

**ANONYMITY, DISCLOSURE AND FIRST AMENDMENT  
BALANCING IN THE INTERNET ERA: DEVELOPMENTS IN  
LIBEL, COPYRIGHT, AND ELECTION SPEECH**

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**ABSTRACT**

*The Supreme Court has long protected anonymity for speakers and writers under the First Amendment. The Internet enables anonymity for individuals who post writings, download music, and participate in political discussion. However, this poses a challenge for plaintiffs who want to sue anonymous speakers for libel, copyright infringement, or election speech. This Article evaluates current legal developments in these areas and makes recommendations about how the law should deal with these different but related issues of anonymous speech.*

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## INTRODUCTION

While the right to speak and write anonymously has been a component of First Amendment theory since the Revolutionary era, digital and Internet communications have challenged both established legal rules and the basic premises of traditional anonymous speech doctrine. Anonymity as a positive speech right developed to encourage frank debate about public affairs in the earliest colonial newspapers, and anonymous pamphlets and newspapers were a common tool by which the Framers of the Constitution advocated for their political causes.<sup>1</sup> By the 1990s, the Supreme Court had squarely enshrined the right to speak anonymously in First Amendment jurisprudence.<sup>2</sup> With a few exceptions, anonymity generally did not raise legal concerns in the traditional media marketplace, in part because publishers of newspapers and books, for example, had established professional norms of transparency of their identities and were often liable for the content of materials they published; they therefore had a market-based incentive to protect against the harms of some anonymous speech.<sup>3</sup>

The nature of the Internet and the characteristics of online speech – such as mass dissemination, ease of publication, decentralization, and transnationalism – have sparked an avalanche of legal claims over the rights of speakers’ anonymity. As a result of these new legal claims, lawyers, judges, and scholars have struggled to reconsider the rationales for and limits of anonymity in the Internet age.<sup>4</sup> Online anonymity touches on many areas of

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<sup>1</sup> See, e.g., Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Anonymous Speech During the Constitutional Debate*, 28 AM. JOURNALISM 35, 53 (2011) (arguing that anonymous speech was “inextricably linked” to the founding of the nation).

<sup>2</sup> See *infra* Part I.

<sup>3</sup> See, e.g., C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 972 (2007) (discussing the tension between transparency and anonymity in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), in which the Supreme Court upheld a law requiring newspapers to disclose the names of its publishers and editors to secure second-class mailing privileges). In the libel context, the Supreme Court has also ruled that a journalist’s privilege could not shield a publisher from liability for libelous content from anonymous sources. See *Herbert v. Lando*, 441 U.S. 153 (1979).

<sup>4</sup> See generally Rob Kling et al., *Assessing Anonymous Communication on the Internet: Policy Deliberations*, 15 INFO. SOC’Y 79 (1999) (noting that members of the American Association for the Advancement of Science expressed concern about governments trying to legislate too much privacy protection and noting

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law, including election law,<sup>5</sup> libel,<sup>6</sup> copyright,<sup>7</sup> employment-related speech and trade secret disclosures,<sup>8</sup> and journalists' privilege to protect confidential sources.<sup>9</sup>

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that these members seemed to favor policies that take into consideration international human rights principles); Lyrisa Barnet Lidsky & Thomas F. Cotter, *Authorship, Audiences and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1598-1602 (2007) (offering a balancing test and encouraging the adoption of an evidentiary privilege); Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMENDMENT L. REV. 176, 184 (2009) (suggesting "a pragmatic revision of § 230 immunity that balances First Amendment interests with individual rights to redress real injuries through litigation"); Jennifer B. Wieland, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589 (2001) (recommending a reassessment of the application of anonymous speech protections in the age of information overload); Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991 (2004) (evaluating the possibility of pseudonymity as a solution to troubles with anonymous speech).

<sup>5</sup> See, e.g., Amy Constantine, *What's in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459 (1996); Jason M. Martin, *Return to the Marketplace: Balancing Anonymous Online Speech and Defamation*, 1 J. MEDIA L. & ETHICS 241, 246 (2009); Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996); Paul Werner, *e-Pluribus Unum?: The Problem of Anonymous Election-Related Communications on the Internet: A Conceptual Methodology for Evaluating Regulatory Interferences with Anonymous Speech*, 4 VAND. J. ENT. L. & PRAC. 47 (2002); George H. Carr, Note, *Application of the U.S. Supreme Court Doctrine to Anonymity in the Network*, 44 CLEV. ST. L. REV. 521 (1996); Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L. REV. 144 (1995).

<sup>6</sup> See, e.g., Ryan M. Martin, *Freezing the Internet: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217 (2007) (urging the development of different standards for unmasking libel defendants based on the type of speech in which they are engaged); Allison Stiles, *Everyone's a Critic: Defamation and Anonymity on the Internet*, 2002 DUKE L. & TECH. REV. 4 (evaluating the outcomes in two cases of online libel); Yang-Ming Tham, *Honest to Blog: Balancing the Interests of Public Figures and Anonymous Bloggers in Defamation Lawsuits*, 17 VILL. SPORTS & ENT. L.J. 229 (2010) (calling for a Supreme Court decision on the rights of bloggers).

<sup>7</sup> See, e.g., Joshua M. Dickman, *Anonymity and the Demands of Civil Procedure in Music Downloading Lawsuits*, 82 TUL. L. REV. 1049 (2008) (discussing joinder issues in filesharing cases); Jeffrey M. Levinsohn, *Protecting Copyright at the Expense of Internet Anonymity: The Constitutionality of Forced Identity Disclosure under 512(h) of the Digital Millennium Copyright Act*, 23 TEMP. ENVTL. L. & TECH. J. 243 (2004) (claiming that § 512 of the DMCA is unconstitutional).

<sup>8</sup> See, e.g., Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity*

The legal claims over online anonymity in these areas of law have underscored the costs of anonymity. Anonymity online has contributed to harassment, invasion of privacy, infliction of emotional distress, and defamation, to name a few legal wrongs. Bloggers have been subpoenaed to unmask anonymous and confidential sources. Newspaper websites have been subpoenaed for the identity of pseudonymous comment posters. Internet Service Providers (ISPs) have been subpoenaed to identify users in libel and copyright-infringement cases. As Judge Jeffrey S. White said in a case involving the controversial WikiLeaks website, “We live in an age when people can do some good things and people can do some terrible things without accountability necessarily in a court of law.”<sup>10</sup> Anonymity can shield individuals from being accountable for their speech; it can hinder the investigation and prosecution of crimes and civil wrongs; it has the potential to undermine government authority and security; and it can undermine business interests and e-commerce.

In many lawsuits, plaintiffs have first had to convince courts to become involved in the anonymity labyrinth before they could proceed with their cases, and judges are only now developing a consensus on the legal tests to determine when a

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*Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 2 (calling for Congressional rules to govern the disclosure of anonymous online bloggers); Konrad S. Lee, *Hiding From the Boss Online: The Anti-Employer Blogger’s Legal Quest for Anonymity*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 135 (2006) (evaluating alternative approaches, such as employee breach of loyalty, to combat anonymous bloggers); Scot Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533 (2002) (suggesting that defamation actions offer the best remedy for online smear campaigns).

<sup>9</sup> See, e.g., Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97 (2002); Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 751 (2006); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609 (2005); Scott Neinas, *A Skinny Shield is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225 (2008); Mary Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2006); Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 J. MEDIA L. & ETHICS 186 (2010).

<sup>10</sup> Noam Cohen & Brian Stelter, *Iraq Video Brings Notice to a Web Site*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/07wikileaks.html>.

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plaintiff can unmask an anonymous or pseudonymous Internet speaker. Rising concerns about online anonymous cyberbullying have raised the stakes for legislatures as well. In 2012, for example, the New York legislature proposed the “Internet Protection Act,” which would mandate that online postings be signed or that the site administrator provide the identities of posters upon request.<sup>11</sup> Yet at least one study suggests that nearly three-quarters of online newspaper commenters feel that anonymity is important, even with increasing negativity and attacks.<sup>12</sup>

This Article assesses the emerging legal standards for anonymous speech in three distinct areas of law: libel, copyright, and campaign-finance law. In doing so, it shows how new technology has reconceptualized several doctrines of constitutional law. This research employs traditional legal research methods in analyzing case law, developing common law and constitutional rules, and statutory law, but also aims to draw on the historical development of the constitutional right to anonymity.

Our central argument is that the pre-Internet values in the Supreme Court’s anonymous speech doctrine should continue to play a central role in the future of the Internet age’s anonymous speech doctrine. The historical foundations of anonymous speech protections are anchored in First Amendment values of democratic self-governance and informed public discussion. These historical values have been emphasized in Supreme Court cases involving anonymity of citizen advocates, whistleblowers, dissident movements, civil rights advocates, literary authors, and journalists.<sup>13</sup> In applying these values, the Court has created a doctrine that embodies ideas of both positive and negative liberty; it stresses both the value of anonymous speech to the marketplace of ideas while emphasizing its connections to speaker autonomy. Individuals have a First Amendment right to make content choices about their speech, including the disclosure of their identity.

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<sup>11</sup> See S.6779, 2011-2012 Gen. Assemb., Reg. Sess. (N.Y. 2012) (“A web site administrator upon request shall remove any comments posted on his or her web site by an anonymous poster unless such anonymous poster agrees to attach his or her name to the post and confirms that his or her IP address, legal name, and home address are accurate.”).

<sup>12</sup> See Jack Rosenberry, *Users Support Online Anonymity Despite Increasing Negativity*, NEWSPAPER RES. J., Spring 2011, at 6, 13 (finding that “[n]early 83 percent strongly or somewhat agreed with the statement that anonymity ‘promotes livelier, more passionate discussion,’ and slightly more than 94 percent . . . said anonymity allowed participants ‘to express ideas they might be afraid to express otherwise’”). The study also found that 26.9 percent of online posters would support the idea of participants identifying themselves. *Id.* at 10.

<sup>13</sup> See generally Carr, *supra* note 5, at 524-30 (discussing the Supreme Court’s historical treatment of anonymous speech).

Additionally, anonymity can encourage individuals to contribute to the “marketplace of ideas” with less fear of retaliation and harassment, and it can preserve individual privacy. Among the assumptions made in the First Amendment doctrine are that audiences are generally rational and able to evaluate the relative strength of anonymous speech without government involvement, that the marketplace of ideas is generally better off with more speech rather than less, and that anonymity can be an important factor in encouraging individuals to participate in public discussion.

Viewing the plethora of recent cases invoking anonymous speech arguments through this historical lens allows us to assess the relative strength of the First Amendment interests in different kinds of online anonymity where a balancing of interests is required by the courts. In discussing libel, copyright, and campaign finance cases, we consider the policy implications in each area to acknowledge the various elements at play within them. Simply put, courts must develop different but related standards by which to assess online anonymity within the context of the policy requirements of the speech at issue. These standards, which are emerging toward consensus in libel and copyright precedents but remain unsettled in campaign finance cases, must delicately balance the virtues of anonymous speech against other policy objectives. One challenge in developing model legal standards is to determine when the harms of anonymity are significant enough to justify an incursion on the right to anonymity. The diversity of cases examined in this research shows a range of compelling interests that courts have determined may overcome First Amendment-based anonymity protections. The harms of some anonymous speech are real, and the First Amendment right to anonymity is not absolute. Legal anonymity protections that are too stringent may encourage too much harmful and perhaps unprotected speech, while weak legal standards threaten to undermine fundamental First Amendment values that inform the anonymous speech doctrine. We believe the emerging legal tests that apply different levels of scrutiny in libel, copyright and electioneering speech provide the best analytical framework for this First Amendment balancing.

This Article is divided into six sections, after this introduction. Part One presents a historical analysis that reveals several important premises for the protection of anonymity related to the encouragement of unpopular expression that may improve the metaphorical marketplace of ideas. The research shows that protection for anonymity is rooted in the practices of colonial printers and political speakers and was codified into constitutional

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doctrine through several Supreme Court cases in the twentieth century. Part One also discusses the evolution of the anonymous speech doctrine in light of the development of the Internet and argues that the general trajectory of court decisions at the state and federal levels support the adoption of a national standard both for plaintiffs seeking to preserve anonymity and the government when seeking the identity of an anonymous or pseudonymous online speaker.

The next three parts address the substantive content areas implicated in many anonymous speech cases before the courts. Part Two discusses the implications of a national standard for John Doe subpoenas in light of the development of the Supreme Court's anonymous speech doctrine. Part Three addresses online anonymity in the context of alleged copyright infringement through filesharing. Part Four turns to the newest wrinkle in the anonymity fabric – anonymous political speech, which formed the foundation of the Court's anonymous speech doctrine but has been under siege in recent years. Finally, Part Five and the conclusion will draw together the three content areas and make recommendations for both the anonymous speech doctrine and future research.

This research is important because online anonymity will continue to confound individuals, lawyers, judges, and scholars, and such analyses and proposals will help shape the future development of law in this area. Although the Internet has revolutionized anonymous speech doctrine in the past fifteen years, an examination of the historical principles and premises of anonymous speech reveals several important lessons that should inform anonymous speech policy today.

I. BEFORE THE INTERNET: THE DEVELOPMENT OF THE  
ANONYMOUS SPEECH DOCTRINE – RATIONALES AND  
LIMITS

This Part examines the major cases and issues that informed the Supreme Court's anonymous speech doctrine prior to the development of the Internet. It briefly examines the historical roots of anonymity in the colonial period and other practices from the Revolutionary Era that provide data for an original intent analysis of the right to anonymity. This Part also briefly explores the case law involving political advocacy and associational speech that led to the Court's articulation of a right to anonymity, long before the Internet presented new challenges related to anonymity.

The roots of the modern anonymous speech doctrine date back to colonial times, when both politicians and printers used



anonymous tracts published in pamphlets and newspapers to advance their causes. Anonymous articles were commonplace in the newspapers of the American colonies, including the influential free speech and liberty tracts known as “Cato’s Letters.”<sup>14</sup> Thomas Paine’s “Common Sense,” which fomented the idea of revolution among colonists, was initially published as authored by “An Englishman.”<sup>15</sup> Even the writers of the Federalist Papers preferred anonymity while they advocated the adoption of various provisions of the Constitution through pamphlets.<sup>16</sup> The jailings of colonial newspaper printers James Franklin and John Peter Zenger also demonstrate the convergence of the developing right of anonymous speech with the development of modern journalism during the Revolutionary Era.<sup>17</sup>

Justice Clarence Thomas drew extensively from this historical record in his concurrence in the 1995 case *McIntyre v. Ohio Elections Commission*<sup>18</sup>:

There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of “Publius,” are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. Of course, the simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government. In this case, however, the historical evidence indicates that the Founding era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the “freedom of the press.”<sup>19</sup>

Justice Thomas’s analysis provides the historical foundation for the notion that anonymous speech should have protection. However, his full and total reliance on the Framers’ notions of what should be considered to be protected should not go unexamined. His concurrence points out that he did not join the reasoning of the majority because that reasoning did not

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<sup>14</sup> See Wieland, *supra* note 4, at 591.

<sup>15</sup> *Id.* at 591-92.

<sup>16</sup> See Ekstrand & Jeyaram, *supra* note 1, at 39-44.

<sup>17</sup> See JASON M. SHEPARD, PRIVILEGING THE PRESS: CONFIDENTIAL SOURCES, JOURNALISM ETHICS AND THE FIRST AMENDMENT 106-13 (2011).

<sup>18</sup> 514 U.S. 334, 358 (1995) (Thomas, J., concurring).

<sup>19</sup> *Id.* at 360-61.

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sufficiently rely on the Framers' writings and perspectives.<sup>20</sup> Yet even in Justice Thomas's concurrence, it remains unclear whether the Framers' recognition of anonymity's virtues or their understandings of what speech has "value" (or both) should guide policy and First Amendment jurisprudence today.

The primary problem with applying Justice Thomas's position to today's anonymous speech landscape is that it leaves no room for balancing; indeed, as he writes in *McIntyre*, "whether certain types of expression have 'value' today has little significance."<sup>21</sup> This is clearly not the way that most anonymous speech jurisprudence is moving today; as will be noted below, courts are regularly engaging in balancing analyses in determining whether to unmask anonymous speakers.<sup>22</sup> At a more basic level, however, Justice Thomas's analysis of the Framers' willingness to protect anonymous speech does provide an excellent rationale for the importance of protecting that speech.

Before the Court had developed a robust First Amendment doctrine, it did not seriously consider right-to-anonymity claims as raising major free speech and press problems. For example, in the 1913 case *Lewis Publishing Co. v. Morgan*,<sup>23</sup> the Court upheld a federal law requiring that newspapers and magazines submit to the government a list of their editorial and business officers. In the 1928 case *New York ex rel. Bryant v. Zimmerman*,<sup>24</sup> the Court upheld a state statute requiring registration of organizations of more than twenty individuals. The Court became more sensitive to First Amendment claims in the late 1920s, in part because of the "incorporation" of the Bill of Rights to the states, and in part because of a series of cases emanating from the World War I era

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<sup>20</sup> *Id.* at 370 ("[W]hat is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights.").

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* notes 107-11 and accompanying text for summary of balancing analysis in libel cases; *infra* notes 148-60 and accompanying text for summary of balancing analysis in copyright cases; and *infra* notes 185-216 and accompanying text for summary of balancing analysis in campaign finance cases. It should also be noted that this is not a novel perspective; for example, Lidsky and Cotter use "First Amendment jurisprudence and democratic theory to provide a normative basis for protecting anonymous speech and to provide guidance on how to balance it against other important rights." Lidsky & Cotter, *supra* note 4, at 1602.

<sup>23</sup> 229 U.S. 288 (1913).

<sup>24</sup> 278 U.S. 63 (1928).

that sparked increasing debate in the courts, and in the country more generally, about civil liberties.<sup>25</sup>

Two cases involving government attempts to obtain membership lists from the NAACP led the court to explicitly recognize a right to anonymity emanating from the First Amendment in cases where harassment or retaliation was likely. The 1958 case of *NAACP v. Alabama ex rel. Patterson* involved the state of Alabama's attempt to obtain a membership list from the NAACP based on the state's corporate qualification statute.<sup>26</sup> In overturning a decision by the Alabama Supreme Court, the U.S. Supreme Court ruled that individuals' First Amendment rights to speech and association were violated by the state's actions and noted the likelihood of harassment of a dissident political group by racially hostile interests.<sup>27</sup> "[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as other improper infringements the Court had struck down in the past.<sup>28</sup> The Court upheld a similar right to anonymity two years later in *Bates v. City of Little Rock*,<sup>29</sup> a case in which city officials sought membership lists of the local chapter of the NAACP.

Also in 1960, the U.S. Supreme Court in *Talley v. California*<sup>30</sup> invalidated a Los Angeles ordinance that prohibited the distribution of all anonymous pamphlets in a case brought against a group of boycotters alleging discriminatory employment practices. In ruling that the ordinance violated the First Amendment and thus overturning the \$10 fine against Mr. Talley, the Court wrote, "Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind."<sup>31</sup> The Court listed several examples of anonymous, controversial publications whose alleged authors were persecuted and found that laws forbidding anonymous speech would infringe on individuals' right to participate in discussion about public affairs.<sup>32</sup>

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<sup>25</sup> See, e.g., MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 105-09 (1992).

<sup>26</sup> 357 U.S. 449 (1958).

<sup>27</sup> See Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 413-18 (2012).

<sup>28</sup> *Patterson*, 357 U.S. at 462.

<sup>29</sup> 361 U.S. 516 (1960).

<sup>30</sup> 362 U.S. 60 (1960).

<sup>31</sup> *Id.* at 64.

<sup>32</sup> See *id.* at 65 ("John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books.").

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These early cases created several precedents that explored the First Amendment implications of laws forbidding anonymous speech, but it was *McIntyre* that codified the anonymous speech doctrine as a robust aspect of First Amendment jurisprudence. The *McIntyre* case involved an Ohio statute that prohibited the distribution of anonymous campaign literature, both about the election or defeat of candidates and also speech “to promote the adoption or defeat of any issue.”<sup>33</sup> Margaret McIntyre distributed leaflets at a school board meeting opposing an upcoming referendum, and school district officials subsequently filed a complaint against her with the Ohio Elections Commission, alleging a violation of state law. The U.S. Supreme Court in a 7-2 vote overturned the Ohio Supreme Court’s decision upholding McIntyre’s \$100 fine.<sup>34</sup>

Justice John Paul Stevens, writing for the majority, began his analysis by discussing the ways in which anonymity raises First Amendment issues. Authors or speakers who choose to remain anonymous do so for a variety of reasons, the Court said. “The 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,” Justice Stevens wrote.<sup>35</sup> The Court reasoned that, like other decisions regarding the content of publication, the decision to remain anonymous encompasses First Amendment values.<sup>36</sup> Additionally, anonymity furthers important political values in encouraging unpopular speech and allowing persecuted groups better access to the marketplace of ideas. The Court explained:

Under our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority . . . . The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.<sup>37</sup>

The majority applied an “exacting scrutiny” analysis to the law, finding that the law was not narrowly tailored to serve an

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<sup>33</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 n.3 (1995) (quoting OHIO REV. CODE ANN. § 3599.09(A) (1988)).

<sup>34</sup> *See id.* at 357.

<sup>35</sup> *Id.* at 341-42.

<sup>36</sup> *See id.* at 342.

<sup>37</sup> *Id.* at 357.

overriding state interest.<sup>38</sup> Justice Thomas concurred with the judgment of the court, but disagreed with the application of scrutiny analysis that partially analyzed the “value” of anonymous speech. Instead, he applied an original intent analysis, finding that the intent of the First Amendment, as originally understood, applied to anonymous political leaflets.<sup>39</sup> His lengthy concurrence traced the history of anonymous speech to the colonial era. Justice Thomas argued that the Zenger case “signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.”<sup>40</sup> Indeed, tracing a number of additional events in the late eighteenth century, Justice Thomas concluded that “the Framers’ understanding of the relationship between anonymity and freedom of the press became more explicit.”<sup>41</sup> Among the cases Justice Thomas cited was the Continental Congress’s failed attempt in 1779 to identify the writer of an article accusing its members of embezzlement and fraud,<sup>42</sup> and a similar failed attempt by the New Jersey State Legislature.<sup>43</sup> Much of the debate surrounding limits to “freedom of the press,” Justice Thomas claimed, was actually about printers’ responsibilities regarding anonymous attacks. Using debates between the Federalists and Anti-Federalists regarding the extent of press protections, Justice Thomas concluded that the issue was settled in favor of protecting anonymity:

When Federalist attempts to ban anonymity are followed by a sharp, widespread Anti Federalist defense in the name of the freedom of the press, and then by an open Federalist retreat on the issue, I must conclude that both Anti Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author’s name.<sup>44</sup>

While originalism was the focus of Justice Thomas’s historical analysis, Justice Scalia in dissent used historical arguments to conclude that campaign anonymity should not be enshrined in First Amendment protection. Justice Scalia argued that the majority’s holding “invalidates a species of protection for the election process that exists, in a variety of forms, in every State except California, and that has a pedigree dating back to the end of

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<sup>38</sup> *See id.* at 348.

<sup>39</sup> *See id.* at 359 (Thomas, J., concurring).

<sup>40</sup> *Id.* at 361.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 362.

<sup>44</sup> *Id.* at 367.

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the 19th century.”<sup>45</sup> Justice Scalia argued that while anonymous electioneering may have occurred during the late 1700s, the existence of a practice does not establish it as a constitutional right.<sup>46</sup> The ambiguity of original intent heightens the need for other historical and policy analysis, Justice Scalia argued:

What we have, then, is the most difficult case for determining the meaning of the Constitution. No accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections. In such a case, constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom (in this case the freedom of speech and of the press) that existed when the constitutional protection was accorded.<sup>47</sup>

Justice Scalia’s historical analysis centered on the traditions of citizens and the widespread development and use of disclosure laws by the states. “Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech,” Justice Scalia wrote.<sup>48</sup>

In embracing the normative values of anonymity, the *McIntyre* majority solidified a speaker’s right, under the First Amendment, to choose to remain anonymous. Justice Thomas’s concurrence and Justice Scalia’s dissent, however, show how arguments could be marshaled to support opposing interpretations of First Amendment history. Partly as a result, *McIntyre*’s precedential value has been debated, and the decision has been criticized as “disappointingly indecisive.”<sup>49</sup> In the 2010 case *Doe*

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<sup>45</sup> *Id.* at 371 (Scalia, J., dissenting).

<sup>46</sup> *See id.* at 373.

<sup>47</sup> *Id.* at 375.

<sup>48</sup> *Id.* at 377.

<sup>49</sup> Constantine, *supra* note 5, at 460, 482 (arguing that *McIntyre*’s “disappointingly indecisive” decision has “tremendous ramifications” on state disclosure laws); *see also* Thomas H. Dupree, Jr., *Exposing the Stealth Candidate: Disclosure Statutes After McIntyre v. Ohio Elections Commission*, 63 U. CHI. L. REV. 1211 (1996) (arguing that the *McIntyre* majority offered little guidance on its applicability to different types of disclosure laws); Caroline E. Strickland, *Applying McIntyre v. Ohio Elections Commission to Anonymous Speech on the Internet and the Discovery of John Doe’s Identity*, 58 WASH. &

*v. Reed*, Justice Scalia wrote in concurrence that the *McIntyre* “mistake” should not be extended further to campaign finance cases.<sup>50</sup> The ambiguous status of the *McIntyre* precedent has contributed to the uncertainty over anonymous speech rights in online communications. Because the Supreme Court has not articulated clear standards for when an individual speaker’s right of anonymity must yield to other interests, lower courts and scholars continue to debate appropriate standards.<sup>51</sup>

Many courts have been forced into this debate because of the volume of cases in which anonymous online speakers are accused of posting defamatory comments.<sup>52</sup> ISPs who maintain the infrastructure that allows for the unmasking of anonymous speakers’ identities have become the central players in many legal battles. Section 230 of the Communications Decency Act provides ISPs with broad immunity from lawsuits for libelous material posted by third parties on their sites.<sup>53</sup> This provision was upheld in 1997 by the Fourth Circuit in *Zeran v. America Online*.<sup>54</sup> But while Section 230 generally shields ISPs from liability for the communication of their users, they have become recipients of many subpoenas for information that would identify their users. We examine these cases next.

## II. UNMASKING ONLINE SPEAKERS IN LIBEL CASES: AN EMERGING CONSENSUS

Libel lawsuits have provided the most significant opportunity for courts to balance the rights of online anonymous speech with plaintiffs seeking an opportunity to sue. We next turn to an analysis of seven lower court decisions that show the adoption of standards courts have used to overcome First Amendment hurdles in unmasking online anonymity.

Some of the earliest formulations of anonymous online speech tests dealt with proceedings against unknown domain name holders. One of these cases arose in the context of a domain name

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LEE L. REV. 1537 (2001) (discussing the marginal relevance of *McIntyre* to cases involving fraudulent, libelous and other harmful anonymous speech); Tien, *supra* note 5 (discussing the implications of *McIntyre* on the role of identification in online speech).

<sup>50</sup> *Doe v. Reed*, 130 S. Ct. 2811, 2832 (2010) (Scalia, J., concurring).

<sup>51</sup> *See, e.g.*, Strickland, *supra* note 49.

<sup>52</sup> *See generally* Robert G. Larson & Paul A. Godfread, *Bringing John Doe to Court: Procedural Issues in Unmasking Anonymous Internet Defendants*, 38 WM. MITCHELL L. REV. 328, 336-41 (2011) (discussing various tests developed by lower courts to unmask anonymous Internet speakers).

<sup>53</sup> *See* 47 U.S.C. § 230(c) (2006).

<sup>54</sup> 129 F.3d 327 (4th Cir. 1997).

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dispute in 1999. *Columbia Insurance Co. v. Seescandy.com*<sup>55</sup> arose as a result of an unknown individual registering “seescandy.com,” a domain name associated with the famous trademark See’s Candies.<sup>56</sup> Columbia, the assignee of various trademarks related to See’s Candies, sued for unfair competition, state and federal trademark dilution, and unjust enrichment, among other actions, and requested a temporary restraining order.<sup>57</sup> While not a defamation case, this case laid the groundwork for subsequent legal tests that have been adopted by recent courts.

The court, in denying the temporary restraining order, said that such an order would be worthless because Columbia had been unable to determine the identity of the defendant.<sup>58</sup> Pointing out the importance of protecting the anonymity of online speakers,<sup>59</sup> the court suggested that a four-part test could balance the competing needs of anonymous speakers and those with bona fide grievances. First, the plaintiff “must identify the 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.”<sup>60</sup> This identification need not be the party’s real name but could be accomplished by showing that online aliases pointed toward a real person.<sup>61</sup> Second, the court said, the plaintiff must demonstrate a good faith effort to locate the identity of the anonymous defendant.<sup>62</sup>

Third, and key, the court explained that the plaintiff must “establish to the Court’s satisfaction” that the suit would survive a motion to dismiss: “plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or

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<sup>55</sup> 185 F.R.D. 573 (N.D. Cal. 1999). The individual also registered “seescandys.com.” *Id.* at 575.

<sup>56</sup> See’s Candies’ official website is <http://www.sees.com>; <http://seescandy.com> and <http://seescandys.com> now both point to the official See’s site. SEE’S CANDIES, <http://www.sees.com/> (last visited Nov. 23, 2012).

<sup>57</sup> *Columbia Insurance*, 185 F.R.D. at 576.

<sup>58</sup> *Id.* at 577.

<sup>59</sup> *See id.* at 578 (“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. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People 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.”).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 579.

<sup>62</sup> *See id.*



entity who committed that act.”<sup>63</sup> This element of the court’s test continues to be important in the current formulation of the test, for it suggests that the plaintiff must invest time and effort in demonstrating that the case has the potential to be resolved in the plaintiff’s favor – or at least that the case is not frivolous. Lastly, the court recommended that the plaintiff file a request for discovery with the court with a statement of why the discovery is necessary and a short list of parties who might be able to help the plaintiff discover the defendant’s identity.<sup>64</sup>

Importing the Fourth Circuit’s findings in *Seescandy.com* to the defamation context, a New Jersey court in 2001 proposed a similar test in a case that dealt with discovering the identity of anonymous posters on online message boards. In *Dendrite International, Inc. v. Doe*,<sup>65</sup> Dendrite wanted to find the identity of an online poster to a Yahoo! message board. The court denied Dendrite’s claim, finding that Dendrite had not established harm as part of its defamation case.<sup>66</sup> In resolving the case, the court provided guidance to other courts through offering a four-part test that has some similarities to the one set forth in *Seescandy.com*. *Dendrite* has often been cited by other courts wrestling with the question of when it is appropriate to unmask the anonymity of online speakers.<sup>67</sup>

First, the court said, the plaintiff must attempt to notify the anonymous poster, including by posting on the original message board, and allow that party time to respond.<sup>68</sup> Second, the plaintiff must identify the statements allegedly made by the defendant that are actionable.<sup>69</sup> Third, as in *Seescandy.com*, the plaintiff must set forth a cause of action that would survive a motion to dismiss.<sup>70</sup> Fourth and finally, the plaintiff must provide sufficient evidence for each element of the claim, and the reviewing court should “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.”<sup>71</sup> The court did

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<sup>63</sup> *Id.* at 579-80.

<sup>64</sup> *Id.*

<sup>65</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>66</sup> *Id.* at 760.

<sup>67</sup> According to a Lexis search conducted in November 2012, the *Dendrite* case has been cited in more than 60 cases.

<sup>68</sup> *Dendrite*, 775 A.2d at 760.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The court noted, however, that this prong is “a flexible, non-technical application of the motion to dismiss standard,” *id.* at 770, and consequently, a claim could fail this prong of the test even if it would survive a traditional motion to dismiss, *see id.* at 771.

<sup>71</sup> *Id.* at 760-61.

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not provide details on how to strike this balance, but in this case, the court found that Dendrite did not demonstrate sufficient harm as part of the defamation case: there was no evidence to suggest that Dendrite's hiring had been hindered or that the anonymous postings, although incorrect, caused Dendrite's stock prices to drop.<sup>72</sup>

In the first state supreme court case to address the issue of identifying anonymous speakers in libel actions brought by public officials, *Doe v. Cahill*,<sup>73</sup> the Delaware supreme court denied a city council member's attempt to unmask a dissenting online poster. Patrick Cahill alleged that an anonymous poster calling himself or herself "Proud Citizen" had defamed Cahill in his position on the Smyrna City Council on an Internet message board hosted by a Delaware newspaper.<sup>74</sup> Upon being required to disclose Doe's identity, the ISP Comcast, as required by federal law, notified Doe, who filed an emergency motion to prevent Comcast from disclosing his or her identity.<sup>75</sup> The trial court judge denied the motion and used a "good faith" standard for determining whether to compel disclosure.<sup>76</sup>

The Delaware Supreme Court modified the *Dendrite* standard, explaining that the plaintiff must make a prima facie case for each element of the defamation claim over which he has control.<sup>77</sup> The court expressed concern that anonymous speech could be chilled by standards that are too lax with regard to protecting anonymity: "This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked."<sup>78</sup>

Moreover, the court continued, the plaintiff must make reasonable efforts to inform the anonymous defendant that he is the subject of a subpoena or court order; allow the defendant time to respond; and, in the case of online defamation actions, post a

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<sup>72</sup> *Id.* at 772. Dendrite thus failed the third prong of this test: even though its claim would survive a traditional motion to dismiss, the Appellate Division found that the district court did not err in using a "flexible, non-technical application of the motion to dismiss standard" to find that Dendrite had not alleged sufficient harm to meet this standard and unmask an anonymous speaker. *Id.* at 770-71.

<sup>73</sup> 884 A.2d 451 (Del. 2005).

<sup>74</sup> *Id.* at 454.

<sup>75</sup> *Id.* at 454-55.

<sup>76</sup> *Id.* at 455.

<sup>77</sup> *Id.* at 461.

<sup>78</sup> *Id.* at 457.

message notifying the anonymous defendant about the discovery notice on the same board in which the alleged defamation appeared.<sup>79</sup> Taken together, the notification and summary judgment requirements do not unduly burden a plaintiff with a legitimate claim while offering protection against trivial or silly claims.<sup>80</sup> The court thus discarded the second and fourth standards from *Dendrite* and retained versions of the first and third: “the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard.”<sup>81</sup>

Applying the summary judgment standard to Cahill’s claim, the court found that the statements were clearly opinion; a reasonable reader would not interpret Doe’s blog comments to be factual statements about Cahill.<sup>82</sup> Cahill thus failed to satisfy the summary judgment requirements and could not unmask the speaker who allegedly defamed him.

In 2009, Maryland’s highest court provided its own take on the revealing of the identities of anonymous posters. In *Independent Newspapers, Inc. v. Brodie*,<sup>83</sup> the court adopted elements of the tests put forth in *Dendrite* and *Cahill*. Zebulon Brodie filed suit for defamation against Independent Newspapers and several anonymous posters; Independent Newspapers filed a motion to quash the orders to reveal the identities of the posters.<sup>84</sup> The circuit court ordered the identities of the anonymous posters to be revealed; the court of appeals reversed.<sup>85</sup> Brodie had not pled a prima facie case of defamation against the five anonymous posters.<sup>86</sup>

In reversing the lower court, the Maryland Court of Appeals used the *Dendrite* test:

[W]e believe that a test requiring notice and opportunity to be heard, coupled with a showing of a prima facie case and the application of a balancing test—such as the standard set forth in *Dendrite*—most appropriately balances a speaker’s constitutional right to anonymous Internet speech with a plaintiff’s right to seek judicial redress from defamatory remarks.<sup>87</sup>

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<sup>79</sup> *Id.* at 461.

<sup>80</sup> *See id.* at 461, 464.

<sup>81</sup> *Id.* at 461.

<sup>82</sup> *Id.* at 466-67.

<sup>83</sup> 966 A.2d 432 (Md. 2009).

<sup>84</sup> *Id.* at 434-35.

<sup>85</sup> *Id.* at 435.

<sup>86</sup> *Id.* at 447.

<sup>87</sup> *Id.* at 456.

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Specifically, the court explained, a court should (1) require the plaintiff to make an effort to notify the anonymous posters that they may be subject to a subpoena; (2) give defendants sufficient time to file opposition; (3) require the plaintiff to identify the actionable statements; (4) determine whether a *prima facie* case for defamation has been made; and (5) “if all else is satisfied, balance the anonymous poster’s First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity, prior to ordering disclosure.”<sup>88</sup>

While *Cahill* and *Brodie* involved anonymous comments posted to newspapers’ websites, another recent case dealt with issues of anonymous Internet speech in a quite different context: anonymous whistleblowing. In 2009, the District of Columbia Court of Appeals set forth a new test for anonymous online speech in *Solers, Inc. v. Doe*.<sup>89</sup> In March 2005, the anti-piracy division of the Software & Information Industry Association (SIIA) received an anonymous online tip that Solers, a defense industry software company, was using pirated software.<sup>90</sup> SIIA ordered Solers to conduct an internal audit, which Solers did and found no violations; SIIA closed the case against Solers.<sup>91</sup> Solers then filed a complaint against the anonymous complainer.<sup>92</sup>

The D.C. Circuit, in dismissing Solers’s claim, set out a five-part test, several elements of which have appeared in other cases:

When presented with a motion to quash (or to enforce) a subpoena which seeks the identity of an anonymous defendant, the court should: (1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control*, and (5) determine that the

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<sup>88</sup> *Id.* at 457.

<sup>89</sup> 977 A.2d 941 (D.C. Cir. 2009).

<sup>90</sup> *Id.* at 945.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 946.

information sought is important to enable the plaintiff to proceed with his lawsuit.<sup>93</sup>

The court rejected *Brodie*'s notion of a balancing test, arguing that the summary judgment test itself provides the balance.<sup>94</sup>

One court took a different approach in determining whether to compel the release of identities of anonymous speakers. In *Matrixx Initiatives, Inc. v. Doe*,<sup>95</sup> a California appeals court rejected a claim for anonymity made by managers of a company to which Matrixx had traced several anonymous critics.<sup>96</sup> The court found that there was an insufficient connection between the managers and those whom they wished to protect, and thus the managers had no standing to assert anonymity for others.<sup>97</sup> In rejecting the claim, the court did not reach the question of which test, if any, to use in evaluating the First Amendment claims of the actual anonymous posters.<sup>98</sup>

The Ninth Circuit Court of Appeals in 2011 affirmed a district court's application of the *Cahill* test in issuing the lower court's order to reveal anonymous speakers in *In re Anonymous Online Speakers*.<sup>99</sup> Calling the *Cahill* test "the most exacting standard" and finding no clear error in the district court's application of that test to three anonymous bloggers who were critical of Quixtar (successor to Amway), the appellate court declined to overturn the order.<sup>100</sup> This case marked the first time that a federal appellate court created a test for unmasking anonymous defendants,<sup>101</sup> and the court did so with a consideration of the *content* of the speech. Indicating some reservations with the district court's decision to use the *Cahill* test, the court suggested that test was too strict a standard for application to commercial speech.<sup>102</sup> "[T]he nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous

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<sup>93</sup> *Id.* at 954.

<sup>94</sup> *Id.* at 956.

<sup>95</sup> 138 Cal. App. 4th 872, 875 (Cal. Ct. App. 2006).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 881.

<sup>98</sup> *See id.*

<sup>99</sup> 661 F.3d 1168, 1177 (9th Cir. 2011).

<sup>100</sup> *Id.* at 1176-77.

<sup>101</sup> *See* Mallory Allen, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers*, 7 WASH. J.L. TECH. & ARTS 75, 76-77 (2011) (noting that the two other circuit courts who had addressed the issue declined to create tests).

<sup>102</sup> *In re Anonymous Online Speakers*, 661 F.3d at 1177 ("By contrast with *Cahill*, this case does not involve expressly political speech but rather speech related to the non-competition and non-solicitation provisions of Quixtar's commercial contracts with its IBOs.").

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speakers in discovery disputes,” the court explained.<sup>103</sup> This is an important distinction, and it seems to mirror the developments and policy considerations that are currently emerging in the development of the online anonymous speech doctrine, as it recognizes that there is a scale of importance of anonymous speech, with anonymous political speech at the top and other forms of speech (for example, as discussed *infra*, filesharing) further down the list.

In a subsequent libel case brought by an Indian company against “allegedly ‘disgruntled former student-teachers and students of Plaintiff’ who operate internet blogs,”<sup>104</sup> a judge relied on a test closely approximating that outlined in *Dendrite*.<sup>105</sup> The district court, in declining to compel disclosure of the anonymous speakers’ identities, noted that to force the unmasking of the anonymous speakers could potentially have chilling effects:<sup>106</sup> “In addition to the plaintiff’s initial burden, the most rigorous standards require the court to balance ‘the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant.’”<sup>107</sup>

The evolution of case law described here shows how judges have tried to balance the interests between the right of anonymity and the right to hold individuals accountable for potentially actionable speech such as defamation. It has been suggested that the emerging test for compelling the release of anonymous speakers’ identities in libel cases resembles, at least in spirit, the test enunciated by Justice Potter Stewart in *Branzburg v. Hayes*<sup>108</sup> for whether the government may discover the identity of a confidential source from a reporter.<sup>109</sup> First, the government must demonstrate probable cause that the information is held by the reporter; second, the information sought cannot be obtained by other means less destructive of First Amendment rights; and third, there must be a compelling, overriding need for the information.<sup>110</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Art of Living Found. v. Does 1-10*, No. 10-CV-05022-LHK, 2011 U.S. Dist. LEXIS 129836, at \*2 (N.D. Cal. Nov. 9, 2011). This test was first articulated in *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005).

<sup>105</sup> See *Art of Living Found.*, 2011 U.S. Dist. LEXIS 129836, at \*7 n.4.

<sup>106</sup> *Id.* at \*6.

<sup>107</sup> *Id.* at \*4 (quoting *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 980).

<sup>108</sup> 408 U.S. 665 (1972).

<sup>109</sup> See, e.g., Victoria Smith Ekstrand, *Unmasking John and Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 425-26 (2003) (connecting each of the three requirements of the *Branzburg* test to similar elements in online anonymity tests).

<sup>110</sup> See *Branzburg*, 408 U.S. at 743.

However, not all commentators agree: at least one suggests that these tests may be distinguished, pointing out that “under the reporter’s privilege analysis in most jurisdictions, courts need not inquire into the strength of the claim of a plaintiff subpoenaing the identity of a reporter’s confidential source.”<sup>111</sup>

The nature of common law, of course, is such that over time, judicial decisions incrementally confront new problems and build to larger solutions. The case law described here suggests a growing consensus toward a national standard, best articulated in *Dendrite* and *Cahill*, that recognizes the First Amendment interests of anonymity in subpoenas seeking the identity of online speakers. Moreover, it seems reasonable to assume that other courts will follow the content distinction raised by the Ninth Circuit in *In re Anonymous Online Speakers*.

The *Dendrite* and *Cahill* tests recognize the importance of anonymous speech while still providing the potential to find out the speaker’s identity if the speech causes sufficient harm. Justice Thomas’s concurrence in *McIntyre* does not address a case in which the speech at issue is potentially libelous. In addition, unlike *McIntyre*, many of these libel cases do not involve political speech (*Cahill* does, of course, but *Dendrite*, *Solers*, and *Anonymous Online Speakers* do not). Nearly all the anonymous speakers identified by Justice Thomas were engaged in debate about the governance of the country and the direction such governance should take.<sup>112</sup> *McIntyre* itself concerned an anonymous political pamphlet. While Justice Thomas’s historical foundation provides the context for anonymous political speech, it does not give much guidance for speech that is not political – particularly speech that is also potentially libelous. That said, the *Dendrite/Cahill* approach does acknowledge the importance of protecting anonymous speech in circumstances where the speech is not libelous and provides a

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<sup>111</sup> Jocelyn V. Hanamirian, *The Right to Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good*, 35 COLUM. J.L. & ARTS 119, 120 (2011). However, Hanamirian does not recommend “grafting the *Dendrite* test wholesale onto the privilege analysis.” *Id.* at 140. Rather, she supports a mandatory balancing test in the federal shield law to evaluate “whether ‘the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.’” *Id.* (quoting H.R. 985, 111th Cong. § 2(a)(4) (2009)).

<sup>112</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360-61 (Thomas, J., concurring) (listing, among others, John Peter Zenger, “Publius” of the *Federalist Papers*, and “Leonidas” (actually named Dr. Benjamin Rush), who had attacked members of Congress for fraud). In fact, Justice Thomas himself notes the limitation: “[I]t seems that the Framers understood the First Amendment to protect an author’s right to express his thoughts *on political candidates or issues* in an anonymous fashion.” *Id.* at 371 (emphasis added).

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balancing test for circumstances where the speech may be libelous. In so doing, it abides by the spirit of Justice Thomas's *McIntyre* concurrence, privileging anonymous speech unless a prima facie case can be demonstrated. As the next Part will demonstrate, the *Dendrite* test informed what may be a similar test to determine the appropriate unmasking of anonymous filesharers.

III. COPYRIGHT INFRINGEMENT: A BALANCING TEST  
AND THE DMCA

A second area of case law involving online anonymity involves alleged copyright infringement. The conflict between the protected First Amendment rights of anonymous speakers and the rights of creators of original works has resulted in a number of cases addressing whether, when, and how to unmask anonymous filesharers. The theory behind this dichotomy has been nicely outlined by law professor Michael Birnhack.<sup>113</sup> Professor Birnhack suggests that there are two views of the relationship between copyright law and free speech: an internal view that focuses solely on copyright law itself, and an external view that examines the conflict between congressional copyright legislation power and the First Amendment.<sup>114</sup> He asserts that both areas need to be taken into account when courts are faced with copyright infringement claims.<sup>115</sup> This Part attempts to do just that.

Generally speaking, courts have suggested that the First Amendment right of anonymity for filesharers who are engaged in uploading and downloading copyrighted works is “exceedingly small.”<sup>116</sup> However, organizations like the Electronic Frontier Foundation (EFF) have expressed dismay at the methods under which some organizations have attempted to unmask anonymous downloaders.<sup>117</sup> In the last five years, business models have

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<sup>113</sup> See Michael D. Birnhack, *Copyright Law and Free Speech after Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003).

<sup>114</sup> See *id.* at 1277.

<sup>115</sup> See *id.* at 1309-10 (“I will argue, first, that the external point of view is a constitutional imperative, in addition to being a convenient interpretive check on the narrative. I will then argue that the external view should be taken in addition to the internal view. Both views, together, serve as a check on the conceptual consistency of copyright law.”).

<sup>116</sup> *Call of the Wild Movie, LLC v. Does 1-1062*, 770 F. Supp. 2d 332, 349 (D.D.C. 2011) (listing recent cases that have so found).

<sup>117</sup> Cindy Cohn, *Mass Copyright Litigation: New Challenge for the Federal Courts*, ELECTRONIC FRONTIER FOUND. (Apr. 19, 2011), <https://www.eff.org/deeplinks/2011/04/mass-copyright-litigation-new-challenge-federal> (“Over 130



developed with the primary focus of suing numerous defendants for copyright infringement. Cases involving such businesses, which are sometimes referred to as “copyright trolls”<sup>118</sup> for their mass copyright litigation tactics, can be divided into two categories. First, businesses like Righthaven, LLC purchase copyrights from the original holders and aggressively pursue small summary actions against alleged copyright infringers.<sup>119</sup> Most of the time, these companies know the identities of the defendants, and thus these cases will not be discussed in this Article.<sup>120</sup>

The other kind of mass copyright litigation deals with anonymous downloading of music and other copyrighted materials. Companies such as the U.S. Copyright Group<sup>121</sup> and DigiProtect<sup>122</sup> sometimes issue subpoenas numbering in the thousands to

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mass copyright cases – i.e., copyright infringement cases joining together hundreds and often thousands of Doe defendants at once – have been filed in just the last 15 months in federal district courts across the country, targeting over 135,000 people.”).

<sup>118</sup> For a review of several of these organizations, see *Copyright Trolls*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/copyright-trolls](http://www.eff.org/issues/copyright-trolls) (last visited Mar. 28, 2012).

<sup>119</sup> Righthaven LLC is currently shut down; after a number of defeats in the courts and mounting debts, a judge seized its assets and put them into receivership to be auctioned. See Steve Green, *Judge strips Righthaven of Rights to 278 Copyrights and its Trademark*, VEGAS INC. (Mar. 5, 2012), <http://www.vegasinc.com/news/2012/mar/05/judge-strips-righthaven-rights-278-copyrights-and/>.

<sup>120</sup> See, e.g., *Righthaven LLC v. Realty One Group, Inc.*, No. 2:10-CV-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010) (alleged copyright infringement found to be a fair use); see also Eric Goldman, *Top Internet Law Developments of 2011*, TECH. & MARKETING L. BLOG (Jan. 27, 2012), [http://blog.ericgoldman.org/archives/2012/01/top\\_internet\\_la.htm](http://blog.ericgoldman.org/archives/2012/01/top_internet_la.htm) (providing an excellent overview and summary of the Righthaven “implosion”).

<sup>121</sup> For coverage of the U.S. Copyright Group’s activities, see Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, HOLLYWOOD REP. (Dec. 21, 2010, 10:56 AM PST), <http://www.hollywoodreporter.com/blogs/thr-esq/litigation-campaign-quietly-targets-tens-63769>; and *USCG v. The People*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/cases/uscg-v-people> (last visited Nov. 24, 2012).

<sup>122</sup> See, for example, two very similar cases from the same federal court: *DigiProtect USA Corp. v. Does 1-266*, No. 10 Civ. 8759(TPG), 2011 WL 1466073 (S.D.N.Y. Apr. 13, 2011); and *DigiProtect USA Corp. v. Does 1-240*, No. 10 Civ. 8760(PAC), 2011 WL 4444666 (S.D.N.Y. Sept. 26, 2011). In both cases, pornographic films (“Let Me Jerk You 2” and “Anal Fanatic Vol. 1”) were alleged to have been illegally downloaded. The court in both cases modified or dismissed the orders so that they would include only ISPs that were in New York. Judge Thomas Griesa was particularly dismissive of the company’s business model: “Digiprotect acquires such rights from various copyright holders in order to—as Digiprotect’s counsel described it—‘educate consumers.’ This ‘education’ of consumers consists primarily of bringing suit against such consumers and seeking ‘modest settlements.’” *Does 1-266*, 2011 WL 1466073, at \*1.

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anonymous defendants. This subpoena power comes from the Digital Millennium Copyright Act of 1998 (DMCA),<sup>123</sup> which allows copyright holders this method to identify alleged infringers by subpoenaing their ISPs. Specifically, § 512(h) of the DMCA contains the subpoena requirements, and it provides, in relevant part:

(h) Subpoena to identify infringer.

(1) Request. A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request. The request may be made by filing with the clerk—

(A) a copy of a notification . . . ;

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena. The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena. If the notification . . . is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) Actions of service provider receiving subpoena. Upon receipt of the issued subpoena . . . the service provider shall expeditiously disclose to the copyright owner or person authorized by the

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<sup>123</sup> See 17 U.S.C. § 512 (2006).

copyright owner the information required by the subpoena . . . .<sup>124</sup>

The DMCA also, however, provides four “safe harbors” under which ISPs may avoid contributory infringement liability: first, under §512(a), an ISP is protected if it serves as nothing more than a conduit through which alleged infringement occurs; second, §512(b) protects the caching (or temporary storage) function of an ISP in delivering content to users; third, §512(c) limits the ISP’s liability for infringing material that resides on its system as a result of its users; and fourth, under §512(d), an ISP’s linking of users to locations with infringing material does not result in liability.<sup>125</sup>

In evaluating whether to compel discovery of anonymous defendants, several courts have looked to a five-part test established in 2004 by Judge Denny Chin of the Southern District of New York (now at the Second Circuit) in *Sony Music Entertainment v. Does 1-40*.<sup>126</sup> Judge Chin examined earlier cases and suggested that the factors that should be considered include: “(1) a concrete showing of a prima facie claim of actionable harm . . . ; (2) specificity of the discovery request . . . ; (3) the absence of alternative means to obtain the subpoenaed information . . . ; (4) a central need for the subpoenaed information to advance the claim . . . ; and (5) the party’s expectation of privacy . . . .”<sup>127</sup> In *Sony*, Judge Chin found that the Does’ stated First Amendment claims for a right of anonymity did not override the need for disclosure of their identities.<sup>128</sup>

The *Sony* test was also used in a 2011 case aggregating three separate actions brought by the U.S. Copyright Group against over five thousand anonymous defendants suspected of illegally downloading a number of copyrighted movies.<sup>129</sup> Time Warner alleged that having to produce so much information in response to the complaints was an undue burden.<sup>130</sup> The court considered whether joining the defendants together in a single action was warranted and found that it was, noting that “every downloader [is] also an uploader of the illegally transferred file(s).”<sup>131</sup> The court concluded that it would be premature to cut off any jurisdictional discovery in response to Time Warner’s concerns that the D.C.

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<sup>124</sup> *Id.* § 512(h).

<sup>125</sup> *See id.* § 512(a)-(d).

<sup>126</sup> 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

<sup>127</sup> *Id.* at 564-65.

<sup>128</sup> *See id.* at 567.

<sup>129</sup> *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332 (D.D.C. 2011).

<sup>130</sup> *See id.* at 338.

<sup>131</sup> *Id.* at 343.

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court would have jurisdiction for only a limited number of defendants who happened to infringe in the District of Columbia.<sup>132</sup>

Turning to the issue of defendants' anonymity, the court applied the *Sony* test (explicitly rejecting the more stringent *Dendrite* test)<sup>133</sup> and found that the plaintiffs prevailed on each element.<sup>134</sup> The court did, however, grant Time Warner's motion to quash one of the actions because the plaintiffs did not adhere to the Federal Rules of Civil Procedure mandating the personal service of subpoenas.<sup>135</sup>

There have been several appellate cases addressing filesharing in the context of unveiling anonymous defendants. In the first, in 2003, the RIAA sought to compel Verizon Internet Services to identify two of its subscribers who were using peer-to-peer (P2P) programs to trade copyrighted music.<sup>136</sup> Verizon alleged that §512(h) of the DMCA did not authorize the release of the names because the ISP was acting merely as a conduit for communications and was protected as such under §512(a), the safe harbor for conduits.<sup>137</sup>

In finding for Verizon's protection under the §512(a) safe harbor, the court found nothing in the legislative history, the structure or the terms of the DMCA to support the RIAA's position.<sup>138</sup> The court expressed sympathy for the RIAA's concerns about P2P filesharing but noted, "It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture . . . ."<sup>139</sup>

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<sup>132</sup> See *id.* at 345-48.

<sup>133</sup> See *id.* at 349 n.7 ("The First Amendment interests implicated in defamation actions, where expressive communication is the key issue, is considerably greater than in file-sharing cases. The Court therefore believes that the *Sony* test is more applicable to the present case.").

<sup>134</sup> See *id.* at 354.

<sup>135</sup> See *id.* at 362.

<sup>136</sup> See *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003). See Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 *BERKELEY TECH. L.J.* 405 (2004), for an in-depth examination of the entire *Verizon* litigation saga, from complaint through final judgment. See also Katherine Reynolds, Comment, *One Verizon, Two Verizon, Three Verizon, More? – A Comment: RIAA v. Verizon and How the DMCA Subpoena Power Became Powerless*, 23 *CARDOZO ARTS & ENT. L.J.* 343 (2005) for a criticism of the *Verizon* case: "The plain text of the statute can be interpreted constitutionally and effectively if section 512(h) is meant to apply to all types of service providers covered by the Act." Reynolds, *supra*, at 378.

<sup>137</sup> See *Verizon*, 351 F.3d at 1231.

<sup>138</sup> See *id.* at 1234-38.

<sup>139</sup> *Id.* at 1238.

A divided Eighth Circuit Court of Appeals extended the same §512(a) protection to Charter Communications in a 2005 case brought by the RIAA.<sup>140</sup> However, in dicta the majority explained its problems with the subpoena power contained in §512(h):

We comment without deciding that this provision *may* unconstitutionally invade the power of the judiciary by creating a statutory framework pursuant to which Congress, via statute, compels a clerk of a court to issue a subpoena, thereby invoking the court's power. Further, we believe Charter has at least a colorable argument that a judicial subpoena is a court order that must be supported by a case or controversy at the time of its issuance.<sup>141</sup>

Judge Diana Murphy dissented from what she viewed was a narrow reading of the DMCA.<sup>142</sup> She claimed that the DMCA subpoena power is an important tool for copyright holders to fight infringement, and that to interpret §512(h) in the way the majority did “block[s] copyright holders from obtaining effective protection against infringement through conduit service providers.”<sup>143</sup> She further argued that Charter had not shown that the DMCA violates the First Amendment or users' anonymity.<sup>144</sup>

Most recently, in the Second Circuit, an anonymous filesharing defendant argued that his or her right of anonymity would be infringed by revealing his or her identity to Arista, a music producer.<sup>145</sup> The court rejected the defendant's claim that the *Sony* test used by the district court was the wrong legal standard.<sup>146</sup> As for the defendant's additional claim of fair use, the court sternly admonished the defendant for “hiding behind a shield of anonymity”<sup>147</sup> that made it impossible to evaluate whether the use of the material would satisfy the fair use test.<sup>148</sup>

While it is impossible to predict whether the *Sony* test will be widely adopted by district and appellate courts in dealing with DMCA subpoenas, its similarity to the well-established *Dendrite* test for revealing anonymous posters of allegedly libelous material

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<sup>140</sup> See *In re Charter Comm'ns*, 393 F.3d 771 (8th Cir. 2005).

<sup>141</sup> *Id.* at 777-78.

<sup>142</sup> See *id.* at 778 (Murphy, J., dissenting).

<sup>143</sup> *Id.*

<sup>144</sup> See *id.* at 785.

<sup>145</sup> See *Arista Records LLC v. Doe 3*, 403 F.3d 110 (2d Cir. 2010).

<sup>146</sup> See *id.* at 119.

<sup>147</sup> *Id.* at 124.

<sup>148</sup> *Id.*

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suggests that it may well enjoy widespread acceptance as cases arise. As noted above, the *Sony* test is less stringent than that outlined in *Dendrite*, and this is appropriate given the First Amendment considerations present in libel cases.

However, the subpoena power of the DMCA itself, as noted above, has come under some judicial scrutiny, if only in dicta. Commentators share several of these concerns and have suggested alternatives to the existing judicial approaches to resolve infringement cases. Professor Birnhack, discussed above, proposes a two-pronged method for copyright cases: the first prong grounded in an internal examination of copyright law on its own, and the second that takes into account its constitutional setting, including the First Amendment.<sup>149</sup> Another critic calls the *Sony* test “impressive on form but weak on substance”<sup>150</sup> and suggests that the music industry and filesharers engage in a voluntary collective licensing agreement, under which filesharers would pay a monthly fee to share copyrighted music over P2P systems.<sup>151</sup>

Several legal commentators take issue with some of the procedural issues in anonymous filesharing cases. The DMCA’s subpoena power, §512(h), has come under attack, with allegations that it is unconstitutional because it lacks safeguards against abuse, most notably “a means for John Doe to oppose the subpoena to disclose his identity, and defend his actions prior to the loss of anonymity.”<sup>152</sup> Still other criticisms of the DMCA focus on the questions of personal jurisdiction for defendants and of whether defendants can be joined to hundreds or thousands of other potential defendants in single filesharing cases (the author suggests that courts rightly defer the consideration of personal jurisdiction but should not defer the question of misjoinder).<sup>153</sup> Another commentator suggests that a class defense would be appropriate for the masses of defendants, citing the *David vs. Goliath* form that many of these cases take: “powerful commercial plaintiffs sue many dispersed, noncommercial defendants.”<sup>154</sup>

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<sup>149</sup> See Birnhack, *supra* note 113, at 1330.

<sup>150</sup> Nicholas M. Menasche, *Recording Industry Missteps: Suing Anonymous Filesharers as a Last Resort*, 26 PACE L. REV. 273, 295 (2005).

<sup>151</sup> See *id.* at 302.

<sup>152</sup> Levinsohn, *supra* note 7, at 263.

<sup>153</sup> See Dickman, *supra* note 7, at 1054. Dickman also suggests that courts are too quick to sacrifice anonymity: “Moreover, in light of the fact that the Does are engaged in anonymous expression that is due at least some protection, there are strong arguments to be made that the record companies should be forced to file procedurally compliant lawsuits before the Does are forced to surrender their anonymity.” *Id.* at 1118.

<sup>154</sup> Jonathan Reich, *The Class Defense: Why Dispersed Intellectual Property Defendants Need Procedural Protections*, 2010 DUKE L. & TECH. REV. 009, ¶ 1.

Perhaps the most critical concern facing both copyright holders and filesharers is the ability of the DMCA to keep up with technological developments. Professor Annemarie Bridy suggests that the DMCA has done well for both sides in hosted content (such as YouTube), but has not scaled well to cope with P2P systems because of the high volume of defendants.<sup>155</sup> She proposes several alternatives, from amending §512(h) to include those now covered by the §512(a) safe harbor provisions,<sup>156</sup> to a “three strikes” protocol,<sup>157</sup> to several types of alternative dispute resolution.<sup>158</sup> As Professor Bridy points out, “Including thousands of allegedly infringing files in a single § 512(c) takedown notice is a workable way of killing lots of birds with one stone when it comes to hosted content, but including thousands of defendants in a single copyright infringement lawsuit is not analogously effective in the P2P context.”<sup>159</sup>

We share some of the concerns of these critics, specifically those that consider whether the DMCA’s subpoena power contained in §512(h) provides sufficient safeguards for speakers’ anonymity rights. An examination of §512(h) reveals no consideration of the First Amendment protections guaranteed to anonymous speakers – an excellent example of Birnhack’s internal view of copyright that does not take into consideration the (external) First Amendment implications of anonymous communication.

However, the *Sony* test, similar as it is to the *Dendrite* and *Cahill* tests for online libel, may provide sufficient external checks on the unbridled subpoena power of copyright holders. Purely infringing speech should not have First Amendment protection, as the First Amendment does not generally protect law breaking.<sup>160</sup> While not as stringent as *Dendrite/Cahill*, the *Sony* test provides sufficient consideration of the First Amendment issues in filesharing cases. And as a policy consideration, this is appropriate

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<sup>155</sup> Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 736 (2011).

<sup>156</sup> *Id.* at 725.

<sup>157</sup> *Id.* at 727.

<sup>158</sup> *Id.* at 729-36.

<sup>159</sup> *Id.* at 724-25.

<sup>160</sup> *But see* Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 771-75 (2001) (discussing how, under current First Amendment doctrine, law-breaking activities such as speeding could be protected under the First Amendment if they are considered sufficiently “expressive”). One could imagine some circumstances in which infringing speech should have protection – perhaps, for example, as a political statement on the evils of recording companies raking in millions of dollars on the backs of performers. There have been no cases of which we are aware that take this position, but that is not to say that there may not be First Amendment implications in such a case.

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given that the First Amendment implications of filesharing (which is often infringing) are less critical to democratic self-governance than those usually implicated in online libel suits or in electioneering speech. Used in conjunction with the DMCA, the *Sony* test adequately balances the rights of anonymous speakers against those of copyright holders.<sup>161</sup> Anonymous speech, then, to garner the most protection, should deal with issues of political importance. This approach rings true with the historical foundation proposed by Justice Thomas in *McIntyre* as well as with First Amendment jurisprudence as it has developed through the years. We turn next to what may be the most sensitive of the areas in which anonymous speech occurs online: political/election speech.

IV. ANONYMOUS POLITICAL SPEECH AND CAMPAIGN  
FINANCE LAWS

Laws prohibiting anonymous political speech have proliferated at the state and federal levels through legislative efforts to control the influence of money in political campaigns.<sup>162</sup> Most states have “disclosure” and “disclaimer” laws that require speakers who seek to influence elections through financial expenditures to identify themselves and disclose sources of money.<sup>163</sup> But these statutes raise an important question: when is the First Amendment interest to remain anonymous while engaging in political speech outweighed by the state’s interest in transparent political campaigns? While many of the anonymity issues in campaign-finance law are not specific to the Internet, online political speech and the increased access to donor information have also raised new questions about the proper role of anonymity in campaign-finance law.

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<sup>161</sup> It is worth noting here that Justice Samuel Alito has recently questioned whether 17 U.S.C. § 402 (Notice of copyright: Phonorecords of sound recordings) applies to allegations of online copyright infringement by downloading digital files. In a dissent from the denial of certiorari in *Harper v. Maverick Recording Co.*, 131 S. Ct. 590 (2010), Justice Alito suggested that the required notice may not appear on many digital files, causing the potential for innocent infringement: “Under this [Fifth Circuit] interpretation, it is not necessary that the infringer actually see a material object with the copyright notice.” *Id.* at 591 (Alito, J., dissenting).

<sup>162</sup> For the text of individual state laws, see *The Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT, <http://disclosure.law.ucla.edu/> (last visited Nov. 25, 2012).

<sup>163</sup> *Id.*; see also *Grading State Disclosure 2008: Evaluating States’ Efforts to Bring Sunlight to Political Money*, CAMPAIGN DISCLOSURE PROJECT, <http://campaigndisclosure.org/gradingstate/GSD08.pdf> (last visited July 2, 2012).



The question of a First Amendment right to engage in anonymous campaign speech is one of growing legal significance after the Supreme Court upended its thirty-year-long framework for campaign finance law in 2010. In this Part, we will (1) provide a brief history of campaign-finance law precedents; (2) discuss the landmark 2010 decision of *Citizens United v. FEC*; (3) evaluate the role of the *Talley* and *McIntyre* precedents in contemporary campaign-finance doctrine; (4) assess the First Amendment's anonymous speech right in relation to current disclosure and disclaimer laws; and (5) argue that the government interests in anticorruption, information, and enforcement should factor heavily in disputes over anonymous speech claims against disclosure and disclaimer laws.

Modern constitutional battles over political speech and campaign-finance laws began in earnest with *Buckley v. Valeo*, the 1975 case in which the U.S. Supreme Court wrestled with the complex problem of when money is speech for purposes of the First Amendment.<sup>164</sup> Under review was the Federal Election Campaign Act of 1971, amended in 1974,<sup>165</sup> which created contribution and expenditure limits for individuals and corporations seeking to donate money to political candidates and organizations. In reviewing this post-Watergate law aimed at controlling the influence of money in elections, the Supreme Court embraced the general argument that campaign-finance laws raise troublesome First Amendment problems and therefore are subjected to “exacting scrutiny.”<sup>166</sup> In applying this heightened level of scrutiny to the FECA, the Court upheld legislative limits on the amount of direct contributions to political candidates but struck down laws that limited spending by candidates and that prohibited independent expenditures. The distinction hinged on the different degrees to which the contributions and expenditures were sufficiently tailored to meet the government “anti-corruption” interest; that is, the Court determined that laws limiting direct contributions to candidates prevented actual corruption and the appearance of corruption, while laws limiting independent expenditures were not sufficiently related to the anti-corruption interest.<sup>167</sup>

In *Buckley*, the Court upheld the disclosure laws in the FECA after applying an “exacting scrutiny” analysis. The Court found that disclosure laws appropriately advanced three government interests: an “informational interest” of providing the

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<sup>164</sup> 424 U.S. 1 (1976).

<sup>165</sup> See 2 U.S.C. § 431 (2006).

<sup>166</sup> *Buckley*, 424 U.S. at 16.

<sup>167</sup> See *id.* at 23, 26-29.

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electorate with information about the sources of campaign money; an “anti-corruption interest” in deterring actual corruption and avoiding the appearance of corruption; and the “enforcement interest” that is served by the necessity of reporting and disclosure rules to detect violations of campaign-finance laws more generally.<sup>168</sup>

The *Buckley* framework guided campaign-finance jurisprudence for nearly thirty years, expanded by several additional complex and complicated decisions. The Court embraced the right of corporations to make independent expenditures in opposition to ballot initiatives in the 1978 case *First National Bank of Boston v. Bellotti*.<sup>169</sup> However, in 1990, the Court upheld state-law limits on corporate independent expenditures, ruling in *Austin v. Michigan Chamber of Commerce* that the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>170</sup> Upholding Congress’s ability to regulate campaign spending even further, the Court in *McConnell v. FEC* upheld major components of the 2002 Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold, that expanded several campaign-finance laws, including limits on donations to political parties and limits on independent expenditures by corporations and unions in the weeks prior to an election.<sup>171</sup> *McConnell* would be the high point of deference to government regulations in campaign-finance law. After shifts in the Court’s makeup with the appointments of Chief Justice John Roberts and Justice Samuel Alito, the Court began to retreat from its deference in 2007, when in *FEC v. Wisconsin Right to Life* the Court narrowed its definition of “electioneering communication” to only that which was the “functional equivalent of express advocacy,” freeing a right-to-life organization from regulation in its “issue advocacy” advertising.<sup>172</sup>

The landmark 2010 *Citizens United v. FEC* ruling upended the *Buckley* framework, overturning *Austin* and parts of *McConnell*.<sup>173</sup> The Court ruled that limits on independent expenditures violated corporations’ First Amendment rights and did not meet exacting scrutiny standards. Politically, the Court’s decision was met with harsh criticism from the Democratic left and

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<sup>168</sup> *See id.* at 67-68.

<sup>169</sup> 435 U.S. 765 (1978).

<sup>170</sup> 494 U.S. 652, 660 (1990).

<sup>171</sup> 540 U.S. 93 (2003).

<sup>172</sup> 551 U.S. 449, 451 (2007).

<sup>173</sup> *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

praise from the Republican right as a major turning point against the constitutionality of campaign finance laws. Many First Amendment scholars also praised the decision, including several considered politically liberal.<sup>174</sup>

It is particularly important to note that the Court upheld, in an 8-1 vote, the federal disclosure and disclaimer laws.<sup>175</sup> This might seem peculiar, especially in light of the Court's emphasis on treating corporate and non-corporate speakers equally for the purposes of First Amendment protections. If Margaret McIntyre can remain anonymous in distributing her election preferences, why can't corporations?

The *Talley* and *McIntyre* precedents discussed above establish earlier constitutional limits to prohibiting anonymous political speech. In *McIntyre*, the Court ruled that the "informational interest" in Ohio's law, as applied to McIntyre's distribution of an anonymous flier about a school funding referendum, was not strong enough: "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit," the Court wrote.<sup>176</sup> "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."<sup>177</sup> While the Supreme Court was satisfied with the "informational interest" in previous campaign finance cases, such as *Buckley* and *Bellotti*, the Court found that the informational interest in *McIntyre* was different. *Buckley* and *Bellotti* involved corporate expenditures; "neither case involved a prohibition of anonymous campaign literature."<sup>178</sup> The *McIntyre* court also noted that the corruption interests at stake with corporate expenditure regulations had no relation to the individual speech rights of McIntyre's choice to remain anonymous in distributing photocopied handbills. As Justice Ginsburg noted in her concurrence,

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<sup>174</sup> See Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010) (expressing surprise at the overwhelming criticism of what the author regards as a reasonable ruling); Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 975 (2011) (defending *Citizens United* for protecting "individual rights"). *But see* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 581 (2011) (lamenting the "incoherence" of the ruling); Robert E. Drechsel, *The Limits of Libertarianism*, CENTER FOR JOURNALISM ETHICS (Feb. 4, 2010), [http://journalismethics.info/feature\\_articles/limits\\_of\\_libertarianism.html](http://journalismethics.info/feature_articles/limits_of_libertarianism.html) (offering a libertarian critique of *Citizens United*).

<sup>175</sup> See *Citizens United*, 130 S. Ct. at 914-915.

<sup>176</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

<sup>177</sup> *Id.* at 349.

<sup>178</sup> *Id.* at 353.

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The Court's decision finds unnecessary, over intrusive, and inconsistent with American ideas the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not by name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.<sup>179</sup>

In *Citizens United*, the Court upheld BCRA's disclosure and disclaimer requirements, which require electioneering communications to include a disclaimer such as "is responsible for the content of this advertising"<sup>180</sup> and the disclosure of financial sources for anyone who spends more than \$10,000.<sup>181</sup> While noting that disclosure and disclaimer laws "may burden the ability to speak," the Court reasoned that they "impose no ceiling on campaign-related activities . . . and do not prevent anyone from speaking."<sup>182</sup> Applying what it called the "exacting scrutiny" standards from *Buckley*, the Court said such laws require a "substantial relation" between the requirements and a "sufficiently important" government interest.<sup>183</sup> In finding that the laws were facially constitutional and constitutional as applied to *Citizens United's Hillary: The Movie* documentary, the Court said the disclaimer law for television advertising allows citizens to "evaluate the arguments for which they are being subject" and is a less restrictive alternative to more restrictive campaign laws.<sup>184</sup> The public's "informational interest" in knowing who is speaking about a candidate shortly before an election is sufficient to require disclosure and disclaimers.

The Court concluded its relatively brief discussion of the disclosure and disclaimer provisions by recognizing the power of the Internet to facilitate information about who is funding electioneering speech. "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>185</sup>

Justice Thomas dissented on the disclosure and disclaimer

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<sup>179</sup> *Id.* at 358 (Ginsburg, J., concurring).

<sup>180</sup> *Citizens United*, 130 S. Ct. at 914 (quoting 2 U.S.C. § 442d(d)(2) (2006)).

<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 915.

<sup>185</sup> *Id.* at 916.

holding in *Citizens United*, and, in doing so, he underscored one fascinating illustration of the philosophical debate over anonymity and political speech that can be found in the contrasting views of his fellow conservative Justice Antonin Scalia. Justice Thomas articulated in *McIntyre* a near absolutist argument about political speech rights and anonymity based on originalism. In his *Citizens United* opinion, Thomas began by citing *McIntyre* as representing the principle that “Congress may not abridge the ‘right to anonymous speech’ based on the ‘simple interest in providing voters with additional relevant information.’”<sup>186</sup> Justice Scalia, on the other hand, has said the original intent of the Framers was far from clear and that deference to the legislature and the interests of transparency in elections were important.<sup>187</sup> In his *McIntyre* dissent, Scalia criticized the Court’s overreaching in taking away the authority of states to regulate state elections despite a near consensus among the states on the importance of disclosure requirements.<sup>188</sup>

The Justices’ contrasting views were on display again in the 2010 case *Doe v. Reed*, in which the Court in an 8-1 vote ruled that disclosure of names and addresses of individuals who signed petitions for ballot initiatives did not on its face violate their rights of anonymity under the First Amendment.<sup>189</sup> The *Doe* plaintiffs, who signed petitions for a ballot initiative eliminating gay civil unions in Washington State, had argued that disclosure of their identities would expose them to harassment, pointing to a pro-gay organization’s intent to post the petitions online.<sup>190</sup> The state had determined that the petitions were required to be released under the state’s public records law.<sup>191</sup> In applying “exacting scrutiny” to the law, the Court found a “substantial relation” between the disclosure requirement and the “sufficiently important” government interest.<sup>192</sup> The Court focused on the state’s interest in the integrity of the electoral process, indicating that disclosure helps prevent corruption and fraud, as well as foster government transparency and accountability.<sup>193</sup> The majority left open the door for an as-applied challenge if the plaintiffs provided evidence of

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<sup>186</sup> *Id.* at 980 (Thomas, J., concurring in part and dissenting in part) (quoting *McConnell v. Fed. Elections Comm’n*, 540 U.S. 93, 276 (2003) (Thomas, J., concurring in part and dissenting in part)).

<sup>187</sup> *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

<sup>188</sup> *Id.*

<sup>189</sup> 130 S. Ct. 2811 (2010).

<sup>190</sup> *See id.* at 2825 (Alito, J., concurring).

<sup>191</sup> *See id.* at 2815 (majority opinion).

<sup>192</sup> *See id.* at 2818.

<sup>193</sup> *Id.* at 2819.

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harassment. Justice Alito emphasized this “harassment” exception to the general disclosure doctrine in his concurrence.<sup>194</sup>

Again Justice Thomas and Scalia’s bipolar views of disclosure and anonymity were on display. Justice Thomas dissented, arguing that disclosure of ballot petition names violates the First Amendment speech and associational rights of individuals and “chills citizen participation” in elections.<sup>195</sup> Justice Scalia’s concurrence made it clear he thought *McIntyre* was a radical mistake in First Amendment jurisprudence, while speaking of the importance of transparency in electoral politics throughout American history. “We should not repeat and extend the mistake of *McIntyre*,” Justice Scalia wrote.<sup>196</sup> “There, with neither textual support nor precedents requiring the result, the Court invalidated a form of election regulation that had been widely used by the States since the end of the 19<sup>th</sup> century.”<sup>197</sup> Justice Scalia traced the history of nonsecret voting and public legislating in history in deciding to uphold Washington State’s determination that the ballot petitions under review could be released under the state’s public records law.<sup>198</sup> Going further on the role of anonymity in election speech, Justice Scalia wrote,

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.<sup>199</sup>

The *Citizens United* and *Doe v. Reed* decisions demonstrate that the Supreme Court views with skepticism claims of First Amendment violations by disclosure and disclaimer laws. These laws “do not prevent anyone from speaking,” as the Court noted in

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<sup>194</sup> *See id.* at 2822 (Alito, J., concurring).

<sup>195</sup> *Id.* at 2837 (Thomas, J., dissenting).

<sup>196</sup> *Id.* at 2832 (Scalia, J., concurring)

<sup>197</sup> *Id.*

<sup>198</sup> *See id.* at 2833-36.

<sup>199</sup> *Id.* at 2837.

*Citizens United*,<sup>200</sup> and are less problematic than direct regulation of expenditures. However, despite the favorable treatment in these cases, the long-term constitutional validity of disclosure and disclaimer laws is far from certain. For example, Darryl Wold, a former chairman of the FEC who wrote an amicus brief in support of *Citizens United*, has criticized the Court's unsophisticated treatment of the anonymity interests in *Citizens United*:

In light of the background of the Court's protection for anonymity in political speech, and the detailed analysis in *McIntyre*, that rather summary rejection of plaintiff's challenge [to the disclosure and disclaimer rules] was somewhat of a surprising result. Possibly more surprising than the result itself, however, was the Court's analysis, which was not only brief, but was dramatically inconsistent with the Court's jurisprudence set out in such detail in *McIntyre*, did not acknowledge taking a different approach, and failed to even mention *McIntyre* or the effect of its new decision on that earlier case.<sup>201</sup>

Wold went on to say that "*Citizens United* also raises the question of whether *McIntyre* is still good law, and if it is, how it will be applied."<sup>202</sup> Wold's analysis underscores how the Supreme Court has inconsistently applied its exacting scrutiny analysis to disclosure and disclaimer rules, prioritizing the "informational interests" in compelled disclosure of speakers' identities in election-related speech in some cases while minimizing it in others. In minimizing the potential anonymity right compromised by disclosure rules, the former FEC commissioner is not alone. In fact, disclosure and disclaimer laws are quickly becoming the next battleground for opponents of campaign-finance laws, emboldened by *Citizens United* and its effects, including the Supreme Court's June 2012 decision to overturn a Montana Supreme Court decision that had upheld a century-old campaign finance law restricting corporate money in Montana state elections.<sup>203</sup> To conclude this Part, we will sketch four developments that suggest that disclosure and disclaimer laws will increasingly be scrutinized and that the law is far from settled.

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<sup>200</sup> 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

<sup>201</sup> Darryl R. Wold, *Tell Us Who You Are – Maybe: Speaker Disclaimers After Citizens United*, 16 NEXUS 171, 191 (2011).

<sup>202</sup> *Id.* at 193.

<sup>203</sup> *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012), *rev'g* *Western Tradition Partnership v. Bullock*, 271 P.3d 1 (Mont. 2011).

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First, the FEC has been criticized for watering down disclosure regulations after *Citizens United* so that not only are there unlimited corporate expenditures in federal campaigns, but much of it remains hidden from public scrutiny.<sup>204</sup> The FEC rules narrowly construed the disclosure laws to apply only to donors who “specifically designated” their money for electioneering communications.<sup>205</sup> Professor Richard Hasen, widely published in campaign finance law, has accused the FEC of refusing to enforce existing laws and blocking investigations into disclosure-law violations.<sup>206</sup> Despite *Citizens United*, “the Republican FEC commissioners have already undermined existing disclosure laws, and the remaining provisions of campaign law seem up for grabs, too,” explains Hasen.<sup>207</sup>

Second, existing state disclosure laws are the target of numerous lawsuits filed around the country, including nearly a dozen federal lawsuits filed by conservative attorney and campaign finance critic James Bopp, who orchestrated the *Citizens United* and *Doe v. Reed* cases.<sup>208</sup> As Bopp told the *New York Times* immediately after the *Citizens United* ruling, “Groups have to be relieved of reporting their donors if lifting the prohibition on their political speech is going to have any meaning.”<sup>209</sup> The National Organization for Marriage, an anti-gay marriage organization, was the lead plaintiff in several of the cases, all unsuccessful at the time of this writing.<sup>210</sup> The most precedential decision thus far is *NOM v. McKee*, in which the First Circuit Court of Appeals upheld Maine’s disclosure and disclaimer laws that have no dollar threshold for the attribution and disclaimer requirements and a \$100 threshold for disclosure.<sup>211</sup> “These provisions neither erect a

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<sup>204</sup> See, e.g., Paul S. Ryan, *Citizens United and the “Effective Disclosure System” That Wasn’t*, AM. CONST. SOC’Y (Jan. 21, 2011), <http://www.acslaw.org/acsblog/citizens-united-and-the-effective-disclosure-system-that-wasn-t>.

<sup>205</sup> *Id.*

<sup>206</sup> See Richard L. Hasen, *The FEC Is as Good as Dead: The New Republican Commissioners Are Gutting Campaign Finance Law*, SLATE (Jan. 25, 2011, 10:13 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/01/the\\_fec\\_is\\_as\\_good\\_as\\_dead.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html).

<sup>207</sup> *Id.*

<sup>208</sup> See Lisa Keen, *NOM Sues for Protection from Campaign Disclosure Laws*, KEEN NEWS SERV. (Sept. 28, 2010), <http://www.keennewsservice.com/2010/09/28/nom-sues-for-protection-from-campaign-disclosure-laws/>.

<sup>209</sup> David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html>.

<sup>210</sup> *See id.*

<sup>211</sup> *See Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 44 (1st Cir. 2011).



barrier to political speech nor limit its quantity. Rather, they promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas,” the First Circuit wrote.<sup>212</sup> The court based its ruling squarely on the *Citizens United* precedent. “*Citizens United* has effectively disposed of any attack on Maine’s attribution and disclaimer requirements.”<sup>213</sup>

Third, while the Supreme Court praised disclosure and disclaimer laws for providing citizens with important information, Congress has failed to pass a bill strengthening provisions. While a bill passed the House of Representatives in 2010,<sup>214</sup> it failed to get 60 votes necessary to break a filibuster in the Senate, and Senate Minority Leader Mitch McConnell has become a leading critic of disclosure calls, calling them “attacks on speech.”<sup>215</sup> Given the political realities, new disclosure laws seem unlikely to become law anytime soon.

Lastly, several scholars after *Citizens United* have critiqued the underlying premise of disclosure and disclaimer laws, suggesting that judges have undervalued the informational privacy right in their government interests analysis. For example, in a law review article, James Bopp and Jared Haynie critique wide swaths of First Amendment doctrine in provoking greater attention to the liberty interests in anonymous political speech.<sup>216</sup> And Professor Richard Briffault has argued in the *Election Law Journal* that disclosure laws may potentially chill citizens from engaging in the political process and will not deter corruption.<sup>217</sup>

Disclosure and disclaimer laws have been a hallmark of modern campaign-finance laws since the Supreme Court began to develop its constitutional doctrine in the 1970s, despite these laws’ abridgment of anonymity. The Court appears to have downplayed anonymity interests in their holdings in *Citizens United* and *Doe v. Reed*, but political developments and ongoing litigation have left the door open to greater anonymity protections in the future. Balancing the government interests in disclosure against the individual interests in anonymity will likely be an area of growing

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<sup>212</sup> *Id.* at 41.

<sup>213</sup> *Id.* at 61.

<sup>214</sup> H.R. 5175, 111th Cong. (2010).

<sup>215</sup> Meredith Shiner, *Senate Democrats Eye DISCLOSE Act Again*, ROLL CALL, June 20, 2012, [http://www.rollcall.com/issues/57\\_154/Senate-Democrats-Eye-DISCLOSE-Act-Again-215499-1.html](http://www.rollcall.com/issues/57_154/Senate-Democrats-Eye-DISCLOSE-Act-Again-215499-1.html).

<sup>216</sup> See James Bopp, Jr. & Jared Haynie, *The Tyranny of “Reform and Transparency:” A Plea to the Supreme Court to Revisit and Overturn Citizen United’s “Disclaimer and Disclosure” Holding*, 16 NEXUS 3 (2011).

<sup>217</sup> See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 274 (2010).

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constitutional controversy. The next Part of this Article discusses the implications of this and other areas of unresolved law.

V. IMPLICATIONS AND DISCUSSION

The development of the anonymous speech doctrine, with its roots in pre-Revolutionary free speech theory and doctrinal vibrancy from the Supreme Court decision in *McIntyre*, emphasizes both positive and negative liberty rights that are at play when an individual speaks anonymously. These values are important in First Amendment theory and have their roots in the original intent of the Constitution's Framers. In its pre-Internet cases, the Supreme Court emphasized the role that anonymity played in advancing the marketplace of ideas, encouraging more speech rather than less. The self-correcting tools of the marketplace limited the effects of dangerous anonymous speech, while wide protections of anonymity reduced the chilling effect that could come from compelled disclosure. Protections for anonymity were strongest for speech that was critical of public officials and about matters of public concern.

The development of the Internet, and the corresponding changes in individuals' speech habits, has raised a host of new legal problems regarding the Court's anonymous speech protections. In many ways, the courts have been forced to further define the limits of the anonymity right in light of new technologies. As this Article has demonstrated, lower courts have struggled to articulate clear standards for John Doe subpoenas, which are necessary to prevent the chilling of speech that can occur when anonymity is not protected, but also to allow for the unmasking on anonymity when legitimate legal wrongs have occurred. John Doe subpoenas present a particularly difficult First Amendment problem, although there is a growing consensus on several elements of the appropriate tests. As noted earlier, variants of the test are appropriate depending on the policy implications of the speech at issue: stronger protections for anonymity in political speech and libel cases, somewhat weaker protection for alleged copyright infringement. It is important to require plaintiffs to provide notice to the anonymous speaker and to provide an opportunity for the anonymous speaker to file a motion to quash (the "notice" and "opportunity" prongs).

Secondly, the plaintiff seeking the identity of an anonymous online speaker must demonstrate the existence of a legitimate legal claim. This may come in the form of passing a summary motion judgment where a plaintiff must show evidence of a prima facie case. Libel litigants, for example, would have to

prove the elements of libel before proceeding with a subpoena to identify an online speaker. However, this is not always easy, given the absence of a defense, including contextual facts, that often exists in the John Doe hearing process. One area of disagreement is whether a balancing standard is necessary as an additional prong if a *prima facie* showing is required, and if so, whether there are clear guidelines about how such balancing should be applied. The historical analysis presented in this research supports the adoption of balancing tests, such as those articulated in *Dendrite*, *Cahill* and *Sony*, that require the First Amendment right of anonymity be balanced with the strength of the *prima facie* claim. Several states have varying *prima facie* standards,<sup>218</sup> suggesting that a balancing prong would be useful to account for these different standards.

It may be a matter of semantics. Whether addressed through the *prima facie* standard or the balancing standard, it is important that the heightened First Amendment issues include the distinction between private and public figures and provide wider deference to speakers' interests when the content is about matters of public concern. Consider two recent cases involving anonymity claims. In the first case, in an online bulletin board for law students, posters named AK47, standfordtroll and Dirty Nigger posted that a Yale University student had bribed her way into Yale and had sex with an administrator, and that another female student had gonorrhea and was addicted to heroin.<sup>219</sup> Some posts threatened to "sodomize" one of the students.<sup>220</sup> The posts appeared in a Google search of the two women's names. In a second case, a model, Liskula Cohen, obtained a subpoena ordering Google to turn over the identity of a writer who called the *Vogue* cover model a "skank" and a "ho."<sup>221</sup> Google complied, and the writer, Rosemary Port, announced plans to sue Google for invasion of privacy.<sup>222</sup>

Using a *prima facie* standard that accounts for First Amendment interests, the bloggers in the first case should be identified because the plaintiffs can clearly establish tortious actions against private individuals on matters of private concern,

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<sup>218</sup> See Note, Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 353 (2008).

<sup>219</sup> For a discussion of this case, see Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C. L. REV. 1373, 1386 (2010).

<sup>220</sup> See *id.* at 1387.

<sup>221</sup> George Rush, *Outed Blogger Rosemary Port Blames Model Liskula Cohen for 'Skank' Stink*, N.Y. DAILY NEWS, Aug. 23, 2009, [http://articles.nydailynews.com/2009-08-23/gossip/17930442\\_1\\_liskula-cohen-google-web-giant](http://articles.nydailynews.com/2009-08-23/gossip/17930442_1_liskula-cohen-google-web-giant).

<sup>222</sup> See *id.*

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diminishing any First Amendment interests that the posters may have. The second case is more problematic, because the comments are arguably not libel per se, and the plaintiff is arguably a public figure or limited public figure, raising the speaker's First Amendment interest in anonymity. Google's liability, however, appears to be minimal, because it turned over the writer's identity in response to a subpoena, and is generally protected from liability under Section 230 of the Communications Decency Act.

Whether ISPs can be sued for invasions of privacy when they reveal the identities of users absent a court order is a question raised by a Cleveland newspaper's decision to reveal that a state judge had been posting comments on its Web site, including on stories that were about cases before her.<sup>223</sup> The case settled before it got to court, but this is merely one of a number of questions sparked by this tentative research that are beyond the scope of the John Doe subpoena theme.

The historical development of the right of anonymity has important implications in other areas of law, beyond the issue of the John Doe standards. For example, to what degree should the right of anonymity extend to electioneering speech? In *Citizens United*, the Supreme Court struck down several components of federal campaign-finance law, signaling a major shift in the doctrine of campaign finance laws. Does this decision open the door to strengthening anonymity in the realm of campaign speech, including revisiting the disclosure and disclaimer requirements that have been upheld several times by the Court since 1975's *Buckley v. Valeo*?

One of the key questions likely to appear before the courts is under what circumstances the protection of anonymous speech fueled by money and aimed at influencing elections outweighs the government interests in preventing corruption, informing the electorate, and in effectively carrying out campaign finance rules. *McIntyre* suggests that an individual who spends no more than photocopying costs to distribute a flier about a ballot initiative in her community is within her First Amendment rights to choose to remain anonymous, as the likelihood of corruption or undue voter influence is minimal. *Citizens United* suggests that while the First Amendment protects corporations from spending unlimited money

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<sup>223</sup> See Brennan McCord & Eamon McNiff, *Judge Saffold Files \$50M Suit Against Cleveland Newspaper Over Online Comments*, ABC NEWS (Apr. 7, 2010), <http://abcnews.go.com/TheLaw/cleveland-judge-denies-making-online-comments/story?id=10304420>. For a discussion of the Saffold case, see also Genelle I. Belmas, *That's What "Friend" is For? Judges, Social Networks and Standards for Recusal*, 1 REYNOLDS CTS. & MEDIA L.J. 147 (2011).

on television commercials, voters at a minimum should know the speaker's identity and the source of its money.

The Internet has rendered money less determinative in influence or possible corruption. This cuts both ways. A well-coordinated anonymous website or online video can have more far-reaching influence than a television advertisement, while databases of donors give the public easier access to information to hold candidates and politicians accountable. It remains to be seen whether the courts will be more deferential to disclosure and disclaimer laws after *Citizens United*, or if subsequent litigation will try to limit *Citizens United's* precedence to large corporate expenditures. One approach for the courts may be to expand two categories of exceptions to disclosure previously articulated by the courts: to protect individuals from harassment and for de minimis expenditures.<sup>224</sup>

If one agrees with the First Circuit's characterization of the precedential value of *Citizens United* to Maine's laws, *McIntyre* remains difficult to reconcile. As lower courts grapple with additional legal challenges, including ones involving the applicability of disclosure and disclaimer rules for express advocacy on the Internet, several key factors will be relevant.

How strong is the "informational interest"? The public has a right to know who is speaking in ways to influence elections so they can evaluate the credibility of the information. This interest would seem just as strong for Internet speech as it is for television advertising. How likely is it that anonymity might corrupt the marketplace of ideas? Anonymity can protect campaigns and surrogates from accountability and it can distort, deceive and manipulate the marketplace of ideas.

Do the laws allow for political speech to be disseminated? For example, anonymity can also protect people from retaliation and intimidation for providing relevant and important information about candidates or campaigns. Laws must be narrowly tailored to focus only express advocacy in windows of time prior to elections. Do the forums of communication or the size of the potential audience relate to the informational interest? What threshold of spending, if any, should trigger disclosure and disclaimer requirements? These are among the questions with which the post-*Citizens United* legal and academic community will wrestle. As noted above, the Ninth Circuit has suggested that the content of the anonymous speech should play a role in determining the level of protection for the anonymous speaker. Commercial speech should

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<sup>224</sup> See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057 (2011).

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receive a less protected status than political speech – a distinction that comports with traditional First Amendment jurisprudence as well as with sound policy considerations.

Ultimately, this analysis suggests that the First Amendment interests in anonymity are likely to factor more prominently in policy and constitutional analysis, especially because disclosure and disclaimer laws are increasingly being challenged in litigation. Like many First Amendment issues, the lines will be drawn through a complex balancing of the underlying rationales for anonymity and the government regulations in regulation. To that end, election law expert Richard Hasen offers a persuasive argument that disclosure and disclaimer laws are especially important in the post *Citizens United* era of secrecy about unprecedented campaign cash.<sup>225</sup> Citing *Caperton v. Massey Coal* as an example of the corrupting influence of independent expenditures in a state supreme court election,<sup>226</sup> Hasen argues for stronger disclosure laws because of loopholes and the rising influence of so-called “SuperPACs.”<sup>227</sup> Disclosure laws may be the only way to further the public’s interest in ensuring the possibility of uncovering corruption, providing voters with important information about candidates and donors, and enforcing whatever campaign-finance laws remain. In this sense, the government interests in disclosure and disclaimer laws have likely increased since *Citizens United*, tipping the balancing in favor of their constitutionality despite the imposition on the right of anonymity.

## CONCLUSION

The focus of this research has been the importance of anonymity in individual expression and its relevance to First Amendment law. First, we examined the relationship between anonymity and free expression from its pre-Revolutionary roots to its doctrinal embrace by the Supreme Court in *McIntyre v. Ohio Elections Commission*. We then examined three areas of law where anonymity interests are provoking dramatic shifts today – libel,

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<sup>225</sup> Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age* (U.C. Irvine School of Law, Research Paper No. 2011-46, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1948313](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948313).

<sup>226</sup> See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); see also Genelle I. Belmas & Jason M. Shepard, *Speaking From the Bench: Judicial Campaigns, Judges’ Speech and the First Amendment*, 58 DRAKE L. REV. 709 (2010) (discussing *Caperton* and its implications for First Amendment jurisprudence).

<sup>227</sup> See Hasen, *supra* note 225, at 15.

copyright infringement, and election speech – using a historical lens. In applying pre-Internet concepts and case law to controversies of the Internet age, we can see how the law should treat the strength of the anonymous speech right in particular circumstances. Our analysis supports the growing consensus of the lower courts is to ensure that First Amendment values are factored into a multi-prong analysis before an anonymous online speaker can be identified by an Internet Service Provider. In particular, requiring plaintiffs to make a prima facie showing that overcomes First Amendment concerns is important to protect traditional values associated with anonymity. Moreover, the current trend of tailoring the legal test to the particular policy considerations in each type of case is appropriate, given the relative First Amendment rights of the anonymous speaker versus countervailing property or jurisprudential rights. We have also argued that anonymity interests in political speech will likely garner increasing attention in the area of campaign-finance disclosure laws, suggesting that disclosure laws raise fewer First Amendment problems than expenditure bans but still must serve important government interests in order to survive First Amendment scrutiny.