

INTERNET ANONYMITY AND PRIVACY: COMPELLING THE DISCLOSURE OF THE IDENTITY OF ANONYMOUS AND PSEUDONYMOUS TORTFEASORS AND INFRINGERS

Excerpted from Chapter 37 (Defamation and Torts) of *E-Commerce and Internet Law: A Legal Treatise With Forms, Second Edition*, a 4-volume legal treatise by Ian C. Ballon (West Publishing 2009)

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Chapter 37

Defamation, Torts and the Good Samaritan Exemption

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37.02. Identifying Anonymous and Pseudonymous Bloggers, Chatroom and Message Board Posters and Others in Internet Litigation

37.02[1]. Overview and Practical Considerations

The Internet allows people to act pseudonymously and, in more limited cases, anonymously.¹ While this phenomenon led plaintiffs, beginning in the early 1990s, to seek to hold third parties such as service providers liable for online misdeeds, the enactment of the Good Samaritan exemption in the Telecommunications Act of 1996² made this approach unproductive in most cases covered by that exemption—especially claims based on Internet speech, including defamation.³ Accordingly, beginning in the late 1990s, plaintiffs increasingly began to explore ways to compel the disclosure of the identity of anonymous and pseudonymous tortfeasors.

In cases involving anonymous or pseudonymous defendants, plaintiffs often must conduct initial satellite litigation just to compel the disclosure of the identity of the defendant. Since 2001, case law in a number of jurisdictions has made it more difficult to do so—particularly in defamation cases involving postings on blogs or public message boards or in chat rooms.⁴ In some jurisdictions it is possible to issue a third party or “John Doe” subpoena, while others require a pre-service motion for discovery. As analyzed in section 37.02[2], a number of states impose threshold showings on plaintiffs which in some cases are akin to the burden of proof required to obtain a preliminary injunction, while in others are closer to a summary judgment standard. In California, suits based on Internet postings also may prompt anti-SLAPP motions, which are expedited motions to dismiss requiring a plaintiff to prove by admissible evidence at the outset of a case likelihood of prevailing on each element of each claim, without benefit of discovery, on risk of dismissal with prejudice, an automatic attorneys’ fee award and the potential for a SLAPP-back lawsuit by the defendant.⁵ These procedural rules when applied to anonymous or pseudonymous posters create sometimes unfair—and often insurmountable—obstacles for plaintiffs, even in meritorious cases. Because the legal standards, procedural rules and local practices differ significantly, it is very important to think strategically before deciding where to file suit, what claims to allege and whether to initiate litigation at all.

As discussed more extensively in sections 50.06 and 57.03, privacy laws generally do not proscribe disclosure of the contact information provided by pseudonymous subscribers, users or

¹ See *supra* §1.06[1].

² 47 U.S.C.A. §230(c); see generally *infra* §37.05.

³ For example, *Patentwizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001) involved a suit by a software marketer and its sole principal alleging that Kinko’s, Inc. wrongfully permitted an Internet user to defame plaintiffs anonymously. Kinko’s did not keep track of people who used its computers for an hourly fee. Although plaintiffs were able to trace the communication to a Kinko’s computer, they could not determine the identity of the person ultimately responsible for the posting and Kinko’s was found exempt from liability under the Good Samaritan exemption, 47 U.S.C.A. §230.

⁴ For a discussion of personal jurisdiction over blog, message board and chat room posters, see *infra* §53.04[5][B].

⁵ See Cal. Code Civ. Proc. §425.16; *infra* §37.02[3].

posters in cyberspace unless a site or service has adopted a privacy policy that purports to prevent such disclosures or otherwise creates a reasonable expectation of privacy in this information. To protect themselves, however, site owners and service providers typically require potential plaintiffs to obtain civil subpoenas to compel the disclosure of contact information. In addition, consumer-oriented services such as Google, Yahoo!, and msn.com further provide notice to defendants to allow them the opportunity to retain counsel and assert their rights to privacy under state or federal law.⁶ Some courts also may require notice to the anonymous or pseudonymous defendant.

Where advance notice is provided, posters frequently do not take action. In such cases, their identities will be disclosed after waiting periods that typically are 10 days or longer.

In some cases, however, Doe defendants will hire lawyers or obtain *pro bono* representation to challenge a subpoena seeking to compel the disclosure of their identity. While this may arise in cases where a defendant has a legitimate First Amendment speech or privacy argument, this procedure ironically is also often invoked by tortfeasors, infringers and others hoping to avoid liability for their misconduct by making litigation difficult or expensive for a plaintiff (and in some cases even successfully quashing a subpoena because of the difficult procedural burdens that a plaintiff must meet when an anonymous or pseudonymous poster challenges the issuance of a subpoena).

Civil subpoenas seeking information about anonymous individuals potentially raise First Amendment concerns.⁷ In political speech cases, individuals have a right to retain their anonymity in connection with advocating particular political viewpoints, where the disclosure of their true identity could have a chilling effect on the assertion of First Amendment speech rights.⁸ In cases involving business-related communications, however, a poster may enjoy the more limited protection afforded commercial, as opposed to political speech.⁹ Where the speech at issue is defamatory, it enjoys *no* constitutional protection whatsoever.¹⁰ In evaluating motions to compel or prevent the disclosure of the identity of anonymous or pseudonymous speakers, courts have struggled to find a balancing test that

⁶ See generally *infra* §57.03.

⁷ See *NAACP v. Patterson*, 357 U.S. 449, 462 (1958).

⁸ See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (overturning a state statute that prohibited dissemination of campaign literature that did not list the name and address of the person issuing it); see also *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 198-200 (1999)(invalidating a statute that required initiative petitioners to wear identification badges); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963)(holding that compelled disclosure of the affiliation with groups engaged in advocacy could constitute an effective restraint on freedom of association); *Talley v. California*, 362 U.S. 60 (1960)(invalidating a statute that prohibited distribution of handbills without the name and address of the preparer); *infra* §39.03[3] (discussing these cases); see also *infra* §§50.06, 57.03 (further analyzing subpoenas directed at anonymous and pseudonymous Internet tortfeasors and infringers).

⁹ Commercial speech, if truthful and not misleading, enjoys “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); see generally *infra* §39.02[1].

¹⁰ See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 (1984); see generally *infra* §39.02.

does not impinge on First Amendment protections but also does not shield speech that is unprotected or may have only limited protection.

If litigation ensues, the outcome may depend on the jurisdiction where the challenge is made and the extent to which the plaintiff can show at the outset of the case that there were strong grounds for initiating litigation. As a practical matter, this means that potential plaintiffs may need to satisfy a much higher burden than the one imposed by Federal Rule 12 and its state equivalents for stating a claim in connection with a motion to dismiss. Ironically, protecting rights to anonymity by imposing unreasonably high threshold burdens on plaintiffs—before they have had the opportunity either to conduct discovery or show that a statement may be tortious by compelling the disclosure of the identity of a pseudonymous poster—effectively has a chilling effect on their entitlement to seek vindication of their rights through litigation.

As on *terra firma*, the nature and context in which a comment is made often is important to proving a defamation case. Absent information on who made the statement, it may be very difficult to prove malice, intent, or other elements of claims or defenses.

The procedural hurdles that a potential plaintiff must circumnavigate to proceed in litigation against an anonymous or pseudonymous tortfeasor (as outlined in section 37.02[2]) counsel caution and a sober analysis of both legal and practical realities. A person or company defamed online may react emotionally and want to vindicate rights without adequate regard to the costs involved, the public relations consequences and the likelihood of prevailing.

Before taking action, it is important to evaluate whether the legal remedy outweighs the potential public relations impact of taking action. Protest or gripe sites,¹¹ angry blog posts and other potentially actionable locations may languish in obscurity until someone takes offense and files suit. Complaints and even cease and desist letters are routinely forwarded by some service providers to sites like *chillingeffects.org*, where they are posted and can generate news articles and commentary in the blogosphere. If a plaintiff's position is viewed as heavy handed or the defendant is otherwise sympathetic, legal challenges may not only promote the popularity of the offending site but generate bad press about the plaintiff.

Potential plaintiffs also must evaluate both the likelihood of prevailing on the merits and the practical costs of litigation. Some defendants conceal their identities through multiple different layers that would need to be unmasked in litigation. A subpoena to Yahoo may yield a gmail account, necessitating a subpoena to Google, which in turn might lead to disclosure of a hotmail address, which will require a further subpoena. Companies engaged in satellite litigation over the identity of anonymous or pseudonymous posters need to anticipate these potential obstacles and the delays and costs associated with them.

¹¹ Legal remedies involving gripe sites are also addressed in connection with Lanham Act remedies in sections 6.14[5], 7.10 and 7.12; *see also infra* §37.05[1].

It is often possible to eventually arrive at contact information that reveals a person's identity—such as a paid Internet account or a work or school address—provided the plaintiff has not lost interest through successive rounds of subpoenas that elongate rather than conclude an investigation. Sometimes, however, subpoenas reveal a trail that runs dry—leading to sites that do not require a working email address to open an account or overseas to locations that will not cooperate and may be difficult to challenge under the legal regimes of the countries in which they operate.

The search for the identity of an anonymous or pseudonymous tortfeasor also may lead to domain names where the registrant's contact information is privacy-protected, which also presents a further challenge.¹² Where domain name information is concealed, it is sometimes possible to identify the registrant by finding older information for the site through the Wayback Machine, although archived information may merely identify a former registrant.¹³ Some domain name registrars will disclose the identity of anonymous registrants even without being served a subpoena when evidence is presented to them showing that a site has been used in connection with activity that violates the registrar's Terms of Use (TOU),¹⁴ depending on whether a disclosure for a TOU violation is permitted by the registrar's privacy policy.¹⁵ Other times, a plaintiff may need to go to court to compel disclosure of the identity of the registrant.

If an offending post is located on a site whose business model is based on hosting challenging content, a potential plaintiff can anticipate that the defendant will fight vigorously. Conversely, some locations such as a popular blog hosting site allow users to register without disclosing a real email address, making litigation potentially unproductive unless I.P. logs can quickly be obtained.

In addition to contact information, subpoenas may be directed at identifying an Internet protocol or "I.P." address used to access an account from which offending posts were made or emails sent. A dynamic I.P. address may be more difficult to trace than a static I.P. address, especially if necessary service provider logs are not quickly preserved. Other times I.P. logs may merely identify a large network that provides a clue but requires further investigation. Sometimes it is simply not possible to trace someone's identity—especially if a plaintiff waits too long to take action, by which time critical logs may have been overwritten. Where delay is inevitable to obtain a subpoena, it is often advisable to put a site owner or service provider on notice of the pending request and ask that relevant documents be preserved.

37.02[2]. Legal Standards for Compelling the Disclosure of the Identity of Anonymous and Pseudonymous Tortfeasors

¹² Anonymous domain name registrations are considered in chapter 7.

¹³ The Wayback Machine is an archive of the Internet, which can be a good source of research in Internet-related litigation. See <http://www.archive.org/web/web.php>.

¹⁴ Terms of Use agreements are addressed in chapter 22.

¹⁵ Privacy policies are addressed in chapter 26.

37.02[2][A]. In General

The procedures and legal standards for compelling the disclosure of the identity of an anonymous or pseudonymous poster vary around the country. It is therefore critically important that potential plaintiffs think strategically in consider where—and whether—to take action.

As discussed in section 37.02, when a subpoena issues,¹⁶ in many cases a site owner or service provider simply responds with the requested information. Some jurisdictions, however, require leave of court to take pre-service discovery, rather than allowing third party “John Doe” subpoenas to issue. In most federal courts, leave must be obtained to take discovery before the initial status conference. Even where Doe subpoenas may be served without leave of court, if an anonymous or pseudonymous poster challenges the subpoena the plaintiff will be required to make a showing to justify why the subpoena should be quashed. Depending on the nature of the proceeding, the Doe defendant may or may not be represented.¹⁷ Likewise, in California, a defendant could bring an anti-SLAPP motion in response to a third party subpoena seeking to compel the disclosure of pseudonymous poster’s real identity.¹⁸

In addition to differing procedures, courts in different parts of the country impose different legal standards on when a subpoena may issue in an attempt to balance the potential First Amendment right of a poster to engage in anonymous speech against the needs of a plaintiff, recognizing that defamatory speech is entitled to no First Amendment protection.¹⁹

¹⁶ This section addresses subpoenas seeking the identity of anonymous and pseudonymous speakers. The contents of private communications (such as stored email messages), as opposed to subscriber or customer information, may not be obtained by subpoena. *See* 18 U.S.C.A. §2703(c)(1); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 609-11 (E.D. Va. 2008); *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1448, 44 Cal. Rptr. 3d 72, 90-91 (Cal. App. 2006); *see generally infra* §50.06.

¹⁷ In *Doe v. Haddock*, 2007 WL 940761 (Tex. App. Fort Worth 2007), an appellate court dismissed the appeal of pseudonymous posters alleged to have made defamatory statements about the plaintiff on Yahoo! Finance message boards where the order compelling the disclosure of their identity had been issued against Yahoo! and Yahoo! had chosen not to appeal the ruling. In *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 713 (Ariz. 2007), the court declined to address whether a service provider had standing to assert the First Amendment rights of its pseudonymous customer on appeal, holding that the individual himself was entitled to be a party to the appeal.

In *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), a file sharing case, the court granted leave to serve a service provider with a subpoena compelling the disclosure of pseudonymous alleged infringers, subject to the later right of the service provider and/or the pseudonymous file sharer to move to quash. Under this approach, a plaintiff may need to go through two rounds of briefing and motion practice in order to obtain disclosure.

¹⁸ *See infra* §37.02[3].

¹⁹ *See generally infra* §39.03[3] (analyzing First Amendment rights in anonymous speech).

An early case suggested that disclosure was appropriate if a plaintiff could show (1) a good faith basis to contend that the plaintiff may be the victim of conduct actionable in the jurisdiction where suit was filed, and (2) that the subpoenaed identity information was “centrally needed” to advance the claim.²⁰ Other courts have adopted a variation of this test, focusing on the need for the requested information and its unavailability from other sources.²¹

Some courts require a plaintiff to make a concrete *prima facie* showing before compelling the disclosure of the identity of a pseudonymous or anonymous poster.²² Others demand that a plaintiff show that it could survive a motion to dismiss.²³ Still others will only compel disclosure if a plaintiff be able to present sufficient evidence to defeat a summary judgment motion,²⁴ which is a difficult if not impossible test for a plaintiff to meet at the outset of a case without discovery and without being able to prove the identity of the defendant (although some courts modify the summary judgment standard by only requiring proof of evidence that is within a plaintiff’s own control).

²⁰ See *America Online, Inc. v. Anonymous Publicly Traded Co.*, No. 40570, 2000 W.L. 1210372 (Fairfax Cty., Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds*, 261 Va. 350, 542 S.E.2d 377 (2001).

²¹ See, e.g., *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

²² See, e.g., *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008) (denying an anonymous defendant’s motion to quash in a libel case); *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (quashing a subpoena in a trademark and unfair competition case); *Dendrite Int’l, Inc. v. Doe No. 3*, 342 N.J. Super 134, 755 A.2d 756, 760-61 (N.J. App. 2001) (holding that (1) plaintiff must take efforts to notify the anonymous poster about the discovery request and allow the poster a reasonable opportunity for a response; (2) plaintiff must specify the exact statements made by the poster; (3) the complaint must set forth a *prima facie* cause of action and produce sufficient evidence to support each element of its *prima facie* case; and (4) the court must balance the strength of plaintiff’s *prima facie* case against the necessity for disclosure); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172, 72 Cal. Rptr. 3d 231, 245 (Cal. App. 2008) (reversing the denial of a motion to quash where the plaintiff could not make out *prima facie* showings of libel or intentional interference with contractual or business relations); see also *Solers, Inc. v. Doe*, 35 Media L. Rep. 1297 (D.C. Super. 2006) (declining to compel the disclosure of the identity of an anonymous tipster who falsely reported that plaintiff was using pirated software, in an online report to SILA, a software trade association; even though the report was false, the communication involved a private disclosure, not a public posting online, and therefore was not actionable).

²³ See, e.g., *Lassa v. Rongstad*, 294 Wis. 2d 187, 718 N.W.2d 673 (Wis. 2006), *reconsideration denied*, 297 Wis. 2d 325, 724 N.W.2d 207 (2006), *cert. denied*, 127 S. Ct. 2251 (2007).

²⁴ See *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) (requiring a plaintiff to: (1) take efforts to notify the anonymous posters about the discovery request and allow them a reasonable opportunity to respond; and (2) show its cause of action could withstand a motion for summary judgment on elements within its control); see also *Best Western Int’l, Inc. v. Doe*, No. DV-06-1537, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006) (adopting the summary judgment standard in a case involving conduct that was “purely expressive” and clarifying that to meet this standard a plaintiff must submit sufficient evidence to establish a *prima facie* case); *Best Western Int’l, Inc. v. Doe*, No. DV-06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006) (granting plaintiff’s motion for expedited and accelerated discovery); *Reunion Industries, Inc. v. Doe*, 80 Pa. D. & C. 4th 449 (Pa. Ct. Common Pleas, Allegheny Cty 2007) (applying the summary judgment standard in granting a protective order to prevent disclosure of the identity of three pseudonymous posters alleged to have made disparaging remarks about a publicly traded company on a Yahoo! Finance bulletin board).

Many courts in defamation cases also require that service be made on the defendant by posting notice on the message board where the allegedly offending material was posted²⁵ (or if the message was sent by email, contacting the defendant at the email address from which the message was sent²⁶) or at least that the requesting party make reasonable efforts to notify the speaker.

Courts addressing the standards for compelling the disclosure of the identity of a pseudonymous defendant in intellectual property disputes have tended to impose less exacting tests (requiring either a *prima facie* showing or applying the motion to dismiss standard), presumably because the balancing required is different when the content at issue involves less expressive speech or where a plaintiff can make a showing of infringement of an intellectual property right.²⁷

While somewhat different tests have been applied in different cases, in different jurisdictions, it is important to account for the type of speech involved. While political speech is entitled to a high level of First Amendment protection, commercial speech is entitled to a lower level and defamatory speech to none at all.

Similarly, in evaluating a plaintiff's claim — regardless of the standard applied — it is important to consider the context in which a statement is made. “When a defamation action arises from debate or criticism that has become heated and caustic, as often occurs when speakers use Internet chat rooms or message boards, a key issue before the court is whether the statements constitute fact [which are actionable] or opinion [which is constitutionally protected].”²⁸ Not all blogs or chat rooms are necessarily that heated, however, and websites and other locations may not be equivalent to stock message boards. In evaluating a potentially defamatory statement, it is important to view the statement in its entirety and in the context in which it arose.²⁹

²⁵ See, e.g., *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super 134, 755 A.2d 756 (N.J. App. 2001) (first articulating this standard); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 713, 720 (Ariz. 2007); *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005).

²⁶ See *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 713, 719-20 (Ariz. 2007).

²⁷ See, e.g., *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (holding, in a case involving pseudonymous file sharers, that while the defendants had some First Amendment right to anonymity it was limited in this case because file sharing was not for the most part expressive and defendants had a minimal expectation of privacy; applying a 5 factor test focusing on (1) plaintiff's ability to establish a *prima facie* claim, (2) the specificity of plaintiff's discovery request, (3) the availability of alternative means to obtain the subpoenaed information, (4) the central need for discovery to advance plaintiff's claim, and (5) defendant's expectation of privacy); *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (quashing a subpoena in a trademark and unfair competition case); *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (holding that pre-service discovery may be warranted in a domain name dispute where a plaintiff can (1) identify the defendant with sufficient specificity that the court can determine it is a real entity or person; (2) show previous efforts taken to locate the defendant; (3) demonstrate that its cause of action could withstand a motion to dismiss; and (4) justify the discovery request and identify persons who could reasonably and likely lead to identifying information about the defendant).

²⁸ *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1174, 72 Cal. Rptr. 3d 231, 247 (Cal. App. 2008).

²⁹ 159 Cal. App. 4th at 1175, 72 Cal. Rptr. 3d at 248.

A discussion of the more important cases in this area is set forth below in section 37.02[2][B].

37.02[2][B]. Case Law

Although the first known lawsuit to compel the disclosure of the identity of a pseudonymous actor was brought in mid-1995,³⁰ as of mid-2002, there were only a handful of opinions evaluating the ostensible right to anonymity of message board posters. As with many other areas of Internet law, courts grappling for new standards have tended to follow earlier Internet-related decisions.³¹ The first reported decision addressing the compelled disclosure of the identity of an anonymous poster arose in the unique context of a motion for pre-service discovery, where the standards are very high³² but not necessarily relevant if alternative procedures are available. This case was followed by Virginia trial court opinion³³ that, although subsequently reversed on appeal, was widely cited and followed.

In *in re Subpoena Duces Tecum to America Online, Inc.*³⁴—the first widely accessible decision on the rights of pseudonymous posters—a lower court in Virginia ruled that AOL’s assertion of the First Amendment rights of anonymous posters to the plaintiffs’ stock boards were outweighed by the state’s legitimate interest in protecting its citizens against potentially actionable communications over the Internet. Although the right to speak anonymously through pseudonyms was well established—James Madison, Alexander Hamilton, and John Jay authored the Federalist Papers under the name

³⁰ In that case, a Caribbean dive shop owner and a scuba instructor filed a motion in the Cook County, Illinois Circuit Court to force America Online to reveal the name of a subscriber who they claimed defamed them on an AOL bulletin board. See *Edupage*, Sept. 19, 1995, *citing* The St. Petersburg Times, Sept. 18, 1995, at 8. America Online released the name after the subscriber failed to object to the disclosure. See *Edupage*, Nov. 28, 1995, *citing* The Wall Street Journal, Nov. 24, 1995, at B1.

In another early case, brought in state court in Arizona in 1996, America Online was compelled by third-party subpoena to disclose the identity of a pseudonymous subscriber who had allegedly posted defamatory statements about the plaintiff. See *Robinson v. Doe*, Case No. 96-10874 (Maricopa County, Ariz. Sup. Ct. 1996); see generally *infra* §57.03.

Privacy laws affecting disclosure of contact information—and related service provider policies—are considered in section 50.06. Service provider policies and procedures for responding to complaints about third-party acts of defamation are considered in chapters 23, 49 and 50.

³¹ This phenomenon is discussed in chapters 2 and 3 and is illustrated by early cases addressing personal jurisdiction in cyberspace (as discussed in section 53.04[3]).

³² See *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); see generally *supra* §7.22; *infra* §57.03[3].

³³ Even unreported trial court decisions relating to the Internet gain wide recognition—and potentially undue attention—because of the speed with which information is disseminated in cyberspace. See generally *supra* chapters 2, 3.

³⁴ *No. 40570, 2000 W.L. 1210372 (Fairfax Cty., Va. Cir. Ct. Jan. 31, 2000), rev'd on other grounds, 261 Va. 350, 542 S.E.2d 377 (2001).*

“Publius”—the court ruled that this right is not absolute. Defamatory statements, for example, are not entitled to First Amendment protection.³⁵ The court wrote that, by analogy,

the release of confidential insider information, relating to a publicly traded company, through a medium such as the Internet, is no less pernicious than the libelous statements that fall outside the scope of First Amendment protections.... [T]he 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.

The court concluded that Indiana (the state where the underlying action was pending) had a compelling state interest in protecting companies operating within its borders. In addition, after conducting an *in camera* review of the relevant postings,³⁶ the court ruled that the plaintiff had met its burden of showing, based on the pleadings or evidence supplied to the court, that (1) there was a good faith basis to contend that the plaintiff may be the victim of conduct actionable in the jurisdiction where suit was filed and (2) that the subpoenaed identity information was “centrally needed” to advance the claim.

The Virginia Supreme Court reversed and remanded the case for further proceedings about a year later, concluding that the plaintiff had not met its burden of showing justification for retaining *its own* anonymity.³⁷ The decision did not address the propriety of preserving the pseudonymity of the Doe defendants. The lower court opinion was already influential, however, and had been cited approvingly in subsequent cases in other states (because of its status as one of the first widely accessible decisions addressing rights in online pseudonymity).

In *Doe v. 2TheMart.com, Inc.*³⁸ a federal court in Washington granted the motion to quash made by one of 23 anonymous individuals represented by the ACLU and the Electronic Frontier Foundation who had posted messages on the Silicon Investor bulletin board. The defendants—a company and its officers and directors subject to a shareholder derivative action—had unsuccessfully sought to compel InfoSpace, the service provider that operated Silicon Investor, to provide it with the

³⁵ *Id.*, citing *Beuharnais v. Illinois*, 343 U.S. 250, 266 (1992); see generally *infra* §45.02.

³⁶ In this case, neither the plaintiff’s nor the defendants’ identities were disclosed to the court.

³⁷ See *America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001). Counsel had represented that plaintiff’s assertion of privacy in its identity was based on “the corporate decision in its business judgment—right or wrong—that [the disclosure of its identity] ... would hurt the shareholders.” 261 Va. at 364-65. Counsel further stated that “it may not be a good judgment, but my client made the business judgment that it would be extremely harmful” to disclose its identity in a case where it alleged that it had been defamed and had its trade secrets posted online. These statements undoubtedly were influential in shaping the appellate court’s decision.

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

poster's contact information. In ruling to quash the subpoena, Judge Zilly of the Western District of Washington set an almost impossible standard for compelling the disclosure of the identity of a pseudonymous poster—at least in cases involving third party subpoenas. Judge Zilly wrote that courts should “impose a high threshold on subpoena requests that encroach” on the First Amendment right to speak anonymously. To enforce a civil subpoena seeking identifying information of a non-party who has communicated anonymously over the Internet, the court wrote that the party seeking the disclosure should make a “clear showing” that four requirements have been met:

- the subpoena seeking the information was issued in good faith and not for any improper purpose
- the information sought relates to “a core claim or defense”
- the identifying information is “directly and materially relevant to that claim or defense, and
- information sufficient to establish or to disprove that claim or defense is unavailable from any other source³⁹

By contrast, Judge Zilly concluded that “[p]eople who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court.”

Following on this standard, an appellate court in New Jersey issued a twin set of opinions on July 11, 2001. In *Dendrite Int'l, Inc. v. Doe No. 3*,⁴⁰ the court concluded that the plaintiff had failed to establish a sufficient nexus between the defendant's statements and the plaintiff's allegation of harm to justify disclosure of the identity of a defendant in a case involving alleged acts of defamation by the defendant on an Internet message board. In the companion case, *Immunomedics, Inc. v. Doe*,⁴¹ the court affirmed a lower court order compelling disclosure of the identity of an anonymous poster who identified herself as one of plaintiff's employees, where the plaintiff presented evidence that all employees were bound by confidentiality agreements and that two of the defendant's postings included

³⁹ Significantly, the court wrote that although an individual must be permitted to appear anonymously to move to quash a subpoena to protect her right to speak anonymously in order to vindicate that right without disclosing her identity, “this Court does not hold that a person would be allowed to proceed anonymously in all cases or under all circumstances.” *Id.* at n.2.

⁴⁰ 342 N.J. Super 134, 755 A.2d 756 (N.J. App. 2001).

⁴¹ 342 N.J. Super 160, 775 A.2d 773 (N.J. App. 2001).

accurate but confidential information disclosed in breach of the employee's obligations to her employer. In both cases, Judge Fall applied a three part series of procedures announced by him in *Dendrite Int'l, Inc.* that collectively present a substantial obstacle to potential plaintiffs seeking to vindicate their rights through litigation (except in unusual cases like *Immunomedics, Inc. v. Doe* where the poster herself volunteers information about herself in her postings).

First, Judge Fall wrote in *dicta* that where a plaintiff seeks an expedited motion to compel an ISP to disclose the identity of an anonymous poster on a message board, in order to strike a balance between the plaintiff's right to protect its proprietary interests and reputation and the First Amendment right to communicate anonymously, the plaintiff should be required to "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application."

Second, a plaintiff must identify the specific statements made by a given poster that allegedly constitute actionable speech. The court will then determine whether, based on the complaint and other evidence presented, the plaintiff has set forth a *prima facie* showing both that the complaint could survive a motion to dismiss *and* that the plaintiff can support each element of its causes of action relating to the postings. This analysis requires a higher showing than what would be required to defeat a motion to dismiss.⁴²

Third, if the court finds that the plaintiff is able to satisfy the first two parts of the test, it must then balance the defendant's First Amendment right of anonymous speech against "the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."⁴³

⁴² The court in fact conceded that Dendrite's defamation claims would survive a traditional motion to dismiss for failure to state a claim. Citing the lower court decision in *In re Subpoena Duces Tecum to America Online, Inc.*, *supra*, Judge Fell wrote that "courts may depart from traditionally-applied legal standards in analyzing the appropriateness of ... [a] disclosure in light of the First Amendment..."

⁴³ The court relied in part on *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), a pre-service discovery case, which it quoted for the proposition that:

Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against the defendant.

Id. at 579-80. The court did not explain, however, why it was important to impose higher procedural safeguards if a plaintiff was also required to provide notice-especially notice to the poster's email address.

Somewhat unreasonably, the court further wrote that notification efforts “should include posting a message of notification of the identity discovery request to the anonymous user on the ISP’s pertinent message board.” Such a requirement would obviously have a chilling effect on potential plaintiffs, who would likely avoid filing suit to vindicate their rights rather than posting a public notice on a message board that would inevitably inflame emotions and generate more problems.

Dendrite Int’l, Inc. was decided by an intermediate appellate court in a state that recognizes broader protections for speech under its state constitution than are available under the First Amendment.⁴⁴ The New Jersey state right of free speech protects against both government conduct and “unreasonably restrictive and oppressive conduct by private entities.”⁴⁵

Taken together the elements of the *Dendrite Int’l, Inc.* test are exceptionally difficult to meet in most cases—including those where a plaintiff’s underlying claim is meritorious. Under *Dendrite Int’l, Inc.*, a potential plaintiff must make a high threshold showing—something that itself may be difficult without evidence of the true identity of a poster—and then disclose its entire theory of the case so that a court, without benefit of discovery, can apply a highly subjective evaluation of the relative merits of the case and necessity for disclosure, balanced against the First Amendment rights of an unknown person who could be entitled to a high level of protection for political speech, a lower level of protection for commercial speech (in the case of a posting by a commercial competitor) or no protection at all, in the case of a defamatory statement. The problem with the *Dendrite Int’l, Inc.* test is not that it sets a higher standard because constitutional rights might be involved—it is that it sets a standard that may be impossible to meet in most actionable cases absent exceptional circumstances (such as where a poster mistakenly reveals details about herself in her postings), even though there is no constitutional right to engage in tortious conduct.

The two cases in which the *Dendrite Int’l, Inc.* test was applied by Judge Fall are not necessarily illustrative of typical cases involving pseudonymous message board posters. *Dendrite Int’l, Inc.* was a case that appeared to be quite weak. The defendant’s posts primarily referred to allegations about new revenue recognition practices, which previously had appeared in the press, and a post alleging that the company’s president was secretly and unsuccessfully “shopping” the company. No evidence evidently was presented to suggest that the statement was more than merely speculation on a chat board. In addition, the plaintiff had sought to compel the disclosure of the identity of multiple posters, suggesting a broader effort to stifle criticism on a public message board. Further, the lower court had found that the plaintiff’s argument that the messages in question were directly tied to decreases in the value of the plaintiff’s stock was not adequately supported by expert testimony.⁴⁶

⁴⁴ See *Dendrite Int’l, Inc. v. Doe No. 3*, 342 N.J. Super 134, 755 A.2d 756 (N.J. App. 2001).

⁴⁵ *Id.*, quoting *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty*, 138 N.J. 326, 353, 650 A.2d 757 (1994), *cert. denied*, 516 U.S. 812 (1995).

⁴⁶ The case was subsequently explained by Judge Fall as turning on a failure of proof of damages attributable to the posts. See *Immunomedics, Inc v. Doe*, 342 N.J. Super 160, 775 A.2d 773 (N.J. App. 2001).

By contrast, *Immunomedics, Inc. v. Doe*,⁴⁷ was an aberrational case where a poster disclosed sufficient information about herself on a message board that the court could evaluate plaintiff's *prima facie* case. In *Immunomedics, Inc. v. Doe*, a poster on a Yahoo! finance board, through counsel, sought to quash a subpoena to Yahoo! for personally identifiable information about her. The plaintiff in that case had alleged that Doe had posted confidential information on Yahoo! and had sued for breach of contract, breach of loyalty, tortious interference with economic gain and defamation. In the postings at issue, Doe, who identified herself as an employee, stated that the company had run out of stock for diagnostic products in Europe and was about to fire its European manager, both of which were assertions that plaintiff conceded were true. The plaintiff further presented evidence that all employees were bound by confidentiality agreements that prohibited disclosures such as those made by Doe.⁴⁸

Most cases, however, involve more scant information about the poster herself. Although the plaintiff's failure to present evidence of harm in *Dendrite Int'l, Inc.* made the case relatively easy to decide under the test announced by Judge Fall, it is not apparent that potential plaintiffs in typical message board poster cases actually could easily satisfy the other elements of the test (because of the impossibility of presenting more than mere allegations in a case where both discovery and the identity of the tortfeasor cannot be obtained). *Dendrite Int'l, Inc.* creates a Catch-22 situation where, unless a plaintiff actually knows who the poster is (and therefore may establish that she has a meritorious case), the plaintiff would have great difficulty providing sufficient evidence to compel the disclosure of the poster's identity. Since the difference between unprotected defamatory content and protected speech often turns on the context in which a statement is made, a plaintiff's inability to identify the speaker or conduct discovery potentially creates a safe haven for potential tortfeasors who are smart enough to not reveal details about themselves in their postings.

In *Doe No. 1 v. Cahill*,⁴⁹ the Delaware Supreme Court adopted a modified version of the *Dendrite* test in evaluating how to respond to a motion to quash by a pseudonymous blogger in a defamation and invasion of privacy case involving political speech. The court concluded that substantial harm could come from "allowing a plaintiff to compel the disclosure of an anonymous defendant's identity by simply showing that his complaint can survive a motion to dismiss or that it was filed in good faith."⁵⁰ Accordingly, the court declined to follow either *In re subpoena duces tecum to America Online, Inc.*'s good faith test or the *Dendrite* test's use of a motion to dismiss standard. Instead, the court adopted a stricter version of the *Dendrite* test, retaining the requirement from *Dendrite* that a plaintiff provide notice to a pseudonymous defendant and delay proceedings to afford an opportunity for the defendant to object, while also requiring that a plaintiff in a political speech case be able to show that it can meet the standards for summary judgment.

⁴⁷ 342 N.J. Super 160, 775 A.2d 773 (N.J. App. 2001).

⁴⁸ Significantly, Judge Fall rejected the defendant's argument that she should be entitled to disprove plaintiff's claims prior to her identity being disclosed. He wrote that, "[a]lthough anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged."

⁴⁹ 884 A.2d 451 (Del. 2005).

⁵⁰ *Id.* at 459.

With respect to notice, the court reiterated the point from *Dendrite* that “to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure” and “withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request.”⁵¹ The court also adopted as part of its holding the suggestion from *Dendrite* that where a “case arises in the internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff’s discovery request on the same message board where the allegedly defamatory statement was originally posted.”⁵²

In explaining how a modified summary judgment standard would be applied, the court stated that a plaintiff must submit sufficient evidence to establish a *prima facie* case for each essential element of its claim. It clarified, however, that what was required was a showing of “a genuine issue of material fact for all elements of a defamation claim *within the plaintiff’s control*.”⁵³ Thus, presumably, a plaintiff would not be penalized for its inability to present evidence uniquely available to the defendant. In the context of *Cahill*, which involved a public figure, this meant that the plaintiff was required to make a *prima facie* showing on each of the five basic elements of a claim for defamation but was not required to show that the statements were made with actual malice since that evidence would not be within a plaintiff’s control.⁵⁴

This aspect of the court’s opinion was criticized in *McMann v. Doe*,⁵⁵ where the court stated that a public person plaintiff should be required to make a *prima facie* showing of malice before a subpoena could issue.⁵⁶ *McMann* was a suit by a real estate developer, Paul McMann, against a cybersquatter who had registered *paulmcmann.com*, which displayed pictures of the plaintiff next to

⁵¹ *Id.* at 460-61.

⁵² *Id.* at 461.

⁵³ *Id.* at 463 (emphasis in original).

⁵⁴ In a defamation case under Delaware law a plaintiff must prove that (1) the defendant made a defamatory statement, (2) the statement was concerning the plaintiff, (3) the statement was published, and (4) a third party would understand the character of the communication as defamatory. In addition, a public figure defamation plaintiff must prove that (5) the statement was false, and (6) the defendant made the statement with actual malice. *Id.* at 463. The differing standards in cases involving private and public plaintiffs are addressed more extensively in section 37.03.

To determine whether a statement is defamatory under Delaware law, a court must first determine whether alleged defamatory statements are expressions of fact or protected expressions of opinion, and second whether the challenged statements are capable of a defamatory meaning. 884 A.2d at 463.

⁵⁵ 460 F. Supp. 2d 259, 267 (D. Mass. 2006).

⁵⁶ *Id.* at 267 (criticizing the Delaware standard because “a public figure could unmask anonymous critics without meeting an essential step in the *prima facie* case, a showing of actual malice” but acknowledging that if a plaintiff were required to show malice to obtain a subpoena compelling the disclosure of the identity of an anonymous defendant “no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet.”). Judge Tauro also criticized the evidentiary requirement imposed by the Delaware Supreme Court, writing that “prior to discovery a court cannot reasonably expect a plaintiff to produce evidence that could rise to the required level of clear and convincing evidence.” *Id.*

the statement that he “turned lives upside down” and the suggestion to “be afraid, be very afraid.” The plaintiff sued for defamation and violations of his right of publicity and privacy rights and filed a motion seeking leave to subpoena the registrar of the domain name to compel the disclosure of the operator of the site, since the name had been registered anonymously. The court dismissed the case for lack of subject matter jurisdiction, ruling that diversity of citizenship could not be shown where the identity of the defendant, and hence his state of residency, could not be shown.⁵⁷ In the alternative, the court held that the evidence presented failed to outweigh the Doe defendant’s constitutional right to anonymity because the website statements were bland, vague and subjective and did not constitute defamation. The court stated that for leave to file early subpoenas, a plaintiff must show irreparable harm and a need to proceed *ex parte*, which the court said had been shown in this case. While the court was critical of the *Cahill* standard as both too narrow (excluding any requirement that a public person show malice) and too strict (by adopting a summary judgment standard that could not reasonably be met at the outset of a case before discovery), the court ultimately concluded that plaintiff’s allegations failed to even state a claim.

In *Lassa v. Rongstad*,⁵⁸ the Wisconsin Supreme Court acknowledged the need for a heightened standard as expressed in *Cahill*, but concluded that a motion to dismiss standard, rather than a summary judgment standard, was appropriate. The court noted that, unlike Delaware, Wisconsin required pleading with particularity in defamation cases which would provide adequate protection against undue infringement on First Amendment rights.⁵⁹

In *Mobilisa, Inc. v. Doe*,⁶⁰ the Arizona Court of Appeals adopted a modified version of Delaware’s *Cahill* standard, requiring a requesting party to show that (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request; (2) the requesting party’s cause of action could survive a motion for summary judgment on elements not dependent on the speaker’s identity; and (3) a balance of the parties’ competing interests favors disclosure. The court declined to follow *Lassa* because, like Delaware and unlike Wisconsin, Arizona is a notice-pleading state. It adopted *Cahill*’s requirement for providing notice and the liability standard requiring a plaintiff to demonstrate it would survive a motion for summary judgment. The Arizona court disagreed with *Cahill*’s rejection of the *Dendrite* step requiring a balancing of the strength of the requesting party’s case against the need for disclosure of the anonymous poster’s identity, based on the *Cahill* court’s conclusion that consideration of these issues was subsumed in the summary judgment standard. The *Mobilisa* court wrote that *Cahill* did not consider whether balancing a broader range of competing interests was warranted. The court explained:

⁵⁷ In a later case, the First Circuit noted that federal courts do not agree on whether Doe defendants are permitted in cases filed in federal court, although the presence of Doe defendants in cases removed from federal court does not destroy diversity. See *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 426 & n.10 (1st Cir. 2007).

⁵⁸ 294 Wis. 2d 187, 718 N.W.2d 673 (Wis. 2006), *reconsideration denied*, 297 Wis. 2d 325, 724 N.W.2d 207 (2006), *cert. denied*, 127 S. Ct. 2251 (2007).

⁵⁹ 718 N.W.2d at 687.

⁶⁰ 217 Ariz. 103, 170 P.3d 713 (Ariz. 2007).

First, surviving a summary judgment on elements not dependant on the anonymous party's identity does not necessarily account for factors weighing against disclosure.... The requesting party's ability to survive summary judgment would not account for the fact that ... it may have only a slight need for the anonymous party's identity.... Additionally, without a balancing step, the superior court would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequences of a discovery order to the speaker and others similarly situated.... Second, a balance of competing interests is consistent with the standard used for evaluating preliminary injunctions.... Third, requiring a balancing of competing interests provides an additional safeguard that comports with Arizona's broad protection given to free speech with individual privacy.

Significantly, the Arizona court's test, unlike most, recognizes that while political speech is entitled to the highest level of First Amendment protection, commercial speech is not (and defamatory statements are entitled to no protection at all).

In *Krinsky v. Doe 6*,⁶¹ an intermediate appellate court in California applied the *prima facie* test but elaborated on its application in ways that may be helpful to future courts.⁶² The court aptly observed that it was "potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet."⁶³ The court noted that pleading standards may vary in different jurisdictions and thus, for example, the requirement in *Dendrite* requiring that a statement of claim be set out with particularity was essential in a notice pleading state but potentially superfluous elsewhere. Similarly, while the court agreed that it was not unreasonable or burdensome to attempt to notify a defendant, the court observed that the requirement in *Cahill* to post notice on the same message board where the allegedly defamatory statement was originally posted may not be practical or desirable. The court noted that "an Internet Web site, chat room or message board may no longer exist or be active by the time the plaintiff brings suit" Similarly, the court observed in a footnote that "[t]he posting requirement is also 'more idealistic than practical; a wronged plaintiff is unlikely to want to keep a false assertion alive by inviting continued debate."⁶⁴ Consequently, the court held that where a service provider or message board itself notifies a defendant that disclosure of his or her identity is sought (which Yahoo! had done in this case), notification by the plaintiff is unnecessary. Similarly, when a defendant moves to quash a subpoena (as in *Krinsky*), and therefore obviously knows about the subpoena, notice need not be provided.⁶⁵ Finally, in evaluating a *prima facie* showing and seeking to balance it against First Amendment considerations, the court noted that "[w]hen there is a factual and

⁶¹ 159 Cal. App. 4th 1154, 1172, 72 Cal. Rptr. 3d 231, 245 (Cal. App. 2008).

⁶² Absent a ruling from the California Supreme Court, other intermediate appellate courts in California are free to adopt their own analysis, much in the same way that federal circuit courts may consider but are free to reject the analysis of other circuit courts.

⁶³ 159 Cal. App. 4th at 1170, 72 Cal. Rptr. 3d at 244.

⁶⁴ 159 Cal. App. 4th at 1171 n.11, 72 Cal. Rptr. 3d at 244 n.11, quoting Siber & Marino, *Unmasking Online Defendants: Addressing the anonymous posting of rumors while preserving the First Amendment*, 237 N.Y.L.J. S4, at 5.

⁶⁵ 159 Cal. App. 4th at 1171, 72 Cal. Rptr. 3d at 244.

legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment ... [and a]ccordingly, a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously."⁶⁶

A similarly pragmatic reading of case law was shown in *Doe I v. Individuals*.⁶⁷ In *Doe*, Judge Christopher Droney of the District of Connecticut, explained that individuals have a "First Amendment right to anonymous Internet speech, but that right is not absolute and must be weighed against [a plaintiff's] need for discovery to address alleged wrongs." He wrote that courts have considered a number of factors in balancing these competing interests to ensure that the First Amendment rights of anonymous Internet speakers are not lost unnecessarily that plaintiffs do not use discovery to "harass, intimidate or silence critics in the public forum opportunities presented by the Internet."⁶⁸ Summarizing earlier case law, he explained:

First, the Court should consider whether the plaintiff has undertaken efforts to notify the anonymous posters that they are the subject of a subpoena and withheld action to afford the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application.... Second, the Court should consider whether the plaintiff has identified and set forth the exact statements purportedly made by each anonymous poster that the plaintiff alleges constitutes actionable speech.... The Court should also consider the specificity of the discovery request and whether there is an alternative means of obtaining the information called for in the subpoena.... Similarly, the Court should consider whether there is a central need for the subpoenaed information to advance the plaintiffs' claims.... Next, the Court should consider the subpoenaed party's expectation of privacy at the time the online material was posted.... Finally, and most importantly, the Court must consider whether the plaintiffs have made an adequate showing as to their claims against the anonymous defendant.

Judge Droney acknowledged that courts have applied different standards, concluding that the standard that strikes the most appropriate balance between the First Amendment rights of a defendant and the interest of a plaintiff in pursuing its claims (ensuring that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism) requires "a concrete showing" of each element of a *prima facie* case. Citing *Kransky*, he explained that under this standard when there is a factual and legal basis for believing that actionable speech has occurred, a "writer's message will not be protected by the First Amendment."⁶⁹ In *Doe I v Individuals*, the court ultimately denied the defendant's motion to quash finding that the plaintiff had made a *prima facie* showing of libel and the

⁶⁶ 159 Cal. App. 4th at 1172, 72 Cal. Rptr. 3d at 245-46. In *Kransky*, the court reversed the lower court's denial of a motion to quash, finding that the plaintiff could not make a *prima facie* showing.

⁶⁷ 561 F. Supp. 2d 249 (D. Conn. 2008).

⁶⁸ *Id.*, quoting *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756, 771 (2001).

⁶⁹ *Id.*, quoting *Kransky v. Doe 6*, 159 Cal. App. 4th 1154, 1172, 72 Cal. Rptr. 3d 231, 245 (Cal. App. 2008).

defendant had only a minimal expectation of privacy because the Privacy Policy of the service she used made clear that the service provider “where permitted or required by law, [will] provide personal identifying information to third parties ... without your consent ... [t]o comply with court order, subpoenas, or other legal or regulatory requirements.”

These cases underscore that procedural differences (such as the specificity required to plead a case) may impact the standard that a particular jurisdiction applies to analyze anonymity.

The procedural context in which a case arises may also impact the ease with which a party may compel the disclosure of the identity of a pseudonymous poster. For example, in California and a small number of other Western states such as Arizona, plaintiffs may file “John Doe” suits in state court against unnamed defendants, issue third party subpoenas and, if unopposed, quickly and inexpensively obtain information on the true identity of anonymous and pseudonymous posters.⁷⁰ In other jurisdictions, where there is no equivalent procedural mechanism, a plaintiff may need to file a motion for pre-service discovery.⁷¹

Different substantive protections also could come into play. California, for example, has a unique constitutional right to privacy, adopted by ballot initiative, which protects individuals both from government and from private intrusions, and which expressly applies to electronic communications.⁷² California, like New Jersey, also provides broader protections under its state Constitution than are available under the First Amendment.

37.02[3]. Anti-SLAPP Motions

About twenty states including California, Florida, Massachusetts, New York and Pennsylvania have adopted Anti-SLAPP statutes intended to quell Strategic Lawsuits Against Public Participation (SLAPP). California’s anti-SLAPP statute, however, goes much further than any other in providing procedural remedies to defendants to obtain quick dismissal of a lawsuit, recovery of attorneys’ fees⁷³ and potentially even the right to bring a new lawsuit (a “SLAPPback” action⁷⁴) against the plaintiff for damages. The procedural burdens imposed on a plaintiff in state court by the anti-SLAPP motion (requiring evidence to support every element of a claim, generally without the ability to conduct discovery) can be particularly onerous when the identity of the defendant is unknown. Indeed, where

⁷⁰ See *infra* §57.03. Alternative means exist to compel the disclosure of the identity of an online infringer under the Digital Millennium Copyright Act, 17 U.S.C.A. §512(h)(1); *infra* §57.03[2].

⁷¹ In California a judge will not pass on the propriety of a third party subpoena unless it is challenged. By contrast, in New Jersey a plaintiff must affirmatively seek leave to sue a Doe defendant. See *generally infra* §57.03[2].

⁷² Cal. Const. Art. 1 §1; see *generally supra* §26.07[2].

⁷³ A prevailing defendant automatically is entitled to recover attorneys’ fees and costs, while a prevailing plaintiff may only recover if the court finds the motion “is frivolous or is solely intended to cause unnecessary delay” Cal. Code Civil Procedure §425.16(c).

⁷⁴ *Id.* §425.18.

defendants have acted pseudonymously, the California anti-SLAPP can be used effectively by tortfeasors to shield themselves from ever being held accountable for illegal activity.⁷⁵

The statute provides a potent remedy for defendants at the outset of a case. In *Global Telemedia Int'l, Inc. v. Doe*,⁷⁶ for example, Judge David Carter dismissed claims against pseudonymous posters under California's AntiSLAPP statute.⁷⁷ He subsequently awarded the defendants \$55,000 in attorneys' fees in an unreported decision.⁷⁸

In state court in California, an Anti-SLAPP motion generally must be brought at the outset of a case and stays discovery.⁷⁹ Indeed, a plaintiff's case can grind to a halt for an extended period of time when an anti-SLAPP motion is filed because even the denial of an anti-SLAPP motion is immediately appealable in state court and divests the trial court of jurisdiction to proceed pending resolution of the appeal.⁸⁰ By contrast, in federal court, an Anti-SLAPP motion will be treated like a motion for summary judgment, generally affording a defendant the opportunity, if requested, to obtain discovery.⁸¹

Under the Anti-SLAPP statute, a court considering message board posts must evaluate (1) whether the postings were an exercise of a defendant's right to free speech under the U.S. or California Constitutions⁸² in connection with a public issue; and (2) whether the plaintiffs have a probability of

⁷⁵ In many cases, persons acting pseudonymously or anonymously fail to appear to contest a claim or appear but voluntarily disclose their identity. Where pseudonymous defendants elect to hire counsel to protect their pseudonymity, the anti-SLAPP statute can be used as a sword that can result in the dismissal of a meritorious lawsuit.

⁷⁶ 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

⁷⁷ Cal. Code Civ. Proc. §425.16. SLAPP is an acronym for Strategic Lawsuits Against Public Participation. The statute, which was enacted in 1992 in response to a perceived increase in lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," provides in part that a cause of action against a person "arising from any act of that person in furtherance of that person's right of ... free speech" under either the U.S. or California Constitutions "in connection with a public issue" shall be subject to a special motion to strike, ... unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The statute thus establishes a mechanism for a defendant at the outset of a case to have a claim dismissed even if the technical pleading requirements have been satisfied and a regular motion to dismiss would not be successful.

⁷⁸ See Shannon Lafferty, "L.A. Judge Anti-SLAPPs Cybergag Suit," *The Recorder*, May 22, 2001.

⁷⁹ See Cal. Civ. Code Proc. §§425.16(f), 425.16(g).

⁸⁰ See *Varian Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180 (Cal. 2005). In *Delfino*, the California Supreme Court vacated judgment for the plaintiff following trial on its claims for libel, invasion of privacy (misappropriation of name), breach of contract and conspiracy arising out of Internet posts after concluding that the case should have been stayed pending the defendants' appeal of the denial of their anti-SLAPP motion. The court ruled that the district court was divested of jurisdiction once an appeal was noticed. Needless to say, it is ironic that even though the plaintiff prevailed on its claims at trial, it potentially could have been dismissed on remand under the anti-SLAPP statute, underscoring the potentially unfair advantage that Internet posters have in seeking to avoid liability for their own misconduct.

⁸¹ See *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-47 (9th Cir. 2001) (ruling that the state procedural rule barring discovery was in "direct collision" with Fed. R. Civ. Proc. 56 and therefore would not be enforced).

⁸² Although the issue of whether speech is involved rarely comes up in suits involving material posted on the Internet, in *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005), the Ninth Circuit reversed an anti-

success on their claims. If a defendant establishes a *prima facie* showing that a claim involves an exercise of free speech in connection with a public issue, the burden shifts to the plaintiff to demonstrate through admissible evidence a probability of success on the merits.⁸³ However, state court opinions suggests that if something is posted on the Internet where it is accessible to the public then by definition it involves a matter of public interest.⁸⁴ Thus, in some Internet posting cases in state court the threshold burden essentially is dispensed with and the burden immediately falls on the plaintiff to prove by admissible evidence (and without discovery) likelihood of prevailing on the merits of each element of each claim against the unnamed pseudonymous defendant.

In *Global Telemedia Int'l, Inc.*, the plaintiff, a publicly traded company, brought suit for trade libel, libel *per se*, interference with contractual relations and prospective economic advantage against individuals who posted critical messages on Raging Bull chat rooms. Judge Carter noted that the anti-SLAPP statute does not apply to statements by one company regarding the conduct of a competitor,⁸⁵ but held that it was applicable to a suit against investors based on their negative comments on a message board. He further found that the plaintiff could not demonstrate a probability of succeeding on its claims because the statements at issue primarily involved assertions of opinions, rather than statements of fact.⁸⁶

SLAPP ruling in favor of the defendant because “[a]n infringement lawsuit by a trademark owner over a defendant’s unauthorized use of the mark as his domain name does not *necessarily* impair the defendant’s free speech rights.” In that case, the plaintiff had sued Kremer, a former patient at its hair restoration institute, over the defendant’s operation of a consumer criticism site at *BosleyMedical.com*.

⁸³ *Global Telemedia Int'l, Inc. v. Doe*, 132 F. Supp. 2d at 1264-66. To show a probability of success, a plaintiff must make a *prima facie* showing of facts which, if proven at trial, would support a judgment in plaintiff’s favor. The applicable standard is similar to the ones used for determining motions for nonsuit, directed verdict or summary judgment. The court cannot weigh evidence, but the plaintiff cannot simply rely on the allegations in the complaint. *ComputerXpress, Inc. v. Jackson*, 93 Cal. App.4th 993, 113 Cal. Rptr. 2d 625, 641 (Cal. App. 2001).

⁸⁴ See *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, 51 Cal. Rptr. 3d 55, 59 (Cal. 2006) (holding “Web sites accessible to the public” including newsgroups “public forums” for purposes of the anti-SLAPP statute; affirming entry of judgment for the defendant in a case barred by the Good Samaritan exemption, 47 U.S.C.A. §230(c)(1), discussed in section 37.05); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569 (Cal. Ct. App. 2005) (holding that websites that are accessible without charge to any member of the public to read comments and post their own opinions met the definition of a public forum; awarding fees to an anonymous poster who prevailed in an anti-SLAPP motion against a company and its chairman who sued for defamation over posts critical of them on an Internet message board); *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d at 638 (writing that statements posted on a publicly accessible website or chat room are deemed to have been made in a “public forum” and therefore potentially are subject to the Anti-SLAPP statute).

In an unreported decision, a federal court held that Google’s page rankings and search results were not a matter of public interest and therefore Google did not meet its threshold burden in seeking to obtain dismissal under the anti-SLAPP statute of claims alleging that Google blocked particular sites. *Kinderstart.com LLC v. Google, Inc.*, 2007 WL 831806 (N.D. Cal. March 16, 2007).

⁸⁵ 132 F. Supp. 2d at 1266, citing *Globetrotter Software, Inc. v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

⁸⁶ Whether a statement constitutes opinion or fact must be evaluated based on the totality of the circumstances. 132 F. Supp. 2d at 1267.

California's Anti-SLAPP statute was also applied in a subsequent suit involving Internet postings. In *ComputerXpress, Inc. v. Jackson*,⁸⁷ ComputerXpress, a public company, filed suit against the owners of various businesses that it had considered merging with, for fraud, negligent misrepresentation, negligence, trade libel, interference with contractual relations, interference with prospective economic advantage, abuse of process, conspiracy, and injunctive relief. Plaintiff alleged that defendants had misrepresented their profitability and, after it decided not to proceed with the merger, began posting false and disparaging statements about ComputerXpress and its management on the Internet and elsewhere to existing and potential customers and investors. The appellate court ruled that ComputerXpress's claims for fraud, negligent misrepresentation, negligence and interference with contractual relations did not "arise from" acts in furtherance of their rights to speech or petition and therefore were not subject to the Anti-SLAPP statute.⁸⁸ The court struck the remaining claims, however, concluding that there was no evidence in the record to indicate that the defendants were competitors *at the time they made their postings* and that the tenor of the messages suggested that the defendants were speaking as investors, rather than competitors.⁸⁹ Since the defendants met their threshold burden, the burden shifted to ComputerXpress to show a probability of prevailing, which it was unable to meet.⁹⁰

Where the identity of the defendant is known, a defendant may be better able to defend itself against an anti-SLAPP motion in a meritorious case. For example, in *MCSi, Inc. v. Woods*,⁹¹ Judge Jeremy Fogel of the Northern District of California ruled that a former employee's pseudonymous postings on a Yahoo! stock message board, after he had been hired by a competitor, were not matters of public interest where the postings were made from his office computer, mostly during standard business hours, with the knowledge or active encouragement of his superiors. In denying the former

⁸⁷ 93 Cal. App. 4th 993, 113 Cal. Rptr. 2d 625 (Cal. App. 2001).

⁸⁸ 113 Cal. Rptr. 2d at 636.

⁸⁹ *Id.* at 639. The case also involved communications sent to the SEC—which constituted statements before an official proceeding (*id.* at 640)—and therefore did not turn exclusively on the message board postings.

⁹⁰ The court wrote that:

ComputerXpress failed to demonstrate how defendants' Internet postings ... were false or defamatory. In fact, it has not even identified which of the numerous postings included in the record it contends were actionable. Instead, ComputerXpress simply refers this court to the 131 pages of Internet postings contained in the record, apparently assuming it is the court's obligation to determine how they support ComputerXpress's position.

Id. at 641-42. The court found those postings that it did review hyperbolic, informal and lacking in the characteristics of typical fact-based documents and would have been seen by a reasonable reader as "mere invective of a disgruntled shareholder..." *Id.* at 642, 643.

⁹¹ 290 F. Supp. 2d 1030 (N.D. Cal. 2003).

employee's anti-SLAPP motion, Judge Fogel ruled that speech by a competitor about a competitor is merely commercial speech and not a matter of public interest.⁹²

Had the poster's identity been kept secret in *MCSi, Inc. v. Woods*, it would have been difficult if not impossible for the plaintiff to present admissible evidence showing that the defendant was a top salesperson for the plaintiff's main competitor in the relevant geographic market and the defendant could well have obtained dismissal of the lawsuit and an award of fees, underscoring the procedural unfairness of applying the anti-SLAPP motion to cases involving pseudonymous posters.

While some anti-SLAPP motions are justifiably granted because of the weakness of a plaintiff's case, the procedural unfairness for plaintiffs in state court actions brought against pseudonymous posters are difficult to overcome even in meritorious cases. Indeed, it is telling that, to date, *MCSi v. Woods* is the only reported case decided under California's anti-SLAPP statute where a company prevailed in defeating an anti-SLAPP motion brought by a pseudonymous Internet poster.⁹³

37.02[4]. The Potential Applicability of Shield Laws to Journalists

Shield laws insulate reporters from being held in contempt for refusing to disclose the source of a story. For example, California's Constitution and Evidence Code provide that a publisher, editor, reporter or other person connected with or employed by a newspaper, magazine or other periodical publication shall not be adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing information for communication to the public.⁹⁴

In *O'Grady v. Superior Court*,⁹⁵ an intermediate appellate court in California held that bloggers who operated "online news magazine" websites were protected by California's shield law and

⁹² Following this case, the California legislature codified an exception to the anti-SLAPP statute where a suit is brought against a person primarily involved in the business of selling or leasing goods or services where, among other things, the statement or conduct consist of representations of fact about a competitor. See Cal. Code Civil Procedure §425.17(c). Needless to say, where the defendant acts pseudonymously it can be difficult if not impossible for a plaintiff to show it is entitled to this exemption in response to an anti-SLAPP motion.

⁹³ In addition to the cases discussed earlier in this section, plaintiffs lost anti-SLAPP motions involving Internet posts in the following cases: *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149 (C.D. Cal. 2005) (dismissing claim by corporation against shareholder over publication of an email asserting that corporate managers were "the biggest crooks on the planet"); *Gilbert v. Sykes*, 147 Cal. App. 4th 13 (Cal. Ct. App. 2007) (reversing the denial defendant's anti-SLAPP motion involving a patient's operation of a consumer criticism website describing her negative experiences being treated by the surgeon, who was held to be a limited purpose public figure); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569 (Cal. Ct. App. 2005) (reversing denial of anti-SLAPP motion where the plaintiff corporation was a limited public figure but could not present evidence that the defendant acted with actual malice).

⁹⁴ Cal. Const. Art. I, §2(b); Cal. Evid. Code §1070(a).

⁹⁵ 139 Cal. App. 4th 1423, 1448, 44 Cal. Rptr. 3d 72, 90-91 (Cal. App. 2006).

therefore could not be punished with contempt for refusing to disclose unpublished information. In that case, Apple Computer, Inc. had sued bloggers who posted what it contended were trade secrets about a new product and sought subpoenas seeking from the site owners where the information was published the identities of the pseudonymous posters and the contents of additional documents. The appellate court reversed the lower court's order denying the defendant's motion for a protective order, holding that the contents of communications were protected from disclosure by the Electronic Communications Privacy Act⁹⁶ and that the bloggers were covered by the shield law.⁹⁷

In so ruling, the court emphasized that this case involved “the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site's operator”, not “information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chat room, bulletin board system, or discussion group.”⁹⁸ The court allowed that “[p]osting of the latter type, where it involves confidential or otherwise actionable information, may indeed constitute something other than the publication of news. But posting of the former type appears conceptually indistinguishable from publishing a newspaper, and we see no theoretical basis for treating it differently.”

It remains to be seen how other courts will rule on this issue.

⁹⁶ 18 U.S.C.A. §2703(c)(1); *see generally infra* §50.06.

⁹⁷ 139 Cal. App. 4th at 1456-67, 44 Cal. Rptr. 3d at 96-105.

⁹⁸ 139 Cal. App. 4th at 1459, 44 Cal. Rptr. 3d at 100.