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BALANCING ACT: FINDING CONSENSUS ON STANDARDS FOR UNMASKING ANONYMOUS INTERNET SPEAKERS

Abstract: The growth in popular use of the internet has led to a dramatic increase in both the amount of anonymous speech and the number of aggrieved plaintiffs claiming to be harmed by it. Lawsuits involving anonymous internet speech present thorny questions for courts because plaintiffs typically must obtain the identity of anonymous speakers during discovery before any adjudication of the underlying claim. Compelled disclosure of identifying information thus risks chilling speech by subjecting anonymous speakers who have done nothing illegal to unwarranted harassment and retaliation. In response to these concerns, courts have formulated “unmasking” standards for determining when to allow anonymous speakers to be identified. This Note examines trends within various unmasking standards and proposes a single standard for future courts that requires notice, an evaluation on the merits of the plaintiff’s claim, and a balancing of the First Amendment rights of the anonymous speaker against the strength of the plaintiff’s claim and the need for unmasking.

INTRODUCTION

The First Amendment protects the right to speak anonymously.¹ This right derives from the principle that to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution.² As Justice John Paul Stevens has noted, “[a]nonymity is a shield from the tyranny of the majority.”³ But what happens when anonymous speakers are accused of harming others with their speech?

The right to speak anonymously is not absolute.⁴ Plaintiffs have the right to seek redress for legally cognizable speech and speakers cannot

¹ See *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 160, 166–67 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199–200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *Talley v. California*, 362 U.S. 60, 64–65 (1960). Throughout this Note, the word “anonymous” refers to speech published both anonymously and under pseudonyms.

² See *McIntyre*, 514 U.S. at 341–43, 357; *Talley*, 362 U.S. at 64–65.

³ *McIntyre*, 514 U.S. at 357.

⁴ See *id.* at 353; *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 441 (Md. 2009).

escape liability simply by publishing anonymously.⁵ For example, a politician may sue for defamation if anonymous speakers harm his reputation by posting false, damaging comments about him online.⁶ Similarly, corporations may file defamation claims or other appropriate causes of action against parties who post false, damaging information online about their business practices.⁷

The difficulty with anonymous internet speech lawsuits is that they bring plaintiffs' rights to seek redress into conflict with defendants' rights to speak anonymously during discovery and before adjudication of plaintiffs' claims.⁸ After filing their claims, plaintiffs must typically obtain the identity of anonymous speakers to proceed with litigation, which is usually accomplished by filing a discovery subpoena with an Internet Service Provider ("ISP") or website host.⁹ But if plaintiffs can unmask anonymous speakers simply by filing cognizable claims and discovery subpoenas, speakers who have done or would do nothing illegal but who wish to remain anonymous may be harassed or intimidated into silence.¹⁰ For example, what if the alleged defamatory statements about our hypothetical politician were merely criticisms of leadership style or a pejorative misspelling of his last name and a statement that he was "paranoid"?¹¹ Similarly, what if the alleged defamatory statements about our hypothetical corporation were postings on an internet financial chat board criticizing the company's accounting practices following several public reports about those accounting practices, and suggesting that the

⁵ See *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

⁶ See, e.g., *Cahill*, 884 A.2d at 454 (suing anonymous poster of comments to Delaware State News website for defamation of town councilor).

⁷ See, e.g., *Solers, Inc. v. Doe*, 977 A.2d 941, 944–45 (D.C. 2009) (suing anonymous defendant who reported alleged illegal business activities for defamation and tortious interference with business opportunities of corporate plaintiff); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760, 762–63 (N.J. Super. Ct. App. Div. 2001) (suing anonymous defendant, who posted comments about the plaintiff company's accounting practices and possible sale on financial chat boards, for defamation and trade secret misappropriation).

⁸ See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 250–52; *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 715–16 (Ariz. Ct. App. 2007); *Cahill*, 884 A.2d at 454–55; see also Ashley I. Kissinger & Katharine Larsen, *Shielding Jane & John: Can the Media Protect Anonymous Online Speech?*, 26 COMM. LAW., July 2009, at 4, 4; Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 858 n.6 (2000); Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 859 (2004).

⁹ See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 250–52; *Mobilisa*, 170 P.3d at 715–16; *Cahill*, 884 A.2d at 454–55.

¹⁰ See *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Seescandy.com*, 185 F.R.D. at 578; *Cahill*, 884 A.2d at 457.

¹¹ See *Cahill*, 884 A.2d at 454.

company was being “shopped” to potential buyers?¹² Should such plaintiffs be allowed to unmask their anonymous critics or use the threat of a lawsuit to intimidate them into silence?¹³ Making it too easy for plaintiffs to unmask anonymous speakers could have a significant chilling effect on free speech.¹⁴

Most courts in the past decade have recognized the First Amendment issues raised by these cases and agree that unmasking requests require a balancing of interests between defendants’ rights to speak anonymously and plaintiffs’ rights to seek redress for harmful speech.¹⁵ There is less agreement, however, about how to conduct this balancing.¹⁶ Courts have formulated a variety of unmasking standards that plaintiffs seeking the identity of anonymous speakers must satisfy before compelling discovery.¹⁷

This Note examines unmasking standards in anonymous internet speech cases and argues for a single proposed standard to be used by all courts.¹⁸ Part I examines the right to speak anonymously, including the history of anonymous speech and the U.S. Supreme Court’s recognition of the right to speak anonymously.¹⁹ Part II explores anonymous speech on the internet, including the various contexts and causes of action under which requests to unmask anonymous speakers arise, as well as the First Amendment issues raised by those cases.²⁰ Part III analyzes unmasking standards formulated by courts in the past decade.²¹ It identifies key areas of consensus among ten different standards, including provisions that require plaintiffs to provide notice of unmasking subpoenas to anonymous defendants, as well as provisions requiring

¹² See *Dendrite*, 775 A.2d at 762–63.

¹³ According to the Supreme Court of Delaware in the 2005 case *Doe 1 v. Cahill* and the New Jersey Superior Court in the 2001 case *Dendrite International, Inc. v. Doe No. 3*, the answer is no. See *Cahill*, 884 A.2d at 467–68 (denying plaintiff’s request to unmask and dismissing case with prejudice); *Dendrite*, 775 A.2d at 772 (affirming lower court’s denial of unmasking).

¹⁴ See *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *Mobilisa*, 170 P.3d at 720; *Cahill*, 884 A.2d at 457.

¹⁵ See *infra* note 88.

¹⁶ See *infra* notes 102–180 and accompanying text.

¹⁷ See *infra* notes 102–103 and accompanying text; see also *infra* app.

¹⁸ See *infra* notes 102–220 and accompanying text; see also *infra* app. This Note focuses on standards for unmasking anonymous internet speakers and does not include unmasking opinions related to file sharing. For a discussion of the speech implications of file sharing and a file sharing unmasking opinion, see *Sony Music Entm’t Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 562–67 (S.D.N.Y. 2004).

¹⁹ See *infra* notes 25–48 and accompanying text.

²⁰ See *infra* notes 49–101 and accompanying text.

²¹ See *infra* notes 102–180 and accompanying text.

that plaintiffs make an evidentiary showing on the merits of the claim and the need for the identifying information.²² It also identifies the main area of disagreement among courts, namely whether a further balancing of plaintiffs' rights to seek redress and defendants' First Amendment interests are needed.²³ Part IV proposes a single unmasking standard for future courts that requires notice, an evaluation on the merits of the plaintiff's claim, and a balancing of the First Amendment rights of the anonymous speaker against the strength of the plaintiff's claim and the need for unmasking.²⁴

I. THE RIGHT TO SPEAK ANONYMOUSLY

A. *The Value of Anonymous Speech*

Anonymous speech has played a key role throughout the course of human history and in the founding of the United States.²⁵ As Justice Black noted, "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."²⁶ Anonymous books and pamphlets were frequently used to criticize the British government in pre-Revolutionary England.²⁷ In the colonies, Revolutionary-era writings like Thomas Paine's *Common Sense* were published anonymously to protect the authors from retribution by the British government.²⁸ Both the *Federalist Papers* and responses from anti-federalists were also published under pseudonyms.²⁹ Likewise, the First Amendment itself was, in part, a reaction to the licensing laws of England that were intended to stifle

²² See *infra* notes 102–148 and accompanying text.

²³ See *infra* notes 149–180 and accompanying text.

²⁴ See *infra* notes 181–220 and accompanying text.

²⁵ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995); *Talley v. California*, 362 U.S. 60, 62 n.3, 64–65 (1960); Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 590–93 (2001).

²⁶ *Talley*, 362 U.S. at 64.

²⁷ See *McIntyre*, 514 U.S. at 342; *Talley*, 362 U.S. at 64–65; Wieland, *supra* note 25, at 591.

²⁸ See *Talley*, 362 U.S. at 62 n.3; Wieland, *supra* note 25, at 591–92; see also *McIntyre*, 514 U.S. at 342–43.

²⁹ See *McIntyre*, 514 U.S. at 342–43; *Talley*, 362 U.S. at 65; Wieland, *supra* note 25, at 592. The *Federalist Papers* were published under the name "Publius" but were authored by James Madison, Alexander Hamilton, and John Jay. See *McIntyre*, 514 U.S. at 343 n.6; Wieland, *supra* note 25, at 592. Anti-federalists also published under pseudonyms, including "Cato," "Centinel," "The Federal Farmer," and "Brutus." See *McIntyre*, 514 U.S. at 343 n.6; Wieland, *supra* note 25, at 592.

criticism of the government by requiring authors to identify themselves in their publications.³⁰

The value of anonymous speech is not limited to the political arena, either.³¹ Many literary and artistic figures have published under pseudonyms, including notable figures like Samuel Langhorne Clemens (Mark Twain) and Benjamin Franklin, who published under a variety of pseudonyms.³² Sometimes authors publish anonymously by choice, but often it is out of necessity, as with many female authors of the nineteenth century including Amandine Aurore Lucie Dupin (George Sand) and Mary Ann Evans (George Eliot).³³ As Justice Black has noted, “[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes.”³⁴ Anonymous speech allows the dissenting, the disenfranchised, and the disempowered to air their views while protecting them from retaliation and persecution.³⁵

B. *Recognition of the Right to Speak Anonymously*

The U.S. Supreme Court first recognized the right to speak anonymously in its 1960 decision, *Talley v. California*.³⁶ In *Talley*, the Court struck down a Los Angeles city ordinance making it illegal to distribute handbills unless the handbills identified the people who created and disseminated them.³⁷ Citing the rich history of anonymous speech in America and elsewhere, the Court held that the city’s identification requirements restricted freedom of expression and that identification of parties who voiced unpopular opinions might deter discussion of matters of public importance.³⁸

Thirty-five years later, the Supreme Court again recognized the right to speak anonymously in, *McIntyre v. Ohio Elections Commission*.³⁹ Striking down an Ohio statute prohibiting the distribution of anonymous campaign literature, the Court wrote that an author’s decision to

³⁰ See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1049–53 (5th ed. 2005); see also *McIntyre*, 514 U.S. at 342; *Talley*, 362 U.S. at 64–65.

³¹ See *McIntyre*, 514 U.S. at 341–42; see also Robert J. Griffin, *Introduction to THE FACES OF ANONYMITY: ANONYMOUS & PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY* 1, 1–15 (Robert J. Griffin ed., 2003).

³² See *McIntyre*, 514 U.S. at 341 n.4.

³³ See *id.*

³⁴ *Talley*, 362 U.S. at 65.

³⁵ See *McIntyre*, 514 U.S. at 341–43; *Talley*, 362 U.S. at 64–65.

³⁶ See 362 U.S. at 64–65.

³⁷ *Id.* at 60–61, 65.

³⁸ See *id.* at 64–65.

³⁹ See 514 U.S. at 342.

remain anonymous was “an aspect of the freedom of speech protected by the First Amendment.”⁴⁰ The Court again cited the rich historical tradition of anonymous advocacy and dissent, noting that anonymity helped shield unpopular individuals and ideas from retaliation and suppression.⁴¹ Regardless of whether the motivation for seeking anonymity was privacy or fear of harassment, the Court wrote that the interest in having anonymous works enter the marketplace of ideas outweighed the public’s interest in knowing authors’ identities.⁴² The Court also noted that although the right to remain anonymous might be abused, the value of free speech generally outweighed these concerns.⁴³

The Supreme Court reaffirmed the right to speak anonymously in its 1999 decision, *Buckley v. American Constitutional Law Foundation*, and in its 2002 decision, *Watchtower Bible & Tract Society v. Village of Stratton*.⁴⁴ In *Buckley*, the Court overturned a Colorado law requiring the identification of the names of all initiative petition circulators.⁴⁵ The Court noted that petition circulators had a strong interest in remaining anonymous, particularly when canvassing in areas where people might be unreceptive to their ideas.⁴⁶ Similarly, in *Watchtower Bible*, the Court struck down a local ordinance requiring individuals to obtain permits before engaging in door-to-door advocacy.⁴⁷ The right to speak anonymously was among the various speech rights cited by the Court as weighing against the ordinance.⁴⁸

⁴⁰ See *id.* at 336, 342, 357.

⁴¹ See *id.* at 341–43, 357.

⁴² See *id.* at 341–42. In a footnote, the Court quoted New York case law, stating:

Don’t underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.

Id. at 348 n.11 (internal citations and quotations omitted).

⁴³ See *id.* at 357.

⁴⁴ See *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 160, 166–69 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 198–200, 204 (1999).

⁴⁵ *Buckley*, 525 U.S. at 186–87, 204.

⁴⁶ See *id.* at 199–200, 204.

⁴⁷ 536 U.S. at 153–55, 164, 169. The Court found the ordinance was overly broad and insufficiently tailored to serve the claimed interests of protecting residents’ privacy as well as preventing fraud and crime. See *id.* at 164–69.

⁴⁸ *Id.* at 166–67.

II. ANONYMOUS SPEECH ON THE INTERNET

Speech on the internet receives full First Amendment protection, including the right to speak anonymously.⁴⁹ But the right to speak anonymously is not absolute, and plaintiffs have the right to seek redress for harmful anonymous speech.⁵⁰ Lawsuits involving anonymous internet speakers, however, raise novel problems for courts, particularly in the area of unmasking.⁵¹

A. Anonymous Internet Speech Unmasking Cases

Anonymous internet speech cases arise in a variety of contexts and under various causes of action.⁵² Most cases involve claims filed against unknown defendants⁵³ for items posted anonymously to websites,⁵⁴ but

⁴⁹ See *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 253–54 (D. Conn. 2008); *Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

⁵⁰ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995); *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Cahill*, 884 A.2d at 456.

⁵¹ See *infra* notes 52–81 and accompanying text.

⁵² See *infra* notes 53–72 and accompanying text.

⁵³ Sometimes websites or other known parties are also sued. See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 442–47 (Md. 2009) (suing newspaper and anonymous users of newspaper's website discussion forums for content posted by the users); see also *Kissinger & Larsen*, *supra* note 8, at 4. Anonymous speech cases may also involve requests to unmask anonymous third parties. See, e.g., *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2001) (seeking the identities of anonymous posters to financial internet chat rooms as part of corporate executives' affirmative defense in a shareholder fraud lawsuit).

⁵⁴ See, e.g., *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 130–31 (D.D.C. 2009) (comments about and responses to plaintiff's video posted on YouTube); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1206, 1208–09 (D. Nev. 2008) (content on websites allegedly intended to lure away plaintiff's business partners); *AutoAdmit.com*, 561 F. Supp. 2d at 250–52 (comments about female Yale Law school students including threats and sexually violent fantasies posted to the website www.AutoAdmit.com); *McMann v. Doe*, 460 F. Supp. 2d 259, 261–62 (D. Mass. 2006) (content of website alleging misdealings by plaintiff developer); *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *1–3 (D. Ariz. July 25, 2006) (content on website formed by member owners devoted to airing views and issues related to plaintiff member corporation); *Alvis Coatings, Inc. v. Does 1 Through 10*, No. 3L94 CV 374-H, 2004 WL 2904405, at *1, (W.D.N.C. Dec. 2, 2004) (comments posted on several websites regarding plaintiff corporation and its products); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 976–77 (N.D. Ohio 2003) (comments regarding plaintiff corporation posted to financial website); *In re Baxter*, No. 01-00026-M, 2001 WL 34806203, at *1, *13–15 (W.D. La. Dec. 20, 2001) (articles about plaintiff university vice president posted to website); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 234–35 (Ct. App. 2008) (comments about plaintiff corporate executive posted on financial website); *Cahill*, 884 A.2d at 454 (comments about plaintiff politician posted on newspaper website blog forum); *Brodie*, 966 A.2d at 442–47 (comments about local businessman posted on a newspaper website); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (comments about plaintiff corporation posted on financial web-

anonymous speakers have also been sued for using corporate names as online pseudonyms,⁵⁵ for registering internet domain names of trademarked corporations,⁵⁶ for reporting suspected illegal corporate activities to a trade industry website,⁵⁷ and for sending emails and other electronic communications.⁵⁸ Plaintiffs are most commonly corporations or companies,⁵⁹ but also include private individuals,⁶⁰ business people and corporate executives,⁶¹ and public figures.⁶²

The primary cause of action in most anonymous speech lawsuits is defamation or another speech-related tort claim, frequently combined with other causes of action, such as breach of contract, copyright violations, trademark violations, property claims, tortious interference with business relations, and miscellaneous statutory violations.⁶³ Anonymous speakers are also sometimes sued without a speech-related tort claim.⁶⁴

site); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 697 (Sup. Ct. 2007) (blog posts about plaintiff school board member); *Reunion Indus. Inc. v. Doe 1*, 80 Pa. D. & C.4th 449, 450 (Com. Pl. 2007) (comments about plaintiff corporation on financial website); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425, 2006 WL 37020, at *1–2 (Pa. Com. Pl. Jan. 4, 2006) (comments about plaintiff lawyers posted on websites); *In re Does 1–10*, 242 S.W.3d 805, 810 (Tex. Ct. App. 2007) (blog posts about plaintiff hospital); *In re Subpoena Duces Tecum to Am. Online, Inc. (AOL)*, 52 Va. Cir. 26, 26–27 (Cir. Ct. 2000), *rev'd on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) (comments and information about plaintiff corporation posted in internet chat rooms).

⁵⁵ See *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 970–72 (N.D. Cal. 2005).

⁵⁶ See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 575–76 (N.D. Cal. 1999).

⁵⁷ See *Solers, Inc. v. Doe*, 977 A.2d 941, 944–45 (D.C. 2009).

⁵⁸ See *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 715 (Ariz. Ct. App. 2007) (suing anonymous defendants for forwarding plaintiff CEO's private email along with anonymous comments to third parties); *Polito v. AOL Time Warner Inc.*, 78 Pa. D. & C.4th 328, 329 (Com. Pl. 2004) (suing anonymous defendant for sending harassing emails and instant messages).

⁵⁹ See, e.g., *Quixtar*, 566 F. Supp. 2d at 1206; *Best Western Int'l*, 2006 WL 2091695 at *1, *3; *Highfields Capital*, 385 F. Supp. 2d at 970; *Alvis Coatings, Inc.*, 2004 WL 2904405, at *1; *SPX Corp.*, 253 F. Supp. 2d at 976; *Seescandy.com*, 185 F.R.D. at 575; *Mobilisa*, 170 P.3d at 715; *Solers*, 977 A.2d at 944; *Dendrite*, 775 A.2d at 760; *Reunion Indus.*, 80 Pa. D. & C.4th at 450; *Klehr Harrison*, 2006 WL 37020, at *1; *AOL*, 52 Va. Cir. at 26.

⁶⁰ See, e.g., *Sinclair*, 596 F. Supp. 2d at 130 (plaintiff private citizen who posted self-made video to YouTube); *AutoAdmit.com*, 561 F. Supp. 2d at 250–51 (plaintiff Yale Law School students); *Polito*, 78 Pa. D. & C.4th at 329 (plaintiff private citizen).

⁶¹ See, e.g., *McMann*, 460 F. Supp. 2d at 261 (real estate developer); *Krinsky*, 72 Cal. Rptr. 3d at 234–35 (company president); *Brodie*, 966 A.2d at 442 (businessman).

⁶² See, e.g., *Cahill*, 884 A.2d at 454 (plaintiff town councilor); *Greenbaum*, 845 N.Y.S.2d at 697 (plaintiff school board member); see also *Baxter*, 2001 WL 34806203 at *1, *13–14 (plaintiff university vice president whom the court found to be a public official).

⁶³ See, e.g., *Sinclair*, 596 F. Supp. 2d at 130 (defamation and reckless misrepresentation); *AutoAdmit.com*, 561 F. Supp. 2d at 252 (libel, invasion of privacy, negligent and intentional infliction of emotional distress, and copyright violations); *McMann*, 460 F. Supp. 2d at 262 (defamation, privacy, and copyright violations); *Best Western Int'l*, 2006 WL 2091695,

Lawsuits involving anonymous speakers may also involve a wide variety of speech.⁶⁵ Topics include everything from commentary on public affairs and public figures,⁶⁶ to statements about corporations, corporate officials and commercial activities,⁶⁷ to comments about private or semi-private individuals.⁶⁸ The subject may be a matter of public record or public importance, or it may relate to more private or personal matters.⁶⁹ The speech may also contain comments that arguably

at *1 (defamation, breach of contract, breach of fiduciary duties, revealing confidential information, trademark infringement, and unfair competition); *Highfields Capital*, 385 F. Supp. 2d at 971 (defamation, commercial disparagement, and trademark violations); *Alvis Coatings*, 2004 WL 2904405, at *1 (defamation, Lanham Act violations, deceptive and unfair trade practices, unfair competition, and tortious interference with business relations); *SPX Corp.*, 253 F. Supp. 2d at 977 (defamation); *Baxter*, 2001 WL 34806203, at *1 (defamation); *Krinsky*, 72 Cal. Rptr. 3d at 235 (libel and interference with contractual and business employment relationships); *Cahill*, 884 A.2d at 454 (defamation and invasion of privacy claims); *Solers*, 977 A.2d at 944 (defamation and tortious interference with business opportunities); *Brodie*, 966 A.2d at 442 (defamation and conspiracy to defame); *Dendrite*, 775 A.2d at 760 (defamation); *Greenbaum*, 845 N.Y.S.2d at 697 (defamation); *Reunion Indus.*, 80 Pa. D. & C.4th at 450 (commercial disparagement); *Klehr Harrison*, 2006 WL 37020, at *1 (defamation and civil conspiracy); *In re Does 1–10*, 242 S.W.3d at 810 (defamation and disclosure of confidential patient information); *AOL*, 52 Va. Cir. at 26–27 (defamation, publication of confidential insider information, breach of fiduciary duties, and breach of contract). For a discussion of the First Amendment implications of trade secret lawsuits, see Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425 (2009).

⁶⁴ See, e.g., *Quixtar*, 566 F. Supp. 2d at 1206 (Lanham Act violations, trade secret misappropriation, and tortious interference with contracts and business relations); *Seescandy.com*, 185 F.R.D. at 576 (trademark infringement and dilution, unfair competition, deceptive trade practices, and unjust enrichment); *Mobilisa*, 170 P.3d at 715–16 (trespass to chattel and violations of federal electronic communications law); *Polito*, 78 Pa. D. & C.4th at 329, 343, 345 (harassment and stalking).

⁶⁵ See *infra* notes 66–72 and accompanying text.

⁶⁶ See, e.g., *Cahill*, 884 A.2d at 454 (comments regarding mayor and town councilor’s leadership styles and efforts to revitalize town); *Brodie*, 966 A.2d at 442–44 (comments on newspaper website forum regarding sale of historic home and subsequent fire that destroyed it); *Greenbaum*, 845 N.Y.S.2d at 699–700 (postings regarding school board member on blog devoted to community issues in Long Island, NY).

⁶⁷ See, e.g., *Solers*, 977 A.2d at 944–45 (anonymous defendant reported alleged illegal corporate activities to a trade industry association website); *Dendrite*, 775 A.2d at 762–63 (comments about corporation’s accounting practices, structuring of contracts, and the possibility that company was being “shopped” for sale); *In re Does 1–10*, 242 S.W.3d at 810 (comments regarding hospital and hospital administration and staff on blog).

⁶⁸ See, e.g., *Sinclair*, 596 F. Supp. 2d at 130–31 (comments regarding video maker who posted video to YouTube); *AutoAdmit.com*, 561 F. Supp. 2d at 250–52 (comments regarding Yale Law School students); *Polito*, 78 Pa. D. & C.4th at 329 (emails and instant messages sent to private individual).

⁶⁹ See *supra* notes 66–68. The line for what speech relates to public matters and private matters is often blurred, particularly within the corporate arena. See, e.g., *Mobilisa*, 170 P.3d at 715 (anonymous defendant forwarded intimate email written by CEO of company asking: “Is this a company you want to work for?”); *Krinsky*, 72 Cal. Rptr. 3d at 234–35 (calling

could be either statements of fact or opinions,⁷⁰ and personal attacks ranging from name calling⁷¹ to full-scale campaigns of harassment.⁷²

Because federal law largely immunizes website owners and ISPs for content posted online by third parties, plaintiffs typically must sue the anonymous individuals who posted the offending materials directly.⁷³ After filing claims, plaintiffs must file discovery subpoenas seeking identifying information from ISPs or websites to proceed with the litigation.⁷⁴

management at company “boobs, losers and crooks” and insulting plaintiff corporate president).

⁷⁰ See, e.g., *SPX Corp.*, 253 F. Supp. 2d at 976–77 (comments on financial chat board alleging fraud, “cooking the books,” and overleveraging, and warning “[g]et ready for and [sic] SEC and FBI Probe” (bracket in the original)); *Dendrite*, 775 A.2d at 762–63 (comments on financial chat board that corporate plaintiff’s executives were changing accounting practices to enhance revenues and attempting to sell the company); see also Lidsky, *supra* note 8, at 932–46 (arguing in favor of adapting opinion privilege doctrines for anonymous internet speech cases given the context and hyperbolic tenor of most anonymous internet speech).

⁷¹ See, e.g., *Krinsky*, 72 Cal. Rptr. 3d at 235 (calling corporate management “boobs, losers and crooks” and saying plaintiff had “fat thighs, a fake medical degree, ‘queefs’ and . . . poor feminine hygiene”); *Cahill*, 884 A.2d at 454 (calling politician “paranoid” and misspelling last name as “Gahill”); *Greenbaum*, 845 N.Y.S.2d at 699–700 (calling school board member a “bigot”).

⁷² See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 250–52 (subjecting plaintiffs, female Yale Law School students, to hundreds of postings by users of the website www.AutoAdmit.com ranging from insults to threats and sexually violent fantasies); see also *Polito*, 78 Pa. D. & C.4th at 329, 343, 345 (harassment and stalking claims in case involving unknown individuals who sent plaintiff harassing emails and instant messages). For more details on the AutoAdmit case, see David Margolick, *Slimed Online*, PORTFOLIO, Mar. 2009, at 80.

⁷³ See 47 U.S.C. § 230(c) (2006). Section 230 states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” *Id.* § 230(c)(1). Courts have interpreted this provision broadly, holding that it largely shields ISPs and website operators from liability for content posted independently online by third parties. See, e.g., *Carafano v. Metersplash.com, Inc.*, 339 F.3d 1119, 1120–25 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–35 (4th Cir. 1997); cf. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162–76 (9th Cir. 2008) (website held responsible for third party content when it was directly involved in shaping that content). Claims are, however, sometimes filed against websites or ISPs, either separately or in addition to anonymous defendants. See Kissinger & Larsen, *supra* note 8, at 4; see also *supra* note 53.

⁷⁴ See Kissinger & Larsen, *supra* note 8, at 4; Margo E. K. Reder & Christine Neylon O’Brien, *Corporate Cybersneer: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 195, 197 (2002); David L. Sobel, *The Process that “John Doe” Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, ¶ 14 (2000), <http://www.vjolt.net/vol5/symposium/v5i1a3-Sobel.html>; Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 495–96 (2001); Vogel, *supra* note 8, at 802–03.

The procedural posture of these unmasking subpoenas presents several difficulties for courts.⁷⁵ First, the subpoenas are frequently served on third party ISPs or websites who sometimes do not contest the subpoenas or notify anonymous speakers about them.⁷⁶ Anonymous speakers thus may have no chance to contest the release of identifying information.⁷⁷

Second, and more substantively, unmasking subpoenas are filed during discovery at a stage in the litigation where claims have not been adjudicated and the record is often underdeveloped, particularly in notice pleading jurisdictions.⁷⁸ If anonymous speakers can be unmasked simply by filing cognizable claims and discovery subpoenas, plaintiffs may intimidate or silence critics who have done or would do nothing illegal but who wish to remain anonymous or avoid costly litigation.⁷⁹ Unmasking may also be the primary remedy sought by plaintiffs and may subject anonymous defendants to extra-judicial retaliation.⁸⁰

⁷⁵ See *infra* notes 76–81 and accompanying text.

⁷⁶ See *2TheMart.com*, 140 F. Supp. 2d at 1095 n.5 (discussing the problems of notice for anonymous internet speakers); see also Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1374 (2009); Reder & O'Brien, *supra* note 74, at 197; Sobel, *supra* note 74, ¶ 14; Spencer, *supra* note 74, at 495–96; Vogel, *supra* note 8, at 802–03.

⁷⁷ See cases and articles cited *supra* note 76. The issue of notice has been mitigated somewhat over time both by increased judicial scrutiny of unmasking subpoenas and by increased willingness of ISPs and websites to protect their customers' privacy. See Kissinger & Larsen, *supra* note 8, at 4; Vogel, *supra* note 8, at 812–13, 853–54. Federal law also mandates that cable ISPs must receive a court order and provide notice to their subscribers before disclosing identifying information to a third party. See 47 U.S.C. § 551(c) (2006); see also Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1598 (2007). This law, however, does not cover non-cable ISPs or other web entities, and notice remains a significant issue in cases involving anonymous internet defendants. See Lidsky & Cotter, *supra*, at 1598 (arguing to broaden notice protections for anonymous defendants beyond the current scope of 47 U.S.C. § 551(c)).

⁷⁸ See, e.g., *Mobilisa*, 170 P.3d at 715–16, 720; *Cahill*, 884 A.2d at 454–55, 458; *Dendrite*, 775 A.2d at 760–64.

⁷⁹ See *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Seescandy.com*, 185 F.R.D. at 578; *Cahill*, 884 A.2d at 457; *Dendrite*, 775 A.2d at 771.

⁸⁰ See *Cahill*, 884 A.2d at 457; see also Lidsky, *supra* note 8, at 876–83, 887–92; Megan M. Sunkel, Note, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1195 (2003). For example, in one well-documented case, Raytheon Co. sued twenty-one anonymous posters to a Yahoo! website alleging they had revealed confidential information about the company. See Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2771–72 (2002) (citing Motion to Quash, *Raytheon v. Does* 1–21, No. 99-816 (Mass. Super. Ct. Feb. 1, 1999)); see also Sobel, *supra* note 74, ¶ 15; Caroline E. Strickland, Note, *Applying McIntyre v. Ohio Elections Commission to Anonymous Speech on the Internet and the Discovery of John Doe's*

Thus, allowing plaintiffs to unmask anonymous defendants too easily risks chilling speech by subjecting anonymous speakers to harassment, retaliation, or retribution merely for expressing unpopular opinions.⁸¹

B. *Evolution of Court Responses to Unmasking Subpoenas*

As popular use of the internet increased during the 1990s, so too did lawsuits involving anonymous internet speakers.⁸² Early on, courts confronted with unmasking subpoenas showed little sensitivity to the First Amendment issues raised by these cases, frequently failing to scrutinize the subpoenas and often allowing them to proceed with little discussion on the rare occasions when they were contested.⁸³

Many commentators criticized these early unmasking cases, citing their potential chilling effect on internet speech.⁸⁴ Particularly worrisome for some was what they identified as a rash of strategic lawsuits against public participation (“SLAPP-suits”), filed by corporations against anonymous online critics.⁸⁵

Over time, courts have shown greater sensitivity to the issues presented in anonymous speech cases.⁸⁶ Many courts have recognized that the primary concern with unmasking subpoenas is the risk of misuse of such subpoenas to harass, intimidate, or otherwise silence critics.⁸⁷ Most

Identity, 58 WASH. & LEE L. REV. 1537, 1553 (2001). After using discovery subpoenas to identify posters who turned out to be employees, Raytheon dropped the lawsuit and handled the matter internally; this reportedly resulted in several employees leaving the company. See O'Brien, *supra*, at 2772. The confidential information cited by Raytheon in the original complaint turned out to be either false or publicly available knowledge. See Strickland, *supra*, at 1553.

⁸¹ See *supra* notes 78–80 and accompanying text.

⁸² See Lidsky, *supra* note 8, at 858 n.6; see also Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 415–17 (2003); Lidsky & Cotter, *supra* note 77, at 1594; Reder & O'Brien, *supra* note 74, at 196–97; Sobel, *supra* note 74, ¶¶ 1–2, 10–17; Spencer, *supra* note 74, at 493–94; Vogel, *supra* note 8, at 802–03.

⁸³ See Lidsky, *supra* note 76, at 1373–74; Lidsky, *supra* note 8, at 858 n.6; Vogel, *supra* note 8, at 802–03.

⁸⁴ See, e.g., Sobel, *supra* note 74, ¶¶ 15–21; Spencer, *supra* note 74, at 493–94.

⁸⁵ See, e.g., Ekstrand, *supra* note 82, at 415–17 (commenting on the phenomenon of SLAPP suits and noting that in 2003 at least twenty states had anti-SLAPP laws that prohibited plaintiffs from using the legal system to silence opposition and chill free speech); Spencer, *supra* note 74, at 493–96 (coining the word cyber-SLAPP to define strategic lawsuits against public participation aimed at online critics).

⁸⁶ See Lidsky, *supra* note 76, at 1374–84; Lidsky & Cotter, *supra* note 77, at 1594–98; Vogel, *supra* note 8, at 810–15.

⁸⁷ See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 254; *2TheMart.com*, 140 F. Supp. 2d at 1092; *Seescandy.com*, 185 F.R.D. at 578; *Mobilisa*, 170 P.3d at 717, 720; *Krinsky*, 72 Cal. Rptr.

courts have concluded that requests to unmask anonymous internet speakers require a balancing of defendants' rights to speak anonymously against plaintiffs' rights to seek redress for harmful speech.⁸⁸ The bigger question is how to achieve this balancing.⁸⁹

C. *An Example of an Unmasking Standard*

Since 1999, many courts have formulated unmasking standards that parties seeking the identity of anonymous speakers must satisfy before allowing unmasking subpoenas to proceed.⁹⁰ A typical example, and one of the earliest standards, comes from the 2001 Superior Court of New Jersey case, *Dendrite International, Inc. v. Doe, No. 3*.⁹¹

In *Dendrite*, Dendrite International, Inc. ("Dendrite") sought to compel disclosure of the identities of anonymous defendants who posted allegedly defamatory comments about the company and its management on a Yahoo! financial website.⁹² First, the court identified its primary concern as balancing defendants' rights to speak anonymously against plaintiffs' rights to seek redress.⁹³ The court then outlined an unmasking standard that required a party seeking to unmask an anonymous internet speaker to: 1) demonstrate efforts to provide notice and a reasonable opportunity to respond to the anonymous speakers, including posting notification of the court proceedings on the website where the comments were made; 2) set forth the exact allegedly actionable statements made by each anonymous speaker; and 3) establish that the cause of action could withstand a motion to dismiss for failure to state a claim upon which relief can be granted, and also produce sufficient evidence for each element of the cause of action on a prima facie basis.⁹⁴ If these three steps were satisfied, then the court was fur-

3d at 238, 245; *Cahill*, 884 A.2d at 457, 459; *Dendrite*, 775 A.2d at 767, 771; *AOL*, 52 Va. Cir. at 34.

⁸⁸ See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 254; *2TheMart.com*, 140 F. Supp. 2d at 1095; *Seescandy.com*, 185 F.R.D. at 578; *Mobilisa*, 170 P.3d at 717; *Krinsky*, 72 Cal. Rptr. 3d at 238-39; *Cahill*, 884 A.2d at 456; *Solers*, 977 A.2d at 951; *Brodie*, 966 A.2d at 447, 456; *Dendrite*, 775 A.2d at 760; *AOL*, 52 Va. Cir. at 34-35.

⁸⁹ See *infra* notes 90-180 and accompanying text.

⁹⁰ See *infra* notes 102-103; see also Lidsky, *supra* note 76, at 1376-84.

⁹¹ 775 A.2d at 760-61.

⁹² See *id.* at 760. The defendant criticized Dendrite's accounting practices, which had been the subject of several published reports, and suggested that the company was being shopped to potential buyers. See *id.* at 762-63. Dendrite claimed that the postings caused the company's stock price to fluctuate and "may" have had detrimental effects on the company's ability to hire and retain employees. See *id.* at 772.

⁹³ See *id.* at 760.

⁹⁴ See *id.*

ther required to balance the defendant's First Amendment right of anonymous speech against the strength of the prima facie case and the necessity for disclosure of the anonymous defendant's identity.⁹⁵ Applying its standard, the court ultimately concluded that Dendrite had not sufficiently stated a prima facie case and denied the motion to compel discovery.⁹⁶

Although an influential case, the *Dendrite* standard is just one of many unmasking standards.⁹⁷ As of 2010, more than twenty courts have either promulgated unmasking standards or outlined specific criteria that parties seeking to identify anonymous internet speakers must satisfy before compelling discovery.⁹⁸ These unmasking standards have been promulgated primarily at the state and federal district court levels and have been formulated on a jurisdiction-by-jurisdiction basis, resulting in what has been described as an "entire spectrum" or, less charitably, a "morass" of unmasking standards.⁹⁹ Nevertheless, although there is much variation within unmasking standards, there are also significant areas of consensus.¹⁰⁰ The following Part examines these areas of consensus and disagreement.¹⁰¹

⁹⁵ See *id.* at 760–61.

⁹⁶ See *id.* at 772. The court concluded that Dendrite had not made a prima facie showing of harm, and that, although Dendrite's discovery request would survive a traditional motion to dismiss, it did not survive the new standard. See *id.* at 771–72.

⁹⁷ See *infra* notes 102–103. Not all courts embrace the use of special standards for evaluating unmasking subpoenas, even when those courts recognize the need to balance the competing interests of plaintiffs and anonymous defendants. See, e.g., *Klehr Harrison*, 2006 WL 37020, at *8–9 (rejecting the implementation of new standards for unmasking anonymous internet posters as "likely [to] do more harm than good"); see also Vogel, *supra* note 8, at 841–55 (arguing for the use of existing procedural mechanisms instead of new unmasking standards in anonymous internet speech cases). Nevertheless, the clear trend is towards using unmasking standards or specific criteria to evaluate unmasking requests. See *infra* notes 102–103.

⁹⁸ See *infra* notes 102–103.

⁹⁹ See Cahill, 884 A.2d at 457 ("entire spectrum"); Lidsky & Cotter, *supra* note 77, at 1598 ("morass"); see also *infra* notes 102–103.

¹⁰⁰ See *infra* notes 102–180 and accompanying text; see also Lidsky, *supra* note 76, at 1376–84; Sam Bayard, *D.C. High Court Joins Consensus Protecting the Anonymity of Online Speakers*, CITIZEN MEDIA L. PROJECT, Aug. 17, 2009, <http://www.citmedialaw.org/blog/2009/dc-high-court-joins-consensus-protecting-anonymity-online-speakers>. Bayard's blog is an excellent resource for tracking and analyzing the ongoing changes in anonymous internet speech cases. See Sam Bayard, Citizen Media Law Project Blog, <http://www.citmedialaw.org/blog/sam-bayard> (last visited Apr. 3, 2010).

¹⁰¹ See *infra* notes 102–180 and accompanying text.

III. CONSENSUS AND DISAGREEMENT WITHIN STANDARDS FOR UNMASKING ANONYMOUS INTERNET SPEAKERS

This Part surveys areas of consensus and disagreement among ten different unmasking standards formulated by courts between 1999 and 2009.¹⁰² The cases selected for the survey were chosen both because the opinions contain clearly articulated standards allowing for easy comparison and also because they are broadly representative of various trends in unmasking standards over the past ten years.¹⁰³

This Part concludes that, although the language of different standards varies widely, there is general agreement that plaintiffs seeking to unmask anonymous defendants should first show that they have made reasonable attempts to provide defendants with notice and an opportunity to respond to the unmasking subpoena.¹⁰⁴ Courts also agree that to balance plaintiffs' rights to seek redress against defendants' rights to speak anonymously, there should both be an evidentiary showing on the merits of the plaintiff's claim and some showing of need for the

¹⁰² See *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999); *Mobilisa, Inc. v. Doe I*, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 244–45 (Ct. App. 2008); *Doe No. 1 v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001); *In re Subpoena Duces Tecum to Am. Online, Inc. (AOL)*, 52 Va. Cir. 26, 37 (2000), *rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). For full text of these unmasking standards, see *infra* app.

¹⁰³ See *supra* note 102; see also *infra* app. Many other courts have thoughtfully considered the issue of unmasking anonymous internet speakers and have either formulated unmasking standards or expounded on specific unmasking criteria. See, e.g., *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132–34 (D.D.C. 2009); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008); *McMann v. Doe*, 460 F. Supp. 2d 259, 266–68 (D. Mass. 2006); *Best Western Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC*, 2006 WL 2091695, at *4–6 (D. Ariz. Jul. 25, 2006); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 970–71 (N.D. Cal. 2005); *Alvis Coatings, Inc. v. Does 1 Through 10, No. 3L94 CV 374-H*, 2004 WL 2904405, at *3–4 (W.D.N.C. Dec. 2, 2004); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 977–78, 980 (N.D. Ohio 2003); *In re Baxter, No. 01-00026-M*, 2001 WL 34806203, at *11–12 (W.D. La. Dec. 20, 2001); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 698–99 (Sup. Ct. 2007); *Reunion Indus. Inc. v. Doe I*, 80 Pa. D. & C.4th 449, 456 (Com. Pl. 2007); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 March Term 2004, 2006 WL 37020, *8–9 (Pa. Com. Pl. Jan. 4, 2006); *Polito v. AOL Time Warner Inc.*, 78 Pa. D. & C.4th 328, 341 (Com. Pl. 2004); *In re Does 1–10*, 242 S.W.3d 805, 821–23 (Tex. Ct. App. 2007). Notably, many of these cases utilize similar factors in evaluating unmasking subpoenas as the cases in this survey and, as such, they are referenced throughout this Part.

¹⁰⁴ See *infra* notes 108–115 and accompanying text.

identifying information.¹⁰⁵ There is substantially less agreement, however, about what evidentiary showing is sufficient¹⁰⁶ and also about other factors courts should consider in balancing plaintiffs' and defendants' interests.¹⁰⁷

A. Notice

Most unmasking standards in the survey require parties seeking the identities of anonymous internet speakers to demonstrate that they have made reasonable attempts to provide notice of the unmasking subpoenas to the anonymous speakers so the subpoenas may be contested.¹⁰⁸ These notice provisions typically require a showing of "adequate notice and a reasonable opportunity to respond."¹⁰⁹ These courts have indicated that adequate notice may be satisfied in a variety of ways, including posting notification of the claim and unmasking subpoena to

¹⁰⁵ See *infra* notes 116–148 and accompanying text.

¹⁰⁶ See *infra* notes 122–137 and accompanying text.

¹⁰⁷ See *infra* notes 149–180 and accompanying text.

¹⁰⁸ See *AutoAdmit.com*, 561 F. Supp. 2d at 254 (requiring petitioner to "notify the anonymous posters . . . and with[ho]ld action to afford . . . a reasonable opportunity to file and serve opposition"); *Seescandy.com*, 185 F.R.D. at 579 (requiring petitioner to "identify all previous steps taken to locate the elusive defendant . . . mak[ing] a good faith effort to comply with the requirements of service and process"); *Mobilisa*, 170 P.3d at 721 (requiring petitioner to give "adequate notice and a reasonable opportunity to respond"); *Krinsky*, 72 Cal. Rptr. 3d at 244 ("notify the defendant"); *Cahill*, 884 A.2d at 460–61 (requiring petitioner to "notify the anonymous poster . . . [and] withhold action to afford . . . a reasonable opportunity to file and serve opposition"); *Solers*, 977 A.2d at 954 (requiring petitioner to make "reasonable efforts to notify the anonymous defendant"); *Brodie*, 966 A.2d at 457 (requiring petitioner to "notify the anonymous posters . . . [and] withhold action to afford . . . a reasonable opportunity to file and serve opposition"); *Dendrite*, 775 A.2d at 760 (requiring petitioner to "notify the anonymous posters . . . and withhold action to afford . . . a reasonable opportunity to file and serve opposition"); see also *infra* app. Only two of the ten standards in the survey do not explicitly contain notice provisions. See *2TheMart.com*, 140 F. Supp. 2d at 1095; *AOL*, 52 Va. Cir. at 37; see also *infra* app. Notably, these are two of the earliest unmasking decisions in this survey, and both also involved contested unmasking subpoenas. See *2TheMart.com*, 140 F. Supp. 2d at 1088, 1095 (decided in 2001); *AOL*, 52 Va. Cir. at 26, 37 (decided in 2000).

Many unmasking opinions outside this survey also require plaintiffs to make a showing that they attempted to provide notice to anonymous defendants. See, e.g., *Quixtar*, 566 F. Supp. 2d at 1212–13, 1216–17; *Best Western Int'l*, 2006 WL 2091695, at *6; *Greenbaum*, 845 N.Y.S.2d at 698; see also *Polito*, 78 Pa. D. & C.4th at 341–42 (requiring the ISP to provide the anonymous defendant with notice and a reasonable opportunity to respond before permitting unmasking).

¹⁰⁹ *Mobilisa*, 170 P.3d at 721. Two courts have required only a showing of notice with no mention of a reasonable opportunity to respond. See *Seescandy.com*, 185 F.R.D. at 579; *Krinsky*, 72 Cal. Rptr. 3d at 244.

the internet forum where the alleged harmful speech occurred, or to an email address from which the speech originated.¹¹⁰

Courts have cited various rationales for including notice provisions in their unmasking standards.¹¹¹ Many courts have broadly invoked due process concerns.¹¹² A few courts have expressed displeasure with ex parte proceedings in general.¹¹³ Perhaps most importantly, notice is desirable on a practical level because it increases the likelihood of adversarial proceedings and encourages a better development of the record by which courts can evaluate the merits of unmasking request.¹¹⁴ Regardless of the rationale, almost all unmasking standards in the survey contain notice provisions.¹¹⁵

B. *Evidentiary Showing on the Merits of the Claim*

Virtually all unmasking standards in the survey also require some evidentiary showing on the merits of the plaintiff's claim.¹¹⁶ Indeed,

¹¹⁰ See *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Seescandy.com*, 185 F.R.D. at 579; *Mobilisa*, 170 P.3d at 719–20; *Krinsky*, 72 Cal. Rptr. 3d at 244; *Cahill*, 884 A.2d at 461; *Solers*, 977 A.2d at 954–55; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760. This can be viewed as a compromise position, attempting to provide at least constructive notice for anonymous defendants while not unduly burdening plaintiffs, especially given the malleable and ever-changing nature of the internet. See *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Seescandy.com*, 185 F.R.D. at 579; *Mobilisa*, 170 P.3d at 719–20; *Krinsky*, 72 Cal. Rptr. 3d at 244; *Cahill*, 884 A.2d at 461; *Solers*, 977 A.2d at 954–55; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760.

¹¹¹ See *infra* notes 112–114 and accompanying text.

¹¹² See *Seescandy.com*, 185 F.R.D. at 579; *Mobilisa*, 170 P.3d at 719–20; see also *supra* note 108; cf. *2TheMart.com*, 140 F. Supp. 2d at 1091–92, 1095 & n.5 (noting that court orders in civil lawsuits constitute state action and as such are subject to constitutional limitations, but neglecting to include a notification provision within the unmasking standard formulated by the court).

¹¹³ See *Cahill*, 884 A.2d at 460–61; see also *Seescandy.com*, 185 F.R.D. at 579–80 (expressing concern with ex parte proceedings, but discussing another part of its unmasking standard); *Dendrite*, 775 A.2d at 770–71 (same).

¹¹⁴ See *supra* note 108.

¹¹⁵ See *supra* note 108.

¹¹⁶ See *AutoAdmit.com*, 561 F. Supp. 2d at 256 (requiring “a concrete showing as to each element of a prima facie case against the defendant”); *Seescandy.com*, 185 F.R.D. at 579 (requiring “that plaintiff’s suit . . . could withstand a motion to dismiss”); *Mobilisa*, 170 P.3d at 721 (requiring that the “cause of action could survive a motion for summary judgment on elements not dependent on the speaker’s identity”); *Krinsky*, 72 Cal. Rptr. 3d at 245 (requiring “a prima facie showing of the elements [of the claim]”); *Cahill*, 884 A.2d at 460 (requiring “facts sufficient to defeat a summary judgment motion [by the defendant]”); *Solers*, 977 A.2d at 954 (requiring “evidence creating a genuine issue of material fact on each element of the claim [within the plaintiff’s control]”); *Brodie*, 966 A.2d at 457 (requiring that petitioner “set forth a prima facie [cause of action]”); *Dendrite*, 775 A.2d at 760 (requiring that petitioner “set forth a prima facie cause of action”); *AOL*, 52 Va. Cir. at 37 (requiring pleadings or evidence showing “that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of [actionable conduct]”);

this evidentiary showing is the primary factor used by most courts to balance the anonymous speech rights of defendants against plaintiffs' rights to pursue redress for harmful speech.¹¹⁷

Although inquiries on the merits of plaintiffs' claims place an unusual evidentiary burden on plaintiffs during discovery, courts have justified this burden because of the unusual nature of unmasking requests.¹¹⁸ Courts have noted that requests to unmask anonymous internet speakers constitute "extraordinary application[s] of the discovery process," implicating the First Amendment rights of anonymous parties.¹¹⁹ Likewise, courts have stressed that unmasking subpoenas may chill speech by harassing or intimidating anonymous critics who have done nothing illegal, or by subjecting anonymous speakers to extrajudicial retaliation.¹²⁰ Most courts have thus concluded that they must ensure that there is a legitimate factual basis for allowing a party to obtain the identity of an anonymous speaker through an unmasking subpoena.¹²¹

While there is general agreement within unmasking standards that some evidentiary evaluation of the plaintiff's claim is needed, there is significantly less agreement as to what evidentiary showing is sufficient.¹²² Courts have formulated four main tests for evaluating the underlying claim, requiring either: 1) a showing that the claim was brought

see also infra app.; *cf. 2TheMart.com*, 140 F. Supp. 2d at 1095 (requiring not a showing on the merits of the claim, but requiring a showing that the subpoena itself was brought in good faith in case where defendant sought to unmask non-party anonymous speaker as part of defense).

¹¹⁷ *See supra* note 116; *see also infra* app. For more unmasking opinions that rely on evidentiary showings on the merits of plaintiffs' claims, see *Sinclair*, 596 F. Supp. 2d at 132, 134; *Quixtar*, 566 F. Supp. 2d at 1212–13, 1216; *McMann*, 460 F. Supp. 2d at 268; *Best Western Int'l*, 2006 WL 2091695, at *4–5; *Highfields Capital*, 385 F. Supp. 2d at 970; *Alvis Coatings, Inc.*, 2004 WL 2904405, at *3; *SPX Corp.*, 253 F. Supp. 2d at 978; *Baxter*, 2001 WL 34806203, at *12; *Greenbaum*, 845 N.Y.S.2d at 698–99; *Reunion Indus.*, 80 Pa. D. & C.4th at 456; *Polito*, 78 Pa. D. & C.4th at 341–42; *In re Does 1–10*, 242 S.W.3d at 821.

¹¹⁸ *See Seescandy.com*, 185 F.R.D. at 579–80; *Cahill*, 884 A.2d at 459; *Dendrite*, 775 A.2d at 770–71.

¹¹⁹ *Seescandy.com*, 185 F.R.D. at 579–80; *see also Mobilisa*, 170 P.3d at 720–21; *Dendrite*, 775 A.2d at 770–71.

¹²⁰ *See Mobilisa*, 170 P.3d at 720; *Cahill*, 884 A.2d at 457, 459; *Dendrite*, 775 A.2d at 771.

¹²¹ *See supra* notes 116–117. One court analogized unmasking subpoenas to warrant requests in criminal investigations, noting that an inquiry into the underlying claim serves a similar function as a probable cause hearing, namely ensuring that there is an adequate factual basis for justifying the court's action. *See Seescandy.com*, 185 F.R.D. at 579–80. Another court has described the inquiry as a "preliminary screening" of the claim. *See Solers*, 977 A.2d at 951.

¹²² *See infra* notes 123–137 and accompanying text.

in good faith;¹²³ 2) a showing that the claim could withstand a motion to dismiss;¹²⁴ 3) a showing that the claim could withstand a motion for summary judgment;¹²⁵ or 4) a showing of prima facie evidence for all elements of the claim.¹²⁶ Several courts additionally require the party seeking unmasking to set forth the exact alleged harmful speech.¹²⁷ Other courts have noted that under either a prima facie evidence or summary judgment standard, the party seeking unmasking would implicitly need to set forth the exact alleged harmful speech.¹²⁸ These evidentiary burdens on plaintiffs, however, are frequently tempered by requiring production of evidence only for elements of the claim within that party's control or independent of speakers' identities.¹²⁹

Overall, the trend for unmasking standards in the survey is towards requiring either prima facie evidence or summary judgment showings.¹³⁰ This is in large part due to concerns that lower evidentiary bur-

¹²³ See *AOL*, 52 Va. Cir. at 37; cf. *2TheMart.com*, 140 F. Supp. 2d at 1095 (requiring a showing that the subpoena itself was brought in good faith in case where defendant sought to unmask non-party anonymous speaker as part of its defense, but not requiring any evaluation of the underlying claim).

¹²⁴ See *Seescandy.com*, 185 F.R.D. at 579; see also *Dendrite*, 775 A.2d at 760 (mentioning that the plaintiff must both establish that the cause of action could survive a motion to dismiss and produce prima facie evidence for each element of the claim sufficient to warrant unmasking).

¹²⁵ See *Mobilisa*, 170 P.3d at 721; *Cahill*, 884 A.2d at 460.

¹²⁶ See *AutoAdmit.com*, 561 F. Supp. 2d at 256; *Krinsky*, 72 Cal. Rptr. 3d at 245; *Brodie*, 966 A.2d at 457; see also *Solers*, 977 A.2d at 954 (requiring a showing of evidence sufficient to create a genuine issue of material fact for each element of the claim, but noting that its standard was perhaps closest to a summary judgment standard); *Dendrite*, 775 A.2d at 760 (mentioning that a plaintiff must establish that his or her cause of action could withstand a motion to dismiss and set forth a prima facie cause of action sufficient to warrant disclosure of the anonymous party's identity).

¹²⁷ See *AutoAdmit.com*, 561 F. Supp. 2d at 254 (“[I]dentify and set forth the exact statements purportedly made by each anonymous poster that . . . constitute[] actionable speech.”); *Brodie*, 966 A.2d at 457 (“[I]dentify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech”); *Dendrite*, 775 A.2d at 760 (“[I]dentify and set forth the exact statements purportedly made by each anonymous poster that . . . constitute[] actionable speech.”).

¹²⁸ See *Cahill*, 884 A.2d at 461; *Solers*, 977 A.2d at 954–55; see also *Mobilisa*, 170 P.3d at 718–20 (endorsing the *Cahill* court's summary judgment inquiry, and noting that it would require production of the exact alleged harmful speech).

¹²⁹ See *Mobilisa*, 170 P.3d at 721; *Cahill*, 884 A.2d at 460, 464; *Solers*, 977 A.2d at 954.

¹³⁰ The two earliest standards in this survey that examine the underlying claim use either good faith or motion to dismiss standards. See *Seescandy.com*, 185 F.R.D. at 579 (utilizing motion to dismiss standard in 1999); *AOL*, 52 Va. Cir. at 37 (using good faith standard in 2000); cf. *2TheMart.com*, 140 F. Supp. 2d at 1095 (requiring that the subpoena itself be issued in good faith in 2001). All later decisions utilize either a summary judgment or prima facie evidence inquiry, with two jurisdictions favoring summary judgment and five favoring a prima facie evidence inquiry. See *AutoAdmit.com*, 561 F. Supp. 2d at 256 (prima

dens like good faith and motion to dismiss standards are too easy for plaintiffs to satisfy and thus more likely to be misused for harassing or intimidating critics.¹³¹ Summary judgment and prima facie evidence standards are considered to be more rigorous evidentiary burdens for plaintiffs to satisfy, and thus more protective of anonymous speakers.¹³²

Within the standards in the survey that utilize these higher evidentiary burdens, five courts have selected prima facie evidence requirements while only two have implemented summary judgment inquiries.¹³³ Courts made this choice for two primary reasons.¹³⁴ First, some consider summary judgment inquiries too burdensome for plaintiffs, finding that prima facie evidence requirements do a better job of balancing the rights of the parties involved.¹³⁵ Second, other courts have rejected summary judgment prongs as potentially confusing and add-

facie); *Mobilisa*, 170 P.3d at 721 (summary judgment); *Krinsky*, 72 Cal. Rptr. 3d at 245 (prima facie); *Cahill*, 884 A.2d at 460 (summary judgment); *Brodie*, 966 A.2d at 457 (prima facie); *Dendrite*, 775 A.2d at 760 (prima facie); see also *Solers*, 977 A.2d at 954 (stating that its standard was most analogous to a summary judgment standard, but requiring evidence creating a genuine issue of material fact for each element of the claim).

Unmasking cases outside this survey also trend towards either a summary judgment or some sort of prima facie evidence inquiry. See, e.g., *Sinclair*, 596 F. Supp. 2d at 132–34 (declining to choose a standard, but finding insufficient evidence to support the plaintiff's claims under either a *Cahill* or *Dendrite* unmasking standard); *Quixtar*, 566 F. Supp. 2d at 1212–13, 1216 (summary judgment); *McMann*, 460 F. Supp. 2d at 267–68 (appearing to endorse a summary judgment standard but noting that the plaintiff simply failed to state a claim); *Best Western Int'l*, 2006 WL 2091695, at *4 (summary judgment); *Highfields Capital*, 385 F. Supp. 2d at 970 (endorsing a showing of a “real evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused real harm”) (quotation omitted); *Akvis Coatings, Inc.*, 2004 WL 2904405, at *3 (prima facie); *Greenbaum*, 845 N.Y.S.2d at 698–99 (declining to define the quantum of proof required but finding alleged harmful statements inactionable as a matter of law); *Reunion Indus.*, 80 Pa. D. & C.4th at 456 (summary judgment); *Polito*, 78 Pa. D. & C.4th at 341–42 (prima facie); *In re Does 1–10*, 242 S.W.3d at 821 (summary judgment).

¹³¹ See *AutoAdmit.com*, 561 F. Supp. 2d at 255–56; *Mobilisa*, 170 P.3d at 720; *Krinsky*, 72 Cal. Rptr. 3d at 244–45; *Cahill*, 884 A.2d at 457–60; *Solers*, 977 A.2d at 952–54; *Brodie*, 966 A.2d at 456–57; *Dendrite*, 775 A.2d at 760, 769–71.

¹³² See *supra* note 131.

¹³³ See *supra* note 130 and accompanying text.

¹³⁴ See *infra* notes 135–136 and accompanying text.

¹³⁵ See *Brodie*, 966 A.2d at 456–57 (noting that a summary judgment prong would essentially require plaintiffs to prove their cases before unmasking anonymous defendants); see also *AutoAdmit.com*, 561 F. Supp. 2d at 255–56. But see *Mobilisa*, 170 P.3d at 720 (finding that a prima facie case standard would set the evidentiary bar too low for parties seeking unmasking); *Cahill*, 884 A.2d at 457–60 (endorsing summary judgment standard after considering good faith, motion to dismiss, and prima facie evidence standards).

ing an unnecessary procedural label to the evidentiary inquiry.¹³⁶ Overall, courts are relatively evenly split on using a prima facie evidence or a summary judgment requirement for evaluating the merits of the plaintiff's claim.¹³⁷

C. *Need for the Identifying Information*

In addition to a showing on the merits of the plaintiff's claim, most unmasking standards in this survey also require the court to consider the need the party seeking unmasking has for the identifying information.¹³⁸ Within these standards, however, need-based inquiries are de-

¹³⁶ See *AutoAdmit.com*, 561 F. Supp. 2d at 255–56; *Krinsky*, 72 Cal. Rptr. 3d at 244–45; see also *Solers*, 977 A.2d at 954 (noting that labels like summary judgment and prima facie evidence may be confusing).

¹³⁷ See *supra* note 130.

¹³⁸ See *AutoAdmit.com*, 561 F. Supp. 2d at 255 (requiring consideration of the specificity of the discovery request, whether there is an alternative means of obtaining the requested information, and whether there is a central need for the information); *2TheMart.com*, 140 F. Supp. 2d at 1095 (requiring consideration of whether the information relates to a core claim or defense, whether the information is directly and materially relevant to that claim or defense, and whether information sufficient to establish or disprove that claim or defense is available from another source); *Seescandy.com*, 185 F.R.D. at 579–80 (requiring a showing that the party has attempted to locate the anonymous party and requiring a filing justifying the specific discovery request and a limited number of persons on whom discovery might be served); *Mobilisa*, 170 P.3d at 720–21 (requiring a balancing of competing interests between the anonymous defendant and plaintiff which may include, but is not limited to, consideration of the scope of the discovery request, the need for the speaker's identity, and the availability of alternative sources); *Krinsky*, 72 Cal. Rptr. 3d at 245 (suggesting necessity for the anonymous speaker's identity as a factor for its standard); *Solers*, 977 A.2d at 954 (requiring a determination that the information sought is important to enable the plaintiff to proceed with the lawsuit); *Brodie*, 966 A.2d at 457 (requiring a balancing of the anonymous speaker's First Amendment rights against the strength of the plaintiff's prima facie case and necessity for disclosure of the speaker's identity); *Dendrite*, 775 A.2d at 760–61 (requiring a balancing of the of the anonymous speaker's First Amendment rights against the strength of the plaintiff's prima facie case and necessity for disclosure of the speaker's identity); *AOL*, 52 Va. Cir. at 37 (requiring that the speaker's identity must be centrally needed to advance the plaintiff's claim); see also *infra* app. Only one standard in the survey does not explicitly or implicitly consider the need for the identifying information as a factor in unmasking. See *Cahill*, 884 A.2d at 460–61 (considering and rejecting a balancing prong that would have included consideration of the necessity for disclosure of the defendant's identity). Other unmasking standards outside the survey also incorporate showings of need. See, e.g., *Best Western Int'l*, 2006 WL 2091695, at *5 (finding that plaintiff had demonstrated a central need for the subpoenaed information); *Highfields Capital*, 385 F. Supp. 2d at 980 (magistrate's report attached to court opinion suggesting that after requiring an evidentiary showing on the merits, the next step would be to balance the party's interests, including consideration of the significance of the identifying information to the plaintiff's case); *Polito*, 78 Pa. D. & C.4th at 341 (requiring a showing that the information is necessary for the plaintiff to pursue the claim and that it is unavailable from other sources).

fined many different ways, and often in different ways within the same standard.¹³⁹ For example, courts may require consideration of: 1) whether there are alternate means of obtaining the information;¹⁴⁰ 2) the scope of the identifying request;¹⁴¹ 3) whether there are valid reasons justifying the unmasking request;¹⁴² 4) whether the identifying information sought is relevant, material, or otherwise important to the lawsuit;¹⁴³ and, more generally, 5) whether there is a need or necessity for unmasking.¹⁴⁴ The Arizona Court of Appeals actually embraced *all* of these various need-based inquiries in its 2007 decision, *Mobilisa, Inc. v. Doe I*, but subsumed them as implied within a different element of its unmasking standard.¹⁴⁵

Although virtually all courts in the survey incorporate some sort of need-based inquiry within their unmasking standards, very few opinions explain why these inquiries are important or how the individual types of inquiry were selected.¹⁴⁶ Perhaps this is because the significance of various need-based inquiries are self-evident: if a plaintiff does not need the identifying information to proceed with his or her claim, if the information is available from another source, if the scope of the identifying request is too broad, or if there is not a good reason for allowing identification, then a court should not allow its unmasking power to be used to potentially violate the First Amendment rights of anonymous speakers.¹⁴⁷ Regardless, courts generally recognize that an inquiry on the merits of the plaintiff's claim by itself is not sufficient to protect anonymous speakers, and that some sort of additional inquiry into the necessity of unmasking is required.¹⁴⁸

¹³⁹ See *infra* notes 140–145 and accompanying text.

¹⁴⁰ See *AutoAdmit.com*, 561 F. Supp. 2d at 255; *2TheMart.com*, 140 F. Supp. 2d at 1095; *Seescandy.com*, 185 F.R.D. at 579. *But see Solers*, 977 A.2d at 954 (specifically rejecting requiring a showing that no alternative means were available).

¹⁴¹ See *AutoAdmit.com*, 561 F. Supp. 2d at 255; *Seescandy.com*, 185 F.R.D. at 579, 580.

¹⁴² See *Seescandy.com*, 185 F.R.D. at 580.

¹⁴³ See *AutoAdmit.com*, 561 F. Supp. 2d at 255; *2TheMart.com*, 140 F. Supp. 2d at 1095; *Krinsky*, 72 Cal. Rptr. 3d at 245; *Solers*, 977 A.2d at 954; *AOL*, 52 Va. Cir. at 37.

¹⁴⁴ See *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61.

¹⁴⁵ See 170 P.3d at 720–21 (requiring a balancing of competing interests between the anonymous defendant and plaintiff including considerations of need for the identifying information, the scope of the discovery request, and the availability of alternative sources).

¹⁴⁶ See *supra* note 138.

¹⁴⁷ See *supra* notes 138–145 and accompanying text.

¹⁴⁸ See *supra* notes 138.

D. *First Amendment Balancing of the Right to Speak Anonymously*

Most courts in this survey agree that plaintiffs must make an evidentiary showing on the merits of the claim and demonstrate a need for the anonymous defendant's identifying information.¹⁴⁹ There is considerably less agreement, however, about other elements in unmasking standards.¹⁵⁰ For example, only one standard in the survey requires a court to consider the anonymous speaker's expectation of privacy.¹⁵¹ Similarly, only one standard explicitly requires that the court determine that the claim has been adequately pleaded.¹⁵² But by far the most divisive issue in unmasking standards is whether an additional First Amendment "balancing" prong is needed to fully protect the rights of anonymous speakers.¹⁵³

Standards that incorporate First Amendment balancing prongs typically operate this way: first, the plaintiff must demonstrate attempts to provide notice to the anonymous speaker and must make an evidentiary showing on the merits of the claim.¹⁵⁴ Then, the court must balance the defendant's First Amendment right to speak anonymously against the strength of the plaintiff's prima facie case and the necessity for disclosing the anonymous speaker's identity.¹⁵⁵

Only a minority of unmasking standards within the survey incorporate balancing prongs, and there is a pronounced split within these

¹⁴⁹ See *supra* notes 116–148 and accompanying text.

¹⁵⁰ See *infra* notes 151–180 and accompanying text.

¹⁵¹ See *AutoAdmit.com*, 561 F. Supp. 2d at 255; see also *Mobilisa*, 170 P.3d at 720–21 (suggesting expectation of privacy as an issue that could be considered within its standard). Consideration of speakers' expectations of privacy is found in only a few anonymous speech unmasking decisions. See, e.g., *Best Western Int'l*, 2006 WL 2091695, at *5.

¹⁵² See *Solers*, 977 A.2d at 954.

¹⁵³ See *infra* notes 154–180 and accompanying text.

¹⁵⁴ See *Mobilisa*, 170 P.3d at 721; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760. Some standards also require that the plaintiff set forth the exact alleged harmful statements. See *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760; see also *supra* notes 127–128 and accompanying text.

¹⁵⁵ See *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61; see also *Mobilisa*, 170 P.3d at 720–21. For standards that contain First Amendment balancing prongs, the inquiry into the need for the identifying information is typically incorporated within that balancing prong. See *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61; see also *Mobilisa*, 170 P.3d at 720–21 (inquiry into the necessity of unmasking implied within the final balancing prong, which is phrased as requiring a finding that "a balance of the parties' competing interests favors disclosure"). For standards that do not use a balancing prong, the need inquiry typically comprises one or more stand-alone elements of the standard. See *supra* note 138; see also *infra* app.

cases regarding the value and importance of balancing prongs.¹⁵⁶ Within the broader context of unmasking opinions outside the survey, balancing prongs are found in an acute minority of cases.¹⁵⁷

The separate balancing prong originated in the 2001 Superior Court of New Jersey decision, *Dendrite International, Inc. v. Doe, No. 3*.¹⁵⁸ In addition to requiring notice and a prima facie showing of the claim, the *Dendrite* court's unmasking standard further required a balancing of the defendant's right to speak anonymously against the strength of the plaintiff's prima facie case and the necessity for disclosure of the anonymous defendant's identity.¹⁵⁹ As justification for this balancing prong, the *Dendrite* court stated that evaluating plaintiffs' claims "in isolation" was insufficient to fully balance plaintiffs' interests against defendants' First Amendment rights, but it gave little indication of how the balancing prong might be implemented.¹⁶⁰ Indeed, the court's ultimate decision in *Dendrite*, affirming the motion to quash the unmasking subpoena, was predicated primarily on the fact that the corporate

¹⁵⁶ Overall, three standards in the survey contain balancing prongs, while seven do not. See *AutoAdmit.com*, 561 F. Supp. 2d at 254–56 (no balancing prong); *2TheMart.com*, 140 F. Supp. 2d at 1095 (no balancing prong); *Seescandy.com*, 185 F.R.D. at 578–80 (no balancing prong); *Mobilisa*, 170 P.3d at 721 (balancing prong); *Krinsky*, 72 Cal. Rptr. 3d at 244–46 (no balancing prong); *Cahill*, 884 A.2d at 460–61 (no balancing prong); *Solers*, 977 A.2d at 954 (no balancing prong); *Brodie*, 966 A.2d at 457 (balancing prong); *Dendrite*, 775 A.2d at 760–61 (balancing prong); *AOL*, 52 Va. Cir. at 37 (no balancing prong). But since balancing prongs first appeared in 2001, three courts in the survey have implemented balancing prongs while four have rejected them. In chronological order, see *Dendrite*, 775 A.2d at 756, 760–61 (decided in 2001 and implementing the first balancing prong); *Cahill*, 884 A.2d at 451, 460–61 (decided in 2005 and no balancing prong); *Mobilisa*, 170 P.3d at 712, 721 (decided in 2007 and containing balancing prong); *Krinsky*, 72 Cal. Rptr. 3d at 231, 244–46 (decided in 2008 and no balancing prong); *AutoAdmit.com*, 561 F. Supp. 2d at 249, 254–56 (decided in 2008 and no balancing prong); *Brodie*, 966 A.2d at 432, 457 (decided in 2009 and containing balancing prong); *Solers*, 977 A.2d at 941, 954 (decided in 2009 and no balancing prong). See also *infra* notes 158–180 and accompanying text.

¹⁵⁷ See, e.g., *Highfields Capital*, 385 F. Supp. 2d at 970–71, 980 (indicating in a magistrate report attached to district court opinion that a balancing step would be used except that party did not satisfy the showing on the merits of the claim). One possible reason for this is that many unmasking cases are decided after considering the evidentiary showing on the merits of the claim alone, and the court never has to consider whether a First Amendment balancing prong would be needed. See, e.g., *Sinclair*, 596 F. Supp. 2d at 132–134 (citing unmasking standards with and without balancing prongs as the prominent unmasking standards, but declining to choose between them in part because the plaintiff's evidentiary showing did not satisfy either); *Greenbaum*, 845 N.Y.S.2d at 698–99 (endorsing factors from an unmasking standard which contains a balancing prong, but determining that the alleged harmful statements were inactionable as a matter of law).

¹⁵⁸ 775 A.2d at 760–61.

¹⁵⁹ See *id.* The *Dendrite* opinion also referred to its examination of the plaintiff's claim as a "motion to dismiss" standard. See *id.* at 760, 770.

¹⁶⁰ See *id.* at 770–72.

plaintiff did not make an adequate showing of its defamation claim.¹⁶¹ The court did note, however, that its unmasking standard was intended to be a “flexible, non-technical, fact-sensitive mechanism,” ensuring that plaintiffs did not abuse discovery procedures to harass or silence their critics.¹⁶²

Since *Dendrite*, two additional courts in the survey have implemented First Amendment balancing prongs in their unmasking standards: the Arizona Court of Appeals in the 2007 decision, *Mobilisa, Inc. v. Doe I*, and the Supreme Court of Maryland in its 2009 decision, *Independent Newspapers, Inc. v. Brodie*.¹⁶³ Like the *Dendrite* court, the *Brodie* court gave little explanation for why it adopted its balancing prong, and its final decision upholding a motion to quash an unmasking subpoena again appeared to be predicated on the weakness of the plaintiff’s claims.¹⁶⁴ The *Mobilisa* court, however, was more expansive in explaining why it implemented a balancing prong.¹⁶⁵

The *Mobilisa* court stated that in addition to requiring plaintiffs to provide notice and a showing on the merits of the claim, a further balancing of the parties’ interests was “necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.”¹⁶⁶ The court mentioned various need-based considerations that might weigh against plaintiffs’ interests, but it also pointed out that there could be numerous First Amendment considerations weighing against disclosure of anonymous speakers’ identities as well, including: the type of speech involved, the speaker’s expectation

¹⁶¹ See *id.* at 771–72.

¹⁶² *Id.* at 771.

¹⁶³ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457. In *Mobilisa*, corporate plaintiff Mobilisa Inc. (“Mobilisa”) sought to unmask anonymous defendants who had obtained and retransmitted an intimate email written by the company’s president on claims including trespass to chattel and violation of federal electronic communications laws. See 170 P.3d at 715–16. The email was forwarded by the anonymous defendant(s) to an unknown list of people that included members of Mobilisa’s management, along with the comment: “Is this a company you want to work for?” *Id.* at 715 (quotation omitted). Mobilisa sought to compel The Suggestion Box, Inc., the company that maintained the website where the retransmitted email originated, to disclose the identity of the person who had sent the email. *Id.* at 715–16. In *Brodie*, a local businessman sought the identity of three anonymous defendants who posted comments about him and a local developer on a newspaper website forum. See 966 A.2d at 442–47. The businessman sued for defamation and conspiracy to defame after the posters criticized him for selling a piece of historic property that later burned in a fire, and also made critical comments about sanitation at food establishments that he owned. See *id.*

¹⁶⁴ See *Brodie*, 966 A.2d at 447–49, 456–57.

¹⁶⁵ See 170 P.3d at 720–21.

¹⁶⁶ See *id.* at 720.

of privacy, and “the potential consequence of a discovery order to the speaker and others similarly situated.”¹⁶⁷ Only by giving courts the flexibility to examine these, and a “myriad of other potential factors,” would courts be able to do justice to both plaintiffs and anonymous speakers on a case-by-case basis.¹⁶⁸

Use of a First Amendment balancing prong in unmasking standards has been heavily criticized, however.¹⁶⁹ Three courts in the survey have declined to adopt balancing prongs in their unmasking standards since the *Dendrite* decision, and balancing prongs were the subject of extensive criticism by concurring justices in *Brodie* and the dissenting judge in *Mobilisa*.¹⁷⁰

The first major criticism of First Amendment balancing prongs appeared in the Supreme Court of Delaware’s 2005 decision, *Doe No. 1 v. Cahill*.¹⁷¹ In formulating its own unmasking standard, the *Cahill* court adopted a notice provision and a summary judgment test for evaluating the merits of the plaintiff’s claim, but explicitly rejected the balancing prong from the *Dendrite* standard.¹⁷² For the *Cahill* court, the summary judgment showing was the sole factor needed to adequately balance the rights of anonymous defendants against plaintiffs’ interests.¹⁷³ The court felt that a First Amendment balancing prong was superfluous and redundant, noting that it “add[ed] no protection beyond that of the summary judgment test and needlessly complicate[d]” the court’s analysis.¹⁷⁴ Analyzing the defamation claim at hand, the *Cahill* court

¹⁶⁷ *See id.*

¹⁶⁸ *See id.* Like the *Dendrite* and *Brodie* courts, the *Mobilisa* court did not appear to put its balancing prong into action, instead remanding the case to the trial court for further consideration. *See id.* at 723–24.

¹⁶⁹ *See infra* notes 170–180 and accompanying text.

¹⁷⁰ *See AutoAdmit.com*, 561 F. Supp. 2d at 254–56; *Mobilisa*, 170 P.3d at 724–27 (Barker, J., dissenting); *Krinsky*, 72 Cal. Rptr. 3d at 245–46; *Cahill*, 884 A.2d at 461; *Solers*, 977 A.2d at 954; *Brodie*, 966 A.2d at 457–59 (Adkins, J., concurring).

¹⁷¹ *See* 884 A.2d at 461. In *Cahill*, a local politician sought to unmask an unknown defendant for posting allegedly defamatory comments about him on an internet blog sponsored by the Delaware State News. *Id.* at 454. The postings criticized the politician for being “a divisive impediment to any kind of cooperative movement” in revitalizing the town, and stated things like “[a]nyone who has spent any amount of time with Cahill would be keenly aware of [his] character flaws, not to mention an obvious mental deterioration,” and “Cahill [*sic*] is as paranoid as everyone in this town thinks he is.” *Id.* (emphasis omitted).

¹⁷² *See id.* at 460–61. The *Cahill* court equated its summary judgment test with the *Dendrite* prima facie evidence requirement and rejected both aspects of the *Dendrite* balancing prong, which included consideration of both the anonymous speaker’s First Amendment rights and the need for disclosure. *See id.*

¹⁷³ *See id.* at 461.

¹⁷⁴ *See id.*

further noted that its summary judgment inquiry would allow consideration of First Amendment issues like the context and content of the speech, and would allow courts to invoke protective doctrines like opinion privilege as well.¹⁷⁵

Other courts in the survey have come to similar conclusions about separate balancing prongs.¹⁷⁶ The main criticisms are: 1) that separate balancing tests are superfluous and needlessly complicate the analysis because the inquiry on the merits of the claim fully conducts the balancing of interests,¹⁷⁷ and 2) that once a plaintiff demonstrates that he or she has a legitimate claim, a further balancing of interests is an unconstitutional restriction on the plaintiff's right to seek redress.¹⁷⁸ There is some tension between these criticisms, as the former suggests that balancing prongs offer no additional protection for anonymous defendants, while the other implies that balancing prongs present extra protections.¹⁷⁹ Nevertheless, the dominant view among unmasking standards is that First Amendment balancing prongs are unnecessary or undesirable as only a minority of jurisdictions have explicitly adopted them.¹⁸⁰

IV. A PROPOSED UNMASKING STANDARD

If most courts have now embraced either unmasking standards, or at least specific criteria that parties seeking to unmask anonymous speakers must satisfy, one key question remains: what would an ideal unmasking standard look like? This Part argues that an ideal unmasking standard would require a party seeking unmasking to: 1) provide the anonymous speaker adequate notice and a reasonable opportunity to

¹⁷⁵ See *id.* at 465–66.

¹⁷⁶ See *AutoAdmit.com*, 561 F. Supp. 2d at 254–56 (formulating its standard after the *Dendrite* decision and citing to the *Dendrite* case within its opinion, but neglecting to include a balancing prong in its standard); *Krinsky*, 72 Cal. Rptr. 3d at 245–46; *Solers*, 977 A.2d at 954, 956; see also *Mobilisa*, 170 P.3d at 724–27 (Barker, J. dissenting); *Brodie*, 966 A.2d at 457–59 (Adkins, J., concurring).

¹⁷⁷ See *Krinsky*, 72 Cal. Rptr. 3d at 245–46; *Solers*, 977 A.2d at 954, 956; see also *Cahill*, 884 A.2d at 461.

¹⁷⁸ See *Mobilisa*, 170 P.3d at 725–27 (Barker, J., dissenting); *Brodie*, 966 A.2d at 457–59 (Adkins, J., concurring).

¹⁷⁹ See, e.g., *Mobilisa*, 170 P.3d at 725 (Barker, J., dissenting) (referring to the majority's standard, which included a balancing prong, as a "summary judgment-plus standard"); *Cahill*, 884 A.2d at 461 (A balancing prong "adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis."); see also *supra* notes 177–178.

¹⁸⁰ See *Mobilisa*, 170 P.3d at 721; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61; see also *supra* notes 156–157 and accompanying text.

respond, and 2) make a prima facie evidence showing for all elements of the claim within the party's control.¹⁸¹ If these showings are satisfied, the court should then balance the speaker's First Amendment right to remain anonymous against the strength of the prima facie case and the need for the identifying information before permitting unmasking.¹⁸²

A. Notice

The ideal standard should first require parties seeking unmasking to show that they provided the anonymous speakers with adequate notice and a reasonable opportunity to respond.¹⁸³ Most courts that have formulated unmasking standards contain a notice provision.¹⁸⁴ These courts have recognized the need to protect anonymous speakers from ex parte requests to discover their identities for both constitutional and practical reasons.¹⁸⁵ At the same time, attempting to provide notice to anonymous parties in the unusual context of the internet requires a tempering of this requirement so as to not unduly burden plaintiffs.¹⁸⁶ Adequate notice can typically be satisfied by posting notice of the lawsuit and the unmasking subpoena to the forum, website, or email address where the alleged harmful speech originated.¹⁸⁷

B. Prima Facie Evidence of the Claim

In addition to notice, the ideal unmasking standard should require the party seeking the identity of an anonymous speaker to make a prima facie evidentiary showing for all elements of the cause of action within that party's control.¹⁸⁸ Such a showing typically will require setting forth the exact alleged harmful speech.¹⁸⁹

¹⁸¹ See *infra* notes 183–200 and accompanying text.

¹⁸² See *infra* notes 201–220 and accompanying text.

¹⁸³ See, e.g., *Mobilisa, Inc. v. Doe I*, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); see also *supra* notes 108–110.

¹⁸⁴ See *supra* notes 108–110; see also *infra* app.

¹⁸⁵ See *supra* notes 112–114.

¹⁸⁶ See *supra* note 110 and accompanying text.

¹⁸⁷ See, e.g., *Doe No. 1 v. Cahill*, 884 A.2d 451, 461 (Del. 2005); see also *supra* note 110.

¹⁸⁸ See *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 256 (D. Conn. 2008); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); see also *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579–80 (N.D. Cal. 1999); *Mobilisa*, 170 P.3d at 721; *Cahill*, 884 A.2d at 460; *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *In re Subpoena Duces Tecum to Am. Online, Inc. (AOL)*, 52 Va. Cir. 26, 37 (Cir. Ct. 2000), *rev'd on other grounds sub nom*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

¹⁸⁹ See *supra* notes 127–128.

Virtually all courts that have considered unmasking requests require some evidentiary showing on the merits of the plaintiff's claim.¹⁹⁰ Indeed, this is the primary factor used by most courts to balance the rights of anonymous speakers against the rights of plaintiffs to seek redress for harmful speech.¹⁹¹ As courts have noted, an evidentiary showing on the merits of the claim ensures that there is a legitimate factual basis for allowing both the litigation and the unmasking subpoena to go forward, and it reduces the risk of abuse of the litigation process to harass, intimidate, or silence critics.¹⁹²

Most courts now use either a summary judgment or prima facie evidence inquiry to evaluate the merits of the claim as opposed to good faith or motion to dismiss standards.¹⁹³ A prima facie evidence requirement is preferable for a variety of reasons.¹⁹⁴ Lower threshold inquiries like good faith basis or motion to dismiss standards are too easy for plaintiffs to satisfy, thus risking misuse of litigation and the discovery process to silence anonymous speakers.¹⁹⁵ Conversely, a summary judgment standard may set the bar too high, applying a level of scrutiny that would typically not be required until the end of discovery.¹⁹⁶ A prima facie evidence inquiry is the appropriate standard, essentially requiring a production of evidence for all elements of the cause of action within the plaintiff's control sufficient to ensure that there is a legitimate claim.¹⁹⁷ This showing will typically require setting forth the exact alleged harmful speech itself, the context in which the speech took place, and a demonstrable harm, thus developing the record and allowing courts to make informed decisions as to whether to allow the unmasking subpoena and litigation to proceed.¹⁹⁸ This is the type of evidence that a plaintiff typically will have during discovery, and therefore it does not present an undue burden for plaintiffs.¹⁹⁹ The prima facie evidence standard also has the advantage of avoiding a potentially confusing and

¹⁹⁰ See *supra* notes 116–117; see also *infra* app.

¹⁹¹ See *supra* notes 116–117.

¹⁹² See *AutoAdmit.com*, 561 F. Supp. 2d at 256; *Krinsky*, 72 Cal. Rptr. 3d at 245; *Cahill*, 884 A.2d at 457; see also *supra* notes 116–121 and accompanying text.

¹⁹³ See *supra* note 130.

¹⁹⁴ See *infra* notes 195–200 and accompanying text.

¹⁹⁵ See *supra* note 131.

¹⁹⁶ See, e.g., *Brodie*, 966 A.2d at 456–57; see also *supra* note 135.

¹⁹⁷ See, e.g., *AutoAdmit.com*, 561 F. Supp. 2d at 256; *Krinsky*, 72 Cal. Rptr. 3d at 245; *Brodie*, 966 A.2d at 457; see also *supra* note 116–117.

¹⁹⁸ See *AutoAdmit.com*, 561 F. Supp. 2d at 254–57; *Krinsky*, 72 Cal. Rptr. 3d at 245–50; *Brodie*, 966 A.2d at 442–49, 456–57; *Dendrite*, 775 A.2d at 760–64, 770–72; see also *Mobilisa*, 170 P.3d at 720–23; *Cahill*, 884 A.2d at 460–67; *Solers*, 977 A.2d at 954–55, 957–59.

¹⁹⁹ See *supra* note 198.

unnecessary procedural label for what should essentially be a straightforward evidentiary showing on the merits of the plaintiff's claim.²⁰⁰

C. *Balancing of the First Amendment Right to Speak Anonymously Against the Strength of the Claim and the Need for Unmasking*

Once a party seeking unmasking has satisfied these threshold issues of notice and a prima facie evidentiary showing on the merits of the claim, the court should then balance the defendant's First Amendment right to speak anonymously against the strength of the plaintiff's prima facie case and the need for unmasking.²⁰¹ Although this type of balancing prong is found in only a minority of unmasking standards,²⁰² it is needed to fully protect anonymous speakers in all of the procedural contexts and causes of action under which unmasking requests arise.²⁰³ The key components of this balancing prong relate to consideration of the need for the identifying information and the speaker's First Amendment right to remain anonymous.²⁰⁴

First, most unmasking standards contain some consideration of whether the party seeking unmasking has a verifiable need for the particular identifying information sought.²⁰⁵ By including need-based inquiries within unmasking standards, courts have recognized that there may be times when a plaintiff can make a legitimate evidentiary showing on the merits of a claim, and yet still lack sufficient need to invoke the power of the court to unmask an anonymous speaker.²⁰⁶ This may be for a variety of reasons, including but not limited to whether the scope of the identifying request is too broad, the identifying information is irrelevant, the identifying information can be obtained through other means, or the case can proceed without the identifying information.²⁰⁷ In such cases, there is no legitimate reason for the court to use its power to unmask an anonymous speaker, particularly when doing so may lead to harassment, intimidation, or silencing of speakers who have done nothing wrong.²⁰⁸ A balancing prong that gives the court broad author-

²⁰⁰ See *AutoAdmit.com*, 561 F. Supp. 2d at 255–56; *Krinsky*, 72 Cal. Rptr. 3d at 244–45; *Brodie*, 966 A.2d at 457; see also *Solers*, 977 A.2d at 954.

²⁰¹ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61.

²⁰² See *supra* notes 156–157.

²⁰³ See *supra* notes 53–72.

²⁰⁴ See *infra* notes 205–220 and accompanying text.

²⁰⁵ See *supra* note 138; see also *infra* app.

²⁰⁶ See *supra* note 138.

²⁰⁷ See *supra* notes 140–145.

²⁰⁸ See *supra* notes 140–145.

ity to consider the need for the particular identifying information sought is thus an important protection for anonymous speakers.²⁰⁹

The second important component of the balancing prong is consideration of the speaker's First Amendment right to remain anonymous.²¹⁰ Some courts have rejected this consideration as superfluous or an extra burden on plaintiffs.²¹¹ But explicit consideration of the speaker's right to anonymity is important because unmasking requests arise in a wide variety of contexts and under many different causes of action, including defamation, trespass to chattel, trademark, and trade secret violations.²¹² Although an inquiry on the merits of the claim will include some consideration of First Amendment issues for speech-related causes of action like defamation, it may not for others like trade secret violations or trespass to chattel.²¹³ A First Amendment balancing prong ensures that courts will consider factors like the type of speech involved, the context where the speech occurred, and protective doctrines like opinion speech, thus promoting uniformity of decision-making and guaranteeing that plaintiffs cannot sidestep the protections of the First Amendment simply by engaging in creative pleading.²¹⁴ Further, this weighing of the defendant's First Amendment right to remain anonymous does not impose any additional evidentiary burden on the plaintiff, but instead is merely a factor to be taken into consideration by the court.²¹⁵

²⁰⁹ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61.

²¹⁰ See *supra* note 209.

²¹¹ See *supra* notes 174–178.

²¹² See *supra* notes 53–72.

²¹³ See, e.g., *Mobilisa*, 170 P.3d at 715–16, 720–24 (defendant sued for trespass to chattel and federal statutory claims); see also *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1206 (D. Nev. 2008) (defendant sued for Lanham Act violations, trade secret misappropriation, and tortious interference with contracts and business relations).

²¹⁴ See *Mobilisa*, 170 P.3d at 720–21; *Dendrite*, 775 A.2d at 760–61, 770–71; see also *supra* notes 53–72 and accompanying text. For discussion of various First Amendment considerations in anonymous speech cases, see Lidsky, *supra* note 8, at 932–46 (arguing for adapting opinion privilege for use in anonymous speech cases); Ryan M. Martin, Note, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1240–44 (2007) (arguing for different unmasking standards based on various types of speech involved, including political and non-political speech).

²¹⁵ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61. None of the courts that have adopted First Amendment balancing prongs in their unmasking standards have needed to use them in coming to their decisions. See *Brodie*, 966 A.2d at 447–49, 457; *Dendrite*, 775 A.2d at 770–72; see also *Mobilisa*, 170 P.3d at 722–24 (remanding for further consideration of the balancing prong).

First Amendment balancing prongs are also important because they require courts to consider each case holistically with a flexible, fact-specific approach.²¹⁶ The goal of unmasking standards is to appropriately balance the rights of anonymous speakers against the rights of plaintiffs to seek redress for harmful speech.²¹⁷ By balancing First Amendment considerations against the strength of the prima facie case and the need for unmasking, courts may consider the content and context of the speech, the need for the identifying information, the harm caused by the speech, the remedies sought by the party seeking unmasking, and the potential harms that unmasking would pose to the anonymous speaker and others similarly situated.²¹⁸ These considerations pose no additional burden on parties seeking unmasking beyond demonstrating the merits of the claim, but are essential for courts to consider all aspects of each case in a “flexible, non-technical, fact-sensitive” manner.²¹⁹ Only by weighing all of these various factors together can a court adequately determine whether unmasking is warranted and ensure that the identifying subpoena is not being used to intimidate or silence critics.²²⁰

CONCLUSION

Unmasking anonymous internet speakers remains a critical issue for both plaintiffs and defendants. On the one hand, unmasking subpoenas jeopardize the right to speak anonymously, potentially subjecting speakers who have done nothing wrong to harassment or retribution. On the other hand, unmasking subpoenas are also frequently the only means for aggrieved parties to pursue redress for harms caused by anonymous internet speech.

Courts confronted with unmasking requests have concluded that such requests require a balancing of the First Amendment rights of anonymous speakers against the right to seek redress for allegedly harmful speech. They have responded primarily by creating standards that the party seeking unmasking must satisfy in order to compel disclosure of the anonymous speaker’s identity. There is little uniformity in

²¹⁶ See *Dendrite*, 775 A.2d at 770–71; see also *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457.

²¹⁷ See *supra* note 88.

²¹⁸ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61; see also *supra* notes 116–180 and accompanying text.

²¹⁹ *Dendrite*, 775 A.2d at 771; see also *supra* notes 116–180.

²²⁰ See *Mobilisa*, 170 P.3d at 720–21; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760–61; see also *supra* notes 116–180 and accompanying text.

unmasking standards, however, leading to uncertainty for both plaintiffs and defendants.

Courts considering unmasking requests should move towards a unified standard that reflects the accumulated wisdom of courts that have already considered the matter. An ideal standard would require parties seeking unmasking to: 1) provide adequate notice and a reasonable opportunity to respond to the anonymous speaker; 2) make a prima facie showing of the evidence for all elements of the claim within the plaintiff's control; and 3) balance the speaker's First Amendment rights against the strength of the prima facie case and the need for unmasking. This standard would allow courts to evaluate unmasking requests in a flexible, fact-sensitive manner, incorporating factors that are relevant to each individual case as it arises. In short, such a standard would ensure that anonymous internet speakers will be shielded from tyranny at the hands of unmasking subpoenas, while simultaneously ensuring that anonymous speakers cannot tyrannize others with the click of a button.

MATTHEW MAZZOTTA

APPENDIX OF UNMASKING STANDARDS

Doe I v. Individuals (*AutoAdmit.com*), 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008).

[T]he [c]ourt should consider [(1)] whether the plaintiff has undertaken efforts to notify the anonymous posters that they are the subject of a subpoena and withheld action to afford the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application. . . . [(2) Whether the plaintiff has identified and set forth the exact statements purportedly made by each anonymous poster that the plaintiff alleges constitutes actionable speech. . . . [(3) The specificity of the discovery request and whether there is an alternative means of obtaining the information called for in the subpoena. . . . [(4) Whether there is a central need for the subpoenaed information to advance the plaintiffs' claims. . . . [(5) The subpoenaed party's expectation of privacy at the time the online material was posted. . . . [And (6)] whether the plaintiffs have made . . . a concrete showing as to each element of a prima facie case against the defendant.

Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

The Court will consider . . . 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.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999).

First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court. . . . Second, the party should identify all previous steps taken to locate the elusive defendant. . . . Third, plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. . . . Lastly, the plaintiff should file a request for discovery with the

Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible.

Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 720–21 (Ariz. Ct. App. 2007).

[T]he requesting party must show: (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could survive a motion for summary judgment on elements not dependent on the speaker's identity, and (3) a balance of the parties' competing interests favors disclosure [including the need for the identifying information and First Amendment concerns].

Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 244–45 (Ct. App. 2008).

[Requiring that the plaintiff demonstrate: (1)] an attempt to notify the defendant . . . [and (2)] a prima facie showing of the elements [of the claim such that] it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim

Doe No. 1 v. Cahill, 884 A.2d 451, 460–61 (Del. 2005).

[Requiring the plaintiff to: (1)] support [the claim] with facts sufficient to defeat a summary judgment motion . . . [and (2)] undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure [and] withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request.

Solers, Inc. v. Doe, 977 A.2d 941, 954 (D.C. 2009).

[T]he court should: (1) ensure that the plaintiff has adequately pleaded the elements of the [] 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 con-*

trol, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.

Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009).

[The court] 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* [cause of] 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 [] presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity

Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

[The] court 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, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application . . . [(2)] require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech . . . [(3)] determine whether [the] plaintiff has set forth a *prima facie* cause of action against the fictitiously-named anonymous defendants [including both] establishing that its cause of action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted [and] produc[ing] sufficient evidence supporting each element of its cause of action, on a *prima facie* basis . . . [and (4)] balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity

In re Subpoena Duces Tecum to Am. Online, Inc. (AOL), 52 Va. Cir. 26, 37 (Cir. Ct. 2000), *rev'd on other grounds sub nom*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[The court should compel disclosure] (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.

