

Help Yourself: Why Courts Should Not Allow Defamation Plaintiffs to Discover the Identity of Anonymous Internet Defendants Without a Showing that Self-Help Would Be Ineffective

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Introduction

The Internet gives individual speakers a voice that did not exist in a less-connected world where access to mass communication media was limited and restricted. As noted in the first important Supreme Court case relating to the Internet, *Reno v. American Civil Liberties Union*, it is “the most participatory form of mass speech yet developed.”¹ The Court went on to say that, “[t]hrough the use of [Internet] chat rooms, any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages . . . and newsgroups, the same individual can become a pamphleteer.”²

The Internet also offers a shield of anonymity to those who desire it and yet still desire to participate in larger discussions with people around the world. The benefits to being able to interact anonymously are immense. According to one federal judge, “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.”³ In addition, according to Prof. Lyrrisa Barnett Lidsky, anonymous Internet communication “promises to make public debate in cyberspace less hierarchical and discriminatory than real-world debate to

¹ 521 U.S. 844, 863 (1997).

² *Id.* at 870.

³ *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

the extent that it disguises status indicators such as race, class, gender, ethnicity, and age, which allow elite speakers to dominate real-world discourse.”⁴ Prof. Victoria Smith Ekstrand adds, “Today, the anonymous author’s Web page is as accessible as the New York Times Web page and is just as simple to publish: Internet users can easily find and read both.”⁵ Anonymity also encourages people to “convey more (or simply more accurate) information than they would in a world where anonymous communications are effectively barred by social conventions or enforceable legal rules.”⁶

The Supreme Court in two recent opinions has held that the right to speak anonymously is protected by the First Amendment. In *McIntyre v. Ohio Elections Commission*, the Court stated that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”⁷ This policy adds diverse voices to the marketplace of ideas, because “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”⁸ Simply put, “[a]nonymity is a shield from the tyranny of the majority.”⁹ And though “speech by its nature will sometimes have unpalatable consequences, . . . in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”¹⁰ In

⁴ Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 896 (2000).

⁵ Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 408 (2003).

⁶ Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2192 (1996).

⁷ 514 U.S. 334, 342 (1995).

⁸ *Id.* at 341-42.

⁹ *Id.* at 357.

¹⁰ *Id.*

Watchtower Bible & Tract Society of N.Y. v. Village of Stratton, the Court reaffirmed its protection of anonymous speech.¹¹

I. The Defamation Suit as a Threat to Free Anonymous Speech on the Internet

The power of anonymous speech on the Internet is threatened by the ability to expose the anonymous speaker's identity through the use of a defamation suit and court-approved discovery. "The threat to core First Amendment free speech rights from too readily identifying anonymous speakers is real, and should be taken seriously by the courts," according to Prof. Michael S. Vogel, though he also questions the use of new standards by the courts to counteract the threat.¹² But some evidence suggests that this is indeed a problem. Prof. David L. Hudson states that "some companies have resorted to defamation suits that resemble Strategic Lawsuits Against Public Participation (SLAPP suits). They want to unmask anonymous speakers and retaliate against them."¹³ Prof. Ekstrand cites a brief filed by America Online in one such case that states that AOL "received approximately 475 civil subpoenas in 2000 from potential plaintiffs seeking identification of AOL users."¹⁴

The standards that courts use to evaluate the merits of such suits at the pretrial phase will greatly affect their likelihood of success in chilling speech. This is particularly so because the "nature of Internet defamation suits is unusual in that most suits are dropped after the

¹¹ 536 U.S. 150 (2002).

¹² Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 801 (2004).

¹³ David L. Hudson, *Blogs and the First Amendment*, 11 NEXUS 129, 132 (2006).

¹⁴ Ekstrand, *supra* note 5, at 416.

plaintiff discovers the defendant's identity,"¹⁵ suggesting that a final court judgment is not the true remedy that such plaintiffs are seeking—they are trying to expose and silence their critics. Those standards in the Internet defamation context, particularly in their application on whether to allow discovery to be used to unveil anonymous posters' identities, are currently evolving. In most jurisdictions, courts are either unclear in how they would evaluate such discovery requests or are using an insufficiently high bar in allowing them to proceed.

A. Defamation Generally and the First Amendment

Defamation is the general term for the dignitary torts of libel and slander, both of which involve an "invasion of the interest in reputation and good name."¹⁶ According to the Restatement (Second) of Torts, the basic elements of a defamation action are 1) "a false and defamatory statement concerning another;" 2) "an unprivileged publication to a third party;" 3) "fault amounting to at least negligence on the part of the publisher; and" 4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."¹⁷ A "defamatory statement" is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹⁸ To be defamatory, the statement need not cause actual harm to reputation.¹⁹ A defamation may not be actionable in some cases, however, without some showing of "special harm." The need

¹⁵ David C. Scileppi, Note, *Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?*, 54 FLA. L. REV. 333, 337 n. 32 (2002).

¹⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 111, at 771 (5th ed. 1984).

¹⁷ Restatement (Second) of Torts § 558 (1977) [hereinafter Restatement].

¹⁸ *Id.* at § 559.

¹⁹ *Id.* at § 559 cmt. d.

for a showing of special harm developed from the law of defamation dealing with slander, with its historical roots as a lesser offense than libel.²⁰

Historically, the “publisher” of a defamatory statement has been construed to include not only the author of the statement but also the publisher of the larger work that contains the statement, as well as any distributors of the publication. Liability, however, has not typically attached to those in the publication or distribution chain who had less control of the contents of the publication. According to the Restatement, “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”²¹

The outer bounds of libel liability, whatever their roots, are now limited by the First Amendment, as the Supreme Court expressly held in *New York Times v. Sullivan*.²² Because libel law and its enforcement require significant state action, they may not be used to infringe on the freedom of speech protected by the First Amendment (and Fourteenth Amendment, which applies the First Amendment to the states).²³ As *Sullivan* held in the case of public official plaintiffs, and as later cases extended to apply to any plaintiff who is a public figure,²⁴ to recover for defamation the plaintiff must show with

²⁰ See KEETON, *supra* note 16, § 112, at 785-86, 795. Libel developed originally as a criminal offense because of its greater potential to cause harm, and in tort it was held to be actionable per se, without proof of actual damage to the plaintiff. *Id.*

²¹ Restatement, *supra* note 17, § 581(1).

²² 376 U.S. 254 (1964). See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.5.2, at 1008 (2d ed. 2002).

²³ CHERMERINSKY, *supra* note 22, § 11.3.5.1, pp. 1007-08.

²⁴ See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, *id.* (extending *Sullivan* to plaintiffs who do not hold public office but are nonetheless very prominent public figures); *Gertz v. Welch*, 418 U.S. 323 (1974) (declining to extend *Sullivan* to any matter of public concern and instead reaffirming the public/private figure distinction).

clear and convincing evidence²⁵ that the defendant made a false statement with actual malice (i.e. knowing of the falsehood or with reckless disregard of the truth).²⁶ Therefore, the burden on the plaintiff in these situations is much higher than that of a typical tort plaintiff.

In *Gertz v. Welch*, the Court explained that these heightened standards were justified because such plaintiffs “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals usually enjoy.”²⁷ This highlights the important role of self-help in the Supreme Court’s freedom of speech jurisprudence. The Court has repeatedly struck down state limitations on speech where those potentially harmed by the speech had an alternative effective self-help remedy.²⁸ The availability of self-help can be used to show that a state limitation on speech, evaluated under strict scrutiny, is not the least restrictive means of accomplishing the state’s interest in regulating it.²⁹ In effect, “the ready availability of self-help remedies disproves the state’s claim to have a compelling interest in content-based restrictions on speech.”³⁰

Even where the plaintiff is not a public figure, the Supreme Court has imposed standards beyond the historical “actionable per se” doctrine of libel. In *Dun & Bradstreet v.*

²⁵ The *Sullivan* court termed it “convincing clarity,” but in subsequent cases the court referred to the standard as “clear and convincing proof.” *Sullivan*, 376 U.S. at 285-86; *Gertz*, 418 U.S. at 342; CHEMERINSKY, supra note 22, § 11.3.5.2 at 1010.

²⁶ CHEMERINSKY, supra note 22, § 11.3.5.2 at 1009.

²⁷ *Gertz*, 418 U.S. at 344.

²⁸ See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 749-51 (2003).

²⁹ *Id.* at 762.

³⁰ *Id.* at 753.

Greenmoss Builders, the Supreme Court held that where the matter in question is of public concern, even if the plaintiff is not a public figure, a state's defamation law can allow recovery of presumed or punitive damages (as opposed to compensatory damages) only if the plaintiff can prove actual malice.³¹ States have more leeway, because of diminished First Amendment concerns, where the plaintiff is a private figure and the matter in question is not of public concern; in that case, even presumed or punitive damages do not require that the state's defamation law impose an actual malice proof standard.³²

B. Evolving Standards to Evaluate Defamation Claims and Requests to Discover Anonymous Posters' Identities

As Internet publication took hold in the 1990s, courts adapted the framework of the law of defamation to the new medium. The key question at that stage was the role of the various players at each stage of the Internet publication process, such as content providers who provide an editorial function (e.g., the web operations of a print newspaper), those who provide a forum but not an editorial function (e.g., the operator of an unmoderated web message board), and those who provide Internet connectivity access to content or forum providers. Early cases applied the typical defamation publisher criteria and made analogies to print media, often with somewhat inconsistent results.³³

³¹ 472 U.S. 749, 756 (1985) (citing *Gertz*, 418 U.S. at 348-49).

³² *Id.* at 761.

³³ *See, e.g.*, *Stratton Oakmont v. Prodigy Services*, 1995 WL 323710 (N.Y. Sup. 1995) (unreported) (online service provider is publisher); *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991) (online service provider is distributor).

Congress and subsequent court decisions clarified the role of the Internet content providers. Section 230(c)(1) of the Communications Decency Act of 1996 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁴ The statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions,”³⁵ and it defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”³⁶ Most courts have followed the 4th Circuit’s stance in *Zeran v. America Online*³⁷ that § 230 should be construed broadly to exempt ISPs and many other entities apart from the author of the allegedly defamatory statement from any publisher or distributor liability for defamation.³⁸

When the defamation defendant is anonymous, an additional restriction on the plaintiff’s ability to sue arises. Most federal courts hold that defamation actions against anonymous defendants cannot proceed in federal court because of a lack of federal subject matter

³⁴ 42 U.S.C. § 230(c)(1) (2005).

³⁵ *Id.* at § 230(f)(2).

³⁶ *Id.* at § 230(f)(3).

³⁷ 129 F.3d 327 (4th Cir. 1997).

³⁸ *See, e.g.,* Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Barrett v. Rosenthal, 40 Cal. 4th 33 (2006). *But see* Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (questioning *Zeran*’s rationale though not reaching the § 230 issue).

jurisdiction.³⁹ No federal question is at issue, and because of the unknown residence of the anonymous defendants, the plaintiff cannot show complete party diversity.

The combination of First Amendment concerns regarding both defamation actions and discovery of identities of anonymous speakers forces courts to use a heightened standard when considering such discovery requests in the context of these cases. Courts are understandably concerned about the use of such methods not to recover for damage to reputation, but instead to reveal and harass those who criticize the plaintiff. The ability of courts to set a consistent, logical standard that appropriately protects this important avenue of remedial speech, however, has been impaired by 1) confusion over the type of speech (e.g., political vs. commercial) being protected; 2) confusion over the type of plaintiff (e.g., public figure vs. private figure) seeking redress; 3) borrowing from other areas of law (e.g., copyright, trade secret, etc.) without identifying possible relevant differences; and 4) insufficient attention being given to plaintiff's ability for self-help, which should be vastly greater in the Internet context.

The first apparent case to consider the appropriate standard, and the case that sets the lowest bar in allowing plaintiff to discover the identify of anonymous defamation defendants, is *In re Subpoena Duces Tecum to America Online*⁴⁰ A publicly traded company filed suit in Indiana against 4 John Doe AOL-subscriber (and 1 anonymous person who was not an AOL member and therefore not at issue here) defendants, alleging, inter alia, that they defamed the company on Internet chat rooms. The plaintiff

³⁹ See infra.

⁴⁰ 2000 WL 1210372 (Va. Cir. Ct.).

obtained an order from the Indiana court to seek discovery in Virginia, home to AOL, of the identity of the 4 AOL members. The Circuit Court of Virginia, in considering the request of AOL to quash the subpoena, rejected AOL's proposed standard that "(1) the party seeking the information must have pled with specificity a prima facie claim that it is the victim of particular tortious conduct and (2) the subpoenaed identity information must be centrally needed to advance that claim."⁴¹ The court was concerned about evaluating the sufficiency of pleadings from another state (and in the process confusing a motion-to-dismiss standard with the summary-judgment-like standard that AOL had advocated, as well as ignoring the fact that state courts often evaluate and apply the laws of other states when their choice-of-law rules require them to do so), so it instead evaluated the request under a "legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" standard.⁴² Though the Supreme Court of Virginia reversed and remanded the decision, it did so on other grounds and it did not address the circuit court's application of the good-faith standard.⁴³

In *Dendrite International, Inc. v. Doe*,⁴⁴ a New Jersey appellate court evaluated whether the plaintiff company should be able to conduct limited expedited discovery from Yahoo!, which hosted a web message board relating to plaintiff's company where the anonymous defendant allegedly posted defamatory comments regarding plaintiff's change in accounting procedures. It went through the trial court judge's application of a

⁴¹ *Id.* at *7.

⁴² *Id.* at *8.

⁴³ *America Online, Inc. v. Anonymous Publicly Traded Company*, 261 S.E.2d 377 (Va. 2001) (holding that the plaintiff corporation could not proceed anonymously under the Uniform Foreign Depositions Act and that according comity to ruling of a foreign court that was not a final judgment was improper).

⁴⁴ 775 A.2d 756 (N.J. Super. 2001).

standard from a 1999 federal district court case, *Columbia Ins. Co. v. Seescandy.com*,⁴⁵ which dealt with an anonymous trademark infringer. The test as stated by the *Seescandy.com* court required the plaintiff to meet a motion-to-dismiss standard before being allowed to conduct discovery relating to the anonymous defendant's identity.⁴⁶ As applied by the lower court in *Dendrite*, however, it effectively became a summary-judgment standard. The New Jersey appellate court had no problem with this application of the test, because it envisioned it "as a flexible, non-technical, fact-sensitive mechanism for courts to use as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet."⁴⁷ The *Dendrite* court somehow also found that the test as applied by the lower court was consistent with the approach taken by the Virginia Circuit Court in *America Online*.⁴⁸ Ultimately, the New Jersey appellate court agreed with the lower court's summary-judgment-like scrutiny of the plaintiff's discovery request and upheld its decision to deny it, particularly because of the plaintiff's lack of showing of actual harm, though New Jersey defamation law allows defamation to be actionable per se when the words "clearly denigrate a person's reputation" and are not "essentially true."⁴⁹ For a private-figure plaintiff, where the offending statements are not of public interest, this passes the *Gertz* test, but the court never addresses the point.

⁴⁵ 185 F.R.D. 573 (N.D. Cal. 1999).

⁴⁶ *Id.* at 579-80.

⁴⁷ 775 A.2d at 771.

⁴⁸ *Id.*

⁴⁹ *Id.* at 772.

The only state supreme court to address this issue is Delaware's 2005 decision in *Doe v. Cahill*.⁵⁰ In a defamation action brought by a city councilman plaintiff for statements made by an anonymous poster on a blog hosted by the Delaware State News, the Delaware Supreme Court overturned the trial court's use of the *America Online*-derived good-faith standard and held that such decisions must be made based on a summary-judgment standard.⁵¹ The *Cahill* court was influenced by the *Dendrite* decision, but it fleshed out much better the reasoning for it. The *Cahill* court compared the situation to where a defamation plaintiff sues a known defendant. In that case, the plaintiff must typically survive a motion to dismiss before proceeding with discovery. That bar is appropriately lower, though, because "where the plaintiff knows the defendant's identity, no constitutional harm comes from allowing a silly or trivial claim to survive a motion to dismiss; the trial court can easily dispose of these cases on a motion for summary judgment. In a case like the one at bar, however, substantial harm may 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."⁵²

At least three federal district courts have also issued opinions relating to the discovery of the identity of anonymous defamation defendants, and the three differ greatly in how they treat the jurisdiction issue and the appropriate standard by which to judge the discovery request. *In re Baxter*,⁵³ decided in 2001, addresses the question of diversity jurisdiction.

⁵⁰ 884 A.2d 451 (Del. 2005).

⁵¹ *Id.* at 457-58.

⁵² *Id.* at 459.

⁵³ 2001 WL 34806203 (W.D. La.).

There are few facts described in the opinion, but it is mentioned that the anonymous defendant (making a limited appearance to contest plaintiff’s discovery motion) claims that the plaintiff is potentially a public figure, meaning that a showing of “actual malice” would be required to succeed in the suit.⁵⁴ Though the plaintiff does not and cannot confidently assert the diversity of the unknown anonymous defendant, the court decided because of the nature of the problem that “it would be wholly improper to require applicant to support federal jurisdiction of a proposed suit against parties which include some whose identities are not yet known at this stage of the proceedings and where all that is before the court is a motion to perpetuate testimony.”⁵⁵ Because it decides to not dismiss for lack of jurisdiction, it then evaluates the merits of the plaintiff’s motion to conduct discovery. After evaluating the standards used in several other cases, including *Seescandy.com*, *America Online*, and *Dendrite*, the court decides to craft a different standard based on a “reasonable probability of success on the merits” assessment.⁵⁶ In rejecting the approach used in *Seescandy.com*, the court criticized a requirement that the plaintiff first exhaust all other available means of identifying the defendant without a court discovery order because “it seems that a defendant’s First Amendment rights are more likely to be protected by the court where a subpoena is sought than where a plaintiff attempts to learn the identify of the party ‘from any other source.’”⁵⁷ Clearly, the court misconstrues the proper application of the First Amendment to these cases, which bars government action—including by the courts in civil suits—to inhibit the free speech rights of anonymous defendants. In rejecting the *Dendrite* approach, the court objects to

⁵⁴ *Id.* at *5.

⁵⁵ *Id.* at *3.

⁵⁶ *Id.* at *13.

⁵⁷ *Id.* at *12.

the requirement of making a prima facie case as too burdensome, especially where the plaintiff might be a public figure, because of the difficulty for the plaintiff in showing “actual malice” without the evidence obtained through discovery.⁵⁸

In *Best Western Int’l, Inc. v. Doe*,⁵⁹ the diversity jurisdiction question is ignored, perhaps because of the importance of the First Amendment implications of granting such a discovery order, though the other federal court cases discussed in this section reject that approach. The court, in assessing the correct approach to allowing a discovery order to proceed against an anonymous defendant, agrees with the Delaware Supreme Court and adopts the summary judgment standard.⁶⁰ In so doing, the court explains that a bare complaint, without identifying the specific allegedly false statements or the particular harm incurred, would probably survive the good-faith and motion-to-dismiss standards, demonstrating how easy it would be for a plaintiff to abuse the system.⁶¹

Finally, in the most recent federal case to evaluate the proper standard in assessing a motion to for discovery to identify an anonymous defendant, the court in *McMann v. Doe*⁶² declined to assert federal subject matter jurisdiction over the case but discussed the merits of the discovery motion anyway.⁶³ It does not adopt a particular standard, but it criticizes the summary-judgment approach used in *Cahill* and *Best Western* as being too steep for a plaintiff to meet.⁶⁴ By implication, the court seems to approve of a less

⁵⁸ *Id.*

⁵⁹ 2006 WL 2091695 (D. Ariz.).

⁶⁰ *Id.* at *4.

⁶¹ *Id.* at *5.

⁶² 460 F. Supp. 2d 259 (D. Mass. 2006).

⁶³ *Id.* at 265.

⁶⁴ *Id.* at 267.

demanding motion-to-dismiss standard, and the court found an alternative basis for dismissing the plaintiff's claim (in addition to the court lacking jurisdiction) because the allegedly defamatory statements were opinions, not provable as true or false.⁶⁵

Neither the state nor the federal courts seem to be heading toward any unifying approach to these cases. More troubling, however, is the muddled analysis that all of them have used in deciding the issue.

II. Eliminating the Chilling Effect of Defamation Suits—Other Proposals

One commentator thinks that existing procedural tools and standards are sufficient to deal with the threat of abusive use of discovery motions to expose anonymous defamation defendants. As mentioned above, Prof. Vogel questions the need to impose new standards to counteract the threat of discovery abuse. A recent case in Pennsylvania agrees with his assessment, citing his article with approval and quoting extensively from it.⁶⁶ First, Prof. Vogel contends that the First Amendment does not protect the type of speech at issue in these cases. Specifically, because the Supreme Court has only directly considered the right to speak anonymously in the context of direct governmental prohibitions against it, the claim to a right to speak anonymously against the threat of court-imposed discovery orders is not as strong.⁶⁷ But ever since *Shelley v. Kraemer*, it has been clear that court

⁶⁵ *Id.* at 269-70.

⁶⁶ Klehr Harrison Harvey Branzburg & Eilers, LLP v. JPA Development, Inc., 2006 WL 37020 (Pa. Com. Pl.), at *8-9.

⁶⁷ Vogel, *supra* note 12, at 822-40.

orders in civil cases are no less government action than the execution of statutes and regulations and therefore equally applicable to First Amendment protection.⁶⁸

Second, Prof. Vogel believes that ordinary procedural rules (i.e. without imposing heightened *Dendrite* or *Cahill* standards) adequately protect defendants in anonymous defamation claims. Some courts require particularized pleading in defamation claims.⁶⁹ Expedited (pre-answer) discovery, which is necessary in an anonymous defendant claim, is usually only permitted by the court after a showing of good cause.⁷⁰ In some cases, Internet Service Providers have fought such requests, based on company policy and agreements with subscribers.⁷¹ And Prof. Vogel also contends that post-discovery remedies are available against those who abuse the process and adequately deter plaintiffs from doing so.⁷² But these protections depend on state and federal discovery rules that are anything but uniform, the presence of an ISP that actively fights to protect its subscribers—hardly guaranteed—and the ability (in terms of time, knowledge, and money) of individual defendants to use court rules to protect themselves, perhaps even after the battle has already been lost.

Finally, he argues that heightened standards in this arena give judges too much discretion that “threatens to compromise the values protected by other constitutional provisions, including due process, equal protection, and the right to trial by jury. In particular, application of an outcome-determinative heightened discovery standard singles out one

⁶⁸ 334 U.S. 1 (1948).

⁶⁹ Vogel, *supra* note 12, at 849.

⁷⁰ *Id.* at 846-48.

⁷¹ *Id.* at 853-54.

⁷² *Id.* at 854-55.

class of plaintiffs who are systematically deprived of the litigation procedures, specifically discovery and trial, that are available to other plaintiffs, including plaintiffs with claims that are similar in all regards except that they allege harm by plaintiffs who did not act anonymously.”⁷³ This ignores the fact that the Internet is different, and in applying the standards for protecting free speech as enunciated by the Supreme Court, courts should take into account those qualities in deciding these issues. This will be discussed in more detail in the next section.

Most other commentators believe that heightened standards should be applied to motions to compel discovery of anonymous defamation defendants. Prof. Lidsky believes that the opinion privilege—derived from the common law qualified privilege of “fair comment” on matters of public opinion⁷⁴—should be construed “to protect Internet discourse from wealthy and powerful plaintiffs who attempt to use defamation law to intimidate their online critics into silence.”⁷⁵ The Supreme Court in *Gertz* had indicated that, no matter “[h]owever pernicious an opinion may seem,” it is not actionable—only “false statements of fact” may be the proper subject of a defamation action.⁷⁶ Lower courts formulated standards to separate actionable false statements from protected opinions based on what *Gertz* had claimed was “the common ground” of First Amendment application to defamation actions.⁷⁷ In one such influential standard enunciated by the D.C. Court of Appeals, courts should consider, inter alia, “the broader context or setting in which the statement appears. Different types of writing have . . . widely varying social conventions

⁷³ *Id.* at 801-02.

⁷⁴ See KEETON, *supra* note 16, § 113A, at 813.

⁷⁵ Lidsky, *supra* note 4, at 919.

⁷⁶ 418 U.S. at 339-40.

⁷⁷ *Id.* at 339.

which signal to the reader the likelihood of a statement's being either fact or opinion."⁷⁸ But the Supreme Court in *Milkovich v. Lorain Journal Co.* rejected this and other similar approaches that are based on "an artificial dichotomy between 'opinion' and fact,"⁷⁹ stating that *Gertz* was not intended to "create a wholesale defamation exemption for anything that might be labeled opinion."⁸⁰ Instead, allegedly defamatory statements are actionable if they imply assertions "sufficiently factual to be susceptible of being proved true or false."⁸¹ Though *Milkovich* limits the privilege for allegedly defamatory opinion, Lidsky still believes that it can and should be interpreted as providing protection to the "discourse on [Internet] message boards"⁸² and other arenas that "caution readers to read the contents with care."⁸³ Because of the context, such statements cannot be presumed to have a nonnegligible effect on those who read them, and Lidsky feels that this rationale survives *Milkovich*.⁸⁴ Indeed, it is apparent that some lower courts are taking this into consideration.⁸⁵ But while this should be a factor in making a determination about whether a defamation plaintiff should be allowed to move forward with his or her suit in seeking discovery of an anonymous defendant, it still leaves lower courts with vague standards about how to proceed. For this reason, Prof. Lidsky supports a requirement that the privilege for Internet opinions "should apply only when such opinions relate to a

⁷⁸ *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc).

⁷⁹ 497 U.S. 1, 19 (1990).

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 21.

⁸² Lidsky, *supra* note 4, at 933.

⁸³ *Id.* at 936.

⁸⁴ *Id.* at 932-44.

⁸⁵ See Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 566-71 (2002); *Global Telemedia Int'l v. Doe*, 132 F. Supp. 2d 1261, 1267 (2001) (determining whether an allegedly defamatory statement is actionable by "look[ing] at the totality of the circumstances[and the] broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work").

matter of public concern.”⁸⁶ This leaves lower court judges, however, with the same abstract balancing that Prof. Vogel complains about and that will not resolve the uncertainty inherent in such determinations.

Megan M. Sunkel proposes that ISPs be treated as journalists for the sake of allowing the use of the privilege enunciated by the Supreme Court in *Branzburg v. Hayes*, enabling them to avoid revealing the identity of anonymous sources when “the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions.”⁸⁷ In civil cases, lower courts applying *Branzburg* have generally required plaintiffs to show that “(1) the information sought is relevant; (2) there is no other means for obtaining the information or all other means have been exhausted; and (3) there is a compelling reason for disclosure.”⁸⁸ Applied to the context of a discovery request to an online user’s ISP for the identity of an anonymous defendant in a defamation case, the court must determine whether “the plaintiff is, in good faith, bringing the subpoena only after exhausting other means of gaining the information itself . . . [and] the subpoena is narrowly drafted to ask only for information necessary to plead a legitimate claim of defamation.”⁸⁹ Again, however, this type of case-by-case determination will not provide much clarity to the judges that have to make these decisions or, more importantly, to the litigants expecting a predictable result. Furthermore, the *Branzburg* approach is particularly problematic given

⁸⁶ Lidsky, *supra* note 4, at 943.

⁸⁷ Megan M. Sunkel, Comment, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C.L. REV. 1189, 1216 (2003) (quoting *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1218-19.

that “[t]he federal circuits have divided, and continue to divide, both amongst themselves and internally, over the scope of [a] journalist’s First Amendment privilege to withhold confidential information in civil proceedings where the journalist is not a party to the suit.”⁹⁰ Therefore, this does not provide a consistent guide to courts on how to proceed in the context of ISPs and the Internet.

Another possibility is to enact statutory guidelines that direct how courts should resolve the issue. Shaun B. Spencer proposes that the Electronic Communications Privacy Act (ECPA) be amended to require ISPs to give users “notice and an opportunity to appear through counsel at a hearing where a court reviews the subpoena” and courts to find “that the plaintiff has sufficient evidence to prove a prima facie case and that the plaintiff’s need for John Doe’s identity outweighs John Doe’s interest in anonymity”—essentially requiring courts to apply the *Dendrite/Cahill* summary-judgment standard.⁹¹ The notice and hearing requirement is, of course, useful, especially where the ISP has no policy or agreement to maintain users’ confidentiality without a court order to disclose such information. As Spencer states, “[p]iercing John Doe’s anonymity without notice or the opportunity to challenge subpoena violates our most basic notions of procedural due process,” given the First Amendment rights at stake.⁹² But this does not alleviate the enormous costs, time, and effort that such a process imposes on the defendant in trying to protect his identity. And the *Dendrite/Cahill* standard, though steep, still lends itself to

⁹⁰ Adrienne Goss, *The Law of the Circuits: The Scope of the Non-Party Journalist’s First Amendment Privilege in Federal Civil Proceedings 1* (April 16, 2007) (unpublished manuscript, on file with author).

⁹¹ Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 493-94 (2001).

⁹² *Id.* at 509.

uneven application by trial-court judges not qualified to make pronouncements about the importance of the defendant's speech and worthiness of First Amendment protection.

Finally, it may be possible in limited circumstances to employ "anti-SLAPP" (Strategic Lawsuits Against Public Participation) statutes to deter frivolous defamation claims. Such statutes require plaintiffs to demonstrate a probability of success on the merits when the defendant makes a showing that the claims brought against him or her "arise out of acts in furtherance of speech that is in connection with a public issue."⁹³ But "[m]ost anti-SLAPP statutes . . . apply only where the defendant is sued for petitioning a governmental body, not for simply exercising the right of free speech. Only California and Rhode Island's anti-SLAPP statutes protect the exercise of free speech more generally, though the speech must pertain to issues of public concern."⁹⁴ The application of such statutes more broadly would somewhat deter discovery abuse, and thus protect free speech, but so much still depends on the application of the appropriate standard in weighing the merits of the plaintiff's case. And anti-SLAPP statutes do not address the special nature of the Internet that profoundly affects an allegedly wronged plaintiff's ability to seek redress without involving the courts.

III. Eliminating the Chilling Effect of Defamation Suits—Applying a Self-Help Requirement on the Plaintiff Before Allowing Discovery

As courts continue to ponder what standard to apply in these cases, there is a danger that this area of law will continue to remain muddled. First, the courts that have tackled the

⁹³ Wilson, *supra* note 85, at 572.

⁹⁴ Spencer, *supra* note 91, at 501-02.

issue so far have not clearly articulated when their favored standard is to be applied. In *Cahill*, for example, the plaintiff was arguably a public figure and the issue almost certainly was a matter of public interest. Would the Delaware Supreme Court employ the same standard to evaluate where a private citizen consumer made disparaging remarks about a nonpublic company that had treated him or her badly? Presumably it would employ the same standard in a case like *Dendrite*, where the plaintiff was a public company and the issue was of interest to its shareholders, since it commented favorably on the case and adopted essentially the same standard. And the weighing of the plaintiff's interest in protecting his or her dignity against the defendant's right to free speech (and the community's interest in hearing that speech) is ripe for inconsistent application by the courts.

Second, the *Dendrite/Cahill* approach is not sufficiently grounded in Supreme Court First Amendment jurisprudence. This is one of the bases of Prof. Vogel's critique. In *Seescandy.com*, for instance, which served as the basis for the standard used in *Dendrite*, the court cited absolutely no Supreme Court First Amendment cases. Though the *Dendrite* and *Cahill* courts support their use of the summary-judgment standard with ample citation to Supreme Court First Amendment cases, the standard still suffers from the uncertainty about the appropriate application of *McIntyre* and the other Supreme Court anonymity cases to the issue of court-imposed discovery. Furthermore, the cases decided so far do not adequately address the issue of whether heightened protection is consistent with the Supreme Court's decisions allowing a lower bar for cases where neither public figures nor matters of public interest are involved.

A better grounding for an appropriate standard to be applied in these cases is “self-help’s influential role in First Amendment jurisprudence[, which] reflects a fundamental principle of liberalism: The state ought not do for us what we can just as well do for ourselves.”⁹⁵ In the context of defamation, the Supreme Court has made a distinction between public and private figures because of their relative abilities to engage in self-help. The Supreme Court articulated exactly this point in *Dun & Bradstreet*: “Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, we found that the State possessed a ‘strong and legitimate . . . interest in compensating private individuals for injury to reputation.’”⁹⁶

Given the fundamentally improved ability for allegedly defamed parties to engage in self-help on the Internet, regardless of whether they are public or private figures, there is a strong justification for this ability to be taken into account in online defamation cases.

According to Prof. Larry E. Ribstein,

The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an

⁹⁵ Bell, *supra* note 28, at 774.

⁹⁶ 472 U.S. at 756 (quoting Gertz, 418 U.S. at 348-49).

anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.⁹⁷

As stated by Prof. Paul Horwitz, "with respect to defamation law, it might make sense to shape legal doctrine in a way that recognizes the collective environment in which speech and the correction of errors takes place in the blogosphere."⁹⁸ In fact, it would be inconsistent with the Supreme Court's requirement that strict scrutiny be applied to infringements on free speech to not take the unique environment of the Internet into account. Therefore, as applied to the discovery of anonymous defendants, courts should require plaintiffs to make an affirmative showing that reasonable attempts at self-help have been taken and not been effective, in addition to the other requirements of a defamation complaint, before allowing discovery to proceed. Courts should not be required to allow plaintiffs to expose anonymous Internet speakers without showing that an effective and less restrictive measure has been taken. For instance, where the plaintiff is a private individual and the allegedly defamatory statement was made on the website of a large media organization, and repeated in various blogs and other websites, the plaintiff could reasonably claim that self-help would not be effective.

Justice Antonin Scalia, in his *McIntyre* dissent, offers an argument against extending First Amendment protection in this way to anonymous speakers. He argues that anonymity "facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity,"⁹⁹ and that "a person who is required to put his name to a document is

⁹⁷ Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 229 (2006).

⁹⁸ Paul Horwitz, "Or of the [Blog]", 11 NEXUS 45, 60 (2006).

⁹⁹ 514 U.S. at 385 (Scalia, J., dissenting).

much less likely to lie than one who can lie anonymously.”¹⁰⁰ Except for his claim that the “very purpose” of anonymity is deception, which is dubious, Justice Scalia is correct in his assessment. Though others assert anonymity’s benefits—Lee Tien states that “[q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity”¹⁰¹—anonymity makes speech cheaper to the speaker. It allows the speaker to put forth views without exposing him- or herself to any cost to reputation, honor, or status.

But this quality of anonymous speech also makes self-help that much easier in order for it to be effective, by highlighting the anonymous nature of the allegedly defamatory statement. According to Prof. Saul Levmore,

Anonymity may encourage communication, but nonanonymity, or identifiability, will often raise the value of a communication to its recipient. Identification can be a useful signal, and it may promote accountability; but it may also be sufficient simply to say that the information contained in the identification of the source of a communication is itself of value to the recipient. . . . [I]dentification is critical to the value of a communication. Generally speaking, the value of identification (of the source of information) is greater the more costly it is for the recipient independently to evaluate the accuracy of the communication.¹⁰²

Therefore, an allegedly wronged person can attack the credibility of the anonymous speaker and his or her statement by pointing to its anonymity. Readers of Internet forums that allow for anonymous postings know that anonymous speakers can hide behind their anonymity, and therefore those readers discount the value of the statements made by

¹⁰⁰ *Id.* at 382.

¹⁰¹ Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 145 (1996). See also Lidsky, *supra* note 4, at 896.

¹⁰² Levmore, *supra* note 6, at 2193-94.

anonymous speakers. Those who post information on the Internet using their actual, verifiable identities gain credibility and readership. As the technology used on Internet forums develops, the ability to certify one's identity will increase, leading to more effective signaling and more effective self-help.¹⁰³

Conclusion

A number of recent cases have identified the need to protect the free speech rights of those who have anonymously posted statements on the Internet and now face the prospect of defending defamation suits and plaintiffs determined to use—or abuse—discovery tools to discover their identities. Many of these cases have implemented standards that attempt to balance the rights of defamed plaintiffs to appropriate remedies against the First Amendment protection deserving of anonymous speech on the Internet. In creating these standards, however, courts have not yet articulated a consistent approach that appropriately satisfies Supreme Court First Amendment jurisprudence, particularly its emphasis on the ability of plaintiffs to use self-help and avoid court-imposed restrictions on speech when not necessary to remedy the alleged defamation. Courts must recognize the Internet's extremely self-help-friendly environment and employ it in the standards

¹⁰³ For instance, Amazon.com allows users, when posting comments about items that Amazon sells, to certify their identities using the cardholder name on their credit cards. According to Amazon, “[a]n author willing to sign his or her real-world name on a piece of content is essentially saying[,] ‘With my real-world identity, I stand by what I have written here.’ A Real Name attribution therefore establishes credibility. . . .” Amazon.com: Your Real Name Attribution, <http://www.amazon.com/exec/obidos/tg/browse/-/14279641/> (last visited May 19, 2007). *See also* Yahoo! Mail: In short, DomainKeys is a forger's worst nightmare, <http://help.yahoo.com/l/us/yahoo/mail/yahoomail/context/context-07.html> (last visited May 19, 2007) (describing the “new Internet standard from Yahoo! that lets us confirm whether emails are really from their claimed domain”).

that they formulate in the future. By doing so, both legitimate defamation plaintiffs and innocent anonymous defamation defendants will be protected.