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Cover Page Footnote
J.D. Candidate, 2003, Fordham University School of Law. This is dedicated to my mom and Kristen, my two best friends and the strongest people I know, and to the memory of my father, who I know is still looking out for me. I would also like to thank Professor Andrew Sims, whose class provided the idea for this Note.

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PUTTING A FACE TO A (SCREEN) NAME: THE FIRST AMENDMENT IMPLICATIONS OF COMPELLING ISPS TO REVEAL THE IDENTITIES OF ANONYMOUS INTERNET SPEAKERS IN ONLINE DEFAMATION CASES

Jennifer O'Brien*

INTRODUCTION

"[A]nonymity is an essential tool in protecting free speech and action on the Internet, even if accountability is marginally diminished."¹

For many, the ideology underlying the First Amendment and the protection it affords the freedom to speak anonymously are sacrosanct aspects of American jurisprudence. In recent years, however, fundamental questions underlying the proper treatment of online defamation have placed established First Amendment principles in uncharted territory. Although common law courts have addressed defamation in a variety of contexts for centuries,² the rise of the Internet has forced judges to grapple with novel legal arguments and design innovative remedies suited to this new medium.

The ability of Internet users to remain anonymous by using "screen names" or other imaginary identities to identify themselves online has created a significant issue within the field of defamation. Although the anonymous user may have submitted his true identity to an Internet Service Provider ("ISP")³ when he signed up for its service, by using a screen name he is able to create an entirely new persona for

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2. See Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts 833 (10th ed. 2000) (chronicling the process through which the common law courts obtained jurisdiction over the torts of libel and slander, which compose defamation, during the sixteenth and seventeenth centuries).
3. See Madeleine Schachter, Law of Internet Speech 522 (2001) (defining an ISP as a company that provides an online user with a connection that allows him access to the Internet).
his Internet communications, based on the distinction that "[u]nlike real space, cyberspace reveals no self-authenticating facts about identity."

In recent years, an increasing number of suits have been filed by plaintiffs who claim to have been defamed by anonymous "postings" in online chat rooms, bulletin board systems, or other message centers. Unlike the plaintiffs in most traditional defamation claims however, these plaintiffs are unable to name their defamers, since only the screen names of the posters are ascertainable. In an effort to determine the true identities of potential defendants, plaintiffs have begun to serve subpoenas on the ISPs that host the anonymous defamers or the message boards on which the communications have been posted to compel them to reveal the identity of the anonymous users. To determine whether the ISP should have to reveal the user's identity, courts have been forced to balance the plaintiff's interest in pursuing a defamation claim against the First Amendment rights of anonymous speakers.

In many instances the motivation for these online suits parallels those in traditional defamation cases, with plaintiffs attempting to redress the perceived harm to their reputation that the defamation has generated. In some cases, however, the plaintiff may be more interested in simply unmasking the identity of the anonymous speaker than in obtaining a judicial remedy. As an example, assume that Al, a disgruntled employee of a retail manufacturer, decides to take out his job frustrations on a popular online message board under the moniker

4. Lawrence Lessig, Code and Other Laws of Cyberspace 33 (1999) (maintaining that the regulability of cyberspace is "profoundly impacted" by the different way in which identity is constructed in real versus cyberspace). Whereas "real space" demands that you reveal "your sex, your age, how you look, what language you speak, whether you can see, whether you can hear, [and] how intelligent you are," cyberspace requires that "you reveal only an [IP] address." Id.

5. See Schachter, supra note 3, at 518 (defining a bulletin board system as "a computer-based message center that allows users to access it remotely and to post messages to be accessed by other users"). In large part, defamation litigation has arisen from allegedly defamatory Internet communications posted on bulletin boards, chat rooms, or other online message centers. Bulletin boards, which have been characterized as "the forum in which society [now] conducts its debates on a variety of matters," allow users to read and respond to online messages on a myriad of topics, and have been characterized as a "frontier" medium of communication in which users feel comfortable communicating openly as a result of their ability to remain anonymous or pseudoanonymous. Jeremy Stone Weber, Note, Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech, 46 Case W. Res. L. Rev. 235, 239-41 (1995).

6. See Julie Hilden, Why Anonymous Internet Speakers Can't Count on ISPs to Protect Them, at http://writ.news.findlaw.com/hilden/20010101.html (Jan. 1, 2001) ("[I]f the target of anonymous, damaging Internet speech wants to seek out the speaker, the ISP is still the entity to which he must direct his subpoena. After all, he can't serve a subpoena on a person he can't even identify.").

7. Id. (discussing the motivation behind traditional defamation suits and those brought against anonymous online posters).
"MadAl." Within his posting, MadAl accuses the managers of his company of incompetence, as well as the embezzlement of corporate funds. Two weeks later, his managers, in an attempt to determine the identity of the anonymous poster, bring an action for defamation. Unable to serve a subpoena on the anonymous Internet user himself, the company serves the ISP that provides MadAl with his Internet connection, demanding that the company divulge his true identity. Although the plaintiffs are aware that the anonymous poster may not possess the financial resources to make pursuit of a defamation suit worthwhile in a monetary sense, they nonetheless hope that the information they garner from the ISP will help them to enact an extra-judicial remedy, whether it be through the employee's dismissal, the demand of his resignation, or private threats to make the postings cease. If the subpoena is challenged, the court will be faced with the question of whether the plaintiffs should be allowed to learn the true identity of MadAl, an issue that has plagued a number of state courts in recent years and for which no definitive guidelines have been established.

As the publicity surrounding the efforts of online defamation plaintiffs to reveal the true identities of anonymous posters has increased, free speech advocates have been adamant in their view that demanding such compelled disclosure is a violation of the anonymous speaker's free speech rights, and that avoiding such First Amendment transgressions must take precedence as courts struggle to establish principles that will govern their decisions in such cases.

This Note explores the competing concerns that courts must consider when an ISP is subpoenaed to disclose the identity of an anonymous speaker: protection of the speaker's First Amendment rights versus recognition of the plaintiff's interest in redressing online defamation.

Part I provides background information on the Internet as a burgeoning medium of communication. Part I also outlines the First Amendment concerns implicated in defamation claims, as well as the way defamation has evolved within the context of the Internet. Finally, Part I discusses the historical underpinnings for the protection

8. See, e.g., Laura Randall, Web Anonymity Suits Face Obstacles, Newsbytes, at http://exn.ca/Stories/1999/07/26/04.asp (July 26, 1999) (characterizing anonymous postings as an issue "dominating the burgeoning field of Internet law," and discussing the media attention granted to releases issued by companies suing anonymous posters).


10. See infra Part I.A.

11. See infra Part I.B.
of anonymous speech, and its salience in ensuring the continuing popularity of the Internet as a medium of communication.\textsuperscript{12}

Part II outlines the legal controversy surrounding the disclosure of the identities of anonymous speakers by ISPs in online defamation actions, and the competing arguments that have been advanced to govern the adjudication of such claims.

Part III argues that the guidelines adopted by the New Jersey Appellate Division in \textit{Dendrite International, Inc. v. Doe, No. 3}\textsuperscript{13} should be uniformly employed by courts dealing with the issue of compelled disclosure by ISPs. In analyzing each step of the \textit{Dendrite} test as it applies to online defamation, this part also contends it is imperative that the unique characteristics of the Internet be taken into account in evaluating whether each element of a defamation claim has been established.

I. THE INTERNET AS AN AVENUE FOR ANONYMOUS DEFAMATION

A. The Evolution of the Internet

With the advent of the Internet, society has witnessed an extraordinary revolution in the means through which people interact. Those assessing the Internet's impact upon modern communication have found it to embody "a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."\textsuperscript{14} With the development of the World Wide Web ("Web")\textsuperscript{15} and the proliferation of individual Web pages,\textsuperscript{16} it is now possible for anyone with a computer and an Internet connection to retrieve a staggering array of information, twenty-four hours a day, at minimal or no cost.\textsuperscript{17}

As the technological underpinnings of the Internet have expanded,\textsuperscript{18} the number of people utilizing its seemingly boundless

\textsuperscript{12} See infra Part I.C.
\textsuperscript{14} Barry M. Leiner et al., \textit{A Brief History of the Internet}, at http://www.isoc.org/internet/history/brief.shtml#Introduction (last modified Aug. 4, 2000).
\textsuperscript{15} See Schachter, \textit{supra} note 3, at 9 (characterizing the Web as "a massive collection of digital information resources stored on servers throughout the Internet").
\textsuperscript{16} See id. (describing Web pages as hypertext documents that "may incorporate various combinations of text, graphics, audio and video content, software programs, and other data" and defining a Web site as a compilation of individual Web pages).
\textsuperscript{17} See id. at 6 (reporting that the quantity of information available to online users has increased to an aggregate of over one billion discrete pages as of 2000).
\textsuperscript{19} Reno v. ACLU, 521 U.S. 844, 850 (1997) ("The number of 'host' computers—
ability to establish links of communication has likewise multiplied. According to a press release published by the United States Internet Council in November 2001, there are currently over a half-billion Internet users worldwide, a figure that is surprisingly high in light of earlier estimates projecting future Internet use. As this pattern of increased use continues, commentators are optimistic that technological advancements will enable the Internet to evolve to meet the stringent demands of an increasingly high-tech society.

Although the Internet has gained notoriety as an instrument of global information dissemination, it has faced a concomitant number of ideological and pragmatic challenges as society has struggled to find a means of understanding and regulating its scope as an unprecedented technological advancement. Within the legal field, the Internet has led to disputes over subjects as varied as online copyright infringement and the privacy implications of using "cookies" in compiling profiles of Internet users. The resolution of such issues often engages both courts and legislatures in a complex struggle to comport longstanding "real world" legal remedies with the unique characteristics of the amorphous digital expanse known as "cyberspace." In recent years, online defamation has emerged as a

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21. Reno, 521 U.S. at 850 (reporting that the Internet has experienced "extraordinary growth" in that "about 40 million people used the Internet [in 1997], a number that is expected to mushroom to 200 million by 1999").

22. See Leiner et al., supra note 14. It is predicted that the continuing evolution of the Internet:

will bring us new applications—Internet telephone and, slightly further out, Internet television. It is evolving to permit more sophisticated forms of pricing and cost recovery.... It is changing to accommodate yet another generation of underlying network technologies with different characteristics and requirements, from broadband residential access to satellites. New modes of access and new forms of service will spawn new applications, which in turn will drive further evolution of the net itself.

Id.


24. See Schachter, supra note 3, at 518 (defining a cookie as "client-side persistent information that allows Web servers to have the Web browser store information about a user's browsing habits, such as which [Web sites] the user previously visited").


26. See Schachter, supra note 3, at 519 (defining cyberspace as a "digital world constructed by computers, such as the Internet; a decentralized, global medium of communication that links people, institutions, corporations, and governments around the world"). It has been noted that many of the challenges to regulating cyberspace have resulted from the fact that "the provision of online services resists traditional centralized methods of legal regulation." Keith Siver, Good Samaritans in Cyberspace, 23 Rutgers Computer & Tech. L.J. 1, 8 (1997). Courts have struggled in analogizing the services provided by ISPs to more traditional communications
particularly challenging area of law, forcing courts to decide how the doctrine underlying traditional defamation jurisprudence should be applied to Internet communications.\(^{27}\) The following section outlines the tort of defamation, focusing on both the First Amendment concerns implicated in analyzing defamatory communications and the manner in which defamation has evolved within the context of the Internet.

**B. The Tort of Defamation**

The tort of defamation is generally defined as a false communication that tends to tarnish a plaintiff's reputation.\(^{28}\) Common law courts have grappled with defamatory communications for hundreds of years,\(^{29}\) as judges have sought to strike a balance between a plaintiff's interest in seeking redress for a reputational injury and a defendant's right to free speech.\(^{30}\) Although the law governing defamation has long been characterized as "twisted, or wrenched sadly out of shape by its historical development,"\(^{31}\) the rise of the Internet has only served to further cloud the already murky waters of defamation jurisprudence.

1. Defamation and the First Amendment

The Restatement (Second) of Torts provides a basic list of the elements that define defamation. According to the Restatement, defamation requires "a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and either

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\(^{27}\) See Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 Conn. L. Rev. 1137, 1154 (1996) (acknowledging that the manner in which "current laws regulating defamation and protecting core First Amendment values will be applied—or should be applied—to cyberlibel is yet unknown").

\(^{28}\) See Schwartz et al., *supra* note 2, at 838; Schachter, *supra* note 3, at 193.

\(^{29}\) See Schwartz et al., *supra* note 2, at 833-34.

\(^{30}\) See Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. Rev. 291, 293 (1994) (stating that aside from being confusing and unclear, the law of defamation "fails to serve its most important objectives: providing an adequate remedy for reputational harm while allowing sufficient protection for speech," primarily because it must incorporate both Supreme Court First Amendment jurisprudence and an "archaic" body of common law arising from "medieval roots").

\(^{31}\) Schwartz et al., *supra* note 2, at 833; see also Rodney A. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519, 1519 (1987) ("From its inception, the law of defamation has been singularly bent on establishing its reputation for quirky terminology and byzantine doctrine.").
actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." 32

In addition to the guidelines posited by the Restatement, the boundaries of the tort of defamation have been constrained by a speaker's free speech rights under the First Amendment. 33 Although commentators have noted that the Supreme Court has demonstrated an "apparent lack of any coherent consensus" on exactly how the First Amendment should be applied to the standards governing defamation, 34 the Court has recognized that "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by [the Court's] decisions. The constitutional safeguard ... 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 35 The Court has also recognized that this freedom must extend beyond the protection of solely political speech, in that "'[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" 36 Therefore, the Court has declared that libel, like other forms of "repression of expression" that have been challenged, "can claim no talismanic immunity from constitutional limitations," and will be judged "by standards that satisfy the First Amendment." 37

Contemporary courts have struggled, however, with the formidable task of introducing the First Amendment into their analysis of libelous communications in an effort to deter false or defamatory speech while enabling "free speech to flourish and public debate to rage unfettered." 38

32. Restatement (Second) of Torts § 558 (1977).
33. See Susan Freiwald, Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation, 14 Harv. J.L. & Tech. 569, 583 (2001) ("In recognition of the risks to non-defamatory speech posed by defamation liability, the Supreme Court has erected First Amendment based hurdles to defamation claims.").
34. Smolla, supra note 31, at 1521; see also Arlen W. Langvardt, Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law, 49 U. Pitt. L. Rev. 91, 92 (1987) (discussing the difficulties encountered by the Supreme Court in balancing the divergent interests in defamation cases).
37. N.Y. Times, 376 U.S. at 269.
38. Jonathan Garret Erwin, Note, Can Deterrence Play a Positive Role in Defamation Law?, 19 Rev. Litig. 675, 676 (2000) (stating that finding a balance between the two goals of "deter[ing] the citizenry, including the press, from communicating all unprivileged, false, defamatory speech" and protecting freedom of speech is the essential aim of defamation jurisprudence).
In a speech before the Georgia Bar Media & Judiciary Conference, the Honorable Abner J. Mikva discussed the difficulties that courts have encountered in attempting to incorporate First Amendment rights into defamation litigation within the context of statements of opinion. Although at one point most lower courts embraced the idea that all statements of opinion were not defamatory and were protected by the First Amendment, Judge Mikva recognized the struggle that many courts nonetheless faced in applying a fact/opinion distinction. In *Milkovich v. Lorain Journal Co.*, the Supreme Court refuted the notion that all expressions of opinion are non-defamatory. The Court held that a First Amendment privilege extends only to statements of opinion that do not "imply a false assertion of fact," either because they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," or because they are provably false. Satire, parody, hyperbole, and invective have all been found to fall within the second category. Lower courts, however, have still failed to adopt a uniform means of adjudicating opinion cases.

The fact/opinion dichotomy represents only one of a myriad of challenges facing courts applying the First Amendment in defamation cases. In *New York Times Co. v. Sullivan*, the Supreme Court’s seminal defamation decision, the Court held that the level of fault a defendant must possess in a defamation suit varies with the status of the plaintiff. In holding that a defendant accused of defaming a plaintiff found to be a "public figure" must be held to an "actual malice" level of fault, the Court reasoned that public figures have greater access to media outlets to counteract reputational damage, and that by assuming public status they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood." This doctrine was later extended by the Court to reach a "private" plaintiff bringing an action for defamation about a matter of "public concern." Under *Gertz v. Robert Welch, Inc.*, such a plaintiff would

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40. *Id.* at 298.
42. *Id.* at 19.
43. *Id.* at 20 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).
44. *Id.*
45. *See id.*
47. 376 U.S. 254 (1964).
48. Black’s Law Dictionary defines a public figure as “[a] person who has achieved fame or notoriety or who has voluntarily become involved in a public controversy.” Black’s Law Dictionary 1243 (7th ed. 1999).
still need to prove at least negligence on the part of the defendant in order to collect damages, and "actual malice" to collect damages for anything other than "actual injury." \(^5\) Lower courts, however, in interpreting the public/private concern dichotomy of defamatory statements outlined by the Supreme Court, have failed to establish "a useful methodology" for adjudicating such cases, instead relying upon "ad hoc analyses" or "ipse dixit conclusions." \(^5\)

2. Defamation Within the Context of the Internet

Not surprisingly, the expansion of the Internet has done little to alleviate the burden of judges in defamation cases, as "[y]esterday's vast, unlitigated frontier of computer-aided communication is quickly becoming today and tomorrow's legal battleground." \(^5\) In adjudicating claims involving Internet defamation, courts have been confronted with an entirely uncharted assortment of arguments for how such claims should be handled. \(^5\) Although it has been noted that "cyberlibel" developed under the same principles that govern traditional defamation cases, courts handling online claims have been forced to "adapt traditional print media applications to the electronic world." \(^5\) In some instances, these challenges have led the court to build upon the principles of traditional defamation adjudication.

In applying the fact/opinion dichotomy in cyberspace, many commentators have argued that the question implicates an even greater concern, as online users often attempt to protect their anonymity in defamation suits by claiming their expressions are

51. Id. at 349.
54. In a speech given before the Computer Law Association, Robert M. O’Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, highlighted a number of the unique issues facing courts in online cases, including how to determine jurisdiction over a “purely electronic visitor,” the guidelines to cover who is a “publisher” on the Internet, the extent to which the privilege of fair comment can be applied to online libel, how retractions of allegedly defamatory statements should be handled in cyberspace, and the overall modifications of defamation jurisprudence that are mandated by the “nature of the medium.” Robert M. O’Neil, The Drudge Case: A Look at Issues in Cyberspace Defamation, Speech Before the Computer Law Association (Feb. 12, 1998), in 73 Wash. L. Rev. 623, 624 (1998).
55. Barry J. Waldman, A Unified Approach to Cyber-Libel: Defamation on the Internet, A Suggested Approach, 6 Rich. J.L. & Tech. 9, ¶ 34 (1999), at http://www.richmond.edu/jolt/v6i2/note1.html. Over the last few years, Internet bulletin boards have also given rise to a distinctive brand of defamation known as “cybersmears,” in which anonymous users post false or disparaging messages pertaining to a business or its highest executives on an Internet message center. John A. Walker, Cybersmears, Cyberspace Law., July/Aug. 2001, at 10 n.1. It is estimated that American companies have filed over 150 cybersmear lawsuits since 1998 against “John or Jane Does” in an attempt to reveal the true identity of the anonymous Internet posters. Id. at 10.
opinions protected by the First Amendment. In arguing that courts must "resolve as a matter of law . . . whether [d]efendants' statements are constitutionally privileged statements of opinion without requiring disclosure of the identities of the [d]efendants," these commentators have outlined a number of factors unique to the Internet that must be factored into classifying a defamatory statement as opinion. These commentators recognize that many statements that may appear factual when taken out of context are really "merely hyperbole, speculation, or invective." Critics have argued that many of the allegedly defamatory statements on message boards are not implying assertions of objective facts, and that courts therefore should "extend the benefit of the constitutional opinion privilege to many (though by no means all) of the defendants in the new Internet libel cases." Commentators have also tackled the way New York Times and its progeny should apply in the Internet context, arguing that most Internet defendants should be held to a standard of actual malice, as all defamation plaintiffs who engage in online discourse are public figures. Critics have also advanced a number of arguments as to why corporations, easy targets for Internet attacks, may correctly be viewed as public figures. In most instances, "corporations have an interest in convincing the public of their financial well-being," and publicly held corporations often proactively "go public" in an effort to raise money from investors, thus "seek[ing] and often obtain[ing] national attention." Even if a plaintiff is not considered a public figure under the New York Times standard, the doctrine set forth in Gertz can often be applied to show that the anonymous statements pertained to a matter of public concern, thus the doctrine still triggers a higher standard of fault. For some commentators, the unique


57. The ACLU has argued that it is "easy" to see how many of the statements giving rise to cybersmear allegations on financial bulletin boards could be classified as opinion. Id. at 12. The ACLU, citing Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998), argued that the "inherently speculative nature of 'investment advice'" has been acknowledged even when the advice is being dispensed by trained analysts. Id. Within the context of Internet financial message boards, it is even more likely that such message boards will be filled with "emotional rants" whenever a stock price begins to drop. Id.

58. Id.


60. Critics have advanced this argument by claiming that all plaintiffs have immediate access to a means of counteracting the defamatory statements, and that by actively participating in the message boards or chat rooms where the allegedly defamatory statements appeared they have "thrust themselves into a situation where they invite public scrutiny." Weber, supra note 5, at 237.

61. Lidsky, supra note 59, at 911.
attributes of Internet discourse also call for an expansion of the traditional definition of what constitutes a matter of public concern.\(^6^2\)

In most early online defamation cases, plaintiffs, to avoid the legal struggles of determining the identity of an anonymous poster or to seek the "deep pockets" of a corporation, would bring an action for defamation against the ISP that hosted the alleged defamer or the board where the messages were posted, rather than the anonymous user. In *Stratton Oakmont, Inc. v. Prodigy Services, Co.*,\(^6^3\) a New York state court upheld this practice, finding that Prodigy, an ISP that claimed to exercise editorial control over the content of its bulletin boards, could be held liable as a "publisher" of allegedly defamatory statements posted anonymously on its "Money Talk" board.\(^6^5\) Although recognizing that Internet bulletin boards should generally be placed in the same category as bookstores or libraries, and held to the lower "knowledge" standard of liability as mere "distributors" of information,\(^6^6\) the court found that Prodigy's policy of exercising editorial control over its bulletin boards and the technology it had implemented to effectuate this control opened it up to greater liability.\(^6^7\)

The decision in *Stratton* eventually became the subject of Congressional scrutiny, leading to passage of the bill eventually implemented as the Communications Decency Act ("CDA").\(^6^8\) The debates on the CDA recognized the "enormous burden" that would be placed on ISPs if they were to be held accountable for the content posted on their sites by third parties.\(^6^9\) In the CDA, Congress

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62. See id. at 912-15 ("The powerful democratizing effect of the boards gives corporations a reason to fear them, but it also justifies treating discourse on the board as involving a matter of public concern."); see also Roundtable, *First Amendment on Trial—The Libel Lawyer's Perspective*, 23 Seattle U. L. Rev. 849, 879 (2000) [hereinafter Roundtable, *First Amendment*] (restating attorney John Shaeffer's argument that "[f]rom a more practical perspective, the way I see the law evolving is—and this is my own personal opinion—is that everything has become an issue of public concern. I can't think of anything right now that isn't an issue of public concern").


64. The court found that Prodigy's computer network had over two million subscribers who communicated over Prodigy's bulletin boards. *Id.* at *23.

65. The court found that "Money Talk," on which members could post messages pertaining to stocks and other financial information, was the most popular financial computer bulletin board within the United States. *See id.*

66. It has been held that "[a] vendor or distributor of a newspaper, magazine or book is called a 'secondary publisher' and is not liable if he had no knowledge of libelous matter in the publication and had no reason to be put on guard." Schwartz et al., *supra* note 2, at 866.


69. *See* Schachter, *supra* note 3, at 203 (citing 141 Cong. Rec. H8460-01, H84-1 (daily ed. Aug. 4, 1995) (statement of Mr. Goodlatte) ("There is no way [these] entities . . . can take the responsibility to edit out information that is going to be coming in to them from all manner of sources. . . . [This] is going to be thousands of
concluded that ISPs should not be held to publisher liability, regardless of whether they had exercised editorial control over the contents of their site. The Act 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." 70

Since the passage of the CDA, federal courts have resolutely shielded ISPs from liability for the allegedly defamatory postings of third parties in a diverse number of situations. 71 In Zeran v. America Online, Inc., 72 Zeran brought an action against America Online, Inc. ("AOL"), claiming that the ISP unreasonably delayed in removing anonymous defamatory statements about Zeran from one of its bulletin boards, refused to post a retraction of the statements, and failed to monitor its message boards for similar defamatory messages thereafter. 73 In deciding the case, the court recognized the CDA as the manifestation of Congress's intent to avoid the "chilling effect" on speech that would result if ISPs were to restrict the number and type of messages posted on their bulletin boards in an effort to avoid liability. 74 The court also took a broad view of the actions of ISPs that Congress sought to protect. In finding that AOL assumed the role of a publisher under its traditional definition, 75 the court rejected Zeran's argument that because AOL had acted as a mere conduit of information with knowledge of its defamatory import it should instead be held to a lower standard of liability as a distributor of information, similar to a traditional news vendor. 76 The court stated that even if Zeran had established that AOL was only a distributor, "this theory of liability is merely a subset, or species, of publisher liability, and is therefore also foreclosed by § 230." 77 The court also rejected the idea that ISPs should be subjected to notice-based liability for defamatory messages posted on their boards, fearing that such liability would dissuade ISPs from policing their boards in order to shield themselves from notice of possible defamatory material, and that the vast amount

70. § 230(c)(1). Section 230 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." § 230(f)(2).
73. See id. at 328-29.
74. See id. at 331.
75. Id. at 332.
76. See id. at 331-32; see supra note 60.
77. Zeran, 129 F.3d at 332.
of information communicated through online message boards would cause ISPs to be "faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."  

In *Blumenthal v. Drudge*, online "gossip reporter" Matt Drudge included in his "Drudge Report" the accusation that Sidney Blumenthal, a White House aide and former journalist, had a history of abusing his wife. After Blumenthal complained about the item Drudge removed it, but Blumenthal and his wife brought an action for defamation against both Drudge and AOL, which hosted the Drudge Report. The court reluctantly held the CDA to be applicable even though AOL, instead of merely maintaining the bulletin board where a third party posted allegedly defamatory content, had played "an active, even aggressive role in making available content prepared by others" by hiring Drudge and paying him for the content he provided. The court found that in a "tacit quid pro quo arrangement" Congress had relieved ISPs from liability in an attempt to increase self-regulation of the material posted on their sites, and that this immunity would be extended to AOL in spite of the fact that it "has the right [sic] to exercise editorial control over those with whom it contracts and whose words it disseminates, [and] it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least . . . to the liability standards applied to a distributor."  

Although the CDA has come under fire by commentators uncomfortable with the idea that the extent of immunity provided to ISPs seemingly leaves plaintiffs in online defamation cases with few means of redressing their injuries, cases such as *Zeran* and *Blumenthal* have established a "strong precedent" for upholding the CDA and shielding ISPs from immunity for any defamatory statements posted on their sites, regardless of notice or the exercise of editorial control. Often, this immunity leaves plaintiffs with a single and seemingly untenable option: trying to bring an action against the anonymous poster.  

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78. *Id.* at 333.
82. *Id.* at 51-52.
83. See David E. Hallett, *How to Destroy a Reputation and Get Away with It: The Communication Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online?*, 41 IDEA 259, 260-61 (2001) (arguing that Congress should amend the CDA to include secondary liability sections that would place a duty on ISPs to take action when given notice of defamatory statements on their sites).
84. *Id.* at 275.
85. *Id.*
C. Protection of Anonymous Speech

Anonymity in cyberspace is not just different in degree from anonymity in real space. As cyberspace presently is, it gives an individual a kind of power that doesn't exist in real space. This is not just the ability to put on a mask; it is the ability to hide absolutely who one is. It is not just the ability to speak a different, or encoded, language; it is the ability to speak a language that is (practically) impossible to crack. Cyberspace is a place that maximizes both social and individual plasticity, which means it is a place that determines very little about what others must know about you.86

The freedom of citizens to engage in anonymous speech has facilitated the attainment of numerous laudable goals within American society.87 In Talley v. California,88 the Supreme Court recognized the valuable role anonymous speech has played in the "progress of mankind."89 In Talley, the plaintiffs challenged the constitutionality of a Los Angeles ordinance requiring handbills to include the name and address of anyone involved in their printing, writing, compiling, manufacturing, distributing, or sponsoring in an effort to identify those responsible for false advertising, fraud, or libel. In holding that the statute was facially void under the Fourteenth Amendment,90 the Court argued that "anonymity has sometimes been assumed for the most constructive purposes,"91 and recognized that a blanket requirement of the disclosure of a speaker's identity would most likely restrict the distribution of information and consequently the freedom of expression.92

In McIntyre v. Ohio Elections Commission,93 a case involving an Ohio statute that prohibited the distribution of anonymous campaign literature, the Court further reasoned that anonymity may often provide "a shield from the tyranny of the majority,"94 and that anonymity can ensure that a speaker who is personally unpopular will still be able to disseminate information to readers without it being rejected solely upon the readers' opinion of its proponent.95 Anonymous speech "thus exemplifies the purpose behind the Bill of

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86. Lawrence Lessig, Reading the Constitution in Cyberspace, 45 Emory L.J. 869, 876-77 (1996).
87. See Schachter, supra note 3, at 236-37 (finding that the social values furthered by anonymous speech include the preserving of a sense of privacy; fostering the ability to seek information on sensitive or controversial subjects; and encouraging the speech of those who fear economic retaliation, social ostracism, and reactions against one's family; the preserving of a sense of privacy.).
88. 362 U.S. 60 (1960).
89. Id. at 64-65.
90. Id. at 65.
91. Id.
92. Id. at 64.
94. Id. at 357.
95. See id. at 342.
Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."³⁶⁶

Although decided within the context of an economic boycott and campaign literature, respectively, the principles underlying the decisions in Talley and McIntyre have been applied by a number of courts confronted with questions pertaining to Internet speech. In extending First Amendment protection to anonymous speech online, these courts have been guided by the Supreme Court's decision in Reno v. ACLU. The Court in Reno stated that there should be "no basis for qualifying the level of First Amendment scrutiny that should be applied" to Internet speech,⁷ which has emerged as a valuable medium of communication.⁸

In ACLU v. Miller,⁹ a federal district court enjoined the enforcement of a Georgia statute that sought to prevent fraud and deception on the public by making it a crime for "any person... knowingly to transmit any data through a computer network... if such data uses any individual name... to falsely identify the person." In recognizing that many Internet users "falsely identify" themselves by communicating anonymously or pseudoanonymously to avoid speaking openly about "sensitive" topics that may lead to discrimination and social ostracism, the court concluded that the sweeping language of the statute banning such communications amounted to a content-based restriction on speech because "the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude." The court held that the statute was not drafted with the "precision necessary for laws regulating speech," in that it was overbroad and would infringe upon constitutionally protected speech in violation of the First Amendment.⁴⁴ Ann Beeson of the ACLU stated that the Miller decision ensured that "whatever limits the Supreme Court sets on Congress's power to regulate the Internet, states are prohibited from acting to censor online expression," and that the decision sent "a

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³⁶⁶ Id. at 357.
⁸ See id. at 868 (characterizing the Internet as a "vast democratic forum").
⁴ Id. at 1230.
¹⁰ Id. at 1230, 1233.
¹¹ See id. at 1232 (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992) (providing that such content-based restrictions are presumptively invalid)).
¹² Id. (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 340-42 (1995)).
¹³ See id. at 1233 ("On its face, the act prohibits such protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy, as well as the use of trade names or logos in non-commercial educational speech, news, and commentary—a prohibition with well-recognized First Amendment problems.").
very important and powerful message to legislators in the other 49 states that they should keep their hands off the Internet.”

In a more recent decision, a federal district court went even further in protecting the right of defendants to communicate anonymously over the Internet. In *Doe v. 2TheMart.com, Inc.*, an anonymous Internet poster challenged a subpoena brought by 2TheMart.com (“TMRT”) to discover the identity of twenty-three anonymous speakers who had participated in message boards operated by the ISP InfoSpace. TMRT sought the information as part of an affirmative defense to prove that “nasty” messages posted on InfoSpace by anonymous users had contributed to the injuries suffered by plaintiffs bringing a shareholder derivative class action against TMRT for fraud on the market. In acknowledging the Internet as “a truly democratic forum for communication” that allows for the exchange of ideas at an unprecedented speed and scale, the court found that “[t]he right to speak anonymously extends to speech via the Internet... The ‘ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.’”

Although the anonymous speakers in *2TheMart.com* were not parties to the underlying litigation, the court stressed the need for “a high threshold” to avoid the “significant chilling effect on Internet communications and thus on basic First Amendment rights” that would result if Internet users could be stripped of those rights by a civil subpoena under the more liberal rules of general civil discovery.

Although many courts have applied First Amendment protection to anonymous Internet speech, it has nonetheless been acknowledged that these rights must be balanced against the interests of plaintiffs seeking redress from anonymous posters who disseminate allegedly defamatory communications. Part II examines the competing legal arguments that have evolved as courts are faced with the task of determining when ISPs should be compelled to reveal the true identities of anonymous Internet speakers in online defamation cases.

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107. See id. at 1089-90.
108. *Id.* at 1097.
109. *Id.* at 1092 (citing Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).
110. *Id.* at 1097.
111. *Id.* at 1093.
II. THE ARGUMENTS SURROUNDING COMPELLED DISCLOSURE

The question of free speech on Internet message boards has become a polarized legal dilemma. On one side, you have the companies that are the subject of postings: Their PR departments cringe when they see message boards brimming with false information and rumors (not to mention coarse language and bad grammar). On the other side, you see a swath of free speech advocates who view the boards as virtual street corners where anyone should be able to set up a podium and anonymously mouth off.

As legal scholar Lyrissa Lidsky has noted, if the only ramifications of the "new" Internet libel suits were to warn Internet users that they will be held accountable for their communications, they might well represent an "unalloyed good." First Amendment conflicts arise, however, when defamation laws begin to "overdeter" and result in prospective speakers engaging "in undue self-censorship to avoid the negative consequences of speaking." As courts have struggled to establish principles to govern compelling ISP disclosures in online defamation cases, different views on how to balance the First Amendment interests of anonymous speakers against the interests of defamation plaintiffs in judicial redress have resulted in an ill-defined body of jurisprudence "that remains so unsettled, it seems likely that courts will continue to experiment with procedural innovations." Although most courts agree that the First Amendment does not serve as a complete bar to the disclosure of the identities of anonymous posters, a definitive method for determining when such disclosure should be compelled has yet to emerge. This part of the Note provides an overview of cases on both sides of the issue of disclosure by ISPs, focusing on the various means through which the courts have implicated the First Amendment in their decisions.

A. The Cases for Compelled Disclosure

For some commentators, the debate over when ISPs should be compelled to disclose the identities of anonymous posters highlights an important inconsistency: "Why should anonymous Internet posters be immune from liability for defamation or other torts when the posters would be held liable if they attached their names to their statements?" In what is considered the first reported instance of an

114. Lidsky, supra note 59, at 887-88.
115. Id. at 888.
117. See infra Parts II.A, II.B.
118. Roger M. Rosen & Charles B. Rosenberg, Suing Anonymous Defendants for
anonymous speaker challenging the disclosure of his identity in court,\textsuperscript{119} a California county court\textsuperscript{120} employed this line of reasoning when it considered the subpoena by Xircom, Inc., a modem company, of Yahoo! to reveal the identity of an online user who had authored two anonymous and allegedly defamatory postings on a message board maintained by Yahoo!. In finding that "there is no right to free speech to defame,"\textsuperscript{121} the court rejected the anonymous speaker's argument that the subpoena was "only being filed to chill the speech of John Doe and other individuals"\textsuperscript{122} and that the disclosure would amount to a violation of the speaker's free speech rights.\textsuperscript{123}

A Virginia court, facing a similar challenge to a subpoena of an ISP, delineated a set of guidelines for determining whether disclosure of the user's identity should be compelled. In \textit{In re Subpoena Duces Tecum to America Online, Inc.},\textsuperscript{124} Anonymous Publicly Traded Company ("APTC") subpoenaed AOL to compel the ISP to reveal the identities of five anonymous posters of allegedly defamatory material representations and confidential information regarding APTC in an AOL chat room.\textsuperscript{125} AOL challenged the subpoena on the ground that the anonymous speakers' First Amendment rights to communicate anonymously over the Internet would be impaired if AOL were forced to comply.\textsuperscript{126} In framing the issue as whether a state's interest in protecting citizens from potentially actionable Internet communications is outweighed by the right to anonymous speech online, the court applied a three-step test to ensure that those who abused the right of anonymous Internet speech could not hide "behind an illusory shield of purported First Amendment rights."\textsuperscript{127} According to the court, a non-party ISP such as AOL would be required to disclose the identity of anonymous posters when:

\begin{quote}
\textsuperscript{120} Motion to Quash, Xircom, Inc. v. Doe, No. Civ. 188724 (Calif. Super. Ct. Ventura County complaint filed May 5, 1999).
\textsuperscript{121} Raney, \textit{supra} note 119.
\textsuperscript{122} Id.
\textsuperscript{123} Although the subpoena was later thrown out on technical grounds, the court indicated that it would "look favorably" upon a redrafted one, and the parties settled the case before a subpoena was reissued. Carl S. Kaplan, \textit{Company Settles Suit Against Online Critic}, at http://www.nytimes.com/library/tech/99/07/cyber/articles/16xircom.html (July 16, 1999).
\textsuperscript{125} Id. at *1.
\textsuperscript{126} Id. at *2.
\textsuperscript{127} Id. at *6.
\end{quote}
(1) the court is satisfied by the pleadings or evidence supplied to that court

(2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and

(3) the subpoenaed identity information is centrally needed to advance that claim.\(^\text{128}\)

In ruling that the APTC's subpoena had met the above requirements, the court held that the compelling state interest in protecting citizens from the "potentially severe consequences" of actionable Internet communications outweighed any "limited intrusion" on the First Amendment rights of innocent anonymous posters.\(^\text{129}\)

In *Hvide v. Does*,\(^\text{130}\) Erik Hvide accused eight anonymous posters in a Yahoo! financial chat room of making false and derogatory statements that both defamed him and damaged his company's reputation.\(^\text{131}\) AOL was also subpoenaed to release information regarding one of the posters who had an AOL e-mail account.\(^\text{132}\) In ruling that subpoenas could issue in the case subject to the review of the appellate court, the court rejected the argument that the "democratic nature of Internet discussions is supported by the convention of anonymity"\(^\text{133}\) and that the plaintiffs should amend their complaint to include greater specificity of the persons being sued and the allegedly defamatory statements, as well as prove actual, financial damages.\(^\text{134}\) The court ruled that "an anonymous critic is not entitled to any special privilege that would prevent or delay his unmasking in a lawsuit just because his comments were posted on the Internet," and thereby rejected the defendants' argument that special court rules should apply in online cybersmear cases.\(^\text{135}\)

Apart from suits alleging cybersmears of corporations, individual plaintiffs have also challenged the right of online users to remain anonymous in defamation litigation. In *Melvin v. Doe*,\(^\text{136}\) Judge Joan Melvin filed a defamation action against a number of anonymous posters on an AOL site who had accused her of political lobbying. As part of her discovery, Judge Melvin attempted to reveal the identity of the site's publisher, an action contested by the anonymous posters

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128. *Id.* at *8.
129. *Id.*
132. *Id.*
133. ACLU Brief, *supra* note 56, at 6.
134. *Id.* at 1.
who fought to maintain their anonymity under the First Amendment. Although in this instance discovery was directed to the anonymous posters directly, the court found that “[i]t is likely that the identity of the publisher [could] be learned through discovery directed to America Online, Inc.”

In rejecting the defendants’ argument that their speech should be labeled “political” and remain anonymous under the First Amendment, the court ruled that if the statements were false, they would no longer be protected. The court went on to find that the plaintiff’s request had met the court’s threshold test for allowing discovery—“that the complaint on its face set forth a valid cause of action and that the plaintiff offer testimony that will permit a jury to award damages.” The court agreed, however, with the defendants that plaintiffs should not be allowed to “use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit.”

In assessing the various arguments that have been raised by both plaintiffs and the courts in online defamation actions, many commentators have stressed the need to implement guidelines that “place[] at least as great an emphasis on accountability and the important interest in reputation that defamation law seeks to protect as [they] place on the right to communicate anonymously.” These commentators ask why a statement that would be actionable as libel in a traditionally “nonanonymous” medium such as a newspaper or magazine should be immunized when posted on the Internet. In addition, it has been acknowledged that unlike traditional forms of print communications, the “extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie.”

Even in those instances where a message is posted on a bulletin board or in a chat room frequented by only a few people, the technological capabilities of the Internet allow for the unlimited republication of the message in new forums. Unlike the fleeting spoken statements of “street corner harangues,” communications made over the Internet may be far more lasting, because statements can be printed,

137. Id. at 450 n.1.
138. Id. at 455.
139. Id. at 462. In a separate memorandum and order of court, the defendants’ motion for summary judgment was denied after the plaintiff produced evidence that would support a finding that the statement was made and was both false and defamatory, and that the plaintiff had sustained actionable harm. The defendants did not raise the argument that their statement was not defamatory. See id. at 452.
140. Id. at 451 n.2.
142. See id.
144. See id.
downloaded, or left on a Web site indefinitely.\textsuperscript{145} In addition to the Internet's potential for unprecedented information dissemination, it also provides an exceedingly "low barrier" to speakers wishing to communicate online.\textsuperscript{146} The Internet is easily accessible to anyone with a computer and Internet connection, and unlike traditional forms of print media, the communications of online speakers are generally not subjected to any kind of editorial or "filtering" device.\textsuperscript{147} Finally, most anonymous message board and chat room visitors are able to find a responsive audience for their messages, unlike a "zealot" on a public street corner who "is likely to be met with titters or nervous glances."\textsuperscript{148}

Commentators have also noted that, although in many cases the battle between the anonymous poster and potential plaintiff is framed as one pitting the little, helpless individual, David, against the powerful, greedy corporate, Goliath, "the reality is that sometimes the little guy is being a jerk."\textsuperscript{149} In commenting on the \textit{Xircom} case, Mark Gibbs argued that although many critics have characterized Xircom's attempts to obtain the anonymous poster's identity as an example of "the big bad company [that] is trying to shut down a whistleblower," in reality the corporation is attempting to seek redress from a critic who claims to have been employed by Xircom and has staged an attack on the company's management and products, an effort Gibbs finds not "unreasonable."\textsuperscript{150} Although Xircom's legal counsel has stated that the messages of the anonymous poster, if truly an employee of Xircom, would be in violation of his employment contract, Gibbs asserts that instead of acknowledging Xircom's interest in justice, "the Internet community and the press seem to be happy not knowing the facts; they automatically side with the little guy and worry about free speech and the squelching of whistleblowers."\textsuperscript{151}

Despite the force of arguments compelling disclosure, other courts have been persuaded by arguments in favor of protecting anonymous Internet speech, as the next section details.

\section*{B. The Cases Preserving Anonymous Speech}

While many commentators have applauded the decisions of courts unmasking the identities of anonymous online speakers, First Amendment activists have advocated just as strongly for greater

\begin{footnotes}
\item 145. Smith, \textit{supra} note 116, at 3.
\item 146. \textit{Id}.
\item 147. \textit{See id}.
\item 148. \textit{Id}.
\item 150. \textit{Id}.
\item 151. \textit{Id}.
\end{footnotes}
protection of anonymous free speech on the Internet. Those taking this position have triumphed in several cases dealing with online defamation or other related issues. In *Columbia Insurance Co. v. Seescandy.com*,\(^{152}\) the assignee of the federally registered service and trademarks “SEE’S” and “SEE’S CANDIES” brought an action for, *inter alia*, trademark infringement and dilution against, *inter alia*, various individuals who registered the domain names “seescandy.com” and “seecandys.com” under their Internet pseudonyms or domain name registration identities. In acknowledging the “legitimate and valuable right to participate in online forums anonymously and pseudoanonymously,” the court recognized that “[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.”\(^{153}\) In striving to balance this right against the right of plaintiffs to seek redress of their grievances, the court outlined four principles to apply to discovery requests seeking the identity of anonymous defendants:

First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court.

Second, the party should identify all previous steps taken to locate the elusive defendant.

Third, the plaintiff should establish to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.

Lastly, the plaintiff should file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible.\(^{154}\)

The court reasoned that employing such guidelines to determine when the identities of anonymous defendants should be revealed would help “foster open communication and robust debate” online, and would allow people to interact anonymously and pseudoanonymously without fear of embarrassing themselves by seeking information “relevant to a sensitive or intimate condition.”\(^{155}\) In *2TheMart.com*,\(^{156}\)

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152. 185 F.R.D. 573 (N.D. Cal. 1999).
153. *Id.* at 578.
154. *Id.* at 578-80.
155. *Id.* at 578.
156. Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001); see
the court considered the Seescandy.com court's reasoning in formulating its own guidelines to apply in a discovery request, finding that only an "exceptional case" would justify jeopardizing the First Amendment rights of a non-party anonymous speaker.157

Although both 2TheMart.com and Seescandy.com have been hailed as integral cases protecting the right of defendants to remain anonymous online, Dendrite International, Inc. v. Doe, No. 3,158 in which the court directly confronted the issue of when an ISP should be compelled to honor a subpoena seeking the identity of an anonymous Internet speaker in an online defamation action, has emerged as the central case protecting the First Amendment right to anonymous speech on the Internet. In Dendrite, anonymous poster John Doe No. 3, under the screen name "xxplrr," posted nine comments on a Yahoo! bulletin board concerning alleged changes in the accounting practices at Dendrite and an attempt by the CEO to sell the company.159 In affirming the trial court's decision to deny the plaintiff's discovery request to determine the identity of the anonymous poster, the New Jersey Appellate Panel held that in determining whether to compel an ISP to honor a subpoena, a court "must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interest and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous ... defendants."160

The Dendrite court, relying on the guidelines delineated in Seescandy.com, outlined a stringent test to be employed by courts confronted with such subpoenas, and held that a trial court should

[F]irst require the plaintiff 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. These 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.

[Second] [t]he court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

[Third] [t]he complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set

\[supra\] notes 106-11 and accompanying text.
157. See 140 F. Supp. 2d at 1092-95.
159. Id. at 763.
160. Id. at 760.
forth a prima facie cause of action . . . [and] must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure.

[If] the plaintiff has presented a prima facie cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.161

The court stressed that these guidelines must be implemented on a case-by-case basis to ensure that the result is “based on a meaningful analysis and a proper balancing of the equities and rights at issue.”162

The Dendrite court found that, although the plaintiff’s defamation claim could withstand a traditional motion to dismiss for failure to state a cause of action, the claim should be reviewed under a stricter level of scrutiny that comported with the guidelines outlined above. The court ruled that in cases dealing with subpoenas seeking compelled disclosure of anonymous speakers, the First Amendment implications allowed courts to depart from traditional liberal standards governing motions to dismiss because “application of our motion-to-dismiss standard in isolation fails to provide a basis for an analysis and balancing of Dendrite’s request for disclosure in light of [John Doe’s] competing right of anonymity in the exercise of his right of free speech.”163

In examining Dendrite’s claim to determine whether it demonstrated the “harm” necessary to evidence a defamatory statement,164 the court ruled that the allegations made by Dendrite’s vice president that the anonymous statements “may . . . have a significant deleterious effect on Dendrite’s ability to hire and keep employees”165 and the company’s contention that the postings resulted in detrimental fluctuations in its stock prices, which the court did not find reflected in its trading records,166 were not enough to prove the harm necessary to establish a prima facie defamation claim.167

161. Id. at 760-61.
162. Id. at 761.
163. Id. at 770.
164. See supra Part I.B.1.
165. Dendrite, 775 A.2d at 772.
166. The comments by xxplrr were posted on the bulletin board between March 14 and June 2, 2000. The trading records on the NASDAQ Exchange from March 1 to June 15, 2000 showed that the total loss during the period was roughly 91 cents, with gains on 32 days, losses on 40 days, and no changes on 2 days. In the seven days after Doe No. 3 posted a statement about Dendrite, the net change in the company’s stock price represented an increase. Michael Bartlett, New Jersey Court Upholds Anonymity on Net Bulletin Board, Newsbytes, at http://www.newsbytes.com (July 11, 2001).
For many, *Dendrite* represents a seminal decision in the field of anonymous Internet speech, one that struck an appropriate balance between the rights of adversaries in Internet anonymous speech cases and that is likely to become an "influential" decision for other trial courts.\(^{168}\) Although concerns have been voiced that the decision may "tip the balance too far" in favor of the First Amendment rights of anonymous speakers, others have characterized the decision as a "fair" attempt at resolving a difficult legal challenge.\(^{169}\)

Part III of this Note argues that the guidelines adopted by the New Jersey Appellate Division in *Dendrite* appropriately safeguard the First Amendment rights of anonymous speakers and should be implemented by trial courts faced with subpoenas seeking the compelled disclosure of the identity of anonymous Internet speakers. In applying the *Dendrite* guidelines in future cases, however, Part III argues that trial courts must remain acutely aware of the unique aspects of the Internet in determining whether each aspect of the test has been fulfilled.

### III. ADOPTING THE DENDRITE TEST

An examination of the guidelines set forth in *Dendrite* reveals that the court struck a proper balance between the interests of defamation plaintiffs and valued First Amendment principles. By requiring plaintiffs to notify anonymous speakers that they are the subject of a subpoena or application for an order of disclosure, the *Dendrite* court addressed an essential concern of many proponents of free speech on the Internet: that ISPs have not "offer[ed] the type of zealous protection to anonymous speakers" that traditional print publications have provided.\(^{170}\) In most instances, the ISPs realize that by complying with subpoenas compelling disclosure they are exposing themselves to little financial or social risk. As a rule, ISPs do not depend on anonymous speech in the same way that newspapers have traditionally relied upon confidential sources in their publications.\(^{171}\) Therefore, although customers who are unsatisfied with the privacy provided by an ISP may react by bringing their business to another commercial online provider, protecting anonymous speech is not "crucial" to the existence of an ISP.\(^{172}\) In fact, most ISPs make it clear to customers from the outset of their membership that, under certain circumstances, the ISP will reveal the true identity behind a screen.

\(^{168}\) Bartlett, *supra* note 166.

\(^{169}\) See id.


\(^{171}\) See id.

\(^{172}\) See id. (acknowledging that although ISPs may lose customers who desire greater protection of their privacy, preserving anonymous speech is not "crucial" to the ISP "in the way protecting confidential sources is crucial to the very life (and pride, and self-conception) of a newspaper").
name. Furthermore, in many instances, an ISP may feel that it is in its best interest to comply with a subpoena in order to avoid giving the impression that it endorses speech that it finds "loathsome, false or useless," and may view the user who posts the potentially defamatory material as a nuisance rather than a valuable customer. In such cases, the ISP is unlikely to challenge the subpoena on its own accord, thus making it vital for the anonymous speaker to have the opportunity to challenge the impending disclosure of his identity.

Aside from allowing anonymous speakers the opportunity to challenge the subpoena, granting notice may also enable the parties to avoid pursuing unnecessary legal action. As free speech advocate Mike Godwin has observed, "the preferred response [under the First Amendment] to a defamation problem is to fix it yourself," and a major goal of libel law has been "level[ing] the playing field" for private individuals who have been libeled by the media and do not have access to an outlet powerful enough to counteract the resultant reputational damage. This theory breaks down within the context of the Internet however, as the "low barrier" to speaking online allows those who allegedly have been defamed the ability to respond to the statements within the same medium and, in the case of many bulletin boards and chat rooms, the exact same context in which the original messages were posted. Often, this provides plaintiffs with a means of redressing reputational damage that is "a lot more satisfying" than seeking legal redress, and provides a remedy in "only minutes."

Giving defendants notice of potential legal action may also result in behavior that placates the plaintiff without revealing the defendant's

173. The AOL Member Privacy Agreement includes the following statement: "We will release specific information about your account only to comply with valid legal process such as a search warrant, subpoena or court order, or in special cases such as a physical threat to you or others." AOL Service Terms, at http://legal.web.aol.com/policy/aolpol/privpol.html (last visited Feb. 15, 2002). Before responding to a subpoena, ISPs are not now required to provide notice to an anonymous speaker that his or her identity is going to be revealed. Although some ISPs may contact the user as a matter of policy, others will not, denying the anonymous users the opportunity to file a motion to quash the subpoena. If an ISP chooses to comply with the subpoena, courts are usually not given the opportunity to determine whether the plaintiff's complaint is facially sufficient, resulting in the anonymous user's identity being compromised even in frivolous actions. See ACLU Brief, supra note 56, at 7.


175. Id.


177. See ACLU Brief, supra note 56, at 4 ("A bulletin board user can promptly post a reply to an objectionable posting and, in many (though by no means all) cases, the reply will reach the exact audience that read the initial posting.").

178. Godwin, supra note 176, at 100; see also ACLU Brief, supra note 56, at 7 ("The existence of an immediate right to reply to any defamatory statements suggests courts should exercise caution in evaluating a plaintiff's unsupported allegations that a defamatory posting caused him harm.").
identity. In some instances, warning defendants may encourage them to cease their allegedly defamatory anonymous postings in order to avoid the revelation of their identities. In past cybersmear cases, plaintiffs have also been willing to dismiss litigation in exchange for a number of remedies, including public apologies or retraction statements on the same boards as the original statements appeared, or the payment of damages or attorney's fees. Such means of redress could often be enacted without the additional step of demanding that an ISP disclose the true identity of the anonymous speaker.

Under the second guideline established by *Dendrite*, plaintiffs are required to identify and set forth the precise statements that they allege are defamatory. In general, this requirement will not serve as an obstacle to pursuing an online defamation action. A review of pre-*Dendrite* Internet speech litigation makes it clear, however, that this requirement will go far to protect the First Amendment rights of Internet speakers. For example, in *Hvide*, a major argument raised by the ACLU revolved around its contention that the plaintiff had failed to specify the bulletin board on which the allegedly anonymous postings were made, or any "single specific statement uttered by a single person." By merely asserting in a "conclusory fashion" that a number of defamatory statements had been posted without linking them to any screen name or individual, the ambiguous nature of the complaint rendered it impossible for any poster to determine whether he or she would later be named as a defendant, or whether a defense of truth or opinion could be asserted to defend an allegedly defamatory statement. In effect, failing to set forth the defamatory statements with specificity, similar to neglecting to give a poster notice that there is a pending threat to his anonymity, results in anonymous users being deprived of the right to challenge the subpoenas before their First Amendment rights are jeopardized.

The *Dendrite* court addressed one of the overriding concerns expressed by many commentators assessing the current wave of cybersmear cases—that lawsuits are being brought by both private individuals and corporations in an effort to determine the true identity of the anonymous speakers and enact their own extra-judicial remedies. The court would require a plaintiff to set forth a prima facie cause of action with sufficient evidence to support each element of the defamation claim against the anonymous defendants before allowing their identities to be revealed. In *Raytheon v. Does 1-21*, Raytheon

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180. See supra notes 130-35 and accompanying text.
181. ACLU Brief, supra note 56, at 2.
182. Id.
Co. sued twenty-one anonymous posters, alleging that their postings on a Yahoo! message board revealed confidential information about rumored mergers and acquisitions, divestitures, and defense contracts. After learning the identities of the posters by subpoenaing numerous ISPs, Raytheon dropped the suit against the defendants, many of whom turned out to be employees of the company who then quit their jobs or were sent for "corporate counseling." Unfortunately, Raytheon is just one example in a troubling line of cases in which corporations bring subpoenas to learn the identities of the anonymous posters, but then choose to forego judicial remedies in favor of implementing their own means of "quiet[ing] criticism." In requiring trial courts to examine a plaintiff's complaint under a level of scrutiny stricter than that of a motion to dismiss, the guidelines in *Dendrite* will help to alleviate this problem by encouraging only those plaintiffs confident that they can evidence each element of a defamation claim to file a subpoena.

In determining whether a defamation claim has been adequately established, the *Dendrite* appellate court also looked to whether the plaintiff had suffered any harm from the allegedly defamatory statements, and noted that the trial court had refused to link opinions on an Internet message board to the subsequent drop in Dendrite's stock price without something more concrete than the claims of Dendrite's vice president and the company's inconclusive trading records. The ACLU has argued that because the "actual malice" standard may not provide adequate "breathing space" to protect Internet defendants who may not be able to prove, as would a traditional media defendant, the process they undertook in verifying the credibility of their sources of information, requiring the plaintiff to prove special, or monetary, damages would help prevent "chilling"

185. See Firm Ends 'John Doe' Lawsuit After Learning Identities, 6.08 EPIC ALERT (EPIC), at http://www.epic.org/alert/EPICAlert6.08.html (June 1, 1999) ("The outcome of the Raytheon case is troubling because it suggests that judicial discovery procedures can be used to destroy an individual's anonymity without any determination of the validity of the underlying legal claim [and] . . . a resulting chilling effect on anonymous Internet speech.").
187. Critics have argued, however, that the standard for evaluating claims under *Dendrite* grants too much deference to anonymous speech and will deter even merit-based claims. Instead, these critics have advocated a more relaxed approach under which "a court would ask whether the communications as alleged in a complaint could reasonably be found to be actionable if false. If so, and after a hearing on the matter, the plaintiff would be entitled to learn the identity of the speaker." Rosen & Rosenberg, *supra* note 118, at 21. It is unlikely however that such an approach will prevent the kind of meritless claims against which critics of Raytheon have warned.
anonymous speakers into silence.\(^{189}\) Even if plaintiffs are not required to prove pecuniary loss, however, it is imperative that courts do not allow plaintiffs such as Dendrite to proceed on mere allegations that anonymous statements caused them harm, as this would result in an unrestrained means through which plaintiffs could obtain the identities of anonymous speakers.

Finally, the *Dendrite* court held that even after a plaintiff has presented a prima facie cause of action, the court must still balance the speaker's First Amendment right to anonymous speech against the strength of the plaintiff's case, as well as the necessity of the disclosure in allowing the plaintiff to proceed properly. In its amicus curiae brief to the *Dendrite* court, Public Citizen\(^{190}\) argued that

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case. . . . If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names. . . . On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.\(^{191}\)

The need for courts to "balance the equities" by demanding only "necessary" disclosures that "go[] to the heart" of the plaintiff's case takes on an even greater importance in cases of anonymous Internet speech, in which individuals are able "to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost," while avoiding the "retaliation" that could stem from disclosure of their identities.\(^{192}\) In their brief in *Dendrite*, Public Citizen and the ACLU of New Jersey stressed that a defendant's anonymity could easily be breached by corporations and private plaintiffs seeking to chill the defendant's speech by hauling him into court for costly and exhaustive litigation.\(^{193}\) Aside from silencing critics with the threat of litigation, courts also must acknowledge the risk inherent in those cases where a plaintiff's complaint fulfills the elements of a defamation action, but the plaintiff is nonetheless

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189. ACLU Brief, *supra* note 56, at 13-14 (citing George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 1-2, 217 (1996)) (arguing that the practical effect of allowing presumed damages in defamation cases "is to make it easy for a plaintiff to sue for defamation any time he comes in for harsh criticism").

190. Public Citizen is a non-profit, national consumer advocacy organization that represents consumer rights in all three branches of government. For more information on Public Citizen's role in *Dendrite*, see http://www.publiccitizen.org.


192. *Id.* at 11.

193. *See id.* at 17.
seeking the identity of the defendants in an effort to enact an extra-judicial remedy. By taking the interests of both sides into account after finding a prima facie case, courts will at least acknowledge the need of keeping "the lines of Internet communication open while not encouraging posters to use anonymity to abuse the rights of others."  

It is also imperative that courts learn to view libel allegations within the unique context of the Internet. In determining whether a plaintiff's complaint includes a published "false and defamatory statement concerning another," commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms "are often the repository of a wide range of casual, emotive, and imprecise speech," and that the online "recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts." Because the context of a statement impacts its potentially defamatory import, it is necessary to view allegedly defamatory statements published on the Internet within the broader framework on which they appear, taking into account both the tenor of the chat room or message board in which they are posted, and the language of the statements. The low barrier to speaking online allows anyone with an Internet connection to publish his thoughts, free from the editorial constraints that serve as gatekeepers for most traditional media of disseminating information. Often, this results in speech characterized by

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194. Id. at 20.
195. In most cases, the issue of whether a statement has been published on the Internet will not be called into question, as defamatory statements become actionable as soon as they have been communicated to a third person. See Schwartz et al., supra note 2, at 861. It has been argued, however, that "keying defamatory content in preparation for transmission of an e-mail message or posting on a discussion group that has not been viewed by others should not be characterized as a publication until the message has in fact been transmitted or posted and read by another." Schachter, supra note 3, at 196.
197. Schachter, supra note 3, at 244. "Rigid application of libel laws to comments made in such an environment might well impose a 'burden of constant vigilance that greatly exceeds the benefits to be had.'" Id. (quoting Tacket v. General Motors Corp., 836 F.2d 1042, 1046 (7th Cir. 1987)).
198. See id. at 243.
199. See ACLU Brief, supra note 56, at 4. "Discourse on financial message boards, for example, tends to resemble informal spoken conversation more than it does formal written communications, and anyone who regularly frequents the message boards learns to interpret what is posted accordingly." Id.
200. Roundtable, First Amendment, supra note 62, at 860 ("[I]f the Internet continues as it appears to be moving, everyone... will have an opportunity to be a reporter. But nobody will be an editor. And that will have profound consequences for the quality of the discourse, the quality of the information, and potentially, for legal liability.").
grammatical and spelling errors, the use of slang, and, in many instances, an overall lack of coherence.\textsuperscript{201}

As the interest that defamation seeks to protect is reputational, in order to be defamatory a statement must "diminish the respect, good will, confidence or esteem in which [the plaintiff] is held, or... excite adverse or unpleasant feelings about him."\textsuperscript{202} In most instances, it seems unlikely that a message including the slang and grammatical errors found in many bulletin board postings would have this effect. In addition, an allegedly defamatory communication must be "read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item... should be read and construed together, and its meaning and signification thus determined."\textsuperscript{203} In light of these principles, it seems unrealistic to assume that a plaintiff will suffer the same damage to his reputation on a common ISP bulletin board as he would in a more traditional publication that is subject to a stringent level of editorial control, as most readers will realize that many of the postings on the board are not meant to be taken seriously. In an effort to preserve the "democratic nature of discussion on the Internet" that has allowed the medium to emerge as the vessel that will "transform the First Amendment 'marketplace of ideas' from ideal to reality," courts must address this assumption and accept that "inevitably," discourse over the Internet will be "more lively and free wheeling than discussions in the mainstream media, simply by virtue of the fact they include more participants and more perspectives."\textsuperscript{204} The defamatory import of speech cannot be divorced from the context in which it occurs. Therefore, it is necessary for courts to acknowledge and embrace the fact that the unique technological characteristics of the Internet have allowed it to develop into an unprecedented forum for "uninhibited, robust, and wide-open"\textsuperscript{205} speech.

**CONCLUSION**

With the increasing popularity of the Internet, society has witnessed an unprecedented revolution in the means through which information may be disseminated. Although contributing to the "robust" and "democratic" nature of speech on the Internet, bulletin boards in

\begin{itemize}
  \item \textsuperscript{201} In *2TheMart.com*, the court provided examples of the statements that had been posted on the TMRT site, including: "'[management was] dumped by their accountants... these guys are friggin liars... why haven't they told the public this yet??? Liars and criminals!!!!!!'" and "'Lying, cheating, thieving, stealing, lowlife criminals!!!!!!'" Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1090 (W.D. Wash. 2001).
  \item \textsuperscript{202} Schwartz et al., supra note 2, at 838.
  \item \textsuperscript{203} Wash. Post Co. v. Chaloner, 250 U.S. 290, 293 (1919) (quoting Commercial Pub'l. Co. v. Smith 149 F. 704, 706 (W.D. Tenn. 1907)).
  \item \textsuperscript{204} ACLU Brief, supra note 56, at 6.
  \item \textsuperscript{205} N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
\end{itemize}
which participants can speak anonymously or pseudoanonymously through the use of a screen name have also given rise to their fair share of problems in the area of online defamation. To some degree, nearly all of the courts that have adjudicated cases of subpoenas compelling ISPs to disclose the identities of speakers have recognized the need to balance the right of the plaintiff to redress of his injury against that of the defendant to speak anonymously. In *Dendrite*, however, the New Jersey Appellate Division developed a set of guidelines that most succinctly sets forth the individual steps the courts must take to protect defendants' First Amendment right to anonymous free speech. By uniformly applying these guidelines in ISP subpoena cases, while remaining cognizant of the unique characteristics of the Internet, trial courts will ensure that the naming of online John Does will occur only when adequate notice has been given to the defendants and the identity is necessary to further a plaintiff's legitimate claim, and thereby will allow the plaintiff a means of redress while safeguarding a cherished First Amendment right.