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INTERNET USER ANONYMITY, FIRST AMENDMENT PROTECTIONS AND MOBILISA: CHANGING THE CAHILL TEST

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Abstract

The Arizona Court of Appeals recently developed a new test to determine whether an anonymous Internet poster's identity should be revealed through a subpoena. While the First Amendment protects anonymous speech, this protection does not extend to defamation and other illegal behavior. Courts have balanced these two competing interests—protection of anonymous speech and revelation of a person's identity via subpoena—by applying varying tests regarding the disclosure of an anonymous poster's identity. The Arizona Court of Appeals, in *Mobilisa, Inc. v. Doe*, recently adopted a three-part test that incorporates elements from two, previously distinct lines of cases. This Article explores the varying standards that apply to the disclosure of the identity of an anonymous online poster, and compares them to the test articulated in *Mobilisa, Inc. v. Doe*. This Article concludes that *Mobilisa's* balancing component is an important and novel prong in light of competing policy and constitutional considerations.

Table of Contents

[Introduction](#)

[The History of Protected Anonymous Speech](#)

[Anonymous Online Speech](#)

[Earlier Judicial Standards for Revealing an Anonymous Online Poster's Identity:](#)

[The Four-part Dendrite Analysis](#)

[The Cahill Test: The Summary Judgment Standard](#)

[The Mobilisa Test](#)

[Does the Mobilisa Test Provide a Better Standard?](#)

[Conclusion](#)

INTRODUCTION

<1>The Internet provides numerous forums for anonymous speech, including blogs, chat rooms and email. The United States Supreme Court has emphasized the contributions anonymous speakers have to public discourse, and commented that “[a]nonymity is a shield from the tyranny of the majority.”² The increase in anonymous speech on the Internet has, however, created a difficult paradigm for courts determining when an anonymous speaker's identity should be protected, or his or her identity should be disclosed via a subpoena. As one court explained, “the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”³ While the First Amendment protects anonymous speech, this protection does not extend to defamation and other illegal behavior. When deciding whether a person's identity should be revealed through a subpoena, courts must, therefore, balance First

Amendment protections with a plaintiff's right to remedy wrongful behavior on the Internet.

<2>This Article focuses on three tests that courts have applied to try to maintain the balance between the First Amendment's protection of anonymous speech, and a plaintiff's right to protect herself from illegal speech, particularly with respect to the disclosure of an online anonymous speaker's identity. The Article analyzes two previous tests regarding this issue—the *Dendrite v. Doe* test⁴ and the *Doe v. Cahill* test⁵—and gives special attention to the more recent three-part test found in *Mobilisa, Inc. v. Doe*.⁶ In *Mobilisa*, an Arizona Court of Appeals adopted a three-part test that incorporates two parts from the *Cahill* case, and adds a third element found in *Dendrite*. This Article explores whether the test adopted in *Mobilisa* strikes a better balance than previous tests between protecting an anonymous poster's First Amendment rights, and ensuring that a plaintiff has remedies for illegal online behavior. The Article concludes that while the impact of *Mobilisa* remains to be seen, the novel balancing component is a positive new approach in light of competing interests in this area of law.

THE HISTORY OF PROTECTED ANONYMOUS SPEECH

<3>As the Supreme Court has observed on numerous occasions, the First Amendment safeguards the right of anonymous speech. In *McIntyre v. Ohio Elections Commission*, the Supreme Court stated “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.”⁷ In an earlier case, the Supreme Court emphasized the need for anonymous speech so that persecuted groups of people can criticize oppressive practices, particularly where the alternative may be not speaking at all.⁸ Indeed, when considering this purpose of protecting anonymous speech it follows that many Supreme Court decisions addressing the issue of anonymous speech, also concern political speech.⁹ The Supreme Court in *McIntyre* explained that protecting anonymous political speech receives the highest protection;¹⁰ however, this priority takes on new dimensions in the digital age.

Anonymous Online Speech

<4>The expansion of the Internet has increased the number of forums available for anonymous speech, as well as increased the quantity of litigation surrounding these modes of digital expression. According to Technorati—a search engine that monitors over a hundred million blogs—there are more than one million blog posts per day.¹¹ Courts have, in light of this vast new arena, recognized the connection between earlier versions of anonymous speech and the Internet. In a previous decision, the Supreme Court explained that First Amendment protection should be granted to the Internet.¹² As another court put it, “the Internet is a truly democratic forum . . . [and] [f]or this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”¹³ Thus, while not all Internet posts are anonymous, the ability to participate in anonymous free speech online has forced courts to more closely examine if and when online postings should be considered protected free speech.

<5>Additional decisions reiterate the First Amendment's application to online anonymous speech, and address the question of when a court order should be issued, compelling disclosure of the name and identity of an anonymous

speaker. In determining whether disclosure is proper, courts have echoed the concerns involving an anonymous speaker's First Amendment rights in non-Internet media. In general, critics fear that plaintiffs will use the court system to hinder political conversations by forcing people to choose between speaking anonymously, and not speaking for fear of retaliation.¹⁵

<6>However, anonymous online speech is not without limits. As a current case demonstrates, one in which the defendant stated on a law-school discussion board that two women should be raped, an anonymous poster's comments may extend beyond free speech protections.¹⁶ In the case, a Connecticut federal court must apply a standard to decide whether the poster's identity should be revealed. Significantly, however, there are several tests that the court *could* apply when considering this issue, some of which will be discussed here.

EARLIER JUDICIAL STANDARDS FOR REVEALING AN ANONYMOUS ONLINE POSTER'S IDENTITY: THE FOUR-PART DENDRITE ANALYSIS

<7>The New Jersey court in *Dendrite v. Doe* examined the standards courts should apply to evaluate discovery subpoena applications for the identities of anonymous posters.¹⁷ Dendrite International, Inc. (Dendrite) filed a complaint against numerous John Does, and specifically John Doe No. 3, for defamation and misappropriation of trade secrets.¹⁸ John Doe No. 3 had made various postings on the Yahoo! Dendrite bulletin board that described Dendrite's revenue recognition policy, and stated that the company's president was shopping the company to other corporations.¹⁹ Dendrite contended that these postings were false and constituted defamation. During the process of the litigation, Dendrite filed a motion to compel discovery to identify John Doe No. 3,²⁰ which the trial court denied and the appellate court subsequently affirmed.

<8>In affirming the trial court's decision, the appellate court set forth a four-part test for trial courts to follow where plaintiffs seek an expedited discovery order compelling Internet Service Providers (ISPs) to disclose the identity of an anonymous online poster.²¹ First, the trial court should require the plaintiff to make efforts to notify the anonymous posters that they are the subjects of a subpoena or requested order of disclosure, and also permit the defendants a reasonable opportunity to oppose the application.²² Second, the court should request that the plaintiff identify the exact statements allegedly made by anonymous posters, which the plaintiff considers the actionable speech. Third, the court must examine whether the plaintiff has produced sufficient evidence to establish a prima facie cause of action against the anonymous defendants.²³ Finally, the court must balance the defendant's First Amendment right of anonymous free speech with the strength of the case presented, in addition to considering the necessity for disclosing the anonymous defendant's identity.²⁴

<9>For example, when making its determination, the *Dendrite* Court concluded that the anonymous poster's identity should not be disclosed where Dendrite failed to sufficiently demonstrate that John Doe No. 3's postings caused any damages to Dendrite's stock value. As such, the motion to compel the anonymous poster's identity was denied.²⁵ Additional court decisions have looked to the test set forth in *Dendrite* when faced with similar plaintiff requests for disclosure, but *Dendrite* does not provide the only approach to this challenge that courts must face.²⁶

<10> In *Doe v. Cahill*, the Delaware State Supreme Court also faced the issue of whether to disclose an anonymous poster's identity. The decision by the state supreme court was the first of its kind by a state supreme court.²⁷ The Internet postings at issue in *Cahill* were two postings by John Doe No. 1 (Doe), which were made on a blog dedicated to opinions about public issues in the Smyrna/Clayton area of Delaware.²⁸ Doe asserted that Cahill, a local councilman, had "obvious mental deterioration" and wrote that "Cahill [sic] is *as paranoid* as everyone in town thinks he is."²⁹ Cahill obtained a court order requiring the ISP to disclose Doe's identity.³⁰

<11> In *Cahill*, the Delaware Supreme Court³¹ reversed the trial judge's order that required the third party—the Internet Service Provider—to disclose Doe's identity.³² While the trial judge applied a good faith standard,³³ the Delaware Supreme Court found that this standard failed to adequately protect John Doe's First Amendment right to anonymous speech.³⁴ Instead the court adopted the summary judgment standard.³⁵ In doing so, the court stated that "[w]e conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously."³⁶

<12> The summary judgment standard applied in *Cahill* has only two prongs, and was influenced by the *Dendrite* Court's decision.³⁷ The first prong in the *Cahill* analysis was the notification provision: a plaintiff must undertake to notify the anonymous defendants that they are the subject of a subpoena or application for order of disclosure.³⁸ As mentioned in *Dendrite*, the plaintiff must withhold action to allow the defendant an opportunity to file and serve motions opposing the discovery request.³⁹ The second prong required in *Cahill* was that the plaintiff must satisfy the summary judgment standard.⁴⁰ The court explained this second prong was, in fact, the third prong in *Dendrite*, which subsumed the other two significant requirements present in the *Dendrite* case. More specifically, the plaintiff must set forth the exact defamatory statements and the trial court must balance the defendant's rights against the strength of the plaintiff's case.⁴¹ The *Cahill* Court clarified that a plaintiff need only prove the elements of the claim that are within the plaintiff's control.⁴²

<13> In applying the summary judgment standard to the facts of *Cahill*, the Delaware Supreme Court concluded that Cahill had failed to plead essential elements of the claim.⁴³ The court determined that since the statements were made on a blog specifically dedicated to opinions regarding Smyrna, a reasonable person would interpret Doe's statements as mere opinions about Cahill that lacked any factual basis.⁴⁴ As such, the Delaware Supreme Court reversed the trial court and remanded with instructions for the case to be dismissed.⁴⁵ The Arizona Court of Appeals, in *Mobilisa, Inc. v. Doe*,⁴⁶ subsequently adopted the *Cahill* test, in addition to the considerations presented in *Dendrite*, to create a new standard when faced with an anonymous poster's rights.

THE MOBILISA TEST

<14> The dispute in *Mobilisa, Inc. v. Doe* centered on an email from an anonymous email account. A Mobilisa⁴⁷ employee used his work account to send an intimate message to a woman with whom he was engaged in a personal relationship.⁴⁸ Six days after the employee sent the contentious email, Mobilisa managers received a forwarded copy of the text of the email with the subject

line: "Is this a company you want to work for?"⁴⁹ The email originated from an anonymous email address maintained by an email service provider known as The Suggestion Box, Inc. (TSB).⁵⁰ Mobilisa then filed suit against John Does 1-10,⁵¹ and sought to compel TSB to disclose the identities of John Doe 1. The superior court found that Mobilisa had made a sufficient showing to meet the *Cahill* two-part standard, and, therefore, Mobilisa could conduct discovery to determine the defendant John Doe 1's identity.⁵² TSB and the anonymous defendant then appealed the decision.⁵³

<15> In fashioning the new three-part test, the Arizona Court of Appeals considered both of the tests established in *Dendrite* and *Cahill*, as well as tests from other decisions. The court of appeals first declined to apply a different test to property-based claims and claims for defamation.⁵⁴ The *Mobilisa* Court stated, "[w]hether the claim is one for defamation or a property-based claim, the potential for chilling anonymous speech remains the same."⁵⁵ The court also adopted the combined standard "that the requesting party show the anonymous speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request."⁵⁶ Furthermore, the court followed the second step of the *Cahill* decision—that the requesting party must demonstrate that it would survive a motion for summary judgment on the elements, not dependent on knowing the speaker's identity.⁵⁷ Finally, the court of appeals in *Mobilisa* then departed from *Cahill*, and instead adopted a *Dendrite* component that balances the strength of the requesting party's case against the need for disclosure of the anonymous poster's identity.⁵⁸

<16> For the final balancing element, a court, as with earlier approaches, must then decide if the competing interests favor disclosure.⁵⁹ The *Mobilisa* Court of Appeals, in making its determination, focused on three central concerns. Primarily, the court focused on the fact that the summary judgment element found in *Cahill* did not necessarily account for factors weighing against disclosure of an anonymous poster.⁶⁰ Adding specific sub-elements to this test allows the court to consider other additional factors, including the following: (1) the type of speech involved; (2) the speaker's privacy expectations; (3) the potential consequence of a discovery order to the speaker; (4) the need for the speaker's identity to advance the requesting party's position; and (5) the availability of alternative discovery methods.⁶¹

<17> In addition, balancing competing interests is consistent with the standard used for evaluating a preliminary injunction, which the court found to be analogous.⁶² Indeed, balancing the interests "provides an additional safeguard that comports with Arizona's broad protection given to free speech and individual privacy."⁶³ In light of this new three-part test—the notice requirement, the summary judgment standard, and the balancing element—the court remanded for an analysis of the third step.⁶⁴ Regardless of the case's final determination, the *Mobilisa* test indicates a new hybrid approach that courts may use to assess the rights of anonymous posters with those of combating questionable online activities. However, the worth of this new balancing approach has yet to be determined.

DOES THE MOBILISA TEST PROVIDE A BETTER STANDARD?

<18> The balancing requirement of the *Mobilisa* test likely improves on the earlier analysis set forth in *Cahill*. The *Mobilisa* test provides greater protection to an anonymous poster's identity, which is an important consideration in light of previous Supreme Court precedent and a poster's First Amendment rights. Under

the *Cahill* test, for example, as long as the plaintiff meets the summary judgment threshold, a court would allow the anonymous poster's identity to be disclosed. Meanwhile, as the balancing factor is present in *Dendrite*, the distinction between the *Mobilisa* test and *Dendrite* test is less apparent. Regardless, the balancing requirement established by the Arizona Court of Appeals forces a court to consider the particular circumstances of a case, and to determine if the situation requires disclosure or warrants protection of anonymous speech.

<19>As the *Mobilisa* Court itself observed, "[r]equiring the court to consider and weigh these [additional] factors . . . would provide the court with the flexibility needed to ensure a proper balance is reached between the parties' competing interests on a case-by-case basis."⁶⁵ The *Mobilisa* three-part test requires the court to weigh the various factors against disclosure and, if known witnesses had the same information, the anonymous poster's identity would be protected even though the plaintiff satisfied the summary judgment element.⁶⁶ As such, the *Mobilisa* test protects Internet posters' First Amendment rights to speak anonymously in situations where the court may weigh which factors favor protection, and provides a novel and improved approach to this issue in light of competing interests.

CONCLUSION

<20>Courts have struggled to adopt a uniform test that balances the First Amendment right of an anonymous defendant to remain anonymous, with the plaintiff's desire to disclose the defendant's identity. The *Mobilisa* test presents a three-part test that strikes a balance between competing party interests. By incorporating the notice and summary judgment requirements from *Cahill*, and adding a balancing prong, the *Mobilisa* court presents a test that requires courts to consider each party's interests and, thus, better protects anonymous speech than the *Cahill* test. Nevertheless, the law concerning the disclosure of anonymous Internet speech will likely remain in flux as different courts determine which judicial standard best balances policy considerations. Therefore, the applicability of the *Mobilisa* test outside of Arizona remains to be decided, but the decision appears to provide an improved approach given competing interests present in the digital age.

[<< Top](#)

Footnotes

1. Kristina Ringland, University of Washington School of Law, J.D. program Class of 2009. Thank you to Professor Jane Winn of the University of Washington School of Law and Professor James Gibson of the University of Richmond School of Law. Thank you also to Boris Reznikov, student editor.
2. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).
3. *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001).
4. *See Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
5. *See Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005).
6. *See Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007).
7. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

8. *Talley v. California*, 362 U.S. 60, 64 (1960).
9. See TOMAS A. LIPINSKI, *TO SPEAK OR NOT TO SPEAK: DEVELOPING LEGAL STANDARDS FOR ANONYMOUS SPEECH ON THE INTERNET* 942 (2002), <http://www.informingscience.org/proceedings/IS2002Proceedings/papers/Lipin103ToSpe>.
10. See *McIntyre*, 514 U.S. at 346-47.
11. About Us: Welcome to Technorati, <http://www.technorati.com/about/> (last visited Apr. 20, 2008).
12. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).
13. *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001).
14. *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (internal citations omitted). See also LIPINSKI, *supra* note 9, at 942 (enumerating additional anonymous Internet speech cases).
15. *2TheMart.com*, 140 F. Supp. 2d at 1095 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999)).
16. See Amir Efrati, *AutoAdmit Suit Update: Defendant "AK47" Responds*, WALL ST. J.: LAW BLOG, Feb. 28, 2008, <http://blogs.wsj.com/law/2008/02/28/autoadmit-suit-update-defendant-ak47-responds/?mod=WSJBlog>.
17. *Dendrite v. Doe No. 3*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001).
18. *Id.* at 763.
19. *Id.*
20. *Id.* at 764.
21. *Id.* at 760.
22. *Dendrite v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).
23. *Id.*
24. *Id.* at 760-61.
25. *Id.* at 772.
26. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 451-57 (Md. 2009).
27. *Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005).
28. *Id.* at 454.
29. *Id.*
30. *Id.* at 455 (emphasis in the original). The court also denied an "Emergency Motion for a Protective Order" filed by Doe in response to the court order requiring Doe's identity be disclosed.
31. *Id.* The Delaware Supreme Court reviewed the trial court's decision de novo.
32. *Doe No. 1 v. Cahill*, 884 A.2d 451, 454 (Del. 2005).

33. *Id.* at 455. The trial court's good faith standard required that Cahill demonstrate three factors: "(1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source." *See also* Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1228 (2007).
34. *Doe No. 1 v. Cahill*, 884 A.2d 451, 454 (Del. 2005).
35. *Id.* at 460.
36. *Id.*
37. *Id.* at 460-61.
38. *Id.*
39. *Doe No. 1 v. Cahill*, 884 A.2d 451, 461 (Del. 2005).
40. *Id.*
41. *Id.*
42. *Id.* at 464.
43. *Id.* at 467.
44. *Id.* at 467.
45. *Doe No. 1 v. Cahill*, 884 A.2d 451, 468 (Del. 2005).
46. *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 716 (Ariz. Ct. App. 2007).
47. Mobilisa is "a Washington company that provides wireless and mobile communication systems to customers that include government and military entities." *Id.* at 715.
48. *Id.* at 715.
49. *Id.*
50. *Id.*
51. *Id.* at 715-16. Plaintiff alleged violation of two federal laws related to electronic communications and asserted a trespass to chattel claim. A central issue was that the defendants accessed Mobilisa's protected computer systems without authorization.
52. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 716 (Ariz. Ct. App. 2007).
53. *Id.*
54. *Id.* at 719 (following *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001)).
55. *Id.* at 719 (citing *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001)).
56. *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 719 (Ariz. Ct. App. 2007).
57. *Id.* at 720 (explaining the purpose of this inquiry is to compel the speaker's identity only as a way to redress misuses of speech and not as a way to retaliate against legitimate free speech).

58. *Id.*
59. *Id.*
60. *Id.*
61. Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 720 (Ariz. Ct. App. 2007).
62. *Id.* at 720-21.
63. *Id.* at 721.
64. *Id.*
65. Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 720 (Ariz. Ct. App. 2007)
(citing Dendrite v. Doe No. 3, 775 A.2d 756, 761 (N.J. Super. Ct. App. Div. 2001)).
66. *Id.*