



Fall 9-1-2001

Applying *McIntyre v. Ohio Elections Commission* to Anonymous Speech on the Internet and the Discovery of John Doe's Identity

Caroline E. Strickland

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Caroline E. Strickland, *Applying McIntyre v. Ohio Elections Commission to Anonymous Speech on the Internet and the Discovery of John Doe's Identity*, 58 Wash. & Lee L. Rev. 1537 (2001).

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Applying *McIntyre v. Ohio Elections Commission* to Anonymous Speech on the Internet and the Discovery of John Doe's Identity

Caroline E. Strickland*

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* The author would like to thank Professor Ronald J. Krotoszynski, Jr. and Professor W. Bradley Wendel for their help with this Note. She would also like to thank her family and friends for their support.

I. Introduction

Statements posted on a Yahoo! financial board¹ speak negatively of Corporation X.² For example, a recommendation that employees of Corporation X leave the company appears on the board. Another posted comment speaks of altered financial reports and the company's lack of future prospects, then concludes that the stock of Corporation X is not a competitive buy. An additional commentator claims that Corporation X advertises and markets products that do not exist. Corporation X believes that it has just been "cybersmeared."³

Corporation X observes a decline in its stock value that coincides with the dates of the alleged cybersmeared described above and wants compensation for this harm. Based on the text of the posted statements, the company could sue for defamation or possible breach of employment contract.⁴ If Corporation X decides to initiate legal proceedings, it will encounter an initial obstacle before it can pursue litigation: similar to much Internet speech, the comments at issue are pseudonymous;⁵ thus, the identities of the statements' authors are unknown. This complication makes it difficult, if not impossible, for the company to proceed in court and obtain relief.⁶

1. See Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 857 n.4 (2000) (explaining that John Does ordinarily post comments on Internet message boards "devoted solely to discussion of a particular corporation" and noting that Yahoo! maintains thousands of financial message boards devoted to particular companies).

2. This hypothetical is based on a recent cybersmear lawsuit, *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/IntFreeSpch/index.cfm> (last visited Oct. 11, 2001), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). See *infra* notes 211-44 and accompanying text (discussing *Dendrite*).

3. See Blake A. Bell, *Dealing With Cybersmear*, N.Y. L.J., Apr. 19, 1999, at 3 (defining corporate cybersmear as false and disparaging rumor about company, its management, or its stock posted on Internet).

4. See *infra* notes 38-49 and accompanying text (discussing various cybersmear claims).

5. Pseudonymous Internet postings appear with the author's user name or other identifying information, whereas anonymous postings appear absent any identifying information. An author's user name is an assigned Internet identity received upon registration with an Internet service provider (ISP) that generally is used for e-mail purposes and for postings to message boards maintained by that ISP. See *infra* note 11 (describing Internet service provider). The postings challenged in cybersmear lawsuits usually are pseudonymous. Court cases cited in the context of cybersmear lawsuits speak in terms of anonymity; thus, this Note uses the terms somewhat interchangeably. For practical purposes, a cybersmear plaintiff is in the same position if challenged postings are pseudonymous or anonymous. In both situations, the cybersmear victim cannot serve the defendant with a copy of the complaint due to the lack of identity information. The presence of a pseudonym does, however, provide the cybersmear victim with one benefit: the pseudonym may be linked to the author's actual name through expedited discovery.

6. See Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3 (2000) (explaining that "[f]rom both a practical and legal perspective, a prin-

Without knowledge of the Internet posters' identities, Corporation X's options are limited. As an alternative to legal proceedings, Corporation X could post a reply to the negative statements on the financial board, although doubts of authenticity may compromise the statement's reliability.⁷ Corporation X instead may hold a press conference in order to explain that the false and negative comments are untrue.⁸ Corporation X could also request that the financial board operator remove the negative statements.⁹ This, however, does not prevent the offending author from posting additional negative comments on the same financial board or on another message board.¹⁰ Faced with these limited options, Corporation X may opt to proceed in court against "John Doe." Section 230 of the Communications Decency Act immunizes John Doe's Internet service provider (ISP)¹¹ and the financial board's host website from liability

cial problem posed by cybersmearing is that alleged cybersmearers, like many users of the Internet, often choose to remain anonymous or pseudonymous online" and thus plaintiff must first identify defendant). *But see id.* at 7 & n.54 (stating it is possible that some cases "could be litigated satisfactorily in their initial stages without requiring identification of individual John Doe defendants" because court does not necessarily need to know defendant's identity to determine jurisdictional issues and because motions to dismiss for failure to state claim turn primarily on legal rather than factual issues). *See also* Carl S. Kaplan, *Judge Says Online Critic Has No Right to Hide*, N.Y. TIMES CYBERLAW J., June 9, 2000, at <http://www.nytimes.com/2000/06/09/technology/09law.html> (last visited Mar. 3, 2001) (stating that "[a] plaintiff is entitled, for starters, to figure out who the defendant is" because identity information is necessary for planning legal strategy (quoting Bruce D. Fischman, plaintiff's attorney in recent cybersmear lawsuit, *Does v. Hvide*, No. 99-22831, *cert. denied*, 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000))); *Corporate Cybersmearing: Using Subpoenas to Unmask 'John Doe'*, Nov. 1, 2000, at <http://www.law.com/cgi-bin/nwlink.cgi?ACG=ZZZ6KUR00FC> (last visited Oct. 11, 2001) (noting difficulty of alleging elements necessary to survive motion to dismiss without knowing defendant's identity).

7. *See Bell, supra* note 3, at 5-7 (noting "risks to replying via the Internet" and recommending that companies treat online replies as they would treat formal press communications). For example, failure to correct beneficial rumors on the website may be characterized as selective disclosure. *Id.*

8. *Id.*

9. *See* Bruce D. Fischman, *Your Corporate Reputation Online*, at http://www.fhdlaw.com/html/corporate_reputation.htm (last visited Oct. 11, 2001) (noting that most commonly used financial message boards are Yahoo!, Motley Fool, Raging Bull, Silicon Investor, Go Network: Individual Investor, Free Realtime, Realize, and Clearstation).

10. *See id.* (listing options for cybersmear victims). A cease-and-desist letter issued to "the Internet user at (pseudonym)" would be virtually useless because the poster could simply obtain a new user name or Internet account and continue posting harmful comments from a new address. *See Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing that wrongful act could be committed entirely online by unidentified author; thus, plaintiff may end up chasing defendant from ISP to ISP with little chance of ever discovering defendant's identity).

11. *See* Jay Eisenhofer & Sidney S. Lieberman, *Caught By the Net: What to Do If a Message Board Messes with Your Client*, 10 BUS. L. TODAY 40, 42 (2000) (describing ISP as Internet service, such as America Online or PSINet, that offers range of commercial services to its customers, including access to computer network, connection to other networks, and e-mail account).

for information posted on their websites.¹² As a result, Corporation X can only hope to obtain a damages award from the thus far unidentified parties.¹³

After filing a lawsuit, a cybersmear victim such as Corporation X might seek an expedited discovery order to facilitate its efforts at uncovering John Doe's identity.¹⁴ Expedited discovery orders allow for limited discovery prior to the formal discovery period; these orders demand production of documents that could uncover the identity of an Internet poster from a message board host or an ISP.¹⁵ Courts issue such orders as an attempt to aid efforts to serve complaints on John Doe defendants.¹⁶ Some courts have granted expedited discovery requests in the cybersmear context.¹⁷ However, opponents fervently dispute the propriety of these orders.

12. See *id.* at 44 (explaining that under Communications Decency Act (CDA) "ISPs are immune from liability for information originating with a third-party user of the service, unless it developed or created the information" (citing 47 U.S.C. § 230(c) (2000))); see also *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1133 (E.D. Va. 1997) (holding that § 230 of CDA created federal immunity to any cause of action that would make ISP liable for information originating with third party users of ISP), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242 (1999) (holding that ISP was not liable for third party's defamatory acts or negligence related to acts).

13. See *Columbia Ins. Co.*, 185 F.R.D. at 578 n.1 (stating that "suing the ISP [for online tortious acts] is most often not productive . . . [because ISPs are] immune pursuant to [§] 230(c) of the Communications Decency Act"); Eisenhofer & Liebesman, *supra* note 11, at 44 (noting that cybersmear claims must be brought against John Doe posters because CDA shields ISPs from liability).

14. See Lidsky, *supra* note 1, at 858 n.6 (stating that "in the typical case, plaintiffs sue an unknown 'John Doe' defendant for defamation and then subpoena John Doe's Internet service provider to uncover his identity"); Eisenhofer & Liebesman, *supra* note 11, at 42 (describing method of "filing a John Doe lawsuit, compelling discovery from the message board host, identifying the wrongdoers, and taking appropriate legal action against the proper parties"); Smith, *supra* note 6, at 3 (stating that companies increasingly respond to online critics by "filing lawsuits against John Doe defendants and then issuing subpoenas to Internet service providers or organizers of message boards seeking to identify the source of the critical speech").

15. See *Columbia Ins. Co.*, 185 F.R.D. at 577 (explaining general rule that "discovery proceedings take place only after the defendant has been served").

16. See Eisenhofer & Liebesman, *supra* note 11, at 42 (explaining that ISP assigns internet user IP address from pool of IP addresses available to ISP each time user logs on to Internet). The IP address is attached to a particular Internet posting and can be linked to its author. *Id.* This is the identifying information plaintiffs seek in expedited discovery. *Id.*; see also Smith, *supra* note 6, at 5 (explaining that speech in cyberspace "leaves an electric identifier that, in many instances, can be readily traced back to its source"). Most people who communicate on the Internet register with an ISP or operator of an online message board; thus, cybersmear plaintiffs can attempt to obtain this identifying information through expedited discovery. *Id.*

17. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26, 38 (Va. Cir. Ct. Jan. 31, 2000), at *8 (denying motion to quash expedited discovery order), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001); *Does v. Hvide*, No. 99-22831, *cert. denied*, 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000) (upholding

The primary challenge to expedited discovery is based on the First Amendment. John Doe defendants and free speech advocates argue that expedited discovery compromises the right to speak anonymously that is granted by the First Amendment¹⁸ and supported by opinions of the U.S. Supreme Court.¹⁹ Opponents assert that many cybersmear plaintiffs are powerful, wealthy corporations that seek to silence critics, employees, John Does, and speech in general on the Internet, and that many cybersmear claims are unsubstantiated.²⁰ The "right" to speak anonymously stems from the "right not to

lower court's grant of expedited discovery); *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 22 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Oct. 11, 2001) (granting expedited discovery of identities of two John Doe defendants), *aff'd*, 775 A.2d 756, 772 (N.J. Super. Ct. App. Div. 2001).

18. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."). A court order constitutes state action and thus is subject to constitutional limitations. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (stating that "[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press . . . [and] [i]t matters not that [the] law has been applied in a civil action"); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that there was state action through judicial enforcement of private agreements). Thus, cybersmear defendants and their advocates rightly apply constitutional protections to the context of expedited discovery orders.

19. See *Smith*, *supra* note 6, at 6 (stating that public interest groups argue that "anonymous online speech is protected by the First Amendment"); John Dorschner, *Miami-Area Court Rules Internet Users Have No Anonymity When Postings Messages*, MIAMI HERALD, Oct. 17, 2000, available at 2000 WL 29450722 (noting that if anonymous Internet speech is not permitted conversation will be stifled and stating that "[t]he ACLU would like to see the courts require some evidence of genuine legal harm" before compromising anonymity (quoting Christopher A. Hansen, ACLU attorney)); Phyllis Plitch, *Defense Sought for Anonymous Online Posters*, WALL ST. J., Feb. 22, 2000, at B9 (stating that constitutional "protection of political speech extends to anonymous expression").

20. See Memorandum of Public Citizen as Amicus Curiae in Opposition to the Requested Discovery at 1, *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/IntFreeSpch/articles.cfm?ID=585> (last visited Oct. 11, 2001) [hereinafter Public Citizen's Brief, *Dendrite*] (stating that companies increasingly file lawsuits without substantial legal basis to "prevent ordinary citizens from using the Internet to express their views about . . . companies . . . [and] hoping to silence their critics . . . [or] . . . obtain the names of critics . . . [to] tak[e] extra-judicial action against them"); Ashley Dunn & Karen Kaplan, *Two Firms Ordered to Identify Internet Message Posters Privacy: Plaintiff in a Defamation Suit Seeks the Identities of Anonymous Chat Room Users Who Criticized Him Online*, L.A. TIMES, Oct. 17, 2000, at C3 (noting that court orders for expedited discovery "could send a chilling message to anonymous Internet users that their identities could be exposed by even the most trivial suits" (quoting Lyrissa Lidsky, Associate Professor of Law, University of Florida College of Law and plaintiff's counsel in recent cybersmear lawsuit)); Plitch, *supra* note 19, at B9 (stating that "[m]any, if not all [cybersmear lawsuits] are frivolous" (quoting Megan E. Gray, cybersmear defendants' attorney)).

speak," which is an ancillary, unenumerated First Amendment right.²¹ Critics rely on the U.S. Supreme Court case *Talley v. California*,²² in which the Court invalidated a law that required disclosure of speakers' identities on handbills that advocated an economic boycott.²³ Free speech proponents frequently rely on *McIntyre v. Ohio Elections Commission*'s²⁴ rule that the First Amendment protects anonymous political leaflets.²⁵ Furthermore, *Buckley v. American Constitutional Law Foundation*²⁶ extended the protection of anonymous speech by invalidating a law which required that petition circulators wear identification badges.²⁷ Throughout this line of cases, the Supreme Court

21. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 356 (1999) (stating that "[t]he Supreme Court has interpreted the right of free speech to entail several associated rights . . . [including] the right *not* to speak"). Other ancillary rights include "the right to associate with others for expressive purposes (and *not* to associate), and the right to facilitate speech through the expenditure of money in connection with political campaigns." *Id.*

22. 362 U.S. 60 (1960).

23. See *Talley v. California*, 362 U.S. 60, 65 (1960) (holding that First Amendment protects distribution of unsigned handbills that urged readers to boycott certain merchants allegedly engaging in discriminatory employment practices). In *Talley*, the U.S. Supreme Court asked whether the First Amendment protected anonymous political handbills. *Id.* at 60. The state convicted the defendant for violating a municipal ordinance that criminalized the distribution of "any handbill in any place under any circumstances" unless it included the name and address of the distributor, the handbill's sponsor or the handbill's author. *Id.* at 61. California argued that its law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." *Id.* at 64. The U.S. Supreme Court rejected this argument, reasoning that the law's text and legislative history did not indicate that the law sought to address those issues. *Id.* The Court recognized the value of anonymous literary works, extended constitutional protection to anonymous political speech, and held that California's identification requirement was an unconstitutional restriction on the freedom of speech. *Id.* at 65.

24. 514 U.S. 334 (1995).

25. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344, 347 (1995) (describing challenged speech as speech "intended to influence the electoral process" and "core political speech"). See *infra* notes 145-81 and accompanying text (describing *McIntyre* decision).

26. 525 U.S. 182 (1999).

27. See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 205 (1999) (holding in relevant part that statutory provision which required that initiative-petition circulators wear identification badges violated First Amendment). In *Buckley*, the U.S. Supreme Court examined a Colorado law's requirement that all petition circulators wear an identification badge bearing the circulator's name. *Id.* at 186. Plaintiffs challenged this part of the law and claimed that it violated the First Amendment's free speech guarantees. *Id.* at 188. The Court first noted that the First Amendment required it to protect "against undue hindrances to political conversations and the exchange of ideas." *Id.* at 192. Next, the Court determined that petition circulation is "core political speech," and thus "at the zenith" of First Amendment protection. *Id.* at 186-87. Colorado's restraint on speech was more severe than Ohio's restraint in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court reasoned, because "[p]etition circulating is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition." *Buckley*, 525 U.S. at 199; see *infra* notes 145-81 and accompanying text (discussing

emphasized the important historical role of anonymous literary and political speech and acknowledged the tradition of judicial protection of anonymous political speech.²⁸ However, it is not clear that the rationale underlying these cases should apply to the speech described in the Corporation X hypothetical.

This Note will consider the application of *McIntyre v. Ohio Elections Commission* in the context of expedited discovery orders in cybersmear lawsuits.²⁹ Part II of this Note will discuss possible cybersmear claims and then describe orders for expedited discovery and arguments for and against these orders.³⁰ Public interest groups, court documents, and legal practitioners often cite *McIntyre v. Ohio Elections Commission*³¹ as an authority for the protection of anonymous Internet speech.³² As such, Part III of this Note will describe the

McIntyre). Thus, the Court concluded that the identification requirement compelled personal name identification when the circulator's interest in anonymity was greatest and, therefore, discouraged participation in the petition circulating process. *Buckley*, 525 U.S. at 199-200. Colorado asserted that it used the statute to "apprehend petition circulators [engaging] in misconduct," but the Court noted that the state had several other laws in place to serve that interest. *Id.* at 198, 205. As a result, the statute did not qualify as a *McIntyre* "more limited [election process] identification requirement." *Id.* at 199 (alteration in original); see *infra* discussion at notes 166-71 and accompanying text (describing this aspect of *McIntyre* Court's decision). Therefore, the Court affirmed the Tenth Circuit's ruling that the Colorado law's requirement was an unconstitutional compromise of free speech rights. *Buckley*, 525 U.S. at 205.

28. See *McIntyre*, 514 U.S. at 342-43 (stating that "even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity" (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)); *Talley v. California*, 362 U.S. 60, 62, 64 (1960) (noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind" and explaining that "persecuted groups . . . throughout history have been able to criticize oppressive practices and laws either anonymously or not at all"). But see *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting) (stating that "the right to anonymity" is not "such a prominent value in our constitutional system that even protection of the electoral process cannot be purchased at its expense," and noting that prior compelled disclosure cases "did not acknowledge any general right to anonymity" but "recognized a right to an exemption from otherwise valid disclosure requirements" if it was reasonably probable "that the compelled disclosure would result in 'threats, harassment, or reprisals from either Government officials or private parties'" (citation omitted).

29. See *infra* Part IV (discussing *McIntyre*'s application to cybersmear context).

30. See *infra* Part II (discussing dilemma of expedited discovery).

31. 514 U.S. 334 (1995).

32. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that statute's prohibition of anonymous, political leafletting invalidly restrained speech); see *infra* notes 145-81 and accompanying text for a discussion of the *McIntyre* case; see also Smith, *supra* note 6, at 3 (explaining that "[i]n a series of amicus briefs filed on behalf of alleged cybersmearers, public interest groups have argued strenuously that the First Amendment protects anonymous online speech" and "rely heavily" on *McIntyre*); Plitch, *supra* note 19, at B9 (stating that ACLU believes that First Amendment's protection of anonymous political speech extends to anonymous Internet expression).

McIntyre decision and will introduce two recent court rulings on expedited discovery orders that cite the case.³³ Many citations to *McIntyre* presuppose that its rationale applies in the cybersmear context and fail to address the distinctions between Mrs. McIntyre's speech and alleged cybersmear. Thus, Part IV of this Note will discuss several such distinctions and will evaluate the application of *McIntyre*'s principles to cybersmear.³⁴ Finally, this Note will conclude that *McIntyre*'s protection of anonymous speech has limits that warrant thorough consideration of cybersmear plaintiffs' interests.³⁵

II. The Expedited Discovery Dilemma

This Part will introduce the expedited discovery order. First, it will describe the types of claims cybersmear victims assert against John Doe defendants. Second, it will explain the process used to obtain an expedited discovery order. Finally, this Part will summarize the arguments for and against expedited discovery.

A. Cybersmear Claims

Corporations increasingly address cybersmear by proceeding against John Does in court.³⁶ John Doe may be a company's employee, competitor, past or present shareholder, or may be an unrelated recreational Internet user.³⁷ Plaintiff corporations base cybersmear actions on existing common law and federal claims including defamation, stock manipulation, and breach of employment contract.³⁸ Libel³⁹ is one of the more common claims asserted

33. See *infra* Part III (discussing First Amendment and anonymous Internet speech).

34. See *infra* Part IV (discussing *McIntyre* in cybersmear context).

35. See *infra* notes 245-306 and accompanying text (discussing technical differences between cybersmear lawsuits and *McIntyre*).

36. See, e.g., Lidsky, *supra* note 1, at 855 (stating that "John Doe has become a popular defamation defendant as corporations and their officers bring defamation suits for statements made about them in Internet discussion fora"); Smith, *supra* note 6, at 3 (noting that companies respond to anonymous or pseudonymous online critics by filing John Doe lawsuits in growing numbers); Elinor Abreu, *Yahoo Postings Prompt More Lawsuits*, THE INDUSTRY STANDARD, Jul. 14, 2000, at <http://www.thestandard.net/article/display/0,1151,16828,00.html> (last visited Oct. 11, 2001) (stating that financial "message boards are proving to be a hotbed of legal activity" and that companies file cybersmear lawsuits with increasing frequency); Howard Mintz, 'Cybersmear' Lawsuits Raise Privacy Concern, Nov. 28, 1999, at <http://www.mercurycenter.com/svtech/news/indepth/docs/boards112999.htm> (last visited Oct. 11, 2001) (stating that in past year, corporations "ranging from Sun Microsystems, Inc. and E*Trade to Ross Stores" filed "cybersmear lawsuits . . . in Silicon Valley courts in unprecedented numbers").

37. See Fischman, *supra* note 9 (listing potential cybersmear posters).

38. See Eisenhofer & Liebesman, *supra* note 11, at 43 (discussing potential cybersmear claims); David E. Dukes & Michael W. Hogue, 'Techno-torts' Pose New Challenges for Litigators, NAT'L L.J., Oct. 9, 2000, at B11 (listing claims alleged in cybersmear lawsuits).

39. See RODNEY A. SMOLLA, THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGU-

in the cybersmear context.⁴⁰ In order to prove a libel claim, the common law of tort requires that a plaintiff show that John Doe published a written, defamatory statement about the plaintiff to a third party.⁴¹ Courts generally do not require proof of economic loss, although some states do require proof of damages.⁴² In addition, Supreme Court precedents usually require proof of fault and proof that the statement at issue is false.⁴³ Accordingly, the statement that Corporation X advertises non-existent products, if false, might give rise to a defamation claim because John Doe published a statement to third parties that could potentially damage Corporation X's reputation.

Harm to Corporation X could surface in the form of a decline in business. In addition, investors use the Internet as a resource for information about publicly traded companies.⁴⁴ As such, a company's stock value could decline considerably as a result of false Internet postings; thus, corporations rightly are concerned about the integrity of information posted on financial boards.⁴⁵

LATION OF MASS MEDIA, FREEDOM OF RELIGION 454 (1999) (explaining that defamation in written or tangible form is libel and defamation in oral form is slander).

40. See Smith, *supra* note 6, at 5, 9 (noting increase in Internet stock manipulation lawsuits and stating that libel "appears to be the most common claim asserted by companies that sue alleged cybersmearers").

41. See RODNEY A. SMOLLA, LAW OF DEFAMATION § 4.01 (1999) (defining defamatory statement as one that "tends so to harm the reputation of another as to lower him in the esteem of the community or to deter third persons from association or dealing with him"); Eisenhofer & Lieberman, *supra* note 11, at 43 (explaining that corporation may assert defamation claim against speaker's false statement of fact that results in damage to reputation).

42. See Lidsky, *supra* note 1, at 873 (stating that libel plaintiff usually does not have to prove economic loss, unless defamatory effect was not clear (citing MARC A. FRANKLIN & DAVID A. ANDERSON, CASES & MATERIALS ON MASS MEDIA LAW 196 (5th ed. 1995))).

43. Lidsky, *supra* note 1, at 873 n.79; see Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986) (stating that when plaintiff is private figure and speech at issue is matter of public concern, plaintiff must prove falsity); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that private figure in defamation lawsuit must prove that defendant's statement was negligent); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending *Sullivan* ruling to "public figures"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (stating that public officials must prove that defendant's statements were false and were made with intent to harm or with reckless disregard of falsity).

44. See Smith, *supra* note 6, at 8 (emphasizing investors' increased use of Internet as information source).

45. See *id.* at 4 & n.12 (explaining that one corporation's shares value declined approximately 2.5 billion dollars as result of false press release); Anne Colden, *Corporations Increasingly Suing their Online Critics, Legal Experts Say*, DENVER POST, Jan. 15, 2001, at E1 (explaining that corporations understandably are concerned about Internet postings that contain negative or false information and potential effects such information can have on stock prices); *Lawsuit Aims at Short-Sellers*, Aug. 30, 2000, at <http://www.wired.com/news/business/0,1367,38522,00.html> (last visited Oct. 11, 2001) (describing technology firm Titan Corporation's stock decline in value of more than fifty percent after false Internet press release stated that company's CEO would soon resign and that corporation would have to revise earnings reports).

Cybersmear's adverse impact on a corporation's stock value also gives rise to a stock manipulation claim. Online stock manipulation, or Internet fraud, occurs when an author posts a statement with the intent to influence a stock's value.⁴⁶ The anti-fraud provisions of the federal securities laws prohibit purposeful misrepresentations.⁴⁷ Accordingly, Corporation X may bring a stock manipulation claim based on John Doe's statements that the company lacks future prospects and that its stock is not a competitive buy if the company can prove that the statements are purposeful misrepresentations.

Corporate plaintiffs also pursue claims based on the employment relationship.⁴⁸ Employees generally must recognize duties of loyalty and confidentiality through contract.⁴⁹ For example, in the hypothetical, John Doe suggested that employees of Corporation X quit working for the company. If Corporation X's employment agreement contained a prohibition on such conduct, the company could assert a breach of contract claim.

B. Requests for Expedited Discovery

Regardless of the claim asserted, no cybersmear victim can obtain judicial relief without first identifying the person from whom they wish to seek relief. As a result, the cybersmear victim likely will attempt to identify John Doe through expedited discovery. An expedited discovery order permits discovery prior to the formal discovery period and usually limits discovery to the information needed to identify a defendant.⁵⁰ These orders are among the most controversial aspects of lawsuits against anonymous Internet posters because at the time a court issues such an order, John Doe might not yet know that a lawsuit against him exists.⁵¹ Conversely, if John Doe is aware of the

46. See *SEC Continues Internet Fraud Crackdown*, Feb. 25, 1999, available at <http://www.sec.gov/news/press/pressarchive/1999/99-24.txt> (last visited Oct. 11, 2001) (describing recent Securities and Exchange Commission (SEC) crackdowns on Internet fraud).

47. See generally 17 C.F.R. § 240.106-5 (2001) (prohibiting purposeful misrepresentations). For example, H-Quotient, Inc. recently filed a lawsuit alleging stock manipulation in the Eastern District of Virginia. See *H-Quotient, Inc. Files Suit Against Alleged Stock Manipulators*, Aug. 4, 2000, available at LEXIS, News Group File, Most Recent Two Years. H-Quotient believed that certain Internet financial board posters defamed and disparaged the company in order to depress its stock value. *Id.*

48. See Smith, *supra* note 6, at 5 (explaining that "[s]everal companies have sued John Doe defendants alleging that the negative online postings appear to originate from employees and thus violate corporate nondisclosure agreements").

49. *Id.*; see *Dukes & Hogue*, *supra* note 38, at B-11 (noting that employers often require that employees recognize certain fiduciary duties).

50. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (noting that courts sometimes permit limited discovery to help plaintiff identify and serve defendant).

51. See *id.* (stating that "[a]s a general rule, discovery proceedings take place only after the defendant [is] served" with process).

lawsuit, he may believe that the claims are unsupported and thus may want to retain his anonymity.

Courts occasionally allow limited, expedited discovery if it will facilitate efforts to identify and to serve an unknown defendant.⁵² Courts grant expedited orders both within and outside of the cybersmear context.⁵³ A cybersmear plaintiff usually will file a lawsuit against John Doe and then petition the court for an expedited order.⁵⁴

When faced with such a petition, a court may require a heightened showing from the requesting party. The *Columbia Insurance Company v. Seescandy.com*⁵⁵ court adopted four limiting principles in its evaluation of an expedited discovery request.⁵⁶ Both judges and free speech advocates often cite these limiting principles in cybersmear lawsuits.⁵⁷

52. *Id.*

53. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971) (noting that trial court ordered United States Attorney to identify "those federal agents who it is indicated by the records of the United States Attorney participated in the . . . arrest of the [petitioner]" (alteration in original) (quoting district court's order that directed production of facts necessary to determine true name of John Doe defendant)); *De Castro v. Sanifill, Inc.*, 198 F.3d 282, 285 (1st Cir. 1999) (stating that district court permitted limited discovery to gather evidence to identify John Doe, Inc. and Richard Doe); *Gillespie v. Civiletti*, 629 F.2d 637, 643 (9th Cir. 1980) (finding that district court abused its discretion in dismissing case with respect to John Doe defendants without requiring that named defendants answer interrogatories that sought names and addresses of supervisors in charge of jail facilities during time period of alleged improper treatment).

54. See *supra* note 14 (describing procedure used to obtain expedited discovery order).

55. 185 F.R.D. 573 (N.D. Cal. 1999).

56. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (listing four "limiting principals [sic]" and explaining that they are "safeguards [to] ensure that . . . [expedited discovery] will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent [its] use . . . to harass or intimidate").

57. See *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 6-7 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001) (adopting *Seescandy.com* limited approach to expedited discovery), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26, 33 n.5 (2000) (noting that *Seescandy.com* court focused "solely on the procedural propriety of allowing discovery before service of process was effected," rather than issue of whether subpoena for expedited discovery would unreasonably compromise defendants' First Amendment rights), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001); Public Citizen's Brief, *Dendrite*, *supra* note 20, at 6 (stating that *Seescandy.com* "required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus giving them an opportunity to defend their anonymity" and "compelled the plaintiff to demonstrate that it had viable claims against such defendants"); Memorandum of Public Citizen in Support of Motion to Quash Subpoena to Yahoo! at 1, *IXL Enterprises, Inc. v. Does* 1-10 (No. 2000CV30567), available at <http://www.citizen.org/litigation/briefs/IntFreeSpch/>

In *Seescandy.com*, Columbia, the plaintiff and assignee of the trademarks "See's," "See's Candies," and "Famous Old Time," filed a claim against several defendants known only by Internet user names.⁵⁸ Columbia claimed that the defendants engaged in trademark infringement and dilution, unfair competition and trade practices, and unjust enrichment because they registered the Internet domain names⁵⁹ "seescandy.com" and "seescandys.com."⁶⁰ Columbia petitioned the court for a temporary restraining order to prevent use of the domain names.⁶¹ The court refused to grant the request because Columbia had not yet served its complaint on the defendants and thus a temporary restraining order would not likely impact the defendant.⁶² In addition, the court explained that it could not issue an *ex parte* preliminary injunction.⁶³ The court recognized the service of process obstacles that occur when defendants are known only by Internet user names.⁶⁴ That problem, explained the court,

articles.cfm?ID=1869 (last visited Oct. 11, 2001) [hereinafter Public Citizen's Brief, *iXL*] (noting that *Seescandy.com* court stated that "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities"). *iXL* Enterprises filed a lawsuit against several John Does alleging that they posted confidential business information and false statements on a Yahoo! financial board. Public Citizen's Brief, *iXL*, *supra*, at 3. *iXL* sought expedited discovery of the John Does' identities. *Id.* at 4; *see also* Smith, *supra* note 6, at 5 (stating that public interest groups often cite *Seescandy.com* in amicus curiae briefs); *EFF and Liberty Project Intercede in Corporate Cybersmear Lawsuit on Behalf of John Doe Defendants*, CYBERSECURITIESLAW TRIB., Feb. 4, 2001, at http://www.cybersecuritieslaw.com/news/archive/cs/tribune_02_11_01.htm#8 (last visited Oct. 11, 2001) [hereinafter *EFF and Liberty Project*] (explaining that two public interest groups asked Northern District of California to adopt *Seescandy.com* standard in review of Rural/Metro Corporation's request for expedited discovery).

58. *See Seescandy.com*, 185 F.R.D. at 576 (discussing known information about defendants).

59. *See id.* at 575 (explaining that on Internet, computers are located by reference to series of numbers that are used to specify address of particular machine connected to Internet (IP address) and that domain names are alphanumeric strings associated with particular IP addresses).

60. *Id.* at 576. Columbia licensed use of the trademarks to See's Candy Shops, Inc. *Id.* at 575.

61. *Id.* at 575.

62. *See id.* at 577 (explaining that discovery typically begins after defendant receives complaint and reasoning that because plaintiff had not yet located defendant, "any temporary restraining order issued could only be in effect for a limited time and would be unlikely to have any effect on defendant").

63. *See id.* (stating that once temporary restraining order had expired, plaintiff "would be unable to obtain a preliminary injunction because such relief cannot be imposed *ex parte*").

64. *See id.* (describing special problem posed by anonymous Internet use). The court cited Rule 4 of the Federal Rules of Civil Procedure as the default federal requirement that plaintiffs sufficiently identify the defendant so that a summons can be served, which generally

supported leniency in the service of process requirements.⁶⁵ Accordingly, the court granted Columbia fourteen days to submit its request for limited, expedited discovery in order to facilitate efforts to identify and serve the defendants.⁶⁶

The *Seescandy.com* court emphasized the importance of balancing the interests of both parties.⁶⁷ In the court's point of view, a plaintiff needs access to a forum where, if injured, he or she can seek relief, while a defendant values his or her ability to speak anonymously online.⁶⁸ The right to communicate anonymously or pseudonymously exists, explained the court, as long as the communications fall within the limits of the law.⁶⁹ The court concluded that orders for expedited discovery should not issue in the absence of a legal wrong because of the value of anonymous Internet speech.⁷⁰

With this consideration in mind, the court adopted "limiting principles" for use in its evaluation of the plaintiff's request for expedited discovery in order to prevent misuse of the process.⁷¹ First, the court determined that the plaintiff must sufficiently identify the defendant so that the court could assess whether jurisdictional requirements were met.⁷² Second, the court required that the plaintiff illustrate its attempts at compliance with service of process requirements by disclosing its previous efforts at locating the defendant.⁷³ Third, the plaintiff needed to demonstrate that its claim could survive a motion to

requires knowledge of the defendant's name and address. *Id.* The court also noted that unlawful acts could be committed entirely online by unidentified authors, and thus a plaintiff could end up chasing the defendant from ISP to ISP with little chance of ever discovering his identity. *Id.* at 578.

65. *See id.* at 578 (explaining that due to Internet's unique nature, "the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with an [sic] forum in which they may seek redress for grievances").

66. *See id.* at 579-80 (noting that plaintiff had fulfilled other limiting principles' requirements, thus plaintiff could submit request for expedited discovery); *id.* at 577 (recognizing that courts occasionally grant requests for limited, expedited discovery if order will help identify defendant).

67. *See id.* at 578 (noting "legitimate and valuable right to participate in online forums anonymously or pseudonymously" and "need to provide injured parties with an [sic] forum in which they may seek redress for grievances").

68. *Id.*

69. *See id.* (stating that "[p]eople are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law").

70. *See id.* (noting that anonymous Internet speech fosters interaction and debate).

71. *Id.* at 578.

72. *See id.* (stating that plaintiff must identify unknown party "with sufficient specificity" to allow court to determine if defendant "is a real person or entity who could be sued in federal court" in order to meet jurisdiction and justiciability requirements).

73. *Id.* at 579.

dismiss.⁷⁴ Finally, the plaintiff must file a statement in support of its request that includes a list of persons from whom discovery was likely to provide identifying information.⁷⁵ The court determined that Columbia fulfilled requirements one through three⁷⁶ and thus allowed it fourteen days to meet requirement four.⁷⁷

Proponents of *Seescandy.com* believe that the limiting principles are a logical step towards the level of judicial protection John Doe defendants need.⁷⁸ Others criticize the *Seescandy.com* principles.⁷⁹ For example, the *Seescandy.com* requirements might place the plaintiff in a bind because the limiting principles may prevent the plaintiff from being able to provide the level of information necessary in order to meet the requirements.⁸⁰ This dilemma arises because it is difficult to allege all that is necessary to survive a motion to dismiss and thus meet the requirements of the third limiting principle without knowledge of the defendant's identity.⁸¹ For example, if the plaintiff is a public figure,⁸² he or she would have to prove actual malice in a defamation claim.⁸³ This would be practically impossible absent knowledge

74. See *id.* (noting that conclusory pleadings would not suffice and explaining that requirement was "necessary here to prevent abuse of this extraordinary application of the discovery process"); *id.* (noting that pre-service discovery is similar to process used to obtain arrest warrants during criminal investigations, and that probable cause showing protects against use of ex parte procedures "to invade the privacy of one who has done no wrong"). A similar protection, reasoned the court, was necessary to prevent abuse of pre-service discovery. *Id.*

75. *Id.* at 580.

76. See *id.* at 578-80 (explaining that Columbia sufficiently had shown that there was actual person behind various known aliases, had made good faith effort to specifically identify and serve notice on defendant, and had shown that trademark infringement claim could withstand motion to dismiss).

77. *Id.* at 580-81.

78. Public Citizen's Brief, *Dendrite*, *supra* note 20, at 6; see *EFF and Liberty Project*, *supra* note 57 (explaining that two public interest groups asked Northern District of California, San Jose Division, to adopt *Seescandy.com* standard in its review of Rural/Metro Corp.'s request for expedited discovery from Yahoo!).

79. See Smith, *supra* note 6, at 7 n.52 (stating that *Seescandy.com* test "has been criticized as 'drastic' and 'largely unworkable' by at least one practitioner").

80. See *Corporate Cybersmearing: Using Subpoenas to Unmask 'John Doe'*, Nov. 1, 2000, at <http://www.law.com/cgi-bin/nwlink.cgi?ACG=ZZZ6KUR00FC> (last visited Oct. 11, 2001) (noting difficulty of alleging what is necessary to survive motion to dismiss without knowing defendant's identity and reasoning that *Seescandy.com* test thus will prevent many plaintiffs from discovering identity of anonymous Internet posters).

81. *Id.*

82. See Lidsky, *supra* note 1, at 907-12 (discussing classification of corporate cybersmear plaintiffs as "public figures").

83. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that public figures must prove actual malice in defamation claim).

of the defendant's identity because proof of actual malice requires knowledge of the defendant's state of mind.⁸⁴

C. Arguments Against Granting Requests for Expedited Discovery

Opponents of expedited discovery in John Doe cybersmear lawsuits argue that the orders compromise First Amendment rights.⁸⁵ For example, Public Citizen⁸⁶ recently filed several amicus curiae briefs that opposed expedited discovery.⁸⁷ Public Citizen argued that compelled identification of John Doe defendants' identities might compromise the First Amendment right to anonymity, and thus courts should review orders for expedited discovery with a critical eye.⁸⁸ The American Civil Liberties Union (ACLU)⁸⁹ similarly argued in an amicus curiae brief that there is a right to communicate anonymously and noted that although defamatory speech does not receive First Amendment protection, courts should initially assume that John Doe's speech deserves protection.⁹⁰

84. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (explaining that statement published with "actual malice" is published with "knowledge that it [is] false or with reckless disregard of whether it [is] false or not").

85. Parts III and IV will discuss the First Amendment argument by providing a detailed examination of two recent cybersmear lawsuits. This Part provides an overview. *Infra* Parts II.C-D; see *infra* notes 139-306 and accompanying text (discussing application of First Amendment in cybersmear lawsuits).

86. Public Citizen is a Washington, D.C. public interest group founded by Ralph Nader. Public Citizen's Brief, *Dendrite*, *supra* note 20, at 1. The group promotes active protest of "abuses [committed] by . . . large institutions, including corporations, government agencies and unions" and advocates protection of consumer, citizen, and employee rights. *Id.* Public Citizen often participates in lawsuits that involve the First Amendment rights of citizens who engage in public debate. *Id.*

87. Public Citizen's Brief, *Dendrite*, *supra* note 20; Public Citizen's Brief, *iXL*, *supra* note 57.

88. See Smith, *supra* note 6, at 6 (stating that disclosure should be granted when it is essential to case, when all other elements of claim can be established, and when plaintiff has exhausted all other means of proving element for which disclosure is deemed necessary (citing Public Citizen's Brief, *Dendrite*, *supra* note 20)).

89. The ACLU is "a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Bill of Rights," and the ACLU of Florida is an affiliate branch of the ACLU. See Brief of ACLU and ACLU of Florida, at 1-2, *Hvide v. Does*, 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000), available at http://www.aclu.org/court/hvide_v_doe.html (last visited Feb. 18, 2001) [hereinafter ACLU's Brief, *Hvide*]. The ACLU seeks to defend citizens' civil liberties from "unconstitutional and unwarranted governmental intrusion." *Id.* at 2.

90. See Mintz, *supra* note 36 (noting that ACLU favors heavy weight for First Amendment right to anonymous communication, even in court review of allegedly unlawful speech).

Other free speech advocates share the belief that the Constitution grants a right to communicate anonymously and that courts should protect that right.⁹¹ In order to provide such protection, the free speech advocates believe that courts should require a showing that a cybersmear claim is likely to succeed on the merits before granting orders for expedited discovery.⁹² For example, in *John Does v. Hvide*,⁹³ a Florida appellate court upheld a lower court's ruling that permitted limited, expedited discovery to aid efforts to uncover the identities of eight anonymous Internet authors.⁹⁴ Eric Hvide sued several John Does for false Internet statements regarding an SEC investigation of Hvide and alleged fraudulent accounting practices.⁹⁵ The John Doe defendants filed a motion to quash the order for expedited discovery based on a First Amendment argument, yet the appellate court refused to review the decision.⁹⁶ *Hvide* received a great deal of publicity because it was one of the first cybersmear lawsuits to reach an appellate court that addressed the First Amendment's protection of anonymous Internet speech.⁹⁷ *Hvide's* potential effect on subsequent cybersmear lawsuits is uncertain, however, because the court did not issue a written opinion or provide reasons for its decision.⁹⁸ Nevertheless, free speech advocates believe that the Florida appellate court's

91. See Mark Donald, *Meet John Doe*, DALLAS OBSERVER ONLINE, Dec. 14, 2000, available at <http://www.dallasobserver.com/issues/2000-12-14/news.html> (last visited Oct. 11, 2001) (stating that some "believe there is a clear right to communicate anonymously under the First Amendment").

92. See *id.* (noting that if court grants petition for expedited discovery and later determines that plaintiff's claim is frivolous, First Amendment rights will be compromised unnecessarily and irreparably).

93. 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000).

94. *Id.*

95. See Ellis Berger, *Court Tackles Anonymity on the Net in Case Raising Free Speech Issues*, S. FLA. SUN-SENTINEL, Sept. 21, 2000, at 1B (explaining that Hvide, former president and chief executive officer of Hvide Marine, claimed that he had to resign from his job as result of defamatory Internet messages posted by "disgruntled stockholders, current or former employees or some other mean-spirited critics" hiding behind First Amendment).

96. See Steven Bonisteel, *Appeals Court: Anonymous Posters Can't Hide on the Net*, NEWSBYTES NEWS NETWORK, Oct. 16, 2000, available at 2000 WL 27301511 (stating that Florida appellate court allowed lower court's expedited discovery order to stand); John Dorschner, *Internet ID Must Be Revealed: Appeals Court Rules in Hvide Marine Case*, MIAMI HERALD, Oct. 17, 2000, available at <http://www.Miami.co/herald/newslibrary> (last visited Oct. 23, 2001) (stating that appellate court refused to review lower court's decision and did not issue written opinion); Kaplan, *supra* note 6 (stating that appeals court judge "squarely rejected" defendants' First Amendment based opposition to disclosure of their identities).

97. See Berger, *supra* note 95 (explaining that case is one of first of its kind to reach appellate level and that it is among many decisions testing limits of First Amendment's application to Internet speech).

98. See Dorschner, *supra* note 96 (stating that appellate court's decision does not set precedent because court did not issue written opinion).

action may chill Internet speech and fear that other courts might follow the *Hvide* example.⁹⁹

In addition to the First Amendment challenge, some argue that John Doe lawsuits are "strategic lawsuits against public participation" (SLAPPs), or "cyberSLAPPs," and thus believe that courts should treat requests for expedited discovery with caution. A SLAPP is a lawsuit that lacks substantial merit, is filed against individuals or groups with the intent to silence speech or divert resources, and is generally a response to the exercise of the right to speak out on a public issue.¹⁰⁰ Critics claim that cybersmear plaintiffs file lawsuits to silence their critics or to uncover the identities of critical employees and then fire them.¹⁰¹ An attorney with the Electronic Privacy Information Center (EPIC)¹⁰² stated that courts need a method for screening out frivolous cybersmear claims and attempts to suppress criticism.¹⁰³ Critics point to a Raytheon cybersmear lawsuit as an example of a "cyberSLAPP."¹⁰⁴ Raytheon's complaint accused twenty-one John Does of disclosing trade secrets.¹⁰⁵ These "trade secrets" turned out either to be false or existing public knowledge.¹⁰⁶

99. See Dunn & Kaplan, *supra* note 20, at C3 (stating that "the court's message could send a chilling message to anonymous Internet users that their identities could be exposed by even the most trivial suits by corporations seeking to silence their critics" (quoting Lyrissa Lidsky)); Catherine Wilson, *Anonymous Net Posting Not Protected*, AP ONLINE, Oct. 16, 2000, available at 2000 WL 27907149 (stating that critics of ruling think it could have "a chilling effect on free expression in Internet chat rooms").

100. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary On Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802 (2000); see GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8 (1996) (stating that SLAPP lawsuits are attempts to silence speech regarding governmental action).

101. See Mary P. Gallagher, *In Cybersmear or CyberSLAPP Suits, Discovery Means Finding a Defendant*, 161 N.J. L.J. 397, July 31, 2000 (stating that many cybersmeares are SLAPP lawsuits and that plaintiffs often use expedited discovery as means to uncover identities and to fire any critical employees); Lidsky, *supra* note 1, at 860 n.11 (explaining that SLAPPs are similar to cybersmear lawsuits "in the sense that both are brought primarily to silence defendants for speaking out," but noting that cybersmear lawsuits differ because challenged speech is not directed at influencing governmental action).

102. EPIC is a public interest research group located in Washington D.C. *About EPIC*, at <http://epic.org/#about> (last visited Oct. 11, 2001). The group seeks to focus public attention on civil liberty and privacy issues. *Id.*

103. See Kaplan, *supra* note 6 (noting that some cybersmear lawsuits arguably are disguised SLAPP lawsuits); Plitch, *supra* note 19, at B9 (noting possible motivations for cybersmear lawsuits and claiming that many corporate plaintiffs do not seek compensation for business damage).

104. See Verne Kopytoff, *Online Speech Hit with Offline Lawsuits*, S.F. CHRON., June 26, 2000, at B1, available at 2000 WL 6485543 (describing Raytheon lawsuit claims and noting that critics say claims were unsubstantiated).

105. *Id.*

106. *Id.*

Although some cybersmear claims rightly are classified as SLAPPs, wholesale characterization of cybersmear lawsuits in this manner ignores both the unique nature of the Internet and the potential for great harm to cybersmear targets.¹⁰⁷ John Doe can use the Internet's widespread reach to inflict serious harm on a corporation.¹⁰⁸ Furthermore, as recent cybersmear lawsuits indicate, corporations may obtain remedies from John Does regardless of their general lack of money for damages.¹⁰⁹ For example, a cybersmear lawsuit may alert the public to the falsity of certain Internet statements.¹¹⁰ Furthermore, a cybersmear plaintiff may be able to negotiate a settlement agreement that mandates a halt to negative Internet postings. For example, Credit Suisse First Boston sued ten John Does and one named defendant in the Southern District of New York in July 2000.¹¹¹ Credit Suisse alleged that certain Internet postings concerning the integrity of the investment bank and one of its research analysts were false and defamatory and claimed that the postings could potentially harm its business.¹¹² The bank sought one million dollars in damages and an order to prohibit further defamatory postings.¹¹³ Credit Suisse negotiated a non-monetary settlement agreement in which the named defendant agreed not to make further false statements about the company or its analyst.¹¹⁴

Similarly, the chairman of Talk Visual Corporation recently settled a John Doe lawsuit in his company's favor.¹¹⁵ The John Doe defendant posted Internet statements which claimed that Talk Visual's chairman engaged in

107. See Lidsky, *supra* note 1, at 865 (stating that classification of cybersmear lawsuits as SLAPP lawsuits "ignores the power that the Internet gives irresponsible speakers to damage the reputations of their targets").

108. See *id.* at 884 (stating that Internet defamation "may have a greater impact than . . . [defamation] in print" because statements can be copied and forwarded on to other readers).

109. See *id.* at 876 (stating that plaintiffs may seek vindication with lawsuit or may just want defamatory postings to stop).

110. See *id.* at 876-77 (concluding that corporate plaintiffs often seek "symbolic victor[ies]" for financial reasons and may bring lawsuits as part of public relations campaign).

111. *Credit Suisse Files Suit Alleging One of Its Analysts Was Cybersmeared*, CYBERSECURITIESLAW TRIB., Jul. 17, 2000 available at <http://www.cybersecuritieslaw.com> (last visited Oct. 23, 2001) [hereinafter *Credit Suisse*].

112. See *id.* (describing Credit Suisse's allegations that certain John Doe Internet postings to Yahoo! financial board defamed company and its analyst); Bloomberg News, *Investment Firm Files Suit Over Message Boards*, (July 12, 2000), available at <http://news.cnet.com/news/0-1005-200-2249203.html> (last visited Oct. 23, 2001) (stating that Credit Suisse alleged that Internet postings were false, defamatory and "potentially injurious to the business of [Credit Suisse]").

113. See *Credit Suisse*, *supra* note 111 (describing relief sought by Credit Suisse).

114. See *id.* (reporting that Credit Suisse settled its cybersmear lawsuit with one named defendant in January 2001).

115. See Smith, *supra* note 6, at 5 (describing recent success of cybersmear plaintiff).

improper stock transactions.¹¹⁶ Talk Visual agreed not to enforce a court damages award in exchange for the defendant's agreement not to further defame the company or its chairman.¹¹⁷

When addressing requests for expedited discovery, some courts recognize the possibility that cybersmear complaints may be masked SLAPP lawsuits. For example, in *Seescandy.com*, the court adopted limiting principles to prevent harassment or intimidation of defendants through the use of expedited discovery.¹¹⁸ In the *Dendrite* lawsuit, the judge required a probable cause showing to ensure that the corporate plaintiff would not misuse court procedure to compromise free speech rights.¹¹⁹ Similarly, in *In re Subpoena Duces Tecum to America Online, Inc.*,¹²⁰ the court recognized a compelling state interest in protecting companies from unlawful Internet communications, yet nevertheless required that the plaintiff put forth proof of a valid claim before it would uphold the expedited discovery order.¹²¹

D. Arguments in Favor of Granting Requests for Expedited Discovery

When considering the argument that cybersmear lawsuits violate the First Amendment, it is important to recognize that corporate plaintiffs also have interests that merit legal protection.¹²² For example, investors rely on Internet

116. *Id.*

117. *Id.*

118. *See* *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (1999) (recognizing potential for frivolous claims and thus implementing protective standard).

119. *See* *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001) (requiring showing of probable cause to protect "against the use of out-of-court procedures to invade the privacy of a person who has done no wrong"), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

120. *See In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *7 (Va. Cir. Ct. Jan. 31, 2000) (stating that "before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made"), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001).

121. *See id.* (noting that Indiana had compelling state interest in "protect[ing] companies operating within its borders" against wrongful conduct alleged and stating general principle that only compelling state interest can justify burden on First Amendment rights (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) and *NAACP v. Button*, 371 U.S. 415, 438 (1963))); *id.* (requiring plaintiff to show evidence of "a true, rather than [a] perceived, cause of action" before it would grant discovery request that could negatively impact defendants' right to speak anonymously on Internet).

122. *See Eisenhofer & Liebesman*, *supra* note 11, at 46 (noting that courts recognize that "anonymity is not a license to ignore the law. . . [t]here is no First Amendment protection for a poster committing tortious acts like fraud, defamation and misappropriation of trade secrets"

financial boards as a primary source of information about publicly traded companies.¹²³ Thus, corporate officers often fear the negative impact of false anonymous Internet postings on their company's stock value.¹²⁴ Companies might conclude that legal proceedings are the most effective means to protect both reputation and stock value.¹²⁵ One First Amendment scholar proposes that the "opinion privilege"¹²⁶ should protect much speech on Internet financial boards because Internet posters do not claim to provide expert opinions and because readers understand that the statements are pure opinion.¹²⁷ To the contrary, it seems misguided to presume that all Internet users have this level of understanding. If that theory is true, it is difficult to explain past situations in which false speech impacted stock prices. For example, Lucent Technology's stock price fell 3.6%¹²⁸ the day after a false Internet press release stated that the company expected an earnings shortfall.¹²⁹ This illustrates the potential impact of false Internet postings and indicates that companies have an interest in protecting the integrity of information posted on Internet financial boards.

(citing *Colson v. Groham*, 174 F.3d 498 (5th Cir. 1999)); Lidsky, *supra* note 1, at 881 (recognizing that "it is perfectly legitimate for plaintiffs to seek to stop an onslaught of offensive and damaging untruths").

123. See Smith, *supra* note 6, at 12 (explaining potential negative effects of information posted to Internet financial boards); David L. Sobel, *The Process that "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, 6 (2000) (stating that "[c]ompanies have to worry about chat rooms and bulletin boards because the Internet allows for rapid dissemination of information to a large audience").

124. See Abreu, *supra* note 36 (explaining possible negative effects of information posted to Internet financial boards).

125. See Kopytoff, *supra* note 104, at B1 (noting potential for harm from Internet postings due to increased use of Internet financial boards by investors).

126. See Lidsky, *supra* note 1, at 919 (explaining that First Amendment "extends a privilege to statements that do not imply an assertion of objective fact, either because such statements 'cannot reasonably be interpreted as stating actual facts' or because statements cannot be proven false (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990)). This privilege is known as the "opinion privilege." *Id.*

127. See *id.* at 865, 919-38 (stating that "the opinion privilege may be a viable defense against the use of defamation law to silence John Doe, but only if courts are willing to adapt the privilege to the unique social context of cyberspace"); Plitch, *supra* note 19, at B9 (stating that one commentator believes that First Amendment opinion privilege should be adopted to "protect the kind of hyperbolic, exaggerated and shrill type of discourse common on [Internet financial] boards" (quoting Lyrissa Lidsky)); *id.* (stating that Lyrissa Lidsky believes that much posting to Internet financial boards is protected by "opinion privilege" because "people understand that they're not giving an expert opinion on a stock price. . . [a reader is] not expecting the same thing from a John Doe as [he] do[es] from a Wall Street Journal reporter").

128. See *Trader Charged with Fraud for Lucent Posting*, NEWSDAY, Mar. 30, 2000, at A56, available at 2000 WL 10004943 (noting that incident reduced Lucent's market capitalization by more than 7.1 billion dollars).

129. *Id.*

The general nature of the Internet further illustrates support for expedited discovery orders. The Internet provides a unique opportunity for speech, including false speech, to reach large audiences.¹³⁰ One author noted four aspects of Internet communication that may potentially affect cybersmear victims.¹³¹ First, an online speaker has immediate access to a large audience.¹³² Online speech can be printed out, downloaded, forwarded, or posted to an online bulletin board for others to read.¹³³ Second, most people can access a public or private computer and participate in discussions on a wide range of topics unhindered by any editorial content screening.¹³⁴ Third, Internet users can easily locate and communicate with others that have common interests.¹³⁵ Fourth, unlike in other media, it is the norm to speak anonymously on the Internet.¹³⁶ These qualities increase the potential for harm from false Internet speech; thus, courts should consider the Internet's unique nature when evaluating requests for expedited discovery. Courts largely analyze Internet issues under existing common law principles; therefore it is likely that the Internet's unique nature does not receive enough weight in the cybersmear context.¹³⁷

130. See Smith, *supra* note 6, at 3 (noting enhanced possibilities for communication on Internet and citing estimate of Internet usage as roughly 250 million Internet users worldwide in late 2000).

131. See Edward A. Cavazos, *The Idea Incubator: Why the First Amendment Poses Unique Problems for the First Amendment*, 8 SETON HALL CONST. L.J. 667, 668-69 (1998) (stating that "the Internet facilitates the creation of new ideas in a way we haven't seen before and . . . promotes propagation of those ideas" because Internet speech reaches large audiences without burdens of editorial control).

132. See Smith, *supra* note 6, at 3 (explaining that Internet speaker has larger audience than does canvasser handing out leaflets in public park); *Stop Signs on the Web: The Battle Between Freedom and Regulation on the Internet*, ECONOMIST, Jan. 13, 2001, available at 2001 WL 7317239 [hereinafter *Stop Signs*] (explaining that Internet transmits data instantaneously and that flow of information is difficult to stop).

133. See Lidsky, *supra* note 1, at 884-85 (explaining that online defamatory "statements can be copied and posted in other Internet discussion fora;" thus, "the potential audience and the subsequent potential for harm are magnified"); Smith, *supra* note 6, at 3 (noting that "[a]n email or posting on a message board can also be republished again and again" which gives Internet communications "the extraordinary capacity . . . to replicate almost endlessly").

134. See Smith, *supra* note 6, at 3 (noting that most other media forms have editorial screening procedures).

135. See *id.* at 3-4 (stating that Internet speaker can "communicate with other persons who are actually interested in the speaker's subject matter in ways that do not occur so easily in the real world").

136. *Id.* at 4.

137. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 210 (1996) (noting that one of "the best ways to learn the law applicable to specialized endeavors is to study general rules" and stating that "most behavior in cyberspace is easy to classify under current property principles"). *But see* Lawrence Lessig, *The Law of the Horse:*

III. *The First Amendment and Anonymous Internet Speech*

In the context of expedited discovery requests, cybersmear defendants, their attorneys, and free speech advocates assert that John Doe has a First Amendment right to communicate anonymously, that cybersmear lawsuits discourage online speech, and that most challenged Internet postings are either non-actionable criticism or opinion.¹³⁸ These arguments rely heavily on the Supreme Court's decision in *McIntyre v. Ohio Elections Commission*.¹³⁹ Judges, attorneys, and free speech advocates cite *McIntyre* as a basis for protection of anonymous Internet speech.¹⁴⁰ A thorough examination of both *McIntyre*'s facts and the Court's analysis indicates that the assumption that the case extends to all anonymous Internet speech is conclusory and may be incorrect. *McIntyre* invalidated an overbroad regulation of anonymous political speech.¹⁴¹ Although the decision describes the unconstitutionality of unlimited restrictions on speech, it does not hold that all regulation of speech transgresses cherished free speech values. Furthermore, major factual and technical distinctions indicate that the Court did not contemplate cybersmear in its assessment of Mrs. McIntyre's speech. As such, wholesale application of *McIntyre* in the context of a cybersmear claim is misapplied.

Why Cyberlaw Might Teach, 113 HARV. L. REV. 501, 508 (1999) (explaining that law regulates behavior in cyberspace "in some cases . . . more efficiently, in others not" and describing problems unique to cyberspace); *Stop Signs*, *supra* note 132 (stating that some argue that Internet "need[s] laws and legal institutions entirely of its own" because of its unique nature).

138. See Smith, *supra* note 6, at 3 (discussing various arguments against allowing expedited discovery); *supra* notes 126-27 (discussing First Amendment "opinion privilege").

139. 514 U.S. 334 (1995); see Smith, *supra* note 6, at 7 (noting that critics of expedited discovery orders rely heavily on *McIntyre*); see also Solveig Singleton, *Panel on Privacy Issues in Cyberspace*, 8 TEX. J. WOMEN & L. 295, 302 (1999) (stating that *McIntyre* is cited by Internet users who want no regulation of anonymity and who base their argument on *McIntyre*'s conclusion that anonymous speech "has been important in our political process and . . . needs to be protected"); Colden, *supra* note 45, at 4 ("First Amendment advocates such as the American Civil Liberties Union [cite] a U.S. Supreme Court decision from 1995 that established the right to speak anonymously . . . [they] argue that [the] right applies to cyberspace as well.").

140. See *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 19 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001) (recognizing *McIntyre*'s factual distinctions and concluding that its general principle – that First Amendment protects anonymous speech – nevertheless applied), *aff'd*, 775 A.2d 756 (N.J. Super Ct. App. Div. 2001); Eisenhofer & Liebesman, *supra* note 11, at 46 (stating that proponents of absolute anonymity argue that *McIntyre* governs anonymous Internet communications); Public Citizen's Brief, *Dendrite*, *supra* note 20, at 4; Public Citizen's Brief, *iXL*, *supra* note 57, at 5; see also Singleton, *supra* note 139, at 302 (noting reliance on *McIntyre* in argument for protection of anonymous Internet speech).

141. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351 (1995) (concluding that Ohio prohibition "encompasses documents that are not even arguably false or misleading" and thus was overbroad, and rejecting Ohio's argument that compelling state interests justify prohibition).

This Part will first examine the *McIntyre v. Ohio Elections Commission*¹⁴² decision. Next, it will address two recent court opinions, *Dendrite International, Inc. v. Does*¹⁴³ and *In re Subpoena Duces Tecum to America Online, Inc.*¹⁴⁴ These two cases illustrate judicial reliance on *McIntyre* in the analysis of requests for expedited discovery.

A. McIntyre v. Ohio Elections Commission

In *McIntyre*, the Court held that an Ohio election law's prohibition of the distribution of anonymous campaign literature violated the First Amendment.¹⁴⁵ Mrs. McIntyre distributed leaflets in opposition to a proposed school tax to attendees of a public meeting at a local middle school.¹⁴⁶ These leaflets concluded with the signature "CONCERNED PARENTS AND TAXPAYERS."¹⁴⁷ As a result, the Ohio Elections Commission fined Mrs. McIntyre for violation of the Ohio election law that prohibited distribution of anonymous leaflets.¹⁴⁸ The leaflets did not contain libelous, false, or misleading information; rather, the Commission fined Mrs. McIntyre solely for her violation of the ban on anonymous political leaflets.¹⁴⁹

142. 514 U.S. 334 (1995).

143. *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

144. *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001).

145. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (stating that Ohio statute's prohibition of distribution of anonymous campaign literature abridges freedom of speech in violation of First Amendment).

146. *Id.* at 336. The relevant portion of the Ohio statute read:

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence voters in any election . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same or the person who issues, makes, or is responsible therefor.

Id. at 338 (quoting Ohio Rev. Code Ann. § 3599.09(A) (1988)).

147. *Id.* at 337.

148. *Id.* at 336, 338.

149. See *id.* at 337, 338 (stating there was "no suggestion that the text of [Mrs. McIntyre's] message was false, misleading, or libelous" and noting that Commission assessed fine for violation of unsigned leaflets law).

The *McIntyre* Court reviewed the constitutionality of the Ohio Election Commission's fine.¹⁵⁰ In this review, the Court emphasized the historical and literary importance of anonymous writings.¹⁵¹ The Court explained that the choice to remain anonymous might stem from fear of economic or governmental retaliation, concern about social ostracism, or the desire to preserve privacy.¹⁵² The Court reasoned that the contribution of anonymous literary works to the "marketplace of ideas" outweighed any public concern with the speech's source, and thus concluded that the First Amendment protects an author's decision to remain anonymous.¹⁵³

A prior Supreme Court decision, *Talley v. California*,¹⁵⁴ extended the freedom to publish anonymously to the advocacy of political causes.¹⁵⁵ In *Talley*, the Court recognized the historical importance of unpopular groups' anonymous criticism of oppressive regimes.¹⁵⁶ Furthermore, the Court stated that an author might believe that an idea will be more persuasive if delivered anonymously.¹⁵⁷ The *McIntyre* court explained that although *Talley* specifically addressed the anonymous advocacy of an economic boycott, it established a general respect for the anonymous advocacy of political causes.¹⁵⁸ Despite this recognition, the Court explained that anonymous speech could be abused if used to shield fraudulent conduct.¹⁵⁹

With this background, the *McIntyre* Court first noted that the Ohio elections law directly regulated the content of speech.¹⁶⁰ Furthermore, the statute

150. *Id.* at 341-47.

151. *See id.* at 341 ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." (citing *Talley v. California*, 362 U.S. 60, 64 (1960))).

152. *See id.* at 341-42 (1995) (explaining reasons why people value anonymity).

153. *See id.* at 342 (noting that "an 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 of speech protected by the First Amendment").

154. 362 U.S. 60 (1960).

155. *See Talley v. California*, 362 U.S. 60, 64-65 (1960) (holding that First Amendment protects anonymous handbills advocating boycott of merchants who allegedly discriminated in their employment practices).

156. *See id.* at 64 (stating that "[p]ersecuted groups and sects have from time to time throughout history been able to criticize oppressive practices and laws either anonymously or not at all").

157. *See McIntyre*, 514 U.S. at 342 (noting that apart from fear of persecution, "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity").

158. *See id.* at 343 (explaining that *Talley* reiterated "respected tradition of anonymity in the advocacy of political causes").

159. *See id.* at 357 ("The right to remain anonymous may be abused when it shields fraudulent conduct.").

160. *See id.* at 346 (stating that statute directly regulated content of speech).

burdened "core political speech,"¹⁶¹ which receives the broadest level of First Amendment protection.¹⁶² Thus, the Court reviewed the Ohio statute's limit on political expression with strict scrutiny.¹⁶³

A law will withstand strict scrutiny review only if "narrowly tailored to serve an overriding state interest."¹⁶⁴ As such, Ohio argued that two state interests justified the statute: its interest in providing relevant information to the voting public and its interest in preventing fraud and libel.¹⁶⁵ In response, the Court explained that identity information is no different than other parts of a document's content that an author may choose to exclude.¹⁶⁶ Moreover, the Court stated that an author's name and address contribute little to a reader's ability to evaluate the material.¹⁶⁷ The Court noted that the statute was not Ohio's principal weapon against fraudulent and libelous speech made during elections and political campaigns; rather, it simply helped enforce other statutory restrictions on false statements that sufficiently addressed these concerns.¹⁶⁸ Finally, the Court concluded that law was overbroad because it applied to documents that were not false or misleading.¹⁶⁹ Thus, Ohio failed

161. *See id.* at 347 (explaining that "core political speech" included speech regarding issue-based elections; thus, similar First Amendment protections extended to Mrs. McIntyre's flyers); *id.* (noting that Mrs. McIntyre's leaflets addressed politically controversial topic, and thus constituted "essence of First Amendment expression").

162. *See id.* at 346-47 (noting that major purpose of First Amendment is "to protect the free discussion of governmental affairs" and that "core political speech" receives "the broadest protection" to assure free exchange of ideas about political and social change desired by public and stating that "[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre's").

163. *Id.*

164. *Id.*

165. *See id.* at 348 (describing Ohio's claim that its "important and legitimate" state interests permitted law to withstand constitutional review).

166. *Id.* at 348.

167. *See id.* (explaining that addition of author's name and address did not add to quality of material).

168. *Id.* at 349.

169. *See id.* at 351 (stating that "the prohibition encompasses documents that are not even arguably false or misleading" and concluding that law was overbroad). The Court explained:

[The statute] applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity . . . [n]or has the state explained why it can more

to demonstrate that its interests justified a prohibition of all anonymous election-related speech.¹⁷⁰ The Court, however, noted that a state's enforcement interest might justify a more limited identification requirement.¹⁷¹

Justice Ginsburg's concurrence emphasized that the Court left open the possibility for valid state regulation of anonymous speech.¹⁷² In other situations, she explained, a state may be able to require that a speaker disclose his identity.¹⁷³ Furthermore, she noted that the Court did not address speech outside the context of Mrs. McIntyre's political speech.¹⁷⁴

Justice Scalia, joined by Chief Justice Rehnquist, dissented from the majority opinion.¹⁷⁵ According to Justice Scalia, the Ohio statute did not stifle free expression because it merely required identity disclosure in the electoral context.¹⁷⁶ Justice Scalia disputed the existence of a right to anonymous speech so entrenched in the constitutional system that it could not be compromised to protect the integrity of the election process.¹⁷⁷ Anonymity facilitates wrongdoing, concluded Justice Scalia, because it eliminates the accountability necessary to protect the election process.¹⁷⁸

McIntyre thus indicates that an overbroad, content-based prohibition of anonymous, political speech is an unconstitutional compromise of free speech

easily enforce the direct bans on disseminating false documents against . . . wrongdoers who might use false names and addresses in an attempt to avoid detection.

Id. at 351-53.

170. *Id.*

171. *See id.* at 353, 357 (noting that state's enforcement interest might "justify a more limited identification requirement" than Ohio's prohibition that "encompasses documents that are not even arguably false or misleading").

172. *See id.* at 358 (Ginsburg, J., concurring) ("We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.").

173. *Id.* (Ginsburg, J., concurring).

174. *See id.* (Ginsburg, J., concurring) (concluding that Court did not address "matters not presented by [Mrs.] McIntyre's handbills").

175. *Id.* at 371-85 (Scalia, J., dissenting).

176. *See id.* at 378-79 (Scalia, J., dissenting) (noting that Supreme Court precedents recognize "no justification for regulation . . . more compelling than protection of the electoral process" (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989))).

177. *See id.* at 378-79 (Scalia, J., dissenting) (recognizing that compelled disclosure of identity may in some circumstances unconstitutionally deter exercise of associational rights, but stating that Supreme Court precedents do not speak in terms of general right to anonymous speech). Justice Scalia noted that the Court exempted speakers from disclosure requirements if a reasonable probability could be shown that disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 379 (Scalia, J., dissenting).

178. *See id.* at 381 (Scalia, J., dissenting) (reasoning that "prohibition of anonymous campaigning" could effectively protect and enhance election process).

rights.¹⁷⁹ The *McIntyre* Court did not address fraudulent, libelous, or otherwise unlawful anonymous speech because Mrs. McIntyre's leaflets did not warrant such examination.¹⁸⁰ As such, although the Court emphasized a general respect for the anonymous advocacy of political causes, it did not contemplate anonymous unlawful speech such as the Internet postings challenged in cybersmear lawsuits.¹⁸¹

B. *In re Subpoena Duces Tecum to America Online, Inc.*

Whereas *McIntyre* addressed anonymous political speech, the *In re Subpoena Duces Tecum to America Online, Inc. (AOL)* court examined allegedly unlawful, anonymous Internet speech.¹⁸² The *AOL* court applied *McIntyre* in its analysis of the First Amendment's protection of anonymous Internet speech. This Part will describe the *AOL* case and that court's application of *McIntyre*.¹⁸³

In *AOL*, a Virginia circuit court reviewed an Illinois state court's order for expedited discovery.¹⁸⁴ "Anonymous Publicly Traded Corporation" (APTC)¹⁸⁵

179. See *id.* at 346 (stating that statute is direct regulation of speech content).

180. See *supra* note 149 (explaining that Mrs. McIntyre's speech was not unlawful and that court did not address anonymous speech outside of this context).

181. See *McIntyre*, 514 U.S. at 343 (explaining that *Talley* represented "respected tradition of anonymity in the advocacy of political causes").

182. *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001).

183. See *infra* notes 184-210 and accompanying text (describing *AOL* court's decision and application of *McIntyre*).

184. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *1 (Va. Cir. Ct. Jan. 31, 2000) (stating that Virginia court would review another state court's decision to issue subpoena for discovery of anonymous defendants' identities), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001). The Supreme Court of Virginia reversed and remanded the decision because it found that the trial court abused its discretion in permitting the anonymous company to proceed anonymously. *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 355 (Va. 2001). In particular, the Virginia Supreme Court found it problematic that no evidence was received nor were any reasons for the Indiana court's decision given. *Id.* at 362. As such, the Virginia court could not properly determine whether the procedural and substantive law applied by the Indiana court was "reasonably comparable to that of Virginia," thus making questionable the appropriateness of giving comity to the Indiana court's order that allowed APTC to proceed anonymously. *Id.* The court noted that it could conduct an independent review of the appropriateness of an anonymous action, yet concluded that APTC had failed to show sufficient evidence of potential economic harm. *Id.* at 365. The lower court's application of *McIntyre* was not addressed in the Virginia Supreme Court's opinion. Thus, examination of the lower court's decision is still warranted for purposes of this Note.

185. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *1 (Va. Cir. Ct. Jan. 31, 2000) (explaining that plaintiff filed lawsuit suit anonymously against John Doe defendants), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly*

sued five John Does for alleged defamatory statements and the posting of confidential corporate information on the Internet.¹⁸⁶ APTC claimed that the postings would cause it to suffer damages and potentially could impact the value of its stock.¹⁸⁷ The Indiana court authorized expedited discovery to enable APTC to determine the anonymous defendants' names.¹⁸⁸ This court requested that the Virginia state courts help carry out the discovery request because America Online, Inc. (AOL), the proposed recipient of the discovery request, was headquartered in Virginia.¹⁸⁹ Accordingly, a Virginia circuit court issued an order to AOL, the defendants' ISP and a non-party to the lawsuit, that demanded the production of documents that could facilitate discovery of the defendants' identities.¹⁹⁰ AOL filed a motion to quash the subpoena based on the argument that disclosure would compromise the defendants' First Amendment rights.¹⁹¹

Before addressing the First Amendment issue, the AOL court determined that AOL had standing to assert the First Amendment rights of others based on the longstanding history of third party standing in similar situations.¹⁹² There

Traded Co., 261 Va. 350 (Va. 2001). The Virginia court allowed APTC to continue to proceed anonymously. *Id.* In *America Online, Inc. v. Anonymous Publicly Traded Co.*, the Supreme Court of Virginia ruled that the trial court abused its discretion in permitting APTC to proceed anonymously and thus reversed the lower court's judgment and remanded the case for further proceedings. *Am. Online, Inc. v. Anonymous Publicly Traded Co.* No. 00974, 2001 Va. LEXIS 38, at *1 (Mar. 2, 2001). The Virginia Supreme Court did not address the propriety of the expedited discovery order aside from the lower court's grant of the plaintiff's request to proceed anonymously. *Id.* As such, an examination of the AOL case's application of *McIntyre* and grant of the expedited discovery order remain helpful to the analysis of the First Amendment issues presented by such orders. *Id.*

186. *See AOL*, 2000 WL 1210372 at *1 (explaining basis for lawsuit).

187. *See id.* at *7 (noting that plaintiff claimed that "irreparable injury, loss and damages" could result from Internet postings).

188. *Id.* at *1.

189. *Id.*

190. *Id.*

191. *Id.* at *2 (explaining basis for plaintiff's motion to quash). Rule 4.9(c) of the Virginia Supreme Court Rules states, in pertinent part:

Production by Person Not a Party: Upon written request therefore filed with the clerk of this court in which the action or suit is pending by counsel of record for any party . . . the clerk shall . . . issue to a person not a party therein a subpoena duces tecum which shall command the person to whom it is directed . . . to produce the documents and tangible things . . . designated and described in said request . . . but, the court, upon written motion promptly made by the person so required to produce, or by the party against whom such production is sought, may quash or modify the subpoena if it is unreasonable and oppressive.

Id. (quoting VA. S. CT. R. 4.9(c)).

192. *See Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 392-93 (1988) (permitting third-party standing in First Amendment context because of potential chilling effect of law on

fore, the court asked whether APTC's subpoena put an "unreasonable" or "oppressive" burden on the First Amendment rights of the defendants and whether Indiana's interest in protecting its citizens against potentially unlawful Internet communications sufficiently outweighed the right to anonymous Internet speech.¹⁹³ In its First Amendment analysis, the *AOL* court first gleaned from *McIntyre* a right to speak anonymously, then extended this right to Internet communications.¹⁹⁴ The court recognized that the right to anonymous speech is not absolute and emphasized the dangers of its misuse on a medium such as the Internet.¹⁹⁵ Cybersmear victims, concluded the court, need the opportunity to obtain court relief and wrongdoers cannot hide behind purported First Amendment rights.¹⁹⁶ Accordingly, the court decided to balance the need to ensure that courts could hold cybersmearers accountable for their unlawful actions with the need to protect defendants' right to speak anonymously.¹⁹⁷

In consideration of these interests, the *AOL* court first noted that the First Amendment does not protect defamatory statements.¹⁹⁸ The court then recognized that the release of a publicly traded company's confidential business information on the Internet could cause significant harm.¹⁹⁹ Next, the court

others); *AOL*, 2000 WL 1210372, at *4 (stating that third parties can "seek vindication of First Amendment rights of others" (citing *NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958) (holding that NAACP "argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative"))).

193. See *AOL*, 2000 WL 1210372, at *5 (noting absence of published opinions on issue in Virginia or Virginia's "sister states"); *id.* at *1, *5 (asking whether plaintiff's subpoena was unreasonable and oppressive request in light of all circumstances). The "unreasonable and oppressive" standard comes from Virginia Supreme Court Rule 4.9(c). *Id.* at *2; see *supra* note 191 (describing relevant provisions of Virginia rule).

194. See *AOL*, 2000 WL 1210372, at *6 (citing *McIntyre* and *Reno v. ACLU* as speech protective rulings and asking whether First Amendment protected anonymous Internet chat room and message board communications). The court stated that failure to recognize this right would discount Supreme Court precedent and the realities of modern speech. *Id.*

195. *Id.*

196. See *id.* at *6 n.13 (stating "that a State's enforcement interest might justify a more limited identification requirement," recognizing that Internet provides for unlimited, inexpensive, immediate communication with millions of people, and noting limit of constitutional protection of anonymous speech (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995))).

197. See *id.* at *6 n.14 (noting that First Amendment "embodie[s] an overarching commitment to protect speech . . . but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems" (citing *Denver Area Ed. Tel. Consortium v. FCC*, 518 U.S. 727, 741 (1996))).

198. See *id.* at *7 (stating that "[a]ny defamatory statements made by one or more of the John Doe defendants would not be entitled to any First Amendment protection" (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1992))).

199. See *id.* (stating that unique nature of Internet creates increased chance for harm "as the proliferation of shareholder chat rooms continues unabated, and more and more traders utilize the Internet as a means of buying and selling stocks").

determined that Indiana had a compelling interest in protecting companies operating within its borders against unlawful Internet conduct.²⁰⁰ Nonetheless, the court required that APTC produce evidence of a valid claim before it would permit discovery that could potentially compromise the defendants' First Amendment rights.²⁰¹

To address this issue, the *AOL* court announced a standard for evaluation of expedited discovery requests.²⁰² The court held that when reviewing a challenged subpoena for expedited discovery issued by another state, it should order disclosure of the identifying information if the plaintiff presented satisfactory pleadings, offered evidence of a legitimate claim, and demonstrated the need for the identity information.²⁰³ The court reviewed the Indiana pleadings and the challenged Internet postings and determined that APTC satisfied this test.²⁰⁴ In conclusion, the court recognized that the expedited discovery order might have adverse effects on the First Amendment rights of some authors if some of the posters did not owe fiduciary or contractual duties to APTC.²⁰⁵ Nevertheless, the court reasoned that Indiana's interest in protecting companies from the potentially severe consequences of actionable Internet communications outweighed the interest in innocent Internet users' First Amendment rights.²⁰⁶

The *AOL* court used *McIntyre* in its First Amendment analysis to extend the protection of anonymous speech to the Internet context.²⁰⁷ The court maintained, however, that the right was not absolute and did not extend to unlawful Internet statements.²⁰⁸ While recognizing the dangers associated

200. See *id.* at *7 n.17 (stating general principle that only compelling state interest can justify burden on First Amendment rights (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

201. See *id.* at *7 (recognizing potential for frivolous and otherwise abusive lawsuits and thus requiring that plaintiff show evidence of actual, rather than perceived, cause of action).

202. *Id.*

203. See *id.* at *8 (stating that court would order disclosure "when [the court] [wa]s satisfied by the pleadings or evidence supplied to that court" that plaintiff had legitimate, good faith basis to believe that it could be victim of "conduct actionable in the jurisdiction where the suit was filed," and subpoenaed identity information is "centrally needed to advance that claim").

204. See *id.* (noting that "all three prongs of the . . . test ha[d] been satisfied").

205. See *id.* at *7 (noting that discovery might burden some First Amendment interests, but reasoning that Indiana's legitimate interests justified risk).

206. *Id.*

207. See *id.* at *6 (citing *McIntyre* and *Reno v. ACLU* as speech-protective rulings, asking whether First Amendment protected anonymous Internet chat room and message board communications, and noting that failure to recognize this right would discount Supreme Court precedent and realities of modern speech).

208. See *id.* at *7 (stating that "[a]ny defamatory statements made by one or more of the John Doe defendants would not be entitled to any First Amendment protection" (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1992))).

with misuse of Internet anonymity,²⁰⁹ the court determined that the Indiana court properly issued the order for expedited discovery.²¹⁰

C. Dendrite International, Inc. v. Does

Similar to the AOL proceeding, *Dendrite International, Inc. v. Does* addressed anonymous Internet speech in connection with a request for expedited discovery. The *Dendrite* court relied on *McIntyre* in a First Amendment analysis subsequent to its application of the *Seescandy.com* principles.²¹¹ This court decision received much publicity due to the judge's order that Yahoo!, the proposed recipient of an expedited discovery request, post notice of the lawsuit on its website in order to provide the John Does with an opportunity to enter the action anonymously and to attempt to preserve their rights.²¹² Moreover, the court subjected the request for expedited discovery to strict review and denied the discovery request as to two John Does that moved to quash the order based on a First Amendment argument.²¹³

Claims asserted against the four John Does included breach of contractual duties and defamation resulting from statements posted on an Internet financial board.²¹⁴ *Dendrite* claimed that John Does One and Two, who were

209. See *id.* (recognizing that Internet provides for unlimited, inexpensive, immediate communication with millions of people).

210. *Id.* at *8.

211. See *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 18-19 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001) (applying *McIntyre*'s principles to facts of case), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

212. See *id.* at 1-2 (explaining that court granted expedited request as to identities of two John Does that did not respond to notice on Internet financial board to assert right for court to protect); Thomas Scheffey, *Unmasking Internet Bad-Mouths*, CONN. L. TRIB., Dec. 19, 2000 available at <http://tm0.com/sbct.cgi?s=112055782&i=286147&d=761434> (last visited Oct. 11, 2001) (reporting that *Dendrite* judge "in an innovative act, had Yahoo give the posters notice of the court action on [its] Web site, allowing them to come into the action anonymously and preserve their rights"); *Two Internet Posters Protect Identities in Defamation Suit*, WALL ST. J., Dec. 1, 2000, available at 2000 WL-WSJ 26618536 [hereinafter *Two Internet Posters*] (stating that *Dendrite* ruling "appears to be the first time anonymous posters have succeeded in blocking a company's request for a subpoena that would have forced a message board operator . . . to turn over information" about their identities).

213. See Scheffey, *supra* note 212 (stating that New Jersey judge "issued an extensive ruling . . . that received national attention"); Martin Stone, *Judge Protects Web-Posters' Anonymity*, NEWSBYTES, Nov. 30, 2000, at <http://www.newsbytes.com/news/00/158764.html> (explaining free speech advocates' view that "setting forth strict evidentiary standards for compelled identification, and then showing that these standards can produce real protection for anonymity, this decision is a tremendous victory for free speech" (quoting Paul Levy, Public Citizen attorney)); *Two Internet Posters*, *supra* note 212 (stating that free-speech advocates tout *Dendrite* decision as "a major victory for authors of unflattering online messages").

214. See *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 1-2 (N.J. Super. Ct.

current or former employees of the company, violated their employment contracts through their Internet speech.²¹⁵ For example, alleged breach of the contract-based fiduciary duty is illustrated in one of John Doe One's postings that stated, "I chat on this exchange because I want to alert the people like me at dendrite [sic] that there are better jobs at better companies out here and I stand to gain a lot of money in referral fees if they come work for me."²¹⁶ Dendrite further alleged that John Does One and Two posted defamatory statements that accused the company of engaging in fraudulent business practices.²¹⁷ John Doe Three, claimed Dendrite, posted false messages about a "secret plan" to sell the company and Dendrite's use of dishonest revenue recognition accounting.²¹⁸ Furthermore, Dendrite claimed that John Doe Four posted confidential business information on the Internet.²¹⁹ In conclusion, Dendrite alleged that drops in the company's stock value coincided with a number of the challenged postings.²²⁰ As such, Dendrite claimed that the anonymous postings caused both an immediate and continued threat of harm to the company and requested an expedited discovery order.²²¹

In addressing Dendrite's allegations and in its evaluation of the request for expedited discovery, the court applied the four-part *Seescandy.com* test.²²² This subpart will focus on Dendrite's defamation claim because it inspired the AOL court's First Amendment analysis and application of *McIntyre*. Dendrite

Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001) (explaining plaintiff's claims against four John Does), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

215. *See id.* at 2 (noting that among other restrictions, employment contract prohibited employees from recommending that other employees terminate employment and from engaging in activities adverse to interests of Dendrite). Dendrite determined that John Does One and Two were current or former employees of the company based on the content of their statements. *Id.* John Does Three and Four were not ever employed by Dendrite, they asserted, and thus could not be charged with violation of the employee contract. *Id.*

216. *Id.*

217. *See id.* at 3 (citing Internet postings which claimed that certain software products offered for sale by Dendrite did not exist and that Dendrite had policy of not paying bonuses).

218. *See id.* (citing Internet postings which claimed that "Dendrite's management was secretly and unsuccessfully shopping the company" and that company did not honestly recognize revenue in its financial accounts).

219. *See id.* (citing Internet postings which stated that Dendrite did not honestly recognize revenue in financial statements and that client of company decided not to renew business contracts with Dendrite).

220. *See id.* at 4 (explaining that Dendrite alleged stock prices decline as result of defendants' anonymous postings).

221. *See id.* at 2, 5 (requesting order for expedited discovery).

222. *See id.* at 22 (noting that both parties had valuable interests at stake); *id.* at 7-15 (applying *Seescandy.com*'s limiting principles to rule on request for expedited discovery); *supra* notes 71-75 and accompanying text (discussing *Seescandy.com* limiting factors).

fulfilled parts one, two, and four of the *Seescandy.com* test for its defamation claim, yet failed to show that it suffered harm, which was an element of a defamation claim as required by the New Jersey court.²²³ The court refused to rely on Dendrite's allegations of harm and the alleged potential for future harm to conclude that any harm had occurred.²²⁴ In particular, the court would not infer a causal link between the negative postings and the drop in Dendrite's stock value.²²⁵ Therefore, Dendrite failed to prove that its claim could withstand a motion to dismiss and thus did not fulfill *Seescandy.com*'s third requirement.²²⁶ Regardless of this failure, John Does Three and Four appeared through counsel and argued that compelled disclosure of their identities would violate their constitutional rights to free speech and privacy.²²⁷ Thus, although the court had already determined that Dendrite's defamation claim against John Does Three and Four did not pass the *Seescandy.com* test, it still addressed the First Amendment issue.²²⁸

In its First Amendment analysis, the *Dendrite* court addressed the *McIntyre* case. The court first noted the importance of protecting anonymous speech in diverse contexts.²²⁹ The court also recognized that New Jersey's constitution provided for protection against both government and private abridgement of free speech rights.²³⁰ The court noted the factual distinctions of *McIntyre*, yet stated that its general principle – that the First Amendment protects anonymous speech – nevertheless applied.²³¹ The *Dendrite* court also cited to *McIntyre* for its recognition that anonymous speech could be abused if used

223. See *Dendrite*, No. MRS-C-129-99, at 12 (stating that "[i]t is not obvious that the statements at issue are false or that Dendrite has been harmed").

224. See *id.* (reasoning that Dendrite's allegations did not "make the alleged harm a verifiable reality").

225. See *id.* (noting that Dendrite's counsel was not "an expert in the field of stock valuation and analysis" and thus could not draw reliable conclusion that fluctuations in stock price were anything more than coincidence). The court further refused to "leap to linking messages posted on . . . [I]nternet message board[s] regarding personal opinions, albeit incorrect opinions, to a decrease in stock prices without something more concrete." *Id.* at 13.

226. See *id.* at 12 (applying *Seescandy.com* third limiting principle and noting that Dendrite did not produce proof of actual harm).

227. See *id.* at 18 (stating that John Does One and Two did not respond to notice of lawsuit posted on Yahoo! financial board and thus did not assert right for court to protect).

228. *Id.* at 17-21.

229. See *id.* at 18 (stating that "[i]nherent in First Amendment protections is the right to speak anonymously in diverse contexts").

230. See *id.* at 19 (explaining that New Jersey constitution provides for broader protection than United States Constitution because it provides protection from unreasonable "restrictive and oppressive conduct by private entities").

231. See *id.* at 18 (stating that *McIntyre* court "rooted its decision in the fact that the speech looking to be protected was political speech").

unlawfully.²³² Furthermore, the *Dendrite* court cited to *AOL* for its conclusion that the First Amendment protected anonymous Internet communications.²³³

With this background, the court concluded that *Dendrite* failed to demonstrate that John Does Three and Four used the First Amendment to protect unlawful anonymous speech; rather, the John Does simply expressed their personal opinions, which are protected by the First Amendment.²³⁴ Thus, the court denied expedited discovery of the identities of John Does Three and Four both because *Dendrite* failed to demonstrate the harm suffered and to thus satisfy the *Seescandy.com* requirements *and* because *Dendrite* did not prove that the John Does used the First Amendment to protect unlawful speech.²³⁵

It is unclear why the court chose to address the First Amendment issue after it had adopted the *Seescandy.com* limiting principles and determined that *Dendrite's* defamation claim did not meet these requirements. Therefore, had *Dendrite* presented a better case, the court may have granted the request for expedited discovery notwithstanding its failure to satisfy all of the *Seescandy.com* requirements.²³⁶ It appears that the court ultimately denied the request for expedited discovery due to *Dendrite's* failure to produce evidence to establish a causal link between the Internet postings and the decline in its stock value.²³⁷ The *Dendrite* court's First Amendment analysis is, however, noteworthy because it illustrates a court's reluctance to rely solely on the *Seescandy.com* requirements. This indicates that courts may give more consideration to the First Amendment implications of expedited discovery. This development is especially important in light of the fact that courts often give *McIntyre* undue heavy weight in the cybersmear context.

232. See *id.* at 19 (stating that anonymity could not be used "to shield fraudulent conduct" (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999))).

233. See *id.* (stating that right to communicate anonymously on Internet "falls within the scope of the First Amendment's protections, but is not absolute" (citing *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Va. 2001))).

234. See *id.* (stating that anonymous posters' conduct was not unlawful, but rather constitutionally protected opinion); *supra* notes 126-27 (discussing "opinion privilege").

235. See *id.* (stating that *Dendrite* did not prove that John Does Three and Four conducted "themselves in a manner which is unlawful or that would warrant th[e] court to revoke their constitutional protections").

236. See *id.* at 6 (explaining that court adopted standards used in *Seescandy.com* and noting that *Seescandy.com* court "set forth [its] test to determine whether the First Amendment rights of a person [could] be abridged").

237. See *id.* at 12-13 (noting that testimony regarding decline in stock value was not given "by an expert in the field of stock valuation and analysis;" thus, court would not draw conclusion that drops in stock value were more than coincidence).

In July 2001, the New Jersey Superior Court reviewed and affirmed the *Dendrite* decision.²³⁸ *Dendrite* argued that the lower court imposed too strict a burden when it required proof that *Dendrite*'s claim could withstand a motion to dismiss and the reviewing court agreed.²³⁹ The court first noted that *Dendrite* need only "plead facts sufficient to identify the defamatory words, their utterer, and the fact of their publication" in order to survive a motion to dismiss.²⁴⁰ This did not resolve the issue because the lower court did not rule on an actual motion to dismiss, but rather reviewed the showing required by *Seescandy.com* requirement three.²⁴¹ This requirement, according to the court, does not require a strict application of the motion to dismiss rules; rather, the *Seescandy.com* requirements "act as a flexible, non-technical, fact-sensitive mechanism."²⁴² The court next referenced *In re Subpoena Duces Tecum to American Online, Inc.* for its premise that when evaluating motions for expedited discovery from ISPs, courts can "depart from traditionally-applied legal standards in analyzing the appropriateness of such disclosure in light of the First Amendment implications."²⁴³ The court then concluded that the motion judge properly denied limited, expedited discovery as to John Doe Three because the evidentiary record did not support a conclusion that the anonymous postings negatively affected the value of *Dendrite*'s stock or hurt *Dendrite*'s hiring practices.²⁴⁴

IV. McIntyre's Application in the Cybersmear Context

The previous Part discussed the *McIntyre* decision and two recent cybersmear lawsuits that applied *McIntyre* in their analyses of requests for expedited discovery. This Part will suggest limitations on *McIntyre*'s application in the cybersmear context. First, this Part will address the technical differences between *McIntyre* and cybersmear lawsuits. It will next discuss several factual and contextual distinctions by comparing Mrs. McIntyre's speech to the speech at issue in cybersmear lawsuits. Finally, this Part will evaluate courts' application of *McIntyre* in the cybersmear context and the reliance on *McIntyre* in recent amicus curiae briefs.

A. Technical Distinctions

This Part will examine two technical distinctions between *McIntyre* and cybersmear lawsuits that support the argument that courts misapply *McIntyre*.

238. *Dendrite Int'l, Inc. v. Does*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

239. *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 17, 23 (N.J. Super. Ct. Ch. Div. Nov. 28, 2000), available at <http://www.citizen.org/litigation/briefs/internet.htm> (last visited Mar. 3, 2001), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

240. *Id.* at 24.

241. *Id.*

242. *Id.*

243. *Id.* at 28.

244. *Id.* at 30.

The Ohio elections law at issue in *McIntyre* was a content-based restriction on speech and a prior restraint on speech. Cybersmear plaintiffs, in contrast, seek legal redress for the aftereffects of unregulated, allegedly unlawful speech.

Prior restraints on speech forbid expression before it takes place.²⁴⁵ Courts disfavor prior restraints on speech and impose a heavy presumption against their constitutional validity.²⁴⁶ In contrast to prior restraints on speech, "subsequent punishments" are government-imposed penalties on speech after expression has occurred.²⁴⁷

Similar to prior restraints on speech, content-based restrictions also often violate the First Amendment. Regulations linked to the content of speech are content-based restrictions on speech.²⁴⁸ The Supreme Court assesses content-based restrictions with heightened scrutiny,²⁴⁹ thus, such restrictions are highly likely to be invalidated on review.²⁵⁰

245. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (stating that Supreme Court has interpreted First Amendment's guarantees "to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a 'previous' or 'prior' restraint on speech"); Rodney A. Smolla, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH* § 15:1 (3d ed. 1996) [hereinafter *SMOLLA & NIMMER*] (defining prior restraints on speech as "judicial orders or administrative rules that operate to forbid expression before it takes place"). A prior restraint is a rule that requires a license or a permit to engage in expression, or is a judicial order prohibiting publication. *Id.*

246. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); *SMOLLA & NIMMER*, *supra* note 245, § 15:2 (reasoning that "[a]lthough current First Amendment doctrine does not erect a *per se* prohibition against all prior restraints, as a practical matter the burdens that must be satisfied in order to justify a prior restraint are so onerous that in application the 'prior restraint doctrine' amounts to a 'near-absolute' prohibition against such restraints").

247. See *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (stating that First Amendment protects "previous restraints upon publications," but does not prevent "subsequent punishment[s]"); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (explaining that "when a state attempts to punish publication after the event it must demonstrate that its punitive action was necessary to further the state interests asserted").

248. See *KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW* 192 (1999). Content-neutral speech regulations, in contrast, aim for a content-neutral interest such as peace and quiet, order, aesthetics, or economic competitiveness. *Id.* Content-based restrictions are generally classified as either "viewpoint" or "subject matter" restrictions. *Id.* at 193.

249. See *SMOLLA & NIMMER*, *supra* note 245, §§ 4:2, 4:3 (stating that under strict scrutiny test, content-based regulation of speech will be upheld only when justified by "compelling government interests" if "narrowly tailored" or if using "the least restrictive means" to effectuate those interests). *Id.* "Heightened scrutiny" review generally means that the Court reviews a law under the strict scrutiny test described above. *Id.* The term "exacting scrutiny" is often used to refer to a heightened scrutiny standard equivalent to strict scrutiny, but tailored to the specific type of speech involved. *Id.*

250. See *Reno v. ACLU*, 521 U.S. 844, 885 (stating that "we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society

The first technical difference between *McIntyre* and cybersmear lawsuits is that the Ohio election law at issue in *McIntyre* was a content-based restriction on speech.²⁵¹ In *McIntyre*, the Court explained that only publications designed to influence voters had to comply with the identity disclosure requirements and accordingly determined that the election law directly regulated the content of speech.²⁵² Thus, the Court evaluated the limit on political expression with exacting scrutiny and determined that Ohio failed to demonstrate that its interest in preventing misuse of anonymous election-related speech justified a prohibition on all uses of that speech.²⁵³

Although the *McIntyre* Court emphasized the value of anonymous speech,²⁵⁴ it ultimately invalidated the election law because it *regulated the content* of anonymous, political speech.²⁵⁵ Thus, citations to *McIntyre* correctly note the Court's recognition of the value of anonymous speech and that constitutional protection extends to such speech. However, it is an overstatement to declare that *McIntyre* stands for First Amendment protection of all anonymous speech. The Court reviewed Ohio's statute with strict scrutiny because it regulated the content of political speech, not because of the anonymous nature of Mrs. McIntyre's speech.²⁵⁶ Even when *McIntyre* is examined as a "compelled speech"²⁵⁷ or a "right not to speak" case, emphasis is on the *McIntyre* Court's invalidation of the law because of its content-regulating qualities.²⁵⁸

outweighs any theoretical but unproven benefit of censorship."); SMOLLA & NIMMER, *supra* note 245, § 3:1 (noting that less rigorous level of constitutional review applies to content-neutral restrictions on speech).

251. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (calling statute "a direct regulation of the content of speech").

252. See *id.* ("Every written document covered by the statute must contain 'the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.'" (citing OHIO REV. CODE ANN. § 3599.09(A) (1988))).

253. See *id.* at 357 (stating that Ohio could not attempt to punish fraud indirectly by indiscriminately outlawing entire category of speech with no necessary relationship to danger sought to be prevented).

254. See *supra* notes 151-53 and accompanying text (explaining historical, literary, and political importance of anonymous speech).

255. See *supra* notes 160-70 and accompanying text (determining that Ohio law regulated content of speech and applying strict scrutiny).

256. See *supra* note 160 (noting that Ohio elections law directly regulated content of speech).

257. See SULLIVAN & GUNTHER, *supra* note 248, at 356 (explaining that subsidiary right to freedom of speech is freedom not to speak, or freedom from "compelled speech"). The right not to speak and thus to remain anonymous is an ancillary free speech right that is not separately listed within the First Amendment. *Id.*

258. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (recognizing First Amendment right to make "decisions concerning omissions or additions to the content of a publication").

Similar to the content distinction, the Ohio statute was also a prior restraint on speech, whereas cybersmear lawsuits involve no law that constitutes a possible prior restraint, but rather seek court remedies for harms that have occurred. Although the *McIntyre* Court did not address this particular issue, Ohio's statute was a prior prohibition on anonymous political speech.²⁵⁹ The Ohio law required that all political leaflets include identity information, thus forbidding anonymous expression before it took place. Another Supreme Court case provides guidance on how to address this distinction. *Near v. Minnesota*²⁶⁰ discouraged prohibitory orders that would restrain publication and announced that a plaintiff's use of tort law to obtain damages was the proper remedy for libel.²⁶¹ As such, a lawsuit appears to be the appropriate course of action for a cybersmear plaintiff. Thus, citations to *McIntyre* in the cybersmear context should note this important distinction: *McIntyre* invalidated a prior restraint on anonymous political speech, whereas cybersmear plaintiffs seek relief for conduct that has already occurred, and *Near v. Minnesota* states that a plaintiff properly seeks to prove a defamation claim and obtain related damages in court.

B. Factual and Contextual Distinctions

In addition to the two technical issues addressed above, reliance on *McIntyre* in the cybersmear context should be qualified due to two significant factual and contextual distinctions.²⁶² First, the Ohio Elections Commission did not claim that Mrs. McIntyre's speech was false or libelous, whereas cybersmear lawsuits always involve claims of unlawful speech. Second, Mrs. McIntyre's speech was political in nature, whereas the Internet postings at

259. See *supra* notes 245-46 and accompanying text (describing prior restraints on speech).

260. 283 U.S. 697 (1931).

261. See *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931) (holding that statute violated Fourteenth Amendment freedom of press). In *Near*, the Court addressed the constitutionality of a Minnesota law that authorized the government to bring a lawsuit to "abate . . . [any] malicious, scandalous and defamatory newspaper." *Id.* at 701-02. Minnesota obtained a court order that restrained publishers of *The Saturday Press* from publishing "a malicious, scandalous, and defamatory newspaper" and stated that the Press could only publish information in accord with the general welfare. *Id.* at 706. The Court held that the order was an unconstitutional prior restraint on speech. *Id.* at 722-23. The Court explained that the proper remedy for a person injured by a scandalous, malicious, or defamatory press release was use of libel law to obtain damages, rather than a prior restraint on speech. *Id.* at 718-19; see also *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring) (stating that "an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored").

262. See, e.g., George B. Trubow, *Regulating Transactions of the Internet*, 24 OHIO N.U. L. REV. 831, 835 (1998) (noting limited nature of *McIntyre* and stating that "the case specifically involved election leaflets").

issue in cybersmear lawsuits generally comment on a corporation and its business practices.

Most notably, the Ohio Elections Commission did not claim that the text of Mrs. McIntyre's message was in any way unlawful.²⁶³ Cybersmear lawsuits, by contrast, always allege that certain Internet statements are defamatory, false, or otherwise unlawful.²⁶⁴ The Court protects the publishing of truthful or lawful speech, such as Mrs. McIntyre's speech.²⁶⁵ However, the Court does not protect nor recognize any value in knowingly false speech.²⁶⁶

In *McIntyre*, the Ohio Elections Commission fined Mrs. McIntyre solely for her failure to comply with a law that prohibited anonymous political leaflets.²⁶⁷ In contrast, in both the *Dendrite* and *AOL* lawsuits, plaintiffs requested orders for expedited discovery in order to identify the authors of allegedly libelous or false statements or to identify authors whose speech violated an employment agreement.²⁶⁸ Although the *McIntyre* Court recognized the value of anonymous speech, it also noted that the First Amendment's protection does not protect fraudulent or libelous speech.²⁶⁹ As recog-

263. See *McIntyre*, 514 U.S. at 337 (stating that there was "no suggestion that the text of [Mrs. McIntyre's] message was false, misleading, or libelous").

264. See *supra* notes 184-87, 211-21, and accompanying text (describing allegations in *AOL* and *Dendrite* cybersmear lawsuits); see also Singleton, *supra* note 139, at 302-03 (noting "a profound difference" between Mrs. McIntyre's speech and message on Internet, "where at the speed of light . . . millions of people . . . can get that message . . . [t]he Internet is a far different environment, and I think *McIntyre* need not control it"); Trubow, *supra* note 262, at 834 (noting that "[i]f anonymity is used to perpetrate torts or crimes while escaping accountability, however, then anonymity cannot be reasonably defended").

265. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101-06' (1979) (concluding that state law criminalizing newspaper publication of lawfully obtained, truthful information without permission of juvenile court violated First and Fourteenth Amendments); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (concluding that state could not enforce confidentiality requirements with criminal sanctions because such sanctions would be unjustified encroachment on First Amendment). In this case, *Landmark* published accurate information about a pending inquiry into a state judge's conduct. *Id.* at 831. The Court refused to allow the state to punish *Landmark* for publishing this truthful information. *Id.* at 838.

266. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that neither intentional lie nor careless error materially advances society's interest in "uninhibited, robust, and wide open debate on public issues"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that libelous speech is "of such slight social value as a step to truth that any benefit that may be derived from [the speech] is clearly outweighed by the social interest in order and morality").

267. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 338 (1995).

268. See *supra* notes 184-87, 211-21 and accompanying text (describing allegations in *AOL* and *Dendrite* cybersmear lawsuits).

269. See *Eisenhofer & Liebesman*, *supra* note 11, at 46 (noting that courts recognize that "anonymity is not a license to ignore the law . . . There is no First Amendment protection for

nized by the *McIntyre* Court, anonymity can be abused if used unlawfully.²⁷⁰ This recognition warrants a limit on *McIntyre*'s application to the knowing falsehoods expressed in some anonymous Internet postings. As a result, heavy reliance on *McIntyre* in the cybersmear context is misplaced.

In addition to the lawfulness distinction, Mrs. *McIntyre*'s anonymous flyers contained "core political speech" and thus received the highest level of constitutional protection available.²⁷¹ The speech at issue in cybersmear lawsuits is, in contrast, not political in nature. The *McIntyre* Court explained that anonymous literature is important because speakers may fear economic or governmental retaliation, or social ostracism, or may want to avoid an audience's possible identity-based bias.²⁷² The Court concluded that protecting anonymous political speech is necessary because "anonymous pamphleteering is . . . an honorable tradition of advocacy and of dissent . . . [and] a shield from the tyranny of the majority."²⁷³ Intentionally false, unlawful speech does not have a similar redeeming value. For example, in the *Dendrite* lawsuit, one allegedly libelous posting stated that the company was dishonest in its accounting.²⁷⁴ Another statement allegedly violated an employment contract because it encouraged *Dendrite* employees to quit their jobs and seek employment elsewhere.²⁷⁵ Internet financial board postings arguably contribute to a socially valuable discussion about publicly traded companies; however, false rumors about a company, its management, or its stock do nothing more than frustrate meaningful discourse.

The First Amendment does not protect or value intentionally false speech similar to some of the anonymous postings challenged in cybersmear lawsuits.²⁷⁶ Both the Supreme Court and legal scholars distinguish between

a poster committing tortious acts like fraud, defamation and misappropriation of trade secrets" (citing *Colson v. Groham*, 174 F.3d 498 (5th Cir. 1999)).

270. See *McIntyre*, 514 U.S. at 357 ("The right to remain anonymous may be abused when it shields fraudulent conduct.").

271. See *id.* at 347 (stating that "[n]o form of speech is entitled to greater constitutional protection than Mrs. *McIntyre*'s" and concluding that Constitution protects against suppression of speech of unpopular individuals such as Mrs. *McIntyre*); SMOLLA & NIMMER, *supra* note 245, § 16:1 (noting "there is no debate that [political speech] is one of the First Amendment's primary concerns"); *id.* § 16:2 (explaining that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs").

272. *McIntyre*, 514 U.S. at 341-42.

273. See *id.* at 357 (recognizing importance of protecting anonymous speech).

274. See *supra* note 218 and accompanying text (describing libelous statements that alleged dishonest accounting).

275. See *supra* notes 216-19 and accompanying text (noting false statements).

276. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270

"high value" and "low value" speech, largely based on a speaker's intent.²⁷⁷ Cybersmear, by definition, is of little social value, and unlawful speech is of the lowest value possible. As a result, *McIntyre*'s application in this context is questionable because *McIntyre* addressed "core political speech" that receives the highest level of constitutional protection available.²⁷⁸ Accordingly, courts should recognize that the anonymous speech contested in cybersmear lawsuits is potentially "low value" speech, and thus does not deserve the high level of protection provided by the *McIntyre* court.

C. Application of *McIntyre*

Subparts A and B identified four significant distinctions between *McIntyre* and cybersmear lawsuits. This subpart will examine application of *McIntyre* in the cybersmear context. It will first address courts' application of *McIntyre* in recent cybersmear lawsuits, then it will examine public interest groups' reliance on the case in amicus curiae briefs.

It appears that the *AOL* court used *McIntyre* as a primary basis for the determination that the First Amendment protects anonymous Internet speech. In its opinion, the court concluded that the First Amendment protects anonymous Internet speech after noting that *McIntyre* extended protection of anonymous speech into the realm of political discussion.²⁷⁹ The *AOL* court, however, failed to provide any explanation for this extension, nor did it expand its application of *McIntyre* to contemplate false statements on Internet financial boards.

(1964) (stating that neither intentional lie nor careless error materially advances society's interest in "uninhibited, robust, and wide open debate on public issues"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that libelous speech is "of such slight social value as a step to truth that any benefit that may be derived from [the speech] is clearly outweighed by the social interest in order and morality").

277. See Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 23 (1995) (noting position that "speech qualifies for protection if it is intended and received as a contribution to social deliberation about some issue"); see also Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHL L. REV. 795, 803 (1993) ("Current law distinguishes between low-value and high-value speech; it treats bribery, perjury, unlicensed medical and legal advice, misleading commercial speech, and much else as bannable on the basis of a lesser showing of harm.").

278. See *supra* notes 161-63 and accompanying text (noting strict scrutiny appropriate in reviewing statute that burdened "core political speech").

279. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000) (stating that "[we] hold that the right to communicate anonymously on the Internet falls within the scope of the First Amendment's protections"), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

The *AOL* court did note that the *McIntyre* Court stated that a state's interest might justify a more limited identification requirement than that of the Ohio election law.²⁸⁰ Based on this underlying principle, the *AOL* court determined that Indiana had a compelling interest in protecting companies from unlawful Internet communications such as cybersmear and allowed another state's expedited discovery order to stand.²⁸¹ In this respect, the *AOL* court properly recognized a difference in cybersmear and lawful, political speech. The *AOL* court allocated such heavy weight to the potential for harm to APTC that it allowed the expedited order to stand even though it recognized that the discovery order might uncover that some of the anonymous defendants did not owe contractual or fiduciary rights to APTC.

In its analysis of the First Amendment's application to the Internet, the *AOL* court could have explained the limits of *McIntyre*'s application more thoroughly. The court redeemed itself by recognizing that cybersmear is inherently different than lawful, political leaflets. In its discussion of the weight of the interests of APTC and the John Does, the *AOL* court properly recognized that knowingly false speech does not receive First Amendment protection.²⁸² As such, the court noted that the challenged speech might not warrant extensive First Amendment protection and used this rationale to justify the expedited discovery order.

In contrast, it appears that the *Dendrite* court incorrectly applied *McIntyre* to allocate heavy weight to the defendants' First Amendment rights. John Does Three and Four protested the expedited discovery order and claimed that it would violate the constitutional right of free speech.²⁸³ In its First Amendment analysis, the *Dendrite* court cited to *McIntyre* for its "general principle . . . [that] the First Amendment protects anonymous speech" and to *AOL* for its extension of the First Amendment's protection to Internet speech.²⁸⁴ The court recognized the potential for abuse of anonymity and noted that the

280. *See id.* at *7 (noting that right to speak anonymously is not absolute and does not extend to unlawful Internet speech).

281. *See id.* ("The protection of the right to communicate anonymously must be balanced 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."); *id.* at 6 (noting that "First Amendment jurisprudence has always 'embodie[d] an overarching commitment to protect speech . . . but without imposing judicial formulas so rigid that they become a straightjacket that disables governments from responding to serious problems'" (quoting *Denver Area Ed. Tel. Consortium v. FCC*, 518 U.S. 727, 741 (1996))).

282. *See id.* at *7 (noting that right to anonymous speech was not absolute and did not extend to unlawful Internet statements).

283. *Dendrite Int'l, Inc. v. Does*, No. MRS C-129-00, slip op. at 18 (N.J. Super. Ct. Ch. Div. Nov. 23, 2000), available at <http://www.citizen.org/documents/dendrite.pdf> (last visited Oct. 11, 2001), *aff'd*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

284. *See id.* at 18-19 (noting that *McIntyre* was "rooted . . . in the fact that the speech looking to be protected was political speech").

First Amendment does not protect libelous statements.²⁸⁵ Unlike the *AOL* court, however, the *Dendrite* court failed to acknowledge that the contested Internet postings might not be worthy of full *McIntyre* protection. Thus, the *Dendrite* court seemingly applied *McIntyre* to wrongfully allocate a great deal of weight to the protection of potentially unlawful statements.

This misallocation surfaces in the *Dendrite* court's *Seescandy.com* and First Amendment analyses. In the *Seescandy.com* application, *Dendrite* only failed to prove that it suffered harm as a result of the allegedly defamatory postings. The court recognized that proof of damage to stock value as a result of negative Internet postings might be difficult, and it acknowledged that Internet communications, by nature, could potentially cause severe harm to the targets of false postings.²⁸⁶ This problem, the court recognized, is particularly significant in the context of Internet financial message boards, on which many people rely for investment information.²⁸⁷ Moreover, the court stated that the challenged Internet postings "could easily be considered defamatory in nature"²⁸⁸ yet refused to accept as valid the proof of harm offered by *Dendrite*'s counsel.²⁸⁹ The court's disregard of *Dendrite*'s attempts to prove harm and its subsequent conclusion that John Does Three and Four simply expressed opinions is inconsistent with its recognition of the defamatory nature of the statements and the potential for great harm to *Dendrite*. Thus, the *Dendrite* court incorrectly used *McIntyre* to allocate significantly heavier weight to the John Does' interests and to the constitutional protection of anonymous speech.

After appeal, *Dendrite* remains important to the issue of whether courts give undue influence to *McIntyre* when ruling on requests for expedited discovery. The New Jersey superior court determined that *Seescandy.com* requirement three did not require actual proof that the defamation claim could survive a motion to dismiss.²⁹⁰ As such, *Seescandy.com* requirement three

285. See *id.* at 19 (stating that "the right to remain anonymous . . . is abused when it is used to shield fraudulent conduct" (citing *AOL* and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999))); *id.* at 18 (noting that libelous speech is not protected by Constitution (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1992))). The *Dendrite* court also noted that the First Amendment does not extend to obscenity under *Roth v. United States*, 354 U.S. 476, 483 (1957), or fighting words under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). *Dendrite*, No. MRS C-129-00, slip op. at 19.

286. See *id.* at 11 (recognizing that financial boards educate investors about corporations).

287. See *id.* (noting that financial message boards reach vast audience over internet).

288. *Id.*

289. See *id.* at 13 (explaining that court would "not take the leap to linking messages posted on an internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock prices without something more concrete" than *Dendrite*'s attorney's explanation of contemporaneous price drop and Internet postings).

290. *Id.* at 26.

may not provide for as heavy a burden as imagined, thus leaving courts with more room to base review of expedited discovery orders on First Amendment concerns and to improperly use *McIntyre* to deny discovery orders.

Misapplication of *McIntyre* also appears in amicus curiae briefs recently filed in John Doe cybersmear lawsuits. These briefs lobbied for court denial of requests for expedited discovery.²⁹¹ Both the ACLU and Public Citizen argued that *McIntyre*'s protection of anonymous speech extends a degree of protection to John Does faced with the possibility that expedited discovery orders may uncover their identities.²⁹² The ACLU cited to *McIntyre* and other cases protecting anonymous speech as evidence that the judiciary sometimes defends the right to communicate anonymously.²⁹³ The ACLU then argued that the *Hvide* court should similarly protect the John Does' speech because of the valuable contribution it provided to online debate and discourse.²⁹⁴ Public Citizen's briefs, by contrast, cited to *McIntyre* and other anonymous speech cases and then concluded that similar protection *did* extend to anonymous Internet speech.²⁹⁵ Regardless of this distinction, both positions are incorrect because they base their conclusions on court decisions that protected anonymous speech in factually and contextually distinguishable situations. Both groups' briefs relied on *ACLU v. Miller*²⁹⁶ and *ACLU v. Johnson*²⁹⁷ as support for protection of anonymous Internet speech.²⁹⁸ The Public Citizen

291. See ACLU's Brief, *Hvide*, *supra* note 89, at 1 (lobbying for denial of expedited discovery order); Public Citizen's Brief, *Dendrite*, *supra* note 20, at 4 (same); Public Citizen's Brief, *iXL*, *supra* note 57, at 1 (same).

292. See ACLU's Brief, *Hvide*, *supra* note 89, at 9 ("This strong tradition of protecting anonymous speech is equally (if not more) important on the Internet."); Public Citizen's Brief, *Dendrite*, *supra* note 20, at 5 (stating that rights to anonymous speech are "fully applicable to . . . the Internet"); Public Citizen's Brief, *iXL*, *supra* note 57, at 6 (same).

293. See generally ACLU's Brief, *Hvide*, *supra* note 89, at 8-9 (citing cases upholding right to anonymity).

294. See ACLU's Brief, *Hvide*, *supra* note 89, at 9 ("This strong tradition of protecting anonymous speech is equally (if not more) important on the Internet."). The ACLU further noted that the Supreme Court recognized that the Internet is a "vast democratic fora" in *Reno v. ACLU*, 521 U.S. 844, 867 (1997), and that the "use of pseudonyms contributes to the robust nature of debate online." ACLU's Brief, *Hvide*, *supra* note 89, at 9.

295. See Public Citizen's Brief, *Dendrite*, *supra* note 20, at 5 (stating that *McIntyre*'s rights are "fully applicable to the Internet"); Public Citizen's Brief, *iXL*, *supra* note 57, at 6 (same).

296. 977 F. Supp. 1228 (N.D. Ga. 1997).

297. 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

298. See *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (granting plaintiffs' motion for preliminary injunction and enjoining defendants from enforcing Georgia Internet law). In *Miller*, the Northern District of Georgia considered the validity of a Georgia law that criminalized the use of false names and the misleading use of others' trademarks on the Internet. *Id.*; see *infra* note 301 (listing relevant provisions of Georgia statute). Plaintiffs argued that the statute's overbroad reach prohibited much mainstream Internet communication because many

briefs cited to these two cases in support of its position, but did not include any discussion of the cases' applicability to the cybersmear context.²⁹⁹ The ACLU, by contrast, summarily noted that each case involved state regulation of Internet speech and only noted one major distinction between the case at hand and the supposedly supporting cases.³⁰⁰ Citation to *ACLU v. Miller* and *ACLU v. Johnson* as support for the opposition of expedited discovery requests is problematic in the same way as is the wholesale application of *McIntyre* in the cybersmear context. In *ACLU v. Miller*, the court applied *McIntyre* and invalidated a content-based Georgia Internet law.³⁰¹ Similarly,

Internet users communicate anonymously or pseudonymously; thus, plaintiffs sought a preliminary injunction against use of the statute. *Miller*, 977 F. Supp. at 1230-31. The court concluded that plaintiffs were likely to prevail on the merits because they were likely to prove that the statute imposed content-based restrictions on speech and was overbroad and vague. *Id.* at 1232. Specifically, the court relied on *McIntyre* to state that the statute regulated the content of speech because a speaker is generally free to decide whether or not to include his or her name within a communication. *Id.* Furthermore, the court noted that the statute swept innocent, protected speech into its scope. *Id.* The court concluded that Georgia had other, less restrictive means in place for addressing fraud and misrepresentation concerns. *Id.* at 1235. Thus, the court granted plaintiffs' motion for preliminary injunction. *Id.*

See also *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (affirming lower court's grant of preliminary injunction against enforcement of New Mexico Internet statute). In *Johnson*, the Tenth Circuit Court of Appeals reviewed a lower court's decision granting a preliminary injunction against a New Mexico Internet statute that criminalized the computer dissemination of material that was harmful to minors and thus hindered the ability to communicate anonymously. *Id.* at 1152. Defendants claimed that the lower court erroneously interpreted the statute to determine that plaintiffs would succeed on the merits. *Id.* at 1154. Therefore, the defendants asked the court to read the statute to narrowly apply only to situations in which the sender "knowingly and intentionally" sends a harmful message to minors. *Id.* at 1158. The court concluded that virtually all Internet communications would meet the "knowingly and willingly" threshold because, absent a viable age verification process, a sender of an Internet message must know that one or more minors will likely view it. *Id.* at 1159. Thus, the Tenth Circuit found that the lower court correctly interpreted the statute as overbroad and upheld the preliminary injunction. *Id.* at 1159, 1164.

299. See generally Public Citizen's Brief, *Dendrite*, *supra* note 20, at 5 (citing *Miller* and *Johnson*); Public Citizen's Brief, *iXL*, *supra* note 57, at 6 (same).

300. ACLU's Brief, *Hvide*, *supra* note 89, at 10.

301. See *ACLU v. Miller*, 997 F. Supp. 1228, 1232 (N.D. Ga. 1997) (stating that "plaintiffs are likely to prove that the statute imposes content-based restrictions . . . because 'the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude' (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995)) (alteration in original)); see also Smith, *supra* note 6, at 7 (stating that "courts have also cited *McIntyre* in their decisions that prohibitions of anonymous or pseudonymous speech is content-based restriction that should be subject to strict scrutiny"). The Georgia law at issue in *Miller* made it a crime for

any person . . . knowingly to transmit any data through a computer network . . . for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank

in *ACLU v. Johnson*, the court invalidated an overbroad Internet statute³⁰² that criminalized the computer dissemination of material harmful to minors.³⁰³ Neither of these cases addressed the after-effects of unregulated, potentially unlawful speech. *ACLU v. Miller's* and *ACLU v. Johnson's* applicability are questionable within the context of cybersmear claims because both cases involved state regulations of Internet speech, whereas cybersmear lawsuits seek to address the after-effects of unregulated, harmful speech. The ACLU and Public Citizen thus inappropriately failed to qualify their reliance on *McIntyre*, *ACLU v. Miller*, and *ACLU v. Johnson*.

Thus, similar to the *AOL* and *Dendrite* courts, Public Citizen and the ACLU did not properly interpret and apply *McIntyre* as well as other anonymous speech cases. *McIntyre* indicates that an overbroad, content-based prohibition of anonymous, political speech is an unconstitutional compromise of free speech rights.³⁰⁴ Although the *McIntyre* Court recognized a respected tradition of anonymity in the advocacy of political causes, the Court did not consider unlawful, anonymous speech; consequently, the *McIntyre* case is not fully applicable to the cybersmear context.³⁰⁵ The two cybersmear cases de-

or point of access to electronic information if such data uses any individual name . . . to falsely identify the person . . . and for any person . . . knowingly to transmit any data through a computer network . . . if such data uses any . . . trade name, registered trademark, logo, legal or official seal, or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use [it] for such purpose when such permission or authorization has not been obtained.

Miller, 997 F. Supp. at 1232 (quoting Act No. 1029, Ga. Laws 1996, codified at O.C.G.A. § 16-9-93.1 (omissions and alterations in original)).

302. See *ACLU v. Johnson*, 997 F. 3d 1149, 1152 (10th Cir. 1999) (discussing New Mexico statute). The statute provided as follows:

Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct.

Id. (citing N.M. STAT. ANN. § 30-37-3.2(C)).

303. See *id.* at 1155 (explaining that district court held that New Mexico statute violated First Amendment because, among other things, it was "substantially over-broad" and prevented "people from communicating and accessing information anonymously" (quoting *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998))).

304. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (stating that statute is "direct regulation on the content of speech").

305. See *supra* text at note 149 (explaining that Mrs. McIntyre's speech was not false, misleading, or libelous speech).

scribed above, *Dendrite* and *AOL*, applied *McIntyre* in the review of requests for expedited discovery.³⁰⁶ These courts failed to sufficiently address the many significant differences between Mrs. McIntyre's speech and alleged cybersmear and thus applied *McIntyre* incorrectly.

V. Conclusion

John Doe defendants and free speech advocates claim that expedited discovery orders in the context of cybersmear claims unconstitutionally compromise free speech rights. This argument relies heavily on the Supreme Court's *McIntyre* decision. As illustrated in this Note, both courts and free speech advocates overlook *McIntyre*'s distinguishing factors and fail to properly apply *McIntyre* as a case that invalidated an overbroad regulation of anonymous political speech.³⁰⁷ Due to the distinctions discussed in this Note, *McIntyre* does not protect all anonymous Internet speech and similarly does not support the denial of all requests for expedited discovery. Courts should garner from *McIntyre* the principle that the Constitution does not allow unlimited restrictions on speech, yet recognize that not all restrictions on speech compromise First Amendment rights.³⁰⁸ The failure to apply correctly the *McIntyre* decision results in confusion and inconsistency in the cybersmear context, as is evidenced by the *AOL* and *Dendrite* court opinions.

The most blatant misapplications of *McIntyre* fail to address the fact that *McIntyre* did not directly contemplate fraudulent, libelous, or otherwise unlawful, anonymous speech.³⁰⁹ By leaving open the door for "a more limited identification requirement," the *McIntyre* Court suggested that the regulation of unlawful speech might justify such a limitation.³¹⁰ Although cybersmear lawsuits do not involve direct regulations of Internet speech, this suggestion indicates that *McIntyre* does not fully extend to anonymous, unlawful speech such as the Internet postings challenged in cybersmear lawsuits.³¹¹

The *AOL* and *Dendrite* courts extended *McIntyre* to justify protection for anonymous Internet speech. The courts next "balanced" John Doe's right to

306. See *supra* notes 268-78 and accompanying text (discussing *Dendrite* and *AOL* courts' misapplication of *Dendrite*).

307. See *McIntyre*, 514 U.S. at 351, 353 (concluding that Ohio prohibition "encompasses documents that are not even arguably false or misleading thus is overbroad" and rejecting Ohio's argument that compelling state interests justify prohibition).

308. See *id.* at 345 (stating that statute is "direct regulation on the content of speech").

309. See *supra* note 149 and accompanying text (explaining that Mrs. McIntyre's speech was not unlawful and that court did not address speech outside of this context).

310. See *McIntyre*, 514 U.S. at 353.

311. See *id.* at 343 (explaining that *Talley* represented "respected tradition of anonymity in the advocacy of political causes").

communicate anonymously against a cybersmear plaintiff's need for an effective judicial forum. It is unclear why the courts chose to "balance interests" in the consideration of a First Amendment issue, and this approach may not be the appropriate way to address requests for expedited discovery. Nonetheless, the *AOL* and *Dendrite* courts used *McIntyre* to protect anonymous Internet speech and ultimately decided the balance of interests quite differently. When coupled with courts' wholesale application of *McIntyre* in the cybersmear context, this differing balance indicates that courts have not yet determined how to properly analyze cybersmear claims and requests for expedited discovery. Nevertheless, courts should recognize that neither the First Amendment nor *McIntyre* protects the intentionally false speech challenged in some cybersmear lawsuits.³¹²

312. See *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1973) (stating that "there is no constitutional value in false statements of fact"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that "[n]either the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide open debate on public issues"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that libelous speech is "of such slight social value as a step to truth that any benefit that may be derived from [the speech] is clearly outweighed by the social interest in order and morality").