Yale Journal of Law and Technology

Volume 11
Issue 1 *Yale Journal of Law and Technology*

Article 5

1-1-2009

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Anthony Ciolli

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11 YALE J.L. & TECH. 176 (2009)

Technology policy, while perhaps not as high-profile as the war in Iraq or health care, was an important issue in the 2008 presidential campaign. Though technology policy is a broad field that encompasses everything from broadband proliferation to patent reform, the major presidential candidates addressed the necessary balance the government must strike between privacy and other national interests. This was particularly true of candidates who served in the U.S. Senate. In that body, a bill, S. 2248, which proposed retroactive immunity for telecommunications companies who opened up their networks to intelligence agencies in violation of federal privacy law, was introduced during the height of the primary campaign season. Senator John McCain, commenting on that bill, stated that he was "a strong supporter of protecting the privacy of Americans" and, even if retroactive immunity was justified in that particular case, "Congress should include provisions that ensure that Americans' private records will not be dealt with like that again."[1] Similarly, Senator Barack Obama announced that, as president, he would "strengthen privacy protections for the digital age and . . . harness the power of technology to hold government and business accountable for violations of personal privacy."[2]

But while the candidates discussed the tension between privacy rights and the war on terror, they said little about how a similar tension between privacy and other governmental objectives should be resolved in the context of civil litigation. This issue has become especially important in recent years, as plaintiffs are increasingly using the civil subpoena process to force anonymous Internet speakers to unveil their identities. Yet neither the Federal Rules of Civil Procedure nor comparable legislation address the issue of when Internet intermediaries must be compelled to provide private information about Internet users to litigants.

As a consequence of the statutory silence on this issue, courts have reached widely divergent results, developing at least

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[1] Declan McCullagh & Anne Broache, *Technology Voters' Guide: John McCain*, CNET NEWS, Jan. 3, 2008, http://www.news.com/Technology-Voters-Guide-John-McCain/2100-1028_3-6224285.html.

[2] Barack Obama & Joe Biden: Technology, http://www.barackobama.com/issues/technology/ (last visited Dec. 2, 2008).

five different tests to answer this question. Since these tests require different elements or otherwise bear little resemblance to each other, the lack of a uniform national standard for disclosure, and the potential for yet another completely new test, has resulted in substantial confusion, leaving no guidance for litigants, intermediaries, and Internet users to understand what circumstances justify disclosure of otherwise confidential information.

This essay will advocate for a technology policy in President Barak Obama's new administration that will provide adequate privacy protection for Internet users in the civil subpoena context. Part I will provide an overview of the First Amendment right to speak anonymously on the Internet. Part II will briefly summarize the different tests various courts have adopted over the past ten years to weigh an Internet user's First Amendment and privacy rights against a litigant's right to use the court system to obtain redress for alleged injuries. Part III will outline four guiding principles that technology policy in this area should follow, ultimately arguing that the new administration should request that Congress amend the Federal Rules of Civil Procedure to require that federal courts nationwide apply a "summary judgment plus" test to all instances where a litigant demands an Internet user's identity or other private information as part of the discovery process.

## I. INTERNET USERS HAVE A FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY ON THE INTERNET

The Supreme Court of the United States has held that the right to speak anonymously is protected under the First Amendment of the U.S. Constitution.[3] The Court, in *McIntyre v. Ohio Elections Committee*, described anonymity as "a shield from the tyranny of the majority" and wrote that anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression . . . ."[4] The *McIntyre* Court further held that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus, "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a

[3] *See, e.g.*, Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150 (2002); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm'n., 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

[4] 514 U.S. at 357.

publication, is an aspect of the freedom protected by the First Amendment."[5] The Court has repeatedly acknowledged that anonymous speech has "played an important role in the progress of mankind."[6]

The Supreme Court has already held that First Amendment rights — including the right to speak anonymously — are not bound by medium, and thus extend to the Internet. The Court has described the Internet as "a vast platform from which to address and hear from a worldwide audience of millions" where "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[7] As a result, the Court has found that there is "no basis for qualifying the level of First Amendment scrutiny that applies to this medium."[8] Numerous lower courts have also explicitly acknowledged that full First Amendment protections extend to anonymous Internet speech.[9]

The Supreme Court has further held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[10] This irreparable injury is especially egregious when it involves the unmasking of an anonymous Internet user.[11] Because the injury in such situations is irreparable, the Court has found that an attempt to use a civil subpoena or other court order to compel discovery of an individual's identity constitutes "governmental action" that "is subject to the closest scrutiny."[12] As a result, "discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts," and "[c]ourts should impose a high threshold on subpoena requests that encroach on this right" to

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[5] *Id.* at 342.

[6] *Talley*, 362 U.S. at 64.

[7] Reno v. ACLU, 521 U.S. 844, 853, 870 (1997).

[8] *Id.* at 870.

[9] *See, e.g.*, Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) ("[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech.").

[10] Elrod v. Burnes, 427 U.S. 347, 373 (1976).

[11] *See* Melvin v. Doe, 836 A.2d 42, 50 (Pa. 2003) ("[I]t is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.").

[12] NAACP v. Alabama, 357 U.S. 449, 461 (1958).

anonymous speech.[13] As one district court judge put it, "[p]eople who have committed no wrong should be able to participate online without the fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities."[14] Any standard other than the highest level of scrutiny thus fundamentally jeopardizes "the rich, diverse, and far ranging exchange of ideas" that "Internet anonymity facilitates."[15]

## II. AN OVERVIEW OF THE DIFFERENT TESTS COURTS HAVE ADOPTED

Although courts must apply the highest level of scrutiny to any civil subpoena that seeks an anonymous Internet speaker's identity or other private information, courts have not reached a consensus as to what this entails, or which particular elements or factors a litigant must fulfill in order to demonstrate that a litigant's need for the speaker's identity outweighs the speaker's First Amendment and privacy rights. This section will provide a brief overview of five of the different tests various federal and state courts have adopted.

### A. The Seescandy.com Motion to Dismiss Test

The U.S. District Court for the Northern District of California, in *Columbia Insurance Co. v. Seescandy.com*,[16] became one of the first courts to consider the issue of when an Internet intermediary must comply with a subpoena seeking the identity of an anonymous defendant. The court, with no precedent to guide its decision, nevertheless recognized that "some limiting principles should apply to the determination of whether discovery to uncover the identity is warranted."[17] But despite this recognition and the acknowledgment that a lenient procedure could potentially make it easier for litigants to "harass or intimidate" anonymous speakers,[18] the *Seescandy.com* court established a test making it very easy to use the discovery process to unmask an anonymous speaker.

The *Seescandy.com* court laid out four requirements that a plaintiff must meet in order to obtain discovery. The court found

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[13] *2TheMart.com*, 140 F. Supp. 2d at 1093, 1097.

[14] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[15] *2TheMart.com*, 140 F. Supp. 2d at 1092.

[16] 185 F.R.D. 573.

[17] *Id.* at 578.

[18] *Id.*

that the requesting party "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."[19] Such a "requirement is necessary to ensure that federal requirements of jurisdiction and justiciability can be satisfied."[20]

After meeting this requirement, the requesting party would then have to "identify all previous steps taken to locate the elusive defendant."[21] The court found that this requirement is necessary to "ensur[e] that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants."[22] The method used to attempt to notify the defendant need not comply with the service requirements in the Federal Rules of Civil Procedure — they just need to "show that [they have] made a good faith effort to specifically identify defendant and to serve notice on defendant."[23]

The third, and key, requirement of the test is that the "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss."[24] In its discussion of this element, the court analogized to "the process used during criminal investigations to obtain warrants," stating that the motion to dismiss requirement would be akin to the government showing probable cause, with both serving as "a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong."[25] The fourth requirement requires the discovering party to "file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested . . . ."[26]

### B. The America Online Good Faith Test

The Circuit Court of Virginia, in *In re Subpoena Duces Tecum to America Online, Inc.*,[27] explicitly rejected the *Seescandy.com* approach. In *America Online*, the plaintiff had

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 579.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 580.

[27] *In re* Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000).

issued a subpoena requiring that America Online turn over all information it had about certain John Doe defendants that the plaintiff had sued for defamation.[28] Though the court purportedly attempted to balance "the right to communicate anonymously against the need 'to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions,'"[29] the court ultimately concluded that a "legitimate, good faith basis" to allege a cause of action against a defendant was sufficient to require disclosure of that anonymous speaker's identity.[30]

### C. The 2TheMart.com Balancing Test

The U.S. District Court for the Western District of Washington, in *Doe v. 2TheMart.com*,[31] was also tasked with deciding whether a subpoena seeking information about an anonymous Internet user should be quashed. But unlike *Seescandy.com* and *America Online*, the anonymous speakers in *2TheMart.com* were not parties to the litigation, but twenty-three non-parties who the defendant believed were necessary for a potential affirmative defense. Consequently, the *2TheMart.com* court believed that a different test than *Seescandy.com* or *America Online* was appropriate, and instead applied a four factor interest balancing test.

As part of this balancing test, the court found that it must first consider whether "the subpoena seeking the information was issued in good faith and not for any improper purpose."[32] It is not necessary for the anonymous speaker to prove malice or demonstrate that the requesting party has engaged in abuse of process for this factor to weigh against the requesting party. Rather, the *2TheMart.com* court found that, "while not demonstrating bad faith *per se*," blanket requests for information of large groups of non-party speakers constitute an "apparent disregard for the privacy and First Amendment rights of the on-line users."[33]

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[28] *Am. Online,* 2000 WL 1210372, at *1.

[29] Ryan M. Martin, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1228 (2007).

[30] *Am. Online*, 2000 WL 1210372, at *8.

[31] 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

[32] *Id.* at 1095.

[33] *Id.* at 1096.

The second factor is whether "the information sought relates to a core claim or defense" in the underlying litigation,[34] for "[o]nly when the identifying information is needed to advance core claims or defenses can it be sufficiently material to compromise First Amendment rights."[35] The court found that information that "relates only to a secondary claim or to one of numerous affirmative defenses" does not impact the "primary substance of the case," which "can go forward without disturbing the First Amendment rights of the anonymous Internet users."[36]

But it is not sufficient for the information to merely relate to a core claim or defense, for the third factor considers whether "the identifying information is directly and materially relevant to that claim or defense."[37] Because First Amendment rights are implicated, a higher standard of relevancy is used than otherwise contemplated in the Federal Rules of Civil Procedure.[38] Innuendos that the speakers have engaged in illegal conduct are not sufficient, for First Amendment rights "cannot be nullified by an unsupported allegation of wrongdoing raised by the party seeking the information."[39]

Finally, the *2TheMart.com* balancing test examines whether "information sufficient to establish or disprove that claim or defense is unavailable from any other source."[40] When the materials requested are already in the requesting party's possession or are publicly available, and disclosing the identities of the anonymous speakers is superfluous, then, a requesting party can support a defense without "encroaching on the First Amendment rights of the Internet users."[41]

### D. The Cahill Summary Judgment Test

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[34] *Id.* at 1095.

[35] *Id.* at 1096.

[36] *Id.*

[37] *Id.* at 1095.

[38] Federal Rule of Civil Procedure 26(b)(1) requires disclosure of any relevant information that "appears reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b)(1). However, "when First Amendment rights are at stake, a higher threshold of relevancy must be imposed." *2TheMart.com*, 140 F. Supp. 2d at 1096.

[39] *2TheMart.com*, 140 F. Supp. 2d at 1097.

[40] *Id.* at 1095.

[41] *Id.* at 1097.

The Delaware Supreme Court's decision in *Doe v. Cahill*[42] represents the first outright rejection by an appellate court of both the good faith and motion to dismiss tests. The *Cahill* court, in an approach later also adopted by the U.S. District Court for the District of Arizona,[43] requires that, in addition to providing adequate notice, the plaintiff in the underlying litigation demonstrate that its claims against an anonymous defendant would withstand a motion for summary judgment on elements that are not dependent on the defendant's identity.[44]

Why require that a plaintiff's case withstand a motion for summary judgment rather than a motion to dismiss? The *Cahill* court correctly noted that "even silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be."[45] Given the low standard of review required at the motion to dismiss stage, as well as the irreparable injury an anonymous speaker will suffer if his First Amendment rights are not respected, the court found that the heightened summary judgment standard is more appropriate in such cases.[46] Anything less, the court stated, would result in a proliferation of "trivial defamation lawsuits primarily to harass or to unmask . . . critics."[47]

Unlike *2TheMart.com*, the *Cahill* court did not require a balancing test in addition to the notice and summary judgment requirements. The *Cahill* court explicitly stated that such a balancing test is unnecessary, since "[t]he summary judgment test is itself the balance," with the balancing test purportedly "add[ing] no protection above and beyond that of the summary judgment test and needlessly complicat[ing] the analysis."[48]

### E. The Mobilisa "Summary Judgment Plus" Test

The Arizona Court of Appeals is the most recent court to consider the Internet anonymity issue. In *Mobilisa, Inc. v. Doe*,[49]

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[42] 884 A.2d 451 (Del. 2005).

[43] Best Western Int'l, Inc., v. Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *11-12 (D. Ariz. July 25, 2006).

[44] *Cahill*, 884 A.2d at 460.

[45] *Id.* at 459.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 461.

[49] 170 P.3d 712 (Ariz. Ct. App. 2007).

the court established the most stringent test applied to such a situation by essentially combining the *Cahill* notice and summary judgment requirements with the *2TheMart.com* and balancing test.[50] This method, dubbed by the dissent as a "summary judgment plus" test,[51] is meant to apply regardless of whether the anonymous speaker is a defendant or non-party witness to the underlying litigation.[52] The New Jersey Superior Court's appellate division, in *Dendrite Int'l, Inc. v. Doe*, has also applied a similar test, though with slightly different elements.[53]

The *Mobilisa* "summary judgment plus" test, though still imperfect, is, for a multitude of compelling reasons, superior to all of the other tests various courts have adopted. The following section, which proposes four key guiding principles that should apply to technology policy in this area, will explain the advantages of the *Mobilisa* test over other approaches, while also acknowledging and proposing remedies for its drawbacks.

## III. INTERNET PRIVACY AND THE CIVIL LITIGATION DISCOVERY PROCESS: FOUR GUIDING PRINCIPLES

The new presidential administration should consider four key guiding principles when shaping policies that would mediate the tension between Internet privacy and the goals of the civil litigation process. This section will briefly outline each of those principles.

### A. National Uniformity is Necessary

Given that, over the past decade, courts have developed and applied at least five different tests to determine whether it is appropriate to use the civil subpoena process to unmask an anonymous Internet user, it should go without saying that a uniform national standard is both desirable and necessary. The current diversity of tests is especially striking when one considers how few courts have actually ruled on this question. Since the overwhelming majority of courts have still not developed precedent on this issue, the lack of a uniform standard creates unpredictability. In most jurisdictions, it remains a mystery which test a court will apply to determine whether a civil subpoena may be used to unmask an anonymous speaker. Because the Federal Rules of Civil Procedure and all federal appellate courts are

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[50] *Id.* at 721.

[51] *Id.* at 725.

[52] *Id.* at 719.

[53] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

currently silent on the issue, no one knows whether a particular district court will apply a good faith test, a motion to dismiss test, a summary judgment test, a balancing test, or a completely new test. When fundamental First Amendment and privacy rights are at stake, consistent decision making among the federal courts is needed.

Without a uniform standard, plaintiffs who seek to silence, intimidate, or otherwise harass their anonymous critics can also forum shop to take advantage of the radically different tests applied by the various courts. For instance, a plaintiff, knowing that the District of Arizona has adopted the *Cahill* summary judgment test while the Northern District of California merely requires that its allegations withstand a motion to dismiss, will, whenever possible, file suit or issue a subpoena in the Northern District of California and avoid litigation in Arizona's federal courts. A uniform national standard, however, would eliminate the benefits of forum shopping, at least with regard to this issue.

### B. An Anonymous Speaker's Status Should Not Matter

But while it may be easy to see the necessity for a uniform standard, some may question why the *Mobilisa* "summary judgment-plus" test should be the standard over the other tests courts have adopted. One of the main advantages of the "summary judgment-plus" test is that courts can apply it to every situation involving an anonymous Internet speaker, whether the speaker is a defendant or witness, and achieve a fair and just result. The *Mobilisa* court itself acknowledged this important benefit, explicitly "reject[ing] . . . [the] view that courts should apply a different test when the identity of a witness is at issue."[54]

How does the "summary judgment-plus" test facilitate a just result for both defendant and non-defendant speakers alike? One simply needs to examine the shortcomings of the other approaches courts have adopted. The *Mobilisa* court, in its explanation of why it declined to apply the *Cahill* test, stated that "surviving a summary judgment on elements not dependent on the anonymous party's identity does not necessarily account for factors weighing against disclosure."[55] For instance, "the anonymous speaker may be a non-party witness along with a number of known witnesses with the same information."[56] In such a situation, "[t]he requesting party's ability to survive summary judgment would not account for the fact that . . . it may have only a slight need for the

[54] *Mobilisa*, 170 P.3d at 719 n.7.

[55] *Id.* at 720.

[56] *Id.*

anonymous party's identity."[57] As the *Mobilisa* court illustrates, applying any test that does not involve a balancing of the interests has the potential to bring about unjust results when applied to anonymous non-party witnesses.

Similarly, applying only a balancing of the interests test, as in *2TheMart.com*, without accounting for the strength of the plaintiffs' case through a summary judgment requirement would almost certainly lead to unjust results for many anonymous defendants. Three of the four *2TheMart.com* factors — that the information sought relates to a core claim, is materially relevant to that core claim, and cannot be obtained from another source — will automatically lean in any plaintiff's favor, since the plaintiff's causes of action could not proceed without the defendant's identity and presumably the plaintiff would not have identified the defendant as a "John Doe" and issued a subpoena if it already knew the defendant's identity or could easily obtain it elsewhere. The remaining factor — that the subpoena was issued in good faith — is even weaker than the good faith requirement in *America Online*, since a subpoena could be issued in good faith even if there is no probable cause for the underlying lawsuit. Accordingly, any test applied to anonymous defendants must involve something more than just a balancing of the interests.

The above mentioned benefits, of course, are dependent on the assumption that the same test should apply regardless of whether the anonymous speaker is a defendant or a witness. Thus, if — like the dissenting judge in *Mobilisa* — one believes that different tests should apply based on the anonymous speaker's status, the benefits of a "summary judgment plus" approach become less clear. However, compelling reasons exist for applying the same test to both anonymous defendants and witnesses.

Just as applying different tests in different district courts promotes forum shopping, applying one test for anonymous defendants and another for anonymous witnesses promotes frivolous lawsuits and gives plaintiffs the opportunity to frame their claims in a way to best maximize their chances of identifying particular anonymous speakers. The *Mobilisa* court acknowledged this danger, finding that "adopting different standards could encourage assertion of . . . claims simply to reap the benefits of a less-stringent standard."[58] A plaintiff abusing the presence of different standards is a particular concern in the context of strategic lawsuits against public participation, or SLAPP suits, where the

[57] *Id.*

[58] *Id.* at 719.

plaintiff's' goal is not to actually recover damages for a legitimate injury, but to silence or harass a critic.[59]

For instance, in a jurisdiction where the *Cahill* summary judgment test applies to anonymous defendants and the *2TheMart.com* balancing test applies to witnesses, one can imagine a plaintiff whose ultimate goal is not to win, but to silence or harass an anonymous critic, choosing to file a frivolous lawsuit against a known party and identifying the anonymous critic as a necessary witness. After obtaining the speaker's identity, the plaintiff may voluntarily dismiss the initial lawsuit against the known party and initiate new proceedings against the unmasked speaker that, while not even capable of withstanding a motion to dismiss, will nevertheless force the speaker to incur substantial attorneys' fees and deter other speakers from criticizing the plaintiff. In this perverse scenario, an anonymous speaker would have actually been better off if he had been sued in the initial litigation rather than treated as a witness. A uniform "summary judgment plus" test, however, would prevent plaintiffs from gaming the system in such a manner, for the result would be the same regardless of whether the anonymous speaker is identified as a defendant or a witness.

### C. Erring on the Side of Speakers, Not Plaintiffs

Perhaps the most common criticism of the *Dendrite*, *Cahill*, and *Mobilisa* tests is that they set the bar too high for plaintiffs seeking to recover damages for injuries that have occurred over the Internet medium. For instance, Professor S. Elizabeth Malloy has argued that the *Cahill* test "makes it extremely difficult for defamation victims to bring suit against anonymous bloggers" because "[t]he standard created is far too sympathetic to anonymous bloggers and fails to address important issues facing victims of defamation."[60]

The problem with this argument is that neither *Cahill* nor any other test imposing the summary judgment requirement bars a plaintiff from bringing suit against an anonymous speaker. Furthermore, the test is only "sympathetic" to speakers in the sense that it considers the strength of the plaintiff's case at an earlier stage in the proceedings than is typical — however, this is balanced by plaintiffs not having to demonstrate a likelihood of success on issues that are dependent on the speaker's identity.

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[59] Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802-03 (2000).

[60] S. Elizabeth Malloy, *Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1189 (2006).

Given that the plaintiff prevails in fewer than ten percent of all media libel cases,[61] courts should have to err on the side of preserving a speaker's First Amendment rights, and only allow disclosure in the relatively rare circumstances where a plaintiff can demonstrate that he is more likely than not to succeed on the merits.

One must also remember that the civil litigation process is not intended as a tool to harass or shame individuals with whom the plaintiff disagrees.[62] While there are benefits to holding individuals accountable for what they say on the Internet, the judicial system is not the appropriate means to achieve those benefits when the speaker has not actually committed any wrongdoing. Extralegal methods, such as offering "bounties" in exchange for an anonymous speaker's identity, are more appropriate for this purpose.[63]

### D. Legislative, Not Judicial, Action is Required

Finally, technology policy in this area should not be determined by the courts, but by the legislative branch. As discussed earlier, the present system of allowing the courts to determine what tests to apply has resulted in substantial confusion, with no clear, uniform standard emerging. Congress, through amendments to the Federal Rules of Civil Procedure, can instantly create a uniform standard that eliminates all uncertainty, while also minimizing transaction costs.

Furthermore, Congress is in a better position than the courts to create potential remedies for the wrongful disclosure of an anonymous speaker's identity. For instance, under current law, there are no remedies available to anonymous speakers who have their identities wrongfully disclosed when a plaintiff subpoenas an intermediary without complying with the *Mobilisa* or *Cahill* notice requirements. Congress could more easily create appropriate remedies than the federal courts.[64]

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[61] Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985).

[62] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[63] *See, e.g.*, Posting of Anthony Ciolli to First Movers, http://firstmovers.blogspot.com/2008/03/ak47-motion-and-anonymous-internet.html (Mar. 3, 2008, 08:45 EST); Posting of Dan Slater to WSJ.com Law Blog, http://blogs.wsj.com/law/2008/02/26/bounty-hunter-outs-author-of-patent-troll-tracker-blog/ (Feb. 26, 2008, 09:01 EST).

[64] *Cf. In re* Grand Jury Subpoena, Miller, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring) (observing that Congress is "the more appropriate institution to reconcile . . . competing interests") (citing Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990)); Syposs v. United States, 179 F.R.D. 406, 412 (W.D.N.Y. 1998) (noting that it is more appropriate for Congress, rather than

## IV. CONCLUDING REMARKS

President Barack Obama will have many challenges to face over the course of the next four years. Though Internet anonymity and other online civil rights issues have not generated as much media attention or public interest as other matters, they continue to remain important and should be addressed by the new administration. President Obama should lobby Congress to resolve the current state of confusion surrounding this issue through amendments to the Federal Rules of Civil Procedure that would codify the *Mobilisa* "summary judgment-plus" standard and require a litigant to notify an anonymous speaker, demonstrate that his or her claim can withstand a motion for summary judgment, and meet a balancing test before obtaining the relief they seek.

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federal courts, to conduct a weighing of interests and determine whether a procedural rule is necessary to further the public interest).