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PROTECTIONS FOR ANONYMOUS
ONLINE SPEECH

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Ms. Kissinger, a partner in the firm, has represented media companies and journalists in libel, invasion of privacy, reporter's privilege, government access, prior restraint and related First Amendment matters for over a decade. Ms. Kissinger's practice is nationwide; she has litigated cases in federal and state courts at both the trial and all appellate levels, representing both parties and *amici curiae* in over 10 states and the District of Columbia.

In addition to traditional First Amendment matters, she has represented clients' First Amendment interests in a variety of unusual contexts, such as defending a book publisher against a claim that it aided and abetted murder. In another unusual case, *Rossignol v. Voorhaar*, Ms. Kissinger successfully represented a newspaper publisher in a civil rights action against a county, its sheriff, and numerous sheriff's deputies, securing a landmark ruling from the United States Court of Appeals for the Fourth Circuit that the defendants' off-duty mass purchase of newspapers on the eve of an election to suppress its contents and retaliate against the publisher violated the publisher's First Amendment rights. And most recently, Ms. Kissinger has represented clients served with subpoenas seeking the identities of anonymous online speakers. She has co-authored several comprehensive articles regarding protection for anonymous online speakers, *see, e.g., Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, by Ashley I. Kissinger and Katharine Larsen, Communications Lawyer (July 2009), and she co-authors the Practising Law Institute's outline on the subject.

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Recently, Ms. Larsen contributed to the successful representation of a Pennsylvania newspaper seeking records under the state’s Right to Know Law from a private foundation that raises funds for a state university. In *East Stroudsburg University Foundation v. Office of Open Records*, the Pennsylvania Commonwealth Court ordered the foundation to provide the newspaper with all requested records in a precedent-setting decision holding that the law mandates the disclosure of all records directly related to activities that the government contracts out to private entities. According to press reports, the Deputy Director of the Pennsylvania Office of Open Records called the court’s opinion “the biggest, most important decision so far” under the new law.

Ms. Larsen has written and spoken extensively on First Amendment protections for anonymous online speech and represented *The Pocono Record* in the first case in which a court expressly held that media companies have standing to challenge subpoenas seeking to unmask anonymous posters on First Amendment grounds. Ms. Larsen has also written about the proposed federal shield law, legal risks associated with online publications, and other matters related to online speech.

Ms. Larsen brings to her law practice considerable international experience: she served as the Legal Education Specialist for the American Bar Association’s Rule of Law Initiative (formerly ABA-CEELI) in Baku, Azerbaijan; was a Fulbright scholar in Croatia; and has worked in the post-war former Yugoslavia as well as in Germany. She is fluent in German, conversational in Bosnian/Serbian/Croatian and Spanish, and speaks basic Azerbaijani.

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FORWARD: DEVELOPMENTS FROM 2009-2010

Over the past year, courts largely trod familiar ground in the law governing the level of protection afforded to anonymous online speakers. In general, variations of the *Dendrite* “prima facie case” test were applied to requests to unmask those engaged in expressive speech, and variations of a motion to dismiss analysis were applied to requests to unmask alleged copyright infringers. A second federal court held that a newspaper has standing to assert the First Amendment rights of those who anonymously posted comments to its website. And more courts employed the *2theMart* test to decide motions to quash subpoenas seeking the identities of anonymous posters who were identified as witnesses rather than as defendants.

But a few recent developments, including decisions by the first two federal appellate courts to weigh in on the subject, will likely cause some significant ripple effects in this fast-developing area of law.

Most significantly, in *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010), the Ninth Circuit issued an opinion reasoning that those who anonymously engage in commercial speech are entitled to less constitutional protection than those who anonymously engage in political speech, and therefore should not receive the benefit of the high bar to disclosure imposed under the *Dendrite* and *Cahill* tests. This is the first published decision by any court that turned on a distinction between categories of expressive speech in determining what test should apply. Due to the procedural posture of the case, the court’s statements on the subject were *dicta*, and the court did not articulate what lower level of protection should be afforded to one anonymously engaged in commercial speech. Moreover, the court’s determination that the speech at issue in that case—criticism of a company’s business practices—was “commercial speech” under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980), is dubious at best. But the decision’s central premise is likely to be adopted by at least some other courts. This may lead to the creation of a new test for (or application of an existing lesser-burden test to) cases involving anonymous speech about commercial matters, and consequently may chill online speech about matters of importance to consumers. Moreover, if courts carve out additional categories of expressive speech for lower protection than political speech—for example, speech about the arts, history, science or religion—anonymous speech about these other matters of legitimate public concern may suffer as well.

The Second Circuit Court of Appeals also waded into this area of law in *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010). The court broke no new ground, holding that a low burden test should apply where the anonymous speaker is an alleged copyright infringer. But it articulated its holding in a manner that could reasonably be read to adopt the low burden test for *all* requests for an anonymous speaker's identity—whether the speech in question is infringing or expressive. It remains to be seen whether the court's phrasing will cause mischief.

One new issue that arose this past year involves the relevance of website privacy policies. Those seeking anonymous posters' identities have increasingly begun arguing that website owners' privacy policies—which generally ensure user privacy but provide that a user's identity may be revealed under certain circumstances—diminish anonymous speakers' expectations of privacy, or even constitute a waiver of their First Amendment rights to remain anonymous altogether. Although one court in Tennessee declined to quash a subpoena on this basis, *see Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009), two other courts found these arguments meritless. In *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010), the court held that the privacy policy at issue, although containing boilerplate language allowing for disclosures under certain circumstances, actually created an expectation of privacy in the user when taken as a whole. In *Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009), the court refused to find that users were contracting away their constitutional rights in the absence of any express waiver in the privacy policy.

Finally, media companies have continued to invoke reporter's privilege statutes in motions to quash subpoenas for anonymous posters' identities, with mixed success. Colorado, Illinois and North Carolina joined the growing list of jurisdictions in which courts have quashed such subpoenas under state shield laws. The court in Illinois was plainly uncomfortable in doing so, however, and invited the state's legislature to clarify the issue. *See Alton Tel. v. Illinois*, No. 08-MR-548 (Ill. Cir. Ct., Madison County, May 15, 2009). And a court in Kentucky rejected the invocation of that state's shield law on the ground that the statute was not meant to apply to the anonymous poster context. *See Clem v. Doe*, No. 08-CI-1296 (Ky. Cir. Ct., Madison County, Mar. 26, 2010).

These developments and others are discussed in detail in the outline below.

I. INTRODUCTION

Every day people believe they are anonymous in their use of the Internet. They choose a login name other than their own to post comments on websites or in other fora, they share files without sharing their names, and they avoid providing any personal information when registering for email addresses and blogs. They often are not aware that their activities leave behind a trail of information, data that can be used to uncover their true identity.

As so-called “anonymous” use of the Internet has exploded, so have efforts to employ legal channels to unmask these users. For more than a decade, courts have struggled to determine how to apply well-established protections for anonymous speech to the online context. Although strong trends have emerged in this area of law, many aspects remain in flux. Indeed, 2010 marks the first year in which the federal appellate courts have entered the fray and published opinions that expressly weigh anonymity rights with conflicting interests in cases involving online speech.

Beginning with a brief discussion of the historical basis for the right to speak anonymously on the Internet, this outline describes typical procedural postures and forms of challenges to anonymity in the online context as well as the issue of who has standing to assert an anonymous speaker’s rights. The outline then examines the various tests created and applied by the courts to determine whether an anonymous speaker should be unmasked—tests that balance the First Amendment right of anonymous speakers with the rights of other parties, primarily parties seeking redress for alleged injuries. It contrasts the treatment of expressive versus infringing speech and identifies areas in which the law remains unsettled, including what test applies when an anonymous speaker is sought as a witness rather than as a defendant. The outline then addresses various additional bases for opposing the unmasking of an anonymous speaker, including the reporter’s privilege. It offers practice pointers for website operators and others wishing to minimize legal risk in responding to subpoenas for anonymous speakers’ identities. And, finally, it includes an Appendix discussing the relevant U.S. Supreme Court decisions, the seminal decisions in this area of law, and other decisions from across the country.¹

II. FROM PAST TO PRESENT: PROTECTIONS FOR ANONYMOUS SPEECH

For centuries, anonymous commentators have identified solutions for political, social, and cultural challenges, promoted unconventional ideas, and catalyzed community development and transformation. The works of Mark Twain, Voltaire, Charles Dickens, Benjamin Franklin and other great thinkers were published under assumed names,² and numerous anonymous texts, including the *Federalist Papers*, are believed to have decisively influenced “the progress of mankind.”³

The U.S. Supreme Court has held, on numerous occasions, that the First Amendment grants substantial protection to anonymous speech.⁴ Such speech is part of the nation’s “honorable tradition of advocacy and of dissent,”⁵ and its protection reflects the historical practice of “accord[ing] greater weight to the value of free speech than to the dangers of its misuse.”⁶ Although protections for anonymity were first applied to protect the authors of pamphlets and leaflets, the Court has since made clear that these protections extend to modern forms of communication, presumably including blogs, website comments, emails and tweets.⁷

This constitutional right is not absolute, however, and is often balanced against other rights.⁸ As discussed in detail below, the conflicting right most commonly invoked in the context of anonymous online speech is the right of an aggrieved party to seek redress for injury.⁹

III. THE NATURE AND FORM OF EFFORTS TO UNMASK ANONYMOUS ONLINE SPEAKERS

Parties have utilized a variety of procedures in seeking to unmask anonymous online speakers. Section 230 of the federal Communications Decency Act generally immunizes website owners from liability for the content of third-party posts, except where the claims are, for example, for copyright or trademark infringement.¹⁰ Those seeking redress for nonexempt injuries allegedly caused by website posts must therefore pursue the posters themselves. For this reason, a plaintiff usually commences a lawsuit against a Jane or John Doe defendant and then moves for issuance of pre-service discovery subpoenas.¹¹ The plaintiff may first issue a subpoena to the owner of a website where the Doe defendant posted and subsequently to the Doe defendant’s Internet service provider (ISP). Alternately, some jurisdictions allow the plaintiff

to commence an independent discovery action.¹² In a copyright dispute, a plaintiff may obtain issuance of a pre-litigation subpoena under the Digital Millennium Copyright Act (DMCA).¹³ And in criminal matters, the poster's identity may be sought through a subpoena issued by the grand jury, prosecutor or defendant.

Most of the subpoenas litigated to published decisions have sought the identity of a poster so that the plaintiff could name him or her as a civil defendant.¹⁴ But there are a few cases in which parties have issued subpoenas seeking the identity of a nonparty anonymous poster—an individual whose speech is not alleged to have caused any harm but who is a potential witness in an ongoing lawsuit or criminal prosecution.¹⁵

Subpoenas typically request “all identifying information” regarding the poster and often identify that person by the pseudonym under which he or she posted, or by the date and time of the post. They usually seek the IP address¹⁶ of the computer from which the person posted the comments to the website. They also typically ask for the information obtained from the poster when he or she registered with the website, which may include the person's name and e-mail address.¹⁷ Because many people register using fake names and non-descript or “toss-away” e-mail addresses, the IP address is often the most valuable piece of information sought.¹⁸

IV. STANDING OF THIRD PARTIES TO ASSERT RIGHTS OF ANONYMOUS SPEAKERS

While an anonymous poster can clearly invoke his own First Amendment right to speak anonymously,¹⁹ whether a third-party subpoena recipient, such as a website operator or ISP, may assert that right on the poster's behalf is a more complex question. Although there is little case law addressing the issue, the “trend among courts . . . is to hold that entities such as newspapers, Internet service providers, and website hosts may, under the principle of *jus tertii* standing, assert the right of their readers and subscribers.”²⁰

Two years ago, in *Enterline v. Pocono Medical Center*, a federal district court expressly held, as a matter of first impression, that a newspaper had standing to assert the constitutional rights of anonymous posters to its website.²¹ The court found that (1) “the anonymous commentators to the [newspaper] website face practical obstacles to asserting their own First Amendment rights” because doing so would require revelation of their identities; (2) the newspaper suffered “the adequate injury-in-fact to satisfy Article III's case or controversy

requirements”; and (3) the newspaper “will zealously argue and frame the issues before the Court.”²² From this it concluded that “the relationship between [the newspaper] and readers posting in the [n]ewspaper’s online forums is the type of relationship that allows [the newspaper] to assert the First Amendment rights of the anonymous commentators.”²³

Similarly, in *In re Subpoena Duces Tecum to America Online, Inc.*, a Virginia appellate court held that an ISP had standing to assert the First Amendment rights of anonymous posters who were its subscribers because if the ISP “did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that [its] subscribers would look to AOL’s competitors for anonymity.”²⁴

Although the *Enterline* analysis has been adopted in one other federal decision,²⁵ there are few opinions examining this issue, and the requisite nature of the relationship between the subpoena recipient and the anonymous speaker has not been well developed. While some decisions appear to require that, to have standing, the subpoena recipient risk financial loss or demonstrate a “close relationship” with the speaker,²⁶ others do not.²⁷ There are, however, analogous cases outside the Internet context that can be consulted when supporting an argument for standing.²⁸

Apart from the legal issue of standing, as a policy matter, some practitioners have expressed concern that website operators and other subpoena recipients could be risking the protections provided by Section 230 of the Communications Decency Act when they move to quash subpoenas by asserting the anonymous posters’ First Amendment rights.²⁹ These entities enjoy immunity under Section 230 for third-party comments posted on websites (in contrast to, for example, letters to the editor published in a traditional physical newspaper). Thus, when they advance a poster’s right to anonymity in a motion to quash, they have the power to potentially prevent an aggrieved party from obtaining information about the poster while enjoying for themselves immunity from suit for the poster’s comments—a result that would leave an allegedly injured party with no avenue for redress. To be sure, every court has held that the First Amendment rights of anonymous posters are qualified, and therefore a genuinely aggrieved party should be able to overcome the qualified privilege and obtain a poster’s identifying information. Nevertheless, some practitioners remain concerned that lawmakers unhappy with the rough-and-tumble of anonymous speech on the Internet will seek to modify Section 230 to remedy a perceived

imbalance between the rights of interactive computer service providers and those speaking through them, on the one hand, and parties aggrieved by online speech on the other.³⁰

V. FIRST AMENDMENT PROTECTIONS FOR ANONYMOUS ONLINE SPEECH

A. Balancing the Online Speaker’s Right to Anonymity Versus an Aggrieved Party’s Right to Seek Redress

The U.S. Supreme Court has yet to consider the proper calculus for weighing the conflicting rights of an anonymous online speaker and other parties who wish to unmask them, and until this year the federal appellate courts had not entered the fray.³¹ In the absence of such guidance, state courts and federal trial courts developed, over the last decade, a range of standards that plaintiffs must satisfy in order to obtain information related to an anonymous speaker’s identity.³²

The critical element in each of the tests articulated by the courts is the degree of burden imposed on the plaintiff to demonstrate the viability of his or her case before the anonymous poster will be unmasked. Various other procedural and substantive requirements are typically included, but the battleground in the cases is whether the burden should be high or low. By 2009, a unified high burden test began to emerge—the “prima facie case” or “summary judgment” test. Courts generally have applied this heightened standard where expressive speech is at issue, such as in defamation lawsuits.³³ Although a number of distinct low burden tests remain—including “motion to dismiss,” “good cause,” and “good faith” tests—these tests are increasingly employed only where the challenged speech is alleged to constitute copyright or trademark infringement.³⁴

The application of a stringent standard in cases involving expressive speech is consistent with the Supreme Court’s recognition of the critical role such speech has played in our democratic history.³⁵ And the application of a decidedly lower bar in copyright infringement actions accords with the fact that most courts addressing the issue have held that allegedly infringing activities only minimally, if at all, constitute protectable speech.³⁶ Moreover, as with the rights of anonymous speakers, copyright owners’ rights are rooted in the Constitution.³⁷

In evaluating how to categorize the type of speech at issue, courts generally look beyond the plaintiff’s own characterization of its

claims. At least one court focused on the gravamen of the case in deciding which standard to apply when a variety of claims were asserted.³⁸ Another squarely rejected “the notion of adopting differing standards that depend on the manner in which a plaintiff has framed its claim” because doing so “could encourage assertion of non-defamation claims simply to reap the benefit of a less-stringent standard.”³⁹

There have been very few published cases in which the anonymous poster is sought simply as a witness—that is, where the poster is alleged to possess information relevant to the case and is not sought as a potential defendant. Whereas at least two courts have concluded that the same test should apply regardless of the anonymous speaker’s role in the action,⁴⁰ four other courts have adopted a test akin to the federal qualified reporter’s privilege to be applied in situations in which the anonymous speaker is a nonparty (the *2TheMart* test).⁴¹ This latter test is discussed in detail below.

1. Expressive Speech: The Prima Facie Case or Summary Judgment Test

Although two recent federal appellate decisions have muddied the waters somewhat, the prevailing view among courts called upon to consider what test should apply in cases involving expressive content is that the plaintiff should be required to put forth sufficient evidence to support a prima facie case, or, put differently, to withstand a hypothetical summary judgment motion. The seminal decisions in this category are *Dendrite International, Inc. v. Doe No. 3*⁴² and *Doe v. Cahill*.⁴³

In *Dendrite*, a New Jersey appellate court held, in a defamation action, that “[t]he complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action.”⁴⁴ Several courts have applied this standard in cases alleging defamation and other torts.⁴⁵ In *Cahill*, another defamation case, the Supreme Court of Delaware expressly adopted this element of the *Dendrite* test, but framed it in terms of defeating a hypothetical motion for summary judgment: “[B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”⁴⁶ The court made clear that the plaintiff need not produce evidence on a particular element if that evidence is not “within the

plaintiff's control," such as evidence of actual malice.⁴⁷ This case, too, has been followed by several courts in defamation and other tort actions.⁴⁸

The *Cahill* court's articulation of the test in summary judgment terms has generated both confusion and criticism. Despite the fact that the court in *Cahill* plainly believed this element of its test was the same as that of *Dendrite*—the court spoke in the same breath of “the *prima facie* or ‘summary judgment standard’”⁴⁹—a few courts have viewed *Cahill* as setting forth a different standard, some of them describing it as *less* burdensome,⁵⁰ and others as *more* burdensome,⁵¹ than *Dendrite*. In *Krinsky v. Doe 6*, a California appellate court concluded it is “unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required.”⁵² Hinging the standard to a procedural device is fraught with difficulty, the court concluded, given that “subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleading and motions.”⁵³

Perhaps as a result, the groundswell in recent years began to move away from the summary judgment formulation of *Cahill* and in the direction of the *prima facie* test announced by the *Dendrite* court. The latter is the standard adopted by the California appellate court in *Krinsky* two years ago.⁵⁴ Maryland's high court settled on the *prima facie* standard in an exhaustive opinion issued last year in *Independent Newspapers, Inc. v. Brodie*.⁵⁵ And several other courts have adopted the *Dendrite*-style formulation over the past year.⁵⁶ At bottom, however, the *prima facie* and summary judgment tests impose similar burdens in terms of the strength of the case the plaintiff must present to the court,⁵⁷ essentially requiring sufficient evidence to create a jury issue on the underlying claim, and both tests are very speech protective.

Following *Dendrite*, some courts have held that, once the plaintiff has satisfied its burden, the court should then balance the First Amendment rights of the anonymous poster against the strength of the plaintiff's case and the necessity of the disclosure.⁵⁸ The *Cahill* court and others have deemed this additional step unnecessary, concluding that either the substantive law of defamation, or the summary judgment test itself, already achieves this balancing of the competing rights of the anonymous poster and the plaintiff.⁵⁹ But at least one court, in *Mobilisa, Inc. v. Doe*,

has expressly criticized the elimination of this element in *Cahill*, asserting that such balancing “is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.”⁶⁰ There, the Arizona Court of Appeals noted that “surviving a summary judgment on elements not dependent on the anonymous party’s identity does not necessarily account for factors weighing against disclosure,” such as where the anonymous poster is a nonparty witness with the same information that is in the control of other witnesses.⁶¹ The court also concluded that, without the balancing step, a court “would not be able to consider factors such as the type of speech involved, the speaker’s expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party’s position, and the availability of alternative discovery methods.”⁶² As discussed below, however, other courts account for some of these factors by expressly including them as additional elements of their analysis.

As of early 2010, it appeared that the *Dendrite/Cahill* standard, with or without the additional balancing test, had taken root as the test to be applied to all types of expressive speech. Recent decisions of the Second and Ninth Circuits have cast that presumption into doubt, however.

The Ninth Circuit recently concluded that, while the *Cahill* test is appropriate in cases involving anonymous political speech, it sets too high a bar in cases involving speech about commercial matters. In *In re Anonymous Online Speakers*, a plaintiff corporation asserted tortious interference and other business tort claims against a competitor for an alleged “smear campaign” and sought the identities of certain anonymous online critics.⁶³ The critics’ statements included comments such as: “Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable”; “Quixtar refused to pay bonuses to IBOs [independent business owners] in good standing”; “[Quixtar] terminated IBOs without due process”; “Quixtar currently suffers from systemic dishonesty”; and “Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC’s Amway rules.”⁶⁴

In apparent reliance on the plaintiff’s allegation that these statements were made by employees of the defendant, the court concluded that the “Internet postings and video at issue in the

petition and cross-petition are best described as types of ‘expression related solely to the economic interests of the speaker and its audience,’” and thus “properly categorized as commercial speech.”⁶⁵ The court reasoned that “the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes,”⁶⁶ and concluded that the district court erred in applying the *Cahill* summary judgment standard: “Because *Cahill* involved political speech, that court’s imposition of a heightened standard is understandable. In the context of commercial speech balanced against a discretionary discovery order under Rule 26, however, *Cahill*’s bar extends too far.”⁶⁷ Because the district court ordered disclosure even under the exacting standard of *Cahill*, however, the court did not articulate what lower standard would apply to such “commercial speech.”⁶⁸

Additionally, in a decision involving nonexpressive speech, *Arista Records, LLC v. Doe 3*, the Second Circuit vaguely noted that the low burden test typically applied in copyright infringement actions “constitute[d] an appropriate *general* standard for determining whether a motion to quash, to preserve the objecting party’s anonymity, should be granted.”⁶⁹ Although the court likely meant to adopt the low burden test only for copyright infringement actions, it did not articulate its holding in such narrow terms, thus raising the possibility for confusion on this point.

Upon close examination, these two decisions may not significantly alter the current legal landscape. There is little to suggest that the Second Circuit intended the low burden test it adopted to apply outside of copyright infringement actions (and, as discussed below, the current state of the law generally limits low burden tests to cases involving infringing speech). And the Ninth Circuit case can be limited to its facts in a number of respects. The court’s determination that the expressive speech at issue—criticism of a company’s business practices—constitutes commercial speech under *Central Hudson* is dubious, at best,⁷⁰ and the application of the court’s reasoning to true commercial speech would affect far fewer cases than the court’s flawed decision might otherwise suggest. Additionally, given the procedural posture of the case, the court’s reasoning is only *dicta*.⁷¹ Nonetheless, these decisions underscore that, while variations on the *Dendrite/Cahill* standard remain the controlling

test in many jurisdictions, the level of protection for expressive anonymous speech online has not yet been settled, and future decisions could possibly cabin the applicability of high burden tests to certain types of expressive speech.

2. *Infringing Speech*

Where the speech at issue is challenged on grounds that it infringes intellectual property rights or otherwise constitutes a business tort, many courts have applied—or at least nominally applied—either a motion to dismiss standard or a good cause standard.

a. The Motion to Dismiss Test

In the 1999 decision of *Columbia Insurance Co. v. Seescandy.com*, a federal district court in California held that discovery of an anonymous defendant’s identity in an action for trademark infringement and other business torts would be allowed when the plaintiff “establish[ed] to the Court’s satisfaction that plaintiff’s suit against [the speaker] could withstand a motion to dismiss.”⁷²

Despite the court’s reference to “withstand[ing] a motion to dismiss,” it in fact set a higher bar than the basic federal Rule 12(b)(6) standard. The court explained that a plaintiff should not be permitted to rest on a well-pleaded complaint but rather 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 entity who committed that act.”⁷³ Indeed, the court likened the standard “to the process used during criminal investigations to obtain warrants,” *i.e.*, a probable cause standard, and examined evidence in the record before concluding that the plaintiff had made the requisite showing.⁷⁴

Other courts have similarly purported to apply a motion to dismiss-type test while actually requiring something more than just stating a viable claim. For example, in a case involving claims for unfair and deceptive trade practices, unfair competition, tortious interference with business relations and defamation, a federal district court in North Carolina adopted a motion to dismiss standard but then appeared to assess the credibility of the plaintiff’s

averments.⁷⁵ And the Supreme Court of Wisconsin adopted a motion to dismiss standard in a defamation case, observing that such a standard would provide more protection in Wisconsin than it would in other jurisdictions because Wisconsin law requires all plaintiffs alleging a defamation claim to plead with particularity.⁷⁶

The decision now emerging as the prevailing standard in copyright infringement matters involving file sharing is *Sony Music Entertainment Inc. v. Does 1-40*.⁷⁷ The *Sony* test—recently adopted by the Second Circuit in *Arista Records, LLC v. Doe 3*⁷⁸—sets forth a slightly less protective motion to dismiss test which, with very few exceptions, has been applied only in copyright infringement actions involving peer-to-peer file sharing networks, cases in which the Doe defendants’ conduct has been found to involve “some creative aspects of downloading music or making it available to others to copy.”⁷⁹ In *Sony*, the court examined several factors it said other courts had considered—and should consider—when evaluating subpoenas seeking identifying information regarding subscribers, including whether the plaintiff made “a concrete showing of a prima facie claim of actionable harm.”⁸⁰ Although the court’s use of the phrase “prima facie” makes the *Sony* test appear at first blush to be more speech protective than the *Seescandy* test (especially in light of the *Dendrite* court’s use of this phrase), it is not. The court held that a plaintiff could satisfy that requirement by alleging the elements of ownership and copying in some detail in the complaint, a lower burden it justified by noting that, “[i]n contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression.”⁸¹

In adopting and applying the *Sony* test in *Arista Records, LLC v. Doe 3*, another peer-to-peer file sharing copyright action, the Second Circuit concluded that the “concrete showing” element was satisfied when the plaintiff provided “factual detail in the Complaint [which] plainly states copyright infringement claims that are plausible” together with an exhibit and declaration.⁸² The court expressly noted, however, that it remained an open question whether a well pleaded complaint, unaccompanied by any evidentiary showing, would be sufficient.⁸³

b. The Good Cause Test

In some actions alleging copyright infringement for the use of peer-to-peer file sharing networks, courts have applied a good cause test, the weakest standard to be applied to anonymous online speech.⁸⁴ This test provides no special protection for anonymous speech; it is essentially the same test employed by federal courts for authorizing expedited discovery in any ordinary civil action under Federal Rule of Civil Procedure 26(d).⁸⁵

One court noted that this standard should apply only in cases either in which “First Amendment rights are not implicated because the information sought by the subpoena does not infringe [the Doe defendants’] rights to engage in protected speech,” or the speaker’s First Amendment interests are “exceedingly small.”⁸⁶ Courts applying this test have, in essence, rejected the *Sony* court’s view that file sharers’ speech is entitled to at least “some level of First Amendment protection.”⁸⁷ Instead, they allow the identification of an anonymous individual where there are “allegations of copyright infringement,” there is a “danger that the ISP will not preserve the information sought,” the information sought is narrow in scope, and expedited discovery “would substantially contribute to moving the case forward.”⁸⁸

B. Notification, Privacy Policies, and Other Considerations

Beyond the degree of burden placed on the issuer of the subpoena, courts often have included various other factors in their tests. The most significant of these is the notification requirement. Courts routinely require that the anonymous poster be notified of the subpoena and given time to respond. Generally, this process begins with the court ordering the plaintiff to undertake efforts to inform the poster that a suit has been filed or a subpoena has been issued.⁸⁹ In fact, the Virginia General Assembly codified this obligation in a statute it enacted to govern the adjudication in civil cases of subpoenas for anonymous online posters’ identities.⁹⁰

In some instances, however, the *recipient* of the subpoena may be required to provide notice to the anonymous poster. Some courts have held that it is within their inherent authority to order the party from whom the information is sought to inform the anonymous

speaker of the pending discovery request.⁹¹ Virginia's statutory scheme also requires the subpoena recipient to notify the anonymous poster via e-mail of the existence of the subpoena and to forward a copy of the subpoena via registered mail or commercial delivery service.⁹²

In addition to the notification requirement, courts have also included a number of other elements in their tests. For example, in *Dendrite*, the court "require[d] the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."⁹³ In *Seescandy*, the court required that the plaintiff identify the anonymous speaker "with sufficient specificity," set forth "all previous steps taken to locate" the anonymous speaker, and "file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible."⁹⁴ And in *Sony*, after surveying various factors applied by other courts, the court considered the "specificity of the discovery request," the "absence of alternative means to obtain the subpoenaed information," whether there was "a central need for the subpoenaed information" to advance the claim, and the anonymous speaker's "expectation of privacy."⁹⁵

Finally, a website's privacy policy may enter the calculus. A privacy policy stating that the website owner may disclose a poster's identifying information when required by applicable laws, regulations, legal process, or other enforceable requests may be found to demonstrate that an anonymous poster has a diminished expectation of privacy. Such was the case in *Swartz v. Doe #1*, in which a Tennessee court considered the language of Google's Privacy Policy in denying a Doe defendant's motion to quash a subpoena to Google for the defendant's identifying information.⁹⁶ Other courts have rejected such arguments, either invoking the presumption against contractual waiver of constitutional rights or finding that the privacy policy as a whole created an expectation of privacy in the user.⁹⁷

C. Alternate Approaches

1. **Anonymous Speakers as Witnesses: The 2TheMart Test**

As mentioned above, some courts have opined that the same test should apply whether the anonymous poster is sought as a defendant or merely as a witness.⁹⁸ In the 2001 decision of *Doe v. 2TheMart.com*, however, a federal district court in Washington created a separate test, similar to the federal qualified reporter's privilege, for consideration of a subpoena seeking the identifying information of anonymous posters who were sought solely as witnesses.⁹⁹ Under the *2TheMart* test, the subpoenaing party must demonstrate, "by a clear showing on the record," that:

- (1) the subpoena seeking the information was issued in good faith and not for any improper purpose,
- (2) the information sought relates to a core claim or defense,
- (3) the identifying information is directly and materially relevant to that claim or defense, and
- (4) information sufficient to establish to or disprove that claim or defense is unavailable from any other source.¹⁰⁰

Although the court spoke in terms of "good faith," it explained that its test imposed a "high burden," one that was "higher" than those that had been applied by other courts at that time and that could only be overcome in "exceptional" cases.¹⁰¹ Moreover, in quashing the defendant's subpoena, the court held that its "extremely broad" nature—while not constituting "bad faith *per se*"—evinced "apparent disregard for the privacy and the First Amendment rights of the online users" and thus weighed against the subpoenaing defendant.¹⁰²

Although three other federal district courts have since employed the *2TheMart* standard in similar circumstances, none squarely considered whether it is the proper test to be applied to nonparty anonymous speakers. The first, a court in Pennsylvania, avoided the need to address this question by noting that *2TheMart* was the test advocated by the subpoenaing plaintiff and that its application "allow[ed] the Court to resolve the present issue on narrow grounds and [did] not require the Court to determine the full extent of the First Amendment right to anonymity" at issue in

the case.¹⁰³ The second and third, courts in Missouri and Pennsylvania, simply applied the test without discussion.¹⁰⁴

A striking difference between the *2TheMart* test and those previously discussed is that the *2TheMart* test does not require that the subpoenaing party's core claim or defense meet any minimum threshold of viability. The *2TheMart* opinion was one of the earliest published decisions in this area of law, and most courts have since created tests imposing a requirement that the subpoenaing plaintiff demonstrate, to some degree, the *merits* of the party's claim. Particularly because a third-party anonymous poster is not alleged to have caused any harm to the subpoenaing party, it seems only appropriate that whatever test the courts settle on in this context should similarly require that the party issuing the subpoena demonstrate, to some level, the bona fides of that party's claim or defense.

2. Virginia: The Good Faith Test

In another of the earliest decisions on the subject, a Virginia court provided only minimal protection for anonymous speech in a defamation case, imposing a test in which the court merely asked whether the "pleadings or evidence" demonstrate that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and . . . the subpoenaed identity information is centrally needed to advance that claim."¹⁰⁵ This decision has been largely distinguished or rejected by courts addressing claims involving expressive speech.

The good faith test appears to live on in Virginia, however, and by its terms it applies to all cases, whether they involve expressive speech or not. In 2002, the Virginia General Assembly codified a version of the good faith test that appears on its face to be as weak as that employed two years earlier by the circuit court. The statute requires the subpoenaing party to show *either* that "one or more communications that are or *may be* tortious or illegal have been made by the anonymous communicator, *or* that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed."¹⁰⁶ No court has yet interpreted or applied this statute in a published decision, but it cannot be disregarded because AOL's corporate headquarters are located in Virginia.¹⁰⁷

3. **Other Tests**

A few courts have developed tests that are different than those described above. The most noteworthy is a decision by a federal magistrate judge that distinguishes between speech on matters of private concern and speech on matters of public concern, imposing a *greater* burden on the plaintiff in the former context. For speech on matters of private concern, the plaintiff must show a “reasonable *probability*” of prevailing on the merits. Where the speech touches upon a matter of public concern and the plaintiff is a public figure, the plaintiff need only show a “reasonable *possibility*” of success on the merits.¹⁰⁸ The court rationalized its holding by observing that “[a]lthough a ‘reasonable probability’ would be the preferred standard [in all cases], requiring a standard higher than a reasonable possibility of recovery is unworkable in cases where the plaintiff is a public figure” because in those cases the plaintiff’s burden of proving fault is higher; he or she must prove “actual malice,” *i.e.*, knowledge of falsity or reckless disregard as to truth or falsity, rather than mere negligence. While the “reasonable probability” standard appears to require the production of some evidence, the court’s application of the “reasonable possibility” standard suggests that reliance on the pleadings alone is sufficient.¹⁰⁹

VI. **ADDITIONAL PROTECTIONS FOR ANONYMOUS ONLINE SPEECH**

Subpoenas for anonymous online speakers’ identities have also been challenged on grounds other than the speaker’s First Amendment rights. In addition to the procedural arguments applicable to any subpoena,¹¹⁰ a subpoena recipient might, for example, assert the reporter’s privilege, move to strike the subpoena under laws designed to protect participation in public dialogue, challenge jurisdiction, invoke other laws as a shield, or argue that enforcement of the subpoena would be futile.

A. **Reporter’s Privilege**

Depending on the contours of the reporter’s privilege in a particular jurisdiction, media companies may have grounds to defend against a subpoena for an anonymous poster’s identity by asserting that privilege. Thus far, state shield laws have been invoked to successfully block the unmasking of anonymous posters in Montana,

Florida, Oregon, Colorado, North Carolina, and Illinois.¹¹¹ The statutes in all of these states except Illinois, however, contain fairly broad definitions of protected information.

In Illinois, a trial court somewhat reluctantly applied the state shield law to partially quash a subpoena in a criminal prosecution for the murder of a child.¹¹² There, the government subpoena sought, from a local newspaper, records leading to the identity of five anonymous posters to the newspaper's website. Finding that two of the posters' comments related to "the Defendant's prior conduct, his propensities for violence, and relationship with the child," the court concluded that the prosecution had overcome the shield law privilege as to those two posters because "the information sought is relevant, . . . all sources of information have been exhausted" since the prosecution had already conducted 117 interviews, "and first degree murder of a child impacts the public interest."¹¹³ The court quashed the subpoena as to the remaining three posters because it found their comments "appear[ed] to be nothing more than conversation/discussion."¹¹⁴ Despite applying the shield law, the court strongly suggested that the statute's definition of "source" did not include individuals who voluntarily post information "*in response to*" an article, and the court invited the legislature to clarify the issue.¹¹⁵ In this regard, the decision is similar to that of a California appellate court in *O'Grady v. Superior Court*, which suggested, in *dicta*, that California's shield law may not apply when website operators "simply open[] their Web sites to anonymous tortfeasors, for a fee or otherwise."¹¹⁶

A Kentucky court also appeared bothered by the prospect of applying a shield law to protect the identity of one who voluntarily posted an anonymous comment to a newspaper website, and in refusing to do so, granted less deference to the statute's text than did the court in Illinois. Kentucky's shield law provides that "[n]o person shall be compelled to disclose . . . the source of any information procured or obtained by him, and published in a newspaper . . . by which he is engaged or employed, or with which he is connected."¹¹⁷ In *Clem v. Doe*, the court determined that the comment was not "procured or obtained by any reporter"¹¹⁸ because the newspaper website's terms of service stated that the content of such comments was "not controlled by the newspaper" and "the newspaper does not take any responsibility for the accuracy of the contents of the web posting."¹¹⁹ Under these circumstances, the court concluded,

application of the shield law “would well extend the purpose of the privilege.”¹²⁰

As the Kentucky and Illinois cases may suggest, invocation of the reporter’s privilege by those resisting subpoenas for anonymous posters’ identities must be carefully undertaken, as it could—at least theoretically—work to undermine support for the privilege. As discussed above with respect to a website provider asserting a poster’s First Amendment rights, the combination of shield law protection for the anonymous poster together with Section 230 immunity for the website operator could leave legitimately injured plaintiffs without a legal remedy.¹²¹ Legislators might seek to narrow shield laws to rebalance the poster’s and plaintiff’s competing rights, and such legislative fiddling may well have the unintended consequence of encroaching on the protection presently enjoyed by the press for keeping its more traditional sources confidential. This scenario seems more realistic in those jurisdictions where shield law protection is absolute, as plaintiffs with meritorious claims against anonymous posters should be able to overcome shield laws offering only qualified protection.

B. Anti-SLAPP Statutes

If the anonymous speech at issue concerns a matter of public interest, an anti-SLAPP statute—a statute designed to curb “Strategic Lawsuits Against Public Participation”—may provide the anonymous poster, or a website operator or ISP, both immunity from suit and attorneys fees for having to move to quash a subpoena for the poster’s identity.¹²² Anti-SLAPP statutes adopted by many states provide an early procedural device to dispose of a case arising from speech on issues of public concern. In 2009, California amended its anti-SLAPP statute in a manner that should deter frivolous efforts from outside California to unmask anonymous posters inside the state. Although the statute previously could be used only to strike a complaint, cross-complaint, petition, or other pleading filed in a California court,¹²³ the law has since been expanded to permit motions to strike requests for subpoenas that originate outside the state.¹²⁴

C. Lack of Subject Matter Jurisdiction

At least two federal courts have dismissed diversity actions against John Doe anonymous posters for lack of subject matter jurisdiction because the citizenship of the defendant posters was unknown.¹²⁵

D. Other Laws Forbidding Disclosure of Identity

The Torture Victim Protection Act (“TVPA”) and other laws may impose an obligation on the recipient of a subpoena *not* to disclose the identity of the anonymous speaker. In *Xiaoning v. Yahoo! Inc.*, two Chinese dissidents sued Yahoo pursuant to the TVPA, alleging that Yahoo’s disclosure of their identifying information to the Chinese government aided or abetted torture and other injuries inflicted on the dissidents.¹²⁶ In addition, in the wake of the *Yahoo!* action, Congress drafted the Global Online Freedom Act, which, if enacted, would bar U.S. companies from disclosing personally identifiable information about online users to foreign governments except for “legitimate foreign law enforcement purposes.”¹²⁷ Separately, technology companies and non-governmental organizations have launched the Global Network Initiative, a coalition that has formulated a code of conduct and a forum designed to protect online free speech and privacy.¹²⁸

E. Futility

A subpoena recipient also may argue that enforcement of the subpoena—even against an ISP—may be futile. With the increased use of open networks as well as anonymizers, IP disguisers, MAC spoofing, and similar technological tools, the IP address sought by a plaintiff may not conclusively identify the anonymous speaker.¹²⁹ In fact, some websites, such as WikiLeaks, make clear that they will go to great lengths to protect contributors, such as by “maintain[ing] . . . servers at undisclosed locations, pass[ing] communication through protective jurisdictions, keep[ing] no traffic logs, and us[ing] military-grade encryption.”¹³⁰

As one court aptly analogized, just as a telephone number is not necessarily indicative of the person using a phone at any given time, an IP address may bear no relation to the anonymous speaker; in fact, it may even mistakenly identify an innocent third party.¹³¹

VII. PRACTICE POINTERS: HOW TO MINIMIZE THE RISK OF LIABILITY FOR SUBPOENA RESPONSES

The appropriate response to a subpoena seeking information about the identity of an anonymous speaker necessarily will vary from case to case. But subpoena recipients always should consider the following steps to minimize legal risk associated with such responses.

A. Preserve the Information Sought

The recipient should immediately preserve the electronic and other information sought by a subpoena, including electronic information that ordinarily would be stored only temporarily.¹³² The failure to do so may result in sanctions for spoliation.¹³³

B. Review Terms of Service and Privacy Policies

When a subpoena recipient, such as a website operator, employs privacy policies, terms of service, or any other policy or agreement governing the disclosure of information that could identify anonymous posters, it should comply with those policies—or face the real possibility of being sued by an anonymous poster for breach of contract.¹³⁴ Subpoenaing parties often point to such policies as evidence that the anonymous speaker has no reasonable expectation of anonymity.¹³⁵ And one court has relied on the language in a website's terms of service to deny shield law protection to an anonymous poster.¹³⁶ Terms of service and privacy policies therefore should be evaluated and updated with potential subpoenas for anonymous website posters in mind.

C. Consider Notifying the Anonymous Speaker

The subpoena recipient should consider voluntarily notifying the anonymous poster of the existence of the subpoena.¹³⁷ The poster has the greatest interest in protecting her right to anonymity, and notification will provide her with an opportunity to respond directly.¹³⁸ Such notice may also head off a potential claim by the anonymous poster that the subpoena recipient's release of her identity breached a contract or resulted in reputational or other injury.¹³⁹ The Virginia legislature has created a notification form for use in such cases, as has at least one federal court.¹⁴⁰

VIII. CONCLUSION

Clear patterns have emerged in the law governing protections for anonymous online speech, but some significant questions remain. Courts have almost uniformly granted expressive speech by anonymous posters the highest level of protection, whereas they allow individuals involved in allegedly infringing speech to be unmasked after satisfaction of only minimal hurdles. But recent decisions by the Second and Ninth Circuits threaten to upend this simple dichotomy.

The *2TheMart* test remains the only test designed to apply where the anonymous poster is sought as a witness rather than as a defendant. The opinions adopting the test have been thin on analysis, however, and the courts issuing them do not appear to have considered whether this test is sufficiently rigorous to protect First Amendment anonymity rights. As the *2TheMart* court itself recognized, unlike a Doe defendant, nonparty speakers are not alleged to have caused a plaintiff or other party harm and are therefore entitled to a higher level of protection. But in contrast to the standards that have evolved for Doe defendant subpoenas, the *2TheMart* test does not require the subpoenaing party to support the merits of its claim or defense and, as such, imposes a lower burden on parties seeking the identifying information of nonparty speakers. Given the very limited number of published cases involving third-party anonymous speakers, however, there remains the opportunity for a more stringent test to take hold.

There have been precious few decisions addressing motions to quash subpoenas for anonymous posters' identities in criminal cases. While it is clear that state shield laws may be invoked in the criminal context, it is not clear that the First Amendment-based tests, which have all been developed in civil cases, will be found to have any bearing. Website operators report seeing an increasing number of prosecutorial subpoenas for anonymous poster information, and thus court decisions in this area may well be right around the corner.

Finally, it remains unclear whether the current state of the law affords a balance between aggrieved parties and anonymous speakers that is acceptable to judges and lawmakers. The immunity provided to website operators under Section 230 may ultimately drive courts to limit the protections for anonymous posters, who are often the only parties able to be sued in these cases. Conversely, the protections for anonymous posters may incentivize legislators to weaken Section 230's protections to enable those injured by online speech to obtain a remedy.

In short, this area continues to be one of the fastest-growing in communications law, and practitioners are well advised to monitor developments closely.

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1. While the Appendix does not include every case decided in this area of law, we have endeavored to be as comprehensive as possible.
 2. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995).
 3. *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive

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- practices and laws either anonymously or not at all. . . . It is plain that anonymity has sometimes been assumed for the most constructive purposes.”).
4. *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999) (striking down requirement that petition circulators wear identification badges stating their names because it “compels . . . identification at the precise moment when the circulator’s interest in anonymity is greatest”); *see also Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2832 (2010) (Scalia, J., concurring in judgment) (describing majority opinion, which upheld open records statute’s application to referendum petitions, as acknowledging a “First Amendment right to anonymity”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (holding that subpoenas seeking names of NAACP members raise First Amendment concerns).
 5. *McIntyre*, 514 U.S. at 347, 357 (“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.”). *But see McConnell v. FEC*, 540 U.S. 93, 128 (2003) (expressing concern regarding the misleading nature of some anonymous speech in the context of advertisements related to federal elections), *overruled on other grounds by Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010).
 6. *McIntyre*, 514 U.S. at 347.
 7. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (affirming that First Amendment protections apply fully to Internet speech); *see also, e.g., Rich v. City of Jacksonville*, No. 3:09-CV-454-MMH-MCR, 2010 WL 1141556 (M.D. Fla., Mar. 23, 2010) (holding that blogger stated claim under Section 1983 for violation of First Amendment right to anonymity where law enforcement obtained blogger’s identity via criminal subpoenas to ISPs).
 8. *See, e.g., McIntyre*, 514 U.S. at 353 (balancing right to anonymity and right to protection from fraud); *Best W. Int’l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *3-4 (D. Ariz. July 25, 2006) (balancing right to anonymity and right to obtain redress for attacks on corporate reputation, trademark infringement, disclosure of confidential information, and unfair competition). As one court recently explained, “because a court order invoked by private litigants constitutes state action, [the subpoenaing party’s] attempt to utilize the subpoena power is subject to review by this Court for consideration of the First Amendment concerns raised by Doe.” *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp. Regarding IP Address 69.120.35.31*, No. MISC 08-347(ARR)(MDG), 2010 WL 2219343, at *7 (E.D.N.Y. Feb. 5, 2010) (“*In re Rule 45 Subpoena*”) (Go, Mag.), *adopted in relevant part by district court*, 2010 WL 1686811 (E.D.N.Y. Apr. 26, 2010).
 9. *See, e.g., Best W. Int’l, Inc.*, 2006 WL 2091695, at *3-4 (“Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrong doers from hiding behind an illusory shield of purported First Amendment rights”) (citation and internal quotation marks omitted).
 10. *See* 47 U.S.C. § 230(c)(1) (“Section 230 of the Communications Decency Act” or “Section 230”). Section 230 does not provide immunity as to federal criminal law, intellectual property law, communications privacy law, or consistent state laws. *See id.* § 230(e).
 11. *E.g., Best W. Int’l Inc.*, 2006 WL 2091695 (plaintiff filed suit against John Doe defendants then sought court order allowing expedited discovery as to third-party

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- ISPs); *see also, e.g.*, New Jersey Rules of Court 4:26-4 (authorizing use of fictitious party names). Occasionally, suits are filed against the owner of the website on which the offending material was posted or the anonymous poster's Internet service provider (ISP), and the plaintiff serves a discovery request on those parties. *E.g., Pub. Relations Soc'y of Am. v. Road Runner High Speed Online*, 799 N.Y.S.2d 847 (N.Y. Sup. Ct. 2005) (naming ISP as defendant); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007) (naming ISP and anonymous speaker as defendants).
12. *E.g., La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV-030197400S, 2003 WL 22962857, at *2-3 (Conn. Super. Ct. Dec. 2, 2003); *see also, e.g.*, Ill. Sup. Ct. R. 224 (authorizing independent actions for discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages").
 13. *See* 17 U.S.C. § 512(h) (authorizing issuance of form subpoena to "provider of online services" for identifying information about an alleged infringer even where there is no pending lawsuit); *see also In re Subpoena Issued Pursuant to the Digital Millennium Copyright Act to: 43SB.com, LLC*, No. MS07-6236-EJL, 2007 WL 4335441 (D. Idaho Dec. 7, 2007) (pre-suit DMCA subpoena served on owner of website hosting allegedly infringing content). DMCA subpoenas may not be served, however, on recipients who have merely acted as conduits for peer-to-peer exchanges, such as file sharing, and have not actually hosted the infringing content. *See Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) ("*RIAA v. Verizon*").
 14. Because the subpoenaing party is most commonly the plaintiff, this outline frequently speaks in those terms. Defendants may also wish to unmask anonymous posters, however, either to assert claims against them or to contact them as potential witnesses. Similarly, this outline generally speaks of anonymous "posters" even though the anonymous person whose identity is being sought might have been communicating in a fashion other than posting comments, such as by sharing music files.
 15. *E.g., Enterline v. Pocono Med. Ctr.*, No. 08-cv-1934-ARC, 37 Media L. Rep. (BNA) 1057, 2008 WL 5192386, at *4 (M.D. Pa. Dec. 11, 2008); *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) ("*2TheMart*").
 16. An Internet protocol address—or IP address—is a number assigned to a computer as it navigates the Internet. Under most circumstances, this number can be used to identify, to a reasonable degree of certainty, the user at the helm of that computer. *But see* notes 129-31 and accompanying text (discussing reasons why an IP address may not always identify the anonymous person sought).
 17. *E.g., 2TheMart*, 140 F. Supp. 2d at 1090 (describing subpoena as seeking, "among other things, '[a]ll identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online message boards,' concerning a list of twenty-three InfoSpace users, including Truthseeker, Cuemaster, and the current J. Doe, who used the pseudonym NoGuano.").
 18. The IP address will identify the poster's ISP. If the other registration information is not authentic, the plaintiff generally serves a second subpoena on the ISP seeking the identifying information of the subscriber associated with the IP address. Although one federal court held that an IP address is not "personally identifiable information," *see Johnson v. Microsoft Corp.*, No. C06-0900RAJ,

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- 2009 WL 1794400, at *4 (W.D. Wash. June 23, 2009), that decision has been criticized, *see, e.g.*, Wendy Davis, *Court: IP Addresses are Not “Personally Identifiable” Information*, Online Media Daily (July 9, 2009), available at http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=109242, and has not been followed by any other court in a published opinion.
19. This year, two federal courts rejected the contention that an anonymous speaker lacks standing to challenge a subpoena issued to his ISP for his identity. *See In re Rule 45 Subpoena*, 2010 WL 2219343, at *4 (finding nonparty standing notwithstanding Fed. R. Civ. P. 45’s language permitting objections to subpoenas by “a person commanded to produce [documents]”); *Elektra Entm’t Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111885, at *7 (E.D.N.C. Sept. 26, 2008) (finding nonparty standing where the speaker “claims a personal right in the information sought by the subpoena”).
 20. *McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010).
 21. 2008 WL 5192386, at *3 (citing, *inter alia*, *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392 (1988)).
 22. *Id.* at *3; *see also 2TheMart*, 140 F. Supp. 2d at 1091 (court invited non-movant website host to brief substantive issues related to rights of anonymous posters).
 23. 2008 WL 5192386, at *4.
 24. 52 Va. Cir. 26, 2000 WL 1210372, at *5 (Jan. 31, 2000) (citing *NAACP*, 357 U.S. at 459 and *Am. Booksellers Ass’n*, 484 U.S. at 392), *rev’d on other grounds by AOL, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001).
 25. *See McVicker*, 266 F.R.D. at 96.
 26. *See Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1215 (D. Nev. 2008) (“the inquiry into whether there is a ‘close relationship’ is functional in nature, and it is not necessarily required that the parties know, work or associate with one another”); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 258 (D.D.C.) (finding that ISP had standing to assert the rights of its anonymous subscribers because “a failure to do so could affect [its] ability to maintain and broaden its client base”), *rev’d on other grounds by RIAA v. Verizon*, 351 F.3d 1229 (D.C. Cir. 2003); *Matrixx Initiatives, Inc. v. Doe*, 42 Cal. Rptr. 3d 79 (Ct. App. 2006) (holding that hedge fund that owned office from which allegedly defamatory posting was made did not have standing to assert First Amendment rights of anonymous poster); *In re Subpoena Duces Tecum to AOL, Inc.*, 52 Va. Cir. at 26, 2000 WL 1210372, at *1, discussed in text *supra*; *see also NAACP*, 357 U.S. at 459-60 (“The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.”).
 27. *See Mobilisa*, 170 P.3d at 716 n.2 (holding that court need not address issue of ISP’s standing to assert rights of anonymous speaker because speaker also appeared on his own behalf); *AOL, Inc. v. Nam Tai Elecs., Inc.*, 571 S.E.2d 128 (Va. 2002) (allowing, without discussion, ISP to assert First Amendment rights of subscriber although subscriber did not join ISP’s motion to quash subpoena).
 28. *See, e.g., Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (holding that professional fundraiser may assert First Amendment rights of its client charities); *NAACP*, 357 U.S. at 458-60 (*NAACP* has standing to assert First Amendment right of its members in their anonymity); *Am. Booksellers Ass’n*,

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- 484 U.S. at 392-93 (bookstore had standing to assert First Amendment rights of patrons because of potential chilling effect of statute at issue); *Rancho Publ'ns v. Super. Ct.*, 81 Cal. Rptr. 2d 274, 275 (Ct. App. 1999) (“draw[ing] upon a well-established body of California case law which allows nonparties to civil litigation (such as a newspaper) to assert the constitutionally protected rights of an author to remain unknown” to grant motion to quash subpoena issued by defamation plaintiff seeking information identifying anonymous persons who purchased advertorials in newspaper); *Denari v. Super. Ct.*, 264 Cal. Rptr. 261, 266 (Ct. App. 1989) (“In several different situations the courts have accorded standing to litigants who are the recipients of discovery demands to assert the privacy rights of third persons not present who would be affected by the litigant’s obedience to the order.”); *Bd. of Trustees v. Super. Ct.*, 174 Cal. Rptr. 160, 164 (Ct. App. 1981) (“The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted.”) (citation omitted; alterations in original); *cf.*, *e.g.*, *NBC, Inc. v. Cooperman*, 501 N.Y.S.2d 405, 406 (App. Div. 1986) (media has standing to contest gag order on trial participants because order “infring[es] on its constitutionally guaranteed right to gather the news”).
29. 47 U.S.C. § 230.
30. Indeed, one federal district court has recently noted the conundrum that Section 230 immunity presents to those disparaged on the Internet. *See, e.g., Blockowicz v. Williams*, No. 09-C-3955 (N.D. Ill., Dec. 21, 2009) (noting, in denying plaintiffs’ motion to enforce an injunction as to a third-party website found not to satisfy the “legal identity” and “active concert or participation” requirements of Rule 65, that the plaintiffs “find themselves the subject of defamatory attacks on the Internet yet seemingly have no recourse to have those statements removed from public view” because the website itself is immune under Section 230).
31. Before this year there were two federal appellate decisions involving subpoenas served on ISPs for information regarding the identity of anonymous online file sharers. Because these decisions ultimately turned on the proper application of the DMCA, they did not address the conflicting rights of the speakers and the plaintiff. *See In re Charter Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005); *RIAA v. Verizon*, 351 F.3d at 1229.
32. *See, e.g., Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008) (collecting and analyzing cases). These standards were developed in civil actions involving private parties. No courts appear to have imported these tests into the criminal context to examine whether a criminal *defendant* has a First Amendment right in the privacy of his or her ISP subscriber information. *See United States v. D’Andrea*, 497 F. Supp. 2d 117, 120 (D. Mass. 2007) (analyzing issue under Fourth Amendment and holding that “internet users have no reasonable expectation of privacy in their subscriber information, the length of their stored files, and other noncontent data to which service providers must have access”); *People v. Delp*, 178 P.3d 259 (Or. Ct. App. 2008) (same); *State v. Reid*, 945 A.2d 26, 35 n.4 (N.J. 2008) (“declin[ing] to import *Dendrite*’s analysis to the grand jury context” when law enforcement officers sought defendant’s ISP subscriber information via grand jury subpoena); *see also* Electronic Communication Privacy Act of 1986, 18 U.S.C. § 2510, *et seq.* (permitting electronic communication services providers to disclose contents of communications to governmental entity

pursuant to defined tests); Cable Communications Policy Act of 1984 (“Cable Act”), 47 U.S.C. § 521, *et seq.* (allowing disclosure of information regarding cable subscriber to governmental entity pursuant to court order if entity offers “clear and convincing evidence” that subject of information is “reasonably suspected of engaging in criminal activity” and information sought would be material evidence); *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 157 F. Supp. 2d 286 (S.D.N.Y. 2001) (holding that Cable Act’s subscriber notice requirements do not apply to disclosure of information to governmental entities by cable companies providing Internet services). A New York court recently did, however, examine the *bona fides* of a prosecution in quashing a subpoena. *See Straus Newspapers Inc. v. People* (N.Y. Sup. Ct., Orange County, Feb. 9, 2010) (transcript of oral argument) (quashing subpoena to newspaper upon finding that anonymous blog comments were not harassing or threatening and therefore not evidence of any crime having been committed).

Media companies and other website owners often receive subpoenas for the identities of anonymous posters sought as *witnesses* in criminal prosecutions, and it remains to be seen whether courts will rely on these tests in that context. At least one court has implicitly done so. *See Texas v. Martinez*, No. 17042-B (Taylor County Dist. Ct., June 19, 2009) (quashing, without explication, a subpoena issued by a criminal defendant after the recipient newspaper argued that the *Dendrite* test applied to protect the identity of a person who had anonymously posted comments to the newspaper’s website). As discussed in Section VI.A of this outline, some courts have also applied state shield laws to quash subpoenas for witnesses’ identities in criminal cases. *See, e.g., Alton Tel. v. Illinois*, No. 08-MR-548 (Ill. Cir. Ct., Madison County, May 15, 2009).

33. *See, e.g., Krinsky*, 72 Cal. Rptr. 3d at 245 (reviewing previous decisions in which low burden good faith basis and motion to dismiss tests were applied and concluding that, in a defamation action, the high burden summary judgment test best protects anonymous speech while allowing plaintiffs to seek remedies for alleged injuries); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (same).
 34. *See Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 7 n.6 (D.D.C. 2008) (applying low burden good cause standard to copyright claim and noting that cases involving “First Amendment-protected speech” could be legally or factually distinguished); *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (“*Sony*”) (finding that “the use of [peer-to-peer] file copying networks to download, distribute, or make sound recordings available qualifies as speech entitled to First Amendment protection,” but “[t]hat protection . . . is limited”). *See also* Nathaniel Gleicher, *John Doe Subpoenas: Toward A Consistent Legal Standard*, 118 YALE L.J. 320, 339-43 (Nov. 2008) (summarizing “[t]he seven major John Doe subpoena standards” and noting that decisions in non-IP cases had increasingly imposed high burden standards irrespective of claim asserted); Citizen Media Law Project, *Legal Protections for Anonymous Speech*, available at <http://www.citmedialaw.org/legal-guide/legal-protections-anonymous-speech> (last visited Sept. 8, 2010) (“The recent and growing trend in anonymity cases is for courts to apply a high-burden [*i.e.*, summary judgment-type] test.”). As discussed below, however, a few courts have applied high burden tests in infringement actions and low burden tests in actions involving expressive speech.
35. *See, e.g., McIntyre*, 514 U.S. at 357.

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36. See *Sony*, 326 F. Supp. 2d at 564 (concluding that using P2P file copying networks to share music files “qualifies as speech, but only to a degree”); see also *Arista*, 551 F. Supp. 2d at 8-9 (contrasting file sharing with “actual speech”) (emphasis in original).
 37. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).
 38. See *Best W. Int’l*, 2006 WL 2091695, at *4 (describing speech in question as “purely expressive” and entitled to substantial First Amendment protection even though plaintiff asserted claims for breach of contract, breach of fiduciary duties, trademark infringement, revealing confidential information, and unfair competition in addition to defamation claim).
 39. *Mobilisa*, 170 P.3d at 719.
 40. See *id.* at 719 n.7 (“[T]he potential for chilling speech by unmasking the identity of an anonymous or pseudonymous internet speaker equally exists whether that party is a defendant or a witness. For that reason, we reject our dissenting colleague’s view that courts should apply a different test when the identity of a witness is at issue.”); *id.* at 720 (where anonymous poster is a nonparty witness “along with a number of known witnesses with the same information,” however, that factor “weigh[s] against disclosure” when a balancing test is performed); *In re Rule 45 Subpoena*, 2010 WL 2219343 (declining to determine whether the *Cahill* or *Sony* test applies but recommending granting a motion to quash after considering an “adapted” version of *Sony*).
 41. *2TheMart.com*, 140 F. Supp. 2d at 1095; see also *McVicker*, 266 F.R.D. at 95; *Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009); *Enterline*, 2008 WL 5192386, at *4 (explaining that, because the plaintiff could not even satisfy the relatively low burden test imposed in *2TheMart* that she herself advocated, the court was not required “to determine the full extent of the First Amendment right to anonymity” in this context).
 42. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
 43. 884 A.2d 451 (Del. 2005).
 44. 775 A.2d at 760.
 45. See, e.g., *Mobilisa*, 170 P.3d at 719-21 (trespass to chattel and violations of federal communications laws); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (defamation); *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001) (breach of loyalty and contract, among other claims); *Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009) (defamation and invasion of privacy); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 697-98 (N.Y. Sup. Ct. 2007) (defamation). See also *Hester v. Doe*, No. 10-CVS-361 (N.C. Sup. Ct., Vance County, Jun. 28, 2010) (purporting to apply *Dendrite* in a defamation action but mistakenly asserting that the standard required only a “Rule 12(b)(6) motion to dismiss analysis”). At least two courts have applied the *Dendrite* standard to infringement claims as well. See *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005) (trademark infringement and unfair competition); *Best W. Int’l*, 2006 WL 2091695, at *4. (trademark infringement). The *Swartz* decision is one of the first in which the *Dendrite* test was applied to factual findings made by the court after an evidentiary hearing. See *Swartz*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009).

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46. 884 A.2d at 460.
 47. *Id.* at 463-64 (holding that public figure plaintiff need not produce evidence as to actual malice because “without discovery of the defendant’s identity, satisfying this element may be difficult, if not impossible”); *accord Best W. Int’l*, 2006 WL 2091695, at *4; *Mobilisa*, 170 P.3d at 720; *Reunion Indus. Inc. v. Doe 1*, 80 Pa. D. & C.4th 449, 456 n.5 (Ct. Comm. Pl. 2007); *In re Does 1-10*, 242 S.W.3d 805, 822 (Tex. App. 2007).
 48. *See, e.g., Doe I v. Individuals*, 561 F. Supp. 2d 249, 253-57 (D. Conn. 2008) (defamation and other claims); *McMann v. Doe*, 460 F. Supp. 2d 259, 266-70 (D. Mass. 2006) (defamation, privacy and copyright); *Best W. Int’l*, 2006 WL 2091695, at *4 (defamation and other claims); *Solers, Inc. v. John Doe*, 977 A.2d 941 (D.C. 2009) (defamation and tortious interference); *Reunion Indus., Inc.*, 80 Pa. D. & C.4th at 456 n.5 (commercial disparagement); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007) (defamation).
 49. 884 A.2d at 460.
 50. *See Krinsky*, 72 Cal. Rptr. 3d at 242-43 (characterizing the *Cahill* standard as more stringent than a motion to dismiss test, but less stringent than a prima facie case test).
 51. *See Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456-57 (Md. 2009) (inaccurately characterizing the *Cahill* summary judgment test as requiring plaintiffs to provide enough evidence to *affirmatively* establish their entitlement to summary judgment, and observing that such a test “[s]et[s] the bar too high” by “undermin[ing] personal accountability and the search for truth, by requiring claimants to essentially prove their case before even knowing who the commentator was”).
 52. 72 Cal. Rptr. 3d at 243-44.
 53. *Id.*
 54. *Id.* at 245-46.
 55. 966 A.2d at 456-57. *But see Solers, Inc.*, 977 A.2d at 953-58 (the District of Columbia’s highest court adopted the *Cahill* standard that same year).
 56. *See SaleHoo Groups, Ltd. v. ABC Co.*, ___ F. Supp. 2d ___, No. C10-0671JLR, 2010 WL 2773801, at *4-5 (W.D. Wash. July 12, 2010) (adopting elements of *Dendrite* and quashing subpoena issued in action alleging defamation, trademark infringement, false designation of origin and unfair competition); *USA Techs., Inc. v. Doe*, ___ F. Supp. 2d ___, No. C 09-80275 SI, 2010 WL 1980242 (N.D. Cal. May 17, 2010) (adopting “streamlined version of the *Dendrite* test” to quash subpoena in action for securities fraud and defamation); *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, ___ A.2d ___, No. 2009-262, 2010 WL 1791274, at *8 (N.H. 2010) (adopting *Dendrite* in defamation action); *see also Juzwiak v. Doe*, ___ A.2d ___, 2010 WL 3022213, at *4 (N.J. App. Div. Aug. 3, 2010) (rejecting argument that *Dendrite* did not apply on the ground that the speech at issue constituted threats beyond the protection of the First Amendment). *But see Maxon v. Ottawa Publ’g*, 929 N.E.2d 666, 675-76 (Ill. App. Ct., 3d Dist., 2010) (rejecting trial court’s application of *Dendrite/Cahill* standard and holding that Illinois Supreme Court Rule 224, which authorizes independent actions for the discovery of the “identity of one who may be responsible in damages,” coupled with the motion to dismiss standard provides the same level of protection given that Illinois is a fact pleading state); *Too Much Media, LLC v. Hale*, 993 A.2d 845, 861-62 (N.J. App. Div. 2010) (rejecting named-defendant blogger’s

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- attempt to invoke *Dendrite*, in addition to shield law, in defamation action to protect identity of her sources, and more broadly asserting that the *Dendrite* standard is limited to “evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards” and has “never been extended beyond ISPs”).
57. See, e.g., *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (equating this aspect of the *Dendrite* and *Cahill* tests).
 58. See *Dendrite*, 775 A.2d at 760-61; accord, e.g., *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 976 (balancing 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”).
 59. See, e.g., *Cahill*, 884 A.2d at 457 (finding a balancing test unnecessary because the “summary judgment test is itself the balance”); *Krinsky*, 72 Cal. Rptr. 3d at 245-46 (rejecting balancing step because, where plaintiff’s proffer demonstrates “there is a factual and legal basis for believing libel may have occurred, the writer’s message will not be protected by the First Amendment”).
 60. 170 P.3d at 720.
 61. *Id.*
 62. *Id.* At least one court has expressly considered some of these factors in the balancing step. A Tennessee court looked to *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) as well as the Tennessee Shield Law, T.C.A. § 24-1-208(c)(2) in seeking guidance on how to perform the balance. See *Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009). The court concluded that the “relevant factors include: the specificity, relevance, and materiality of the discovery request; the absence of alternative means to obtain the requested information; and the extent and reasonableness of the speaker’s privacy expectations.” *Id.*
 63. 611 F.3d 653 (9th Cir. 2010), *appealed from Quixtar Inc. v. Signature Mgmt. TEAM, LLC*, 3:07-CV-505-ECR-RAM (D. Nev. Apr. 7, 2009) (Dkt. Entry 409).
 64. *In re Anonymous Online Speakers*, 611 F.3d at 655-56.
 65. See *id.* at 657 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980)).
 66. *Id.* at 661 (citing, *inter alia*, *Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817-18 (2010)); see also *id.* at 657 (“The right to speak, whether anonymously or otherwise, is not unlimited, ... and the degree of scrutiny varies depending on the circumstances and the type of speech at issue.”).
 67. *Id.* at 661.
 68. *Id.* at 660-62. The court relied upon two other circuit court cases, each of which considered anonymity rights in the context of offline speech found to be commercial in nature. In *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir. 2009), the Fourth Circuit allowed the disclosure of the identity of a shareholder who requested that his anonymous complaints about the company be forwarded by the company to its auditors. In *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir.1998), the Sixth Circuit quashed a subpoena for the identity of a newspaper advertiser. In both cases, the courts evaluated whether the plaintiff had demonstrated that a “substantial state interest” in disclosure outweighed the anonymity rights at stake.
 69. 604 F.3d 110, 119 (2d Cir. 2010) (emphasis added).

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70. *See, e.g., In re Rule 45 Subpoena*, 2010 WL 2219343, at *8-9 (rejecting argument that speech analogous to that at issue in *In re Anonymous Online Speakers* was “commercial speech” deserving of less protection under the First Amendment, because “[t]he ‘core notion’ of commercial speech is that ‘which does no more than propose a commercial transaction’” and “[n]one of Doe’s comments . . . amount to an attempt to propose a commercial transaction or constitute some sort of advertising”) (quoting *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002) (citation omitted)).
 71. The case arose on a petition for mandamus, and the court held that the district court did not clearly err since it ordered disclosure even under the heightened *Cahill* standard. *In re Anonymous Online Speakers*, 611 F.3d at 661.
 72. 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (“*Seescandy*”).
 73. *Id.* at 580; *accord Rocker Mgmt., LLC v. Does 1-20*, No. 03-MC-33-CRB, 2003 WL 22149380, at *1 (N.D. Cal. May 29, 2003); *see also Krinsky*, 72 Cal. Rptr. 3d at 245 (noting that “[e]ven the decisions imposing a motion-to-dismiss obligation nonetheless require some showing that the tort took place”) (internal quotation marks and citations omitted).
 74. *Seescandy*, 185 F.R.D. at 579-80.
 75. *Alvis Coatings, Inc. v. Does 1-10*, No. 3L94-CV-374-H, 2004 WL 2904405, at *3 (W.D.N.C. Dec. 2, 2004). Although the court stated that the plaintiff must make “a prima facie showing that an anonymous individual’s conduct on the Internet is otherwise unlawful,” it cited cases employing motion to dismiss and even lower burden standards in its discussion of what that means. *Id.*
 76. *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis.) (noting that *Cahill*, which applied a summary judgment test, was decided in a notice pleading state), *reconsideration denied*, 297 Wis. 2d 325 (2006). In the wake of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2007), which “retired” *Conley v. Gibson* and held that “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 545-47, a motion to dismiss standard might provide at least some degree of greater protection in a federal case than it would in a court in a notice pleading state.
 77. 326 F. Supp. 2d 556 (S.D.N.Y. 2004).
 78. 604 F.3d 110 (2d Cir. 2010).
 79. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 163 (D. Mass. 2008) (stating further that these aspects were “the value judgment of what is worthy of being copied; the association of one recording with another by placing them together in the same library; the self-expressive act of identification with a particular recording; the affirmation of joining others listening to the same recording or expressing the same idea”); *see also, e.g., UMG Recordings, Inc. v. Does 1-4*, No. 06-0652 SBA (EMC), 2006 WL 1343597, at *2 (N.D. Cal. Apr. 19, 2006) (finding that a “person who uses the Internet to download or distribute copyrighted music without permission is engaging in the exercise of speech, but only to a limited extent, and the First Amendment does not protect the person’s identity from disclosure”).
 80. 326 F. Supp. 2d at 564-66.
 81. *Id.* at 564-65. Only four courts have applied the *Sony* test outside of the file-sharing context. *Sony* was applied this year in what appears to have been a garden-variety infringement case. *See XCENTRIC VENTURES, LLC v. Arden*,

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- No. C 09-80309 MISC JW (PVT), 2010 WL 42444 (N.D. Cal. Jan. 27, 2010). In *Public Relations Society of America v. Road Runner High Speed Online*, a New York court applied the test in a defamation action. 799 N.Y.S.2d at 853-54. The court's analysis of the First Amendment issue was perfunctory, however, and the decision's predictive value is further diminished by three subsequent New York decisions. See *In the Matter of the Application of Liskula Cohen*, No. 100012/09, 2009 WL 2883410 (N.Y. Sup. Ct. Aug. 17, 2009) (holding that the law generally applicable to an application for pre-action disclosure, together with the legal requirements for establishing a meritorious cause of action for defamation, applied); *Sandals Resorts Int'l Ltd. v. Google, Inc.*, ___ N.Y.S.2d ___, No. 100628/10, 2010 WL 1428266 (N.Y. Sup. Ct. Mar. 4, 2010) (same); *Greenbaum*, 845 N.Y.S.2d at 698-99 (finding *Dendrite* to be "persuasive authority" in pre-action proceeding for discovery, but concluding that it "cannot reach the issue of the quantum of proof that should be required on the merits because, here, the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law"). In *General Board of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc.*, a federal district court applied the *Sony* test to an action brought under the Stored Communications Act, in which a corporate plaintiff sought from an ISP the identity of an individual who allegedly hacked into the e-mail accounts of seven of the company's employees and sent a message from one account. No. CV-06-3669 (DRH) (ETB), 2006 WL 3479332 (E.D.N.Y. Nov. 30, 2006). The court relied on *Sony* to conclude that there was "a minimal expectation of privacy in the alleged tortious conduct set forth in the petition." *Id.* at *5.
82. 604 F.3d 110, 122 (2d Cir. 2010).
83. See *id.* at 123.
84. *E.g.*, *Arista*, 551 F. Supp. 2d at 6-7; *LaFace Records, LLC v. Does 1-5*, No. 2:07-CV-187, 2007 WL 2867351 (W.D. Mich. Sept. 27, 2007).
85. See FED. R. CIV. P. 26(d) (providing that parties generally may serve discovery only after Rule 26(f) conference, "except . . . when authorized by . . . court order"); see also, *e.g.*, *Monsanto Co. v. Woods*, No. 4:08-CV-00137-CEJ, 2008 WL 821717, at *2 (E.D. Mo. Mar. 25, 2008) (court required showing of good cause before granting plaintiffs' *ex parte* motion for expedited discovery).
86. *Arista*, 551 F. Supp. 2d at 8, 9 (citation omitted).
87. 326 F. Supp. 2d at 564 (quoting *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d at 260 (concluding that "there is some level of First Amendment protection that should be afforded to anonymous expression on the Internet, even though the degree of protection is minimal where alleged copyright infringement is the expression at issue").
88. *LaFace*, 2007 WL 2867351, at *1; see also *Arista*, 551 F. Supp. 2d at 4 (explaining that expedited discovery was authorized on the basis that "'Defendants must be identified before this suit can progress further'") (citation omitted). One federal magistrate judge recently applied this very low burden standard in a defamation case, see *20/20 Financial Consulting, Inc. v. Does 1-5*, No. 10-cv-01006-CMA-KMT, 2010 WL 1904530 (D. Colo. May 11, 2010) (Tafoya, Mag.), but this case is an outlier. Some courts have authorized the issuance of subpoenas on the basis of a good cause standard, but then have applied a more burdensome test upon consideration of a subsequent motion to quash the subpoenas. See, *e.g.*, *Arista Records LLC v. Does 1-16*,

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- No. 1:08-CV-765 (GTS/RFT) (N.D.N.Y. July 22, 2008 & Feb. 18, 2009) (Treece, Mag.) (applying good cause standard to allow issuance of pre-service subpoenas, then applying *Sony* to deny motion to quash subpoenas).
89. See, e.g., *Mobilisa*, 170 P.3d at 719-20 (requiring that plaintiff attempt to notify anonymous speaker via same medium used to send or post speech at issue); *Cahill*, 884 A.2d at 461 (“[w]hen First Amendment interests are at stake we disfavor *ex parte* discovery requests”); accord, e.g., *Doe I v. Individuals*, 561 F. Supp. 2d at 254; *Best W. Int’l*, 2006 WL 2091695, at *6; *Seescandy*, 185 F.R.D. at 579; *Dendrite*, 775 A.2d at 760 (all imposing notification requirement).
90. See VA. CODE ANN. § 8.01-407.1(A)(1)(b) (requiring, *inter alia*, that party issuing subpoena make reasonable efforts to identify anonymous communicator).
91. See *UMG*, 2006 WL 1343597, at *3 (using its “authority under the Federal Rules” to order a third-party ISP to notify subscribers of plaintiffs’ subpoena for their identities); *Mobilisa*, 170 P.3d at 721 (affirming trial court’s order requiring defendant e-mail service provider to notify John Doe co-defendant about the proceedings where plaintiff had tried but failed, and noting that where a cost is involved, plaintiff may be ordered to pay that cost); *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328, 342 (Ct. Com. Pl. 2004) (requiring ISP to notify the anonymous subscribers before disclosing their identities “to afford them a reasonable opportunity to petition the court to vacate, reconsider or stay the discovery order”); see also *Solers*, 977 A.2d 941, 954 (noting that “it often will be simpler and more effective to require the recipient of the subpoena (who likely knows the identity of the anonymous defendant, or at least knows how to contact him) to provide such notice” and “leav[ing] it to the trial court to determine in the circumstances of each case who should notify the anonymous defendant of the efforts to discover his identity”).
92. VA. CODE ANN. § 8.01-407.1(A)(3). Also, federal law provides that “cable operators”—including cable content providers, ISPs using cable modems, and wire and radio communications service providers—generally must notify a subscriber before disclosing personally identifiable information in response to a court order. See 47 U.S.C. § 551(c) (but exempting court orders obtained by government entities).
93. 775 A.2d at 760.
94. 185 F.R.D. at 578-80.
95. 326 F. Supp. 2d at 564-66; accord, e.g., *In re Rule 45 Subpoena*, 2010 WL 2219343, at *8 (adapting the considerations discussed in *Sony* to an unusual case in which bankruptcy trustee sought identity of anonymous critic of bankrupt company).
96. No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009). See also *Advance Magazine Publishers Inc. v. Does 1-5*, No. 1:09-CV-10257-JGK (S.D.N.Y. Dec. 21, 2009) (authorizing pre-service discovery for identities of anonymous posters where plaintiff argued, *inter alia*, that the privacy policies of the subpoena recipients made clear that identifying information was collected and would be provided in response to a court order).
97. See *McVicker*, 266 F.R.D. at 96 (finding that privacy policy created expectation of privacy in its users where policy “reflects that [the website operator] will disclose its users personally identifiable information only in very limited situations,” notwithstanding provisions stating that “[t]he Company may . . . disclose your information in response to a court order” and “at other times when

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- the Company believes it is reasonably required to do so”); *Sedersten*, 2009 WL 4802567, at *3 (rejecting the subpoenaing plaintiff’s argument that the poster had waived his First Amendment rights pursuant to the newspaper’s privacy policy—which stated that the newspaper reserved the right to disclose information collected about posters “in any way and for any purpose”—in light of the presumption against contractual waiver of constitutional rights and the absence, in the privacy policy, of any indication that a user might be waiving her anonymity rights).
98. See notes 40 and 60-61 and accompanying text.
 99. 140 F. Supp. 2d 1088 (W.D. Wash. 2001).
 100. *Id.* at 1097.
 101. *Id.* at 1095 (discussing the low burden tests applied in *Seescandy* and *In re Subpoena Duces Tecum to AOL* and asserting that “[t]he standard for disclosing the identity of a non-party witness must be higher than that articulated in [those cases]. When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.”) (emphasis in original). See also, e.g., *Sedersten v. Taylor*, 2009 WL 4802567, at *2 (noting that “a party seeking disclosure must clear a higher hurdle where the anonymous poster is a non-party”); *In re Rule 45 Subpoena*, 2010 WL 2219343, at *10 (explaining that a higher level of scrutiny must be imposed before revealing the identity of nonparties).
 102. 140 F. Supp. 2d at 1095-96.
 103. *Enterline*, 2008 WL 5192386, at *4.
 104. *Sedersten v. Taylor*, 2009 WL 4802567, at *2 (noting that “a party seeking disclosure must clear a higher hurdle where the anonymous poster is a non-party”); *McVicker*, 266 F.R.D. at 95 (same).
 105. *In re Subpoena Duces Tecum to AOL, Inc.*, 2000 WL 1210372, at *8. One court has combined good faith and motion to dismiss concepts in the same analysis. See *Polito*, 78 Pa. D. & C.4th at 341 (plaintiff must “satisfactorily state[] a cognizable claim under Pennsylvania law” and demonstrate that she “is seeking the requested information in good faith and not for some improper purpose such as harassing, intimidating or silencing her critics,” among other requirements).
 106. VA. CODE ANN. § 8.01-407.1(A)(1)(a) (emphasis added).
 107. The California Legislature considered but ultimately did not enact a similar provision. See Julia Scheeres, *Making It Harder For Prying Eyes*, WIRED, May 5, 2003, available at <http://www.wired.com/politics/law/news/2003/05/58720>.
 108. *In re Baxter*, No. 01-00026-M, 2001 WL 34806203 (W.D. La. Dec. 20, 2001).
 109. See *id.* at *12-17.
 110. For example, subpoenas issued under the DMCA may be defective if they are not issued in accordance with the Act’s specific requirements, see 17 U.S.C. § 512(h), and Rule 45(c)(3) of the Federal Rules of Civil Procedure sets out other bases upon which a subpoena must or may be quashed, see FED. R. CIV. P. 45(c)(3).
 111. *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Ct., Yellowstone County, Sept. 3, 2008) (applying the Montana Media Confidentiality Act, MONT. CODE ANN. § 26-1-902, *et seq.*, in an action for defamation and false light invasion of privacy and granting a third-party newspaper’s motion to quash a subpoena for

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- identifying information about various persons who had anonymously posted comments to articles in the newspaper's online edition); *Beal v. Calobrisi*, No. 08-CA-1075 (Fla. Cir. Ct., Okaloosa County, Oct. 9, 2008) (applying the Florida Shield Law, FLA. STAT. § 90.5015, to grant a third-party newspaper's motion to quash a subpoena seeking the identifying information of an anonymous poster to the newspaper's website); *Doe v. TS*, No. 08030693 (Or. Cir. Ct., Clackamas County, Sept. 30, 2008) (applying the Oregon Media Shield Law, O.R.S. § 44.510, *et seq.*, to deny plaintiff's motion to compel production of information identifying the author of an anonymous blog comment); *People v. Bruce*, No. 09M3247 (Colo. Springs Mun. Ct. Oct. 27, 2009) (applying Section 13-90-119(2), C.R.S. to quash a subpoena issued to a newspaper website for the identity of an individual alleged to be an exculpatory witness to allegedly criminal conduct); *People v. Mead*, No. 10 CRS 2160 (N.C. Super. Ct., Gaston County, Aug. 16, 2010); (applying the North Carolina shield law, N.C. Gen. Stat. § 8-53.11, to grant a newspaper's motion to quash a subpoena issued by a criminal defendant); *Alton Tel. v. Illinois*, No. 08-MR-548 (Ill. Cir. Ct., Madison County, May 15, 2009) (discussed in text).
112. *Alton Tel.*, No. 08-MR-548, at 6-7.
113. *Id.* at 3, 6-7. The relevant portions of the shield law provide that “[n]o court may compel any person to disclose the source of any information obtained by a reporter” unless “all other available sources of information have been exhausted . . . [and] disclosure of the information sought is essential to the protection of the public interest involved.” 735 ILCS 5/8-901, 907(2).
114. *Alton Tel.*, No. 08-MR-548, at 7.
115. *Id.* at 5-6 (emphasis in original). A “source” is defined by the shield law as “the person or means from or through which the news or information was obtained.” 735 ILCS 5/8-902(c).
116. *See O’Grady v. Super. Ct.*, 44 Cal. Rptr. 3d 72, 98 (Ct. App. 2006).
117. KRS 421.100.
118. No. 08-CI-1296, at 3 (Ky. Cir. Ct., Madison County, Mar. 26, 2010).
119. *Id.*
120. *Id.*
121. *See* notes 10 and 29-30 and accompanying text.
122. *See, e.g., Global Telemedia Int’l Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1269-71 (C.D. Cal. 2001) (granting defendants’ motion to strike pursuant to California’s anti-SLAPP statute in a defamation action brought against those who had anonymously posted comments to a securities dealers’ message board); *Paterno v. Super. Ct.*, 78 Cal. Rptr. 3d 244, 250 (Ct. App. 2008) (“The [California] anti-SLAPP statute reinforces the self-executing protections of the First Amendment”) (citing *Krinsky*, 72 Cal. Rptr. 3d at 231).
123. *See Tendler v. www.jewishsurvivors.blogspot.com*, 79 Cal. Rptr. 3d 407, 411 (Ct. App. 2008).
124. CAL. CODE CIV. PROC. §§ 1987.1-1987.2 (amended subpoena provisions); *see also id.* §§ 425.16-425.18 (provisions related to motions to strike pleadings). The text of the bill can be found at <http://www.casp.net/statutes/AB2433.html> (last visited Sept. 8, 2010); *see also* Corynne McSherry, *California Governor Signs Off on New Protections for Free Speech*, ELECTRONIC FRONTIER FOUNDATION, Oct. 2, 2008, <http://www.eff.org/deeplinks/2008/10/california-governor-signs-new-protections-free-spe> (discussing impact of the law’s terms).

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125. See *Sinclair*, 596 F. Supp. 2d at 132-33, 134 (also noting lack of personal jurisdiction); *McMann*, 460 F. Supp. 2d at 265.
126. See No. 4:07-CV-02151-CW (N.D. Cal. filed July 30, 2007), *complaint available at* <http://humanrightsusa.org> (follow “Accountability for Torturers” hyperlink; then follow “Corporate Accountability A” hyperlink); Dan Nystedt, *Yahoo sued again by Chinese dissidents*, WASHINGTON POST, Feb. 29, 2008, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022901240.html>. The case was settled in November 2007. *But see Zheng Cunzhu v. Yahoo! Inc.*, No. C-08-1068 MMC (N.D. Cal. Dec. 2, 2009) (dismissing claims that Yahoo violated the Electronic Communications Privacy Act by disclosing to the Chinese government Internet user information about certain Chinese dissidents and reasoning that the Act did not apply extraterritorially).
127. See, e.g., Jacqui Cheng, *Bill would penalize companies for aiding Internet censorship*, ARS TECHNICA, May 1, 2008, *available at* <http://arstechnica.com/tech-policy/news/2008/05/bill-would-penalize-companies-for-aiding-internet-censorship.ars> (summarizing pertinent provision of Act). In 2007-08, the bill, H.R. 275, cleared three House committees and was awaiting a floor vote, but objections by the Department of State and the Department of Justice ultimately derailed it. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00275:@@@L&summ2=m&> (last visited Nov. 28, 2009) (detailing Congressional activity on bill); Declan McCullagh, *‘Internet freedom’ bill targeting China cooperation faces rough road*, CNET, May 28, 2008, *available at* http://news.cnet.com/8301-13578_3-9952815-38.html (describing objections by State and Justice Departments). The 2009 version of the bill, H.R. 2271, has been reintroduced and referred to committee. See <http://thomas.loc.gov/> (enter “HR 2271” under “Search Bill Summary and Status”).
128. See <http://www.globalnetworkinitiative.org>; see also, e.g., Miguel Helft & John Markoff, *Big Tech Companies Back Global Plan to Shield Online Speech*, NEW YORK TIMES, Oct. 27, 2007, *available at* http://www.nytimes.com/2008/10/28/technology/internet/28privacy.html?_r=1&ei=5070&emc=eta-1&oref=slogin.
129. See *London-Sire Records Inc.*, No. 1:04-cv-12434 (D. Mass. Nov. 24, 2008) (quashing subpoena and holding that IP address insufficient to identify alleged infringers with reasonable degree of technical certainty). Although contained in a sealed letter and thus not available in the public record, the arguments advanced by the subpoena recipient in *London-Sire Records* are discussed in Wendy Davis, *Judge Ruling Protects IP Address Identities*, MEDIAPOSTNEWS, Dec. 1, 2008, *available at* http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=95689. See also Bennett Haselton, *Virginia High Court Wrong About IP Addresses*, SLASHDOT, Oct. 1, 2008, *available at* <http://news.slashdot.org/article.pl?sid=08/10/01/1526235&from=rss> (describing ways in which an Internet user can render an IP address insufficient to identify her).
130. Noam Cohen, *Calling on Leakers to Help Document Local Misdeeds*, New York Times (Dec. 21, 2009) (quoting description provided by the WikiLeaks website) (internal quotation marks omitted).
131. See *Columbia Pictures Indus. v. Bunnell*, No. CV06-1093FMCJXC, 2007 WL 2080419, at *2 n.7 (C.D. Cal. May 29, 2007).

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132. *See, e.g., id.* at *3, 7-8, 14 (ordering preservation and production of server log data that would, in the ordinary course, have been erased from the defendants' website server after approximately six hours).
 133. *See id.* at *13-14 (declining to impose sanctions in the absence of precedent imposing duty to preserve information temporarily stored in RAM). As courts and lawyers gain more familiarity with e-discovery obligations and litigation holds on electronic data, courts will likely expect greater preservation efforts by sophisticated parties receiving subpoenas.
 134. *See, e.g., Wargo v. Lavandeira*, No. 1:08-cv-02035-LW (N.D. Ohio Oct. 3, 2008) (Dkt. No. 15) (dismissing for lack of personal jurisdiction an action against a blogger seeking \$25 million in damages for publishing an anonymous poster's name and work e-mail address, along with the poster's previously anonymous comments, in violation of the blog's privacy notice); *compare Meyer v. Christie*, No. 07-2230-JWL, 2007 WL 3120695, at *4 (D. Kan. Oct. 24, 2007) (denying motion to dismiss breach of contract claim and finding that "bank's privacy policy constituted part of [plaintiff's] bargained-for exchange with the bank") *with Dyer v. Northwest Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (granting motion to dismiss breach of contract claim because, *inter alia*, "broad statements of company policy do not generally give rise to contract claims").
 135. *See* notes 96-97 and accompanying text.
 136. *See Clem*, 08-CI-1296, at 3; *see also* notes 117-20 and accompanying text.
 137. Where the subpoena recipient intends to file a motion to quash, it may be more appropriate simply to urge the court to adopt a procedure to notify the anonymous posters of their rights and permit them to assert those rights in the event the court is inclined to deny the motion to quash. *See, e.g., Bizub v. Paterson*, No. 2007CV1960 (Colo. Dist. Ct., El Paso County, motion filed May 27, 2008) (where plaintiff issued overbroad subpoena seeking 38 individuals' identities, newspaper moved to quash and urged court to require notification only in event motion was to be denied, and court quashed subpoena rendering notification unnecessary).
 138. When appropriate, the Doe defendant or witness can be referred to an organization that may provide or help obtain representation, such as Citizens Media Law Project (www.citmedialaw.org); Electronic Frontier Foundation (www.eff.org); Public Citizen (www.citizen.org); or the American Civil Liberties Union (www.aclu.org). Alternately, the court may appoint *pro bono* counsel. *See, e.g., Doe I v. Individuals*, 561 F. Supp. 2d at 252.
 139. *See Gallucci v. N.J. On-Line, LLC*, No. L-001107-07 (N.J. Super. Ct., filed on or about Feb. 5, 2007) (anonymous poster, who alleged his identifying information was revealed without notice by website in response to subpoena, sued website but later dismissed action); *see also Jessup-Morgan v. AOL, Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998) (awarding summary judgment in favor of defendant on one claim and dismissing all others in action for disclosure of identity information pursuant to subpoena without notice to anonymous speaker).
 140. *See* VA. CODE ANN. § 8.01-407.1(B); *London-Sire Records, Inc.*, 542 F. Supp. 2d at 181-82 (containing, in Appendix A, a court-directed notice providing file sharers with information about their rights and instructions on how to secure counsel).

APPENDIX: CASE SUMMARIES

Appendix: Case Summaries

The Right to Speak Anonymously: Supreme Court Cases

- *Doe No. 1 v. Reed*, ___ U.S. ___, 130 S. Ct. 2811 (2010). The Supreme Court implicitly concluded that the right to anonymous speech was not implicated where petition signers challenged the constitutionality of the application of the Washington open records law to their names and addresses, collected by the state during the petition process. In his concurrence, and although agreeing that the law survived a facial challenge, Justice Scalia argued that the case should have been framed in terms of the right to anonymity. He nonetheless asserted that this right did not apply to one's participation in legislative and electoral activities given the long national tradition of these functions being exercised in public (and given his belief that *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), was wrongly decided). In his concurrence, Justice Stevens disagreed with Justice Scalia's construction of the case and argued that the Court's decision in *McIntyre* "posited no . . . freewheeling right" to anonymous speech (and that the First Amendment only protects "the right to speak, not . . . the right to speak anonymously").
- *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (holding that a town ordinance that criminally punishes door-to-door advocacy without a permit is unconstitutionally overbroad because, *inter alia*, it requires speakers "to forgo their right to speak anonymously").
- *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (invalidating a Colorado law requiring that initiative petition circulators wear a badge identifying the circulator's name as a violation of the First Amendment).
- *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (finding, in a case examining the constitutionality of portions of the Communications Decency Act, that, in contrast to the established bases for regulation of the broadcast industry, Supreme Court precedent "provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]").

- *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (holding that a ban on distributing anonymous campaign literature violates the First Amendment, explaining that “[a]nonymity is a shield from the tyranny of the majority”).
- *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) (holding that booksellers have standing to challenge a Virginia statute banning the display of sexually explicit material accessible to juveniles as an infringement of the First Amendment rights of their customers).
- *Talley v. California*, 362 U.S. 60 (1960) (declaring invalid an ordinance that prohibits the distribution of handbills that fail to identify the name and address of those responsible for their creation and distribution).
- *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (finding that association has standing to assert constitutional rights of its members and holding that compelled disclosure of association’s membership list constitutes a denial of members’ rights to pursue lawful private interests privately and to associate freely with others).

Unmasking Anonymous Online Speakers: Standards Developed by the Courts

SEMINAL DECISIONS

The following are the leading cases addressing the standards by which courts will permit discovery of an anonymous speaker’s identity. They are summarized here and referenced by shorthand in the additional case law discussed below.

The Summary Judgment/Prima Facie Case Tests

- *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (“*Cahill*”). A town council member filed a defamation action against an anonymous poster who criticized plaintiff’s performance in office on a website welcoming comments regarding public issues. The court reversed the denial of the Doe defendant’s motion for protective order and ordered the case dismissed on the ground that no reasonable person could have interpreted the comments as being anything other than opinion. The court held that, “before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must”—

through “a verified complaint or affidavits”—“support his defamation claim with facts sufficient to defeat a summary judgment motion,” except that the plaintiff need not produce evidence on an element that is not within his or her control (such as actual malice). (It is not clear whether the court intended to limit its holding to cases involving public figure plaintiffs and core political speech.) The court also held that the plaintiff must “undertake efforts to notify the anonymous poster” and “withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request.”

- *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (“*Dendrite*”). In a defamation action against an anonymous poster to a Yahoo bulletin board, the court affirmed the denial of plaintiff’s request for expedited discovery to ascertain the Doe defendant’s identity. The court held that trial courts, “when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to . . . disclose the identity of anonymous Internet posters who are sued,” should follow four steps: (1) “require the plaintiff to undertake efforts to notify the anonymous posters . . . and withhold action to afford [them] a reasonable opportunity to file and serve opposition to the application”; (2) “require the plaintiff to identify and set forth the exact statements . . . that plaintiff alleges constitute actionable speech”; (3) review “all information provided to the court . . . to determine whether plaintiff has set forth a prima facie cause of action against [the posters],” which requires plaintiff to “produce sufficient evidence supporting each element of its cause of action, on a prima facie basis”; and (4) if a prima facie case is presented, “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”

The Motion to Dismiss Tests

- *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (“*Sony*”). In a copyright infringement action for the downloading and distribution of music via peer-to-peer file copying networks, the plaintiffs subpoenaed an ISP for

the Doe defendants' identities, and the ISP notified the anonymous defendants. After concluding that one who engages in such file sharing "is not engaging in true expression," the court denied four Doe defendants' motions to quash after it "considered a variety of factors to weigh the need for disclosure against First Amendment interests": (1) "a concrete showing of a prima facie claim of actionable harm"; (2) the "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."

- *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) ("*Seescandy*"). Assignee of See's Candy's trademarks sued various entities for trademark infringement and other business torts and moved for a temporary restraining order even though it had not served the defendants, which it had been unable to locate. The court denied the motion as futile, gave the plaintiff two weeks to submit a proper request for discovery process, and held that the following "limiting principals [sic] . . . apply to the determination of whether discovery to uncover the identity of a defendant is warranted:" (1) "the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court"; (2) "the party should identify all previous steps taken to locate the elusive defendant"; (3) "the plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss"; (4) the plaintiff must make some showing "that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act"; and (5) the plaintiff "should file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible." Other courts have noted that, although *Seescandy* references a motion to dismiss standard, the actual standard the court applied there was much higher, as the court required "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 entity who committed the act.”

The Third-Party Witnesses Test

- *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (“*2TheMart*”). The defendant in a shareholder derivative action served a subpoena on an ISP, seeking the identities of persons who had anonymously posted comments to a bulletin board hosted by the ISP. Upon notice from the ISP, one anonymous poster filed a motion to quash. The court held that the standard for disclosure of non-parties’ identities must be higher than that for parties to the suit, and that it must determine whether: “(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.” The court quashed the subpoena.

FEDERAL APPELLATE DECISIONS

Second Circuit

- *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010), *affirming Arista Records LLC v. Does 1-16*, No. 1:08-CV-765 (GTS/RFT) (N.D.N.Y. Mar. 5, 2009); *Arista Records LLC v. Does 1-16*, No. 1:08-CV-765 (GTS/RFT), 2009 WL 414060 (N.D.N.Y. Feb. 18, 2009) (Treece, Mag.). In this copyright infringement suit brought by recording companies against anonymous individuals using peer-to-peer file sharing software, the Second Circuit concluded that the *Sony* test, including its requirement that a plaintiff make a “concrete . . . showing of a prima facie claim of actionable harm,” constitutes “an appropriate general standard for determining whether a motion to quash, to preserve the objecting party’s anonymity, should be granted.” The court affirmed the denial of the Doe defendant’s motion to quash, concluding that plaintiffs satisfied the “concrete showing” requirement by providing “factual detail in the Complaint [which] plainly states copyright infringement claims that are plausible,” together with an exhibit and declaration. (The court expressly noted that it remained an open question whether

a well pleaded complaint, unaccompanied by any evidentiary showing, would fulfill the *Sony* standard.)

Eighth Circuit

- *In re Charter Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005). In a copyright infringement action concerning peer-to-peer file sharing activities in which plaintiff sought to enforce DMCA subpoenas against an ISP, the Eighth Circuit adopted the reasoning of the D.C. Circuit's decision in *Verizon* and held that Section 512(h) of the DMCA did not authorize the subpoena issued in the case. The court expressed concern that the Section 512(h) subpoena mechanism "may" violate Article III's "case or controversy" requirement, but it declined to reach the issue.

Ninth Circuit

- *In re Anonymous Online Speakers*, 611 F.3d 353 (9th Cir. 2010), denying cross-petitions for writs of mandamus regarding *Quixtar Inc. v. Signature Management TEAM, LLC*, 3:07-CV-505-ECR-RAM (D. Nev. Apr. 7, 2009) (Dkt. Entry 409), and 566 F. Supp. 2d 1205 (D. Nev. 2008). In this action in which Quixtar asserted tortious interference and other claims against a competitor for an alleged online "smear campaign," the district court concluded that the *Cahill* standard had been satisfied as to certain anonymous online statements and that Quixtar was entitled to discover the identity of the speakers who posted those statements. The anonymous speakers sought a writ of mandamus directing the district court to vacate its order. In considering the petition, the Ninth Circuit explained that the "right to speak, whether anonymously or otherwise, is not unlimited, . . . and the degree of scrutiny varies depending on the circumstances and the type of speech at issue." The court found that, because the "Internet postings and video at issue in the petition and cross-petition are best described as types of 'expression related solely to the economic interests of the speaker and its audience,'" they were "properly categorized as commercial speech." The court reasoned that the imposition of the *Cahill* standard, while "understandable" in the context of political speech, "extends too far" in a matter involving only commercial speech. Because the district court had found that plaintiff satisfied even the heightened standard of *Cahill*, the Ninth Circuit found no "clear

error” in the district court’s ruling, denied the petition, and declined to articulate what standard would properly be applied to commercial speech.

D.C. Circuit

- *Recording Industry Association of America v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). In this copyright infringement action concerning peer-to-peer file sharing activities, plaintiff served an Internet service provider with a subpoena pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512(h). The district court denied the ISP’s motion to quash, but the D.C. Circuit reversed, holding that a DMCA subpoena may only be issued to an ISP “engaged in storing on its servers material that is infringing or the subject of infringing activity,” and not to one acting as a mere conduit of information as in the peer-to-peer file sharing context.

DECISIONS BY FEDERAL DISTRICT COURTS AND STATE COURTS

Arizona

- *Ecommerce Innovations L.L.C. v. Does 1-10*, No. 2:08-MC-00093-DGC, 2009 WL 322893 (D. Ariz. Feb. 10, 2009) (Dkt. No. 22). A jewelry retailer filed suit against several anonymous posters to the website Ripoff Report, alleging a federal trade libel claim and a defamation claim. Applying the summary judgment standard, the district court ordered the operator of the website to comply with a subpoena seeking the identities of the anonymous posters. The website operator appealed to the Ninth Circuit; however, the appeal was voluntarily dismissed before the court rendered a decision.
- *Best Western International, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. July 25, 2006). A non-profit corporation filed suit against John Doe defendants alleging breach of contract, defamation, trademark infringement and other torts arising from the posting of anonymous comments on a website created for the non-profit’s members and staff. In response to plaintiff’s motion to expedite discovery to seek disclosure of the posters, the court found that the speech, which was “in a forum specifically designed for the exchange of opinions and ideas anonymously,” was “purely expressive” and

thus entitled to “substantial First Amendment protection.” Given “the significant [speech] interest at stake,” the court held, citing both *Cahill* and *Sony*, that the plaintiff “must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim” that is “*within plaintiff’s control*.” The court denied the motion because plaintiff’s complaint provided no factual support for any of its claims, but permitted plaintiff to renew its motion if it undertook “reasonable efforts to notify the anonymous defendant of the discovery request,” and “with[held] action to allow the defendant an opportunity to respond.”

- *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. App. 2007). An anonymous individual obtained access to a personal email message sent by a wireless company’s CEO and forwarded that message to the company’s management team along with the comment, “Is this a company you want to work for?” The company sued the anonymous person and his email service provider, and the trial court permitted discovery of the person’s identity from that provider over the objection of them both. The appellate court reversed and remanded, adopting a modified *Cahill* summary judgment standard and holding that the trial court had failed to engage in the balancing step.

California

- *Zynga Game Network Inc. v. Williams*, No. CV-10:01022 JF, 2010 WL 2077191 (N.D. Cal. May 20, 2010) (Trumbull, Mag.). Zynga, the company behind the online game “Mafia Wars,” moved to conduct third party discovery to determine the identity of the owners and operators of three different websites that were allegedly infringing the “Mafia Wars” trademark and reselling “Virtual Goods” from “Mafia Wars” in violation of the game’s terms of service. Following the *Seescandy* motion to dismiss test, the magistrate judge granted the motion but narrowed the scope of the proposed subpoenas to that necessary “to only determine Defendants’ true identities and locations” in order to effectuate service.
- *USA Technologies, Inc. v. Doe*, ___ F. Supp. 2d ___, No. C 09-80275 SI, 2010 WL 1980242 (N.D. Cal. May 17, 2010). A Pennsylvania company subpoenaed Yahoo to discover the identity of an anonymous poster against whom it asserted a defamation claim and a claim for violations of the Securities

Exchange Act of 1934 (“the Act”). The claims were based on statements that accused plaintiff of “legalized highway robbery” and operating a “Ponzi scheme” and plaintiff’s CEO of holding a “worldview . . . that humanity exists to be fleeced” and being a “known liar.” The court applied the standard from *Highfields Capital Management*, an earlier Northern District case—which the court described as a “streamlined version of the *Dendrite* test”—and granted the poster’s motion to quash on the basis that plaintiff “failed to plead, much less adduce competent evidence to support, a prima facie case” for either its securities or its defamation claim.

- *XCENTRIC VENTURES, LLC v. Arden*, No. C 09-80309 MISC JW, 2010 WL 424444 (N.D. Cal. Jan. 27, 2010). After obtaining a default judgment in a copyright and trademark infringement action against a website, the plaintiff in this action served a subpoena on Google to determine the identity associated with an email address found on the website. The website moved to quash, and the court denied the motion in part, applying the five-part test set out in *UMG Recordings*, an earlier Northern District case, to order Google to provide the requested information about the email address. (The court specifically found the Northern District’s *Highfields Capital Management* test was inapplicable on the basis that it “did not involve any copyright claims,” whereas *UMG Recordings* did.) In walking through the first requirement, the court concluded that the plaintiff had offered more than “a concrete showing of a *prima facie* claim of actionable harm” because it already obtained a default judgment. The court allowed the subpoena response to be provided subject to the terms of a protective order.
- *Capitol Records, Inc. v. Doe*, No. 07-CV-1570-JM, 2007 WL 2429830 (S.D. Cal. Aug. 24, 2007). Music companies filed a copyright infringement suit against a Doe defendant file sharer and sought expedited discovery of the defendant’s identity from his or her third-party ISP. The court permitted the discovery under Fed. R. Civ. P. 26(d), holding the plaintiffs established “good cause” for the request given “(1) the allegations of copyright infringement . . . ; (2) the danger that [the ISP] will not preserve the information that Plaintiffs seek; (3) the narrow tailoring of the discovery request so as not to exceed the minimum information required to advance this lawsuit without

prejudicing the Defendant; and (4) the Court’s finding that the expedited discovery requested will substantially contribute to moving this case forward.”

- *Wang Xiaoning v. Yahoo! Inc.*, No. 4:07-CV-02151-CW (N.D. Cal. filed July 30, 2007), *complaint available at* <http://humanrightsusa.org> (follow “Accountability for Torturers” hyperlink; then follow “Corporate Accountability A:” hyperlink). Two Chinese dissidents sued Yahoo pursuant to the Alien Tort Claims Act and the Torture Victim Protection Act and alleged human rights and other tort claims. The plaintiffs asserted that Yahoo’s disclosure of their identifying information to the Chinese government aided or abetted torture and other injuries to the dissidents. Yahoo settled the case for an undisclosed amount.
- *Columbia Pictures Industries v. Bunnell*, No. CV 06-1093 FMCJX, 2007 WL 2080419 (C.D. Cal. May 29, 2007). Plaintiffs filed a complaint against defendants for copyright infringement, based on website operated by defendants that allows users to download dot-torrent files. Plaintiffs then moved for an order requiring defendants to preserve and produce certain server log data, including the IP addresses of its users. Plaintiffs’ website was designed to erase such data after six hours. The court ordered the defendants to preserve and produce the data from the date of its decision on, but allowed the defendants to mask, encrypt or redact their users’ IP addresses. The court declined to impose sanctions on the defendants for the destruction of earlier data because of a lack of precedent concerning temporarily stored data.
- *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652 SBA, 2006 WL 1343597 (N.D. Cal. Apr. 19, 2006). In copyright infringement action for peer-to-peer file sharing, court authorized Rule 45 subpoena to be issued to file sharers’ ISP and ordered ISP to notify the file sharers of its issuance. The court held that good cause existed for issuance of the subpoena because plaintiffs had no other means of obtaining the information, ISPs “typically retain user activity logs for only a limited period,” and “copyright infringement claims necessarily involve irreparable harm to Plaintiffs.” Adopting the *Sony* court’s view that even peer-to-peer file sharers have First Amendment rights “to a

limited extent,” the court also applied the *Sony* factors in reaching its decision to permit the subpoena.

- *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). A hedge fund initiated a trademark and unfair competition action against an anonymous speaker who used the name of the hedge fund in his screen name and posted “sardonic commentary” on an Internet message board. The anonymous speaker filed a motion to quash a subpoena issued to the speaker’s ISP, and a magistrate judge concluded that because the comments involved issues of public concern (the performance and policies of a large, publicly-traded corporation and hedge fund), a two-part test applied, requiring that (1) plaintiff “adduce competent evidence ... tend[ing] to support a finding of *each* fact that is essential to a given cause of action”; and (2) if the plaintiff satisfies the requisite showing, the court must “assess and compare the magnitude of the harms that would be caused to the competing interests” and determine whether “enforcing the subpoena would cause relatively little harm to the defendant’s First Amendment and privacy rights and that its issuance is necessary to enable plaintiff to protect against or remedy serious wrongs.” The magistrate judge held that plaintiff failed to satisfy either part of this test, and the district court adopted the recommendation on the ground that plaintiff had failed to make a sufficient showing that the anonymous poster had engaged in wrongful conduct causing harm to plaintiff.
- *Rocker Management LLC v. Does 1-20*, No. 03-MC-33, 2003 WL 22149380 (N.D. Cal. May 29, 2003). An investment management firm sued Doe defendants in New Jersey for allegedly posting libelous comments in a Yahoo chat room and subpoenaed Yahoo for their identities. Following the *Seescandy* approach, the court granted an anonymous defendant’s motion to quash the subpoena on the ground that plaintiff had not identified any specific statement which, in the context in which it was made, would be viewed by a reasonable reader as a defamatory statement of fact given the hyperbolic nature of many comments posted in such chat rooms.
- *Global Telemedia International, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001). A telecommunications company brought suit against two posters to an Internet bulletin board, alleging

that their messages about the company were defamatory. The court granted the defendants' motion to strike pursuant to California's anti-SLAPP statute, holding that the posts about the large, publicly traded company were made "in connection with a public issue" and that the plaintiffs failed to show a probability of success on their claims for trade libel and defamation.

- *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). Discussed in Seminal Decisions, *supra*.
- *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008). An officer of a financial company brought an action for defamation and interference with contractual relationships in Florida against anonymous posters of messages to Yahoo financial message boards. Plaintiff subpoenaed Yahoo for their identities. After exhaustively reviewing the extant case law on the subject, the court held that, to unmask an anonymous poster, a plaintiff must (1) "attempt to notify the defendant" unless such an attempt would be futile or unnecessary (*e.g.*, if the subpoena recipient itself notifies the defendant); and (2) "make a prima facie showing of the elements" of a claim. Applying the test, the court reversed the denial of one poster's motion to quash, holding that the posts were nonactionable statements of opinion and the tortious interference claim was, in actuality, simply a claim for defamation.
- *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006). In a trade secret misappropriation case, Apple Computer sought the identities of persons who provided information about a yet-to-be released Apple product to certain website publishers which had, in turn, posted articles about the product, including what appeared to be original internal Apple documents. The court held that because the material was not merely "posted" by unknown persons to the websites but was, rather, received in the course of newsgathering by the website publishers themselves, the First Amendment reporter's privilege and California shield law applied and barred discovery of the sources' identities.
- *Matrixx Initiatives, Inc. v. Doe*, 42 Cal. Rptr. 3d 79 (Cal. Ct. App. 2006). A pharmaceutical company filed suit for defamation and related claims against anonymous posters to a Yahoo message board. The plaintiff subpoenaed a hedge fund, from

whose offices the posts originated, for the identities of the anonymous posters. The court affirmed an order granting the plaintiff's motion to compel, holding that neither the hedge fund nor its manager had standing to assert the First Amendment rights of the anonymous speakers.

- *Coupleguys, Inc., v. Doe*, No. BC 427389 (Cal. Super. Ct., Los Angeles County, filed Dec. 4, 2009). A corporation acting on behalf of Ron Livingston (of Office Space fame) filed suit against a Doe defendant, alleging claims of libel, false light, and misappropriation, for having posted online, including to Wikipedia and Facebook, that Livingston is involved in a relationship with another man.
- *Chang v. Regents of University of California*, No. 34-09-33484 (Cal. Super. Ct., Sacramento County, Sept. 9, 2009). In a civil suit, the plaintiff sought the identities of people who posted anonymous comments on a blog, contending that the comments were libelous and, because the comments appeared to be made by managing agents of the defendant, they violated an earlier settlement agreement between the parties. Applying *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008), the court concluded that the plaintiff had failed to establish a libel claim against the posters, but did find that the subpoena appeared “reasonably calculated to lead to admissible evidence” concerning a potential breach of the settlement agreement. The court ordered the plaintiff to pay for an independent third party to review the posters’ identifying information and determine whether any of them were managing agents of the defendant. If so, that information would be released to the plaintiff.
- *People v. Kuehl*, No. 09HF0538 F A (Cal. Sup. Ct., Orange County, Aug. 18, 2009) A criminal defendant sought the identity of an anonymous poster who was a percipient witness to a fatal car accident. The court denied the newspaper’s motion to quash the subpoena, holding that “[e]ven if the California Shield Law is applicable to the subject information, the defendant’s due process right to a fair trial supersedes any otherwise conflicting rights of the moving party [or the anonymous poster].”
- *H. B. Fuller Co. v. Doe*, No. 1-05-CV-053609, 2006 WL 6080949 (Cal. Super. Ct., Santa Clara County, Mar. 15, 2006). Plaintiff company in a Minnesota breach of employment contract

action subpoenaed Yahoo to discover the identity of an anonymous online commenter, and the commenter filed a motion to quash the subpoena. The plaintiff believed the anonymous poster was one of its employees who had published confidential information on a Yahoo message board shortly after a meeting at the company's offices. Relying upon the Northern District of California's decision in *Highfields Capital Management*—as well as *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538 (1999) and the New Jersey appellate court opinion in *Immunomedics*—the court held that “[p]laintiff has made a prima facie showing that Defendant violated an employment contract by declaring that all employees are bound by a confidentiality agreement, confidential information was disclosed at a company meeting with employees, and that confidential information was disclosed soon after the company meeting raising the inference that the Yahoo message [*sic*] were posted by an employee.” On this basis, the court denied the defendant's motion and ordered Yahoo to comply with the subpoena.

Colorado

- *20/20 Financial Consulting, Inc. v. Does 1-5*, No. 10-cv-01006-CMA-KMT, 2010 WL 1904530 (D. Colo. May 11, 2010). In this defamation suit by a company against those who anonymously posted allegedly defamatory comments on various websites, a magistrate judge granted a Rule 26(d) motion to conduct expedited discovery for the limited purpose of discovering the defendants' identities. The judge analogized the case to *Arista Records, LLC v. Does 1-19*, 551 F. Supp. 2d 1 (D.D.C. 2008), a copyright infringement suit, noting that “Defendants here have engaged in anonymous online behavior, which will likely remain anonymous unless Plaintiff is able to ascertain their identities.”
- *Video Professor, Inc. v. Does 1-100*, No. 07-CV-01726-WYD-CBS (D. Colo. filed Aug. 16, 2007). In this action for defamation and other business torts, the magistrate issued an order granting, without analysis, plaintiff's *ex parte* motion for an order authorizing discovery of the anonymous defendants' identities from third parties. Public Citizen Litigation Group (PCLG) negotiated with the plaintiff on behalf of one of the third party subpoena recipients, arguing that the subpoena was invalid because it did not make the showing necessary to unmask the

anonymous posters, and was unduly burdensome both in failing to identify which particular posts were allegedly unlawful and because it would impose significant costs on the third party. PCLG notified the anonymous posters of the subpoena and its intention to move to quash it on behalf of the third party it represented. The plaintiff voluntarily dismissed the case on December 26, 2007.

- *Warner Bros. Records, Inc. v. Does 1-20*, No. 07-CV-01131-LTB-MJW, 2007 WL 1655365 (D. Colo. June 5, 2007). Applying the “good cause” standard, the court allowed plaintiffs to seek expedited discovery to identify 20 Doe defendant file sharers who allegedly infringed the companies’ copyrighted material.
- *Interscope Records v. Does 1-8*, No. CIVA06CV00352 WDMPAC, 2006 WL 1351876 (D. Colo. Mar. 16, 2006). Applying the “good cause” standard, the court allowed plaintiffs to seek expedited discovery to identify eight Doe defendant file sharers who allegedly infringed the companies’ copyrighted material.
- *People v. Bruce*, No. 09M3247 (Colo. Springs Mun. Ct. Oct. 27, 2009). A criminal defendant sought the identity of a poster to the website of *The Gazette* on the basis that the poster was an exculpatory witness. The court quashed the defendant’s subpoena, finding that Colorado’s Press Shield Law, Section 13-90-119(2), C.R.S., and the First Amendment barred the defendant from obtaining the anonymous poster’s identity.
- *Bizub v. Paterson*, No. 2007CV1960 (Colo. Dist. Ct., El Paso County, Aug. 22, 2008). Plaintiff issued a subpoena seeking the identifying information of 38 individuals who had anonymously posted comments on the website of *The Gazette*. The newspaper moved to quash on the grounds that the subpoena was overbroad, violated the First Amendment rights of the anonymous speakers, and violated the newspaper’s shield law privilege. The newspaper urged the court to require notification of the anonymous posters (and provide an opportunity to be heard) in the event it was inclined to deny the motion. The court quashed the subpoena, rendering notification unnecessary.

Connecticut

- *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008) (also known as the “AutoAdmit” case). Two Yale law students filed suit against 39 anonymous persons for libel, invasion of privacy, negligent and intentional infliction of emotional distress, and copyright violations. Plaintiffs issued a subpoena *duces tecum* to an Internet service provider for information related to the identity of one poster. The poster responded by filing a motion to quash and a motion to proceed anonymously. The court found that, although the poster had a First Amendment right to speak anonymously, this right was outweighed by plaintiffs’ need for discovery to redress alleged wrongs. In so deciding, the court considered (1) whether plaintiffs undertook efforts to notify the poster of the subpoena; (2) whether plaintiffs identified the exact statements at issue; (3) whether plaintiffs had an alternate means of obtaining the poster’s identity information; (4) whether there was a central need for the subpoenaed information; (5) the poster’s expectation of privacy; and (6) whether plaintiffs had made “a concrete showing as to each element of a prima facie case against the” poster. Additionally, the court found that the poster had “not made a showing of any substantial privacy right or of any potential physical or mental harm as a result of being a named party to this litigation.” The plaintiffs subsequently settled their case against the unmasked defendant and dismissed the action with regards to the other defendants.
- *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 WL 22962857 (Conn. Super. Dec. 2, 2003) (underlying defamation action filed in France). In this action for a bill of discovery, plaintiff had sued an ISP seeking information regarding the identity of a subscriber who allegedly sent an anonymous email accusing plaintiff of “underhanded and deceptive business practices.” The ISP notified the anonymous speaker of the discovery action, who then intervened and opposed the application for the bill. After holding an evidentiary hearing at which both the plaintiff and the anonymous speaker were represented, the court granted plaintiff’s application for the bill, finding that (1) plaintiff had established probable cause; (2) it was seeking information regarding the anonymous speaker’s identity in good faith and not for any improper purpose; and (3) the information was limited in scope, “material

and necessary,” and the plaintiff had no other adequate means of obtaining it.

Delaware

- *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Discussed in Seminal Decisions, *supra*.

District of Columbia

- *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009). The plaintiff filed suit against three anonymous Internet users, alleging defamation and reckless misrepresentation related to comments the users posted in response to a YouTube video posted by the plaintiff. The plaintiff then subpoenaed three Internet companies to compel the production of identifying information about the users. The court quashed the subpoenas on three independent grounds. First, because the citizenship of the anonymous defendants was unknown, diversity of citizenship could not be established, and the court lacked subject matter jurisdiction. Second, the court found no basis to believe that the plaintiff could establish personal jurisdiction over the defendants. And third, the court questioned the sufficiency of the plaintiff’s substantive allegations, thus rendering the subpoenas deficient under the standard established by *Dendrite* and *Cahill*.
- *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1 (D.D.C. 2008). Applying the “good cause” standard established by the Federal Rules of Civil Procedure, the court denied a motion to quash a subpoena seeking from a university information about the identities of nineteen Doe defendant file sharers who allegedly infringed the defendant-companies’ copyrighted music. The court found that the First Amendment right to anonymity did not mandate quashing the subpoenas because the file sharing at issue was not “actual speech.” The court also rejected as irrelevant the argument that the resulting information may be unreliable.
- *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C.), *rev’d on other grounds by RIAA, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), discussed *supra*. The court denied Verizon’s motion to quash a Recording Industry Association of America subpoena seeking the identifying information of a file sharer. The court held that

Verizon had standing to assert the First Amendment rights of its subscribers because standing requirements are interpreted more liberally in the First Amendment context, and because Verizon is an adequate advocate for the subscribers where it has the type of relationship with subscribers that “will ensure that issues will be ‘concrete and sharply presented,’” and where it has a vested interest in protecting the subscribers’ rights given its own interest in maintaining and broadening its client base.

- *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009). After an anonymous tipster used a website reporting form to inform a trade association that Solers was engaged in copyright infringement, Solers filed suit against the tipster for defamation. Solers then subpoenaed the trade association, seeking to learn the identity of the tipster. The court granted the trade association’s motion to quash the subpoena, adopting a modified summary judgment standard. Under this standard, a court must: (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 information sought is important to enable the plaintiff to proceed with his lawsuit.

Florida

- *Rich v. City of Jacksonville*, No. 3:09-CV-454-MMH-MCR, 2010 WL 1141556 (M.D. Fla., Mar. 23, 2010). In this Section 1983 action, a blogger alleged that law enforcement officers opened a criminal investigation into the blogger’s anonymous comments about a church pastor after the church asked one of the officers—who was a member of the church—for assistance in identifying him. The complaint further alleged that the state attorney’s office issued subpoenas to the bloggers’ ISPs, which resulted in the unmasking of the blogger and consequent pressure by the church on the blogger and his wife to leave the congregation. The court denied defendants’ motion to dismiss in

part, holding that the blogger had stated a claim, *inter alia*, for a violation of his constitutional right to speak anonymously.

- *Beal v. Calobrisi*, No. 08-CA-1075 (Fla. Cir. Ct., Okaloosa County, Oct. 9, 2008). A Florida circuit court granted a third party newspaper's motion to quash a subpoena seeking the identifying information of an anonymous poster to the newspaper's website, holding that the Florida Shield Law applied and created a qualified privilege against compelled disclosure of the information.

Idaho

- *In re Subpoena Issued Pursuant to the Digital Millennium Copyright Act to: 43SB.com, LLC*, No. MS07-6236-EJL, 2007 WL 4335441 (D. Idaho Dec. 7, 2007). An anonymous individual posted comments to a website, 43SB.com, regarding a company and its CEO. The general counsel for the company sent a cease and desist letter to the website, asking that the comments be removed. Instead, a second anonymous individual posted the letter to the website. The company responded by serving a pre-litigation Digital Millennium Copyright Act (DMCA) subpoena on the website, asserting that the posting of the letter constituted copyright infringement and seeking identifying information about both anonymous individuals. The website filed a motion to quash, which the court granted as to the poster of the comments, but denied as to the poster of the letter, holding that that the company had pleaded a *prima facie* case of copyright infringement as to the latter but not as to the former.

Illinois

- *Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045 (N.D. Ill. May 10, 2001). In a suit seeking compensation for physical injury against a member of a white supremacist group, the plaintiff served subpoenas on four ISPs in order to obtain information about certain email accounts used by group members. The defendant and a non-party white supremacist group filed a motion to quash. Applying *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), the court granted the motion as to those individuals whose identities were not publicly known. The court concluded that the information sought in the subpoenas would reveal the identity of anonymous members and

thus directly chilled their First Amendment associational rights, and that the plaintiff had not satisfied his burden of demonstrating the relevancy of the information sought to the claims asserted. The court then denied the motion as to the accounts of publicly known members of the group.

- *Maxon v. Ottawa Publishing*, 929 N.E.2d 666 (Ill. App. Ct., 3d Dist., 2010). Here, an Illinois appellate court reversed the trial court's denial of petitioners' motion to compel a newspaper to disclose the identifying information of individuals who posted allegedly defamatory comments to its website. The court held that a state procedural rule—Illinois Supreme Court Rule 224, which authorizes independent actions for the discovery of the “identity of one who may be responsible in damages”—coupled with the motion to dismiss standard, provides sufficient protection for the right to speak anonymously. In so doing, the court rejected the trial court's application of the higher-burden *Dendrite/Cahill* standard. The court observed that “Illinois is a fact-pleading jurisdiction [I]f a complaint can survive a motion to dismiss, it is legally and factually sufficient and should be answered.” Because it found that the plaintiffs had alleged sufficient facts in their complaint to make out a claim for defamation, the court granted the plaintiff's motion to discover the identity of the anonymous posters.
- *Stone v. Paddock Publications, Inc.*, No. 2009 L 5636 (Ill. Cir. Ct., Cook County, Nov. 9, 2009). In the comments section of a suburban Chicago newspaper's website, an anonymous poster made allegedly defamatory statements about a local political candidate during a debate with another online user who turned out to be the candidate's minor son. After winning her election, the candidate petitioned the court under Illinois Supreme Court Rule 224 for discovery of the identity of the poster. In its ruling, the court first held that the state anti-SLAPP statute did not apply to a Rule 224 petition. The court then applied five of the six factors set out in *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008) to conclude that plaintiff was entitled to the discovery sought: the poster actively participated in the lawsuit, the candidate had no alternate means to discover the poster's identity, the candidate could not commence her lawsuit without knowing the poster's identity, and the poster “forfeited any expectation of privacy when he chose to make a posting on a

newspaper public forum.” The court determined that the plaintiff need not satisfy the sixth factor—whether the plaintiff can make “an evidentiary showing that the proposed lawsuit has merit”—until suit is actually filed. Nonetheless, the court concluded that the poster’s identity should be subject to a protective order, limiting disclosure of the name to the agent designated for service of process, the candidate, her attorneys, and essential support staff.

- *Alton Telegraph v. Illinois*, No. 08-MR-548, 37 Media L. Rep. 2084 (Ill. Cir. Ct., Madison County, May 15, 2009). The court applied the Illinois Shield Law to partially quash a government subpoena in a criminal case seeking a local newspaper’s records leading to the identity of five anonymous posters to the newspaper’s website. Although the court strongly suggested that the statute’s definition of “source” did not include individuals who voluntarily post information in response to an article, the court applied the shield law in the case and invited the legislature to clarify the issue. Finding that two of the posters’ comments related to “the Defendant’s prior conduct, his propensities for violence, and relationship with the child,” the court concluded that the prosecution had overcome the shield law privilege as to those two posters because “the information sought is relevant, . . . all sources of information have been exhausted” since the prosecution had already conducted 117 interviews, “and first degree murder of a child impacts the public interest.” The court quashed the subpoena as to the remaining three posters because it found their comments “appear[ed] to be nothing more than conversation/discussion.”

Indiana

- *Roman Catholic Archdiocese of Indianapolis v. John/Jane Doe and Facebook, Inc.*, No. 49D120805-CT-20862 (Ind. Super. Ct., Marion County, May 9, 2008). The court issued a temporary restraining order directing Facebook to preserve and produce identifying information regarding the creator of a Facebook page in the name of a high school dean when the creator used the page to “transmit[] and publish[] false and misleading information of and concerning [the dean] and the Archdiocese.”

Kansas

- *Interscope Records v. Does 1-14*, 558 F.Supp. 2d 1176 (D. Kan. 2008) (Sebelius, Mag.). Plaintiff record company subpoenaed the University of Kansas to reveal identities of Doe defendants who were allegedly using peer-to-peer software to distribute copyrighted music. The court applied the *Sony* test to conclude that disclosure should be ordered and thus denied the Doe defendants' motion to quash the subpoena. The court rejected defendants' argument that the University was prevented from revealing the information under the Family and Education Right and Privacy Act of 1974, 20 U.S.C. § 1232g, noting that the statute contains explicit provisions that allow the release of information in response to a court order.

Kentucky

- *Clem v. Doe*, No. 08-CI-1296 (Ky. Cir. Ct., Madison County, Mar. 26, 2010). In this defamation action brought against an anonymous commenter on a newspaper website, the newspaper moved to quash a subpoena seeking the commenter's identity. The newspaper asserted both the state shield law, KRS 421.100 ("No person shall be compelled to disclose . . . the source of any information procured or obtained by him, and published in a newspaper . . . by which he is engaged or employed, or with which he is connected"), and the commenter's First Amendment right to anonymity. The court determined that the comment was not "procured or obtained by any reporter" under the terms of the shield law because the newspaper website's terms of service stated that the content of such comments was "not controlled by the newspaper" and "the newspaper does not take any responsibility for the accuracy of the contents of the web posting." Under these circumstances, the court concluded, application of the shield law "would well extend the purpose of the privilege." Next, noting that the case raised an issue of first impression in the Kentucky courts, the court applied the test established by the D.C. Court of Appeals in *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009) and concluded that, because the plaintiff had not made "reasonable efforts to notify" the commenter of the complaint and subpoena, the motion to quash should be granted.

Louisiana

- *In re Baxter*, No. 01-00026-M, 2001 WL 34806203 (W.D. La. Dec. 20, 2001). A university vice-president applied for an order to obtain discovery from a website host regarding the identities of “authors, editors and publishers” of allegedly defamatory statements made on the website. The website host agreed to provide the information to plaintiff upon court order, and one of the anonymous defendants moved to intervene. The court, after evaluating the tests applied by other courts, applied a “reasonable probability or a reasonable possibility” of success on the merits standard. Under this standard, a plaintiff must show a “reasonable probability” of prevailing on the merits if the challenged speech is on a matter of private concern, and a “reasonable possibility” of success on the merits if the challenged speech is on a matter of public concern. (The court noted that “[a]lthough a ‘reasonable probability’ would be the preferred standard [in all cases], requiring a standard higher than a reasonable possibility of recovery is unworkable in cases where the plaintiff is a public figure” and thus must prove actual malice.) The court held that because plaintiff met these requirements, “mover is not entitled to assert the defense that the statements were privileged as free speech protected by the First Amendment,” and because they were not so protected, “neither does the mover have a right under the First Amendment to proceed anonymously by way of intervention.”

Maine

- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005). Plaintiff sued a Doe defendant who allegedly sent an email to others purporting to be from plaintiff. The suit asserted claims for misappropriation of identity and several other torts, and plaintiff sought discovery of the defendant’s identity from his ISP, Time Warner. The Doe defendant opposed the discovery effort, but not on First Amendment grounds. The court affirmed the order granting the discovery on the ground that Section 551(c)(2)(B) of the Cable Act authorized the disclosure by a cable operator of subscribers’ identifying information pursuant to court order provided that notice is provided to the subscriber. The court held the Doe defendant waived his constitutional arguments, having never raised them in the trial court.

Maryland

- *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009). A local business owner commenced a defamation action against a newspaper and three anonymous posters to the newspaper’s website. The newspaper filed a motion for protective order to shield it from complying with the business owner’s requests for identity information regarding the posters. The trial court denied the motion, and the newspaper appealed. The Court of Appeals reversed, adopting the *Dendrite* standard and holding that “when a trial court is confronted with a defamation action in which anonymous speakers or pseudonyms are involved, it should, (1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board; (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application; (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech; (4) determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters; 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.” Finding that the business owner had failed to satisfy this standard, the court remanded with instructions to grant the protective order.

Massachusetts

- *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153 (D. Mass. 2008). Record companies filed suit for copyright infringement against anonymous file sharers and sought identifying information from their ISPs. The court granted two motions to quash after applying the *Sony* test and finding that: (1) movants were entitled to limited protection of their anonymity; (2) the court lacked sufficient information about the agreement between the movants and their ISP to determine movants’ expectation of privacy; and (3) movants raised an issue

of fact as to whether the subpoena invaded the anonymity of non-file sharers. The court further ordered the ISPs not to destroy the information sought.

- *United States v. D'Andrea*, 497 F. Supp. 2d 117 (D. Mass. 2007). In a criminal action, the court held that a senior administrator at the state Department of Social Services had not violated the defendants' Fourth Amendment rights by accessing a password-protected website after being given the password by an anonymous caller to a child abuse hotline. The court found that federal courts have "uniformly conclude[d] that internet users have no [Fourth Amendment-based] reasonable expectation of privacy in their subscriber information, the length of their stored files, and other noncontent data to which service providers must have access."
- *McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006). In an action alleging invasion of privacy, defamation, and copyright claims, plaintiff sought leave to subpoena GoDaddy.com and Domains by Proxy, Inc. to disclose the name of an individual who created a website in plaintiff's name. The court denied the motion and dismissed the action for lack of subject matter jurisdiction because diversity jurisdiction cannot lie when the defendant's domicile is unknown. In the alternative, the court held that although there was good cause for the discovery request, the action must be dismissed for failure to state a claim. The court rejected the approach of applying the summary judgment standard to the issuance of subpoenas, finding it problematic in defamation cases because of the near impossibility of demonstrating clear and convincing evidence and the requisite level of fault and because a waiver of the actual malice requirement would undermine a key protective mechanism created by the Supreme Court. The court acknowledged that "it is reasonable to apply some sort of a screen to the plaintiff's claim before authorizing the subpoena," and held that, "[i]n this case, a preliminary screening of Plaintiff's assertions show that not only could they not pass summary judgment, but that they fail to state a claim." It did not, therefore, announce an alternative "test" to be applied in all cases, but it did hold that plaintiffs bear an "evidentiary burden."

Michigan

- *LaFace Records, LLC v. Does 1-5*, No. 2:07-CV-187, 2007 WL 2867351 (W.D. Mich. Sept. 27, 2007). Members of the music industry sought the identities of individuals who allegedly violated their copyrights via peer-to-peer networks. The court approved immediate discovery under the “good cause” standard. The court stated that “good cause” for expedited discovery in such actions is based upon: (1) an allegation of copyright infringement; (2) the existence of a danger that the ISP “will not preserve the information sought”; (3) “the narrow scope of the information sought”; and (4) a determination that expedited discovery “would substantially contribute to moving the case forward.”
- *Jessup-Morgan v. America Online, Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998). Plaintiff filed an action for breach of contract, invasion of privacy, and related claims against AOL after AOL disclosed her identity information to a private party pursuant to a subpoena without notice to plaintiff after that party alleged that plaintiff had posted messages in her name containing invitations for sex. The court dismissed the action in part and granted summary judgment to AOL in part, holding that AOL did not violate the Electronic Communications Privacy Act when it disclosed identity information to a private party pursuant to a subpoena, AOL did not breach the Member Agreement with plaintiff, and plaintiff failed to state any other claim upon which relief could be granted.

Michigan

- *Quixtar, Inc. v. Does*, No. 07-59739-CZ (Mich. Cir. Ct., Ottawa County, filed Oct. 8, 2007). Quixtar, a sister company of Amway, filed suit against several John Does for postings and comments on a variety of blogs and on YouTube. The suit alleges that the unknown defendants are involved in a rival organization and that the posted comments interfered with Quixtar’s business relationships with its distributors. News reports indicate Quixtar sought to subpoena third parties for the anonymous defendants’ identities. There are no decisions published by Westlaw or Lexis.

Missouri

- *Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009). In a civil rights action for physical injury inflicted by a police officer, a prisoner-plaintiff subpoenaed *The Springfield News-Leader* for identifying information about an anonymous poster to the newspaper's website. Writing in response to an article about the prosecutor's decision to drop charges against the officer, the poster made comments critical of the prosecutor's office and in support of the officer. The newspaper objected, and plaintiff filed a motion to compel, which was denied by the court. Noting that "a party seeking disclosure must clear a higher hurdle where the anonymous poster is a non-party," the court concluded that the plaintiff could not satisfy the *2TheMart* test because the evidence he intended to elicit from the poster was cumulative of the evidence available elsewhere. The court also squarely rejected plaintiff's argument that the poster had waived his First Amendment rights pursuant to the newspaper's privacy policy—which stated that the newspaper reserved the right to disclose information collected about posters "in any way and for any purpose"—in light of the presumption against contractual waiver of constitutional rights and the absence, in the privacy policy, of any indication that a user might be waiving her anonymity rights.

Montana

- *Vinogradov v. Montana State University-Bozeman*, No. DV-03-49 (Mont. Dist. Ct., Gallatin County, Jun. 5, 2009). While seeking a new trial after losing a discrimination suit against Montana State University (MSU), plaintiff sought documents and testimony from a newspaper regarding the authors of anonymous statements on the newspaper's website. The plaintiff alleged that the content of the statements suggested that they were made by a juror who appeared to have obtained knowledge about plaintiff outside the judicial proceedings. Although the newspaper invoked the Montana shield law, § 26-1-902, M.C.A., the court concluded that the plaintiff failed to satisfy the procedural requirements of Montana Rule of Civil Procedure 27, which govern the perpetuation of testimony.
- *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Ct., Yellowstone County, Sept. 3, 2008). In this action for defamation and false

light invasion of privacy, the plaintiff subpoenaed the *Billings Gazette* for information about readers who had commented anonymously about articles in the online newspaper. The *Gazette* successfully argued that it was privileged under Montana's shield law from providing the information sought. The court held that the shield law not only affords a statutory privilege to journalists, but also, in effect, codifies the First Amendment rights of news sources to speak anonymously, and reflects a legislative determination that those rights outweigh the rights of civil litigants to obtain their identities.

Nevada

- *Does 1-4 v. United States Attorney, District of Nevada*, No. 2:09-cv-01083-KJD (D. Nev. Oct. 2, 2009) (also titled "Does 1-3"), *appeal pending*. During the course of a high profile prosecution for tax evasion, anonymous posters to the *Las Vegas Review Journal's* website posted comments stating "I bid 10 Quatloos that [one of the prosecutors] does not celebrate his next birthday" and "The sad thing is there are 12 dummies on the jury who will convict [the defendant]. They should also be hung with the feds." The prosecutor issued a grand jury subpoena to the *Journal* seeking information about every comment posted in response to an article about the case. The same day that the ACLU of Nevada sought to intervene to quash the subpoena, the prosecutor filed a superseding subpoena which was limited to the two threatening comments. The *Journal* complied with this subpoena prior to resolution of the ACLU motions, and the ACLU filed revised motions. The court granted the prosecutor's motion to dismiss the revised motions and the action, holding that the *Journal's* compliance rendered the action moot. In *dicta*, the court also determined that, given the government's compelling interest in "protecting the jury physically" and in "ensur[ing] the integrity of the legal system," the comments at issue did not merit First Amendment protection.

New Hampshire

- *Mortgage Specialists v. Implode-Explode*, ___ A.2d ___, No. 2009-262, 2010 WL 1791274 (N.H. May 6, 2010). The plaintiff, a mortgage brokering and banking company, sued the operator of a website that ranks businesses in the mortgage industry. The website first reported that plaintiff was allegedly engaged in

improper mortgage activities and posted one of plaintiff's filings with state banking authorities ("the Loan Chart"). Thereafter, an individual pseudonymously posted allegations about plaintiff's president. In the action, plaintiff sought removal of the Loan Chart from the website (on the basis that its disclosure was statutorily prohibited) and further requested the identifying information for the individual who provided the Loan Chart and for the pseudonymous poster. The trial court granted plaintiff's requests and enjoined the website from republishing the Loan Chart and the comments of the pseudonymous poster. On appeal, the New Hampshire Supreme Court first vacated the trial court's disclosure order with regard to the source of the Loan Chart, finding that the order failed to consider the state's constitutional qualified newsgathering privilege and failed to conduct any balancing of the interests involved. Second, the court remanded the order with regard to the unmasking of the pseudonymous poster and ordered further proceedings consistent with the test enunciated in *Dendrite*. Finally, the court held that the injunction imposed by the trial court was an unconstitutional prior restraint and reversed the order to the extent that it prohibited republication.

New Jersey

- *State v. Reid*, 945 A.2d 26 (N.J. 2008). In a criminal action for second-degree computer theft, the court held that, pursuant to the New Jersey Constitution, citizens have a reasonable expectation of privacy in the subscriber information provided to ISPs, but that law enforcement officials can overcome that protection and obtain subscriber information by serving a grand jury subpoena on an ISP without notice to the subscriber. The court expressed no view on the *Dendrite* standard but declined to extend it to the grand jury context.
- *Too Much Media, LLC v. Hale*, 993 A.2d 845 (N.J. Super. Ct. App. Div. 2010). A plaintiff company moved to compel a defendant blogger to reveal the sources of information for her allegedly defamatory blog posts. The blogger argued that she was a journalist and that disclosure was barred by the state shield law, N.J. Rev. Stat. 2A:84A-21 *et seq.*, but this claim was rejected by the trial court, which found that she was not "connected with . . . news media" as required by the law. The

appellate court affirmed, holding that although the terms “news” and “news media” were broadly defined under the shield law, the blogger “has exhibited none of the recognized qualities or characteristics traditionally associated with the news process, nor has she demonstrated an established connection or affiliation with any news entity.” Furthermore, the court rejected the blogger’s argument that the company must make a prima facie showing of defamation under *Dendrite*. The court ruled that *Dendrite* was inapplicable because (1) the *Dendrite* standard is limited to “evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards” and the “protections of *Dendrite* have never been extended beyond ISPs” and (2) the blogger used her full name when posting so “the present matter does not involve an individual’s right to speak anonymously.”

- *A.Z. v. Doe*, 2010 WL 816647 (N.J. Super. Ct. App. Div. Mar. 8, 2010). In this defamation action, a high school student subpoenaed Cablevision to discover the identity of the author of an anonymous email, sent to a school official, in which the author stated that the student had engaged in underage drinking and attached a photo of the student participating in a drinking game. The trial judge granted the author’s motion to quash plaintiff’s subpoena under *Dendrite*, concluding that although the student had produced prima facie evidence in support of each element of her cause of action, the author’s First Amendment right of anonymous free speech outweighed the flawed evidence in support of the student’s claim. The appellate court affirmed on a different ground, concluding that the student had not produced prima facie evidence of each element of her defamation claim.
- *Juzwiak v. Doe*, ___ A.2d ___, 2010 WL 3022213 (N.J. Super. Ct. App. Div. Mar. 8, 2010). In an action for harassment and intentional infliction of emotional distress, the appellate court reversed the trial court’s denial of defendant’s motion to quash a subpoena to discover defendant’s identity. Applying *Dendrite*, the court held that the plaintiff had failed to offer evidence to support a prima facie showing of intentional infliction of emotional distress: the statements in the emails in question were not extreme and outrageous, and the plaintiff had offered no objective evidence that the statements had caused severe distress.

The court also held that the harassment claim failed for similar reasons.

- *Township of Manalapan v. Moskovitz*, No. MON-L-2893-07 (N.J. Super. Ct. Law Div., Monmouth County, Dec. 21, 2007). Manalapan Township sued its prior attorney for malpractice in the town's acquisition of polluted lands, and several bloggers posted their opinions regarding the decision to file suit. The township subpoenaed Google in an effort to uncover the identity of "daTruthSquad," a pseudonym used by a blogger who was critical of the decision. The court granted the anonymous blogger's motions to intervene, to quash, and for protective order against the township, stating from the bench that "[t]o allow the subpoena would be [an] undue and unjust infringement on the blogger's First Amendment rights." The court noted that the plaintiff had provided no evidence to suggest the defendant was himself the anonymous poster. See <http://www.eff.org/cases/manalapan-v-moskovitz> (last visited Sept. 7, 2010).
- *Gallucci v. New Jersey On-Line, LLC*, No. L-001107-07 (N.J. Super. Ct., filed on or about Feb. 5, 2007). Plaintiff town councilman sued his ISP, alleging it revealed confidential identifying information about him to a litigant in another lawsuit in violation of the standard established in *Dendrite* and in violation of the privacy policy of the ISP, thus causing financial and emotional damages, including loss of his seat on the council. Plaintiff voluntarily dismissed the action in November 2007.
- *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005). In an action for defamation, intentional infliction of emotional distress and "harassment" against both the operator of a website and 40 authors of anonymous comments on the website, the court affirmed the dismissal of the operator pursuant to Section 230 of the Communications Decency Act of 1996. The trial court had also quashed a subpoena to the website operator seeking information regarding 117 anonymous postings "because appellants failed to comply with the procedures required by *Dendrite*." Although that order was not on appeal, the appellate court reaffirmed the *Dendrite* standard in its holding. See also Richard L. Ravin & Van V. Mejia, *Anonymous Online Speech: New Jersey's First Amendment Privacy Interest* (summary of trial court proceedings authored by counsel for

some of the Doe defendants), *available at* www.ravin.com/anonymous.html (last visited Sept. 8, 2010).

- *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001). In an action for breach of contract and loyalty and negligently revealing confidential and proprietary information (among other claims) brought against an anonymous poster to a Yahoo bulletin board, the court affirmed the denial of the defendant's motion to quash a subpoena served on her ISP. Applying the *Dendrite* standard, the court concluded that plaintiff had set forth a prima facie case of breach of a confidentiality statement and that the plaintiff's right to redress outweighed defendant's right to anonymity.
- *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). Discussed in *Seminal Decisions*, *supra*.

New York

- *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, No. MISC 08-347 (ARR)(MDG), 2010 WL 2219343 (E.D.N.Y. Feb. 5, 2010) (Go, Mag.), *adopted in relevant part by district court*, 2010 WL 1686811 (E.D.N.Y. Apr. 26, 2010). Plaintiff sought to reveal the identity of an anonymous poster on a Yahoo forum; the plaintiff believed that the poster was the source of allegedly damaging comments made to a bankruptcy trustee during a liquidation investigation in the underlying bankruptcy suit. First, the court rejected the plaintiff's argument that the poster lacked standing to seek to quash the subpoena sent to his ISP. Second, without determining what standard properly applies, the court recommended granting the motion to quash after considering an "adapted" version of the *Sony* test, examining: "(1) the nature of the speech of the anonymous internet user; (2) the nature and strength of the claims or defenses of the party seeking the discovery; (3) the importance of the identifying information to such claims and defenses; (4) the availability of other sources of information; and (5) the conduct and relationship of the parties and subpoenaed party." The court found that the speech was expressive, not commercial; that the plaintiff's underlying claims depended on many other factors besides the poster's identity; and that there was no evidence that the trustee relied on the

poster's statements in making his decision. In this analysis, the court relied upon *2TheMart* in support of its conclusion and explained that a higher level of scrutiny must be imposed before revealing the identity of nonparties.

- *Advance Magazine Publishers Inc. v. Does 1-5*, No. 1:09-CV-10257-JGK (S.D.N.Y. Dec. 21, 2009). In this case for copyright infringement, Advance Magazine Publishers alleged that one or more anonymous defendants hacked into its servers, downloaded copyrighted material, and made that material available on a number of websites. The plaintiff moved for expedited pre-service discovery based on a four-factor good cause test and argued that: (1) it properly alleged violations of both copyright law and the Computer Fraud and Abuse Act; (2) a danger existed that, with the passage of time, the information sought from third parties would be destroyed; (3) the scope of discovery was limited to information needed to identify the defendants; and (4) discovery would substantially move the suit forward because the plaintiff would be able to serve the pleading on the real defendants. The plaintiff also argued that the defendants had a low expectation of privacy because the privacy policies of the proposed subpoena recipients, Google and AT&T, made clear that identifying information was collected and would be provided in response to a court order. The court signed the plaintiff's proposed order without further amplification, authorizing the subpoenas. Plaintiff subsequently voluntarily dismissed the case.
- *General Board of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc.*, No. CV-06-3669 (DRH) (ETB), 2006 WL 3479332 (E.D.N.Y. Nov. 30, 2006). A company filed suit under the Stored Communications Act, seeking from an ISP the identity of an individual who allegedly hacked into the email accounts of seven of the company's employees and sent a message from one account. Relying on *Sony*, the court held that there was only a minimal expectation of privacy in the alleged tortious conduct and the disclosure of identifying information relating to the IP address of the hacker does not violate the First Amendment.
- *Elektra Entertainment Group, Inc. v. Does 1-9*, No. 04 Civ. 2289 (RWS), 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004). Applying

the *Sony* test, the court denied a motion to quash a subpoena in this copyright infringement action based on peer-to-peer file sharing.

- *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004). Discussed in Seminal Decisions, *supra*.
- *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, 157 F. Supp. 2d 286 (S.D.N.Y. 2001). After the court granted the United States' application pursuant to 18 U.S.C. § 2073(d) for an order requiring Cablevision to provide information to the government concerning a subscriber to Cablevision's cable Internet service, Cablevision moved to quash the order on the ground that the portion of the order that prohibited it from disclosing the existence of the order to the customer violated its obligations under the Cable Communications Policy Act of 1984. The court disagreed, holding that the Act does not apply to disclosure of information to governmental entities by cable companies providing Internet services.
- *Sandals Resorts International Ltd. v. Google, Inc.*, ___ N.Y.S.2d ___, No. 100628/10, 2010 WL 1428266 (N.Y. Sup. Mar. 4, 2010). In this action under a state discovery rule, CPLR § 3102(c), Sandals sought to discover the identity of a Google email account holder who had allegedly made defamatory statements concerning Sandals' hiring practices in Jamaica. Google and Sandals entered into a stipulation in which Google notified the account holder of the proceeding and secured him or her an extended period to contest production of the information requested. After examining the statements, the court determined that they were mere statements of opinion, not objective fact, which could not form the predicate for a defamation claim. The court also found that Sandals offered no evidence of any harm flowing from the statements. The court denied the discovery petition on these grounds.
- *Straus Newspapers Inc. v. People* (N.Y. Sup. Ct., Orange County, Feb. 9, 2010) (transcript of oral argument). Through a grand jury subpoena, the state sought to discover the identity of posters who made critical remarks in a newspaper's online comment section. Although skeptical of the applicability of Section 230 of the Communications Decency Act (and

differential treatment of posts to a newspaper website and letters to the editor published in the print edition), the judge ruled that the comments on the blog were not harassing or threatening and therefore not evidence of any crime having been committed. On this basis, the court granted the newspaper's motion to quash.

- *Intellect Art Multimedia, Inc. v. Milewski*, No. 117024/08, 2009 NY Slip Op. 51912(U) (N.Y. Sup. Ct. Sept. 11, 2009). Plaintiff moved to compel the operator of the Ripoff Report website to provide identifying information about posters who allegedly defamed plaintiff. The court denied the motion on two grounds. First, it held that the discovery request was overbroad because it sought information about posters whose comments were not at issue in the litigation. Second, the court held that plaintiff was not entitled to the identifying information of the poster whose comments gave rise to plaintiff's defamation claim because those comments were opinions and thus not actionable.
- *In the Matter of the Application of Liskula Cohen*, No. 100012/09, 2009 WL 2883410 (N.Y. Sup. Ct. Aug. 17, 2009). Model Liskula Cohen sought an order to compel pre-action disclosure directing Google to reveal the identifying information of a blogger who posted allegedly defamatory comments about Cohen. The blogger appeared anonymously through counsel to oppose the disclosure. The court held that Cohen was entitled to pre-action discovery of the blogger's identity because she has "sufficiently established the merits of her proposed cause of action for defamation against [the blogger]" and "the information sought is material and necessary to identify the potential defendant." Noting that New Jersey had adopted the *Dendrite* standard, the court held that the law generally applicable to a CPLR 3102(c) application for pre-action disclosure (which requires "a prima facie showing of a meritorious cause of action," which the court went on to describe in a manner suggesting that factual allegations supporting all elements of the claim suffice), together with the legal requirements for establishing a meritorious cause of action for defamation, were sufficient to address the constitutional concerns raised by anonymous posters.
- *Von Kuersteiner v. Schrader*, No. 100089/08 (N.Y. Sup. Ct. Oct. 17, 2008). Plaintiff sought to obtain the identities of people

who posted anonymous comments on a blog that allegedly defamed plaintiff and his businesses. The court applied the *Sony* factors as articulated in *Public Relations Society of America v. Road Runner High Speed Online*, 799 N.Y.S.2d 847 (N.Y. Sup. Ct. 2005), and denied the request on the ground that the challenged statements were opinions and that the complaint therefore failed to state a viable defamation claim.

- *Ottinger v. Journal News*, 36 Media L. Rep. 2018 (N.Y. Sup. Ct. July 8, 2008). After anonymous posters on a newspaper website accused a couple of fraudulently and illegally obtaining authorization to build a large home on a “substandard” lot, the couple commenced a defamation action against the posters and sought information regarding their identity from the newspaper. The newspaper filed a motion to quash the subpoena. Applying the *Dendrite* standard, the court found that the couple had attempted to notify the posters of the proceedings, had identified the allegedly defamatory statements, and had produced evidence on all elements of their claim, save actual malice, which was not within their control. The court further found “that the balance in this case weighs in favor of” disclosure and denied the newspaper’s motion to quash.
- *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007). An anonymous blogger intervened in this suit for pre-action discovery, in which an elected school board member was seeking identifying information of the blogger and other anonymous posters from Google, the blog’s host. Although the court described *Dendrite* as “persuasive authority,” it declined to “reach the issue of the quantum of proof that should be required on the merits” because “the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law” because they were not reasonably susceptible of a defamatory meaning and were constitutionally protected opinion.
- *Public Relations Society of America v. Road Runner High Speed Online*, 799 N.Y.S.2d 847 (N.Y. Sup. Ct. 2005). An anonymous speaker, who had written an email containing allegedly defamatory statements about plaintiff, moved to intervene in an action for pre-suit discovery filed against the speaker’s ISP. The court denied the motion, holding that the email was libelous *per se* and that the *Sony* factors weighed in favor of disclosure.

North Carolina

- *Elektra Entertainment Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111885 (E.D.N.C. Sep. 26, 2008) (Gates, Mag.), *adopted by district court, Elektra Entertainment Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111886 (E.D.N.C. Dec. 4, 2008). In a copyright infringement suit by plaintiff recording company against anonymous John Doe defendant, plaintiff subpoenaed North Carolina State University to discover Doe's identity. The magistrate judge, applying the *Sony* factors, denied Doe's motion to quash the subpoena. In a footnote, the court explained that it declined to apply the *Dendrite* standard because the case involved online music distribution, not expressive speech, and because matters of copyright infringement are "a unique area of particular federal concern."
- *Alvis Coatings, Inc. v. Does 1-10*, No. 3L94 CV 374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004). Plaintiff sued anonymous website posters for defamation, trademark infringement, and various other torts, and subpoenaed their ISPs for their identities. The court denied a defendant's motion to quash on the ground that plaintiff made a "prima facie showing" on its claims because it "credibly averred" facts in support of them.
- *North Carolina v. Mead*, No. 10 CRS 2160 (N.C. Super. Ct. Gaston County Aug. 16, 2010). A North Carolina state court granted a newspaper's motion to quash a subpoena issued by a criminal defendant and seeking the identifying information of a poster to the newspaper's website. The court found that disclosure of the poster's identity was barred by the North Carolina shield law, N.C. Gen. Stat. § 8-53.11 because (1) the subpoena recipient is a journalist, (2) the information sought by the subpoena is "confidential information related to [the newspaper's] newsgathering and news publishing activities," (3) the information was obtained while the subpoena recipient was acting as a journalist, and (4) the defendant failed to demonstrate clearly and specifically that the information (a) is relevant and material to the proper administration of the proceeding, (b) cannot be obtained from alternative sources, and (c) is essential to the maintenance of his defense.
- *Hester v. Doe*, No. 10-CVS-361 (N.C. Sup. Ct. Vance County Jun. 28, 2010). In this defamation action, the plaintiff, a local

elected official, subpoenaed the owner of a website on which anonymous posters had made allegedly defamatory comments. Without explanation, the court applied a hybrid test that combined the *2TheMart* factors with a motion to dismiss analysis (which the court asserted to be grounded in *Dendrite's* prima facie case standard). The court specifically rejected a summary judgment standard on the basis that this “test [is] way too stringent and premature, especially where there is no dispute that the blogs [*sic*] were posted and that the blogs content [*sic*] are out there for all the world to read.” Finding that six of the twenty statements at issue were defamatory *per se* and that the *2TheMart* factors were satisfied, the court denied the website owner’s motion to quash the subpoena as to those six statements.

Ohio

- *SPX Corp. v. Doe*, 253 F. Supp. 2d 974 (N.D. Ohio 2003). A publicly traded company brought a defamation action against an anonymous poster to a Yahoo bulletin board and sought to subpoena Yahoo for the poster’s identity. Yahoo informed the poster of the subpoena, and the poster, through counsel, filed both a motion to quash and a motion to dismiss. After examining the statements at issue, the court found that “a reasonable reader would view these statements as the Defendant’s opinions, not facts” and granted the motion to dismiss.
- *Wargo v. Lavandeira*, No. CV-08-664752 (Ohio Ct. Com. Pl., Cuyahoga County, filed July 14, 2008) (the “Perez Hilton” case), *after removal* No. 1:08-cv-02035-LW (N.D. Ohio, notice of removal filed Aug. 22, 2008). Plaintiff, who had posted anonymous comments on the Perez Hilton celebrity gossip blog, filed suit after Mario Lavandeira, also known as Perez Hilton, published her name and work email address and encouraged others to contact her about her comments. Plaintiff seeks \$25 million in damages, alleging that Lavandeira violated the blog’s privacy notice, causing her to lose her job. The case was subsequently removed to federal court and, on October 3, 2008, was dismissed for lack of personal jurisdiction.

Oregon

- *Doe v. TS*, No. 08030693 (Or. Cir. Ct., Clackamas County, Sept. 30, 2008). The court applied the Oregon Media Shield Law to

deny plaintiff's motion to compel production of information identifying the author of an anonymous blog comment.

- *People v. Delp*, 178 P.3d 259 (Or. Ct. App. 2008). Defendant was convicted on charges of sexually abusing a minor. An FBI agent, posing as a 14 year old girl, engaged in an online chat on AOL with defendant, which led the FBI to believe defendant was planning on traveling interstate to have sex with a minor. The FBI issued an administrative subpoena to AOL to discover defendant's true identity. This information eventually led to defendant's arrest. On appeal, the defendant argued that the subpoena was invalid because it violated his "privacy interest" in his AOL subscriber information, an interest guaranteed to him by the Oregon Constitution. The court rejected this argument, holding that defendant had no legally cognizable "interest in keeping private the noncontent information that is held by a third party regarding his Internet usage." The court noted that it was unaware of any principle that would prevent AOL from responding to a proper government subpoena.

Pennsylvania

- *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010). A former municipal employee sued his former employer for employment discrimination and moved to compel discovery from a media entity's website of the identities of a number of anonymous posters. The court denied the motion. First, the court concluded that the "trend among courts . . . is to hold that entities such as newspapers, internet service providers, and website hosts may, under the principle of *jus tertii* standing, assert the right of their readers and subscribers." Second, the court rejected the employee's argument that the media entity's website privacy policy vitiated the anonymous posters' expectation of privacy with regard to their identifying information. Third, the court applied the *2TheMart/Enterline* test to deny the motion, determining that the posters' identities were "not directly and materially relevant to Plaintiff's claim, but rather potentially may relate to impeachment" and that "much of information Plaintiff hopes to uncover . . . is information that has been, or will be, obtained through normal, anticipated forms of discovery."

- *USA Technologies, Inc. v. Doe*, No. 2:09-cv-03899-JD (E.D. Pa. Sept. 10, 2009). See *USA Technologies, Inc. v. Doe*, No. C 09-80275 SI, 2010 WL 1980242 (N.D. Cal. May 17, 2010).
- *Enterline v. Pocono Medical Center*, No. 3:08-cv-1934, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008). Plaintiff filed suit against her employer alleging sexual harassment and retaliation. The local newspaper, *The Pocono Record*, published an article about the lawsuit, and in response several people anonymously posted comments opining on the parties and the facts underlying the case. On the newspaper's motion to quash a subpoena issued to it seeking the posters' identifying information, the court held, as a matter of first impression, that the newspaper had standing to assert the First Amendment rights of the posters. It further observed that "[a]pplication of the standard set forth in *Doe v. 2TheMart.com Inc.*," see Seminal Decisions, *supra*, "a case . . . that Plaintiff quotes and cites in support of her arguments, allows the Court to resolve the present issue on narrow grounds and does not require the Court to determine the full extent of the First Amendment right to anonymity." The court quashed the subpoena, holding that the plaintiff had failed to demonstrate the absence of alternative avenues for the information sought.
- *Fonovisa, Inc. v. Does 1-9*, No. 07-1515, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008). Applying the "good cause" standard, the court allowed plaintiffs to seek expedited discovery to identify nine Doe defendant file sharers who allegedly infringed the companies' copyrighted material.
- *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). A trial court judge commenced a defamation action against anonymous speakers who accused the judge of professional misconduct. Plaintiff propounded discovery related to the names of the speakers, and the anonymous speakers filed a motion for protective order, which was denied by the court. The appellate court quashed the appeal, holding that the order was not a collateral order, but the Pennsylvania Supreme Court vacated and remanded the action for consideration of "whether the First Amendment requires a public official defamation plaintiff to establish a *prima facie* case of actual economic harm" before unmasking an anonymous speaker. The case settled.

- *Reunion Industries Inc. v. Doe I*, 80 Pa. D. & C.4th 449, 2007 WL 1453491 (Pa. Ct. Com. Pl., Allegheny County, Mar. 5, 2007). After filing suit for commercial disparagement against three anonymous posters to a Yahoo bulletin board, plaintiff corporation sought an order compelling AOL to identify one of the posters, and that poster moved for a protective order. The court reviewed extant case law and held that the summary judgment standard announced in *Cahill* was the appropriate standard. The court granted the poster’s motion without analysis and invited plaintiff to file a motion to rescind if it can make the requisite prima facie showing.
- *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, Inc.*, No. 0425 March Term 2004, 2006 WL 37020 (Pa. Ct. Com. Pl., Philadelphia County, Jan. 4, 2006). Plaintiff law firm filed a defamation and civil conspiracy action against the owners/publishers of two websites containing anonymous postings that were held to be defamatory *per se*. The court rejected the *Cahill* and *Dendrite* standards, concluding that ordinary discovery rules provide the appropriate vehicles for analyzing an anonymous poster’s First Amendment rights. Applying those rules, the appellate court affirmed the denial of the motion for protective order. (The court had earlier expressed its suspicion that the anonymous poster was the defendant himself.)
- *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328, 2004 WL 3768897 (Pa. Ct. Com. Pl., Lackawanna County, Jan. 28, 2004). Plaintiff filed suit against anonymous speakers’ ISP and sought an order compelling the ISP to reveal the identities of the anonymous speakers, whom plaintiff alleged had harassed her with “pornographic, embarrassing, insulting, annoying and . . . confidential” emails. The court granted the relief after finding that plaintiff: “(1) satisfactorily state[d] a cognizable claim under Pennsylvania law entitling her to some form of civil or criminal redress for the actionable speech of the unknown declarant(s); (2) demonstrate[d] that the identifying information is directly related to her claim and fundamentally necessary to secure relief; (3) [wa]s seeking the requested information in good faith and not for some improper purpose such as harassing, intimidating or silencing her critics; and (4) [wa]s unable to discover the identity of the anonymous speaker(s) by alternative means.” Additionally,

the court required the ISP to notify the anonymous subscribers before disclosing their identities, “to afford them a reasonable opportunity to petition the court to vacate, reconsider or stay the discovery order.”

Tennessee

- *Swartz v. Doe #1*, No. 08C-431 (Tenn. Cir. Ct., Davidson County, Oct. 8, 2009 and Mar. 13, 2009). Donald and Terry Swartz filed suit for defamation and invasion of privacy against the anonymous owner of and posters to a blog that allegedly accused the couple of “ruining” the Old Hickory neighborhood in Nashville. After the Swartzes issued a subpoena to Google seeking the identity of the anonymous bloggers, one of them moved to quash. The court ruled that it would follow the *Dendrite* standard for determining the motion and granted a temporary protective order preventing discovery of the identity of the bloggers. (A videotape of the March 13, 2009, ruling is available at <http://blip.tv/file/1879086> (last visited Sept. 7, 2010).) After additional briefing and the presentation of affidavits, the court applied the *Dendrite* test to its factual findings, determined that all five prongs had been satisfied, and denied Doe #1’s motion to quash and for protective order. Interestingly, in seeking guidance on how to apply the final prong, the balancing test, the court looked to *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) as well as the Tennessee Shield Law, T.C.A. § 24-1-208(c)(2). The court concluded that the “relevant factors include: the specificity, relevance, and materiality of the discovery request; the absence of alternative means to obtain the requested information; and the extent and reasonableness of the speaker’s privacy expectations.” Finally, the court granted Doe #1’s motion for interlocutory review, finding that the issues warranted immediate appellate consideration.
- *People v. Cobbins*, Nos. 86216A, 86216B & 86216C, 2009 WL 2115350 (Tenn. Cir. Ct. Apr. 14, 2009). After a criminal trial garnered significant local media attention, the defendants sought relief for coverage which they claimed had “fueled hostile threats, accusation, and diatribes by the public” against them and their attorneys. The defendants moved the court to (1) prohibit newspaper websites from having comments sections following

articles about the trial, or (2) require that all commenters use their true names and addresses, or (3) establish guidelines for acceptable comments and employ monitors to ensure compliance. The court found that any order to disable the comment forums would constitute an improper prior restraint. It further rejected the defendants' request to restrict commenters' rights to anonymous speech, relying on *2TheMart* to conclude that "[s]o long as people are not committing any wrongdoing, they should be free to anonymously participate in the online forums."

Texas

- *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007). A hospital sued anonymous posters for allegedly defamatory comments on a website. The trial court ordered an ISP to reveal the identity of one of the defendants, and that defendant filed a petition for writ of mandamus. The appellate court conditionally granted the writ, holding that (1) the trial court improperly relied upon the Cable Communications Policy Act as a basis for its discovery order; and (2) a defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question, provided such evidence is within plaintiff's control (citing *Cahill*).
- *Texas v. Martinez*, No. 17042-B (Taylor County Dist. Ct. June 19, 2009). A criminal defendant sought from the *Abilene Reporter-News* the names and other identifying information of anonymous individuals who posted comments on the newspaper's website. The newspaper argued that, in accordance with Supreme Court precedent interpreting the First Amendment right to anonymity and the Texas appellate opinion in *In re Does 1-10*, the *Dendrite* test applied, and the defendant had failed to satisfy his burden under that test. The newspaper also asserted that the request was unduly burdensome, given that the newspaper was only provided one day to respond. The court quashed the request without explication.

Utah

- *Warner Bros. Records, Inc. v. Does 1-4*, No. 2:07-CV-424, 2007 WL 1960602 (D. Utah July 5, 2007). Applying the "good cause" standard, the court allowed plaintiffs to seek expedited discovery

to identify four Doe defendant file sharers who allegedly infringed the companies' copyrighted material.

Virginia

- *Interscope Records v. Does 1-7*, 494 F. Supp. 2d 388 (E.D. Va. 2007). In this action against seven Doe defendant file sharers for copyright infringement, the court denied plaintiffs' *ex parte* motion to serve a subpoena on an ISP, finding that the subpoena was not authorized by the Cable Act, the DMCA, or "any other authority" known to the court.
- *America Online, Inc. v. Nam Tai Electronics, Inc.*, 571 S.E.2d 128 (Va. 2002). A company filed suit in California against unknown individuals for posting allegedly false and defamatory messages about the company's stock to an Internet message board. The company then obtained an out-of-state discovery order from a California court to depose AOL's custodian of records in order to determine the identity of one poster. Although the Virginia Supreme Court denied AOL's motion to quash the subpoena on comity grounds, it allowed AOL to assert the First Amendment rights of the subscriber, even though the subscriber did not join the motion to quash after he was notified of the proceedings.
- *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Ct. 2000), *rev'd on other grounds by America Online, Inc. v. Anonymous Publicly Traded Company*, 542 S.E.2d 377 (Va. 2001). In this defamation and breach of confidentiality action, the trial court held that "a court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim." The Virginia Supreme Court reversed and remanded on the basis that the lower court abused its discretion in permitting the plaintiff—who was seeking to unmask anonymous speakers—to proceed anonymously.

Washington

- *SaleHoo Groups, Ltd. v. ABC Co.*, ___ F. Supp. 2d ___, No. C10-0671JLR, 2010 WL 2773801 (W.D. Wash. Jul. 12, 2010). A company called SaleHoo filed suit for trademark infringement, false designation of origin, unfair competition, and defamation against the anonymous owners of a website called “salehoo-sucks.com.” SaleHoo sought pre-service discovery on the relevant ISP, which the court authorized. SaleHoo issued a subpoena to the ISP, and the ISP notified the website owner, who moved to quash the subpoena. Applying a “*Dendrite*-style test,” the court determined that SaleHoo had not offered prima facie evidence to support all of the elements of its claims and granted the owner’s motion to quash the subpoena.
- *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). Discussed in Seminal Decisions, *supra*.

Wisconsin

- *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570 (W.D. Wis. 2007). During a grand jury investigation of suspected tax evasion and wire/mail fraud by a used-book seller who sold books through Amazon.com, the government subpoenaed Amazon to obtain the identities of a random sampling of people who purchased books from the seller. Amazon moved to quash the subpoena on the ground that it would violate its customers’ First Amendment right to privacy in book purchasing choices. The magistrate judge ruled that where a grand jury subpoena to a witness raises a legitimate First Amendment concern, the government must make an additional showing of need and the judge must fashion a solution that balances the need of the government with the First Amendment rights of the witness. The judge found that although the government had made a showing of need, the legitimate First Amendment concerns of the book buyers weighed against disclosing their identities without their consent. The court held that there was a real possibility that disclosure could chill book purchases, noting “it is an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else.” The judge therefore ordered a compromise whereby Amazon would contact its customers and ask for

volunteers who would be willing to come forward and contact the government themselves. The government subsequently withdrew the subpoena.

- *Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006), *reconsideration denied*, 297 Wis.2d. 325 (2006), *cert. denied*, 550 U.S. 933 (2007). In this defamation action filed by a political candidate against a political organization and its president for statements made in a mailer, the court held that a trial court must first decide a motion to dismiss before compelling disclosure and imposing sanctions on a party for non-disclosure. In adopting a motion to dismiss test, the court expressly noted that this standard provided more protection than it might in other jurisdictions because Wisconsin state law requires all plaintiffs alleging a defamation claim to plead with particularity. The court held the test was met and ordered disclosure.

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