

ANONYMITY IN SOCIAL MEDIA

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I. INTRODUCTION

On July 5, 1993, *The New Yorker* published a now-infamous cartoon by Peter Steiner: a dog sitting at a computer, along with the caption “On the Internet, nobody knows you’re a dog.”¹ This seemingly innocuous statement appears to have marked a turning point in the history of the Internet. Nowadays, not only do Internet users know if you are a dog, they know what breed you are, your lineage, your age, what you ate for breakfast, lunch, and dinner,

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¹ Sue Cockburn, *Is Social Media Just a Passing Fad?*, EZINEARTICLES, <http://ezinearticles.com/?Is-Social-Media-Just-A-Passing-Fad?&id=6547282> (last visited Oct. 25, 2013).

what treats you prefer, what toys you don't destroy, and when you last went outside to do your business. It is safe to conclude that the days of Internet anonymity have long since passed.

In an effort to diminish the amount of data mining that proliferates on the Internet, many people look to the next-best thing to mask their identity: the pseudonym². With the ever-increasing popularity of social media³, and the lack of identity verification by social media sites,⁴ the ability to be anonymous online is growing at a rapid rate.

The battle over having a "real" online identity has been going on as long as the Internet has been around. Even the earliest forms of social media allowed, and even required, its users to create a username instead of using their legal name.⁵ It seems that many social media sites actually *encourage* the anonymity of their users through the registration process. The suggestion of a username as opposed to a real name indicates that social media sites want their users to be known as something other than their true identities.

Social media has become the dominant medium of interaction over the past twenty years. According to The Pew Research Center's Internet & American Life Project, as of May 2013, 72% of adults use social networking sites.⁶ Of the twenty most-visited websites by Internet users in the United States, nearly half are social media sites.⁷ Facebook has 1.11 *billion* active, monthly users, with an average of 665 million unique users logging in to the site each day.⁸ Twitter has 500 million users, 200 million of which are active users that create more than 400 million tweets each day.⁹ Over 1 *billion* unique users visit You-

² Pseudonym is defined as "a fictitious name used by an author to conceal his or her identity." *Pseudonym Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/pseudonym> (last visited Oct. 25, 2013).

³ There is no generally accepted definition as to what constitutes a "social media" site.

⁴ Viktoria Michaelis, *Defamation of Character on Social Networking Sites*, EZINEARTICLES (Oct. 15, 2012), <http://ezinearticles.com/?Defamation-of-Character-on-Social-Networking-Sites&id=7333824>.

⁵ Although there is not a consensus as to the "first" social media site, Geocities, founded by Beverly Hills Internet in 1994, was the first widespread website for social interaction. *The Brief History of Social Media*, UNIV. OF N.C. AT PEMBROKE, <http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html> (last visited Oct. 25, 2013).

⁶ Joanna Brenner, *Pew Internet: Social Networking*, PEW INTERNET & AM. LIFE PROJECT (Aug. 5, 2013), <http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx>.

⁷ *Top Sites in United States*, ALEXA, <http://www.alexa.com/topsites/countries/US> (last visited Oct. 25, 2013).

⁸ *Facebook Reports First Quarter 2013 Results*, FACEBOOK INVESTOR RELATIONS (May 1, 2013), <http://investor.fb.com/releasedetail.cfm?ReleaseID=761090>. Number of users estimated in March of 2013. *Id.*

⁹ Karen Wickre, *Celebrating #Twitter7*, TWITTER BLOGS (Mar. 21, 2013, 7:42 UTC), <https://blog.twitter.com/2013/celebrating-twitter7>; *Twitter Reaches 500 Million User Mark*, WASH. POST,

Tube monthly, and they watch over 6 *billion* hours of video while they are on the site.¹⁰ The user bases of other sites such as LinkedIn, Pinterest, Google+, Instagram, and Tumblr are also continuing to explode.¹¹ Social media is not a fad;¹² but rather, a burgeoning source of legitimate communications that will continue to be utilized through various mediums and for various purposes.

This Article will focus on the adoption of pseudonyms in social media and the legal viability of any such usage. It will begin with a retrospective of the right to anonymous speech in the United States, and will then discuss the conflict between those historical rights and the current necessity to unmask anonymous authors who use their anonymity to commit torts. Finally, it will conclude with a tutorial on how to determine the identity of anonymous authors in litigation through the standards identified by various courts within the United States, and how to avoid running up against the immunities put in place by the Communications Decency Act.

II. HISTORY OF RIGHT TO FREE SPEECH AND SPEAKING ANONYMOUSLY

A. *Free Speech is What This Country Was Built On*

For Americans, the right to free speech is axiomatic. The First Amendment of the Constitution states, in relevant part: “Congress shall make no law . . . abridging the freedom of speech.”¹³ Indeed, “The expression of one’s opinion is absolutely protected by the First and Fourteenth Amendments to the U.S. Constitution. . . . Under the First Amendment there is no such thing as a false idea. . . . Thus, [h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”¹⁴ The concept of freedom of speech is ingrained in American society. The Internet should not take that concept away, but instead, expand and encourage it.

B. *Anonymous Speech is a Pillar of the First Amendment*

Before the Founding Fathers wrote the Constitution, they recognized the importance of being able to speak anonymously and found the use of pseud-

http://articles.washingtonpost.com/2012-07-30/business/35488395_1_public-tweets-twitter-users-user-mark (last visited Oct. 25, 2013).

¹⁰ *Statistics*, YouTube, <http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 25, 2013).

¹¹ See *Top Sites in United States*, *supra* note 7.

¹² Sue Cockburn, *Is Social Media Just a Passing Fad?*, EZINEARTICLES (Sept. 7, 2011), <http://ezinearticles.com/?Is-Social-Media-Just-A-Passing-Fad?&id=6547282>.

¹³ U.S. CONST. amend. I.

¹⁴ *AMCOR Inv. Corp. v. Cox Ariz. Publ’ns, Inc.*, 764 P.2d 327, 329-30 (Ariz. Ct. App. 1988).

onyms to be powerful tools in political debate.¹⁵ The Federalist Papers, a series of 85 essays written and published between October 1787 and May 1788, were anonymously written under the name “Publius,” though we now know John Jay, Alexander Hamilton, James Madison were the authors.¹⁶

Due to an innate understanding of the intricate relationship between speaking anonymously and speaking freely, numerous courts have found that the First Amendment also protects the right to anonymous speech.¹⁷ The United States Supreme Court has held that the First Amendment to the United States Constitution protects a person’s right to speak anonymously.¹⁸

The rationale behind allowing anonymous speech is simple. Courts wish to avoid the chilling effect that would occur if anonymous authors were unmasked simply because someone did not like or agree with what was said. Across the country, courts have analyzed the bounds of the right to anonymous speech and have affirmed its value by: striking down an ordinance requiring identification permits to engage in door-to-door political advocacy;¹⁹ prohibiting a law requiring initiative petition circulators to wear identification badges;²⁰ striking down a law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature;²¹ and by invalidating a statute prohibiting the distribution of “any hand-bill in any place under any circumstances” that did not contain the name and address of the person who prepared it, reasoning that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”²² Through these holdings, the courts have made their intention of unequivocally upholding the First Amendment perfectly clear.

¹⁵ See *About the Federalist Papers*, LIBR. OF CONGRESS, http://thomas.loc.gov/home/histdox/abt_fedpapers.html (last visited Oct. 25, 2013).

¹⁶ *Id.*

¹⁷ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom protected by the First Amendment.”).

¹⁸ *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999).

¹⁹ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167-68 (2002).

²⁰ *Buckley*, 525 U.S. at 200.

²¹ *McIntyre*, 514 U.S. at 357 (holding that “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority.”).

²² *Id.* at 357; *Talley v. California*, 362 U.S. 60, 63, 65 (1960).

C. *With the Evolution of the Internet, the Right to Anonymous Speech Continues to be Protected in New Forums*

How does the First Amendment right to anonymous speech relate to social media? Easily. The concept of the “username”, while prevalent in email addresses and early-adopted instant messaging programs, reached its critical mass with the advent of social media. Social media sites do not always simply *suggest* that their users create an online persona; in most instances, they *require* it upon initial registration.²³ It may come as somewhat of a surprise that these social media logins actively encourage usernames to be creative, unique, and something other than the user’s individual email address; however, utilizing a pseudonym on social media is nothing new for Internet users.

Social media users are entrenched in the anonymity of usernames.²⁴ It has been suggested that the Internet may be the “greatest innovation in speech since the invention of the printing press[.]”²⁵ As one court explained it, “[t]he rapid growth of Internet communication and Internet commerce has raised novel and complex legal issues and has challenged existing legal doctrine in many areas.”²⁶ “The near universal use of pseudonyms in e-mail and instant messages has fostered a culture in which users are freed to say and do things they never would by offline means.”²⁷ By using a screen name, an anonymous user “is able to create an entirely new persona for his Internet communications, based on the distinction that ‘[u]nlike real space, cyberspace reveals no self-

²³ See, e.g., *What Are Usernames?*, FACEBOOK, <https://www.facebook.com/help/www/211813265517027> (last visited Oct. 25, 2013) (explaining “What are usernames?” in the context of Facebook); *The Twitter Glossary*, TWITTER, <https://support.twitter.com/articles/166337-the-twitter-glossary#> (last visited Oct. 25, 2013) (defining “Username” for Twitter purposes); *Alternate Usernames*, GOOGLE, https://support.google.com/accounts/answer/70206?hl=en&ref_topic=2373945 (last visited Oct. 25, 2013) (explaining that alternate Google account usernames, including a “nickname,” can be created).

²⁴ In August of 2013, a search on Google for “creative username generator” produced more than 668,000 results. A number of the results were websites that create usernames for social media sites based on input from the user. See generally, GOOGLE, <https://www.google.com/#q=creative+username+generator> (last visited Aug. 5, 2013). For example, on May 31, 2013, Duvamis social network launched as a social media site, which guarantees anonymity from both other users of the site, as well as the site operators. See *What Is Duvamis?* DUVAMIS, <http://duvamis.com/newvision/about.html> (last visited Oct. 25, 2013); Michael del Castillo, *Anonymous Founders of Anonymous Social Network Speak Out*, UPSTART BUS. J. (June 24, 2013, 12:01 AM), <http://upstart.bizjournals.com/companies/startups/2013/06/24/anonymous-duvamis-founders-speak.html?page=all>.

²⁵ Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 88 (2000).

²⁶ Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001).

²⁷ Elizabeth A. Ritvo et al., *Online Forums and Chat Rooms in Defamation Actions*, COMM. LAW., Summer 2006, at 1, 23 (quoting *Polito v. AOL Time Warner*, No. Civ. A. 03CV3218, 2004 WL 3768897, at *3 (Pa. Ct. C.P. Jan. 28, 1994)).

authenticating facts about identity.’”²⁸ While the vast majority of Internet users judiciously utilize their ability to speak anonymously, an unfortunate minority hide behind a pseudonym for evil instead of good. Those evils can include using a pseudonym to defame, harass, bully, or infringe upon their intellectual property rights of others. Fortunately, a number of courts have taken a proactive stance regarding the crossroads of freedom of speech and the Internet.

The U.S. Supreme Court extended the protections of the First Amendment to speech on the Internet as early as 1997.²⁹ Other courts have followed that path, explaining that “[t]his ability to speak one’s mind [on the Internet] without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.”³⁰ Another court likened anonymous Internet speech to the Federalist papers, explaining that such speech “can become the modern equivalent of political pamphleteering.”³¹ Users of social media embrace this philosophy.

This freedom to speak anonymously on the Internet is enhanced by the fact that “even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes.”³² A commentator analyzing Reddit, a social media site, explained that the site’s anonymity and use of pseudonyms “has the odd effect of prompting users to be very intimate and remarkably candid.”³³ For speech purposes, a dog using social media can be anything it wishes to be.

III. CONFLICTING POLICIES PRESENT-DAY OF FREE SPEECH VERSUS IDENTIFICATION

Although the courts readily uphold the right to speak anonymously, the right to do so is not absolute.³⁴ Given the history of the United States, it is no

²⁸ Jennifer O’Brien, *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, 2745-46 (2002) (quoting LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 33 (1999)).

²⁹ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

³⁰ *See, e.g., Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

³¹ *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

³² Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 *DUKE L.J.* 855, 896 (2000).

³³ David Carr, *Left Alone by Its Owner, Reddit Soars*, *N.Y. TIMES*, Sept. 3, 2012, at B1, available at <http://www.nytimes.com/2012/09/03/business/media/reddit-thrives-after-advance-publications-let-it-sink-or-swim.html>.

³⁴ *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *see also In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

surprise that political speech receives the highest level of protection.³⁵ At the other end of the freedom spectrum is commercial speech, which enjoys “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,”³⁶ but only if the speech is “neither misleading nor related to unlawful activity.”³⁷ Types of speech such as defamation,³⁸ obscenity,³⁹ and fighting words remain completely unprotected.⁴⁰ When contesting speech, the type of speech determines the level of protection courts will afford.

In the context of a conflict between anonymous authors’ First Amendment rights and the ability of tort victims to unmask anonymous speakers, courts have engaged in a wary balancing act between the two interests.⁴¹ These courts have acknowledged that they must strike a balance “between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendant[].”⁴² As a result, the identity of an anonymous speaker may be disclosed during discovery to protect a litigant’s legitimate interest in vindicating a legal right in court.⁴³ Finding this balance is a difficult, often puzzling process, which varies depending on the type of injury alleged.⁴⁴

³⁵ *Meyer v. Grant*, 486 U.S. 414, 420, 425 (1988) (describing the First Amendment protection of “core political speech” to be “‘at its zenith.’”).

³⁶ *Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989).

³⁷ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

³⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

³⁹ *Roth v. United States*, 354 U.S. 476, 483 (1957).

⁴⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁴¹ *Mobilisa Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (recognizing “victims of wrongful internet communications should be able to seek legal redress unimpeded by wrongdoers’ attempts to hide behind an unwarranted shield of First Amendment rights” and citing extensive authority for premise).

⁴² *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

⁴³ *See Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 249 (4th Cir. 2009) (reasoning that revealing Doe Client’s identity provides the defendant a fair opportunity to defend oneself in court).

⁴⁴ *Solers, Inc. v. Doe*, 977 A.2d 941, 952 (D.C. 2009) (explaining “one size does not necessarily fit all” when it comes to the test utilized to expose an anonymous speaker).

IV. COURT-CREATED PROCEDURES ON HOW TO IDENTIFY AN
ANONYMOUS AUTHOR AND RELATED CDA ISSUES WITH
ANONYMOUS AUTHOR PUBLICATIONS

People regularly reach out to the courts for judicial intervention to obtain the “real” identity of Internet users.⁴⁵ Despite the inclination of courts to facilitate the identification of anonymous social media users, they are constrained by Federal and common law. Courts, along with social media users and litigants, should be aware of the limitations placed on the judiciary regarding the unmasking of a social media accountholder’s identity.

A. *Communications Decency Act*⁴⁶

In 1996, Congress passed the Communications Decency Act (“CDA”), which was intended to “promote unfettered speech on the Internet.”⁴⁷ The CDA accomplishes that goal by creating “a federal immunity to any cause of action that would [otherwise] make service providers liable for information originating with a third-party user of the service.”⁴⁸ Congress enacted the CDA “to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.”⁴⁹ The CDA 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.”⁵⁰

In short, the CDA protects from liability (1) a provider of an interactive computer service; (2) whom a plaintiff seeks to treat as a publisher; and (3) of information provided by another information content provider.⁵¹ CDA immunity applies unless the “interactive computer service” also functions as an “information content provider,” in connection with the statements at issue in the underlying litigation.⁵² This language is critical to courts’ in the application of defamation law to online postings, and in the utilization of the Courts to obtain information regarding anonymous authors.

The CDA preempts inconsistent state laws. Specifically, one provision states, “[n]o cause of action may be brought and no liability may be imposed

⁴⁵ See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 161 (D. Mass. 2008).

⁴⁶ Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560-61 (2006).

⁴⁷ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997).

⁴⁸ *Id.* at 330.

⁴⁹ *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

⁵⁰ 47 U.S.C. § 230(c)(1) (2006).

⁵¹ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).

⁵² *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (internal quotation marks omitted).

under any State or local law that is inconsistent . . .”⁵³ As the California Supreme Court has explained, the CDA provides website operators, including social media sites, with broad immunity for claims based on publishing material authored by one of the website’s users.⁵⁴

“[W]ell-settled precedent [provides] that the CDA is a complete bar to suit against a website operator for his or her ‘exercise of a publisher’s traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content.’”⁵⁵ The Ninth Circuit has explained that courts should carefully construe the CDA in favor of immunity to ensure the prompt dismissal of meritless cases unless there is clear evidence that a website directly participated in the creation of unlawful content:

We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. *Such close cases, we believe, must be resolved in favor of immunity*, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged-or at least tacitly assented to-the illegality of third parties. . . . *[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.*⁵⁶

Additionally, “[c]ourts across the country have repeatedly held that the CDA’s grant of immunity should be construed broadly”⁵⁷ because the CDA’s “provi-

⁵³ *Green v. Am. Online*, 318 F.3d 465, 470 (3rd Cir. 2003) (quoting 47 U.S.C. § 230(e)(3) (2006)).

⁵⁴ *Barrett v. Rosenthal*, 146 P.3d 510, 516-17 (Cal. 2006); *see also* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (explaining “Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties.”) (footnotes omitted).

⁵⁵ *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 932 (D. Ariz. 2008) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

⁵⁶ *Fair Hous. Council*, 521 F.3d at 1174-75 (emphasis added) (citation omitted).

⁵⁷ *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699-700 (S.D.N.Y. 2009) (citing *Universal Comm’n Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)) (“reviewing cases and holding ‘we too find that Section 230 immunity should be broadly construed.’”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998)).

sions set up a *complete shield* from a defamation suit for an online service provider, *absent an affirmative showing that the service was the actual author of the defamatory content*.⁵⁸ Thus, any cause of action “that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.”⁵⁹ Given a plaintiff’s inability to seek relief against a website where an anonymous author’s content is published, a person seeking to identify the author of tortious content must then utilize alternative methods to gain information regarding the identity of the author.

B. Website Liability for Intellectual Property Claims

It is undisputed that the CDA expressly carves out any claims against a website pertaining to intellectual property issues.⁶⁰ This helps prevent anonymous authors from creating a permanent veil over their identity simply because they have committed some form of violation of an intellectual property right. Whether a claim arises out of trademark infringement or copyright infringement will affect whether liability can attach to the website which is hosting the infringing content, and how to identify the anonymous author.

1. Trademark Infringement

Anonymous Internet users can easily infringe on an intellectual property owner’s trademark by simply inserting a trademark into web content to divert Internet traffic. Because users can anonymously own domain names, trademark infringement can occur by an unidentified user as well, thereby necessitating discovery of the website owner’s identity through other means.

“To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a party ‘must prove: (1) that it has a protectable ownership interest in the mark; and (2) that the defendant’s use of the mark is likely to cause consumer confusion.’”⁶¹ When examining the consumer confusion component of this test, courts look to eight factors as an adaptable proxy: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of

⁵⁸ Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5TH 169, § 2[a] (2000) (emphasis added).

⁵⁹ *Fair Hous. Council*, 521 F.3d at 1170-71; *see also* *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (citing *Fair Hous. Council*, 521 F.3d at 1170).

⁶⁰ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting in part *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006)) (“[T]he CDA does not clothe service providers in immunity from ‘law[s] pertaining to intellectual property.’”).

⁶¹ Lanham Act, 15 U.S.C. § 1051 (2006); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting in part *Dep’t of Parks & Recreation v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006)).

goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.⁶²

Courts have found that consumers on the Internet apply different levels of scrutiny depending on the circumstances. This "[i]nitial interest confusion in the internet context derives from the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill."⁶³ Because of the blatant nature of trademark infringement, coupled with the lack of a legitimate legal interest in infringing on a party's trademark, courts have been far more willing to uncover an anonymous trademark infringer than in any other context.

2. Copyright Infringement

Beginning in the 1980s, Internet users would publish copyright-protected materials online in various locations, including electronic bulletin boards.⁶⁴ Third-party users would then copy and download the published works from those websites.⁶⁵ Advances in technology have allowed the piracy of copyright protected materials to proliferate; for example, in 1998 Internet users downloaded approximately three million copyright-protected recordings per day.⁶⁶ New technology continued to emerge, allowing users to publish large volumes of copyright-protected materials, including video and musical recordings, and to allow other Internet users to download those materials. Despite a number of courts shutting down these processes in 2001 and 2002,⁶⁷ emergent technologies continue to allow anonymous Internet users to exchange copyright-protected materials with other anonymous Internet users.

⁶² AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979) (the "*Sleekcraft* factors.").

⁶³ Austl. Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006); *see also* Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1018-19 (9th Cir. 2004) (holding that initial interest confusion occurs when a defendant uses a plaintiff's trademark in a way calculated to capture a consumer's attention and divert the consumer to the defendant's own website); Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 814 (7th Cir. 2002) (affirming the grant of a preliminary injunction preventing the defendant from using the plaintiff's trademark as a metatag in the defendant's website); Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1061-65 (9th Cir. 1999) (holding that the defendant's use of a trademark in a website's metatags allowed the defendant to benefit improperly from the goodwill associated with the mark); Gov't Emps. Ins. Co. v. Google, Inc., 330 F. Supp. 2d 700, 701, 706 (E.D. Va. 2004) (holding that the auction of trademarked terms to the highest bidder states a cause of action under the Lanham Act).

⁶⁴ *In re Charter Commc'ns, Inc.*, 393 F.3d 771, 773 (8th Cir. 2005).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2002); A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001).

Copyright infringement is clearly not speech that is entitled to First Amendment protection.⁶⁸ However, some courts have held that Internet users have a limited First Amendment privacy interest in anonymous Internet usage, including “the use of [peer-to-peer] file copying networks to download, distribute, or make available for distribution copyrighted” material in electronic form.⁶⁹ In the context of copyright infringement, that same court explained that, “[p]arties may not use the First Amendment to encroach upon the intellectual property rights of others.”⁷⁰ Thus, courts tasked with determining whether to quash a subpoena for an anonymous Internet subscriber’s identifying information, typically apply the same or similar standards as they would in evaluating a claim for defamation arising under the First Amendment.⁷¹

Through the Digital Millennium Copyright Act of 1998 (the “DMCA”),⁷² a party who believes their copyright protected material has been infringed by an anonymous Internet user can request that a subpoena be issued to the ISP that is hosting the infringing content.⁷³ Even use of a DMCA subpoena does not insulate the requesting party from the impact of the protection afforded by an Internet user’s First Amendment rights. The DMCA does not warrant enforcement of a subpoena in violation of the First Amendment. In fact, numerous courts have granted motions to quash subpoenas seeking information regarding alleged copyright infringers because it would violate the user’s right to free speech.⁷⁴

C. *Unmasking Anonymous Authors Through the Courts*

While the posters of anonymous content enjoy the protections their pseudonyms provide, the subjects of those postings are less pleased by the shield of the username. Because of the CDA, the subject of anonymously posted material cannot hold the website, or the ISP, liable for the content.⁷⁵ Instead, the

⁶⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-57, 560 (1985) (discussing the First Amendment and copyright issues to examine whether the fair use doctrine applied to alleged act of copyright infringement).

⁶⁹ *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004).

⁷⁰ *Id.* at 563 (citing *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143 (11th Cir. 1990)).

⁷¹ See *John Wiley & Sons, Inc. v. Doe Nos. 1-30*, 284 F.R.D. 185, 189 (S.D.N.Y. 2012); see also *Arista Records LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010).

⁷² Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

⁷³ 17 U.S.C. § 512(h) (2006); see also *Signature Mgmt. Team, LLC v. Automattic, Inc.*, No. C-13-80028 RCB, 2013 WL 1739480, at *3 (N.D. Cal. Apr. 22, 2013) (“[T]he purpose of a DMCA subpoena is to identify a copyright infringer.”).

⁷⁴ *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 260–68 (D.D.C. 2003), *rev’d on other grounds*, *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

⁷⁵ 47 U.S.C. § 230 (2006).

target of any lawsuit has to be the actual author.⁷⁶ Liability cannot attach to a “Jane Doe” defendant, however, so the identity of the author must be determined before the court can render a judgment.⁷⁷ As a result, the use of subpoenas to unmask anonymous speakers that use the Internet to publish their content is on the rise.⁷⁸

Courts are typically willing to unmask an anonymous author, but their standards to do so vary. This is because a court order, requested by a private party in a civil lawsuit, constitutes state action that is subject to the constitutional limitations set forth in the First Amendment.⁷⁹ Regardless of which standard a court applies, where discovery possibly impinges on First Amendment rights, courts will “balance the burdens imposed . . . against the significance of the . . . interest in disclosure,”⁸⁰ to “determine whether the ‘interest in disclosure . . . outweighs the harm.’”⁸¹ Many jurisdictions have created their own version of the procedural standards that direct a website or ISP to provide personally identifying information about the anonymous author.⁸² While these standards vary, for the most part, the initial burden in each of these cases rests on the party seeking discovery and requires some degree of proof of the underlying claim.⁸³ The Supreme Court has yet to weigh in on this subject; although, given the inconsistency by which courts apply these standards and the reach of the Internet stretching across all states equally, the issue is ripe for judicial intervention to create a uniform standard.⁸⁴

⁷⁶ Megan M. Sunkel, Comment, *And the I(sp)s Have it . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1196-97 (2003).

⁷⁷ *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 573 (N.D. Cal. 1999).

⁷⁸ Ashley I. Kissinger & Katharine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, J. INTERNET L., Mar. 2010, at 1; Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 320 (2008).

⁷⁹ *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)).

⁸⁰ *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (internal quotation marks omitted) (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003)).

⁸¹ *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting in part *Buckley v. Valeo*, 424 U.S. 1, 72 (1976)).

⁸² *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173-76 (9th Cir. 2011).

⁸³ *Id.* at 1176.

⁸⁴ Even in late 2013, a number of states still lack any reported decision on the process for identifying an anonymous Internet user. Those states include: Alabama; Alaska; Arkansas; Colorado; Georgia; Hawaii; Iowa; Kansas; Kentucky; Louisiana; Maine; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Mexico; North Dakota; Ohio; Oregon; Rhode Island; South Carolina; South Dakota; Utah; Vermont; and Wyoming.

1. The Motion to Dismiss and Good Faith Standards

The most easily satisfied standard merely requires that the Court be convinced the party seeking the information “has a legitimate, good faith basis to contend that it may be the victim of [actionable] conduct.”⁸⁵ This so-called “good faith” test offers the least protection of an author’s anonymity: “Plaintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision.”⁸⁶ In courts that apply this standard, or the motion to dismiss standard, there is a strong possibility that courts will needlessly strip the author’s anonymity if they lack substantial evidence of any wrongdoing, giving little to no effect to the First Amendment protections the anonymous author would otherwise be afforded. The following courts have adopted this *prima facie* standard:

- Florida⁸⁷
- Illinois⁸⁸
- Michigan⁸⁹
- North Carolina⁹⁰
- Virginia⁹¹
- Wisconsin⁹²

Utilizing the “motion to dismiss” standard, when challenging the author’s anonymity, the identity of the author is uncovered on nearly every occasion.

⁸⁵ *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

⁸⁶ *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

⁸⁷ *Rich v. City of Jacksonville*, No. 3:09-CV-454-J-34MCR, 2010 WL 4403095, at *11 (M.D. Fla. Mar. 31, 2010) (In the criminal context, the party “must demonstrate an overriding and compelling interest in obtaining the material at issue in the subpoena.”).

⁸⁸ *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 674-66 (Ill. App. Ct. 2010).

⁸⁹ *Thomas M. Cooley Law Sch. v. Doe 1*, 833 N.W.2d 331, 344 (Mich. Ct. App. 2013) (“To the extent that Doe 1 urges us to adopt *Dendrite* because it more adequately protects other interests or is better public policy, we decline to do so.”).

⁹⁰ *Alvis Coatings, Inc. v. John Does 1-10*, No. 3L94 CV 374-H, 2004 WL 2904405, at *3 (W.D.N.C. Dec. 2, 2004) (“[W]here a plaintiff makes a prima facie showing that an anonymous individual’s conduct on the Internet is otherwise unlawful, the plaintiff is entitled to compel production of his identity in order to name him as a defendant and to obtain service of process.”).

⁹¹ *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

⁹² *Lassa v. Rongstad*, 718 N.W.2d 673, 697 (Wis. 2006).

2. The Summary Judgment Evidence Standard

At the opposite end of the spectrum from the motion to dismiss/good faith standard, is the standard articulated by the New Jersey Superior Court in *Dendrite*.⁹³ The *Dendrite* standard requires that a party seeking the identity of an anonymous author “produce sufficient evidence supporting each element of its cause of action, on a prima facie basis.”⁹⁴ The court then balances “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 . . . to allow the plaintiff to properly proceed.”⁹⁵

Shortly after the *Dendrite* holding, the Supreme Court of Delaware adopted a modified version of the evidence standard in *Cahill*.⁹⁶ There, the court explained, “before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”⁹⁷ In creating this standard, the Delaware court qualified its evidence requirement by noting that “the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff’s control*.”⁹⁸ The Delaware court also expanded the requirements set forth in *Dendrite* by placing an additional burden on the party seeking the information.

[T]o the extent reasonably practicable under the circumstances, the [party seeking information under *Cahill*] must 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.⁹⁹

The following courts have adopted a form of this standard:

- Arizona¹⁰⁰
- California¹⁰¹

⁹³ *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

⁹⁷ *Id.* at 460.

⁹⁸ *Id.* at 463.

⁹⁹ *Id.* at 460-61.

¹⁰⁰ *Mobilisa Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007).

¹⁰¹ *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 245 (Cal. Ct. App. 2008).

- Connecticut¹⁰²
- Delaware¹⁰³
- District of Columbia¹⁰⁴
- Idaho¹⁰⁵
- Indiana¹⁰⁶
- Maryland¹⁰⁷
- Massachusetts¹⁰⁸
- Nevada¹⁰⁹
- New Hampshire¹¹⁰
- New Jersey¹¹¹
- New York¹¹²
- Pennsylvania¹¹³
- Texas¹¹⁴
- Washington¹¹⁵
- United States Court of Appeals for the Ninth Circuit¹¹⁶

The majority of courts that have adopted a standard for disclosure of the identity of an anonymous author appear to utilize this standard, which offers

¹⁰² Doe I v. Individuals, 561 F. Supp. 2d 249, 256 (D. Conn. 2008).

¹⁰³ *Cahill*, 884 A.2d at 457.

¹⁰⁴ *Solers, Inc. v. Doe*, 977 A.2d 941, 954-57 (D.C. 2009).

¹⁰⁵ *Cornelius v. Deluca*, No. 1:10-CV-027-BLW, 2011 WL 977054, at *1 (D. Idaho Mar. 15, 2011).

¹⁰⁶ *In re Ind. Newspapers Inc.*, 963 N.E.2d 534, 551-52 (Ind. Ct. App. 2012) (applying “*Dendrite* test” from *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001)).

¹⁰⁷ *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 435 (Md. 2009).

¹⁰⁸ *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 162 (D. Mass. 2008) (subjecting the plaintiffs’ subpoenas “to somewhat heightened scrutiny” in a copyright infringement context); *see also* *McMann v. Doe*, 460 F. Supp. 2d 259, 268 (D. Mass. 2006) (explaining that while “there may [] be problems with the mechanics of a summary judgment test, it is reasonable to apply some sort of a screen to the plaintiff’s claim before authorizing the subpoena.”).

¹⁰⁹ *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008) (“[S]o long as an objection is raised by a party with standing to raise it, *Cahill* articulates the correct standard.”).

¹¹⁰ *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 193 (N.H. 2010) (applying “*Dendrite* test.”).

¹¹¹ *Dendrite*, 775 A.2d at 760-61.

¹¹² *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 700 (N.Y. Sup. Ct. 2007).

¹¹³ *Pilchesky v. Gatelli*, 12 A.3d 430, 442 (Pa. Super. Ct. 2011) (using a modified version of the *Dendrite/Cahill* test).

¹¹⁴ *In re Does 1–10*, 242 S.W.3d 805, 814-15 (Tex. App. 2007).

¹¹⁵ *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1215 (W.D. Wash. 2010) (adopting a “*Dendrite*-style test [a]s appropriate to safeguard the First Amendment interests at stake in this action.”).

¹¹⁶ *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

greater protection for the anonymity of the author and greater acknowledgment of the author's First Amendment right to free speech.

V. CONCLUSION

The Internet is a truly global universe. Social media users may publish anonymous content from just about anywhere through mobile devices and applications that perform on virtually all platforms worldwide.¹¹⁷ Because of this virtual blurring of lines between published content and ownership of that content, the likelihood of abuse of the cloak of anonymity continues to increase.

Without any true methodology for social media user identification, there will continue to be an unsteady balance between the right to speak anonymously and the right to publish and utilize social media through pseudonyms. Courts today continue to struggle when confronted with requests to direct social media sites to provide personally identifiable information regarding anonymous users of that website. Absent implementation of a uniform process and standards by which anonymous authors can be unmasked, courts across the country will provide inconsistent results as to whether or not they will compel identification. This erratic application of law to social media users can and has resulted in mass confusion, not only among Internet users, but also among the underlying business owners who must respond to the subpoenas seeking anonymous author information.

Until the Supreme Court decides a case regarding anonymous authorship, the interplay between the First Amendment and the right to speak anonymously will remain unsettled. Whether or not a social media users will have their anonymity stripped away is contingent upon a number of factors, including the type of speech and the location in which the speech occurred. In the interim, social media users are recognizing and interpreting the extent of their free speech rights without guidance from the Supreme Court. Business owners who traffic in social media platforms, on the other hand, are responsible for the rights of the social media entity, as well as what constitutes tortious speech. While these two policies continue to clash in the courts, educating oneself on the underlying legal and policy issues is the best way to resolve any issue pertaining to use of a pseudonym in social media as efficiently, and amicably, as possible.

¹¹⁷ The question of where the proper jurisdiction for filing a lawsuit relating to online content can itself be the subject of another article, and is purposefully not discussed here.

