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Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?

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NOTE

ANONYMOUS CORPORATE DEFAMATION PLAINTIFFS: TRAMPLING THE FIRST AMENDMENT OR PROTECTING THE RIGHTS OF LITIGANTS?

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I. INTRODUCTION

Since 1998, American companies have filed more than 150 lawsuits against anonymous cyberposters[1] who have posted defamatory comments on the World Wide Web.[2] One of the reasons for the recent emergence of defamation lawsuits against individuals is that the Internet makes it

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1. A cyberposter can be defined as any person who creates a writing with the intention of having the writing accessible on the World Wide Web. An anonymous cyberposter is initially named as a John Doe defendant until the plaintiff discovers the defendant's identity, which is usually accomplished by subpoenaing an Internet Service Provider's ("ISP") records. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 858 n.6 (2000).

2. John A. Walker, *Cybersmears*, 6 CYBERSPACE LAWYER 10 (2001), *available at* http://www.jordenusa.com/CybersmearsSpr01.html (last visited Feb. 3, 2002).

relatively easy for an individual to "publish."[3] Another reason could be that Internet anonymity frees individuals from restrictive social norms, including a fear of accountability for speech.[4] The average person, however, has not considered the implications of publishing defamatory information in a medium that is potentially accessible by millions of people.[5]

Suits alleging Internet defamation arise most often when a John Doe posts derogatory information regarding a company on an Internet bulletin board, causing the company's stock price to fall.[6] Not only have these postings contributed to declining stock prices, but derogatory postings also have led to management resignations[7] and rampant rumors regarding a company's financial stability[8] and business practices.[9] In addition, companies have sued John Does who have initiated mass emails that criticize the companies' business practices.[10]

Sometimes suing John Doe defendants can be poor strategy. For example, when Ford Motor Company sued Robert Lane, the publisher of www.blueovalnews.com, Ford experienced a consumer backlash.[11] Ford claimed that Lane's site, which was self-billed as the "independent voice of the Ford community," disclosed confidential company information.[12] Not only did Ford seek damages, but it also sought to shut the site down.[13] After the suit was filed, people became concerned that Ford could not "take a little criticism."[14] Ford is not alone in experiencing a backlash. After engineering firm Stone & Webster sued John Doe for defamation, an individual posted this criticism on a bulletin board: "S&W, stop wasting

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3. Lilian Edwards, *Defamation and the Internet*, *in* LAW AND THE INTERNET 183, 188 (Lilian Edwards & Charlotte Waelde eds., 1997). The development of the Internet has largely torn down traditional barriers to publish, such as the need for large amounts of start-up capital.

4. Lee Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 152 (1996).

5. *See id.*

6. *See, e.g.*, Global Telemedia Int'l, Inc. v. Doe, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 770 (N.J. Super. Ct. App. Div. 2001).

7. *See, e.g.*, Tom Collins, *Fighting Cyber-Slander*, MIAMI DAILY BUS. REV., June 29, 2001.

8. *See, e.g.*, Robert McGravey, *Cyberslander*, ELECTRONIC BUS., March 2001, at 39 (discussing a rumor that Skecher USA, Inc. planned to file for Chapter 11 protection).

9. *See, e.g., Action Is Often the Best Course When Dealing with Internet Libel*, HOTEL AND MOTEL MGMT., Feb. 7, 2000, at 26 (discussing a rumor that clothing designer Tommy Hilfiger made racist statements on the Oprah Winfrey show).

10. *See, e.g.*, Cordelia Brabbs, *Red Bull Fights Off E-mail Saboteurs*, MARKETING, March 30, 2000, at 1 (detailing the efforts of Red Bull GmbH in defending its energy drink after an email began circulating linking its product to brain tumors).

11. Anne Colden, Sending a Message: Companies Go to Court to Stop "Cyber-smearers," DENV. POST, Jan. 15, 2001, at E-01.

12. *Id.*

13. *Id.*

14. *Id.*

shareholder money. Concentrate on doing your job and improving your performance. That's the way to stop honest criticism."[15]

The emerging backlash against corporate plaintiffs that sue John Doe defendants has developed out of the notion that individuals should have the right to speak anonymously.[16] The United States Supreme Court has held that individuals have First Amendment protection to distribute anonymous handbills and campaign literature.[17] Extending the Court's holdings to the Internet is the natural next step because the Internet is simply an inexpensive distribution mechanism for the 21st Century "pamphleteer."[18] Moreover, the Court has granted the Internet broad First Amendment protection.[19] Thus, these lawsuits inherently implicate the First Amendment.[20] However, not all John Does are allowing corporations to steamroll their anonymity rights. Some John Does have countersued corporations to prevent a corporation from discovering their identities.[21] Others have set up a website to support the right of anonymity on the Web.[22] Still other John Does have sought help from their ISPs, which have challenged subpoenas on the John Does' behalf.[23] In addition, the American Civil Liberties Union and the Electronic Privacy Information Center are offering support to John Does.[24]

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15. William J. Angelo, *Companies Suing over Cybersmear*, ENR, May 10, 1999, at 10.

16. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (striking down an Ohio statute prohibiting the distribution of anonymous campaign literature as unconstitutional); Talley v. California, 362 U.S. 60, 64-65 (1960) (striking down a Los Angeles ordinance prohibiting the distribution of anonymous handbills as unconstitutional); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (finding a "legitimate and valuable right to participate in online forums anonymously or pseudonymously . . . . This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate.").

17. *McIntyre*, 514 U.S. at 357; *Talley*, 362 U.S. at 64-65.

18. Tien, *supra* note 4, at 136-37; *see also Columbia Ins. Co.*, 185 F.R.D. at 578.

19. *See* Reno v. ACLU, 521 U.S. 844, 869-70 (1997).

20. U.S. CONST. amend. I (stating in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press").

21. *See, e.g.*, Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1097-98 (W.D. Wash. 2001) (granting defendant's motion to quash subpoena); Immunomedics, Inc. v. Doe, 775 A.2d 773, 778 (N.J. Super. Ct. App. Div. 2001) (affirming trial court's decision allowing discovery of defendant's name); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 771-72 (N.J. Super. Ct. App. Div. 2001) (affirming the trial court's decision denying discovery of defendant's name).

22. *See* John Does Anonymous Foundation, *at* http://www.johndoes.org (last visited Feb. 3, 2002). The site includes updates to recent John Doe lawsuits, allows users to register for anonymous email accounts, and provides chat rooms for individuals to discuss civil liberty issues. *Id.*

23. *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (2000), *rev'd*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

24. *'John Does' Fight to Keep Anonymity*, MILWAUKEE J. SENTINEL, June 6, 2000, at 1M.

The growing public sentiment against corporations suing John Does may be for good reason. Legal action in Internet defamation cases, especially actions with individuals as defendants, have a peculiar motivation. Most actions are initiated by large, deep-pocketed corporations against individuals without sufficient resources to satisfy a substantial judgment.[25] Thus, the usual cost-benefit analysis undertaken by a plaintiff before initiating litigation does not apply.[26] In situations where the John Doe's criticism has merit, a corporation that sues for Internet defamation is simply using the lawsuit as a scare or intimidation tactic to prevent individuals from speaking out.[27] These types of lawsuits have been termed SLAPP (Strategic Lawsuits Against Public Participation) suits by George W. Pring and Penelope Canan.[28] Corporations, in an effort to avoid a consumer backlash, have developed a new litigation strategy: sue anonymously. Corporations are attempting to navigate the unclear standards that courts have developed over the past thirty years that allow a plaintiff to proceed anonymously.[29] For example, in March 2001, the Virginia Supreme Court was the first appellate court in the United States to tackle a case involving an anonymous corporation suing a John Doe

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25. Lidsky, *supra* note 1, at 861.

26. *See id.* at 872, 876-83. This statement holds true to the extent that the benefit derived is measured by the size of the judgment. *See id.* Other benefits such as protecting a corporate image may justify a lawsuit. *See id.*

27. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8 (1996). See also http://www.epic.org/anonymity/aquacool_complaint.pdf (last visited Feb. 3, 2002) for a complaint filed against Yahoo!, which alleges:

> On information and belief, Yahoo! knows or has reason to know that many of the lawsuits seeking members' personal information are frivolous and would not withstand a motion to dismiss. Yahoo! is aware that executives at publicly owned companies that are featured on the message boards frequently take umbrage at the critical comments posted about "their" companies on the message boards. With sensitive egos and money to burn, such companies often file a lawsuit merely in order to obtain the right to subpoena Yahoo! for members' information so that the company's curiosity and desire to silence the member can be satiated. This phenomenon has been chronicled in numerous media. Nonetheless, the subject of the lawsuit is unable to mount such a defense prior to Yahoo!'s disclosure of personal information solely because the defendant is not notified by Yahoo! of the lawsuit or the subpoena.

Id.

28. PRING & CANAN, *supra* note 27, at 8-9.

29. *See, e.g.*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 379 (Va. 2001). *See also* Tom Kertscher, *Cyberspace Litigation Pits 'Anonymous' vs. 'Unknown,'* MILWAUKEE J. SENTINEL, July 16, 2001, at 3B (discussing an individual filing a defamation suit anonymously in Wisconsin). The author attempted to contact the plaintiff's attorney for an update of the pending litigation, but received no reply.

defendant for defamation in *America Online, Inc. v. Anonymous Publicly Traded Co.*[30] Although the Virginia Supreme Court refused to recognize an Indiana trial court decision authorizing the anonymous plaintiff to obtain the defendant's identity from a Virginia-based ISP,[31] such cases will likely become more common. It is already a common occurrence for courts to receive subpoena requests from named corporate plaintiffs that seek to uncover a cyberposter's identity.[32] While it would be unusual for a corporation to pursue an anonymous defamation claim against a John Doe successfully, there is limited support for such an action.[33] However, because this is an emerging area of the law, courts have not yet developed a systematic approach for dealing with this issue.

This Note explores the beginning of a new phenomenon: the ability of an anonymous corporate plaintiff to sue a cyberposter. Part II of this Note addresses the public's First Amendment right of access to courts and whether anonymity unconstitutionally restricts access. Part III focuses on the United States Supreme Court's recognition of a right to privacy and to what extent that right applies to corporate litigants. Part IV discusses the issue of SLAPP suits and how the motivation of Internet defamation suits complicates the courts' need to balance a plaintiff's right to privacy and the public's right of access. Finally, Part V suggests a framework for courts to follow in attempting to balance a plaintiff's limited right to privacy with the public's First Amendment right of access.

II. PUBLIC ACCESS TO COURTROOMS: HOW FAR DOES THIS CONSTITUTIONAL RIGHT GO?

The United States Constitution provides no explicit right for public access[34] to courtrooms.[35] There has been, however, a strong common law

30. 542 S.E.2d 377 (Va. 2001).

31. *Id.* at 382.

32. The nature of Internet defamation suits is unusual in that most suits are dropped after the plaintiff discovers the defendant's identity. A compilation of filed complaints can be found at http://www.cybersecuritieslaw.com/lawsuits/cases_corporate_cybersmears.htm (last visited Feb. 3, 2002).

33. *See infra* Part V.

34. The author uses the word "public" to refer to the general public as well as members of the press. Nearly every courtroom has physical space limitations and therefore the entire public cannot attend every trial. The press acts as the public's representative. Thus, although the press does not have greater First Amendment protection than the public, members of the press are the most frequent challengers of restrictions on courtroom access. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring); Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (holding that the First Amendment does not provide a greater right of access to the press than the public); Branzburg v. Hayes, 408 U.S. 665, 682-86, 690 (1972) (holding that a reporter has no special protection against grand jury subpoenas); N.Y. Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) (finding that the First Amendment does not

tradition of open courtrooms dating back to 15th Century England.[36] Since the United States Constitution does not expressly grant or deny the right of access to courtrooms, a question arose as to whether the drafters intended to require all judicial proceedings to be open to the public.[37] Through a series of United States Supreme Court decisions between 1979 and 1986, the question has largely been resolved in favor of a right of access.[38]

In *Gannett Co. v. DePasquale*,[39] the Court, in a 5-4 decision, upheld the constitutionality of restricting public access to pretrial judicial proceedings.[40] At a pretrial hearing, in which two murder defendants moved to suppress evidence and statements they had made to the police, the defendants requested that the public be excluded from the hearing.[41] The trial judge, in an attempt to balance the defendants' Sixth Amendment[42] right to a fair trial with the First Amendment's guarantee of a free press, granted the defendants' request to exclude the public from the courtroom.[43] On appeal to the United States Supreme Court, the issue was whether the public had a constitutional right to require pretrial judicial proceedings to be open to the public.[44]

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provide the press special access to information not available to the public).

35. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

36. *Richmond Newspapers*, 448 U.S. at 564-569 (plurality opinion); Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979).

37. *Gannett*, 443 U.S. at 370-71.

38. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 5-6 (1986) (*Press-Enterprise II*); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 513 (1984) (*Press-Enterprise I*); *Globe Newspaper*, 457 U.S. at 602; *Richmond Newspapers*, 448 U.S. at 580-81 (plurality opinion); *Gannett*, 443 U.S. at 370.

39. 443 U.S. 368 (1979).

40. *Id.* at 394.

41. *Id.* at 374-75. The defendants, who were the victim's fishing companions on the day of the murder, gave statements to authorities that led police to the murder weapon. *Id.* at 370, 375. Huge publicity surrounded the investigation, which included a manhunt for the defendants that spanned two states and the possibility that the trial would commence before the police had recovered the victim's body from the bottom of Seneca Lake. *Id.* at 372-74.

42. U.S. CONST. amend. VI (stating in part "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .").

43. *Gannett*, 443 U.S. at 376. Although the trial judge granted the motion, the New York Supreme Court, Appellate Division, reversed. *Id.* at 376. The defendants pled guilty before the Appellate Division made its decision. *Id.* at 377 n.4. Thus, the pretrial hearing had no bearing on the defendants' convictions. *See id.* The New York Court of Appeals later affirmed the decision of the Appellate Division. *Id.* at 376. Furthermore, both the New York Court of Appeals and the U.S. Supreme Court agreed that the issue was not moot, as the issue was "capable of repetition, yet evading review." *Id.* at 377.

44. *Id.* at 370.

Gannett, a large newspaper chain, argued that a constitutional right of access rested in both the First and Sixth Amendments.[45] Refusing to review the First Amendment question, the Court determined that although a defendant has a right to a public trial, there is no reciprocal right preventing the defendant from having a private trial.[46] Despite agreement between the majority and the dissent that open courts "may improve the quality of testimony, [and] induce unknown witnesses to come forward with relevant testimony," the majority determined that the strong societal interest to ensure a fair trial was more important.[47] In noting that the closure of a pretrial proceeding is one of the most effective means a trial judge can use to protect a defendant's right to a fair trial, the Court provided further support for the proposition that a defendant's Sixth Amendment rights trump the First Amendment when the two constitutional principles conflict.[48] Justice Rehnquist, in a concurring opinion, went so far as to interpret the Court's holding as "the Sixth Amendment does not require a criminal trial or hearing to be opened to the public if the participants to the litigation agree for any reason . . . that it should be closed."[49]

With the *Gannett* Court having limited its decision to *pretrial* hearings but having referred to closure of a *trial* throughout its opinion,[50] significant confusion resulted, which was alleviated when the Court reviewed another access case, *Richmond Newspapers, Inc. v. Virginia*,[51] the following term. In *Richmond Newspapers*, the defendant faced a fourth murder trial because his first conviction was reversed and his next two trials ended in mistrials.[52] To prevent a third mistrial, the defendant moved to close the trial to the public.[53] One day after granting the defendant's motion to close the trial, the judge directed a verdict of not guilty.[54]

In an extremely divided Court, with no opinion garnering support from more than three Justices, the plurality distinguished *Gannett* by finding a significant difference between the right to attend criminal trials and the right to attend pretrial hearings.[55] A majority of the Court found constitutional

45. *Id.* at 376.
46. *Id.* at 381 & n.9, 382.
47. *Id.* at 383, 392-93, 427-28 (Blackmun, J., dissenting).
48. *Id.* at 378-79; *see also* Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966).
49. *Gannett*, 443 U.S. at 404 (Rehnquist, J., concurring).
50. *Id.* at 379-83.
51. 448 U.S. 555 (1980).
52. *Id.* at 559 (plurality opinion).
53. *Id.* at 561 (plurality opinion).
54. *Id.* at 561-62 (plurality opinion). Richmond Newspapers sought to vacate the order, but after a closed hearing, the trial judge denied the request. *Id.* at 561 (plurality opinion). Richmond Newspapers then unsuccessfully appealed to the Virginia Supreme Court. *Id.* at 562 (plurality opinion).
55. *Id.* at 563-64 (plurality opinion).

protections for open courtrooms in the First Amendment rather than the Sixth Amendment.[56] The protections offered by the First Amendment, including the freedom of speech, the freedom of the press, the right to peacefully assemble, and the right to petition the government for a redress of grievances, all share a common purpose in that these rights aid the public's duty of ensuring a properly functioning government.[57] Furthermore, the Court determined that certain traditions such as open courtrooms share the same common purpose underlying the First Amendment principles and therefore should have the same protections.[58] Although the Court recognized that the public's right was not absolute, it held that a trial court must have no other alternatives to adequately protect the defendant's right to a fair trial before excluding the public from a trial.[59]

With the fractured *Richmond Newspapers* decision failing to provide sufficient guidance for the Court's *Gannett* decision, the Court decided *Globe Newspapers Co. v. Superior Court*[60] two years later. In *Globe,* the Court struck down a Massachusetts statute that mandated state courts to exclude the public from the courtroom during the testimony of minors who are sex crime victims.[61] While the Court recognized that the public's access privilege was not absolute in *Richmond Newspapers*, the Court reiterated that exclusions should be rare.[62] Thus, any mandatory exclusion will most

56. Seven Justices out of eight participating in the decision held that the First Amendment protects the public's right of access to courts. *Id.* at 576 (plurality opinion), 581-82 (White, J., concurring), 584 (Stevens, J., concurring), 585 (Brennan, J., concurring), 598 (Stewart, J., concurring), 604 (Blackmun, J., concurring).

57. *Id.* at 575-76 (plurality opinion).

58. *Id.* at 575 (plurality opinion). Specifically, the Court relied on historical evidence indicating that criminal trials were presumptively open at the time the Bill of Rights was adopted. *Id.* at 567 (plurality opinion), 589-93 (Brennan, J., concurring). In addition, the Court recognized that public scrutiny ensures the proper functioning of the judicial system. *Id.* at 569 (plurality opinion), 593-97 (Brennan, J., concurring).

59. The Court suggested reasonable alternatives such as sequestering or excluding witnesses from the courtroom or instituting time, place, and manner restrictions during the course of a trial. *Id.* at 581 n.18 (plurality opinion), 600 (Stewart, J., concurring). In addition, while the concurring opinion of Justices Brennan and Marshall did not address the possibility of less intrusive alternatives, both Justices had joined the *Gannett* dissenting opinion, which would have required the defendant to prove that alternatives to closing the trial would be ineffective. Gannett Co. v. DePasquale, 443 U.S. 368, 441 (1979) (Blackmun, J. concurring in part and dissenting in part); *see also* Mark R. Stabile, Note & Comment, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 343-47 (1990) (providing examples of how alternatives have been used). *See generally* Gerald T. Wetherington, et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425 (1999) (providing guidance to judges and lawyers in balancing the conflicting rights of the free press/fair trial issue).

60. 457 U.S. 596 (1982).

61. *Id.* at 598, 602.

62. *Id.* at 606-07. The Court relied on the same historical arguments as in *Richmond*

likely be held unconstitutional given that a constitutional analysis would require a trial judge to conduct a strict scrutiny review.[63] Since a trial judge must determine whether a compelling state interest exists and whether excluding the public is narrowly tailored to meet that interest, a case-by-case approach must be relied upon rather than a general rule of exclusion.[64]

In further expanding its holding in *Globe*, the Court has provided some guidance for lower courts faced with a defendant's request to close a trial to the public.[65] In *Press-Enterprise I*,[66] a unanimous Court applied strict scrutiny review to reverse a decision by a California trial court judge to close *voir dire* in a trial involving the rape and murder of a teenage girl.[67] The Court noted that jury selection has been a historically open process that aids the proper functioning of the judiciary system and held that the trial judge erred in failing to consider less intrusive alternatives than closing the courtroom to the public.[68]

Two years later, in *Press-Enterprise II*,[69] the Court developed the current constitutional standard for open access to courtrooms.[70] The Court, in a 7-2 decision, drew from its prior access to courts jurisprudence and developed a two-tiered analysis.[71] First, the Court suggested that lower courts should determine whether the proceeding has been traditionally open to the public and whether the openness plays a "significant positive role" in the judicial process.[72] Second, if the proceeding is determined to be presumptively open, the defendant's request for closure must be subjected to strict scrutiny review.[73] In applying this two-tiered analysis, the Court reversed a California trial judge's refusal to release a transcript of a closed preliminary judicial proceeding.[74] The Court's decision in *Press-Enterprise*

Newspapers. *Id.* at 605-06. *See supra* note 58.

63. *Globe*, 457 U.S. at 606-07.

64. *Id.* at 607-08.

65. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 5-6 (1986) (*Press-Enterprise II*); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 513 (1984) (*Press-Enterprise I*).

66. 464 U.S. 501, 503, 505 (1984).

67. *Id.* at 503, 505.

68. *Id.* at 505, 508, 511.

69. 478 U.S. 1 (1986).

70. *Id.* at 8-10.

71. *Id.*

72. *Id.* at 8. In prior access to courtroom cases, the Court used historical evidence and the usefulness of publicity as a check on the judicial system to support a strict scrutiny analysis. *See supra* note 58. This decision effectively *requires* a court to base its decision upon whether a particular proceeding has been historically open to the public and whether the publicity will ensure a properly functioning judicial system.

73. *Press-Enterprise II*, 478 U.S. at 9.

74. *Id.* at 15.

II, while not overturning *Gannett*, casts doubt as to *Gannett's* continuing precedential value.[75]

While criminal defendants have attempted to use the Sixth Amendment to close courtrooms, corporations, through the use of protective orders during discovery, attempt to keep details of alleged wrongdoing from the public view.[76] For example, concern over secrecy in product liability litigation has caused the United States Senate Judiciary committee to investigate.[77] Product liability litigation is especially prone to secrecy because the defendants want to limit exposure, the corporate plaintiffs want to settle quickly, and the judge wants to clear an overflowing docket.[78] As a result of sealing court documents in product liability cases, the same products that the manufacturer implicitly agrees are unsafe by agreeing to settle with a plaintiff remain on the market, threatening an otherwise unwary public.[79] In testimony before the Senate Judiciary committee, First Amendment expert, Paul K. McMasters, argued that while this "system may work well for the parties directly involved . . . [t]he courts do not exist to resolve private disputes behind closed doors."[80] Thus, the real interested party in opening up the judicial system is the public, not the litigants.

Supporters of protective orders argue that confidentiality leads to a better outcome than permitting the public unfettered access to private information.[81] Although the Federal Rules of Civil Procedure require wide disclosure of evidence, protective orders provide litigants some degree of assurance that their adversaries will use private information only for trial preparation.[82] Without such protection, litigants may be more likely to proceed to trial to defend their reputations and less likely to comply fully with discovery requests.[83] Both of these effects would lead to higher litigation costs.

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75. Another Supreme Court decision also casts doubt on *Gannett's* precedential authority. *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149 (1993) (striking down a rule of criminal procedure of Puerto Rico that required preliminary hearings to be held in private unless the defendant requested otherwise).

76. *See generally* Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

77. *Court Secrecy: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. (1990) [hereinafter *Hearings*].

78. *Id.* at 155 (statement of Paul K. McMasters).

79. *Id.* at 155-56 (statement of Paul K. McMasters). Sealed documents have allowed dangerous playground equipment to remain on playgrounds without warning parents. *Id.* at 156 (statement of Paul K. McMasters). In addition, toxic spills that threatened entire neighborhoods have remained a secret. *Id.* (statement of Paul K. McMasters).

80. *Id.* at 155 (statement of Paul K. McMasters).

81. *Id.* at 193 (statement of Professor Arthur R. Miller).

82. *Id.* at 202 (statement of Professor Arthur R. Miller).

83. *Id.* at 202-03 (statement of Professor Arthur R. Miller).

Although there is a robust debate among scholars as to the pervasiveness of confidentiality in the court and whether court secrecy hampers the administration of justice, there is little empirical evidence to support either side's argument.[84] Nevertheless, some of the same First Amendment arguments the United States Supreme Court has used to protect the public's access to criminal trials are applicable to protective orders.[85] Although proponents of protective orders correctly point out that the United States Supreme Court has never found a First Amendment right of access to *civil* trials, there is substantial support in the lower courts.[86] Thus, at least theoretically, civil litigants should be subject to the *Press-Enterprise II* test, as civil trials have been historically open to the public and publicity fulfills an important role in the judicial process.[87]

Court secrecy and closed courtrooms limit the public's First Amendment right of access to the judicial process. Similarly, a litigant's use of a pseudonym limits the public's right of access by preventing the public from fully understanding the motivation of the litigation. For example, in an Internet defamation action, the public is prevented from casting judgment on an anonymous corporate plaintiff when it brings a weak defamation case against a critic. The use of pseudonyms, however, may help preserve the privacy rights of litigants.

III. HAVE COURTS RECOGNIZED A PLAINTIFF'S RIGHT TO PRIVACY?

A. *History of the Right to Privacy*

Unlike the right of access to courts, the right to privacy is not well-grounded in the common law. It was not until the late 19th Century when aggressive journalism prompted Samuel D. Warren and Louis D. Brandeis to urge American courts to recognize a right to privacy or the "right to be let alone."[88] Warren and Brandeis complained of the increased discussions of sex and gossip in the daily newspapers, and determined that a judicial remedy was necessary.[89] In arguing for a right of privacy, Warren and

84. Dore, *supra* note 76, at 301.

85. *Id.* at 322-23.

86. *Hearings*, *supra* note 77, at 194 (statement of Professor Arthur R. Miller). Both state and federal courts have extended the Court's holdings to apply to civil proceedings. *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 340 (Cal. 1999).

87. *But see* Dore, *supra* note 76, at 320-21.

88. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890). Warren and Brandeis credit the phrase "right to be let alone" to Judge Cooley. *Id.* at 195.

89. *Id.* at 196.

Brandeis analogized the right to be let alone with similar preexisting rights such as the right not to be defamed, the right not to be falsely imprisoned, the right not to be assaulted, and the right not to be maliciously prosecuted.[90] In essence, Warren and Brandeis claimed that a right of privacy existed in the common law by 1890.

While courts slowly adopted Warren and Brandeis's argument over the next half-century, it was not until Dean Prosser helped sort out the privacy jurisprudence that the privacy tort gained some sense of order. Prosser synthesized the existing common law and explained that the privacy tort was not a single tort, but a group of four distinct torts that shared a common name.[91] Prosser, as the reporter for the American Law Institute's Restatement (Second) of Torts, later incorporated these torts into the Restatement.[92]

Beginning in the 20th Century, the United States Supreme Court began expanding Warren and Brandeis's right to privacy into a constitutional right. Although the enumerated rights in the Bill of Rights are few, certain fundamental rights receive protection by an inherent zone of privacy.[93] The privacy right is formed by penumbras emanating from the guarantees of the First, Third, Fourth, Fifth and Ninth Amendments.[94] Courts have generally protected two different kinds of privacy interests in litigation.[95] The first interest involves the right to make certain types of personal decisions, such as whether to use contraceptives,[96] marry,[97] live with extended family members,[98] and home-school children.[99] The second interest involves the right to choose not to disclose personal information.[100] A litigant who attempts to use a pseudonym is effectively asserting the latter privacy right. Whether litigants have a privacy right is, however, an unsettled area of the law.

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90. *Id.* at 205.

91. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Specifically the four torts were described as: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

92. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

93. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

94. *Id.*

95. Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Kneeland v. NCAA, 650 F. Supp. 1064, 1068-69 (W.D. Tex. 1986).

96. Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972); *Griswold*, 381 U.S. at 485-86.

97. Zablocki v. Redhail, 434 U.S. 374, 386 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

98. Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (plurality opinion).

99. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

100. *Kneeland*, 650 F. Supp. at 1068.

B. *Litigants' Implicit Right to Privacy*

In both state and federal courts, the rules of civil procedure implicitly prohibit anonymous parties from proceeding in court.[101] However, such generalized rules do not take into account individual factual circumstances. For example, some litigants must reveal extremely personal facts that lack any significant public concern. Arbitrarily denying all litigants the right to remain anonymous to avoid revealing private matters causes an unfair intrusion into litigants' private lives.

In the past thirty years, courts have recognized a limited privacy right for a plaintiff in a civil lawsuit.[102] Although the United States Supreme Court has never ruled on the constitutionality of a plaintiff proceeding anonymously, there has been a marked increase in the number of anonymous plaintiffs since *Roe v. Wade*[103] was permitted to proceed with anonymous plaintiffs.[104] The United States Supreme Court's silence has led courts to decide the issue in an ad hoc fashion as recently as the early 1980s.[105] Beginning in the 1980s, however, courts began developing broad standards to determine whether a plaintiff could proceed anonymously.

The Fifth Circuit has been especially active in developing standards to apply to plaintiff requests for anonymity. In *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*,[106] the Fifth Circuit denied anonymity to the plaintiffs after analyzing decisions in which other courts had allowed plaintiffs to proceed anonymously.[107] The court noted that all plaintiffs who were successful in proceeding anonymously had three similarities: (1) the plaintiff was challenging a governmental activity; (2) the plaintiff was required to disclose information of utmost intimacy; and (3) the plaintiff was compelled to admit his intention to engage in illegal conduct.[108] This three-part test has not only provided guidance for the Fifth Circuit, but for other courts as well.[109]

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101. For example, Rule 10 states that "In the complaint the title of the action shall include the names of all the parties . . . ." FED. R. CIV. P. 10. See also Rule 17, which states that "[e]very action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17.

102. *See* Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity when a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1660-62 (1995).

103. 410 U.S. 113 (1973).

104. Milani, *supra* note 102, at 1662. Federal decisions before 1969 with Doe plaintiffs or known Doe defendants are rare. Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 1 n.2 (1985).

105. *See* Steinman, *supra* note 104, at 2.

106. 599 F.2d 707 (5th Cir. 1979).

107. *Id.* at 713.

108. *Id.*

109. *E.g.*, Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) (citing *S. Methodist Univ*, 599

In another Fifth Circuit case, *Doe v. Stegall*,[110] the court weighed the plaintiffs' privacy interests against the public's right of access to courts.[111] In *Stegall*, the Fifth Circuit reviewed an interlocutory appeal as to whether two Jewish middle school students could sue their school board anonymously to challenge the constitutionality of allowing prayer in Mississippi's public schools.[112] While the court recognized the requirements of the Federal Rules of Civil Procedure to include the names of all parties named in the action,[113] the court also noted that Rule 26(c) gave the court broad discretion to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."[114] The Fifth Circuit held that the plaintiffs could proceed anonymously because the plaintiffs met all three of the *Southern Methodist* factors.[115] Despite the mechanical application of the *Southern Methodist* test, the Fifth Circuit was quick to point out that it "advance[d] no hard and fast formula for ascertaining whether a party may sue anonymously."[116]

While courts throughout the country have adopted the reasoning of *Southern Methodist* and *Stegall*, plaintiffs who disclose "intensely personal" facts appear to have the greatest likelihood of prevailing in a motion to proceed anonymously. There may be nothing more personal than pregnancy and abortions, and judges have provided the greatest deference to anonymous plaintiffs in such cases.[117] The strong privacy rights for a plaintiff in an abortion lawsuit protect the plaintiff from severe social stigma

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F.2d at 712); Heather K. v. City of Mallard, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995); Doe v. Bell Atl. Bus. Sys. Servs., Inc., 162 F.R.D. 418, 421 (D. Mass. 1995).

110. 653 F.2d 180 (5th Cir. Unit A 1981).

111. *Id.* at 186.

112. *Id.* at 181.

113. *See* FED. R. CIV. P. 10.

114. *Stegall*, 653 F.2d at 184 (quoting FED. R. CIV. P. 26(c)).

115. *Id.* at 186. The *Stegall* court found that (1) the plaintiffs were suing to challenge a governmental activity; (2) the suit required the disclosure of intimate information because "religion is perhaps the quintessentially private matter"; and (3) that although the students were not compelled to confess an intention to commit a crime, there was great potential to acquire infamy similar to committing a crime by challenging the Christian beliefs in the small Mississippi town. *Id.*

116. *Id.* at 186.

117. *See, e.g.*, Poelker v. Doe, 432 U.S. 519, 519 (1977); Doe v. Bolton, 410 U.S. 179, 184 (1973); Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 679 (11th Cir. 2001); Doe v. Gen. Hosp., 434 F.2d 427, 429 n.2 (D.C. Cir. 1970); Doe v. Deschamps, 64 F.R.D. 652, 652 (D. Mont. 1974); Doe v. Dunbar, 320 F. Supp. 1297, 1298 (D. Colo. 1970). In several instances, the privacy rights of the plaintiffs were so strong that there was no challenge to the plaintiff's anonymity. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 120 n.4 (1973) (dismissing the issue with a mere footnote that Jane Roe was a pseudonym); Planned Parenthood Affiliates v. Engler, 73 F.3d 634, 635 (6th Cir. 1996) (presuming the ability of plaintiff to use a pseudonym without discussion); Doe v. First Nat'l Bank, 865 F.2d 864, 865 (7th Cir. 1989) (presuming the ability of plaintiff to use a pseudonym without discussion).

that may result from asserting her constitutional rights. In that same light, women who have been sexually assaulted[118] or raped[119] are similarly protected. In addition, sexual molestation victims have a privacy right.[120] Courts have also found disability,[121] AIDS,[122] and mental illness[123] deserving of protection from public scrutiny.

While case law supporting anonymous plaintiffs is dominated by plaintiffs seeking to shield intimate private details from public view, courts may also use anonymity to protect plaintiffs from severe economic harm. In an action premised on the Fair Labor Standards Act, the Ninth Circuit permitted twenty-three foreign garment workers to sue twenty-one garment manufacturers anonymously.[124] The garment workers sued on behalf of the 25,000 garment workers who lived as nonresidents in the United States' territory of the Northern Mariana Islands.[125] Plaintiffs feared that if not permitted to sue anonymously, they would be fired from their jobs, deported from the United States, and arrested upon their return to the People's Republic of China.[126]

In reversing the district court's order denying the plaintiffs' request to proceed anonymously, the Ninth Circuit set forth a three-prong test to guide the district court.[127] In applying the test, the Ninth Circuit held that

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118. *See, e.g.*, Doe v. Evans, 202 F.R.D. 173, 175 (E.D. Pa. 2001). *But see* Doe v. N.C. Cent. Univ., No. 1:98CV01095, 1999 U.S. Dist. LEXIS 9804, at *12-*14 (M.D.N.C. April 15, 1999) (holding that courts are reluctant to allow plaintiff anonymity even in sexual assault cases).

119. *See, e.g.*, C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305, at *6 (D. Kan. July 10, 1998) (granting anonymity to minor female who had been raped); Doe v. St. George's Sch., No. 88-0676B, 1989 U.S. Dist. LEXIS 6779, at *2 (D.R.I. May 30, 1989) (granting anonymity to a minor female who had been raped).

120. *See, e.g.*, Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 690 (E.D. Tex. 2001); Doe v. Covington County Sch. Bd., 884 F. Supp. 462, 465 (M.D. Ala. 1995); Doe v. X Corp., No. CV93-0351397, 1997 Conn. Super. LEXIS 273, at *1 n.1 (Super. Ct. Jan. 30, 1997); Doe v. Diocese Corp., 647 A.2d 1067, 1074 (Conn. Super. Ct. 1994).

121. *See, e.g.*, Heather K. v. City of Mallard, 887 F. Supp. 1249, 1251-52, 1256 (N.D. Iowa 1995). *But see* A.B.C. v. XYZ Corp., 660 A.2d 1199, 1200 (N.J. Super. Ct. App. Div. 1995) (refusing to grant anonymity in an employment discrimination claim where the plaintiff claimed to suffer from exhibitionism).

122. Doe v. Hirsch, 731 F. Supp. 627, 628 & n.1 (S.D.N.Y. 1990).

123. Anonymous v. Legal Servs. Corp., 932 F. Supp. 49, 50 (D.P.R. 1996).

124. Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000).

125. *Id.* at 1063. To secure employment, these workers were required to sign a contract with a recruiting agency, which entitled the agency to receive several thousand dollars as payment upon the employee's return home. *Id.*

126. *Id.* at 1062. In addition, the plaintiffs feared that China would accelerate the repayment of debt owed to the recruiting agency. *Id.* at 1063. It was possible for economic retaliation to extend to the garment workers' families as well. *Id.* at 1065.

127. *Id.* at 1068 ("[T]he district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation.")

the district court's finding that anonymity can never be used to protect against economic injury was incorrect as a matter of law.[128] In addition, the Ninth Circuit held that the plaintiffs' fears were reasonable and that they were sufficiently vulnerable to retaliation.[129] Most importantly, however, the Ninth Circuit rejected the defendants' arguments that allowing the plaintiffs to proceed anonymously would violate the public's right of access to courtrooms.[130] The court could protect the public's right by permitting access to the facts and the decision, but withholding the plaintiffs' names.[131]

As previously discussed in Part II, there is a strong presumption of open courtrooms, and thus surviving a balancing test is an uphill battle for many anonymous plaintiffs.[132] Even plaintiffs who sue to recover damages involving extremely private matters such as sexual abuse are not always granted the right to proceed anonymously.[133] For example, the district court in *Doe v. Smith* denied the plaintiff's request to proceed anonymously despite the plaintiff's claims that she was molested and sexually assaulted by her psychiatrist.[134] The district court acknowledged the need to balance the plaintiff's privacy rights with the public's right of access to courtrooms.[135] The district court borrowed the *Southern Methodist* factors, and added two additional factors: (1) "whether identification would put the plaintiff at risk of physical or mental injury" and (2) "whether the defendant would be prejudiced [if the plaintiff proceeded] anonymously."[136]

While the district court recognized the extremely private nature of the charges, it also determined that the plaintiff's credibility was ultimately at issue.[137] Since the plaintiff was not challenging a governmental action, but alleging that the defendant committed extremely despicable behavior, the court had to allow the defendant to publicly defend himself against an uncloaked accuser.[138] The court was also concerned about setting a

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(citations omitted).

128. *Id.* at 1070.

129. *Id.* at 1071. The Ninth Circuit emphasized that the plaintiffs did not need to prove that the defendants would carry out their threats, only that the plaintiffs reasonably believed that the defendants would. *Id.*

130. *Id.* at 1069.

131. *Id.* at 1072-73.

132. *See* W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001) ("proceeding under a pseudonym in federal courts is . . . 'an unusual procedure'") (citation omitted); Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974) (holding that the general rule prohibits pseudonyms).

133. *See, e.g.*, Doe v. Hartz, 52 F. Supp. 2d 1027, 1048 (N.D. Iowa 1999); Doe v. Smith, 189 F.R.D. 239, 241 (E.D.N.Y. 1998).

134. Doe v. Smith, 189 F.R.D. at 241.

135. *Id.* at 242.

136. *Id.* (citations omitted).

137. *Id.* at 242-43.

138. *Id.* at 243-44. By prohibiting the plaintiff from shielding her identity while casting accusations against the defendant, the court attempted to place the alleged victim and the alleged

"disturbing precedent," allowing patients to sue psychiatrists for sexual improprieties anonymously.[139]

Following the *Doe v. Smith* reasoning, courts ordinarily balance the plaintiff's privacy with the public's right of access to courtrooms. For example, privacy rights do not extend universally to all suits involving abortion.[140] In addition, even if a court grants a petition to proceed anonymously to one plaintiff, the privacy right does not necessarily extend to all co-plaintiffs in the same suit.[141] A further indication of the courts' struggle with balancing the plaintiff's privacy rights and the public's right of access to courtrooms is that courts have been reluctant to extend the privacy right to corporations.

C. *Privacy Rights Applied to Corporations*

Courts have summarily denied the right of privacy to corporations.[142] Courts generally hold that since corporations are artificial entities and only exist when recognized by state law, the state can deprive a corporation of a privacy right.[143] Courts have had difficulty finding a corporate right of privacy because courts have focused on whether a corporation can be embarrassed to the same degree as individuals upon public disclosure of private facts.[144] The private facts that an individual may seek to shield from public view consist of intimate details of a private life, which is a stark

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attacker on equal footing. Compare that rationale with the highly controversial rules of evidence relating to a defendant's character in sexual assault cases. *See* FED. R. EVID. 413-15.

139. *Smith*, 189 F.R.D. at 244-45.

140. *See, e.g.*, M.M. v. Zavaras, 139 F.3d 798, 804 (10th Cir. 1998) (affirming the trial court's determination that the public interest in open trials outweighed the privacy rights of an indigent inmate seeking an abortion). *See also* Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 689 (11th Cir. 2001) (Hill, J. dissenting) ("I doubt . . . that there is any longer a real threat of 'social stigma' associated with [having an abortion]").

141. Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974) (limiting the privacy right to the pregnant woman and refusing to extend the right to her doctor).

142. *See* DAVID A. ELDER, THE LAW OF PRIVACY § 1.4, at 11-12 (1991).

143. *See, e.g.*, Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65-66 (1974); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950); Clinton Cmty. Hosp. Corp. v. S. Md. Med. Ctr., 374 F. Supp. 450, 456 (D. Md. 1974); Roberts v. Gulf Oil Corp., 195 Cal. Rptr. 393, 409-10 (Ct. App. 1983); Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545, 548 (Mass. 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977) (stating that a corporation has no cause of action for a right of privacy).

144. *See, e.g.*, Med. Lab Mgmt. Consultants v. ABC, Inc., 931 F. Supp. 1487, 1493 (D. Ariz. 1996); Nabisco, Inc. v. Ellison, No. 94-1722, 1994 U.S. Dist. LEXIS 16041, at *14-*16 (E.D. Pa. Nov. 8, 1994); Ion Equip. Corp. v. Nelson, 168 Cal. Rptr. 361, 366 (Ct. App. 1980); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 594-95 (Ind. 2001). *See also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977).

contrast from confidential information that a corporation may seek to shield from competitors.[145]

Although corporations may not have the same type of intimate secrets as individuals, corporations have certain confidential information, and therefore seek some recognition of a right of privacy. Consequently, while courts have been reluctant to find an express right of privacy covering all of a corporation's activities, courts have found limited privacy rights for business entities in certain situations.[146] Courts have generally used the right of privacy to protect corporations from 1) harassment; 2) disclosure of financial information; 3) unfair business practices; and 4) misuse of the discovery process.

Courts have held that businesses have a right to be free from harassment by the government.[147] In *Socialist Workers Party v. Attorney General*,[148] the Socialist Workers Party sued the United States for common law invasion of privacy.[149] The political party charged that the Federal Bureau of Investigation had engaged in a campaign of excessive interrogations, spied on party members with surveillance equipment, and committed burglaries to harass the party's membership.[150] The court discounted the government's reliance on the Restatement (Second) of Torts § 652I, which states that a privacy right is a personal right.[151] Instead, the court noted that the Restatement is not "intended to exclude the possibility of further

145. *See Felsher*, 755 N.E.2d at 594-95.

146. *See, e.g.*, Bowsher v. Merck & Co., 460 U.S. 824, 836 (1983) (denying the government's request to review corporate records to ascertain the company's manufacturing costs); Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1012 (D.C. Cir. 1984) (finding privacy rights in corporation's confidential information), *vacated on other grounds by* 737 F.2d 1170 (D.C. Cir. 1984) (*en banc*); E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970) (protecting corporation's privacy from industrial espionage); Socialist Workers Party v. Attorney Gen., 463 F. Supp. 515, 525 (S.D.N.Y. 1978) (finding a right of privacy for associations); Ameri-Medical Corp. v. Workers' Comp. Appeals Bd., 50 Cal. Rptr. 2d 366, 383 (Ct. App. 1996) (finding a limited privacy right in financial records for a corporation); H & M Assocs. v. City of El Centro, 167 Cal. Rptr. 392, 399-400 (Ct. App. 1980) (finding a right of privacy for partnerships); Camp, Dresser & McKee, Inc. v. Steimle & Assocs., 652 So. 2d 44, 50 (La. Ct. App. 1995) (finding violation of privacy through an unfair trade practice statute for a corporation); *see also* Kneeland v. NCAA, 650 F. Supp. 1064, 1069 (W.D. Tex. 1986) (acknowledging a corporation's limited privacy right, but not finding a violation of the right with the specific facts); *Roberts*, 195 Cal. Rptr. at 411 (acknowledging a corporation's limited privacy right, but not finding a violation of the right with the specific facts).

147. *Socialist Workers*, 463 F. Supp. at 525; *H & M Assocs.*, 167 Cal. Rptr. at 399.

148. 463 F. Supp. 515 (S.D.N.Y. 1978).

149. *Id.* at 516-17.

150. *Id.* at 518. In addition, the government contacted party members' friends, landlords, prospective employers, and families to provoke hostility and discrimination against the political party. *Id.*

151. *Id.* at 524-25; *see also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977).

developments in the tort law of privacy."[152] In recognizing a right of privacy for an association, the court relied on the premise that the association's right was intertwined with its members, and could not be easily separated.[153]

However, not all extensions of the privacy right to business entities require an intertwinement between the entity and its principals. California extended the right of privacy when a local government harassed a limited partnership.[154] The partnership was in the process of refinancing the mortgages of its financially troubled apartment complex and was delinquent in paying its water service bills.[155] Although the partnership remitted the delinquent amount after it received a delinquency notice, the local government shut off water service and notified the mortgagees and the local newspaper.[156] In finding a right of privacy, the court discounted the formalistic differences between partnerships, corporations, and individuals.[157] In addition, the court noted that just as an individual can build his reputation, a business can increase its goodwill.[158]

A second important protection for corporations is a limited protection of financial information.[159] While corporations do not receive broad protection against disclosing financial information in a governmental investigation,[160] courts do provide limited protection.[161] For example, in *Bowsher v. United States*,[162] the United States Supreme Court refused to enforce a General Accounting Office demand to inspect Merck & Co.'s financial records.[163] By restricting government access to records relating to

152. *Socialist Workers*, 463 F. Supp. at 525.

153. *Id.*

154. *See* H & M Assocs. v. City of El Centro, 167 Cal. Rptr. 392, 395 (Ct. App. 1980).

155. *Id.*

156. *Id.* at 396. The local government hoped to purchase the land at a foreclosure sale for governmental use. *Id.*

157. *Id.* at 399. The court noted that an individual can incorporate his sole proprietorship and large businesses can be run as partnerships. *Id.* Thus, the court seemed to be troubled to take a formalistic view as to whether a privacy action is precluded merely based on the fact that the plaintiff was a corporation.

158. *Id.*

159. *See* Bowsher v. Merck & Co., 460 U.S. 824, 836 (1983); Ameri-Medical Corp. v. Workers' Comp. Appeals Bd., 50 Cal. Rptr. 2d 366, 383 (Ct. App. 1996).

160. *See* United States v. Arthur Young & Co., 465 U.S. 805, 817-19 (1984) (holding that a corporation's independent auditors do not have a work product privilege in protecting a client's financial records).

161. *Bowsher*, 460 U.S. at 836.

162. 460 U.S. 824 (1983).

163. *Id.* at 826. Merck had entered a fixed-price contract with the Defense Department to supply pharmaceuticals. *Id.* Every fixed-price contract signed by the government contains an access-to-records clause granting the government the right to examine corporate records involving transactions related to the contract. *Id.* at 827-28.

direct costs, and preventing the government from examining records for indirect costs such as research and development, marketing, promotion, and distribution, the Court protected the privacy of a private contractor's business records.[164] A California court applied similar reasoning when limiting governmental review of a private contractor's financial records to records directly supporting the charges incurred by a local government.[165] Thus, third parties, including governments, "do not have an automatic right to unfettered access to books and records . . . ."[166]

Third, courts have been especially protective of a corporation's trade secrets that are revealed by unfair business practices of competitors.[167] Courts will not tolerate a corporation's competitor exploiting information obtained through industrial espionage.[168] For example, the Fifth Circuit held that taking aerial photographs of a duPont plant under construction, which exposed a highly secretive unpatented process for producing methanol, was a misappropriation of trade secrets.[169] To protect the "spirit of inventiveness," the court held that commercial privacy must be protected.[170] A Louisiana court used similar reasoning in protecting an engineering corporation's privacy when a competitor hired a detective agency to sift through the corporation's trash in hopes of finding confidential information.[171]

Finally, courts have not only protected against industrial espionage, but have also protected information obtained in pretrial discovery of a defamation suit.[172] For example, in *Seattle Times v. Rhinehart*,[173] the spiritual leader of a small religious foundation sued two newspapers, which he claimed printed false statements causing the foundation's membership to drop.[174] The trial court granted the newspapers' request for information

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164. *Id.* at 830, 836.

165. Ameri-Medical Corp. v. Workers' Comp. Appeals Bd., 50 Cal. Rptr. 2d 366, 384 (Ct. App. 1996).

166. *Id.*

167. *See, e.g.*, Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1012 (D.C. Cir.), *vacated on other grounds by* 737 F.2d 1170 (D.C. Cir. 1984) (*en banc*); E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970); Camp, Dresser & McKee, Inc. v. Steimle & Assocs., 652 So. 2d 44, 50 (La. Ct. App. 1995).

168. *Christopher*, 431 F.2d at 1016.

169. *Id.* at 1013-14. *Christopher* was cited approvingly by the U.S. Supreme Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).

170. *Christopher*, 431 F.2d at 1016.

171. *Steimle*, 652 So. 2d at 50.

172. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984); *Tavoulareas*, 724 F.2d at 1012.

173. 467 U.S. 20 (1984).

174. *Id.* at 22. The Aquarian Foundation is a religious organization that believes in contacting the dead through a medium. *Id.* at 22. The Foundation's membership in Washington State and Hawaii dropped from 300 to 150 members after the *Seattle Times* and *Walla Walla Union-Bulletin*

about the foundation, but only after issuing a protective order, which effectively prevented the newspapers from printing any information obtained from discovery.[175] In upholding the protective order, the United States Supreme Court dismissed the newspapers' First Amendment access claim by stating that "a litigant has no First Amendment right of access to information made available only for purposes of trying his suit."[176] Instead, the Court relied on the Washington Supreme Court's observation:

> [As] the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.[177]

In addition, the Court held that it was inappropriate to undertake any special First Amendment scrutiny in considering a protective order, as the Federal Rules of Civil Procedure only require "good cause."[178]

In a similar case, the Court of Appeals for the District of Columbia held that Mobil Oil Corp. had a privacy right in its confidential records obtained by the *Washington Post* during discovery of a defamation suit.[179] Mobil feared that releasing the confidential internal memoranda gathered in discovery would jeopardize its relationship with Saudi Arabia, and thus the

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printed articles about the group's activities. *Id.* at 22, 23 n.2.

175. *Id.* at 27.

176. *Id.* at 32.

177. *Id.* at 36 n.22 (quoting Seattle Times, Co. v. Rhinehart, 654 P.2d 673, 689 (Wash. 1982)) (quotation marks omitted).

178. *Id.* at 37 & n.23; see also FED. R. CIV. P. 26(c) which states:

> Upon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way. . . .

Id.

179. Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1012 (D.C. Cir.), *vacated on other grounds by* 737 F.2d 1170 (D.C. Cir. 1984) (*en banc*). This D.C. Circuit Court panel decision was vacated *en banc* in a rehearing and remanded to the trial court for further consideration in light of the *Seattle Times* decision. Tavoulareas v. Wash. Post Co., 737 F.2d 1170, 1171 (D.C. Cir. 1984). The D.C. Circuit applied a more rigorous review than was required in *Seattle Times*. *Id.* at 1172. On remand, the trial court granted Mobil's protective order request. Tavoulareas v. Wash. Post Co., 111 F.R.D. 653, 661 (D.D.C. 1986). Thus, despite the *en banc* decision to remand, the D.C. Circuit's holding that a corporate right of privacy exists was never criticized.

company would suffer severe economic harm.[180] The court was concerned for the corporation's privacy because a business organization cannot operate effectively if the court releases a corporation's confidential information every time it is involved in litigation.[181] Furthermore, the court held, since the purpose of discovery is to prepare for litigation and not to punish litigants, "a corporation's privacy interest in nondisclosure is essentially identical to that of an individual."[182]

Although courts may limit a corporation's privacy rights, courts have protected corporations from harassment, disclosure of financial information, unfair business practices, and misuse of the discovery process. Thus, the question arises whether a corporation has a sufficient right to privacy to sue anonymously for Internet defamation when revealing its identity may cause the corporation severe economic harm. To decide this issue, courts should undertake the balancing test set forth in Part V.

IV. SLAPPS: COMPLICATING THE COURT'S BALANCING ACT

To simply balance a plaintiff's privacy right with the public's right of access to courts ignores an important development in defamation law. Plaintiffs in most defamation claims sue, at least in part, to silence the plaintiff's critics,[183] but there is greater risk for Internet defamation defendants. In an Internet defamation action, the defendant is generally an individual who has published information on the Internet rather than a traditional media outlet such as a television station or a newspaper. Since most defendants lack sufficient economic resources to litigate against corporations and their attorneys, there is an increased risk that legitimate criticism posted on the Web will be stamped out by a corporation's threat to sue.[184]

Thousands of Americans who relied on First Amendment protections have been sued for "circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, [and] peacefully demonstrating. . . [against corporations]."[185] Corporations file lawsuits against citizens who have voiced their concern regarding issues such as land development, nuclear power plants, and landfills.[186] These types of suits, aimed at private citizens who have attempted to influence governmental action regarding a substantive issue

180. *Tavoulareas*, 724 F.2d at 1014 n.8.
181. *Id.* at 1014.
182. *Id.* at 1022.
183. Lidsky, *supra* note 1, at 860.
184. *Id.* at 904-05.
185. PRING & CANAN, *supra* note 27, at 1.
186. *Id.* at 7.

of public or social significance by partaking in activities covered by the First Amendment, are considered SLAPP suits.[187]

SLAPP suits are meant to intimidate and silence critics, not to recover damages.[188] In fact, courts dismiss most SLAPP suits, but not before the suit successfully distracts the defendant from the original underlying issue.[189] In characterizing SLAPP suits, a New York trial court judge wrote a particularly strong opinion.[190] In *Gordon v. Marrone*,[191] Judge Colabella ordered a land developer to pay a non-profit organization $10,000 in attorney fees.[192] The developer had challenged the organization's property tax exemption after the organization successfully blocked a development project.[193] The judge described the effect of SLAPP suits:

> Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. To [sic] ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.[194]

Since the Pring and Canan definition of SLAPP suits must involve a societal issue,[195] it is not clear whether a corporation that sues a cyberposter for defamation can be considered a SLAPP suit. A narrow interpretation of the original Pring and Canan concept would seem to answer that question in the negative.[196] However, a narrow interpretation would ignore the impact of public corporations on the U.S. economy. For example, revenues for the Fortune 1000 companies in the year 2000 totaled over $8.1 trillion.[197] In

187. *Id.* at 8-9.

188. *Id.* at 8.

189. Alexandra Dylan Lowe, *The Price of Speaking Out*, 82 A.B.A. J. 48 (Sept. 1996).

190. *See* Gordon v. Marrone, 590 N.Y.S.2d 649, 650 (Sup. Ct. 1992).

191. 590 N.Y.S.2d 649 (Sup. Ct. 1992).

192. *Id.* at 658.

193. *Id.* at 651.

194. *Id.* at 656.

195. The full definition of SLAPP as used in their study is as follows: "Primarily it had to involve communications made to influence a governmental action or outcome, which, secondarily, resulted in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations (NGOs) on (c) a substantive issue of some public interest or social significance." PRING & CANAN, *supra* note 27, at 8-9.

196. *Id.*

197. Fortune 500 Companies, FORTUNE, *available at* http://www.fortune.com (last visited Feb. 3, 2002). Revenues are compiled from Form 10-K filed with the Securities and Exchange

addition, the gross domestic product of the United States in the year 2000 was approximately $9.9 trillion, of which non-farm businesses comprised $8.3 trillion or 84%.[198] Economically, corporations have a significant impact on society, and thus criticism of corporations inherently involves a societal issue.[199] Therefore, a court must consider the possibility of SLAPP suits when balancing the privacy rights of a plaintiff with the public's First Amendment right of access.

V. HOW COURTS CAN RESPECT THE FIRST AMENDMENT AND PROTECT LITIGANTS FROM FURTHER ECONOMIC HARM

The courts face a difficult dilemma. On one hand, courts need to protect the public's First Amendment right of access to courtrooms. But at the same time, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[200] A potential corporate litigant may be denied that civil liberty if it fears public rebuke for seeking a remedy.[201] Thus, to protect both fundamental liberties, courts must employ a balancing test that incorporates the proper factors.

In *America Online, Inc. v. Anonymous Publicly Traded Co.*, [202] the Virginia Supreme Court granted certiorari to review a case where an anonymous Indiana-based corporation sued a cyberposter for defamation.[203] An Indiana trial court issued an order authorizing discovery of the John Doe's identity and allowed the corporation to proceed anonymously, at least until it uncovered the defendant's identity.[204] Virginia-based America Online received a subpoena from the Anonymous Publicly Traded Co. and moved to quash.[205] The Virginia trial court acknowledged the public's First Amendment right of access to courts, but gave deference to the Indiana trial court through the Full Faith and Credit Clause of the United States Constitution.[206] Before reversal on appeal, the Virginia Supreme Court

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Commission.

198. Bureau of Economic Analysis, *Table 1.7: Gross Domestic Product by Sector* (Sept. 28, 2001), *available at* http://www.bea.doc.gov (last visited Feb. 3, 2002).

199. *See* Global Telemedia Int'l, Inc. v. Doe, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001) (holding that publicly traded companies are of public interest); ComputerXpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 639 (Ct. App. 2001) (holding that publicly traded companies are of public interest).

200. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

201. *See supra* note 177 and accompanying text.

202. 542 S.E.2d 377 (Va. 2001).

203. *Id.* at 379.

204. *Id.* at 380.

205. *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 26 (2000), *rev'd*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

206. *Id.* at 38; U.S. CONST. art. IV, § 1. Before allowing the plaintiff limited discovery, the

undertook an independent review of the plaintiff's ability to proceed anonymously.[207] Although the First Amendment creates a strong presumption for open courts, the Virginia Supreme Court did not bar litigant anonymity *per se*.[208] Instead, the court cited several factors similar to the *Southern Methodist* factors to guide its decision.[209] If a litigant showed "special circumstances," which could include "extraordinary" economic harm, then the litigant could proceed anonymously.[210] The plaintiff in *America Online*, however, failed to bear the burden of proving "special circumstances."[211]

Cases like *America Online* will likely become more common as the Internet's accessibility expands. As a result, courts are recognizing a need to develop a standard to balance an individual's right to speak out with the plaintiff's right to seek a remedy in Internet defamation suits.[212] In *Dendrite International, Inc. v. Doe*,[213] a publicly traded corporation sued several anonymous individuals for posting defamatory comments on a Yahoo! financial bulletin board.[214] In upholding a trial court decision denying Dendrite's request for limited discovery for the purpose of identifying the

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Virginia circuit court undertook a limited review to ensure that the plaintiff did not trample the defendant's First Amendment right to speak anonymously. *Am. Online*, 52 Va. Cir. at 37. The circuit court judge proposed a three-prong test to protect a cyberposter: A court should permit a plaintiff to discover a John Doe's identity only

> (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good-faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.

Id. The use of a good-faith standard appears to be a burden beyond a usual motion-to-dismiss standard. Nonetheless, the extra protection given to the defendant did not prevent the circuit court judge from denying the motion to quash the subpoena. *Id.*

207. *Am. Online*, 542 S.E.2d at 383-85. In reviewing the anonymity issue, the Virginia Supreme Court canvassed cases decided by other courts, as the issue had never been presented to the Virginia Supreme Court. *Id.* at 383-84.

208. *Id.* at 385.

209. *Id.* at 384; *see also supra* notes 106-09 and accompanying text.

210. *Am. Online*, 542 S.E.2d at 384-85. The court defined "special circumstances" as when a party's need for anonymity outweighs the public's right of access to courtrooms and the prejudice to the opposing party. *Id.* at 385.

211. *Id.* This decision, while ignoring any extra protection offered to the cyberposter by the circuit court, protects the cyberposter's identity by forcing the plaintiff to prove the court's "special circumstances" burden.

212. Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

213. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

214. *Id.* at 760.

defendant,[215] the New Jersey appellate court set forth some guiding principles.[216] When ruling on a discovery motion to ascertain the names of anonymous cyberposters, the trial court must 1) attempt to notify the defendants that they are subject to a subpoena; 2) require the plaintiff to identify the defamatory comments; 3) determine whether the plaintiff has set forth a prima facie cause of action using a standard similar to probable cause;[217] and 4) balance the privacy right of the defendants to speak anonymously with the strength of the prima facie case and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to pursue a claim.[218] Consequently, the court recognized that Internet defamation lawsuits inherently involve competing First Amendment issues and therefore the court must exercise extraordinary protection.

Requiring a plaintiff to meet a higher burden of proof than the usual burden for a motion to dismiss is arguably the most unusual factor developed by the New Jersey court. In developing the standard, the court determined that "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."[219] Consequently, by allowing a plaintiff to meet the lesser motion-to-dismiss burden, the court would be implicitly disregarding the defendant's right of privacy.[220] Although the plaintiff's bar may criticize the standard as too onerous, the court quickly silenced some potential criticism by applying the *Dendrite* holding to a companion case, in which the court affirmed a trial court's decision to allow discovery.[221]

Although the *Dendrite* guidelines are helpful, they do not fully address two characteristics inherent in anonymous corporate plaintiff Internet defamation suits against John Doe defendants. First, the *Dendrite* guidelines do not directly address the potential for suits arising in bad faith, specifically

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215. Although Dendrite sued several John Does, only one John Doe prevailed at the preliminary hearing. *Id.* at 760 n.1.

216. *Id.* at 760.

217. A simple motion-to-dismiss standard would be ineffective in balancing the plaintiff's request for disclosure with the defendant's right of anonymity. *Id.* at 770. A stricter standard similar to the probable cause standard that the government must meet before a judge issues a search warrant strikes a better balance. *Id.* The added burden protects "against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong." *Id.*

218. *Id.* at 760-61.

219. *Id.* at 767.

220. *See id.* at 770.

221. Immunomedics, Inc. v. Doe, 775 A.2d 773, 777-78 (N.J. Super. Ct. App. Div. 2001). In *Immunomedics*, an anonymous cyberposter released confidential business information onto a Yahoo! financial bulletin board. *Id.* at 774. The court applied the *Dendrite* standard, but found that discovery could proceed because the anonymous cyberposter was an employee who had voluntarily signed a confidentiality agreement. *Id.* at 777.

SLAPP suits. Second, *Dendrite* offers no guidance in determining a plaintiff's right of privacy, specifically, whether a plaintiff can sue anonymously.

Dendrite's requirement that a plaintiff demonstrate "probable cause" before a court allows discovery helps preserve free discourse on the Internet. The extra burden can prevent a plaintiff from abusing the courts to gain information to intimidate or silence a critic.[222] The crippling effect of SLAPP suits on the First Amendment,[223] however, necessitates additional consideration, including consideration of the plaintiff's motivation to sue. Instituting a legal presumption that when a plaintiff sues a cyberposter the plaintiff's suit is a presumed SLAPP can effectively force a court to consider plaintiff motivation. While this may seem unjustified at first glance, it is important to remember that 1) most Internet defamation suits have SLAPP characteristics,[224] and 2) the presumption may be overcome fairly easily. A plaintiff who meets the "probable cause" element of the *Dendrite* guidelines should overcome the presumption unless the defendant has evidence to demonstrate the plaintiff's bad faith. This presumption should not act to curtail legitimate retaliatory suits between the parties, but it may protect a defendant from being caught in a legal quagmire defending a meritless suit against a foe with much greater resources.

The second factor to consider adding to the *Dendrite* guidelines addresses the plaintiff's privacy. A court that permits a corporate plaintiff to proceed anonymously in discovery should undertake an analysis similar to the *Press-Enterprise II* analysis.[225] Such an analysis would require a plaintiff to demonstrate a compelling interest for anonymity that could not be met by any alternative less intrusive on the public's First Amendment rights.[226] Thus, a corporate plaintiff that is particularly vulnerable to economic harm resulting from a consumer backlash caused by suing a John Doe should receive an opportunity to demonstrate its need to proceed anonymously. A motion to proceed anonymously could be argued at the same time that the trial court considers the plaintiff's discovery motion as set forth in the *Dendrite* framework.

VI. CONCLUSION

The rapid acceptance of the Internet will continue to challenge traditional notions of the law. A 2001 Jupiter Media Metrix analysis

222. *See* PRING & CANAN, *supra* note 27.
223. *See supra* Part IV.
224. *See id.*
225. *See supra* notes 69-75 and accompanying text.
226. *See supra* notes 69-75 and accompanying text.

projects that the number of American Internet users will increase from the current 142 million users to 211 million in 2006, which would represent a 68% penetration of U.S. households.[227] The greater number of Internet users will likely lead to more postings that are derogatory and therefore, increased litigation. Consequently, courts must devise new ways to police litigation. Adopting the *Dendrite* guidelines, with the two additional proposed factors in Part V, is a good first step to ensure that both parties' rights are protected.

227. Jupiter Media Metrix, *Industry Projections*, *at* http://www.jmm.com/xp/jmm/press/industryProjections.xml (last visited Feb. 3, 2002).