September 13, 2005

3) Online Speech: Not enough or too much?

- *Cubby, Inc. v. Compuserve Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991)
- *Stratton Oakmont, Inc. v. Prodigy Servs Co.*, 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. May 24, 1995)
- *CDA § 230*, 47 USC § 230 (1996)
- *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997)
- *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998)
- *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D.Wash. 2001)
- *Code*, chapters 6-7

For further reading (optional):

- Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L. J. 855 (2000) <http://www.law.duke.edu/journals/dlj/articles/dlj49p855.htm>
- EFF, Blogging Anonymously, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>

Among the Internet content "as diverse as human thought" is plenty of material for anyone to find objectionable. This week's readings follow the evolution of defamation law in the Internet context and look into the challenges of anonymity and accountability on the Internet.

Offline or on, defamation is a complicated subject. Its elements, as described by the Restatement (Second) of Torts § 558, are "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." There are numerous exceptions and defenses that may depend on the nature and subject of the communication and of the parties.

Apart from the original speaker, those who repeat defamatory statements may also face liability. Courts have traditionally distinguished between "publishers" and "distributors," holding the publisher of a defamatory statement (the editor of a magazine or radio broadcaster) liable, but not the unknowing distributor (the bookstore or newspaper vendor).

In the early cases, *Cubby v. Compuserve* and *Stratton Oakmont v. Prodigy*, courts struggled with the proper analogy: Is an online bulletin board service a library or a newspaper? Why do the two courts reach different conclusions? Do you see significant differences between CompuServe's Rumorville and Prodigy's "Money Talk"?
What kind of incentives does the two courts' reasoning create for companies operating online services?

Congress addressed some of the uncertainty in 1996, when it enacted Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Look at the motivations in the legislative findings, as well as the core protections in § 230(c). (Note that § 230 was not struck down when the "harmful to minors" provisions were declared unconstitutional in *Reno v. ACLU*). How would *Cubby* and *Stratton Oakmont* have been resolved if they had been litigated post-CDA? What kind of incentives does this law create for Internet service providers?

Zeran v. America Online and *Blumenthal v. Drudge* show how § 230 has played out. Not how much harder the statute made it to pursue intermediaries. Why do both Zeran and Blumenthal sue ISPs? What were their alternatives? Are the courts comfortable with the results they reach? Since *Zeran*, courts have almost universally followed its reading of § 230.

Not only does the Internet make it easy for speakers to reach nationwide audiences, it lets them do so anonymously or using pseudonyms – if they are careful. Many Internet users who think that they are speaking anonymously don't realize that ISPs have enough information to connect their postings to an offline identity, perhaps because they gave real information when they signed up for accounts, or perhaps because they posted from computers on dial-up or broadband connections registered in their names. *Doe v. 2TheMart* shows a court responding to a third-party discovery subpoena to an ISP asking for users' identifying information, where the user asserts rights to anonymity.

As you see in *2TheMart*, the right to speak anonymously has been recognized as part of the First Amendment's guarantee of free speech. Users who want to assure that their postings are not traced back to offline identities can use a variety of anonymizing technologies: paying cash at an Internet café; going through a proxy such as anonymizer.com; or "onion routing" their traffic through a series of proxies, such as Tor (see <http://tor.eff.org/>). Political bloggers on the right and left have used long-term pseudonyms when posting their commentaries. For more on anonymizing technologies, see EFF's Blogging Anonymously, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.

How should we treat anonymity in the Internet age, as compared to the posting of anonymous handbills in the town square? Can accountability and trust be created without reference to offline identity? Is technology or law winning the arms race?

Cubby, Inc. v. Compuserve Inc.,
776 F.Supp. 135 (S.D.N.Y. 1991)

CompuServe develops and provides computer-related products and services, including CompuServe Information Service ("CIS"), an on-line general information service or "electronic library" that subscribers may access from a personal computer or terminal. Subscribers to CIS pay a membership fee and online time usage fees, in return for which they have access to the thousands of information sources available on CIS. Subscribers may also obtain access to over 150 special interest "forums," which are comprised of electronic bulletin boards, interactive online conferences, and topical databases.

One forum available is the Journalism Forum, which focuses on the journalism industry. Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe."

One publication available as part of the Journalism Forum is Rumorville USA ("Rumorville"), a daily newsletter that provides reports about broadcast journalism and journalists. Rumorville is published by Don Fitzpatrick Associates of San Francisco ("DFA"), which is headed by defendant Don Fitzpatrick. CompuServe has no employment, contractual, or other direct relationship with either DFA or Fitzpatrick; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that DFA "accepts total responsibility for the contents" of Rumorville. Cameron Aff., Exhibit B. The contract also requires CCI to limit access to Rumorville to those CIS subscribers who have previously made membership arrangements directly with DFA.

CompuServe has no opportunity to review Rumorville's contents before DFA uploads it into CompuServe's computer banks, from which it is immediately available to approved CIS subscribers. CompuServe receives no part of any fees that DFA charges for access to Rumorville, nor does CompuServe compensate DFA for providing Rumorville to the Journalism Forum; the compensation CompuServe receives for making Rumorville available to its subscribers is the standard online time usage and membership fees charged to all CIS subscribers, regardless of the information services they use. CompuServe maintains that, before this action was filed, it had no notice of any complaints about the contents of the Rumorville publication or about DFA.

In 1990, plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") (collectively, "plaintiffs") developed Skuttlebut, a computer database designed to publish and distribute electronically news and gossip in the television news and radio industries. Plaintiffs intended to compete with Rumorville; subscribers gained access to Skuttlebut through their personal computers after completing subscription agreements with plaintiffs.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and

defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that Blanchard was "bounced" from his previous employer, WABC; and a description of Skuttlebut as a "new start-up scam."

…

Discussion

A. The Applicable Standard of Liability

Plaintiffs base their libel claim on the allegedly defamatory statements contained in the Rumorville publication that CompuServe carried as part of the Journalism Forum. CompuServe argues that, based on the undisputed facts, it was a distributor of Rumorville, as opposed to a publisher of the Rumorville statements. CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory [**9] statements. Plaintiffs, on the other hand, argue that the Court should conclude that CompuServe is a publisher of the statements and hold it to a higher standard of liability.

Ordinarily, "'one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.'" Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) With respect to entities such as news vendors, book stores, and libraries, however, "New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981).

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment. "The constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry. Smith v. California, 361 U.S. 147, 152-53, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959). In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents. The Court reasoned that

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.

Id. at 153. Although Smith involved criminal liability, the First Amendment's guarantees are no less relevant to the instant action: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)

CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.

With respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications . . . . Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984),.

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

B. CompuServe's Liability as a Distributor

CompuServe contends that it is undisputed that it had neither knowledge nor reason to know of the allegedly defamatory Rumorville statements, especially given the large number of publications it carries and the speed with which DFA uploads Rumorville into

its computer banks and makes the publication available to CIS subscribers. The burden is thus shifted to plaintiffs, who "'must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Plaintiffs have not set forth anything other than conclusory allegations as to whether CompuServe knew or had reason to know of the Rumorville statements, and have failed to meet their burden on this issue. Plaintiffs do contend that CompuServe was informed that persons affiliated with Skuttlebut might be "hacking" in order to obtain unauthorized access to Rumorville, but that claim is wholly irrelevant to the issue of whether CompuServe was put on notice that the Rumorville publication contained statements accusing the Skuttlebut principals of engaging in "hacking."

Plaintiffs have not set forth any specific facts showing that there is a genuine issue as to whether CompuServe knew or had reason to know of Rumorville's contents. Because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements, summary judgment in favor of CompuServe on the libel claim is granted.

…
Conclusion

For the reasons stated above, CompuServe's motion for summary judgment pursuant to Fed. R. Civ. P. 56 is granted on all claims asserted against it.

Stratton Oakmont, Inc. v. Prodigy Services Co.,
1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. May 24, 1995)

At issue in this case are statements about Plaintiffs made by an unidentified bulletin board user or "poster" on PRODIGY's "Money Talk" computer bulletin board on October 23rd and 25th of 1994. These statements included [claims that plaintiff had engaged in criminal and fraudulent acts in connection with stock offerings]. Plaintiffs commenced this action against PRODIGY, the owner and operator of the computer network on which the statements appeared, and the unidentified party who posted the [allegedly defamatory] statements. The second amended complaint alleges ten (10) causes of action, including claims for per se libel.

…

Plaintiffs base their claim that PRODIGY is a publisher in large measure on PRODIGY's stated policy, starting in 1990, that it was a family oriented computer network. In various national newspaper articles written by Geoffrey Moore, PRODIGY's Director of Market Programs and Communications, PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper. In one article PRODIGY stated:

> "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate."

Plaintiffs characterize the aforementioned articles by PRODIGY as admissions and argue that, together with certain documentation and deposition testimony, these articles establish Plaintiffs' prima facie case. In opposition, PRODIGY insists that its policies have changed and evolved since 1990 and that the latest article on the subject, dated February, 1993, did not reflect PRODIGY's policies in October, 1994, when the allegedly libelous statements were posted. Although the eighteen month lapse of time between the last article and the aforementioned statements is not insignificant, and the Court is wary of interpreting statements and admissions out of context, these considerations go solely to the weight of this evidence.

…

A finding that PRODIGY is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault. However, a newspaper, for example, is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the exercise of editorial control and judgment, and with this editorial control comes increased

liability. In short, the critical issue to be determined by this Court is whether the foregoing evidence establishes a prima facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.

…PRODIGY argues that in terms of sheer volume -- currently 60,000 messages a day are posted on PRODIGY bulletin boards -- manual review of messages is not feasible. While PRODIGY admits that Board Leaders may remove messages that violate its Guidelines, it claims in conclusory manner that Board Leaders do not function as "editors". Furthermore, PRODIGY argues generally that this Court should not decide issues that can directly impact this developing communications medium without the benefit of a full record, although it fails to describe what further facts remain to be developed on this issue of whether it is a publisher.

As for legal authority, PRODIGY relies on the Cubby case, supra. There the defendant CompuServe was a computer network providing subscribers with computer related services or forums including an online general information service or "electronic library". One of the publications available on the Journalism Forum carried defamatory statements about the Plaintiff, an electronic newsletter. Interestingly, an independent entity named Cameron Communications, Inc. ("CCI") had "contracted to manage, review, create, delete, edit and otherwise control the contents of the Journalism Forum in accordance with editorial and technical standards and conventions of style as established by CompuServe". The Court noted that CompuServe had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe's computer banks. Consequently, the Court found that CompuServe's product was, "in essence, an electronic for-profit library" that carried a vast number of publications, and that CompuServe had "little or no editorial control" over the contents of those publications. In granting CompuServe's motion for summary judgment, the Cubby court held:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.

The key distinction between CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is

compelled to conclude that for the purposes of plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.

…PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice. For the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate network for its increased control and the resulting increased exposure. See, Eric Schlachter, *Cyberspace, The Free Market and The Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bullet: Board Functions***,** 16 Hastings Communication and Entertainment L. J., 87 138-139. Presumably PRODIGY's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a mark it perceived to exist consisting of users seeking a "family-oriented" computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences. In addition, the Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which a pending in Congress, is enacted.

47 USCS § 230

§ 230. Protection for private blocking and screening of offensive material

(a) Findings. The Congress finds the following:
(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy. It is the policy of the United States--
(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.
(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)

[subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Zeran v. America Online
129 F.3d 327 (4th Cir. 1997)

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA") -- 47 U.S.C. § 230 -- bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL's alleged negligence prior to the CDA's enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran's, instituted after the CDA's enactment. Accordingly, we affirm the judgment of the district court.

"The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. Reno v. ACLU, 138 L. Ed. 2d 874, 117 S. Ct. 2329, 2334 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. Id. AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

… On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to

"please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. n1 After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). [*330] The district court granted AOL's motion, and Zeran filed this appeal.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n1 Zeran maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users. The issue of AOL's record keeping practices, however, is not presented by this appeal.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

II.A.
Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Id. § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation." Id. § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Id. § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." Id. § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. See Reno v. ACLU, 117 S. Ct. at 2334 (noting that at time of district court trial, "commercial online services had almost 12 million individual subscribers"). The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy -- an interactive computer service like AOL -- for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the Stratton Oakmont decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

…

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the Stratton Oakmont court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Cf. Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming

transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Blumenthal v. Drudge,
992 F.Supp. 44 (D.D.C. 1998)

This is a defamation case revolving around a statement published on the Internet by defendant Matt Drudge. On August 10, 1997, the following was available to all having access to the Internet:

> The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.
>
> The accusations are explosive.
>
> There are court records of Blumenthal's violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT.
> …

In late May or early June of 1997, at approximately the time when the licensing agreement expired, defendant Drudge entered into a written license agreement with AOL. The agreement made the Drudge Report available to all members of AOL's service for a period of one year. In exchange, defendant Drudge received a flat monthly "royalty payment" of $ 3,000 from AOL. During the time relevant to this case, defendant Drudge has had no other source of income. Under the licensing agreement, Drudge is to create, edit, update and "otherwise manage" the content of the Drudge Report, and AOL may "remove content that AOL reasonably determine[s] to violate AOL's then standard terms of service." Drudge transmits new editions of the Drudge Report by e-mailing them to AOL. AOL then posts the new editions on the AOL service. Drudge also has continued to distribute each new edition of the Drudge Report via e-mail and his own web site.

Late at night on the evening of Sunday, August 10, 1997 (Pacific Daylight Time), defendant Drudge wrote and transmitted the edition of the Drudge Report that contained the alleged defamatory statement about the Blumenthals. Drudge transmitted the report from Los Angeles, California by e-mail to his direct subscribers and by posting both a headline and the full text of the Blumenthal story on his world wide web site. He then transmitted the text but not the headline to AOL, which in turn made it available to AOL subscribers.

After receiving a letter from plaintiffs' counsel on Monday, August 11, 1997, Complaint, Ex. 6, defendant Drudge retracted the story through a special edition of the Drudge Report posted on his web site and e-mailed to his subscribers. At approximately 2:00 a.m. on Tuesday, August 12, 1997, Drudge e-mailed the retraction to AOL which posted it on the AOL service. Defendant Drudge later publicly apologized to the Blumenthals..

II. AOL's MOTION FOR SUMMARY JUDGMENT

…The term 'Internet' means the international computer network of both Federal and non-

Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1). The Internet is "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks." ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff'd, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997). The "web" is a "vast decentralized collection of documents containing text, visual images, and even audio clips . . . . The web is designed to be inherently accessible from every Internet site in the world." Stephen Wilske and Teresa Schiller, *International Jurisdiction In Cyberspace: Which States May Regulate The Internet?* 50 FED. COM. L. J. 117, 140 (1997).

[*49] The near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to computers and thus to the Internet have created ever-increasing opportunities for the exchange of information and ideas in "cyberspace." n8 This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene and pornographic materials, and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape.

…

B. *Communications Decency Act of 1996, Section 230*

…

Plaintiffs concede that AOL is a "provider . . . of an interactive computer service" for purposes of Section 230, and that if AOL acted exclusively as a provider of an interactive computer service it may not be held liable for making the Drudge Report available to AOL subscribers. See 47 U.S.C. § 230(c)(1). They also concede that Drudge is an "information content provider" because he wrote the alleged defamatory material about the Blumenthals contained in the Drudge Report. While plaintiffs suggest that AOL is responsible along with Drudge because it had some role in writing or editing the material in the Drudge Report, they have provided no factual support for that assertion. Indeed, plaintiffs affirmatively state that "no person, other than Drudge himself, edited, checked, verified, or supervised the information that Drudge published in the Drudge Report." It also is apparent to the Court that there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL, and plaintiffs seem to have all but abandoned that argument.

.

… While Section 230 does not preclude joint liability for the joint development of content, AOL maintains that there simply is no evidence here that AOL had any role in creating or developing any of the information in the Drudge Report. The Court agrees. It is undisputed that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL. AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a "publisher or speaker" and therefore may not be held liable in tort. 47 U.S.C. § 230(c)(1).

…

Plaintiffs make the additional argument, however, that Section 230 of the Communications Decency Act does not provide immunity to AOL in this case because Drudge was not just an anonymous person who sent a message over the Internet through AOL. He is a person with whom AOL contracted, whom AOL paid $ 3,000 a month -- $ 36,000 a year,

Drudge's sole, consistent source of income -- and whom AOL promoted to its subscribers and potential subscribers as a reason to subscribe to AOL. Furthermore, the license agreement between AOL and Drudge by its terms contemplates more than a passive role for AOL; in it, AOL reserves the "right to remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL . . . . violates AOL's then-standard Terms of Service. . . ." By the terms of the agreement, AOL also is "entitled to require reasonable changes to. . . content, to the extent such content will, in AOL's good faith judgment, adversely affect operations of the AOL network."

In addition, shortly after it entered into the licensing agreement with Drudge, AOL issued a press release making clear the kind of material Drudge would provide to AOL subscribers -- gossip and rumor -- and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report. The press release was captioned: "AOL Hires Runaway Gossip Success Matt Drudge."[I]t noted that "maverick gossip columnist Matt Drudge has teamed up with America Online," and stated: "Giving the Drudge Report a home on America Online (keyword: Drudge) opens up the floodgates to an audience ripe for Drudge's brand of reporting . . . AOL has made Matt Drudge instantly accessible to members who crave instant gossip and news breaks." Why is this different, the Blumenthals suggest, from AOL advertising and promoting a new purveyor of child pornography or other offensive material? Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip "instantly accessible" to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?

If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider

community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

… As the Fourth Circuit stated in Zeran: "Congress enacted § 230 to remove . . . disincentives to self-regulation . . . . Fearing that the specter of liability would. . . deter service providers from blocking and screening offensive material. . . . § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." Zeran v. America Online, Inc., 129 F.3d at 331. n.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n.
One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.
H.R. CONF. REP. No. 104-458, at 194 (1996).
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Any attempt to distinguish between "publisher" liability and notice-based "distributor" liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability. As the Fourth Circuit has noted: "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message," and such notice-based liability "would deter service providers from regulating the dissemination of offensive material over their own services" by confronting them with "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability" exactly what Congress intended to insulate them from in Section 230. Zeran v. America Online, Inc., 129 F.3d at 333. Cf. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (decided before enactment of Communications Decency Act). While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment.

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

This matter comes before the Court on the motion of J. Doe (Doe) to proceed under a pseudonym and to quash a subpoena issued by 2TheMart.com (TMRT) to a local internet service provider, Silicon Investor/InfoSpace, Inc. (InfoSpace). The motion raises important First Amendment issues regarding Doe's right to speak anonymously on the Internet and to proceed in this Court using a pseudonym in order to protect that right. The Court heard oral argument on the motion and issued an oral ruling on April 19, 2001. Due to the importance of the constitutional issues raised by this motion, the Court now issues this written order.

FACTUAL BACKGROUND

There is a federal court lawsuit pending in the Central District of California in which the shareholders of TMRT have brought a shareholder derivative class action against the company and its officers and directors alleging fraud on the market. In that litigation, the defendants have asserted as an affirmative defense that no act or omission by the defendants caused the plaintiffs' injury. By subpoena, TMRT seeks to obtain the identity of twenty-three speakers who have participated anonymously on Internet message boards operated by InfoSpace. That subpoena is the subject of the present motion to quash.

InfoSpace is a Seattle based Internet company that operates a website called "Silicon Investor." … One of the Internet bulletin boards on the Silicon Investor website is specifically devoted to TMRT. According to the brief filed on behalf of J. Doe, "to date, almost 1500 messages have been posted on the TMRT board, covering an enormous variety of topics and posters. Investors and members of the public discuss the latest news about the company, what new businesses it may develop, the strengths and weaknesses of the company's operations, and what its managers and its employees might do better." Past messages posted on the site are archived, so any new user can read and print copies of prior postings.

Some of the messages posted on the TMRT site have been less than flattering to the company. In fact, some have been downright nasty. For example, a user calling himself "Truthseeker" posted a message stating "TMRT is a Ponzi scam that Charles Ponzi would be proud of. . . . The company's CEO, Magliarditi, has defrauded employees in the past. The company's other large shareholder, Rebeil, defrauded customers in the past." Another poster named "Cuemaster" indicated that "they were dumped by their accountants ... these guys are friggin liars ... why haven't they told the public this yet??? Liars and criminals!!!!!" Another user, not identified in the exhibits, wrote "Lying, cheating, thieving, stealing, lowlife criminals!!!!" Other postings advised TMRT investors to sell their stock. "Look out below!!!! This stock has had it ... get short or sell your position now while you still can." "They [TMRT] are not building anything, except extensions on their homes...bail out now."

TMRT, the defendant in the California lawsuit, issued the present subpoena to InfoSpace

pursuant to Fed.R.Civ.P. 45(a)(2). The subpoena seeks, among other things, "all identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online message boards," concerning a list of twenty-three InfoSpace users, including Truthseeker, Cuemaster, and the current J. Doe, who used the pseudonym NoGuano. These users have posted messages on the TMRT bulletin board or have communicated via the Internet with users who have posted such messages. The subpoena would require InfoSpace to disclose the subscriber information for these twenty-three users, thereby stripping them of their Internet anonymity.

InfoSpace notified these users by e-mail that it had received the subpoena, and gave them time to file a motion to quash. One such user who used the Internet pseudonym NoGuano now seeks to quash the subpoena. n

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -
n NoGuano has moved anonymously to quash the subpoena. At oral argument, counsel for all parties agreed that NoGuano was entitled to appear before this Court anonymously on the motion to quash. When an individual wishes to protect their First Amendment right to speak anonymously, he or she must be entitled to vindicate that right without disclosing their identity. Accordingly, this Court grants NoGuano's request to proceed under a pseudonym for the purposes of this motion. However, this Court does not hold that a person would be allowed to proceed anonymously in all cases or under any circumstances. The Court need not reach this issue in light of the parties' agreement to allow Doe to proceed anonymously before this Court.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

NoGuano alleges that enforcement of the subpoena would violate his or her First Amendment right to speak anonymously. In response to the motion this Court issued a Minute Order directing the interested parties TMRT, InfoSpace, and NoGuano to file additional briefing. All interested parties filed briefing as directed and participated in oral argument.

DISCUSSION

The Internet represents a revolutionary advance in communication technology. It has been suggested that the Internet may be the "greatest innovation in speech since the invention of the printing press[.]" See Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch-22, 75 Tul. L. Rev. 87, 88 (2000). It allows people from all over the world to exchange ideas and information freely and in "real-time." Through the use of the Internet, "any person with [**7] a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." Reno v. ACLU, 521 U.S. 844, 870, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997).

The rapid growth of Internet communication and Internet commerce has raised novel and complex legal issues and has challenged existing legal doctrine in many areas. This

motion raises important and challenging questions of: (1) what is the scope of an individual's First Amendment right to speak anonymously on the Internet, and (2) what showing must be made by a private party seeking to discover the identity of anonymous Internet users through the enforcement of a civil subpoena? n4

A. The anonymity of Internet speech is protected by the First Amendment.

…The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. See generally McIntyre, 514 U.S. at 341-42. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.

The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999). People who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court. Id.

When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the "core" or "essence" of the First Amendment. See McIntyre, 514 U.S. at 346-47. Governmental restrictions on such speech are entitled to "exacting scrutiny," and are upheld only where they are "narrowly tailored to serve an overriding state interest." Id. at 347. However, even non-core speech is entitled to First Amendment protection. "First Amendment protections are not confined to 'the exposition of ideas[.]'" Id. at 346, citing Winters v. New York, 333 U.S. 507, 510, 92 L. Ed. 840, 68 S. Ct. 665 (1948). Unlike the speech at issue in Buckley, McIntyre and Talley, the speech here is not entitled to "exacting scrutiny," but to normal strict scrutiny analysis….

B. Applicable legal standard.

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

As InfoSpace has urged, "unmeritorious attempts to unmask the identities of online

speakers . . . have a chilling effect on" Internet speech. The "potential chilling effect imposed by the unmasking of anonymous speakers would diminish if litigants first were required to make a showing in court of their need for the identifying information." "Requiring litigants to make such a showing would allow [the Internet] to thrive as a forum for speakers to express their views on topics of public concern." See InfoSpace's memorandum, docket no. 14 at 2. InfoSpace and NoGuano have accordingly urged this Court to "adopt a balancing test requiring litigants to demonstrate . . . that their need for identity information outweighs anonymous online speakers' First Amendment rights[.]" Id.

In the context of a civil subpoena issued pursuant to Fed.R.Civ.P. 45, this Court must determine when and under what circumstances a civil litigant will be permitted to obtain the identity of persons who have exercised their First Amendment right to speak anonymously. There is little in the way of persuasive authority to assist this Court. However, courts that have addressed related issues have used balancing tests to decide when to protect an individual's First Amendment rights.

In Columbia Ins. Co. v. Seescandy.com, the plaintiff was unable to identify the defendants when filing the complaint. That complaint named J. Doe defendants, and alleged, inter alia, the infringement of a registered trademark when those defendants registered the "Seescandy.com" domain name. See Seescandy.com, 185 F.R.D. at 576. The J. Doe defendants had engaged in the allegedly tortious conduct entirely online, and anonymously. Id. at 578. The court considered whether to allow discovery to uncover the identity of the defendants so that they might be properly served and subject to the jurisdiction of the court. The court recognized the defendant's "legitimate and valuable right to participate in online forums anonymously or pseudonymously." Id.

Accordingly, the court ruled that four limiting principals would apply to such discovery. The court required that the plaintiff identify the individual with some specificity so the court could determine if they were truly an entity amenable to suit, and that the plaintiff identify all previous steps taken to locate the defendant, justifying the failure to properly serve. Id. at 578-579. The Seescandy.com court imposed two other requirements that have direct relevance here. First, the plaintiff was required to show that the case would withstand a motion to dismiss, "to prevent abuse of this extraordinary application of the discovery process and to insure that plaintiff has standing[.]" Id. at 579-80. Second, the plaintiff was required to file a discovery request justifying the need for the information requested. Id. at 580. Therefore, the court required the plaintiff to demonstrate that the suit, and the resulting discovery sought, was not frivolous, and to demonstrate the need for the identifying information.

The standard for disclosing the identity of a non-party witness must be higher than that articulated in Seescandy.com… When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.

Accordingly, this Court adopts the following standard for evaluating a civil subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation. The Court will consider four factors in determining whether the subpoena should issue. These are whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

This test provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of civil litigants to protect their interests through the litigation discovery process. The Court shall give weight to each of these factors as the court determines is appropriate under the circumstances of each case. This Court is mindful that it is imposing a high burden. "But the First Amendment requires us to be vigilant in making [these] judgments, to guard against undue hindrances to political conversations and the exchange of ideas." Buckley, 525 U.S. at 192....

[The court found that while the subpoena had been issued in good faith, it did not relate to a defense core to the litigation, the identity of the Internet user was not relevant to TMRT's defense, and non-identity information was still available on the InfoSpace boards.]

The Court has weighed these factors in light of the present facts. TMRT has failed to demonstrate that the identity of these Internet users is directly and materially relevant to a core defense in the underlying securities litigation. Accordingly, Doe's motion to quash the subpoena is GRANTED.

IT IS SO ORDERED.