Washington Journal of Law, Technology & Arts

Volume 7 | Issue 2 Article 2

10-1-2011

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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 7, ISSUE 2 FALL 2011

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Cite as: 7 Wash J.L. Tech. & Arts 75 (2011)
http://digital.law.washington.edu/dspacelaw/handle/1773.1/1066

ABSTRACT

There is no judicial consensus about what test to apply when plaintiffs attempt to obtain the identity of an anonymous Internet user during discovery in an online defamation case. In July 2010, the Ninth Circuit became the first federal appeals court to devise an articulable test to determine when a plaintiff may compel disclosure of an online commentator. Previously, federal courts had applied inconsistent balancing tests to determine whether disclosure was appropriate. In In re Anonymous Online Speakers*, the Ninth Circuit relied upon the Delaware state-court standard from* Doe v. Cahill *but applied this test in a way that made it easier for commercial defamation plaintiffs to obtain the identity of anonymous defendants. This Article surveys the prevalent online defamation cases, summarizing the three primary judicial tests applied by state courts and positing that other circuits likely will adopt the reasoning set forth in* Anonymous Online Speakers *for commercial online speech.*

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Thank you to Professor Anita Ramasastry for helpful advice on this Article.

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INTRODUCTION

With the proliferation of Internet chat rooms and message boards, courts must increasingly balance plaintiffs' right to seek redress for defamatory speech with a potential defendant's First Amendment right to engage in anonymous free speech. While state courts have established various standards to determine when a plaintiff may compel disclosure of an online commentator, before *Anonymous Online Speakers*,[1] only two federal circuit courts had addressed anonymous online commercial speech.[2] The courts in both of these cases neglected to articulate a standard for

[1] In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010), *opinion withdrawn and superseded by* In re Anonymous Online Speakers, No. 09-71265, 2011 WL 61635 (9th Cir. Jan. 7, 2011).

[2] *See* Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240 (4th Cir. 2009); NLRB v. Midland Daily News, 151 F.3d 472 (6th Cir. 1998). Few federal courts have decided an appropriate standard for disclosure of anonymous Internet speakers because appellate courts rarely consider interlocutory review of discovery disputes under the collateral order doctrine. *See* Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599, 609 (2009) (reiterating that the class of appealable orders must remain "narrow and selective in its membership").

determining when disclosure of a poster's identity was appropriate.

In formulating its test, the district court in *Anonymous Online Speakers* relied on the "summary judgment" standard articulated in *Doe v. Cahill*: in order to disclose the identity of an online commentator, plaintiffs must survive a hypothetical motion for summary judgment by making a *prima facie* showing for each element of the claim.[3] While the *Cahill* court required a defamation plaintiff to make a substantial legal and factual showing that the complaint had sufficient merit before the court would unmask an anonymous Internet speaker, the Ninth Circuit declined to adopt such a clearly defined standard.

While the Ninth Circuit did not reverse the lower court's application of the *Cahill* summary judgment standard, the Court suggested that *Cahill*'s standard, although potentially appropriate for political speech, does not apply to commercial speech. The Court instead advocated for an attenuated summary judgment standard where the nature of the speech in question should be the primary deciding factor. Noting a distinction between commercial speech and non-commercial speech, the Court determined that the identity of an alleged defamer should be revealed with increased ease in commercial speech cases.[4]

I. INTERNET ANONYMITY AS A FIRST AMENDMENT RIGHT

Courts have long protected anonymous speech, recognizing that "an author's decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment."[5] As

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[3] Doe v. Cahill, 884 A.2d 451, 459 (Del. 2005).

[4] The original, and presently used, definition of commercial speech is "speech which does no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 376 (1973); *see also* Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (commercial speech is "related solely to the economic interests of the speaker and its audience…").

[5] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-43 (1995) (invalidating an Ohio election law that prohibited the circulation of anonymous leaflets in connection with political campaigns). *See also* Talley v. California, 362 U.S. 60, 65 (1960) (invalidating a city ordinance that prohibited the distribution of any handbill in the city unless the name and address of the author,

electronic communication became more prevalent, the U.S. Supreme Court responded by holding that online speech retains the same protections as other forms of speech.[6] In *McIntyre v. Ohio Elections Commission*, the U.S. Supreme Court held that the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without a fear of retaliation that could lead to the chilling of online speech.[7]

Nevertheless, the right to anonymous speech is a qualified privilege that extends only so far. Courts have consistently held "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."[8] For example, fighting words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[9]

The tort of defamation seeks to address intentionally or negligently injurious statements. To create liability for defamation there must be a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher with respect to the act of publication; and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[10] A communication is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[11]

The Supreme Court has been careful to draw distinctions between politically motivated defamatory speech and

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sponsor, or preparer was identified).

[6] Reno v. ACLU, 521 U.S. 844, 845 (1997) (noting that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech).

[7] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995).

[8] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[9] *Id*. at 572.

[10] RESTATEMENT (SECOND) OF TORTS § 558 (1977).

[11] RESTATEMENT (SECOND) OF TORTS § 559 (1977).

commercially motivated defamatory speech; the latter is not granted the same level of First Amendment protection. In fact, before 1976, the Supreme Court assumed that commercial speech fell outside the realm of First Amendment protection.[12] In 1976 the Supreme Court held that free-enterprise depended on the free flow of information and that truthful, non-misleading advertising was entitled to First Amendment protection.[13] The Court re-established its position in *Central Hudson Gas v. Public Service Commission of New York* by instituting a four-part test that emphasized the accuracy and lawfulness of the advertising.[14] Commercial speech has *never* enjoyed the same degree of protection given to political expression.

Courts have encountered new challenges when applying First Amendment principles in the online context. While some courts have found the immediacy and size of the Internet increases the harm of defamatory speech,[15] others have found the exact opposite, commenting that Internet speech is full of hyperbole, sarcasm and invective language not taken seriously by any reasonable reader.[16] For example, if readers do not take online commentary seriously, a plaintiff may not be sufficiently harmed

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[12] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[13] *Va. State Bd. of Pharmacy*, 425 U.S. at 764-65.

[14] Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[15] *See* In re Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *7 (Va. Cir. Ct. 2000) *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 261 Va. 350, 542 S.E.2d 377 (2001). "In this age of communication in cyberspace, the potential dangers that could flow from the dissemination of such information increase exponentially as the proliferation of shareholder chat rooms continues unabated, and more and more traders utilize the Internet as a means of buying and selling stocks. As such, the wrongful dissemination of such information through the Internet may also fall outside the scope of First Amendment protections."

[16] *See* Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001). Internet defamation cases must be viewed in light of the fact that bulletin boards and chat rooms "are often the repository of a wide range of casual, emotive, and imprecise speech," and recipients of any harmful or offensive statements "do not necessarily attribute the same level of credence to the statements that they would accord to statements made in other contexts." MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 522 (2d ed. 2001).

to merit recovery for the tort of defamation. On the other hand, language that may not have been defamatory if spoken or published on paper can become defamatory if broadcasted to an audience of millions.

II. THE BALANCING ACT: THE TESTS AND HOW THEY COMPARE

When a plaintiff alleges Internet defamation but does not know the identity of his or her defamer, he or she must first serve a subpoena on the website host or the Internet service provider (ISP) asking for the release of the potential defendant's identity.[17] Many ISPs oppose the request in an attempt to protect their customers' privacy. The court must then hold a hearing to determine the propriety of disclosure. It is in this context that the courts must apply a balancing test between the plaintiffs' rights to be free from defamatory conduct and the defendants' rights to anonymous free speech.

A. Federal Courts

Because no federal court had articulated a standard for when unmasking an anonymous Internet speaker is appropriate, most courts looked to state-court tests for guidance. In fact, only two federal cases have addressed the issue of revealing the identity of an anonymous Internet user in a defamation case: *NLRB v. Midland Daily News*[18] and *Lefkoe v. Jos. A. Bank Clothiers, Inc.*[19]

In *Midland Daily News*, a government agency moved to compel a newspaper to answer a subpoena for the identity of an anonymous advertiser.[20] The district court and the Sixth Circuit Court of Appeals denied this request.[21] As the court of appeals

[17] Under Section 230 of the Communications Decency Act, online publishers (ISPs) enjoy immunity from civil liability for defamatory content posted by third parties. 47 U.S.C. § 230 (1996). As such, ISPs are not the targeted defendants in defamation suits.

[18] *See* NLRB v. Midland Daily News, 151 F.3d 472 (6th Cir. 1998).

[19] *See* Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240 (4th Cir. 2009).

[20] *Midland Daily News*, 151 F.3d at 472-73.

[21] *Id.* at 472.

explained, permitting the NLRB to obtain the identity of Midland's advertiser without requiring it to demonstrate a reasonable basis for seeking such information would have an unconstitutional chilling effect on the newspaper's ability to publish lawful advertisements.[22] The plaintiff in this case facially failed to demonstrate a substantial state interest that outweighed the danger to the free speech rights of Midland, its anonymous advertiser, and to countless other similarly situated entities across the nation.[23] In addition, the court found that NLRB could have used less-extensive and less-intrusive means to access the information it desired.[24]

In *Lefkoe*, the Fourth Circuit permitted the deposition of an anonymous speaker in a securities-fraud suit.[25] The court utilized an extremely lenient disclosure standard, reasoning that once the plaintiff carries his or her burden and shows that the information held by the Doe Client "could be relevant and useful" to the defense of the litigation, the governmental interest in providing a fair trial is served by unveiling the identity of the anonymous speaker.[26]

Neither federal appeals court articulated with any degree of precision how lower courts should weigh the First Amendment rights of anonymous speakers against the right of identity disclosure for defamation plaintiffs.

B. State Courts

State courts have applied three distinct tests to determine when a plaintiff has made a sufficient showing to merit a court-issued motion to compel disclosure of the identity of an anonymous poster. Courts have required plaintiffs to demonstrate either (1) a good faith basis warranting disclosure; (2) evidence sufficient to survive a motion to dismiss before allowing disclosure; or (3) evidence sufficient to survive a hypothetical motion for

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[22] *Id*. at 475.
[23] *Id*.
[24] *Id*.
[25] Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 248 (4th Cir. 2009).
[26] *Id*. at 249.

summary judgment. The former asks for the least stringent proof, while the latter requires the most robust proof from the plaintiff.

1. The Good Faith Standard

The good faith standard, espoused in *In re Subpoena Duces Tecum to America Online, Inc.*, requires the plaintiff to show only that his claim was made in good faith and not out of intent to harass the defendant.[27] In *America Online*, the plaintiffs, under the pseudonym of "Anonymously Publicly Traded Company," alleged that several anonymous posters (referred to as "John Does") published defamatory material misrepresentations and confidential material insider information in various Internet chat rooms and sought to discover the identity of these anonymous posters.[28] In considering the plaintiff's request, the court applied a balancing test focused on "whether a state's interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak [through the Internet]."[29] Under this standard, a plaintiff must only demonstrate that a cause of action *may* exist in order for the court to abridge the right to communicate anonymously on the Internet.[30]

In articulating the precise scope of this "good faith" standard, the court determined that the party requesting the subpoena must have a legitimate, good faith basis to contend that it may be the victim of actionable conduct and that the subpoenaed identity information is "centrally needed to advance that claim."[31] The court determined this good faith basis was met, denied America Online's motion to quash the subpoena, and ordered disclosure of the identities of the John Does.[32]

Other courts have rejected the good faith standard as setting the bar too low to protect a defendant's First Amendment right to

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[27] In re Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. 2000).

[28] *Id.* at *1.

[29] *Id.* at *5.

[30] *Am. Online*, 2000 WL 1210372, at *7.

[31] *Id.* at *8.

[32] *Id.*

speak anonymously on the Internet.[33]

2. The *Prima Facie* Case Standard

In *Dendrite International v. Doe No. 3*, the plaintiff, a corporation, sought a discovery request to ascertain the identity of a certain John Doe No. 3 from an ISP, Yahoo!, because of alleged defamation and other actionable statements made on a Yahoo! bulletin board.[34] The Superior Court of New Jersey Appellate Division applied a *prima facie* case standard, which requires plaintiffs to satisfy a four-prong test akin to resisting a motion to dismiss. The court held that the plaintiff must support his or her claim with a *prima facie* evidentiary showing such that the action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted.[35]

In order to satisfy the test, the court determined that plaintiffs must first "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure."[36] This step should include posting a message of notification of the identity request on the ISP's message board and the withholding of any further legal action to allow the John Doe defendants a reasonable opportunity to file and serve an opposition.[37]

The second step requires the plaintiff to identify the precise alleged actionable speech made by each anonymous poster.[38] The plaintiff met this burden by (1) identifying specific statements as purportedly defamatory; (2) identifying John Doe No. 3 as the speaker; and (3) establishing that the statements were in fact published on Yahoo!'s bulletin board.[39]

Third, before a court will order identity disclosure, the plaintiff must set forth a *prima facie* cause of action that can withstand a

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[33] *See* Doe v. Cahill, 884 A.2d 451, 462 (Del. 2005).

[34] Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760, n. 1 (N.J. Super. Ct. App. Div. 2001).

[35] *Id.* at 760.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 770.

motion to dismiss for failure to state a claim upon which relief can be granted.[40]

Fourth, if the plaintiff has presented a sufficient cause of action, the court should *then* balance the defendant's First Amendment right of anonymous free speech against the strength of the case presented and the necessity of the identity disclosure to the plaintiff's ability to properly proceed.[41] Under the *Dendrite* test, this final balancing test does not occur until a *prima facie* claim of defamation has been established.[42] The court largely based its opinion on a concern for discovery abuse by disgruntled plaintiffs looking to harass, intimidate or retaliate.[43]

Based on this test, the court determined that the motion judge appropriately concluded that Dendrite failed to establish a sufficient nexus between John Doe No. 3's statements and Dendrite's allegations of harm; therefore, disclosure of John Doe No. 3's identity was not warranted.[44]

Compared to the good faith standard, *Dendrite*'s *prima facie* case standard demands much more of a plaintiff seeking disclosure of the identity of an anonymous speaker. Even after the plaintiff has presented sufficient evidence to survive a motion to dismiss, the court may still balance the right of disclosure against the anonymous speaker's First Amendment rights. Such a requirement asks for much more than a mere "good faith" claim.

3. The Summary Judgment Standard in *Doe v. Cahill*

The Supreme Court of Delaware became the first state supreme court to hear a request for disclosure of an online defamation defendant in *Doe v. Cahill*.[45] The court held that, in order to disclose the identity of an online commentator, plaintiffs must

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[40] *Id*. at 760.
[41] *Id.*
[42] *Id*. at 770.
[43] *Id.*
[44] *Id*. at 771.
[45] Monique C.M. Leahy, *Cause of Action for Internet Defamation: Discovery of Anonymous Posters and Protective Orders*, 32 CAUSES OF ACTION 2d 281 § 36, (originally published 2006; updated September 2010).

survive a hypothetical motion for summary judgment by making a *prima facie* showing for each element of the claim.[46]

In *Doe v. Cahill*, a city councilman sued John Doe defendants for defamation after they allegedly posted defamatory comments on a local political website alleging that Mr. Cahill's mental condition was deteriorating and his leadership failing.[47] The plaintiff subpoenaed the ISP for the IP addresses and identities of the bloggers.[48] The court recognized that granting the subpoena might chill political speech in violation of the First Amendment, ultimately holding that the summary judgment standard "more appropriately balances a defamation plaintiff's right to protect his reputation and a defendant's right to speak anonymously."[49] In reaching its conclusion, the court determined that no reasonable person could have interpreted Doe's statements as defamatory as they were no more than an "unfounded and unconvincing opinion."[50] Such statements cannot give rise to a *prima facie* case for defamation liability.[51]

The court found *Dendrite*'s four-part test unnecessary, adopting only parts one and three. In particular, the court eliminated the requirement that a plaintiff set forth the exact statements made by the anonymous poster because that portion is "subsumed in the summary judgment inquiry."[52] The court further found that part four "adds no protection above and beyond that of the summary judgment test," needlessly complicating the analysis.[53] In sum, in order to satisfy the summary judgment standard, a plaintiff must establish a *prima facie* case for each element and give notice to the speaker.[54]

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[46] Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).
[47] *Id.* at 454.
[48] *Id.*
[49] *Id.* at 462.
[50] *Id.* at 467.
[51] *Id.*
[52] *Id.* at 461.
[53] *Id.*
[54] *Id.* at 463-64 ("A public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control.").

III. INTERPRETATION OF *CAHILL* IN *ANONYMOUS ONLINE SPEAKERS*

In *In re Anonymous Online Speakers*, the commercial defamation in question was an allegation that defendant, Signature Management TEAM, LLC (TEAM), had created an online smear campaign against the corporate plaintiff, Quixtar, Inc.[55] Quixtar alleged that the defamation was effected through anonymous postings disparaging Quixtar and its business practices.[56] During discovery, Quixtar requested TEAM release the identities of five anonymous online posters, alleged employees of the company.[57] TEAM refused, so Quixtar filed a motion to compel disclosure in the District Court of Nevada.[58] Based on the test announced in *Doe v. Cahill*, the district court ordered TEAM to release the identities of three of the five pseudonyms.[59]

Both Quixtar and TEAM petitioned the Ninth Circuit for a writ of mandamus challenging the order to release the identities.[60] While the Ninth Circuit denied both writs for mandamus, it did so based on the fact that neither party had demonstrated a need for the extraordinary remedy of mandamus.[61] As the district court's

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[55] In re Anonymous Online Speakers, 611 F.3d 653, 655-56 (9th Cir. 2010) *opinion withdrawn and superseded by* In re Anonymous Online Speakers, No. 09-71265, 2011 WL 61635, at *1 (9th Cir. Jan. 7, 2011).

[56] *Anonymous Online*, 2011 WL 61635, at *1 (the claims were based on comments such as "Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable"; "Quixtar refused to pay bonuses to IBOs in good standing"; Quixtar "terminated IBOs without due process"; "Quixtar currently suffers from systemic dishonesty"; and "Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC's Amway rules.")

[57] *Id.*

[58] *Id.* at *5.

[59] *Id.*

[60] *Id.*

[61] In federal courts, 28 U.S.C.A. § 1291 provides that appellate review of lower-court decisions should be postponed until after a final judgment has been rendered in the lower court. A writ of mandamus offers an exception to this rule and allows a dissatisfied party to appeal a decision before the trial proceeds. However, such an order is issued only in exceptional circumstances. *See* Kerr v. U.S. Dist. Court, 426 U.S. 394, 402 (1976). *See also* Kathryn Freund, *Ninth Circuit Argues for Less Stringent Test for Protecting Anonymous Online Commercial Speech***,** JOLT DIGEST, HARV. J.L. & TECH. (July 27, 2010, 9:19

decision was not "clearly erroneous as a matter of law," the Ninth Circuit upheld the lower court's order.[62]

Nevertheless, the court determined that where commercial speech is at issue, the *Cahill* test requires too much of a showing by the plaintiff. While the Ninth Circuit refrained from overturning the district court's usage of the summary judgment standard from *Cahill*, the court nevertheless held the standard to be too strict for commercial defamation actions.

The Ninth Circuit recognized that it had not previously considered First Amendment claims of an anonymous non-party speaker on the Internet in a circumstance involving commercial speech and noted that previous commercial speech cases failed to establish a relevant standard.[63] After raising and dismissing various tests, including the *Dendrite* "*prima facie*" standard and the *America Online* "good faith" standard, the court found the *Cahill* standard to be "the most exacting,"[64] but considered it too strict of a standard for commercial speech. The court noted that because *Cahill* addresses political speech, the heightened summary judgment standard was appropriate, but the court found that when commercial speech is balanced against a discretionary discovery order under Federal Rule of Procedure 26, "*Cahill*'s bar extends too far."[65] The court reasoned that because of the lesser constitutional protection afforded commercial speech, a lower bar to reveal the identities of the anonymous posters was more appropriate.[66]

In limiting *Cahill*'s application to political speech, the court judged the degree of protection given to online speakers by "the impact the speech has on the other party rather than the intent of the speaker."[67] The court explicitly clarified that if the lower court had refused to unmask the anonymous speakers, "its application of

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PM), http://jolt.law.harvard.edu/digest/9th-circuit/in-re-anonymous-online-speakers.

[62] *Anonymous Online*, 2011 WL 61635, at *7.

[63] *Id.* at *4.

[64] *Id.* at *5.

[65] *Id.* at *6.

[66] *Id.*

[67] *See* Freund, *supra* note 60.

the wrong test could have rendered that decision reversible."[68]

Anonymous Online's "new" standard considers the nature of the speech as the primary driving force in balancing the rights of anonymous speakers in discovery disputes, based upon the idea that "the specific circumstances surrounding the speech serve to give context to the balancing exercise."[69] Commercial speech, as opposed to political speech, enjoys a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[70] This "subordinate position" makes commercial speech "subject to modes of regulation that might be impermissible in the realm of noncommercial expression."[71] Contrasted with *Cahill*, the Ninth Circuit found that the anonymous speech in *Anonymous Online* did not involve expressly political speech, but rather, "speech related to the non-competition and non-solicitation provisions of Quixtar's commercial contracts."[72]

Although the Ninth Circuit denied the writs of mandamus at issue for procedural reasons, the *Anonymous Online* decision provides the backdrop for a useful discussion of the protection afforded to Internet free speech in the commercial context. Indeed, the Ninth Circuit's decision in *Anonymous Online* may indicate that courts are lowering the bar for plaintiffs who attempt to unmask anonymous bloggers.

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[68] *See* Julian A. Biggs, *Not So Brave New World: Unmasking Anonymous Online Defamation*, CORPORATE COUNSEL, Oct. 7, 2010.

[69] *Anonymous Online*, 2011 WL 61635, at *6.

[70] *Id.* at *2, (citing Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978)).

[71] Bd. of Trs. of State. Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quotations omitted) (citing Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978)).

[72] *Anonymous Online*, 2011 WL 61635, at *6. Although the court found that the speech in question was not "expressly political," the court refused to decide if the speech at issue constitutes commercial speech under the Supreme Court's definition in *Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Nevertheless, "even if the speech was commercial, the district court's choice of the *Cahill* test did not constitute clear error."

IV. WHY OTHER CIRCUITS WILL FOLLOW *ANONYMOUS ONLINE'S* INTERPRETATION OF THE SUMMARY JUDGMENT STANDARD

Anonymous Online will remain influential in online defamation cases for two distinct reasons. First, writs of mandamus are universally considered an extraordinary form of relief and appellate courts commonly avoid discovery disputes.[73] Therefore, very few appellate courts hear cases where plaintiffs in defamation cases seek to identify anonymous Internet commentators. Until the U.S. Supreme Court squarely addresses the proper disclosure test for commercial speech, it is likely that the Ninth Circuit's opinion in *Anonymous Online* will remain the primary authority on the subject.

Second, *Anonymous Online* will continue to influence courts' decision-making because many likely "subpoena targets," such as Google, Yahoo!, and Bing are physically located in the Ninth Circuit, and are therefore bound by the precedent set in *Anonymous Online*.[74] Courts that have not selected a balancing test will most likely look to the Ninth Circuit as the circuit court that consistently deals with the most established and technologically prominent parties.

The court in *Anonymous Online* held that courts should examine the nature of the speech at issue to determine whether the speech is commercial—and therefore subject to unmasking—or political, and thus protected by the First Amendment. This emphasis on the nature of the speech may create potential litigation problems for parties seeking to unmask anonymous commentators. For example, it is entirely possible that a party making defamatory statements could include both political and commercial statements in order to maintain anonymity while still causing significant harm.

In addition, basing the test on the nature of the anonymous speech at issue is problematic in cases where the true nature of the speech cannot be determined until after the author's identity is revealed.[75] For example, a cause of action for defamation relating

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[73] *See id.* at *3.
[74] Biggs, *supra* note 67.
[75] *See id.*

to the use of insider information might be predicated upon whether or not the author of alleged defamatory content is an employee of a plaintiff company, as opposed to whether the author is completely unaffiliated with the company.

CONCLUSION

Anonymous Online provides a useful standard for lower courts to follow when deciding whether to reveal the identity of an anonymous Internet user in a defamation lawsuit. First, the standard requires that the court determine the nature of the anonymous speech and decide whether that speech is commercial or political in nature. Second, the Ninth Circuit emphasizes that when speech is commercial, Internet anonymity warrants less First Amendment protection and therefore a less-demanding test for the plaintiff to attain revelation of an anonymous commentator. After *Anonymous Online*, the classification of certain speech as commercial or non-commercial will likely have substantial consequences for plaintiffs in Internet defamation cases.

Nevertheless, *Anonymous Online* leaves some questions unanswered. While the court discussed the appropriate standard for commercial speech, it did not explicitly determine the threshold that must be met in order to uncover a politically motivated anonymous speaker. As such, the good faith standard, the *prima facie case* standard, or *Cahill's* summary judgment standard may still be used in cases of alleged politically motivated defamation.

PRACTICE POINTERS

- Defamation plaintiffs seeking the identity of an anonymous online commentator under *Anonymous Online* should demonstrate that the speech at issue is commercial in nature by looking to the U.S. Supreme Court's *Central Hudson* decision.
- Commercial speech under the Supreme Court's decision in *Central Hudson* means speech that is "related solely to the economic interests of the speaker and its audience" and

goes to the heart of the plaintiff's commercial practices or its business operations.[76]

- If commercially motivated, the lawsuit should be framed as a commercial case.[77] Instead of filing a defamation complaint, it may be wiser to explicitly classify the cause of action as an economic tort, such as unfair competition or other unfair trade practices.
- If the speech at issue is unquestionably politically motivated, the plaintiff's most viable argument is to show that the speech meets a higher threshold test. *Anonymous Online* discussed the appropriate standard for commercial speech, indicating that the threshold is lower than the threshold for political speech, but the court did not explicitly determine the precise threshold that must be met in order to uncover the anonymous speaker in a politically motivated context. Here, courts may continue to look to the good faith standard, the *prima facie* case standard, or *Cahill's* summary judgment standard to answer such requests.

[76] Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[77] *See* Biggs, *supra* note 67.