup>75</sup> *Stone v. Paddock Publ'n, Inc.*, 961 N.E.2d 380, 388-90 (Ill. App. Ct. 2011) (citing *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010)) (finding it unnecessary to apply the First Amendment to a petition for prelitigation discovery because Illinois rules already require a verified complaint, specification of defamatory words, determination that a valid claim was stated, and notice to Doe). I am skeptical that these state rules are as protective as the First Amendment would be, in part because I have seen some of the prelitigation discovery petitions that apparently pass muster in that state, and their specification of the claims can be maddeningly vague.

Internet context, also treated state law as providing sufficient protection.<sup>76</sup>

Various federal district courts have lined up either with the full set of *Dendrite* requirements<sup>77</sup> or the four *Cahill* requirements without express equitable balancing;<sup>78</sup> some have indicated that they did not

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*E.g.*, Houlihan Smith & Co. v. Forte, No. 10 CM 08717 (Ill. Cir. Ct., Cook Cnty., Mar. 2, 2010). Moreover, if the standard for discovery arises under the First Amendment, review of orders granting discovery of the identity of anonymous speakers (assuming there is appellate jurisdiction) would be de novo under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

<sup>76</sup> *Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006), was a non-Internet case in which a political candidate sued a political organization over a leaflet, written by several unidentified members, that denounced the candidate for her relationship with a recently indicted political leader. *Id.* at 677-79. After the known defendant was sanctioned for lying under oath to avoid giving information identifying the other anonymous authors, the parties settled the case on terms that allowed Rongstad to appeal. *Id.* at 681-82. On appeal, he presented an argument, not made below, that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions. *Id.* at 684-85. A plurality opinion joined by only two of the four justices participating in that case stated that Wisconsin's detailed pleading requirement met the First Amendment concerns raised by the court in *Cahill*. *Id.* at 687. However, one of the other justices concurred on other grounds but declined to reach the First Amendment issues; the fourth justice dissented on First Amendment grounds; and three justices disqualified themselves. *Id.* at 696-701. The plurality opinion does not state Wisconsin law because a majority of justices must join an opinion for it to "have any precedential value." *State ex rel. Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 661 N.W.2d 884, 888 (Wis. Ct. App. 2003); *Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 102 n.11 (Wis. 1997). Moreover, *Cahill* was decided after briefing was complete, and it is not clear that any party argued for the application of *Cahill*'s summary judgment standard, not to speak of *Dendrite*'s balancing standard.

<sup>77</sup> *See, e.g.*, *Art of Living Found. v. Does 1-10*, No. 10 CV 05022 LHK, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011); *Koch Indus., Inc. v. Does 1-25*, No. 2:10CV1275DAK, 2011 WL 1775765 (D. Utah May 9, 2011); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). *Fodor v. Doe* followed *Highfields* but treated it like a *Cahill* case, ignoring its express balancing prong. *Fodor v. Doe*, No. 3:10 CV 0798 RCJ (VPC), 2011 WL 1629572, at \*3-4 (D. Nev. Apr. 27, 2011).

<sup>78</sup> *See, e.g.*, *Doe I v. Individuals*, 561 F. Supp. 2d 249, 255 (D. Conn. 2008); *London Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 164 n.12 (D. Mass. 2008); *Alvis Coatings, Inc. v. Does 1-10*, No. 3L94 CV 374-H, 2004 WL 2904405, at \*3 (W.D.N.C. Dec. 2, 2004); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 563-64 (S.D.N.Y. 2004). One pre-*Dendrite* decision set forth a motion to dismiss

need to choose between the two approaches because neither was satisfied on the facts of the case.<sup>79</sup>

The fifth balancing stage of the *Dendrite* test is, to this author's mind, an important one precisely because it enables courts to apply the test to a wide range of circumstances while taking the individualized circumstances of each case into account.<sup>80</sup> For example, although any Doe subpoena threatens to deprive the previously anonymous speaker of the right to remain anonymous, in some cases the speaker stands to lose more than a theoretical interest, insofar as identifying the speaker may expose her to a significant likelihood of adverse private consequences.<sup>81</sup> On the other hand, sometimes it is the plaintiff that has an interest that is particularly strong because there is an especially high likelihood of significant damage to the plaintiff.<sup>82</sup> A delay in obtaining relief may be particularly damaging, such as in circumstances where injunctive relief is not a legally permissible remedy.<sup>83</sup> And in some cases, the First Amendment protection for a particular form of speech is particularly low;<sup>84</sup> this is another aspect of the controversy that the court can weigh in the balancing stage of the *Dendrite* analysis.<sup>85</sup>

The *Dendrite* balancing stage is particularly apt for a ruling on a motion to quash a Doe subpoena because that ruling is analogous to a preliminary injunction proceeding, in which the analysis rests on princi-

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standard but, in fact, took evidence into account. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *supra* notes 59-60.

<sup>79</sup> See *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1215 (W.D. Wash. 2010); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009). The early decision in *In re Baxter* cited *Dendrite* as the best approach of those previously decided cases but ultimately settled on "a reasonable probability or a reasonable possibility of recovery" standard, noting its concern about the difficulty of establishing a prima facie case on actual malice without being able to identify the defendant. *In re Baxter*, No. 01 00026 M, 2001 WL 34806203, at \*12 (W.D. La. Dec. 20, 2001).

<sup>80</sup> See *Dendrite Int'l, Inc.*, 775 A.2d at 760-61.

<sup>81</sup> See *id.* at 766.

<sup>82</sup> See *id.*

<sup>83</sup> Preliminary injunctions are never permitted in defamation cases, see *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971), and many jurisdictions flatly bar injunctions against repetition of defamation on the ground that "equity will not enjoin a defamation," see *Willing v. Mazzocone*, 393 A.2d 1155, 1159 (Pa. 1978).

<sup>84</sup> See discussion *infra* Part III.

<sup>85</sup> See *Dendrite Int'l, Inc.*, 775 A.2d at 760.

ples of an early look at the merits of the parties' dispute.<sup>86</sup> In every case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury because once the speaker's name becomes generally available, his anonymity cannot be recovered.<sup>87</sup> If the equities balance more strongly in favor of one party, the court can impose a more demanding or less demanding standard for the evidence needed to identify the defendant and hence to move forward with the litigation.<sup>88</sup> Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint.<sup>89</sup> Plaintiffs can renew their motions after submitting more evidence.<sup>90</sup>

Although many state appellate courts have addressed the issue of Doe subpoenas over the past twelve years, it is only in the past couple of years that the issue has started to surface in the federal appellate courts.<sup>91</sup> I discuss those cases next.

## II. NINTH CIRCUIT: DOES *DENDRITE* HAVE A NONCOMMERCIAL SPEECH EXCEPTION?

The United States Court of Appeals for the Ninth Circuit has recently produced a pair of decisions that give anonymous speakers engaged in commercial speech less protection against subpoenas than speakers engaged in other categories of speech, although the decisions do not specify what level of protection such speakers should receive.<sup>92</sup> The leading case is *In re Anonymous Online Speakers*,<sup>93</sup> which arose

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<sup>86</sup> See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>87</sup> See *In re Anonymous Online Speakers (Anonymous II)*, 661 F.3d 1168, 1172 (9th Cir. 2011), *withdrawing and replacing In re Anonymous Online Speakers (Anonymous I)*, 611 F.3d 653, 656 (9th Cir. 2010); *Dendrite Int'l, Inc.*, 775 A.2d at 765.

<sup>88</sup> See *Dendrite Int'l, Inc.*, 775 A.2d at 760-61.

<sup>89</sup> See *id.* at 770-71.

<sup>90</sup> See *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 971 (N.D. Cal. 2005).

<sup>91</sup> See, e.g., *Anonymous II*, 661 F.3d 1168; *Koch Indus. v. Does*, No. 2:10CV1275DAK, 2011 WL 1775765 (D. Utah May 9, 2011); *Fodor v. Doe*, No. 3:10-CV-0798-RCJ (VPC), 2011 WL 1629572 (D. Nev. Apr. 27, 2011); *Highfields Capital Mgmt.*, 385 F. Supp. 2d 969; *Dendrite Int'l, Inc.*, 775 A.2d 756.

<sup>92</sup> See *Anonymous II*, 661 F.3d at 1173; *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F. App'x 431, 432 (9th Cir. 2011).

<sup>93</sup> See generally *Anonymous II*, 661 F.3d 1168.



out of acrimonious litigation between two business rivals, Quixtar, a company formerly known as Amway, and Signature Management TEAM (TEAM), a company formed by former Amway sales operators.<sup>94</sup> Quixtar alleged that TEAM was running an online “smear campaign,” pointing in part to a series of blogs and message boards that appeared to be part of TEAM’s operation.<sup>95</sup> During a deposition, TEAM’s online manager (Dickie), citing the First Amendment, refused to say whether he knew the identities of anonymous speakers who had created anti-Quixtar blogs or other criticism of Quixtar online and refused to say whether he himself had posted anonymously or whether TEAM was somehow involved in the critical material.<sup>96</sup> The magistrate ordered Dickie to answer questions about whether he or other TEAM employees, managers, and leaders had posted the alleged tortious material, and both Dickie and TEAM sought review.<sup>97</sup>

The district judge canvassed the various tests for enforcing Doe subpoenas and ruled that the prima facie evidence test, as described in *Cahill*, was the proper standard to adjudicate whether the court should grant discovery,<sup>98</sup> but held that, in light of Dickie’s refusal to discuss his own involvement or to say whether other defendants’ personnel were involved, it would not be appropriate to recognize defendants’ standing to object to the discovery based on the First Amendment rights of the anonymous speakers.<sup>99</sup> The judge ordered defendants to give notice to the Does, indicating that in response to motions to quash from the re-

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<sup>94</sup> The factual section of the Ninth Circuit’s opinion is remarkably cursory; the facts reported here are drawn largely from the only reported district court decision in the case. *See Quixtar v. Signature Mgmt. TEAM, LLC*, 566 F. Supp. 2d 1205, 1217 (D. Nev. 2008), *aff’d in part and vacated in part sub nom. Anonymous II*, 661 F.3d at 1172.

<sup>95</sup> *See Anonymous II*, 661 F.3d at 1171-72.

<sup>96</sup> *See id.*

<sup>97</sup> *See Quixtar*, 566 F. Supp. 2d at 1209-10.

<sup>98</sup> *See id.* at 1211-14, 1216.

<sup>99</sup> *Id.* at 1213-16 (citing *Matrixx Initiatives, Inc. v. Doe*, 42 Cal. Rptr. 3d 79 (Ct. App. 2006) (stating that the court denied standing to a third party who ran a company by which allegedly tortious messages were posted to assert the rights of the posters, where the third party refused to say whether or not he was the Doe)).

sponsible parties, the court would decide whether Quixtar had met the *Cahill* test.<sup>100</sup>

After five Does sought protection from the trial court, the trial court directed Dickie to identify three of them, while holding that identifying two of the Does would violate their First Amendment rights.<sup>101</sup> The three Does whom Dickie was to identify and Quixtar cross-petitioned for writs of mandamus overturning the respective parts of the order that disadvantaged them.<sup>102</sup> The Ninth Circuit denied both petitions,<sup>103</sup> granted rehearing, and reissued an opinion that reached the same result but based on subtle but significant changes in its reasoning.<sup>104</sup>

In its initial ruling, the court began by canvassing Supreme Court decisions about anonymous speech, noting that the right to speak is not unlimited and that the degree of protection varies according to the circumstances and type of speech.<sup>105</sup> Commercial speech, the court said, enjoys only a limited measure of protection.<sup>106</sup> The court, in a separate paragraph citing the *Central Hudson* test for commercial speech, explained that the Internet comments in the case before the court were “best described as types of ‘expression related solely to the economic interests of the speaker and its audience’ and are thus properly categorized as commercial speech.”<sup>107</sup> The court reasoned that “[t]he claimed disparagement goes to the heart of Quixtar’s commercial practices and its business operations. However, this characterization alone does not determine the First Amendment protections for the anon-

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<sup>100</sup> *Id.* at 1216. Given these facts, it is not at all clear that *Cahill* (or *Dendrite*) would have been the appropriate test. Quixtar did not name the Does as defendants, and the apparent purpose of the discovery was not to add new defendants to the case, but to obtain additional evidence to support Quixtar’s claims against TEAM, its business rival. *Id.* The *2TheMart* test appears to have provided the proper frame of reference. *Id.* at 1214.

<sup>101</sup> *Anonymous I*, 611 F.3d 653, 656 (9th Cir. 2010), *withdrawn and replaced by Anonymous II*, 661 F.3d 1168.

<sup>102</sup> *Anonymous I*, 611 F.3d at 662.

<sup>103</sup> *Id.*

<sup>104</sup> *See Anonymous II*, 661 F.3d 1168.

<sup>105</sup> *Anonymous I*, 611 F.3d at 658-61.

<sup>106</sup> *Id.* at 659.

<sup>107</sup> *Id.* at 657 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980)).

ymous commercial speech central to this case”<sup>108</sup> because *McIntyre* recognizes that an author’s decision to remain anonymous is part of the freedom of speech.<sup>109</sup>

Having decided that the speech was commercial, the court turned to the decision before it.<sup>110</sup> After noting the limited scope of review in a mandamus petition and the general reluctance to review discovery disputes, the court said, “Anonymous online speech is an increasingly important issue in the commercial context,” and cited non-Internet cases, one from the Sixth Circuit and one from the Fourth Circuit, which had addressed discovery into the identity of anonymous commercial speakers.<sup>111</sup> The court then canvassed the standards for online Doe subpoenas, noting the *2TheMart* standard as well as the motion to dismiss standard as in *Seescandy.com* and the prima facie showing standard from cases such as *Cahill*.<sup>112</sup> Without any mention of *Dendrite*, the court said that *Cahill* represents “the most exacting standard,”<sup>113</sup> but then noted that, given the mandamus context, an appellate court could not overturn the trial judge’s discovery decisions absent clear error.<sup>114</sup> In that regard, the court said that because the anonymous speech in *Cahill* (criticisms of an elected political official) “involved political speech, that court’s imposition of a heightened standard is understandable.”<sup>115</sup> But, “[i]n the context of commercial speech balanced against a discretionary discovery order . . . *Cahill*’s bar extends too far.”<sup>116</sup> The court decided that the nature of the speech should drive the court’s choice of a standard to balance the rights of anonymous speakers in discovery disputes because “commercial speech should be afforded less protection than political, religious, or literary speech.”<sup>117</sup> Without saying anything about what standard courts *should* apply to

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<sup>108</sup> *Id.*

<sup>109</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

<sup>110</sup> *Anonymous I*, 611 F.3d at 658.

<sup>111</sup> *Id.* at 659 (citing *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998) and *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir. 2009)) (addressing discovery into anonymous commercial speakers).

<sup>112</sup> *Id.* at 660.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 661.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

subpoenas to identify commercial speakers, the court said the decision to impose “a high hurdle for disclosure” was within the district court’s purview with respect to the three Does who had sought mandamus, and therefore, the district court did not clearly err in its order.<sup>118</sup>

Some aspects of the Ninth Circuit’s original reasoning were unsupported.<sup>119</sup> Precedent in the Ninth Circuit and elsewhere squarely rejects the argument that commercial speech includes criticism of a company, even criticism that someone intends the company’s customers to see and to harm the company’s business.<sup>120</sup> The Does moved for reconsideration, arguing, among other things, that Quixtar disputed the Does’ speech at the district court level.<sup>121</sup> The Ninth Circuit thereupon revised its opinion by eliminating the reasoning about how the Does’ speech was commercial.<sup>122</sup> But in the part of its opinion captioned “No Clear Error,” the Ninth Circuit drew a line distinguishing *Cahill* due to “*Cahill*’s bar extend[ing] too far” when commercial speech is “balanced against a discretionary discovery order,” however, the Ninth Circuit never explained why the speech was commercial.<sup>123</sup>

The Ninth Circuit took this approach another step further in a subsequent unpublished opinion.<sup>124</sup> In that case, the plaintiff, SI03,

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see, e.g., *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004).

<sup>120</sup> *Id.* Under the Ninth Circuit’s theory, Consumers Union’s reviews of the Bose speaker system would be commercial speech, which is certainly contrary to the theory on which the Supreme Court proceeded in *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 511 (1984) (analyzing whether the party making the statements knew whether the statements made were true or false); see also *CPC Int’l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462-63 (4th Cir. 2000) (“[T]he speech on the Skippy web site did not propose a commercial transaction. The web site simply tells one woman’s story about her family and recounts her view of CPC’s actions and the legal events surrounding the trademark SKIPPY.”).

<sup>121</sup> See *Quixtar Inc. v. Signature Mgmt. TEAM, LLC*, 566 F. Supp. 2d 1205, 1211 (D. Nev. 2008), *aff’d in part and vacated in part sub nom. Anonymous II*, 661 F.3d 1168, 1172 (9th Cir. 2011).

<sup>122</sup> Compare *Anonymous I*, 611 F.3d at 657-58, with *Anonymous II*, 661 F.3d at 1173-74 (showing that analysis was removed to reflect Ninth Circuit precedent).

<sup>123</sup> *Anonymous II*, 661 F.3d at 1177.

<sup>124</sup> See *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F. App’x 431, 432-33 (9th Cir. 2011).

sued in an Illinois federal court over anonymous postings on several message boards about the SI03's nutritional supplements, and SI03 served a subpoena from the district of Idaho seeking to identify the authors of the derogatory messages.<sup>125</sup> The court below denied discovery, so review of the final order was by appeal, effectively avoiding the limited scope of mandamus review.<sup>126</sup> But the court's disposition was even more summary, and the analysis less satisfying than in the *Quixtar* case.<sup>127</sup> The court began by noting that cases involving commercial speech call for a less-protective standard for disclosure, in that if the speakers work for plaintiff's competitors, "there is good reason to suspect that their harsh criticisms were intended to promote other, competing products," however, "[t]o characterize the speech at issue here, we must know the true identities of the speakers."<sup>128</sup> And the court could not decide whether the speakers were agents of the competitors until their identities were revealed.<sup>129</sup> Thus, without a "clear indication that the speech in question [was] *not* commercial," the Ninth Circuit held that the court below erred by applying the *Cahill* standard without *first* determining who the speakers were and their relationship to the plaintiff.<sup>130</sup>

To be sure, there is room for debate about whether the First Amendment should protect the right to engage in commercial speech anonymously.<sup>131</sup> At least some of the reasons why commercial speech receives a lesser degree of First Amendment protection undercut a

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<sup>125</sup> Brief of Appellant at 1, *SI03, Inc.*, 441 F. App'x 431 (No. 10-35308), 2010 WL 6776004 at \*2.

<sup>126</sup> *SI03, Inc.*, 441 F. App'x at 431.

<sup>127</sup> *Compare id.* at 432-33 (holding that the district court should have determined the type of speech at issue before determining a standard for disclosure of identity), *with Quixtar Inc. v. Signature Mgmt. TEAM, LLC*, 566 F. Supp. 2d 1205, 1216-17 (D. Nev. 2008) (holding that unless the exact statement at issue is in evidence, then the plaintiff should not be afforded discovery to determine the identity of any anonymous author), *aff'd in part and vacated in part sub nom. Anonymous II*, 661 F.3d at 1172.

<sup>128</sup> *SI03, Inc.*, 441 F. App'x at 432.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 432-33 (stating that the court provided some protection for the Doe defendants in this case by requiring that the disclosures concerning the defendants' relationships to the plaintiff's competitors remained limited to only attorneys' eyes until the anonymity issue was fully resolved). *Id.* at 432 n.1.

<sup>131</sup> *See Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (discussing how trial courts must balance an anonymous speaker's First

claimed right to engage in anonymous commercial speech.<sup>132</sup> The *Dendrite* standard is motivated in part by concern about avoiding a chilling effect on speech, but because commercial speech is “the offspring of economic self-interest, [it] is a hardy breed of expression,”<sup>133</sup> therefore, it is less likely that the threat of regulation will chill this speech.<sup>134</sup> Moreover, insofar as protection for commercial speech is motivated by the value that the speech has for consumers in a free market society,<sup>135</sup> the fact that identification of the speaker’s commercial motives for its statements might be a valuable datum for consumers supports giving less protection to anonymity.<sup>136</sup> On the other hand, a third reason for giving commercial speech less protection cuts against applying the lesser protection doctrine to cases like the Quixtar/TEAM dispute.<sup>137</sup> Courts sometimes say commercial speech merits less protection because “the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.”<sup>138</sup> When, however, the speech is about a competitor’s products and services, this rationale for less protection does not apply.<sup>139</sup>

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Amendment rights with the rights of plaintiffs seeking redress for tortious conduct of the speaker).

<sup>132</sup> See *Anonymous II*, 661 F.3d 1168, 1177 (9th Cir. 2011) (discussing commercial speech and the First Amendment protection it receives in comparison to other types of speech).

<sup>133</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980).

<sup>134</sup> See *id.*; 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996).

<sup>135</sup> See *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (discussing the value of information in a commercial marketplace).

<sup>136</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (discussing First Amendment protection in relation to a speaker’s motives in a commercial advertisement).

<sup>137</sup> See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (suggesting that another reason for less protection on commercial speech is that such speech is already calculated, accurate, and reliable); *Quixtar v. Signature Mgmt. TEAM, LLC*, 566 F. Supp. 2d 1205, 1215-16 (D. Nev. 2008), *aff’d in part and vacated in part sub nom. Anonymous II*, 661 F.3d at 1172.

<sup>138</sup> *Id.* at 381.

<sup>139</sup> See Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309, 327 n.78 (1993) (discussing the classification of speech about a competitor’s services or products).

But even assuming the less-protected status of commercial speech provides a reason why courts should give speaker anonymity less protection, it does not provide a reason to change the standard by which courts should assess subpoenas seeking to identify anonymous speakers when the plaintiff alleges that the critical speech is commercial.<sup>140</sup> The Arizona Court of Appeals rejected such an argument in *Mobilisa v. Doe*, where the plaintiff sued over the anonymous forwarding of an internal company e-mail that showed the company's CEO had a personal relationship with a woman to whom he was not married.<sup>141</sup> The plaintiff's claims included computer fraud, access to stored communications, and trespass to chattel; plaintiff argued that the *Dendrite* and *Cahill* tests were appropriate only for tort claims, such as defamation.<sup>142</sup> But the court disagreed, reasoning that if the standard changes with the type of claim in the suit, then plaintiffs would have a perverse incentive to change the label on the claim if their real reason for suing was unmasking or intimidating the defendant, rather than genuinely expecting to prevail on the merits.<sup>143</sup> The court also noted that the chilling effect on possibly protected speech would be the same regardless of the cause of action, and that using the same standard for all causes of action "would both permit ease of application in the [trial] court and better enable consistent decision making."<sup>144</sup> Consistent with *Mobilisa's* holding, courts have applied the *Dendrite* or *Cahill* standard to subpoenas seeking to identify defendants being sued for a wide variety of claims, including various torts that amount to defamation claims under the principles of *Hustler v. Falwell*,<sup>145</sup> trademark infringement,<sup>146</sup> dis-

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<sup>140</sup> See *Mobilisa, Inc. v. Doe* 1, 170 P.3d 712, 719 (Ariz. Ct. App. 2007) (holding that courts should use one single test in evaluating a discovery request to identify an anonymous Internet speaker).

<sup>141</sup> *Id.* at 716, 719.

<sup>142</sup> *Id.* (the CEO himself presumably made a tactical choice not to bring his own claim for invasion of privacy or defamation, perhaps to avoid the defensive discovery that such claims could warrant).

<sup>143</sup> *Id.* at 719.

<sup>144</sup> *Id.*

<sup>145</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that a plaintiff bringing a claim that relies on harm to reputation as a key element cannot evade the protections of the First Amendment that apply to defamation claims); see also *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008) (applying the *Dendrite* and *Cahill* standards to claims of negligent and intentional infliction of emotional distress, as well as defamation); *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231,

closure of confidential information or breach of privacy,<sup>147</sup> and other claims.<sup>148</sup>

Moreover, changing the standard depending on whether the plaintiffs claim the Does are involved in commercial speech is conceptually inconsistent with the way every other court has gone about the adjudication of such subpoena proceedings.<sup>149</sup> The First Amendment does not protect false, defamatory speech that meets the *New York Times v. Sullivan* standard for imposing liability, but that does not mean that whenever plaintiffs allege defamation the standard changes for deciding whether to allow a subpoena to identify an alleged defamer.<sup>150</sup> Instead, the elements of a claim for defamation change depending on whether the plaintiff is a public figure, as well as a variety of other considerations, and those legal considerations can affect the court's de-

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246 (Ct. App. 2008) (determining that among such claims held subject to the *Dendrite* and *Cahill* standards are the torts of outrage and intentional interference with contract or with business relations); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009) (determining that *Dendrite* is the appropriate standard in conspiracy and defamation cases); *Pilchesky v. Gatelli*, 12 A.3d 430, 442 (Pa. Super. Ct. 2011) (applying the *Dendrite* and *Cahill* standards to claims of defamation and intentional infliction of emotional distress).

<sup>146</sup> See *Koch Indus., Inc. v. Does 1-25*, No. 2:10CV1275DAK, 2011 WL 1775765, at \*1, \*10 (D. Utah May 9, 2011) (applying the *Dendrite* and *Cahill* standards to a trademark infringement lawsuit); see also *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 976-77 (N.D. Cal. 2005) (discussing the elements of trademark infringement).

<sup>147</sup> See *In re Does 1-10*, 242 S.W.3d 805, 821-22 (Tex. App. 2007) (applying the *Cahill* standard to a disclosure of confidential information and defamation lawsuit); see also *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 778 (N.J. Super. Ct. App. Div. 2001) (applying *Dendrite* to a breach of privacy claim).

<sup>148</sup> See *Best W. Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at \*1 (D. Ariz. July 25, 2006) (involving claims of breach of contract and of fiduciary duty as well as defamation, unfair competition, and trademark infringement); *Immunomedics*, 775 A.2d at 774 (involving an alleged breach of a confidentiality agreement and disclosure of trade secrets).

<sup>149</sup> See *In re Anonymous Online Speakers (Anonymous II)*, 661 F.3d 1168, 1176-77 (9th Cir. 2011); John P. Borger et al., *Recent Developments in Media, Privacy, and Defamation Law*, 46 TORT TRIAL & INS. PRAC. L.J. 483, 491-92 (2011).

<sup>150</sup> See *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 759-62 (N.J. Super. Ct. App. Div. 2001). But see *Anonymous II*, 661 F.3d at 1176-77.



cision under the standard.<sup>151</sup> The same should be true when the plaintiff's claim is that an anonymous critic had commercial motives for the criticism—the court must “view the evidence presented through the prism of the substantive [law] . . . .”<sup>152</sup>

In my experience, anonymous speech cases often involve claims filed over commercial *criticism*, not commercial speech generally.<sup>153</sup> Sock puppetry—sowing online fora with comments that purport to be from satisfied consumers, but that have actually been placed by the praised individual<sup>154</sup> or by a company that has contracted to improve a company's online profile by burying criticisms in praise—is at least as big a problem as online criticism posted by rivals.<sup>155</sup> And in theory, individuals could bring false advertising claims for simulated praise based on state uniform deceptive trade practice laws,<sup>156</sup> just as companies could bring false positive advertising claims over anonymous praise based on section 43(a)(1)(B) of the Lanham Act.<sup>157</sup> But in twelve years of litigating Doe subpoenas and watching such cases, I have yet to see a single such subpoena proceeding brought by a private

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<sup>151</sup> See *Cahill*, 884 A.2d at 463-64.

<sup>152</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

<sup>153</sup> See *Paul Alan Levy*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=337> (last visited Nov. 3, 2012); see, e.g., *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 674 (9th Cir. 2005).

<sup>154</sup> See, e.g., Carolyn Kellogg, *The Furor Over 'Sock Puppet' Amazon Book Reviews*, L.A. TIMES, Sept. 4, 2012, <http://www.latimes.com/features/books/jacketcopy/la-jc-the-furor-over-sock-puppet-amazon-book-reviews-20120904,0,5360238.story>.

<sup>155</sup> See generally Pedram Tabibi, *How to Respond to Fake Social Media Reviews*, YOUNG ISLAND (Sept. 21, 2012), <http://libn.com/youngisland/2012/09/21/how-to-respond-to-fake-social-media-reviews/> (discussing an increase of companies posting false reviews).

<sup>156</sup> See generally *Smith v. Prime Cable of Chi.*, 658 N.E.2d 1325, 1337 (Ill. App. Ct. 1995) (discussing the type of relief that a party can bring under the Uniform Deceptive Trade Practices Act).

<sup>157</sup> 15 U.S.C. § 1125(a)(1)(B) (2006). Because “competitive injury” is required, consumers lack standing to enforce this provision. *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995). See generally *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 504 (5th Cir. 2000) (holding “that the slogan ‘Better Ingredients. Better Pizza[.]’” was not actionable under the Lanham Act because it was not a false or misleading statement); Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 FRANCHISE L.J. 187, 187, 189 (2002) (discussing the causes of action that a party can bring under the Lanham Act).

party over public praise.<sup>158</sup> Individual consumers generally lack either the financial resources or the incentives to file lawsuits over anonymous praise, in the hope that the praised business will turn up in a discovery jackpot.<sup>159</sup> Additionally, although business litigation over their known competitors' false positive advertising is all too common under section 43(a)(1)(B) of the Lanham Act,<sup>160</sup> companies apparently have bigger fish to fry than dissipating their assets in tracking down the sources for their rivals' anonymous praise.<sup>161</sup> Consequently, a rule that automatically assigns a more permissive standard for deciding whether to identify anonymous critics when the plaintiff alleges commercial motives will inevitably skew the market of ideas to make businesses look better artificially.<sup>162</sup>

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<sup>158</sup> See, e.g., *Bosley Med. Inst., Inc.*, 403 F.3d at 674. Such an unfair or deceptive practices act theory is alleged in a lawsuit against a dentist who uses a standardized agreement under which patients assign the copyright in any online commentary they publish. Class Action Complaint for Declaratory and Injunctive Relief and Individual Action for Declaratory Relief and Damages at 2, *Lee v. Makhnevich*, No. 1:11-cv-08665-PAC (S.D.N.Y. Nov. 29, 2011), available at <http://www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf>. But no Does are involved. *Id.*

<sup>159</sup> See generally Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (discussing how litigation is expensive and distracts people from their normal activities); Reichman & Cannady, *supra* note 157, at 194 (discussing the type of monetary relief available for claims of false advertising); Alison Flood, *Sock Puppets and Fake Reviews: Publish and Be Damned*, GUARDIAN, Sept. 4, 2012, <http://www.guardian.co.uk/books/2012/sep/04/sock-puppetry-publish-be-damned> (commenting on the length of time required to discover false praise).

<sup>160</sup> 15 USC § 1125(a)(1)(B) (2006); see Reichman & Cannady, *supra* note 157, at 187-89.

<sup>161</sup> See, e.g., *Bosley Med. Inst., Inc.*, 403 F.3d at 675.

<sup>162</sup> See *In re Anonymous Online Speakers (Anonymous II)*, 661 F.3d 1168, 1176-77 (9th Cir. 2011); *Doe v. U.S. SEC*, No. C 11 80209 CRB, 2011 WL 5600513, at \*1 (N.D. Cal. Nov. 17, 2011); Tabibi, *supra* note 155. Government agencies such as the Securities and Exchange Commission (SEC) and Federal Trade Commission (FTC) commonly pursue cases involving false or misleading commercial speech that praises particular items for sale. See *Nat'l Comm'n On Egg Nutrition v. FTC*, 570 F.2d 157, 158 (7th Cir. 1978); *U.S. SEC*, 2011 WL 5600513, at \*1. When it is a government agency that seeks to identify an anonymous speaker in pursuit of its law enforcement duties, the calculus may well be different because administrative subpoenas are typically assessed pursuant to a significant presumption of regularity, and it is much less likely that the subpoena is being pursued in aid of extrajudicial self-help. See *U.S. SEC*, 2011 WL 5600513, at \*3-4; Levy, *supra* note 3, at 1, 3. For example, when the SEC pursues a subpoena to identify the source of puffery about a stock in a "pump and dump" investigation, courts deny motions to quash regardless of the possible

Instead of changing the standard for such subpoenas, courts could serve the same objective—allowing an injured company to obtain judicial redress for viable grievances—by incorporating the issue of commercial speech into the standard.<sup>163</sup> When commercial speech is at issue, the elements of the plaintiff’s prima facie case are less stringent, so long as the plaintiff can show a reasonable basis for believing that the criticisms *are* commercial. In such cases, to the extent that there are indications that the speech is commercial, courts could treat the speech as having less value at the balancing stage, just as, implicitly, courts deciding whether to compel the identification of anonymous alleged downloaders of copyrighted musical recordings or movies have said that although speech is involved, it is speech of relatively little value.<sup>164</sup> Courts could treat commercial status as comparable to actual malice in public figure defamation cases, holding that this is an issue where the courts cannot expect the plaintiff to make a fully satisfactory showing without the opportunity to take some discovery about the defendant’s status.<sup>165</sup> But just as in defamation cases, the fact that the court excuses the plaintiff from making a showing on one issue need not excuse the plaintiff from making a showing on other elements of its claim, such as

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commercial speech angle simply because a federal investigation implicates a different standard. *See, e.g., U.S. SEC*, 2011 WL 5600513, at \*3, \*5-6. Similarly, the FTC does not pursue bloggers for violation of its endorsement guidelines. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2012); Jenna Greene, *FTC Reassures Bloggers Big Brother Isn’t Watching*, BLOG OF LEGAL TIMES (Oct. 14, 2009, 1:10 PM), <http://legaltimes.typepad.com/blt/2009/10/ftc-.html> (discussing an FTC investigation of anonymous praise for commercial products that presumably would not implicate the *Dendrite* standard independent of the fact that the agency proceeded on a commercial speech theory).

<sup>163</sup> *See Anonymous II*, 661 F.3d at 1177.

<sup>164</sup> *See Anonymous II*, 661 F.3d at 1177; *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004).

<sup>165</sup> *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005). While accepting as a general proposition that a plaintiff cannot be expected to prove a defendant’s state of mind without knowing the defendant’s identity, Nathan Gleicher proposes holding public figures to the standard of alleging detailed facts from which actual malice can be inferred. Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 356-57 (2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (“[P]laintiffs must ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.’” (citation omitted))).

the factual elements of harm or falsity, or the legal element of the statement being one of fact rather than opinion.<sup>166</sup>

Moreover, it is just too easy for a plaintiff to allege that criticism is commercial and to bring these cases mistakenly, albeit in good faith. Many business owners seem incapable of believing that anybody besides a competitor would criticize them, their company, or their product.<sup>167</sup> In my experience, this is particularly true of smaller businesses in highly competitive markets. Consequently, courts should not simply ratchet down the standard, or excuse the plaintiff from making at least *some* showing on the commercial character of speech, just because the plaintiff alleges that the Doe defendants are commercial rivals.<sup>168</sup>

In *Anonymous Online Speakers*, the reasons for suspecting commercial character of the speech might have included that the speech was apparently made on forums created by a commercial competitor and aimed at affiliates of that competitor.<sup>169</sup> Be that as it may, the court not only cited no basis for believing that the speech at issue in the case was commercial but also withdrew its only assertions about commercial character when its reasoning was challenged.<sup>170</sup>

The reasons for suspecting commercial purposes are even more abstruse in *SI03*.<sup>171</sup> The ease with which the Ninth Circuit assumed the possibility of commercial speech was, therefore, quite worrisome given the readily available alternatives.<sup>172</sup>

### III. SECOND AND FIFTH CIRCUITS: IS THERE A COPYRIGHT EXCEPTION?

Soon after the courts began to adjudicate Doe subpoenas in suits over critical messages and websites, there was a parallel set of lawsuits

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<sup>166</sup> See *id.* at 463-64.

<sup>167</sup> See *Anonymous II*, 661 F.3d at 1172, 1177; *Vision Media TV Grp., LLC v. Forte*, 724 F. Supp. 2d 1260, 1261-62 (S.D. Fla. 2010); *Hadeed Carpet Cleaning v. Doe*, No. CL 12003401 (Va. Cir. Ct., Alexandria Cnty., Nov. 19, 2012).

<sup>168</sup> See *Anonymous II*, 661 F.3d at 1171-72, 1177.

<sup>169</sup> *Id.* at 1171-72.

<sup>170</sup> *Id.* at 1177.

<sup>171</sup> *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F. App'x 431, 432 (9th Cir. 2011).

<sup>172</sup> See *id.*; *Anonymous II*, 661 F.3d at 1178.

alleging copyright infringement through the exchange of copyrighted recordings on file-sharing systems.<sup>173</sup> At first, the parties fought over specialized subpoenas served under section 512(h) of the Digital Millennium Copyright Act, which required clerks of federal district courts to issue subpoenas, even without a filed lawsuit, to ISPs requiring them to identify users who were storing infringing material on the ISPs' systems.<sup>174</sup> But in a series of test cases where the Recording Industry Association of America ("RIAA") sought such subpoenas on behalf of its member companies, the courts generally held that RIAA could not serve such subpoenas on ISPs that did nothing more than provide Internet access to and act as a conduit for communications between individual users who were employing file-sharing systems on their own computer equipment.<sup>175</sup>

Consequently, litigation over such subpoenas shifted to copyright infringement lawsuits, in which a collection of recording companies, represented by RIAA counsel, filed infringement lawsuits against scores or even hundreds of Doe Internet users whose only connection to each other was that they had accounts with the same ISP.<sup>176</sup> Once the subpoenaed party provided identifying information, an enforcement center created especially for these cases would contact the Doe defendants and demand the payment of thousands of dollars to settle the infringement lawsuit against each of them.<sup>177</sup> Although the actual damages from each infringement would have been quite small, the plaintiffs also sought statutory damages and attorneys' fees and demanded settlements based on the threat that, if they did litigate the case, each defendant might face judgments of many thousands of dollars.<sup>178</sup>

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<sup>173</sup> *In re Charter Comm'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771, 774 (8th Cir. 2005); *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

<sup>174</sup> *In re Charter Comm'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d at 776-77; *RIAA*, 351 F.3d at 1234-35.

<sup>175</sup> *See In re Charter Comm'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d at 778; *RIAA*, 351 F.3d at 1239.

<sup>176</sup> *See Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012) (showing wide effort to sue hundreds of individuals committing copyright infringement).

<sup>177</sup> *Id.* at 242.

<sup>178</sup> *Arista Records, LLC v. Does 1-27*, No. 07-162-B-W, 2008 WL 222283, at \*1 (D. Me. Jan. 25, 2008).

It is not clear that the plaintiffs were bringing suits to secure damages that would exceed the costs of the litigation program, so much as to communicate that file sharing was infringement and to deter continued infringement.<sup>179</sup>

Members of the public who used file-sharing systems to share digital copies of musical recordings were unlikely to have any valid defenses to infringement claims.<sup>180</sup> Moreover, well-established companies whose evidenced purpose was to stop infringement filed the actions instead of enabling extrajudicial remedies such as retaliation against the defendants, and these companies typically filed test cases and motions for discovery based on thorough affidavits.<sup>181</sup> Both facts give reason to hesitate about using the cases as test cases on the defense side to extend the realm of *Dendrite* into a new line of precedent cases.<sup>182</sup>

On the other hand, the widespread use of home wireless networks without adequate password protection means that it is entirely possible that users whose accounts were used to communicate with other file sharers over the Internet are themselves completely innocent of infringement.<sup>183</sup> Moreover, the fact that the initial cases were so well supported does not mean that subsequent infringement cases would continue to be well supported, if the courts did not set the right standard at the outset.<sup>184</sup> Concerned about the danger that plaintiffs would make mistakes in identifying alleged infringers in cases involving large numbers of unrelated defendants, the public interest groups that formed the CyberSLAPP Coalition to pursue justice for anonymous Internet speak-

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<sup>179</sup> Mick Haig Prods. E.K. v. Does 1-670, 687 F.3d 649, 652 n.2 (5th Cir. 2012) (citing Raw Films, Ltd. v. Does 1-32, No. 3:11cv532 JAG, 2011 WL 6182025, at \*3 (E.D. Va. Oct. 5, 2011)).

<sup>180</sup> *Arista Records, LLC*, 2008 WL 222283, at \*5.

<sup>181</sup> *See id.* at \*6.

<sup>182</sup> *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

<sup>183</sup> In *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012), plaintiff conceded that as many as thirty percent of all the names that the ISPs provided in response to Doe subpoenas in file-sharing cases are inaccurate because somebody other than the account holder shared the files.

<sup>184</sup> *See Dendrite Int'l, Inc.*, 775 A.2d at 760.

ers filed amicus briefs in selected music downloading cases.<sup>185</sup> They argued for the application of the *Dendrite* standard, as well as consideration of principles of joinder<sup>186</sup> (because unrelated tortfeasors must ordinarily be sued separately) and personal jurisdiction<sup>187</sup> (because the cases were filed where the ISP was located and not where the Does' IP addresses showed the Does were located).<sup>188</sup>

As the wave of RIAA litigation died down, a new wave of such cases began, in which a law firm representing a single movie company sued hundreds or even thousands of anonymous Internet users, alleging that they had used Bit Torrent systems to infringe copyright of a single

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<sup>185</sup> *Id.*; *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 342 (D.D.C. 2011).

<sup>186</sup> *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 342. We pressed that issue because of concern that, in a case involving hundreds of otherwise unrelated defendants, it is too easy for the court to overlook inadequate proof against truly innocent defendants because of concerns about the efficient processing of the case.

<sup>187</sup> FED. R. CIV. P. 12(b)(2). We pressed that issue because, in a litigation model based on the assumption that the parties will settle rather than litigate the case, the filing of a case hundreds or even thousands of miles from the home of the anonymous defendants creates an unfair pressure on an innocent defendant to settle the case because an individual is less likely to be able to find affordable counsel in a distant jurisdiction. Brief for The Electronic Frontier Found. et al. as Amici Curiae Supporting Third Party Time Warner Cable's Motion to Quash or Modify Subpoena at 4, *Call of the Wild Movie, LLC v. Does 1-358*, No. CA 1:10-cv-00455-RMU (D.D.C. June 2, 2010).

<sup>188</sup> Some districts have accepted these arguments. See *Fonovisa, Inc. v. Does 1-9*, No. 07-1515, 2008 WL 919701, at \*5 (W.D. Pa. Apr. 3, 2008); *Interscope Records v. Does 1-25*, No. 6:04 cv 197 Orl 22DAB, 2004 WL 6065737, at \*5 (M.D. Fla. Apr. 1, 2004) (holding that the "same transaction requirement requires joint action or liability on the part of the Defendants and is not satisfied by the fact that the Defendants accessed the songs through [the same] peer-to-peer network, or the fact that Defendant [sic] are 25 of the 2.1 million subscribers who access the Internet through [the same ISP]"); see also *LaFace Records, LLC v. Does 1-38*, No. 5:07-CV-298-BR, 2008 WL 544992, at \*2-3 (E.D.N.C. Feb. 27, 2008); *Arista Records v. Does 1-27*, No. 07-162-B-W, 2008 WL 222283, at \*6 n.5 (D. Me. Jan. 25, 2008); *BMG Music v. Does 1-4*, No. 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237, at \*5-6 (N.D. Cal. July 31, 2006); *Elektra Entm't Grp., Inc. v. Does 1-9*, No. 04 Civ. 2289(RWS), 2004 WL 2095581, at \*6-7 (S.D.N.Y. Sept. 8, 2004). Other courts have decided that it is premature to raise the issues at the subpoena stage, before the defendant has revealed her actual place of residence, *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 344-45, or before actual differences in defense arguments have emerged, *Digital Sin, Inc.*, 279 F.R.D. at 244. This Article, however, discusses only the *Dendrite* argument.

movie.<sup>189</sup> Unlike the RIAA cases, this new wave of cases has been filed by a small number of entrepreneurial law firms that plainly intended to use mass litigation to make money from the settlement process.<sup>190</sup> These law firms filed each case over a single movie and selected the court of filing solely based on the court's proximity to the law firm's office and without regard either to the residence of the filmmaker or to the likely location of the Does as revealed by their IP addresses.<sup>191</sup> The several ISPs who received such subpoenas moved to quash them, and the CyberSLAPP Coalition filed amicus briefs again raising the same three arguments as in the RIAA cases.<sup>192</sup>

In the past two years, appeals from decisions in both an RIAA case over alleged infringement of sound recordings, *Arista Records, LLC v. Doe 3*, and a case involving alleged infringement of an individual film, *MickHaig Productions v. Does 1-670*, reached the Second and Fifth Circuits, respectively.<sup>193</sup>

In *Arista Records*, thirteen recording companies brought suit in the Northern District of New York against sixteen students of the State University of New York at Albany (SUNY Albany), alleging that the anonymous defendants had used their school Internet access to download or distribute to the public various copyrighted musical recordings.<sup>194</sup> Following the RIAA's consistent practice in these cases, the plaintiffs accompanied their complaint with an exhibit (Exhibit "A") identifying the IP address of each defendant and specifying the titles of several copyrighted recordings from one or the other of the plaintiffs that the plaintiffs had observed at that defendant's IP address.<sup>195</sup>

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<sup>189</sup> See, e.g., *In re Charter Comm'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 778 (8th Cir. 2005); *Digital Sin, Inc.*, 279 F.R.D. at 241.

<sup>190</sup> *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649, 650 (5th Cir. 2012); *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 338; *Digital Sin, Inc.*, 279 F.R.D. at 240.

<sup>191</sup> *Mick Haig Prods. E.K.*, 687 F.3d at 650 (identifying over 600 unnamed persons after obtaining only their IP addresses without any further information); *Digital Sin, Inc.*, 279 F.R.D. at 241.

<sup>192</sup> *Arista Records, LLC*, 2008 WL 222283, at \*4-6; *Mick Haig Prods. E.K.*, 687 F.3d at 650.

<sup>193</sup> *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 110 (2d Cir. 2010); *Mick Haig Prods. E.K.*, 687 F.3d at 649.

<sup>194</sup> *Arista Records, LLC*, 604 F.3d at 113.

<sup>195</sup> *Id.* at 121-22.



Under the Federal Rules of Civil Procedure, discovery cannot begin before the Rule 26 discovery conference without leave of court.<sup>196</sup> Of course, without knowing who the defendants were, the plaintiffs could not hold that conference, so they moved for leave to take discovery from SUNY Albany to identify the defendants.<sup>197</sup> The plaintiffs attached an affidavit from an RIAA official attesting to the copyrighted status of the recordings, explaining the method used to tie the IP address to each recording, and verifying a review of the files to demonstrate the infringement that had occurred with respect to that recording (that is, listening to enough of the recording to verify that the file was, in fact, what its name made it appear to be).<sup>198</sup> The court granted the motion for discovery but ordered SUNY Albany to notify the Does of the subpoena.<sup>199</sup> Four of the Does moved to quash, claiming, among other things, that the First Amendment protected against enforcement of the subpoena because plaintiffs had neither pleaded in sufficient detail nor sufficiently shown evidence supporting the allegation that the Does had committed an infringement, and arguing as well that their alleged infringement was actually a fair use.<sup>200</sup> The district court denied their motion to quash, and Doe 3 appealed.<sup>201</sup>

The court began by agreeing that it had appellate jurisdiction.<sup>202</sup> Although discovery orders must commonly be challenged by disobeying them, being held in contempt, and then appealing the contempt order,<sup>203</sup> ISPs are generally unwilling to be held in contempt to protect the anonymity of a few students.<sup>204</sup> In light of this problem, the law of

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<sup>196</sup> FED. R. CIV. P. 26(d); *Arista Records, LLC*, 604 F.3d at 113.

<sup>197</sup> *Arista Records, LLC*, 604 F.3d at 113.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Arista Records, LLC v. Does 1-16*, No. 1:08 CV 765 (GTS/RFT), 2009 WL 414060, at \*2 (N.D.N.Y. Feb. 18, 2009).

<sup>201</sup> *Arista Records, LLC*, 604 F.3d at 112.

<sup>202</sup> *Id.* at 116.

<sup>203</sup> *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009).

<sup>204</sup> In a rare exception to this generalization, Yelp was willing to take the risk of being held in contempt to stand up for its customers' right to speak anonymously in *Hadeed Carpet Cleaning v. Does 1 to 10*, No. CL12003401 (Va. Cir. Ct., Alexandria Cnty., Nov. 19, 2012), where the author is representing Yelp pro bono. Deborah Elkins, *Website Must Identify 'John Doe' Posters*, VA. LAW. WKLY. (Dec. 4, 2012), available at <http://valawyersweekly.com/2012/12/03/website-must-identify-john-doe-posters/> (subscription required).

appellate jurisdiction recognizes an exception to the general rule “where the subpoena is directed against a third party [who is unlikely to risk . . . contempt to vindicate someone else’s rights].”<sup>205</sup> The Second Circuit invoked this exception in concluding that it has jurisdiction of the appeal.

Turning to the merits, the Second Circuit agreed that the First Amendment protects the right to speak anonymously, yet does not shelter copyright infringement.<sup>206</sup> The Second Circuit proceeded to discuss the balance of interests by applying the five-factor standard articulated in the first case to address the CyberSLAPP Coalition’s amicus argument about Doe subpoenas in the context of downloading music recordings, *Sony Music Entertainment v. Does 1-40*.<sup>207</sup> In that case, District Judge Chin agreed that suits for copyright infringement through file-sharing addresses raised issues of free speech, but that the First Amendment interest in being able to distribute the copyrighted recordings of others through a file-sharing system was close to minimal.<sup>208</sup> He applied five factors, including “(1) a concrete showing of a prima facie claim of actionable harm; (2) specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the [plaintiff’s] claim; and (5) the [Doe’s] expectation of privacy.”<sup>209</sup> Although the appellant in *Arista Records* had not challenged the adequacy of the *Sony Music* test as an erroneous legal standard, the Second Circuit agreed that it was “an appropriate general standard.”<sup>210</sup>

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<sup>205</sup> *In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987*, 834 F.2d 1128, 1130 (2d Cir. 1987); see also *In re Grand Jury Subpoena*, 190 F.3d 375, 382-83 (5th Cir. 1999) (discussing the exception in the context of a criminal proceeding); *In re Grand Jury Proceedings*, 832 F.2d 554, 558-59 (11th Cir. 1987) (narrowing the doctrine to “appeals based on privileges personal to the third party seeking review”).

<sup>206</sup> *Arista Records, LLC*, 604 F.3d at 118-19; *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004).

<sup>207</sup> *Arista Records, LLC*, 604 F.3d at 118-19; *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 566-67.

<sup>208</sup> *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 566-67.

<sup>209</sup> *Id.* at 564-65 (citations omitted).

<sup>210</sup> *Arista Records, LLC*, 604 F.3d at 118-19.

In *Arista Records*, as in *Sony Music*, this balancing test called for disclosure of the Does' identities,<sup>211</sup> although the Second Circuit in *Arista Records* did not discuss the way in which the *Sony Music* factors applied to the record before it because Doe 3, the appellant in the case, did not challenge the trial court's application of the factors.<sup>212</sup> Doe 3's main objection was that Arista had not pled the infringement in sufficient detail, but the Second Circuit disagreed.<sup>213</sup> Moreover, the court noted that although the complaint was pled on information and belief, the plaintiff supported the allegations against each Doe with Exhibit A and an affidavit sworn on personal knowledge.<sup>214</sup> And although Doe argued that the plaintiff had not sufficiently rebutted his fair-use defense, most of the fair-use factors plainly favored plaintiffs, and the one fair-use factor that Doe 3 was contesting—the purpose of the use—rested on considerations of Doe's mental state that the court could not fairly decide while Doe was still anonymous.<sup>215</sup> Finally, the court declined to decide whether a well-pleaded complaint with no evidentiary showing could have met the requirement of a "concrete showing of a prima facie claim of actionable harm" because the complaint, exhibit, and affidavit plainly met that standard.<sup>216</sup>

The Fifth Circuit's ruling in *Mick Haig* was very different, although like the Second Circuit in *Arista Records*, the Fifth Circuit did not make a firm judgment about the applicable standard.<sup>217</sup> Mick Haig, a German film company, brought suit in the Northern District of Texas, seeking to identify 670 Does who had allegedly used Bit Torrent software to distribute copies of a pornographic film called *Der Gute Onkel*.<sup>218</sup> The plaintiff brought the suit in Texas not only because this was where the plaintiff's lawyer, Evan Stone, had his solo practice, which specialized in precisely this sort of lawsuit,<sup>219</sup> but also because the Fifth Circuit, unlike some other courts, construes section 411 of the

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<sup>211</sup> *Sony Music Entm't Inc.*, 326 F. Supp. 2d at 565.

<sup>212</sup> *Arista Records, LLC*, 604 F.3d at 118-19.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 122-23.

<sup>215</sup> *Id.* at 124.

<sup>216</sup> *Id.* at 123.

<sup>217</sup> *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012).

<sup>218</sup> *Mick Haig Prods. E.K. v. Does 1-670*, No. 3:10-CV-1900-N, 2011 WL 5104095, at \*1 (N.D. Tex. Sept. 9, 2011).

<sup>219</sup> *Id.*

Copyright Code as allowing a plaintiff to bring an infringement action once it has filed an application for registration, even though the Copyright Office has not yet acted on the application.<sup>220</sup> As in *Arista Records*, Mick Haig moved for leave to take discovery, but instead of granting that motion as judges normally do in cases brought against Doe defendants, Judge David Godbey decided that identifying the defendants in a case involving plaintiff's movie could adversely affect the otherwise anonymous defendants' interests.<sup>221</sup> In addition, he recognized that the allegations in some file-sharing cases had turned out not to be true, that the immediate purpose of the subpoenas was not to initiate litigation but to provide the opportunity to send demands for settlement payments in lieu of litigation, and that Haig's attorney had filed over a dozen similar cases in the Northern District of Texas alone.<sup>222</sup> Judge Godbey appointed two attorneys employed by the Electronic Frontier Foundation and one employed by Public Citizen as counsel for the Doe defendants ad litem for the purpose of addressing the issues posed by the motion for early discovery.<sup>223</sup>

During their investigation of the case, counsel found some disturbing facts. They found that, unlike the detailed affidavits typically furnished in the RIAA cases, Mick Haig's affidavits purporting to show that each of the 670 Does had engaged in infringing conduct were vague about the precise methods Mick Haig used to make these determinations.<sup>224</sup> They also found that Stone had given an interview to a local alternative newspaper about his pornography cases, in which he bragged that he was able to achieve a very high settlement rate because, once he identified the defendants, Does were uncomfortable with their families knowing about their viewing of his clients' movies.<sup>225</sup> And perhaps

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<sup>220</sup> See, e.g., *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365 (5th Cir. 2004).

<sup>221</sup> *Mick Haig Prods. E.K.*, 2011 WL 5104095, at \*1.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at \*6.

<sup>224</sup> Opposition to Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(F) Conference at 11, *Mick Haig Prods. E.K. v. Does 1-670*, No. 3:10-cv-1900-N (N.D. Tex. Nov. 24, 2010), 2010 WL 5763757 at \*8.

<sup>225</sup> "You have people that might be OK purchasing music off iTunes, but they're not OK letting their wife know that they are purchasing pornography." John Council, *Adult Film Company's Suit Shows Texas Is Good for Copyright Cases*, TEX. LAWYER (Oct. 4, 2010), available at <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202472>

most important, they identified a significant flaw in Mick Haig's copyright claim—Mick Haig had not submitted the copyright registration application until long after the Bit Torrent use that Mick Haig alleged in the complaint.<sup>226</sup> Consequently, unlike many infringement cases brought over downloading, Mick Haig would not have a claim for statutory damages because the Copyright Code allows statutory damages only for infringement that occurs after registration,<sup>227</sup> and the settlement demand that Stone typically sent, seeking payments in the four figures, would be based on a nonexistent claim.<sup>228</sup> Counsel ad litem argued that, in light of all these facts, the Does' interest in not being publicly identified outweighed the plaintiff's interests in identifying the Does; they also argued against personal jurisdiction in Texas and mass joinder of unrelated defendants.<sup>229</sup>

While Judge Godbey was considering these arguments, counsel ad litem made another, even more startling discovery—even though Judge Godbey had not granted Mick Haig's motion for early discovery, its attorney had sent subpoenas in the case to several ISPs, which had begun to respond to the subpoenas by providing identifying information.<sup>230</sup> The counsel ad litem made this discovery because they received calls from some of their Doe clients, who received communications about the case, checked online, and learned that the court had appointed

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786304&Adult\_Film\_Companys\_Suit\_Shows\_Texas\_Is\_Good\_for\_Copyright\_Cases &slreturn=20121002161340. Other lawyers gave similar public statements about their litigation strategy: “‘It seems like it will be quite embarrassing for whichever user ends up in a lawsuit about using a popular shemale title,’ Vivas said, using a term that refers to a person who has female features but male genitalia. ‘When it comes to private sexual fantasies and fetishes, going public is probably not worth the risk that these torrent and peer-to-peer users are taking.’” *Porn Titans Come Together to Expose Pirates*, INDEPENDENT, Sept. 27, 2010, available at <http://www.independent.co.uk/arts-entertainment/films/porn-titans-come-together-to-expose-pirates-2090786.html>.

<sup>226</sup> Opposition to Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(F) Conference, *supra* note 224, at \*16-17.

<sup>227</sup> 17 U.S.C. § 412 (2006).

<sup>228</sup> Opposition to Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(F) Conference, *supra* note 224, at \*17.

<sup>229</sup> *Id.* at \*7-13.

<sup>230</sup> Defendants' Motion for Attorney's Fees or Sanctions, Mick Haig Prods. E.K. v. Does 1-670, No. 3:10-cv-1900-N (N.D. Tex. Feb. 11, 2011), Docket Entry No. 10, at \*4.

counsel to represent them.<sup>231</sup> Ad litem counsel promptly contacted Stone to ask for an explanation for his having sent out discovery and, indeed, for his communications with Does whom he knew to be represented by counsel.<sup>232</sup> Instead of responding to these questions, Stone abruptly filed a voluntary dismissal of the complaint, including intemperate remarks contending that the dismissal was the judge's fault because he had appointed ad litem counsel instead of just allowing discovery, and that the delay in ruling had improperly denied Mick Haig the right to enforce its copyright.<sup>233</sup> Ad litem counsel, still worried about what Stone might have said to their clients and whether he had obtained any settlement payments from them, moved the court to order answers to their questions and to sanction Stone for pursuing early discovery without permission.<sup>234</sup>

The court concluded that the misuse of its authority to obtain identifying information about the Does, and presumably to shake them down for settlements, despite the fact that the court had told Stone to wait, was an egregious violation of the discovery rules.<sup>235</sup> The court granted the motion for sanctions, including a substantial punitive fine, an award of attorney fees, and an order to answer the questions that ad litem counsel had posed.<sup>236</sup> Stone sought review of the sanctions, and the Fifth Circuit affirmed in a fairly short opinion that made no direct statements about the standards for identifying anonymous Internet speakers.<sup>237</sup> The opinion approved the sanctions, in part, because the court understood the importance of procedural protections against early discovery and recognized both the interest of anonymous Internet users—even anonymous Internet users who have been accused of copyright infringement—in avoiding premature identification and the fact that some lawyers seek to identify anonymous Internet users for improper purposes.<sup>238</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at \*3.

<sup>235</sup> *Id.* at \*7.

<sup>236</sup> *Id.* at \*7.

<sup>237</sup> Mick Haig Productions, E.K. v. Does 1-670, 687 F.3d 649, 652 (5th Cir. 2012).

<sup>238</sup> The court reasoned:

[T]he sanctions [were] imposed as a result of Stone's flagrant violation of the Federal Rules of Civil Procedure and the district

Although neither the Second nor the Fifth Circuit squarely decided whether to adopt all prongs of the *Dendrite* or *Cahill* tests for such subpoenas, the *Sony Music* standard, which courts have consistently applied in the reported file-sharing cases, is itself a repackaging of the *Dendrite* standard in the context of a file-sharing copyright infringement case, together with some aspects of the *2TheMart* standard.<sup>239</sup> To the extent that the standard is different from *Dendrite*, it both includes *Cahill*'s requirement that evidence or liability be provided and shows, implicitly, an application of *Dendrite*-style balancing.<sup>240</sup>

The first factor of the test calls for a “concrete showing of a prima facie claim”; the phrase “concrete showing” implicitly refers to evidence.<sup>241</sup> Although the Second Circuit declined to reach the question of whether evidence or only allegations are needed,<sup>242</sup> the phrase’s interpretation should depend on the context of the record of the cases in which the courts have used this phrase—cases in which the RIAA plaintiffs and the movie plaintiffs consistently supported their motions

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court’s orders. Stone committed those violations as an attempt to repeat his strategy of suing anonymous internet users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars—a tactic that he has employed all across the state and that has been replicated by others across the country.

*Id.* at 652. The court also quoted the following approvingly:

[P]laintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants’ personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does. Whenever the suggestion of a ruling on the merits of the claims appears on the horizon, the plaintiffs drop the John Doe threatening to litigate the matter in order to avoid the actual cost of litigation and an actual decision on the merits.

*Id.* at 652 n.2 (quoting *Raw Films, Ltd. v. Does 1-32*, No. 3:11cv532–JAG, 2011 WL 6182025, at \*3 (E.D. Va. Oct. 5, 2011)).

<sup>239</sup> The factors or the lack of alternative means to obtain the information and the need for the information to advance plaintiff’s claim come directly from *2TheMart*. See *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (discussing factors the court will consider in determining whether to issue a subpoena).

<sup>240</sup> *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004).

<sup>241</sup> *Id.*

<sup>242</sup> See *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 121-24 (2d Cir. 2010).

for leave to take early discovery with affidavits verifying the IP addresses, displaying copyrighted recordings, and verifying as well that the recordings actually displayed were, in fact, the copyrighted works that their names would imply.<sup>243</sup> With one exception,<sup>244</sup> the courts routinely cite those affidavits as establishing the prima facie case of copyright infringement.<sup>245</sup> In this respect, it is not correct to say, as some authors have, that there is any copyright law or even a file-sharing exception to the general requirement of producing enough evidence to support a prima facie case.<sup>246</sup> Nor, indeed, do the file-sharing cases show any good reason not to require a showing of evidentiary merit before identifying the Doe defendants in those cases because it is not at all difficult to make the necessary factual showing, and indeed, to make that showing with respect to hundreds or even thousands of Does in a single case.<sup>247</sup>

The *Sony Music* test expressly incorporates consideration of particular reasons why the anonymous speaker would have an interest in privacy, but because the appellant in *Arista Records* did not argue that the court below had misapplied the factor, the Second Circuit did not

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<sup>243</sup> *Id.*

<sup>244</sup> *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 352 (D.D.C. 2011). In *Call of the Wild*, the district court said that it would enforce the subpoena because the copyright owner had “sufficiently alleged prima facie claims of copyright infringement” and confirmed that evidence of infringement was not needed in a footnote addressing a technical flaw in plaintiff’s evidence of infringement. *Id.* at 352-53. The plaintiff in that case submitted an affidavit purporting to attest to each Does’ infringement and averring that attached exhibits showed the IP addresses where the plaintiff had viewed the infringement, but a number of the infringements reflected in the exhibits submitted with the affidavit were committed *after* the execution date of the affidavit. *Id.* at 351 n.8. Judge Howell excused plaintiff by saying that the affidavit was only intended to show the method the plaintiff used to identify the Does, and therefore plaintiff’s “claims” against defendants whose infringements occurred later were sufficient to justify enforcing the subpoena to identify them. *Id.*

<sup>245</sup> *See, e.g., Interscope Records v. Does 1-14*, 558 F. Supp. 2d 1176, 1178 (D. Kan. 2008); *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652 SBA (EMC), 2006 WL 1343597, at \*2 (N.D. Cal. Mar. 6, 2006); *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 565.

<sup>246</sup> Ashley I. Kissinger & Katherine Larsen, *Protections for Anonymous Online Speech*, in 2 COMMUNICATIONS LAW IN THE DIGITAL AGE 2011, at 815, 833-34 (Practicing Law Inst. ed., 2011) (establishing that subpoenas in file-sharing cases can be enforced so long as a motion to dismiss standard is met).

<sup>247</sup> *Call of the Wild Movie, LLC*, 770 F. Supp. 2d at 343-44.



discuss it.<sup>248</sup> Indeed, as District Judge Beryl Howell pointed out during oral argument in *Call of the Wild v. Does*, the Doe defendants in file-sharing cases do not, as a general class, face the same danger of retaliation or the chilling effect against protected expression as a result of being identified as defendants who have been sued. They are unlikely to have any direct relationship with the plaintiff that can result in extrajudicial self-help, and there is little social stigma connected with being identified as an accused file sharer.<sup>249</sup>

One class of file-sharing cases forms an exception to this general rule—cases alleging the downloading of pornographic films.<sup>250</sup> And it is precisely in such cases that several trial judges have gone out of their way to provide special protection for the anonymous defendants, recognizing that in *these* file-sharing cases, merely being identified as the defendant could have serious consequences.<sup>251</sup> A number of judges have suggested that the prospect of litigation with a shakedown of anonymous downloaders hoping to avoid identification, and not marketing and sales in the normal sense, may be the reason why some pornographic films are being made in the first place.<sup>252</sup>

Judge Chin did address the “privacy” factor in *Sony Music*, but the only consideration he discussed was the terms of service for the Doe’s ISP, which both forbade the use of the service for various actionable purposes, including violations of intellectual property rights, and

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<sup>248</sup> See *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 114 (2d Cir. 2010) (examining *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 564-67).

<sup>249</sup> Ray Delgado, *Law Professors Examine Ethical Controversies of Peer-to-Peer File Sharing*, STAN. REP. (Mar. 17, 2004), <http://news.stanford.edu/news/2004/march17/fileshare-317.html>; Bootie Cosgrove-Mather, *Poll: Young Say File Sharing OK*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2003/09/18/opinion/polls/main573990.shtml>.

<sup>250</sup> See *In re BitTorrent Adult Film Copyright Infringement Cases*, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at \*10 (E.D.N.Y. 2012).

<sup>251</sup> *E.g., id.*; *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242-43 (S.D.N.Y. 2012); see also *Pacific Century Int’l Ltd. v. Does 1-101*, No. C 11 02533 (DMR), 2011 WL 5117424, at \*2 (N.D. Cal. Oct. 27, 2011) (denying discovery without mentioning that the copyrighted work is the film *Erin Stone Amateur Creampies*).

<sup>252</sup> *Media Prods., Inc. v. Does 1-26*, Nos. 12 Civ. 3719(HB), 12 Civ. 3630(HB), 12 Civ. 2962(HB), 2012 WL 3866492, at \*2 (S.D.N.Y. Sept. 4, 2012); *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011).

stated that the ISP could disclose account information to comply with the law.<sup>253</sup> This aspect of the *Sony Music* analysis is highly unsatisfactory for several reasons. Reliance on the terms of service has a question-begging aspect to it because the question remains whether there *has*, in fact, been copyright infringement—at the subpoena stage, it is just an allegation, or just an allegation supported by evidence sufficient to make out a prima facie case.<sup>254</sup> Moreover, most ISPs have similar provisions in their terms of service,<sup>255</sup> for a very good reason. Such terms both help warn users not to use the services improperly and protect the ISPs against being charged with encouraging misuse, and at the same time ensure that courts cannot hold ISPs liable for releasing information when courts order them to do so.<sup>256</sup> And, because such terms of

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<sup>253</sup> See *Sony Music Entm't Inc.*, 326 F. Supp. 2d at 566.

<sup>254</sup> At the subpoena stage there is potential for abuse since subpoenas may be issued without any action from a district court. See 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2459 (3d ed. 2012).

<sup>255</sup> E.g., *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/en-us/> (last visited Nov. 3, 2012); *Yahoo! Privacy Policy*, YAHOO!, <http://info.yahoo.com/privacy/us/yahoo/details.html> (last visited Nov. 3, 2012); *Terms of Service*, AOL, <http://legal.aol.com/terms-of-service/full-terms/> (last visited Nov. 3, 2012); *AOL Privacy Policy*, AOL, <http://privacy.aol.com/privacy-policy/> (last visited Nov. 3, 2012); *Privacy Policy*, GOOGLE, <http://www.google.com/intl/en/policies/privacy/> (last visited Nov. 3, 2012); *Google Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last visited Nov. 3, 2012); *Code of Conduct*, MICROSOFT, <http://windows.microsoft.com/en-US/windows-live/code-of-conduct> (last visited Nov. 3, 2012); *Microsoft Online Privacy Statement*, MICROSOFT, <http://privacy.microsoft.com/en-us/fullnotice.mspx> (last visited Nov. 3, 2012); *Acceptable Use Policy*, RCN, <http://www.rcn.com/dc-metro/images/pdfs/acceptableusepolicy.pdf> (last visited Nov. 3, 2012); *Privacy Policy*, RCN, <http://www.rcn.com/dc-metro/privacy-policy> (last visited Nov. 3, 2012); *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last visited Nov. 3, 2012); *Verizon Online Terms of Service*, VERIZON, [http://my.verizon.com/central/vzc.portal?\\_nfpb=true&\\_pageLabel=vzc\\_help\\_policies&id=TOS](http://my.verizon.com/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS) (last visited Nov. 3, 2012); *Comcast Customer Privacy Notice*, COMCAST, <http://www.comcast.com/Corporate/Customers/Policies/CustomPrivacy.html> (last visited Nov. 3, 2012); *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Nov. 3, 2012); *Facebook's Privacy Policy*, FACEBOOK, [http://www.facebook.com/note.php?note\\_id=%20322194465300](http://www.facebook.com/note.php?note_id=%20322194465300) (last visited Nov. 3, 2012).

<sup>256</sup> See generally *Yahoo! Terms of Service: Member Conduct*, YAHOO!, ¶ 6, <http://info.yahoo.com/legal/us/yahoo/utos/terms/> (last visited Nov. 3, 2012) (listing specific acts that are forbidden, such as uploading harassing content, harming minors, and falsely misrepresenting yourself).

service are relatively uniform across all ISPs and tend to forbid defamation, harassment, and a variety of other abuses, reliance on the terms of service as a factor in deciding whether to enforce subpoenas does not help courts decide in which cases they should order disclosure and in which cases they should not.<sup>257</sup> And, by the same token, if such terms of service always supported disclosure, the result would be to perpetuate the very chilling effect on anonymous speech that the *Dendrite* and *Cahill* line of authority was adopted to prevent.<sup>258</sup>

Moreover, to the extent that many subpoena decisions in cases about copyright infringement through file sharing tend to suggest that only a modest showing needs to be made to obtain a subpoena or defeat a motion to quash—and even if only a pleading of actionable harm is required in this context—these courts are themselves engaged in *Dendrite* balancing.<sup>259</sup> In acknowledging the extent to which the users of file-sharing systems are engaged in speech with respect to musical recordings, Judge Chin denigrated the extent of First Amendment protection for that speech because, after all, an Internet user does not use the system “to communicate a thought or convey an idea.”<sup>260</sup> Instead, the “individual’s real purpose is to obtain music for free.”<sup>261</sup> On the other hand, the plaintiffs in the file-sharing cases have a strong interest in being able to enforce their copyrights against a form of infringement, which, if wholly unchecked, threatens their ability to sell their copy-

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<sup>257</sup> Compare *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal 2010) (quashing subpoena that sought discovery of messages on MySpace and Facebook without discussing the terms of service agreements of either company), with *People v. Harris*, 945 N.Y.S.2d 505, 508 (Crim. Ct. 2012) (finding defendant’s privacy interest in Twitter messages without merit because Twitter’s terms of service clearly indicate that third parties can view any and all Twitter posts).

<sup>258</sup> See *supra* notes 63-73 (discussing the standards courts will use to determine whether to grant subpoenas to identify anonymous Internet speakers); see also *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>259</sup> See *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-67 (S.D.N.Y. 2004) (balancing five factors: a concrete showing of a prima facie case, specificity of the discovery request, absence of alternative means to obtain the information, a need for the subpoenaed information to advance the claim, and the party’s expectation of privacy).

<sup>260</sup> *Id.* at 564.

<sup>261</sup> *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 349 (D.D.C. 2011) (quoting *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 564).

righted works by making it too easy for prospective customers to obtain the copyrighted works without charge.<sup>262</sup> One might argue, as some have done, that recording companies should change their business models to adapt to the digital age or to avoid alienating young customers who are accustomed to file sharing;<sup>263</sup> but unless and until copyright holders choose otherwise, they are surely entitled to enforce their copyright through litigation.<sup>264</sup>

None of the judges who have ruled on subpoenas in the copyright infringement lawsuits over file sharing cite *Dendrite* as establishing a standard that justifies a balancing of the parties' respective interests.<sup>265</sup> But instead of engaging in a covert balancing, courts should acknowledge the balancing, thus making it easier to hold them accountable for their rulings, whether by appellate judges in the course of review, by members of the public assessing their rulings, or by trying to predict how future cases will be decided.<sup>266</sup>

In a recent California case, a magistrate judge relied on *Sony Music* in denying a motion to quash a Doe subpoena that the plaintiff sought to identify a blogger who, in the course of criticizing an international religious cult, published a copy of one of the cult's teaching manuals as a way of denigrating its theories as being no more than

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<sup>262</sup> See Hugh C. Hansen, *Peer-to-Peer "File-Sharing" Software and Copyright: Showdown at the Supreme Court Corral*, 2004-2005 PREVIEW U.S. SUP. CT. CAS. 363, 368 (2005).

<sup>263</sup> E.g., Fred von Lohmann, *Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND., 1 (Apr. 30, 2008), <https://www.eff.org/files/eff-a-better-way-forward.pdf>.

<sup>264</sup> See 17 U.S.C. § 502 (2006). Paradoxically, because the makers of pornographic films have a more limited market for their works through ordinary channels of commercial distribution than the makers of hit films, they may have an especial need to rely on infringement litigation, and on the deterrent effect of such litigation, to protect their market. Thus, although Does accused of file sharing these films may have greater exposure to public obloquy from being identified, the plaintiffs may have a greater interest in access to effective judicial remedies for the online downloads. See *supra* notes 249-52 and accompanying text.

<sup>265</sup> See, e.g., *In re Charter Comm'n's, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771 (8th Cir. 2005); *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239 (S.D.N.Y. 2012).

<sup>266</sup> See Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 633-34 (1988).

ordinary yoga principles.<sup>267</sup> The magistrate judge read *Sony Music* as stating the general rule that the plaintiff needs no more than allegations when the plaintiff claims copyright infringement.<sup>268</sup>

The Does objected to the magistrate judge's order, and the district judge rejected the magistrate judge's analysis.<sup>269</sup> Judge Lucy Koh agreed that the *Sony Music* standard is weaker than *Dendrite* balancing but held that, based on *In re Anonymous Online Speakers*, this weaker standard is confined to file-sharing cases where no expressive speech is involved.<sup>270</sup> "In choosing the proper standard to apply, the district court should focus on the 'nature' of the speech . . . rather than the cause of action alleged by the plaintiff."<sup>271</sup> The court decided that the plaintiff religious organization had met the requirement of presenting evidence sufficient to establish a prima facie case of ownership of the copyright in question,<sup>272</sup> while noting that, because fair use embodies First Amendment protections, the First Amendment could protect copying if the courts sustained the fair-use defense.<sup>273</sup> The court declined to reach the fair-use argument as a basis for granting the Does' motion to quash plaintiff's subpoena because, on the facts of the case, it concluded that the Does' interest in remaining anonymous while the parties were litigating the fair-use issues outweighed the plaintiff's interest in identifying the Does immediately.<sup>274</sup> The court allowed the litigation to go forward based on the Does' commitment to answer written discovery and proclaimed intention to seek summary judgment, which the court eventually granted on the copyright claim.<sup>275</sup> Soon after the court granted summary judgment and an anti-SLAPP motion based on previous dismissal of several parts of the case, the parties settled the remain-

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<sup>267</sup> See *Art of Living Found. v. Does 1-10*, No. C10 05022 LHK (HRL), 2011 WL 3501830, at \*2-3 (N.D. Cal. Aug. 10, 2011).

<sup>268</sup> See *id.* at \*3.

<sup>269</sup> See *Art of Living Found. v. Does 1-10*, No. 10 CV 05022 LHK, 2011 WL 5444622, at \*1 (N.D. Cal. Nov. 9, 2011).

<sup>270</sup> See *id.* at \*5-6.

<sup>271</sup> *Id.* at \*5.

<sup>272</sup> *Id.* at \*8.

<sup>273</sup> *Id.* at \*8 n.6.

<sup>274</sup> *Id.* at \*8-10.

<sup>275</sup> *Art of Living Found. v. Does 1-10*, No. 5:10-cv-05022-LHK, 2012 WL 1565281, at \*1 (N.D. Cal. May 1, 2012).

der of the case with the Does remaining anonymous and the challenged blogs remaining online.<sup>276</sup>

Although confining the *Sony Music* standard to file-sharing cases makes it less worrisome, the fact that such discovery is often sought *ex parte* makes the existence of even a single exception problematic.<sup>277</sup> In federal court, at least, if the plaintiff has not yet served the potential defendants, then the parties must seek discovery through an *ex parte* motion, and many lawyers will simply invoke the lowest available standard without any indication that a higher standard could be appropriate on the facts of the case.<sup>278</sup> That is what happened in a recent case in which the Ron Paul Presidential Campaign Committee brought a trademark claim<sup>279</sup> against anonymous Internet users who posted a YouTube video pillorying a presidential candidate for his alleged China ties, including having adoptive Asian children, while urging support for candidate Paul.<sup>280</sup> The motion cited several cases as allowing discovery to identify anonymous speakers so that the plaintiff could serve them based on no more than a “good cause” standard, coupled with the statement that, until the plaintiff served the Does, the parties could not conduct the needed discovery conference.<sup>281</sup> Only after amici learned of the case from press reports and filed a brief urging the court to apply the *Dendrite* standard and pointing out several flaws in the purported trademark theories did the district court focus on the legal flaws in the case and directed the plaintiff to respond to the arguments.<sup>282</sup> The plaintiff

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<sup>276</sup> *Id.*; Joint Statement of Plaintiff Art of Living Foundation and Defendants Doe/Skywalker and Doe Klim, LEAVING THE ART OF LIVING (June 19, 2012), <http://artoflivingfree.blogspot.com/2012/06/joint-statement-of-plaintiff-art-of.html>.

<sup>277</sup> See *Art of Living Found.*, 2011 WL 5444622, at \*5.

<sup>278</sup> See Plaintiff’s *Ex Parte* Application for Expedited Discovery, Ron Paul 2012 Presidential Campaign Comm. v. Does 1-10, No. 3:12-cv-00240-MEJ (N.D. Cal. Jan. 18, 2012), available at <http://www.cyberslapp.org/documents/Motion-for-Expedited-Discovery.pdf>.

<sup>279</sup> See Complaint for False Designation of Origin, False Advertising, and Libel/Defamation, Ron Paul 2012 Presidential Campaign Comm. v. Does 1-10, No. 3:12-cv-00240-MEJ (N.D. Cal. Jan. 13, 2012), available at <http://www.cyberslapp.org/documents/Ron-Paul-Complaint.pdf>.

<sup>280</sup> NHLiberty4Paul, *John Huntsman’s Values*, YOUTUBE (Jan. 4, 2012), <http://www.youtube.com/watch?v=tZeVqj-t1U0>.

<sup>281</sup> Plaintiff’s *Ex Parte* Application for Expedited Discovery, *supra* note 278.

<sup>282</sup> Amici Curiae Addressing the Proper Standard for Early Discovery to Identify Anonymous Political Speakers, Ron Paul 2012 Presidential Campaign Comm. v. Does

initially tried to argue for discovery anyway,<sup>283</sup> but after the court demanded further explanations,<sup>284</sup> the plaintiff filed a voluntary dismissal.<sup>285</sup>

In rejecting the motion for leave to take discovery for a second time, the district court said nothing about the plaintiff's misleading citation of cases setting forth a low standard for subpoenas to identify anonymous Internet speakers despite the fact that the speech at issue was unquestionably political speech.<sup>286</sup> The remaining section of this paper discusses what measures judges might take to ensure fair consideration of the interests of anonymous speakers in the determination of motions for early discovery.<sup>287</sup>

#### IV. ADDRESSING EX PARTE MOTIONS FOR EARLY DISCOVERY TO IDENTIFY DOE DEFENDANTS

In a federal lawsuit, the first time the issue of discovery is likely to come up is when the plaintiff moves for leave to take discovery to identify anonymous defendants so that it can serve them with process.<sup>288</sup> As in *Dendrite*, where the court decided the subpoena issue on a motion for leave to take discovery and not on a motion to quash,<sup>289</sup> federal judges should take this stage of the litigation seriously, ensuring that even before a subpoena is authorized, the plaintiff has made a suffi-

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1-10, No. 3:12-cv-00240-MEJ (N.D. Cal. Jan. 27, 2012), available at <http://www.cyberslapp.org/documents/Paul-v-Doe-Amicus-Memo.pdf>.

<sup>283</sup> *Ron Paul 2012 v. Does 1-10*, CITIZEN MEDIA LAW PROJECT, <http://www.citmediaweb.org/threats/ron-paul-2012-v-does-1-10> (last updated Mar. 15, 2012).

<sup>284</sup> Order Denying Plaintiff's Amended Ex Parte Application for Ex Parte Discovery, *Ron Paul 2012 Presidential Campaign Comm. v. Does 1-10*, No. 3:12-cv-00240-MEJ (N.D. Cal. Mar. 8, 2012), available at <http://www.cyberslapp.org/documents/Ron-Paul-v-Does-Order-Denying-Discovery.pdf>.

<sup>285</sup> Notice of Voluntary Dismissal, *Ron Paul 2012 Presidential Campaign Committee v. John Does 1-10*, No. 3:12-cv-00240-MEJ (N.D. Cal. Mar. 23, 2012), available at <http://www.citizen.org/documents/Ron-Paul-Campaign-v-Does-Notice-of-Voluntary-Dismissal.pdf>.

<sup>286</sup> Order Denying Plaintiff's Amended Ex Parte Application for Ex Parte Discovery, *supra* note 284.

<sup>287</sup> *See infra* Part IV.

<sup>288</sup> Levy, *supra* note 3, at 1.

<sup>289</sup> *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 767 (N.J. Super. Ct. App. Div. 2001).

cient showing to warrant the exercise of judicial power that might undercut First Amendment rights.<sup>290</sup>

Even though, as noted above, the terms of service for many ISPs absolve them from any liability for disclosing information pursuant to the judicial process, the majority of ISPs will try to give notice so that the Does can have an opportunity to defend their anonymity.<sup>291</sup> But there are still many ISPs that do not give notice, and even when the ISPs do give notice, there are a variety of ways in which it can be ineffective.<sup>292</sup>

For example, if the plaintiff posts a notice to a message board, as Judge MacKenzie ordered in *Dendrite*,<sup>293</sup> the posting may come so long after the offending message that the Doe might not see the notice because he may no longer be participating in the forum.<sup>294</sup> Moreover, if the plaintiff sends a notice to the e-mail address that the Doe used when registering to the forum, that registration may have occurred so long before the posting that the e-mail address may no longer be valid or, at least, it is for an account that the Doe no longer uses actively.<sup>295</sup> Yet even an e-mail address that has fallen out of use can serve to identify its former user easily, if the address is inherently identifying or if the Doe used the e-mail address for communications that may be located through a search engine.<sup>296</sup> For example, in *Independent Newspapers v. Brodie*, the newspaper notified via e-mail each of the Does whose iden-

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<sup>290</sup> Levy, *supra* note 3, at 1-2.

<sup>291</sup> 47 U.S.C. § 551 (2006) (stating that ISPs that provide Internet access as part of their cable service are obligated to give such notice).

<sup>292</sup> Levy, *supra* note 3, at 5.

<sup>293</sup> *Dendrite Int'l, Inc.*, 775 A.2d at 760.

<sup>294</sup> *See Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 (Md. 2009) (noting that responses in an Internet forum are made over time rather than immediately in real time).

<sup>295</sup> *See Will Sturgeon, How Often Do You Change Your Email Address*, ZDNET (Oct. 16, 2002), <http://www.zdnet.com/how-often-do-you-change-your-email-address-3040144006/> (noting that one-third of people change their e-mail address once a year).

<sup>296</sup> *See Amit Agarwal, Find the Person Behind an Email Address*, DIGITAL INSPIRATION (June 10, 2012), <http://www.labnol.org/internet/find-person-by-email-address/13913/> (listing four ways that a person's identity may be found online). An inherently identifying e-mail address contains the user's first initial and last name. *See supra* notes 17-25 and accompanying text. Because each means of notice has its own limitations, the court should require the use of multiple means of notice to maximize



tities the plaintiff had subpoenaed. However, one of the Does did not learn of the litigation until she read a story in the Washington Post about the oral arguments and called the author of this Article, who represented the newspaper in its appeal from the order enforcing the subpoena, to find out what she needed to do to protect her anonymity. Yet another reason why a notice may not produce a motion to quash a subpoena, even if the lawsuit is meritless, is simply because it can be very expensive to hire a lawyer to defend a libel suit in a jurisdiction without an anti-SLAPP statute that makes it possible to hire a lawyer on a contingent-fee basis,<sup>297</sup> and because it is almost impossible to file a pro se motion to quash while remaining anonymous.<sup>298</sup>

When a plaintiff asks a judge to identify an anonymous speaker through discovery, a judge should scrutinize the application carefully because of the serious potential for harm to the defendant, much as a judge must do when deciding *ex parte* whether to authorize a warrant.<sup>299</sup> Similarly, when issuing a default judgment under Rule 55 of the Federal Rules of Civil Procedure, the court must determine that the well-pleaded allegations of the complaint state a viable cause of action,<sup>300</sup> determine the facts on which the plaintiff bases its proposed damages,<sup>301</sup> and carefully consider the proper limits of any injunctive re-

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the chance that the plaintiff will receive the notice in time to present an objection to discovery.

<sup>297</sup> See *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (last updated Aug. 27, 2012). A jurisdiction with an anti-SLAPP statute makes it possible to hire a lawyer on a contingent fee basis. *Id.*

<sup>298</sup> See *Klein v. City of N.Y.*, No. 10 Civ. 9568(LAK)(JLC), 2011 WL 3370402, at \*1 (S.D.N.Y. Aug. 3, 2011) (“As a general rule, parties may not litigate their disputes anonymously.”).

<sup>299</sup> See *Indep. Newspapers, Inc.*, 966 A.2d at 447 (“Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong.”).

<sup>300</sup> See *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) (“Not only was the district court required to accept this court’s finding that Black had stated a claim of retaliation, but the district court also was obligated to accept as true all facts alleged in Black’s complaint.”).

<sup>301</sup> *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d 151, 154-55 (2d Cir. 1999).

lief.<sup>302</sup> When issuing an injunction in a lawsuit over the exercise of free speech rights, the court has an especial obligation to consider whether the relief it is awarding is consistent with the First Amendment.<sup>303</sup> And unlike damages and injunctions awarded by default, which can be set aside on motion,<sup>304</sup> and improper searches, which can be remedied by the suppression of evidence or, indeed, by an action for damages,<sup>305</sup> an order authorizing the identification of a Doe defendant is likely to result in relief that can never be undone.<sup>306</sup> Consequently, a judge should carefully scrutinize a plaintiff's memorandum of law supporting a motion for early discovery to ensure that the motion states the law fully and accurately and should review the affidavits to make sure that they show a prima facie case.<sup>307</sup>

This is a big task given the huge dockets with which trial judges must contend, but there are two ways in which courts can ensure that they have the opportunity to make sound decisions about *ex parte* motions for leave to take early discovery.<sup>308</sup> The first is to remind counsel that the ethical obligation of candor to the tribunal takes on especial urgency when counsel knows that the matter will be decided without an adversary proceeding.<sup>309</sup> In that circumstance, counsel has an extra ob-

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<sup>302</sup> See *City of N.Y. v. Mickalis Pawn Shop*, 645 F.3d 114, 145 (2d Cir. 2011) ("A court is required to frame its orders so that those who must obey them will know what the *court* intends to forbid." (citation omitted)).

<sup>303</sup> See *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."); *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 605 (7th Cir. 2007) ("[W]e note that there are sensitive First Amendment issues presented in the context of permanent injunctions in defamation actions.").

<sup>304</sup> FED. R. CIV. P. 55(c).

<sup>305</sup> See *McKinley v. Trattles*, 732 F.2d 1320, 1328 (7th Cir. 1984) (instructing the lower court to consider punitive damages when improper search occurred).

<sup>306</sup> See Donna Nicoletti, *The Effect of Anonymity on Self-Disclosure*, W. CONN. STATE UNIV., <http://people.wcsu.edu/mccarneyh/acad/Nicoletti.html> (last visited Nov. 3, 2012) (finding that people are much more likely to reveal personal information if anonymous).

<sup>307</sup> *Supra* Part I.

<sup>308</sup> See *infra* notes 309-16.

<sup>309</sup> See *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265, 268-69 (1st Cir. 1990) ("Where counsel appears *ex parte* . . . the customary checks and balances do not

ligation to bring potentially adverse facts and authority to the court's attention.<sup>310</sup> In one recent case, for example, a district court partially based its award of attorney fees for bringing a meritless action on counsel's violation of the "greater degree of thoroughness and candor" that counsel owed in connection with an *ex parte* proceeding at the outset of the case.<sup>311</sup> Courts might also consider including a reminder of this obligation in their local rules or in their handbooks for members of their local bars.<sup>312</sup> Similarly, a court may treat an attorney's failure to cite relevant facts or law as a "failure to do equity," which is relevant to the equitable balancing stage of a *Dendrite* analysis;<sup>313</sup> mentioning the extra duty of candor in a published opinion and denying leave to take discovery is likely to get the attention of other lawyers who are preparing similar motion papers in the same district.<sup>314</sup>

The second way that trial judges can respond to the inherent lack of balance in an *ex parte* proceeding for early discovery is to appoint counsel *ad litem* solely to address the motion for early discovery.<sup>315</sup> In

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pertain—and the court is entitled to expect an even greater degree of thoroughness and candor from unopposed counsel than in the typical adversarial setting.”); *cf. e.g.*, *Jorgenson v. Cnty. of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988) (stating that in *ex parte* proceeding, “appellants had a duty to refrain from affirmatively misleading the court as to the state of the law”); *Keith ex rel. Eagan v. Jackson*, 855 F. Supp. 765, 790 (E.D. Pa. 1994) (“Candor to the Court, though desirable under any circumstance, is mandated in *ex parte* proceedings, where the Court is deprived of the benefits of the ‘dialectic of the adversary system.’” (citation omitted)); *Cedar Crest Health Ctr. v. Bowen*, 129 F.R.D. 519, 525 (S.D. Ind. 1989) (disclosing potentially dispositive cases “is a duty of every practitioner, the violation of which is sanctionable under Rule 11”; the point holds “particularly true” when counsel proceeds *ex parte*).

<sup>310</sup> *See Maine Audubon Soc’y*, 907 F.2d at 268-69 (stating that a greater degree of thoroughness and candor is required when *ex parte*).

<sup>311</sup> *Career Agents Network, Inc. v. Careeragentsnetwork.biz*, 722 F. Supp. 2d 814, 818, 824 (E.D. Mich. 2010) (emphasis added).

<sup>312</sup> *E.g.*, N.H. R. PROF. CONDUCT 3.3(c).

<sup>313</sup> *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

<sup>314</sup> *See, e.g., Career Agents Network, Inc.*, 722 F. Supp. 2d at 824 (awarding punitive damages when attorney failed to follow the extra duty of candor); *cf. In re Disciplinary Proceeding Against Douglas Schafer*, 66 P.3d 1036, 1046-47 (Wash. 2003) (en banc) (addressing the state disciplinary board’s conclusion that increased sanctions are necessary to deter other lawyers from breaching the duty of confidentiality).

<sup>315</sup> *See infra* notes 316-17.

*Mick Haig*, Judge Godbey reached out to find nationally known public interest lawyers from distant cities,<sup>316</sup> but in a more recent case, District Judge S. Allan Alexander appointed a lawyer whom she knew to be interested in intellectual property issues as ad litem counsel.<sup>317</sup> Particularly where the litigation raises unfamiliar issues, appointing ad litem counsel might provide the best way for courts to protect the interests of anonymous Internet speakers while ensuring that valid lawsuits based on real wrongs can go forward.

## V. CONCLUSION

The extent to which it is desirable to preserve forums for anonymous expression remains controversial. Some express concern that a culture of anonymity and pseudonymity unduly encourages irresponsible and harmful behavior, such as bullying,<sup>318</sup> that is hard to regulate directly due to concerns of vagueness and selective enforcement.<sup>319</sup> Although many experienced bloggers welcome the added value that the capacity for anonymous comment brings to the discussions on their websites,<sup>320</sup> several media organizations have recently sought to restore a measure of civility to the discussion sections that follow online articles or columns by requiring participants to log in through accounts on

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<sup>316</sup> *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649, 650 (5th Cir. 2012).

<sup>317</sup> *Combat Zone Corp. v. John Does 1-2*, No. 2:12-cv-00142-MPM-SAA (N.D. Miss. Aug. 30, 2012), available at <http://www.rfcexpress.com/lawsuits/copyright-lawsuits/mississippi-northern-district-court/101493/combat-zone-corp-v-john-and-jane-does-1-2/summary/>.

<sup>318</sup> Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 216 (2012); Natasha T. Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 LEWIS & CLARK L. REV. 605, 630 (2012).

<sup>319</sup> See Lyrissa Barnett Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2097684>.

<sup>320</sup> Tim Cushing and Mike Masnick at Techdirt are passionate advocates of this approach. E.g., Tim Cushing, *Anonymous Commenters: Cowards Or Contributors?*, TECHDIRT (Nov. 4, 2011), <http://www.techdirt.com/articles/20111103/06223116619/anonymous-commenters-cowards-contributors.shtml>; Mike Masnick, *Are Anonymous Comments Evil?*, TECHDIRT (Mar. 22, 2010), <http://www.techdirt.com/articles/20100322/0236228653.shtml>.

which they can easily be identified.<sup>321</sup> The Gannett chain, for example, now allows comment only by users who can sign in through Facebook, which forbids anonymity and treats the use of pseudonymous account names as a breach of its Terms of Service.<sup>322</sup> Other forums encourage the use of real or identifiable names through trusted user systems that enable users to have their comments displayed more prominently when they register and show a track record of socially acceptable commentary.<sup>323</sup> Some Internet users may choose to patronize websites based on whether the sites employ such techniques; the media companies are no doubt acting out of concern that the demographic to which they prefer to display advertising will avoid sites full of name-calling and insults. Moreover, one may well wonder how much real credence Internet users place in criticisms that are posted in a truly Wild West environment.

But because the First Amendment right of anonymous speech does not allow governments to impose such limits, courts will continue to be confronted with *Dendrite*-type cases, where they must balance the right of the speaker to remain anonymous against the right of someone to vindicate a claimed legal right that the speech at issue is alleged to have violated. Across the country, most courts have dealt with these conflicting rights by adopting some variant of the *Dendrite* or *Cahill*

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<sup>321</sup> See, e.g., *USA Today Switches to Facebook Commenting*, USA TODAY, <http://usatoday30.usatoday.com/news/story/2011-11-28/USA-TODAY-switches-to-Facebook-commenting/51451610/1> (last updated Nov. 29, 2011).

<sup>322</sup> *GCI Switching All Sites to Facebook Commenting*, GANNETT BLOG (Oct. 31, 2011), <http://gannettblog.blogspot.com/2011/10/urgent-gci-switching-all-sites-to.html>; see also Tim Ebner, *Is Facebook the Solution to the Obnoxious Comment Plague?*, AJR (Dec. 19, 2011), <http://ajr.org/Article.asp?id=5213>.

<sup>323</sup> The New York Times requires a moderator to review a comment before a comment appears on its site, *Comments & Readers' Reviews*, N.Y. TIMES, <http://www.nytimes.com/content/help/site/usercontent/usercontent.html> (last visited Nov. 3, 2012), unless the post comes from "verified commenters," *Verified Commenters*, N.Y. TIMES, <http://www.nytimes.com/content/help/site/usercontent/verified/verified-commenters.html> (last visited Nov. 3, 2012). On the Washington Post's website, comments appear without moderation but frequent commenters can earn a series of topic-specific badges that allow their posts to be displayed more prominently; an Internet user viewing comments must specifically click the "all comments" tab to see posts from the hoi polloi. See *Commenting: Get a Badge*, WASH. POST, <http://www.washingtonpost.com/wp-srv/interactivity/get-a-badge.html> (last visited Nov. 3, 2012); *Frequently Asked Questions*, WASH. POST, [http://www.washingtonpost.com/wp-srv/interactivity/policy/discussion\\_faq.html](http://www.washingtonpost.com/wp-srv/interactivity/policy/discussion_faq.html) (last visited Nov. 3, 2012).

approach and by adapting long-standing procedural mechanisms to allow the application of that analysis to new situations as they arise.