

# THE TRUTH CAN CATCH THE LIE: THE FLAWED UNDERSTANDING OF ONLINE SPEECH IN *IN RE ANONYMOUS ONLINE SPEAKERS*

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In the early years of the Internet, many cases seeking disclosure of anonymous online speakers involved large companies seeking to unveil identities of anonymous posters criticizing the companies on online financial message boards.<sup>1</sup> In such situations, Internet service providers (ISPs)—or, less often, online service providers (OSPs)<sup>2</sup>—disclosed individually-identifying information, often without providing defendants notice of this disclosure,<sup>3</sup> and judges showed hostility towards defendants’ motions to quash.<sup>4</sup> Often these subpoenas were issued by parties alleging various civil causes of action, including defamation and tortious interference with business contracts.<sup>5</sup> These cases occurred in a time when courts and the general public alike pictured the Internet as a wild west-like “frontier society,”<sup>6</sup> devoid of governing norms, where anonymous personalities ran

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1. Lyriisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1373–74 (2009).

2. As will be discussed below, there has been some conflation of two separate services that allow users to access the Internet, on the one hand, and engage in various activities, speech, and communication, on the other. Most basically, this Note distinguishes between Internet Service Providers (ISPs) and Online Service Providers (OSPs) in order to separate those services and companies involved with providing subscribers access to the infrastructure of the Internet (ISPs, and their subscribers) and those services and companies involved with providing users with online applications, services, platforms, and spaces on the Internet (OSPs and their users).

3. *See, e.g.*, *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001) (discussing problem of lack of notice in cases involving subpoenas for unmasking anonymous speakers), *cited in* Lidsky, *supra* note 1, at 1374 n.5.

4. *See, e.g.*, *2TheMart.com*, 140 F. Supp. 2d at 1095 n.5, *cited in* Lidsky, *supra* note 1, at 1374 n.5. *See generally* Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996).

5. *See, e.g.*, *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Int’l, Inc. v. Doe*, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

6. *See* Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 863 (2000) (“The fact that many Internet speakers employ online

rampant,<sup>7</sup> and no one would know whether their fellow conversant was, in real life, a dog.<sup>8</sup>

However, these general statements defining the Internet as a singular space governed by one set of characteristics and resulting in one kind of phenomenon are descriptively inaccurate. These statements conflate the Internet understood as infrastructure with online user platforms and services,<sup>9</sup> and from this presumption, courts generally derive a dual narrative of the Internet: on the one hand, the Internet is a beacon of opportunity for diverse viewpoints and truly inclusive democratic dialogue; on the other, it is a harbinger of lies, characterized by anonymity and the corresponding inherent lack of accountability, at a magnitude unparalleled in human history.<sup>10</sup> By contrast, today ISPs and OSPs are distinct entities and codes

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pseudonyms tends to heighten this sense that ‘anything goes,’ and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world.”); *see also* David Allweiss, Note, *Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?*, 15 *TOURO L. REV.* 1005, 1005 (1999) (“The Internet . . . seems easily comparable to the old Western American frontier.”); Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 *HARV. J.L. & TECH.* 429, 430 (1998) (“Lawyers, legal scholars, and other commentators are only beginning to explore the challenges of the interactive computer capabilities that comprise this new technological frontier.”). *But see* Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 *PACE L. REV.* 41, 43 (1998) (disputing the wild west characterization).

7. LAWRENCE LESSIG, *CODE, VERSION 2.0*, 19 (2006) (“[C]yberspace is different because of the reach it allows. But it is also different because of the relative anonymity it permits.”).

8. *See* Peter Steiner, *On the Internet, Nobody Knows You’re a Dog*, *THE NEW YORKER*, July 5, 1983, at 61; *see also* Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, *N.Y. TIMES*, Dec. 14, 2000, available at <http://www.nytimes.com/2000/12/14/technology/cartoon-captures-spirit-of-the-internet.html>. *But see* JOMC 50/EIS RESEARCH INITIATIVE, *On the Internet, Nobody Knows You’re a Dog* (Aug. 27, 1997), <http://www.unc.edu/depts/jomc/academics/dri/idog.html>.

9. Typically, the defining characteristics courts adopt of the Internet as infrastructure derive from the underlying presumptions of the two qualities associated with virtues of “the Internet”: that the Internet is free and that it is open. *See, e.g.*, Julius Genachowski, Prepared Remarks, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity* (Sept. 9, 2009), <http://www.openinternet.gov/read-speech.html>; SAVE THE INTERNET, <http://www.savetheinternet.com/about> (last visited Feb. 21, 2011) (“We’re working together to preserve Net Neutrality, the First Amendment of the Internet, which ensures that the Internet remains open to new ideas, innovation and voices.”). It seems these two presumptions have encouraged the image of “the Internet” as a space where speech, activities, and communications move at a faster speed, with a larger reach, and with a more diverse group of speakers than ever before seen in human history.

10. *See, e.g.*, John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 8, 1996), <https://projects.eff.org/~barlow/Declaration-Final.html> (last visited Mar. 13, 2011); *see also* Janet Morahan-Martin & Phyllis Schumacher, *Incidence and Correlates of Pathological Internet Use among College Students*, 16 *COMPUTERS IN HUMAN BEHAVIOR* 13 (2000), available at

governing behaviors in online spaces are diverse and malleable.<sup>11</sup> As such, online spaces where individuals speak, interact, and communicate are not a homogeneous virtual world.<sup>12</sup> Rather, the Internet is comprised of many different kinds of spaces, platforms, communities, and services, each of which has its own attendant characteristics, values, norms, and internal systems of accountability and regulation.<sup>13</sup>

In cases involving anonymous online speech, misunderstanding the nature of speech in online spaces has grave consequences for harmed parties and anonymous speakers alike. When faced with discovery requests and subpoenas to unmask anonymous speakers' identities, courts must weigh the harmed parties' rights to redress against the anonymous online speakers' Constitutional rights of speech.<sup>14</sup> Though there exist competing jurisdictional standards which require varying burdens on the plaintiff to show magnitude

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[http://www.sciencedirect.com/science?\\_ob=ArticleURL&\\_udi=B6VDC-3YGDD58-2&\\_user=4420&\\_coverDate=01/31/2000&\\_rdoc=1&\\_fmt=high&\\_orig=search&\\_origin=search&\\_sort=d&\\_docanchor=&view=c&\\_searchStrId=1634668443&\\_rerunOrigin=google&\\_acct=C000059607&\\_version=1&\\_urlVersion=0&\\_userid=4420&md5=76b9c905b1d098935b32b5bbd2f093fd&searchtype=a](http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VDC-3YGDD58-2&_user=4420&_coverDate=01/31/2000&_rdoc=1&_fmt=high&_orig=search&_origin=search&_sort=d&_docanchor=&view=c&_searchStrId=1634668443&_rerunOrigin=google&_acct=C000059607&_version=1&_urlVersion=0&_userid=4420&md5=76b9c905b1d098935b32b5bbd2f093fd&searchtype=a).

11. See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (the structure of the Internet can actually change insofar as its regulated); BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION*, 83–112 (2010) (discussing choice of architects of the Internet and alternate choices, that are still a possibility). However, just as real-world architecture is difficult and costly to change and rebuild, so would be the underlying Internet infrastructure. By contrast, online services and the technologies/codes that govern available interactions can be altered in the time it takes to write the code and roll-out the changes. See Nick O'Neill, *Massive Facebook Privacy Changes Are Imminent*, ALLFACEBOOK.COM (May 23, 2010), <http://www.allfacebook.com/massive-facebook-privacy-changes-are-imminent-2010-05>; see also LESSIG, *supra* note 7, at 102 (“[A]s Jennifer Mnookin says of LambdaMOO, ‘politics [is] implemented through technology.’”) (quoting Jennifer Mnookin, *Virtual(hy) Law: The Emergence of Law in LambdaMOO*, 2 J. COMPUTER-MEDIATED COMM’N 1, 14 (June 1996)).

12. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006); HENRY JENKINS, *CONVERGENCE CULTURE* (2006).

13. See generally LESSIG, *supra* note 7; JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008).

14. In *In re Anonymous Online Speakers*, No. 09-71205, 2011 WL 61635, at \*6 (9th Cir. Jan. 7, 2011), the Ninth Circuit explicitly recognized the need to “to balance the rights of anonymous speakers in discovery disputes” and used the *Cabill* standard accordingly. See *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005) (“The fourth *Dendrite* requirement, that the trial court balance the defendant’s First Amendment rights against the strength of the plaintiff’s *prima facie* case is . . . unnecessary” because “[t]he summary judgment test is itself the balance.”). But see Charles Dosko, *Peek-A-Boo I See You: The Constitution, Defamation Plaintiffs, and Pseudonymous Internet Defendants*, 5 FLA. A. & M. U. L. REV. 197, 198 (2010) (rejecting the balancing approach as “unworkable, unnecessary, and inappropriate”).

of harm prior to discovering the identities of the defendants,<sup>15</sup> accurately applying these standards is nearly impossible without assessing the nature, meaning, and scope of harm. In online speech cases, this entails an accurate understanding of speech online.<sup>16</sup>

Recently, the Ninth Circuit was the first circuit court to address a discovery request to unmask anonymous speakers in a case involving online speech.<sup>17</sup> Given the competing standards developed by courts over the past decade,<sup>18</sup> it seemed that *In re Anonymous Online Speakers* would provide a singular standard to guide the lower courts in anonymous online speech cases. However, not only did the Ninth Circuit decline to clarify competing standards, it mistakenly characterized the online nature of the defendant's speech as a separate factor in the aforementioned balancing test, finding that the allegedly harmful speech occurred on the Internet inherently weighed against the anonymous speaker.<sup>19</sup> In making this assumption, the Ninth Circuit failed to accurately understand the effect of various online spaces on the accuracy, verifiability, and correct-ability of anonymous online speech. In light of the Ninth Circuit's decision, this Note argues that regardless of the standard employed in balancing the rights of the anonymous online speakers with the rights of allegedly harmed plaintiffs,<sup>20</sup> courts cannot afford to

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15. Currently, there are four competing standards used by court in online, and offline, defamation cases. One is the good faith standard. *See, e.g., In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008). The second is the prima facie standard. *See, e.g., Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008). The third standard falls somewhere between a good faith and prima facie standard. *See, e.g., Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001). And the fourth, most stringent standard is the summary judgment standard. *See, e.g., Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). For in-depth discussions of competing standards, *see generally* Lidsky, *supra* note 1; Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469 (2009); Jonathon D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?*, 7 FIRST AMEND. L. REV. 421 (2009).

16. *See infra* Section I.B.

17. *See Anonymous Online Speakers*, 2011 WL 61635.

18. *See supra* note 15.

19. *Anonymous Online Speakers*, 2011 WL 61635, at \*6 (“The district court here appropriately considered the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action . . . and that particularly in the age of the Internet, the ‘speed and power of internet technology makes it difficult for the truth to ‘catch up’ to the lie.’” (quoting *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1213 (2008))).

20. *Krinsky* expressed skepticism in the plausibility of choosing one standard for all jurisdictions, stating: “We find it unnecessary and potentially confusing to attach a

misunderstand the nature of the Internet nor, by extension, the nature of speech occurring in online contexts.

Speech on the Internet does not occur in one vast, undifferentiated expanse. Rather, Internet speech occurs within a variety of online contexts, each one of which facilitates distinctive kinds of expression, interaction, and activity among users. Therefore, in order to accurately assess the “specific circumstances surrounding the speech,”<sup>21</sup> courts must distinguish between the single, interconnected infrastructure of the Internet and the online platforms, services, and applications that use that Internet infrastructure. In addition to providing a background distinguishing Internet infrastructure (“the Internet”) from online spaces, applications, platforms, and services (“online contexts”), this Note will provide an overview of a variety of online spaces particularly pertinent to anonymous speech cases and their specific characteristics affecting the nature, meaning, and potential harmfulness of the anonymous speech at issue.<sup>22</sup> Armed with this understanding of online speech, courts faced with discovery orders for disclosing anonymous speakers’ identities will be better equipped to balance the relative rights of both anonymous speakers and harmed parties.<sup>23</sup>

Before proceeding, it should be emphasized that in offering descriptions of these different online spaces, this Note in no way suggests that online speech should be a third category of protection under the First Amendment nor that online spaces and user expectations within these spaces are unaffected by practice or nonmalleable through either user norms or code. This Note is not, in other words, arguing for a change in First Amendment jurisprudence such that, for example, First Amendment protection be highest for political, artistic, literary, religious speech, next highest for online speech, and least highest for commercial speech. Nor, in similar vein, is this Note arguing for different standards to be applied depending on the particular forum of the online speech; for example, a higher burden for the plaintiff if the allegedly harmful speech was uttered on a review site and a lower burden

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procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet.” *Krinsky*, 72 Cal. Rptr. 3d at 244. For example, the *Krinsky* court continued, “California subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleading and motions.” *Id.*

21. See *Anonymous Online Speakers*, 2011 WL 61635, at \*6.

22. See *infra* Section II.C.

23. This understanding will also benefit courts in other online speech and Internet-related cases. See, e.g., *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (net neutrality case); *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Cal. Ct. App. 2010) (cyberbullying case).

if the speech were uttered on an individual's blog. Rather, this Note argues that in order to accurately characterize the nature of the speech and level of First Amendment protection on the one hand, and the meaning of the speech and the scope of the harm on the other, courts must understand online speech as occurring in a multitude of very different platforms, communities, and spaces, each with its own distinguishing and malleable characteristics and verification mechanisms.

In so arguing, this Note shows that highlighting the online context of the speech is not only necessary for combating the misconception of the Internet as a wild, undifferentiated frontier, but is also in line with established precedent in both anonymous speech cases and cases involving online speech. Furthermore, this Note summarizes recent efforts of a number of district and state courts to take the context of online speech into account when balancing the rights of anonymous speakers with the rights of harmed plaintiffs.<sup>24</sup> These cases reveal that, though good efforts at capturing the nature of speech in a variety of online spaces, courts fail to understand the particularly malleable and fast-changing characteristics of specific online sites. As such, this Note will show that online speech cases occur in situations of a peculiarly malleable nature for two main reasons, and that both reasons must be taken into account in anonymous online speech cases. Not only are the different categories of online spaces themselves constantly developing,<sup>25</sup> but the user norms and technological codes governing speech, actions, and communications within and between these spaces are also constantly (and sometimes abruptly) changing.<sup>26</sup> Thus, courts' investigations of the meaning and effect of online speech require a nuanced understanding of both the heterogeneity of online spaces as well as the malleable nature of particular sites and services within different categories of online spaces.

Part I of this Note outlines the background of anonymous speech jurisprudence in both offline and online cases. In so doing, it shows courts' emphases on context, as well as content, in assessing First Amendment protection and granting subpoenas or discovery orders for unmasking

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24. *See Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009).

25. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) ("Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely.")

26. LESSIG, *supra* note 7, at 113 ("In places where community is not fully self-enforcing, norms are supplemented by rules imposed either through code or by the relevant sovereign.")

anonymous speakers. It also describes some of the shortcomings of online speech jurisprudence. Part II analyzes *Anonymous Online Speakers* against this precedent, highlighting the implications of the Court's failure to distinguish between Internet infrastructure and online platforms, services, and applications. This attempts to explain an underlying reason for courts' inaccurate analyses in online speech cases and provide clarity for future cases. Part III describes a number of online spaces relevant to anonymous speech cases and highlights particularities that affect the nature, meaning, and potential harmfulness of the anonymous speech at issue. This Note concludes that an enhanced understanding of online speech, recognizing the distinction between Internet infrastructure and online spaces, and attention to the context surrounding online spaces, will better equip courts to balance the rights of anonymous speakers and the rights of harmed parties.

## I. ANONYMOUS SPEECH: OFFLINE AND ONLINE CONTEXTS

The Internet has drastically changed the possibilities for publishing speech, disseminating ideas, and communicating with others. Nonetheless, context remains important in determining the nature and meaning of speech in both offline and online cases.<sup>27</sup> In cases establishing constitutional rights to different types of speech, courts have focused on the context in which the speech occurs.<sup>28</sup> Notably, First Amendment jurisprudence consistently emphasizes not only the content of the speech but also the context of the speech in determining the level of First Amendment protection afforded. Furthermore, in the online context, the seminal case extending these protections to online speech, *Reno v. ACLU*,<sup>29</sup> implicitly characterizes online speech according to both its content and context. Importantly, some district court subpoena and discovery cases involving anonymous online speech follow the lead of *Reno* and balance the competing rights of harmed plaintiff

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27. See *infra* Sections I.A. and I.B.

28. See *infra* Section I.A.

29. 521 U.S. 844, 870 (1997) (concluding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to the medium”). Other courts have explicitly extended offline free speech protections to online speech. See, e.g., *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 439–40 (Md. 2009); *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

and anonymous defendant by assessing, if not the particular online context, at least the online platform within which the speech was uttered.<sup>30</sup>

Though applauding the democratizing effects of the Internet as a medium of communication,<sup>31</sup> courts have also struggled with its perceived dangers.<sup>32</sup> First, courts worry that because online speech is often anonymous by default, there is an inherent lack of accountability built into the medium.<sup>33</sup> Secondly, courts fear that the Internet's increased speed of dissemination makes it difficult for unverified speech to be corrected.<sup>34</sup> These fears converge in a spate of recent cases involving requests to discover the identities of anonymous online speakers by potentially harmed plaintiffs.<sup>35</sup>

This Part examines precedent in offline and online anonymous speech cases, focusing on the wealth of instances in which courts have relied on the context of the speech in order to determine the nature of the speech in question. In so doing, this Part will not choose between the standards currently employed in balancing these competing rights.<sup>36</sup> In fact, the effect of different pleading standards in different jurisdictions may well render a singular standard implausible.<sup>37</sup> Instead, this Part emphasizes the importance of assessing anonymous online speech within the context in which it was uttered as background for later observations about the Ninth Circuit's approach in *Anonymous Speakers Online*. Especially in light of *Reno*'s precedent,

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30. See *Krinsky*, 72 Cal. Rptr. 3d at 247; *Cahill*, 884 A.2d at 463.

31. See *Reno*, 521 U.S. at 873 (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

32. See, e.g., *Krinsky*, 72 Cal. Rptr. 3d at 237–38 (“[T]he relative anonymity afforded by the Internet forum promotes a looser, more relaxed communication style. Users are able to engage freely in informal debate and criticism, leading many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone.”).

33. *Id.* at 238 (“It is this informal ability to ‘sound off,’ often in harsh and unbridled invective, that opens the door to libel and other tortious conduct.”).

34. See *Quixtar Inc., v. Signature Management Team, LLC*, 566 F. Supp. 2d 1205, 1213 (D. Nev. 2008); *Indep. Newspapers, Inc.*, 966 A.2d 432, 458 (Adkins, J., concurring) (suggesting that a summary judgment test may require courts “to set additional barriers to a person seeking to assert a legitimate cause of action to remedy the damage inflicted by a defamatory Internet communication”).

35. See *supra* note 11.

36. For this discussion, see generally Lidsky, *supra* note 6; Moore, *supra* note 15; Jones, *supra* note 15.

37. See *Krinsky*, 72 Cal. Rptr. 3d at 244 (“California subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleading and motions.”); see also Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795 (2004).



assessing the context of online speech—more so than a jurisdictionally-consistent standard—should guide courts’ balancing of anonymous online speech when faced with subpoenas and discovery orders to unmask anonymous speakers.

A. RECOGNIZING THE RIGHT TO ANONYMOUS SPEECH: LOOKING AT CONTEXT

The benefits of free speech, and of anonymous speech, have been well-recognized in the history of United States society and jurisprudence. Anonymous speech is protected under the Constitution because of its “honorable tradition of advocacy and of dissent” and because of the valuable public discourse it affords.<sup>38</sup> Even the authors of the Federalist Papers published their views in support of the Constitution under pseudonyms.<sup>39</sup> The Supreme Court reasoned that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance” and was therefore contrary to free speech and the social benefits such speech affords.<sup>40</sup> Furthermore, even without the threat of persecution to the author, anonymity may force readers to focus on the ideas expressed and not on the identity of the source.<sup>41</sup> As such, anonymity may prevent prejudice against speakers who are personally unpopular or known as affiliated with a particular political party or action group and force readers to evaluate the ideas themselves and not the messenger.<sup>42</sup>

Nonetheless, anonymous speech does pose some dangers. For example, particular to anonymous speech is the fear that unaccountable, fraudulent,

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38. See *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 64 (1960) (“Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”).

39. See *Talley*, 362 U.S. at 65; *McIntyre*, 514 U.S. at 342 (“Justice Black . . . reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names.”) (citing *Talley*, 362 U.S. at 64–65).

40. *Talley*, 362 U.S. at 65.

41. *McIntyre*, 514 U.S. at 342 (“On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.”).

42. “Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” *Id.* This particular benefit of anonymity is especially relevant for online speech. Online users are increasingly able to control their exposure to online information. See CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* at 1–5 (2007). As this “daily me” becomes more prevalent, exposure to different viewpoints may well depend on “chance encounters” with opposing viewpoints via anonymous speech; that is, an online user will not be able to filter out certain viewpoints based on the identity or affiliation of the speaker.

and vitriolic speech will result from the ability to speak without identification.<sup>43</sup> Furthermore, anonymous speech may also lack accountability and thereby embolden speakers to spread lies or uncharitable expression.<sup>44</sup> Absent public repercussions for uncivil behavior, speakers can hide behind anonymity to express vitriolic views, instead of publicly valuable and diverse ones.<sup>45</sup> However, even though anonymity “may be abused when it shields fraudulent conduct,” it is also an important “shield from the tyranny of the majority.”<sup>46</sup> Also, not only do the benefits of anonymous speech often outweigh the potential harms,<sup>47</sup> there are alternate protections and safeguards available to limit fraudulent or deceptive speech that can result from anonymous speech.<sup>48</sup>

As with speech attributable to a source, the Constitution does not prohibit all regulation of anonymous speech.<sup>49</sup> For example, in commercial speech cases, the dangers posed by anonymous speech—i.e., unaccountable or misleading speech—are often outweighed by the states’ vested interests in

43. In his dissent in *McIntyre*, Justice Scalia wrote that anonymity “facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity.” *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting); see also Julie Zhou, *Where Anonymity Breeds Contempt*, N.Y. TIMES, Nov. 30, 2010, at A 31, available at <http://www.nytimes.com/2010/11/30/opinion/30zhuo.html?scp=1&sq=Where%20Anonymity%20Breeds%20Contempt&st=cse>.

44. As Justice Scalia writes in his dissent in *McIntyre*, “[t]he principal impediment against [character assassination in political campaigns] is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression.” 514 U.S. at 383 (Scalia, J., dissenting).

45. *Id.* at 385 (Scalia, J., dissenting).

46. See *id.* at 357 (citing JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 3–4 (R. McCallum ed. 1947)); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 8 (2006) (“[T]he Constitution needs to be understood as an intentionally anti-majoritarian document . . . [and] should be appraised from the perspective of whether it has succeeded in restraining the majority, especially in times of crisis, and successfully protecting minorities’ rights.”).

47. “[O]ur society accords greater weight to the value of free speech, than to the dangers of its misuse.” *McIntyre*, 514 U.S. at 357 (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting)). But see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The government may ban forms of communication more likely to deceive the public than to inform it.”). Nonetheless, courts have found First Amendment protections for anonymous commercial speech. See *Lefkoe v. Jos A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir. 2009); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

48. See *McIntyre*, 514 U.S. at 350 (“Ohio’s prohibition of anonymous leaflets is not its principal weapon against fraud.”).

49. See *id.* at 344 (“We must, therefore, decide whether and to what extent the First Amendment’s protection of anonymity encompasses documents intended to influence the electoral process.”).

protecting consumers against fraudulent or misleading advertising practices.<sup>50</sup> As such, just as commercial speech lacks the same public value as political speech, and is thereby afforded less Constitutional protection than political speech when weighed against other parties' interests, the same is true for anonymous commercial speech cases.<sup>51</sup> Therefore, though the Court explicitly recognized the importance of anonymous speech, it also recognized its limitations. In determining the correct level of First Amendment protection, the Court has looked to the content and context of the speech,<sup>52</sup> characterized the speech as political or commercial,<sup>53</sup> assessed the importance of anonymity in the particular interaction,<sup>54</sup> and considered safeguards in place to protect against fraud that can result from anonymous speech.<sup>55</sup>

For example, in *McIntyre v. Ohio Election Commission*, the Court struck down an Ohio statute prohibiting the distribution of anonymous campaign literature as violating First Amendment protections to anonymous speech.<sup>56</sup> The Court situated its inquiry in a long history protecting the right to anonymous speech and cited precedent recognizing the importance of anonymous speech in avoiding persecution or oppression of unpopular viewpoints.<sup>57</sup> The *McIntyre* Court also mentioned the benefit of anonymous speech in advocacy, stating that “[o]n occasion, quite apart from any threat of

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50. See *Cent. Hudson Electric Corp.*, 447 U.S. at 563; see also *Lefkoe*, 577 F.3d 240.

51. See, e.g., *Lefkoe*, 577 F.3d at 248; *NLRB*, 151 F.3d at 475.

52. See, e.g., *McIntyre*, 514 U.S. at 347; *Talley*, 362 U.S. at 65; *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976).

53. While the right to free political speech has a long history, see *Buckley*, 424 U.S. at 45 (holding that limitations on political speech are subject to exacting scrutiny) and *Meyer*, 486 U.S. at 423, the right to commercial speech, by contrast, is more recent. Commercial speech is defined as “expression related solely to the economic interests of the speaker and its audience.” *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976), cited in *Central Hudson*, 447 U.S. at 562. It is protected from unwarranted government regulation so long as it “concern[s] lawful activity and [is] not . . . misleading.” *Central Hudson*, 447 U.S. at 566. The rationale underlying this, albeit limited, protection is that “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Id.* at 561–62. For more on this, see generally Alexander D. Baxter, Note, *IMS Health v. Ayotte: A New Direction on Commercial Speech Cases*, 25 BERKELEY TECH. L.J. 649 (2010).

54. See *McIntyre*, 514 U.S. at 342 (“On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.”).

55. See *id.* at 350 (“Ohio’s prohibition of anonymous leaflets is not its principal weapon against fraud.”).

56. *Id.* at 357.

57. *Id.* at 341 (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind” (quoting *Talley*, 362 U.S. at 64)).

persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.”<sup>58</sup> Turning to the particular speech at issue, the Court highlighted both the content and the context of speech in determining its status as protected anonymous political speech.<sup>59</sup> In addition to the context of the particular speech (i.e. leaflets), the *McIntyre* Court looked to the larger societal context, political atmosphere, and other prohibitions that would fulfill the state’s interest in preventing fraud.<sup>60</sup> Furthermore (and similar to safeguards in online contexts to protect against fraud, below), the Court emphasized that “Ohio’s prohibition of anonymous leaflets plainly is not its principal weapon against fraud.”<sup>61</sup> As such, the Court acknowledged that the potential disadvantages of anonymous speech (i.e. fraud, lack of accountability, and vitriolic speech) could be ameliorated by other means; in other words, the Court rejected the intimation that protecting anonymous speech also necessarily allows for unaccountability and fraud. The Court reasoned that even though “[t]he right to remain anonymous may be abused when it shields fraudulent conduct[,] . . . our society accords greater weight to the value of free speech than to the dangers of its misuse.”<sup>62</sup> Working under that presumption, the Court concluded that “Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech.”<sup>63</sup>

Similarly, in *Meyer v. Grant*,<sup>64</sup> the Court was charged with determining the level of First Amendment protection afforded to ballot-initiative petitions. The Court looked at both the content and context of the speech. It concluded that because petition circulation involved “interactive communication [i.e. context] concerning political change [i.e. content],” it constituted “core political speech” subject to the strictest scrutiny.<sup>65</sup> Even in commercial speech, courts look to the context of the speech in order to

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58. *Id.* at 342.

59. *See id.* at 347 (“[T]he speech in which Mrs. McIntyre engaged—handing out leaflets [i.e., context] in the advocacy of a politically controversial viewpoint [i.e., content]—is the essence of First Amendment protection.”).

60. *See id.* at 347 (finding that Mrs. McIntyre’s “advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre’s expression.”).

61. *Id.* at 350.

62. *Id.* at 357 (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting)).

63. *Id.*

64. 486 U.S. 414, 415 (1988) (striking down a Colorado statute prohibiting of payment for the circulation of ballot-initiative petitions).

65. *Id.* at 422 (1988); *see also* *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (holding that limitations on political speech are subject to exacting scrutiny).

determine whether the speech is subject to Constitutional protection. Interestingly, the *McIntyre* Court clarified that even though “[t]he specific holding in *Talley* related to advocacy of an economic boycott”—i.e., the content of the speech—the Court’s reasoning looked at particular context and method of distribution of the speech in question and “embraced a respected tradition of anonymity in the advocacy of political causes.”<sup>66</sup> The *McIntyre* Court similarly looked to particular context of the speech, in addition to the content of the speech, in determining the level of First Amendment protection.<sup>67</sup>

Likewise, in *Central Hudson Gas & Electric Company v. Public Service Commission of New York*,<sup>68</sup> which articulated the reigning standard for commercial speech protection, the Court determined whether the commercial speech was “misleading” by looking for a number of external factors and conditions (i.e. context) “that would distort the decision to advertise.”<sup>69</sup> Almost a decade later, the Court described these limiting factors on commercial speech protection as affording commercial speech “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”<sup>70</sup>

More recently, in *Buckley v. American Constitutional Law Foundation, Inc.*,<sup>71</sup> the Court reasoned that requiring name-identifying badges “discourages participation in the petition process by forcing name identification without sufficient cause.”<sup>72</sup> In reaching its conclusion, the Court likened the context of political speech in the Colorado statute with the political speech at issue in *McIntyre*.<sup>73</sup> Both circulating petitions and distributing handbills “involve a one-on-one communication;” however, “the restraint on speech” in *Buckley* was “more severe.”<sup>74</sup> The Court highlighted the difference in context of political speech as it related to the effect of restraint on speakers rights to anonymous speech, stating that “[p]etition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the

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66. *McIntyre*, 514 U.S. at 343.

67. *Id.* at 347.

68. 447 U.S. 557, 571 (1980) (holding ban of electric utility from advertising unconstitutional because violates right to commercial speech).

69. *Id.* at 567.

70. *See* *Bd. of Trs. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

71. 525 U.S. 182, 187 (1999) (holding that CO statute requiring initiative-petition circulators wear name-identifying badges violated First Amendment right to anonymous political speech).

72. *Id.* at 200.

73. *Id.* at 199.

74. *Id.*

petition.”<sup>75</sup> The Court thereby concluded that “[t]he injury to speech is heightened for the petition circulator [in relation to the handbill distributor] because the badge requirement compels personal name identification at the precise moment when the circulator’s interest in anonymity is greatest.”<sup>76</sup>

The above precedent shows that, in recognizing the right to anonymous speech, the Court assessed both the content and the context of the speech in question. In determining both the nature of the speech in question and also the level of First Amendment protection afforded to the particular speech, the Court looked at the method of distribution, kind of interaction, and form of the speech—in addition to the actual content of the speech. Furthermore, as the *Buckley* Court explained, some situations involve longer interactions in which the need for anonymity (in order to convince the electorate based on the message and not on personal bias against the deliverer of the message) is greater than in other contexts.<sup>77</sup>

B. ONLINE ANONYMOUS SPEECH CASES: LOOKING AT PUBLICATION PLATFORM BUT MISSING CONTEXTUAL CHARACTERISTICS

As shown above, in offline cases recognizing the right to anonymous speech, assessing the speech in context was essential for courts to determine the nature of the speech, its meaning, and potential harmfulness.<sup>78</sup> The same is true for anonymous online speech.<sup>79</sup> Therefore, in order for courts to clearly, fairly, and comprehensively apply current standards for balancing the rights of online speakers with harmed parties, online speech must be evaluated in the context of the online space within which the speech was uttered.

In the seminal online speech case, *Reno v. ACLU*, the Court ruled that online speech is afforded the same First Amendment protections as non-online speech.<sup>80</sup> *Reno* involved a challenge to the anti-decency provisions of the Communications Decency Act of 1996, which the Court struck down as violating free speech provisions of the First Amendment.<sup>81</sup> In the course of its reasoning, the Court distinguished the Internet as a medium of

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75. *Id.*

76. *Id.*

77. *See id.*

78. *See supra* Section I.A.

79. *See infra* Section I.B.

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

81. *Id.* at 846.

communication from more “invasive”<sup>82</sup> broadcast media, following established precedent conducting medium-specific inquiries.<sup>83</sup> Furthermore, the Court recognized that the factors in broadcast media inquiries “are not present in cyberspace”<sup>84</sup> and explicitly highlighted the different online contexts available for different kinds of online speech.<sup>85</sup> For example, in an often-quoted passage, the Court explained: “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”<sup>86</sup> In so declaring the protections involved in online speech, the *Reno* Court enumerated a number of online spaces in which speech can be uttered. It also recognized that, because of continuously developing technologies, the categories of online spaces courts may face in the future could not be fully enumerated at the time of the decision.<sup>87</sup>

However, though the *Reno* Court’s examples were helpful illustrations of options for online speech, given the proliferation of online platforms and online services that have no strict real world counterparts, the Court failed to emphasize that online speech is not limited to a one-to-one correlation with real world communities, platforms, and publication opportunities. For example, since the early 2000s, online-only communities have developed—e.g., Second Life<sup>88</sup>—and services based on real-life social contexts have developed online-only characteristics—e.g., Facebook’s geographically disparate social networks.<sup>89</sup> Furthermore, the *Reno* court failed to acknowledge the opportunity for particular sites within the different categories of online spaces to have differentiated norms and effects of speech. For example, depending on user expectations or specific technological codes in specific online sites at a given time, anonymous speech in these spaces may have different meanings and different potentials

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82. *See id.* at 869 (“[T]he Internet is not as ‘invasive’ as radio or television” because “[u]sers seldom encounter content ‘by accident.’”); *see generally* LESSIG, *supra* note 7; TIM WU, *THE MASTER SWITCH* (2010); ZITTRAIN, *supra* note 13.

83. *Reno*, 521 U.S. at 868; *see also* Sw. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399–400 (1969).

84. *Reno*, 521 U.S. at 868.

85. *Id.* at 870.

86. *Id.*

87. *See id.* at 851 (“Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely.”).

88. *See* SECOND LIFE, <http://www.secondlife.com> (last visited April 17, 2011).

89. *See* FACEBOOK, <http://www.facebook.com> (last visited April 17, 2011).

for harm. That is, not every instance of sending an electronic newsletter necessarily has the effect of being a pamphleteer, nor does every chatroom or every user's speech within a particular chatroom make the online speakers town criers. As such, the *Reno* court offers a preliminary, though by no means exhaustive (nor up-to-date given the malleability and speed of innovation in online applications, platforms, and services)<sup>90</sup> explanation of online spaces within which anonymous speech can occur.<sup>91</sup>

Nonetheless, despite these shortcomings of the *Reno* opinion, the Court did recognize the variety of particular online spaces in which speech is uttered online and the different kinds of speech that result from these different spaces. Though some courts have failed to follow this particular aspect of the *Reno* opinion and did not look at the online context of the speech in anonymous speech cases,<sup>92</sup> some courts drew standards governing the unmasking of a speaker's identity by explicitly looking to the publication platform of the online speech. For example, *McIntyre*,<sup>93</sup> *Doe v. Cabill*,<sup>94</sup> and *Krinsky v. Doe*<sup>95</sup> all define and highlight the different kinds of online platforms in which online speech occurs.<sup>96</sup> However, though *Cabill* and *Krinsky*, following *Reno*, recognize the online platforms in which the online speech is initially published, each court mistakenly ascribes certain inherent

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90. See LESSIG, *supra* note 7, at 44 (calling the "end-to-end principle . . . a core principle of the Internet's architecture and, in my view, one of the most important reasons that the Internet produced the innovation and growth that it has enjoyed.").

91. This is not to say that different categories of online speech should receive different levels of First Amendment protection; indeed, the Court strongly warns that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 870. However, as the Court recognized, the kind and meaning of speech online depends on the particular online context. An online pamphleteer may enjoy the same rights of anonymity as handbill distributors; by contrast, an online advertiser using chat rooms for misleading commercial speech forfeits First Amendment protections. *Id.*

92. See, e.g., *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205 (D. Nev. 2008); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001); *Dendrite Int'l, Inc. v. Doe*, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

93. See *supra* Part I.A.

94. 884 A.2d 451 (Del. 2005).

95. 159 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

96. Similar to *Cabill* and *Krinsky*, there are other cases that address the context of online speech when assessing whether to unmask the identities of anonymous speakers. See, e.g., *Highfields Capital Management v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Indep. Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009). However, like *Cabill* and *Krinsky*, these courts also suffer from similar problems, including enumerating online spaces without understanding the particularity of speech on a case-by-case basis as well as the possibility for these spaces to change according to user norms.



characteristics to each space, ascribing some online spaces with greater de facto legitimacy and others with lesser de facto legitimacy. Though a good first step in looking at context of online speech, giving each online space its own set of inherent characteristics threatens to automatically condemn anonymous speech as harmful in some platforms and not others. Though anonymous speech could turn out to be harmful in a particular instance, courts' presumption that all speech on blogs, for example, has particular characteristics, distinct from all speech on message boards, mistakenly ascribes inherent characteristics to all speech on particular platforms regardless of the particular platform, specific norms or user expectations, or user or external means of verification and correction.

As a result, the chilling effects for anonymous speech could be true for certain online platforms and not others. Similarly, courts risk misunderstanding the meaning and effect of the speech—that is, whether the speech is fact or opinion, commercial or political—by failing to recognize that, for example, some blogs host factual information while others host opinions intermixed with facts.<sup>97</sup> Online spaces are developing rapidly and different examples of similar online platforms may have different opportunities for verifying and correcting speech: consider different blogs, which may have different technological opportunities for correction—metacritics, flagging comments, etc.—as well as different governing norms from the users' expectations, societal or otherwise. For example, these characteristics of a blog embedded in a well-established site could differ greatly from those of an independent blog. Therefore, if courts follow *Krinsky* and *Cabill* without further acknowledging that online spaces can have changing and case-specific characteristics that must be taken into account, then the effects could be similarly undesirable as the Ninth Circuit's decision. Nonetheless, *Krinsky* and *Cabill* are moving in the right direction at least by highlighting the importance of context.

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97. Many blogs have developed an authoritative, legitimate, and factual tone. *See, e.g.*, GIZMODO, <http://www.gizmodo.com> (last visited April 17, 2011) (gadget reviews); TECHCRUNCH, <http://www.techcrunch.com> (last visited April 17, 2011) (group-edited technology blog); THE HUFFINGTON POST, <http://www.huffingtonpost.com> (last visited April 17, 2011) (began as a blog, now an "Internet newspaper" with embedded blogs). Others, by contrast, are recognized and relied upon more as mere opinion and gossip, but still have some factual elements. *See, e.g.*, GAWKER, <http://www.gawker.com> (last visited April 17, 2011) ("Today's gossip is tomorrow's news."); *Opinionator Blogs*, N.Y. TIMES, <http://opinionator.blogs.nytimes.com/> (last visited April 17, 2011) (offering commentary on news).

In *Cabill*, the Delaware Supreme Court performed a *de novo* review of the standard the lower court employed in ordering the ISP to disclose the identity of the anonymous online speaker who posted allegedly defamatory remarks on a community website sponsored by the local newspaper.<sup>98</sup> Recognizing that “[t]he [I]nternet is a unique democratizing medium unlike anything that has come before,” and repeating the *Reno* Court’s description of the different kinds of online political speech, the *Cabill* court also remarked that “Internet speech is often anonymous.”<sup>99</sup> *Cabill* thereby addressed the difficult tension inherent in anonymous speech that can be beneficial to public discourse but can also encourage vitriolic and defamatory statements violating the rights of harmed plaintiffs. The court, like the *Meyer*, *McIntyre*, and *Buckley* Courts,<sup>100</sup> was especially “concerned that setting the standard too low [would] . . . chill potential posters from exercising their First Amendment right to speak anonymously.”<sup>101</sup> The court began by alluding to the difference between the Internet understood as infrastructure and the online spaces layered on the Internet in which users communicate and interact. It wrote, in stark contrast to the district court and Ninth Circuit in *Anonymous Online Speakers*, that “we do not rely on the nature of the [I]nternet as a basis to justify our application of the legal standard.”<sup>102</sup> That is, it declined to assume that speech on the Internet is of a particular nature that requires the application of a particular legal standard (the way that courts look at the nature of political versus commercial speech). Instead, the *Cabill* court explained that the online spaces on and through which users interact, publish, communicate, and interact bear characteristics that may be relevant to determining a balancing standard. It wrote: “[w]hile as a form of communication the [I]nternet is not legally distinct . . . , it is worth noting that

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

99. *See id.* at 455–56.

100. *See id.* at 456.

101. *See id.* at 457. In this particular case, because the claim at issue was a defamation claim, and because often unmasking leads to dropping the case and instead “engag[ing] in extra-judicial self-help remedies,” the need to protect to the anonymous speakers was especially important. *Id.* However, there are non-defamation case instances where the plaintiff’s intent in unmasking the anonymous speaker is not to engage in self-help; rather, there could be real psychological or reputational harm for which the plaintiff seeks compensation. *See In re Application of Cohen*, No. 09-10012 (N.Y. Sup. Ct. Aug. 17, 2009) (granting request to identify a speaker who called plaintiff “skank” and “ho” on a blog because plaintiff “sufficiently established the merits of her proposed cause of action for defamation against that person or persons, and that the information sought is material and necessary to identify the potential defendant”).

102. *See Cabill*, 884 A.2d at 465.

certain factual and contextual issues relevant to chat rooms and blogs are particularly important in analyzing the defamation claim itself.”<sup>103</sup>

In another case concerning anonymous speech on online message boards, *Krinsky*, the court also looked to the online context within which the speech occurs and concluded that the statements made were offered as opinions, not as fact, and therefore the defamation claim was without merit.<sup>104</sup> *Krinsky* involved ten anonymous commentators on a Yahoo! Message board who posted unflattering statements about the former president, CEO, and chairman of a company.<sup>105</sup> In discerning that the comments were not factual, the court engaged in an extensive and detailed analysis of the use of online message boards.<sup>106</sup> The court asserted that “[i]n this case, Doe 6’s messages, viewed *in context*, cannot be interpreted as asserting or implying objective facts.”<sup>107</sup> Had the *Krinsky* court not understood the kind of speech uttered on message boards (for example, recognizing message boards as a common forum for users to make satirical, juvenile remarks),<sup>108</sup> then the court may have mistaken those statements for facts and compelled disclosure of the speaker’s identity. By contrast, if reasonable online users relied on this speech uttered on the message boards as fact, instead of mere opinion, then the court could have seriously barred a harmed plaintiff from access to redress.

Both the *Cabill* and *Krinsky* courts successfully took the publication platforms of the online speech into account in their decision-making, and further recognized the existence of a variety of online contexts within which speech can occur. In *Cabill*, the court described several relevant characteristics of online speech, including: the potential for harmed plaintiffs to “instantly” respond to defamatory attacks and “generally set the record straight;”<sup>109</sup> the “spectrum of reliability of sources on the [I]nternet;”<sup>110</sup> and the lack of controls on the postings, unlike in traditional media.<sup>111</sup> In

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103. *See id.*

104. *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 248 (Cal. Ct. App. 2008).

105. *Id.* at 234–35.

106. *Id.* at 249–51.

107. *Id.* at 248 (emphasis in original).

108. The court might also have made a mistake had it not understood that on online message boards, all users interpreted speech to take on a certain kind of meaning. *See Cabill*, 884 A.2d at 467 (“Given the context, no reasonable person could have interpreted these statements as being anything other than opinion.”).

109. *Cabill*, 884 A.2d at 464.

110. *Id.* at 465.

111. *Id.* (quoting *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1264 (C.D. Cal 2001)).

assessing the merit of the defamation claim against the right to anonymity of the online speaker, the court stated this would depend on “the words and the context in which they were published.”<sup>112</sup> After looking at the words within the online context in which they were uttered, the court continued, “the summary judgment standard imposes no heavier burden than would any other standard” in regards to whether the words were fact or opinion.<sup>113</sup> Similarly, the *Krinsky* court, like the *McIntyre* Court, looked to “the surrounding circumstances—including the recent public attention to [the company’s] practices and the entire . . . message-board discussion over a two-month period [devoted to the company-plaintiff].”<sup>114</sup> In looking at the larger societal context of the speech, as well as the context of the online space (i.e. message board) in which the speech was uttered, the court concluded that the allegedly defamatory speech was mere opinion and therefore not actionable.

Nonetheless, neither the *Cabill* nor *Krinsky* courts successfully acknowledged the particularized, and sometimes changing, characteristics of these online spaces. For example, certain message boards may develop governing etiquette norms or web programmers may write code that limits the length of posts or the ability to respond to others’ comments as the needs of the site and users change.<sup>115</sup> User norms can develop from repeated interactions and internal monitoring or external governing of particular sites.<sup>116</sup> These norms can also change, resulting both in differentiated online spaces within one type of platform (e.g. blogs, message boards, chat rooms) and also particular online sites with characteristics that can change from day to day or year to year.<sup>117</sup> That is, changes in the norms governing the particular online context or various technological modifications may alter the characteristics of these spaces.<sup>118</sup>

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112. *Id.* at 463.

113. *Id.*

114. *See* *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 250 (Cal. Ct. App. 2008).

115. *See* LESSIG, *supra* note 7, at 113; *see also* LESSIG, *supra* note 7, at 102 (quoting Mnookin).

116. *See* Lawrence Lessig, *The Laws of Cyberspace* (1998), available at [http://www.lessig.org/content/articles/works/laws\\_cyberspace.pdf](http://www.lessig.org/content/articles/works/laws_cyberspace.pdf).

117. *See, e.g.*, Paul Boutin, *Engadget editor: Why I turned off comments*, VENTUREBEAT (Feb. 2, 2010), <http://venturebeat.com/2010/02/02/engadget-comments/>.

118. Interestingly, *Reno* was successful in acknowledging this characteristic of online spaces. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (“Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely.”); *see also* LESSIG, *supra* note 7, at 113 (“In places [i.e., online spaces] where community is not fully self-

Failure to understand context on a case-by-case basis can lead to a mistaken impression of the characteristics of speech in a given online space. The *Cabill* and *Krinsky* courts looked to the particular online platforms within which the allegedly harmful speech occurred, but both courts failed to understand the particular characteristics of each online context. In so misunderstanding the characteristics of speech in online spaces, these courts made a similar mistake as the district court and the Ninth Circuit in *Anonymous Online Speakers*, explored *infra* Part II: the courts presumed that speech, uttered in either online spaces or the Internet, was marked with inherent characteristics. Though the *Cabill* court correctly recognized that there are different online spaces in which users speak and that these online spaces have distinct characteristics, it also wrongly attributed inherent characteristics to each of these online spaces.<sup>119</sup> Not all online spaces, as the *Cabill* court claimed, would enable a harmed plaintiff to “instantly” respond and correct the harmful speech.<sup>120</sup> For example, some blog sites do not accept comments.<sup>121</sup> Similarly, merely because some anonymous online speech could “promote[] a looser, more relaxed communication style,” as the *Krinsky* court asserted, does not mean that all online speech must be “relaxed” or “combative” in tone.<sup>122</sup> Finally, simply because some online platforms *generally* host a certain kind of speech—e.g., “[b]logs and chat rooms tend to be vehicles for the expression of opinions”<sup>123</sup> and message boards were generally thought to “substitute gossip for accurate reporting”<sup>124</sup>—does not mean that all speech on these platforms are necessarily one kind of speech or another.

Therefore, both the *Cabill* and *Krinsky* courts mistakenly attached inherent characteristics to these different online spaces similar to the Ninth Circuit’s mistaken presumption that speech “on the Internet” is inherently fast-moving and far-spreading. Given that there are many different online spaces for speech, some of which have sophisticated mechanisms to ensure that comments are accurate and some of which serve as forums for factual

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enforcing, norms are supplemented by rules imposed either through code or by the relevant sovereign [i.e., site administrator, host, or developer].”).

119. See *Cabill*, 884 A.2d at 464; see also LESSIG, *supra* note 7; Lessig, *supra* note 116; Glen R. Shilland, *Influencing and Exploiting Behavioral Norms in Cyberspace to Promote Ethical and Moral Conduct of Cyberwarfare* (June 2010) (unpublished thesis, School of Advanced Air and Space Studies, Air University) (on file with Maxwell Air Force Base).

120. See *Cabill*, 884 A.2d at 464.

121. See, e.g., Boutin, *supra* note 117.

122. See *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 238 (Cal. Ct. App. 2008).

123. See *Cabill*, 884 A.2d at 465.

124. See *Krinsky*, 72 Cal. Rptr. 3d at 238.

discourse,<sup>125</sup> merely asserting that speech occurred “on the Internet” is insufficient in assessing both the level of First Amendment protections and the scope or severity of harm. Without assessing online speech within the context of the online platform, courts fail to adequately address the interests of both parties involved; the nature of the speech (commercial versus political), scope of harm, intent of the speaker, and even meaning and accuracy of comments depend on the embedded, contextual, relative space in which the speech is published and made available to the public.

As this Part shows, Supreme Court precedent recognizes the right to anonymous speech. In its reasoning, the Court looked to the context within which the anonymous speech was uttered and the general societal understanding of the particular kind of speech, finding these options for assessing the speech in context essential for courts to determine the nature of the speech, its meaning, and the potential harmfulness of the speech. The same should apply to anonymous online speech. In order for courts to clearly, fairly, and comprehensively apply current standards for balancing the rights of online speakers with harmed parties, they must evaluate online speech in the context of the online space within which the speech was uttered. If courts fail to look at the online context, the societal understanding of that online context, and the governing norms or possibilities for mitigation of harmful anonymous speech within those contexts, courts would not only be turning their back on long-established precedent protecting the rights of anonymous speech, they would also be failing to understand the nature, meaning, and scope of that speech’s potential harm accurately. This would make it nearly impossible for courts to accurately weigh the rights of harmed parties against the Constitutional rights of the speakers, regardless of the particular jurisdictional standard.

## II. *IN RE ANONYMOUS ONLINE SPEAKERS: MESSING THE STANDARDS AND MISSING THE CONTEXT*

Though many have discussed the harm in having competing standards to deploy in balancing the rights of anonymous online speakers with the plaintiffs’ rights of redress,<sup>126</sup> the only Circuit Court decision on the topic, *In*

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125. For example, it is not the case that there are no controls on postings in online spaces: some spaces require named postings; others review comments before publishing or actively police postings; many close the commenting period for certain stories; and most recently, some spaces are using users to act as “metacritics” who police comments and postings.

126. *See supra* Section I.B.

*re Anonymous Online Speakers*, failed to provide a unifying standard. Especially in online cases involving unmasking anonymous speakers, both the district court and Ninth Circuit, like other courts beforehand, struggled to accurately assess the nature, meaning, and potential harmfulness of speech uttered in online contexts.<sup>127</sup> Nonetheless, as the Ninth Circuit explained, “[t]he district court here appropriately considered the important value of anonymous speech balanced against a party’s need for relevant discovery in a civil action.”<sup>128</sup> Furthermore, instead of looking to the “specific circumstances surrounding the speech . . . to give context to the balancing exercise,” as the Ninth Circuit itself suggested, the district court and Ninth Circuit both contented with ascribing online speech a singular characteristic. The Ninth Circuit wrote: “in the age of the Internet, the ‘speed and power of internet technology makes it difficult for the truth to ‘catch up’ to the lie.”<sup>129</sup> That is, the district court asserted, and the Ninth Circuit affirmed, that the mere fact the anonymous speech occurred online is *de facto* more harmful to the plaintiff than if the speech had occurred offline. Such a gross misunderstanding of the nature and meaning of online speech both threatens to undermine long-standing Constitutional protections for anonymous speech and to muddy existing standards employed by lower courts in balancing the rights to such speech with harmed plaintiffs’ rights of redress.

A. *ANONYMOUS ONLINE SPEAKERS: FACTS*

In *Anonymous Online Speakers*, the Ninth Circuit faced a discovery request to unmask the identities of anonymous bloggers posting potentially harmful comments regarding a competitor’s business.<sup>130</sup> *Anonymous Online Speakers* involved five anonymous bloggers who allegedly made defamatory comments about Quixtar, a cosmetic and nutritional product distribution company.<sup>131</sup> An employee from successor-company Amway Corporation, and Signature Management TEAM (“TEAM”), with which Quixtar was in an on-going business dispute, knew the identities of the anonymous bloggers.<sup>132</sup> The employee refused to disclose the identities of the bloggers during testimony and the district court ordered the employee to disclose three of the

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127. *See id.*

128. *In re Anonymous Online Speakers*, No. 09-71205, 2011 WL 61635, at \*6 (9th Cir. Jan. 7, 2011).

129. *Id.* (quoting *Quixtar, Inc., v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008)).

130. *Id.* at \*1.

131. *Id.*

132. *Id.*

five speakers.<sup>133</sup> The bloggers then sought a writ of mandamus to vacate the order.<sup>134</sup> Quixtar cross-petitioned for a writ of mandamus to reveal the identities of the remaining two speakers.<sup>135</sup>

The Ninth Circuit wrote that “[t]he district court here appropriately considered the important value of anonymous speech balanced against a party’s need to relevant discovery in civil action.”<sup>136</sup> In this element of its analysis, the Ninth Circuit followed established precedent recognizing that civil discovery orders and subpoenas seeking to unmask anonymous speakers’ identities, online or offline, involves balancing the competing rights of anonymity and redress. However, the Ninth Circuit seemingly went on to add another element for consideration in this balancing: the fact that the anonymous speech occurred online. Adopting the district court’s words, the Ninth Circuit recognized that the Internet permitted “’great potential for irresponsible, malicious, and harmful communication’ and that particularly in the age of the Internet, the ‘speed and power of internet technology makes it difficult for the truth to ‘catch up’ to the lie.’”<sup>137</sup>

As the first circuit court to face the particular question of the right to anonymous online speech, it seemed the Ninth Circuit would provide a coherent standard to govern lower courts in such cases. Instead, the court in *Anonymous Online Speakers* reasoned that the stringent *Cabill* standard placed too high a burden on the plaintiff in cases involving commercial, instead of political, speech, although the outcome in this case was not affected.<sup>138</sup> In rejecting the *Cabill* standard,<sup>139</sup> and supporting different standards for different kinds of anonymous speech,<sup>140</sup> the Ninth Circuit did not, in fact, adopt a lesser standard. Instead, it held that the higher *Cabill* standard was permissible in this case because the speech, though commercial (and therefore afforded less First Amendment protection) occurred online (therefore posing a greater threat for harm).<sup>141</sup> In other words, the Ninth Circuit concluded that *all* online speech, regardless of specific online publication platform and regardless of particular characteristics of the

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133. *Id.*

134. *Id.* at \*2.

135. *Id.*

136. *Id.* at \*6.

137. *Id.* (quoting *Quixtar, Inc., v. Signature Management Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008)).

138. *Id.*

139. *Id.* at \*6–7.

140. *Id.* at \*6.

141. *Id.*



context in this particular case, inherently weighed against the anonymous speaker. That is, all online speech, by default, increases the harm incurred by the plaintiff.

B. *ANONYMOUS ONLINE SPEAKERS: THE IMPORTANCE OF EVALUATING ONLINE CONTEXT*

In *Anonymous Online Speakers*, the Ninth Circuit uncritically adopted and applied without explanation the presumption that the Internet is a singular, borderless world in which there is but one set of characteristics that apply equally to all forms and contents of online activity, interaction, and speech.<sup>142</sup> Approving of the district court's treatment of the online speech at issue, the Ninth Circuit in *Anonymous Online Speakers* echoed the district court's acknowledgment of the "great potential for irresponsible, malicious, and harmful communication" in an Internet-age where the "speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie."<sup>143</sup> In reaching this decision, the Ninth Circuit affirmed the ruling of the district court, but criticized its use of the stringent *Cabill* standard.<sup>144</sup> Nonetheless, under the auspice of assessing the level of First Amendment protection based on nature of the speech—commercial versus political—, the Ninth Circuit allowed for application of the more stringent, political-speech standard in a commercial-speech case because of, what the Ninth Circuit perceived as, the inherent and increased threat posed by speech occurring on the Internet.<sup>145</sup> Therefore, in declining to assess the forum in which the allegedly harmful speech took place, the Court failed to assess the discovery request for identifying information based on the actual nature of the speech. The Court did not acknowledge the potential differences between online forums and considered only that the speech occurred online.<sup>146</sup>

As such, in *Anonymous Online Speakers*, not only did the Ninth Circuit miss an opportunity to clarify competing standards, it also missed an even greater opportunity to highlight the particular characteristics of online speech depending on the various spaces within which the speech was uttered. For example, depending on the publication and governing technological or user

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142. *Id.*

143. *Id.* (quoting *Quixtar, Inc., v. Signature Management Team, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008)).

144. *Id.* ("Because *Cabill* involved political speech, that court's imposition of a heightened standard is understandable. In the context of the speech at issue here . . . however [i.e., commercial speech], *Cabill's* bar extends too far.").

145. *Id.*

146. *Id.*

norms, a lie may be corrected in a number of ways. A lie may be discredited instantaneously by vigilant users or tagged for removal as erroneous.<sup>147</sup> Alternately, a lie may be taken in the aggregate with other opinions so that the truth is determined in a sort of democratic weighing of comments (the most repeated comment is “true”).<sup>148</sup> Also, a correction may be highlighted after the initial publication went live.<sup>149</sup> Or a lie may indeed gather so much popularity that it is revealed near the top of popular search results.<sup>150</sup> Ignoring these varied contextual characteristics, and instead of further clarifying *Cahill* and *Krinsky* to say that kinds of online spaces do not necessarily have inherent characteristics, the Ninth Circuit, asserted that *regardless* of the online space, *all* speech uttered online moves so fast and so far that lies run rampant and the truth is left behind.

The Ninth Circuit’s decision, in so egregiously describing the characteristics and effects of speech online, threatens to both automatically render defendants’ online speech more harmful than similar offline speech and misidentify the character of the defendants’ online speech—for example, fact versus opinion<sup>151</sup> or commercial versus political speech.<sup>152</sup> This chills anonymous online speech—which serves a publicly-valuable function—but could also make it difficult to identify the urgent instances of real harm that can result from anonymous online speech.<sup>153</sup> For example, if individuals

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147. See, e.g., *Template: Flag-templates*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Template:Flag-templates#Flag\\_templates\\_for\\_deletion\\_warnings](http://en.wikipedia.org/wiki/Template:Flag-templates#Flag_templates_for_deletion_warnings) (last visited Feb. 20, 2011).

148. See generally CLAY SHIRKY, *HERE COMES EVERYBODY* (2008); JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005).

149. See Stephen Baker, *Blog Corrections: A New Literary Style?*, BUSINESS WEEK, Aug. 8, 2005, <http://blogs.businessweek.com/mt/mt-tb.cgi/1424.1234112340>.

150. See, e.g., THE BIRTHERS, <http://www.birthers.org> (last visited April 17, 2011), cited in Kay Rand, *Political Blogs Not Always Factual: Opinion Masquerades as “Truth”*, MORNING SENTINEL, Aug. 21, 2010, available at <http://www.onlinesentinel.com/opinion/KAY-RAND-Political-blogs-not-always-factual-opinion-masquerades-as-truth.html> (“While this story [Obama’s birthplace] has been thoroughly debunked by CNN and other reputable news sources, it persists.”).

151. For example, under Florida law, “pure opinion,” in distinction from mixed opinion and fact or pure fact, will not support a defamation action. See *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 251 (Cal. Ct. App. 2008) (“We thus conclude that Doe 6’s online messages, while unquestionably offensive and demeaning to plaintiff, did not constitute assertions of actual fact and therefore were not actionable under Florida’s defamation law.”).

152. Commercial speech is afforded less First Amendment protection, both in anonymous and nonanonymous cases, than political speech. See *supra* Section I.A.

153. See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (The “‘sue first, ask questions later’ approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more

feared their identities could be exposed on public record and their names attached to otherwise anonymous statements, anonymous speakers may be dissuaded from valuable critical political and commercial speech. Alternately, if courts mistakenly understand the meaning of speech uttered in a particular online space as necessarily opinion, as opposed to an informal statement that other reasonable online users would nevertheless rely upon as fact, then defamed plaintiffs lose access to redress for the harmful speech in question. Therefore, failure to accurately understand the online context of the allegedly harmful speech—that is, presuming that the worries of unaccountability of anonymous speech in general are only amplified by the speed and power of the Internet—could both unjustly unmask a lawfully anonymous speaker and deny harmed parties rights to redress and compensation.

In order to balance the benefits of anonymous online speech while also ensuring that harmed parties can consistently seek redress, courts must be vigilant in understanding the nature, meaning, potential for harm, and actual harmfulness of anonymous speech in varying online contexts. In order to succeed in this endeavor, courts must understand the difference between the Internet infrastructure on online services, platforms, and spaces within which users communicate and interact.

### C. CONFLATION OF INTERNET INFRASTRUCTURE AND ONLINE SPACES

The most egregious consequence of the confusion between Internet infrastructure and online services and platforms<sup>154</sup>—as evidenced in the Ninth Circuit decision—is courts adopting the presumption that “the Internet” exists as a single, borderless space and presuming that all speech in this single space has an underlying, inherent characteristic. Though the Internet understood as infrastructure can correctly be envisioned as singular and compatible in the same way the interstate highway system or telephone

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anonymous posters censor the online statements in response to the likelihood of being unmasked.”).

154. Adding to the confusion surrounding the Internet, ISPs, OSPs, and online spaces is that scholars of the Internet and cyberspace often use overlapping and sometimes contradictory language. Lawrence Lessig calls online spaces cyberspaces and refers to these cyberspaces as architecture. *See* LESSIG, *supra* note 7, at 45 (mentioning the “difference in architectures of real space and cyberspace”). By contrast, Barbara van Schewick refers to the Internet as architecture and online spaces as applications. *See* SCHEWICK, *supra* note 11, at 84–112. Therefore, this Note will refer to the Internet (i.e., that open, end-to-end IP network through which data is sent; what Schewick calls the “Internet layer”) as the “infrastructure”; ISPs as the hosts at the end of the IP network that provide access to the Internet via assigned IP addresses; and OSPs as the hosts/administrators of online spaces.

network is singular and compatible (they have to be for efficiency's sake),<sup>155</sup> online spaces, platforms, and applications are as decidedly diverse and varied as real-world spaces in which people interact, communicate, publish speech, and conduct business. This is not to insinuate that there is a one-to-one relationship between real-world and virtual spaces; far from it. There are characteristics of online spaces that encourage certain kinds of activity, behavior, and communication just as there are characteristics of real-world spaces that are better suited to other kinds of activity, behavior, and communication. For example, online speech allows for large-scale aggregations of material that would be nearly impossible in offline cases. Similarly, offline interactions may allow for a more nuanced understanding of individual or group emotions than online speech.

Despite these differences, courts addressing online activities and speech have often uncritically and mistakenly adopted the presumption that the Internet—infrastructure and online spaces alike—is a singular, borderless, virtual space that presents one unified set of opportunities and consequences.<sup>156</sup> One of the reasons for courts' confusion could be the historical development of Internet services and attendant online platforms. The Internet was created as an open end-to-end connected network. As such, it does not discriminate the data that is sent to the end hosts.<sup>157</sup> The infrastructure of the Internet simply “delivers datagrams from one host to another”<sup>158</sup> and allows different applications to reside on the network and communicate with each other (accounting for the interconnectedness of the variety of users, platforms, and services on the Internet).<sup>159</sup> Though the Internet's infrastructure allows for the creation of many different online spaces, as well as norms and standards to develop and govern these spaces,<sup>160</sup> courts including the Ninth Circuit have failed to make this distinction.<sup>161</sup> In

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155. LESSIG, *supra* note 7, at 44 (calling the “end-to-end principle . . . a core principle of the Internet's architecture and, in my view, one of the most important reasons that the Internet produced the innovation and growth that it has enjoyed”). For more information see generally Wendy Seltzer, *The Imperfect Is the Enemy of the Good: Anticircumvention versus Open User Innovation*, 25 BERKELEY TECH. L.J. 910 (2010).

156. *See In re Anonymous Online Speakers*, No. 09-71205, 2011 WL 61635, at \*6 (9th Cir. Jan. 7, 2011); *Dendrite Int'l, Inc. v. Doe*, No. 3, 775 A.2d 756, 706–61 (N.J. Super. Ct. App. Div. 2001).

157. SCHEWICK, *supra* note 11, at 84–85.

158. *Id.* at 86.

159. *Id.* at 87 (“The application layer contains a range of protocols that let applications communicate with one another.”).

160. *See supra* note 11.

161. *See supra* Sections I.B. and II.A.

so doing, the courts mistakenly ascribe some characteristics of the infrastructure of the Internet—openness and non-hierarchical sharing of information<sup>162</sup>—to all online spaces.

A second possible source of courts' misunderstanding of speech on the Internet is a more general confusion between ISPs and OSPs. In the early years of the Internet being commercially available, often the companies providing consumers with home Internet access (i.e. assigning an IP address through which to access the Internet networks *and* the online applications layered on this network), were *the same companies* providing the online services, platforms, and spaces in which consumers "used" (i.e. communicated, spoke, or interacted through) the Internet. For example, in the early 1990s, AOL was the ISP which provided consumers with dial-up Internet access; it was also the OSP which provided these consumers with emailing services, searching capabilities, and chat rooms.<sup>163</sup> Today, by contrast, AOL/Time Warner provides consumers with broadband Internet access, while AOL, Yahoo!, and Google provide online search, email, message board, chat room, and other online services.<sup>164</sup> The proliferation of "websites" has often been

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162. These ideas about the characteristics of the Internet infrastructure seem to develop from the prevalence of "net neutrality" in discussions regarding information flows on the Internet. The net neutrality debate centers on an idea of an "open Internet," adopting the views of the early Internet pioneers who envisioned a decentralized, borderless network as the ultimate democratizing medium. Unfortunately, some of the underlying rhetoric of freedom and openness in the net neutrality context, as they accurately apply to the infrastructure of the Internet, has been uncritically adopted by scholars as equally applying to online activities, platforms, and services. The idea of "open networks" could have been confused by courts with individual users' experience online as borderless. However, the openness of the Internet network is only peripherally linked to the ease of access to and movement between various online spaces within which most online users interact, communication, and create.

163. See generally *History of Ecommerce*, ECOMMERCELAND, [http://www.ecommerceland.com/history\\_ecommerce.html](http://www.ecommerceland.com/history_ecommerce.html) (last visited April 17, 2011).

164. This confusion between Internet infrastructure and OSPs is offered as a corrective to a messy and unclear conflation of these two layers involving Internet and cyberspace issues. The consequences of this confusion are discussed below. However, before moving on, it would be wise to emphasize that this particular characterization of a fairly stark divide between ISPs and OSPs could easily change in the future. For example, if Comcast and Yahoo! merged, the company would be both an Internet and online service provider. Or, if the interconnectedness of online spaces were too insecure for a group or individual's purpose (or even for simplicity's sake, for example, an elderly couple who only wants directory search and email capacities like the early AOL ISP/OSP provided), one could imagine a particularized ISP/OSP company which, for lower costs than current ISPs, provided home Internet access as well as limited OSP services. Lower costs, increased security, and simplicity could very well be an attractive package for some individuals.

cited with awe;<sup>165</sup> however, these websites are not merely individual creations, but rather products of a number of developing online spaces and services (for example, Facebook, as an OSP and an online space, has its own website; members of Facebook also have their own Facebook-assigned webpages). Facebook, YouTube, Twitter, Blogger, Digg, Yahoo! message boards, AOL chat rooms, Google search, Flickr, FourSquare, and Skype, among many others, are all OSPs creating online spaces through which users can speak or otherwise interact online. None, however, are ISPs; that is, in order for individuals to use any of these OSPs, users must have Internet access provided through an ISP.

The stakes in continuing this false presumption are wide reaching. As more activities and interactions are conducted in online spaces, courts must assess the speech and activity in the online context within which the speech is uttered or the activity takes place. In so doing, courts must look to the online spaces, characteristics, user norms, and societal understandings in each particular instance, but must also caution against what Lawrence Lessig describes as fact-finding endeavors.<sup>166</sup> He writes, in contrast to courts' tendency to "discover" online spaces as static forums, that "[w]hat data can be collected, what anonymity is possible, what access is granted, what speech will be heard—all these are choices, not 'facts.' All of these are designed [by the administrators, hosts, or product developers of the online spaces], not found [by courts]."<sup>167</sup>

Lessig's claim may be overreaching in that there is no reason a court could not identify certain online spaces while still allowing for other online spaces to be developed or simultaneously coexist.<sup>168</sup> However, there is a danger, as demonstrated in *Cabill* and *Krinsky*, that courts could characterize

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165. See Marcha Walton, *Web reaches new milestone: 100 million sites*, CNN.COM (Nov. 1, 2006) [http://articles.cnn.com/2006-11-01/tech/100millionwebsites\\_1\\_web-site-cern-tim-berners-lee?\\_s=PM:TECH](http://articles.cnn.com/2006-11-01/tech/100millionwebsites_1_web-site-cern-tim-berners-lee?_s=PM:TECH).

166. LESSIG, *supra* note 7, at 318.

167. *Id.*

168. Even though the *Cabill* court is singling out chat rooms and blogs, this should not, I would argue, imply that the court is engaged in fact-finding at odds with simultaneously acknowledging that online spaces are malleable and develop at fast rights. Instead, the courts are highlighted the relevant online spaces for the case at hand; it would be nearly impossible and also irrelevant to provide an overview of all kinds of online spaces within which speech occurs before assessing the character, meaning, and potentially harmfulness of the speech. In fact, the *Reno* Court explicitly realized that online spaces were constantly changing, but nonetheless decided to describe the relevant online spaces at the time. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) ("Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely.").

certain online spaces as, “by their very nature,” involving certain kinds of speech over others. For example, though in 2005 (when *Cabill* was decided), blogs were a fairly novel, and un-institutionalized, online platform for free-of-charge online speech, today they are also highly institutionalized. *The Atlantic*, *The New Yorker*, and *The New York Times* all have online “blogs” embedded within their larger news sites.<sup>169</sup> Furthermore, even un-institutionalized blogs can be sources of fact or opinion—the independent blogs of many professors from respected research universities are sources upon which most reasonable persons would rely.<sup>170</sup> As online spaces, the norms and code governing these spaces, and new technologies (i.e. mobile devices and applications, “cloud” storage and access to personal information, etc.) change, determining the nature, meaning, and effect of speech occurring in online spaces will require pointed, fact and time-specific, and technologically-nuanced assessments.

Therefore, in addition to mistakenly attributing inherent characteristics to online spaces, this understanding of online spaces as inherently and unalterably constructed and used as they currently are discourages courts from looking at the specific cases and uses of the spaces at issue on a case-by-case basis. As such, in resolving these issues, courts should resist treating online spaces as non-malleable with inherent characteristics. Rather, courts should look into the particular uses, governing norms, user interactions, and societal understandings of specific online speech uttered in each instance for which an allegedly harmed plaintiff issues a discovery request.

### III. ONE STRUCTURE, MANY SPACES: A MODEL OF ONLINE SPEECH ON THE (HETEROGENEOUS) WEB

As described above, “the Internet,” which is best understood as the actual infrastructure enabling wired and wireless Internet capabilities, is often misapplied to describe online services and platforms developed in order to enable online users to interact, communicate, disseminate, and publish information. However, as seen in *Cabill*, *Krinsky*, and *Anonymous Online Speakers*, in order for courts to fully and accurately assess the nature of the

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169. See *The Atlantic Blogs*, THE ATLANTIC, <http://www.theatlantic.com/magazine/archive/2008/01/the-atlantic-blogs/6623/> (last visited Feb. 21, 2011); *Blogs*, THE NEW YORKER, <http://www.newyorker.com/online/index/blogs> (last visited Feb. 21, 2011); *Blogs*, N.Y. TIMES, <http://www.nytimes.com/interactive/blogs/directory.html> (last visited Feb. 21, 2011).

170. See *100 Best Professors Who Blog*, ONLINECOLLEGE.ORG (Oct. 12, 2009), <http://www.onlinecollege.org/2009/10/12/100-best-professors-who-blog/>; LEITER REPORTS, <http://leiterreports.typepad.com/> (last visited Mar. 13, 2011).

speech as well as the harmfulness of questionable speech at issue, courts must assess the speech within the online context in which the speech was published, considering case-by-case norms—technological or user-created—for not only that particular online space, but also any context(s) to which speech was disseminated. If the latter applies, courts must also take into account whether the speaker knew or had reason to know the speech would disseminate to these secondary platforms. As argued above, *supra* Part II, the district court and Ninth Circuit made the mistake of thinking speech uttered online occurs in a borderless and undifferentiated space, called “the Internet.” By contrast, the courts should have taken into account the online context of the speech, the platforms on which this speech occurs, and the borders of the online spaces within which the speech is contained. This Part explores various categories of online spaces that represent the diversity of services used to speak anonymously online, as a means of guiding courts in developing more nuanced analysis of online speech. It further reflects on the implications of adopting such a contextual analysis for anonymous speech, and specifically explores how such an approach might have changed the outcome in *Anonymous Online Speakers*.

#### A. ONLINE SPACES FOR SPEECH

As this Note addresses issues of anonymous online speech, and not protections for online speech more generally, it only focuses, in detail, on a limited number of categories of online spaces. These categories are offered merely as guidance for courts in both discerning the nature of the speech as well as assessing the harmfulness of the questionable speech. In no way is this a comprehensive summary of different online platforms. Across each of these categories exist sub-issues that courts should also consider, such as built-in mechanisms for expressing the relevance of comments, searchability of the speech, access via mobile devices, visible documentation of changes and corrections made to already-published speech, ability to comment on published speech, and likelihood (and knowledge that) speech would be disseminated to other platforms. If future dissemination does occur in a particular case, then courts must likewise assess the characteristics of those platforms. As such, this Section also explains how and for what purposes individuals use these online spaces. Furthermore, the Section will also explain the boundaries of each of these spaces and opportunities for overlap (multiple postings), ease-of-access (search engines, mobile access), and



dissemination of speech (email<sup>171</sup> and search engines<sup>172</sup>) outside of the original space where the speech was uttered.

#### B. BLOGS AND INDIVIDUAL PLATFORMS FOR PUBLICATION

Blogs, perhaps the most basic online platform, are a free and neutral template (similar to a blank document in a word processing program) that provides individuals opportunity for self-expression in an identifiable and searchable online space. Blogs and even personal webpages (made user-friendly by various templates and webpage services) provide individuals with online forums to publish and thereby make accessible to others their speech, thoughts, expressions, creative content, and other material. In general, blogs provide a permanent, virtual location to which an author can point others to access the blog. Though blogs require bloggers to register in order to use the service,<sup>173</sup> the individual blogger chooses the extent of his or her anonymity. For example, the individual could choose to post information under a single-word pseudonym with no other “about me” information (essentially anonymous speech); or the individual could choose to post under a real name and include truthful and complete “about me” information. One question, therefore, for courts to consider is not merely whether the speech uttered occurred on a blog, but what measures, if any, the blogger took to preserve anonymity.

A significant misconception of blogs, reflected in the reasoning of the *Cahill* court,<sup>174</sup> is that speech on blogs is mere opinion and that no reasonable reader would rely on blogs for verified, accurate, or factual information.<sup>175</sup> In some instances, a blog can serve as an aggregation site, simply linking to

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171. Email *may* have the potentially fast and far-reaching effect the district court described. But, either speech was originally uttered in email form (in which case it is proper to describe the characteristic of the speech as somewhat fast-spreading and far-reaching; but even then, how far/fast do chain emails actually spread) or the speech was taken out of its original context and put in email (i.e., easily disseminated form).

172. Search engines have the ability to reproduce anonymous statements, out of the original online context, and in an ordered list. In most cases, a high position on popular search engines, like Google, adds legitimacy and reliability to a statement or source. A statement which, in its original context, would not be relied upon as fact may be relied upon as fact if reproduced and displayed prominently in a particular search query.

173. This is the case unless someone creates an individual webpage registering a domain name. In such cases, the web programmer has full control over the template and code governing speech in that particular space.

174. *See Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

175. *See id.* at 465 (“[B]logs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely.”).

other sources (verified or not) with varying amounts and kinds of commentary. Other blogs serve as a free-of-charge publishing platform for highly respected academics, journalists, and other researchers. Whether these blogs are anonymous may depend on professionals wanting to keep a separate, but still factually accurate, platform for non-professional speech. Regardless, on all blogs, the individual blogger (or the parent company for which the blog is written) controls the quantity, quality, and kind of information posted to the public. This information could be factually accurate, unverified opinion, or merely aggregate other people's speech. Norms governing online spaces change quickly; as such, in assessing nature, meaning, and harmfulness of this online speech, courts would thereby need to assess the particular blog's function and how particular reasonable readers, within the current online landscape and accepted norms of behavior, would understand the speech uttered in that particular online space.

#### 1. *Special Interest Blogs*

Another misconception surrounding blogs, especially blogs as the prototypical example of low-cost online speech that allows previously unheard voices to have a platform, is that speech on these individual platforms are disseminated widely to others.<sup>176</sup> However, many blogs are not read more widely than by a circle of close friends or family. In other cases, the subject matter of the blog will attract a small group of followers with similar interests; with the geographic diffusion of online users, these interests may draw readers to special-interest blogs authored by people physically located far away. Whether the blogs are anonymous rarely matters (the "real" name of a person 3,000 miles away is about as informative as a pseudonym).<sup>177</sup> In both instances, readers with similar interests will evaluate the accuracy of the bloggers speech based on their own expertise in the area.

Often, the appeal of a blog is its service as a noninvasive space where an individual can post thoughts, updates, reflections, etc. and where those whom the individual has identified as being interested in such content are able to access the information on their own time and without an invasion of posts sent to personal email. In such circumstances, the fear of speech on "the Internet" as somehow widely and quickly disseminating to so many people such that the speech poses a greater threat than speech that could be widely and quickly repeated through a phone call seems unlikely. Surely, there

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176. See SUNSTEIN, *supra* note 42.

177. There may be instances where a pseudonym instills more trust in the blogger than anonymity.

is little built-in mechanism for accountability (save the group of followers leaving comments correcting posts, or adding more information), but there is as much accountability as there would be in a repeated conversation among different groups or friends, colleagues, and family. In other words, the fear of unbridled lies seems no more justified in these situations merely because the content is posted in an online space rather than published in an email newsletter or communicated in a face-to-face gathering.

## 2. *Blogs with Wider Reach*

However, though courts are correct that blogs are not limited to individuals with a small group of followers and some blogs have large groups of followers, thereby widely and quickly sharing information, these wider-reach blogs normally have sophisticated verification mechanisms and are often not anonymous. For example, blog platforms often serve as low-cost and easy forum for groups and organizations to provide topical information, advertise events, or rally support for a cause, and can sometimes have a substantial following. In these cases, the worry about the speed and ease of dissemination is somewhat more substantial only insofar as there are more people following the blog. However, in terms of actively disseminating the address to the blog (i.e. access to the blog), the means for such dissemination are no more sophisticated than large-scale listserv emails or traditional advertising avenues. Similarly, accountability in these situations could be more sophisticated than non-online speech given the ability for comments, documented corrections, and ability to update already published material. Furthermore, given the increased viewership of the content, there could be a wider range of knowledge and ability to correct.<sup>178</sup>

Finally, in contrast to blogs in their earliest forms, which were almost exclusively independent, discrete, unaffiliated platforms for individual expression, currently established institutions (that either started online and exist entirely online, e.g. HuffingtonPost,<sup>179</sup> or that started in analog and exist both online and off, e.g. The N.Y. Times<sup>180</sup>) have blogs embedded within their larger online platform. In such cases, these bloggers are often understood in an online only op-ed capacity: they are selected, vetted, edited, and retained by the companies running the larger entity and as such the bloggers answer to the companies that consist of these larger online service

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178. See generally SUROWIECKI, *supra* note 148; SHIRKY, *supra* note 148.

179. See THE HUFFINGTON POST, <http://www.huffingtonpost.com> (last visited April 17, 2011).

180. See *Blogs*, N.Y. TIMES, <http://www.nytimes.com/interactive/blogs/directory.html> (last visited Feb. 21, 2011).

platforms. These blogs are far from the independent publishing platforms in which anyone with a computer and Internet access could have a voice that would be disseminated, with no identification, no gatekeepers, and no barriers.

By contrast, such embedded blogs represent an interesting reality in the online world, one unanticipated by early Internet-utopia narratives. Instead of online platforms serving as a low-cost soapbox where every hitherto unheard voice could be heard far and wide across the land, with embedded blogs, just as in real-world spaces, the voice most heard and most frequently accessed is the voice speaking from within an already-established institutional voice replete with gatekeepers and editors. In these situations, the speech is heard and read by as many people as voluntarily access the blog through the many services' webpage. Furthermore, the speech is highly verified, edited before going "live" online and then further edited as more information comes out or new stories develop,<sup>181</sup> and often open for reader comments and corrections.

### 3. *Micro-Blogs and the Innovation*

Twitter<sup>182</sup> is an example of a hybrid online service that shares common characteristics with other online platforms and is constantly innovating and developing. Though billed more as a social networking service than a blog because it includes a social component (for example, users can respond to other Twitter users, individuals sign up to follow particular Twitter feeds), it shares some characteristics with email newsletters, short-form blogs, and social networking platforms. As such, understanding the nature of the speech at issue, the meaning of the speech (almost learning how to "read" Twitter feeds), and the potential scope of harm from these "tweets"—or 140 characters messages sent via Twitter's online service—is a complex endeavor and must take into account many particular characteristics of speech uttered via tweets and read by followers on an individual's feed.

Perhaps more than any other current online platform, speech via Twitter's online service is readily identified as a tweet even if not read on Twitter because of the 140 character limit as well as certain conventions common to most tweets (including addressing other Twitter users). In this case, the context of the speech and the content of the speech are inextricably

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181. *See, e.g.*, BOINGBOING, [www.boingboing.com](http://www.boingboing.com) (last visited April 17, 2011); TECHDIRT, [www.techdirt.com](http://www.techdirt.com) (last visited April 17, 2011); ENGADGET, [www.engadget.com](http://www.engadget.com) (last visited April 17, 2011).

182. TWITTER, <http://www.twitter.com> (last visited April 17, 2011).

linked which, consequently, adds a layer of accountability especially helpful if tweets are taken out of context. If, for example, a comment seems oddly spelled, incomplete, or inaccurate, but it also contains characteristic elements of a tweet (not longer than 140 characters, directed at another Twitter user, including a hyperlink), it could become apparent to those reading the speech that it was originally part of a short-form update service. As such, the speech may be understood or reasonably expected to be understood as shorthand, not complete or authoritative on the subject, or expressed by an individual with no requisite expertise on the particular subject at hand.

Furthermore, Twitter's service exemplifies some of misconceptions regarding the fast and furious spread of speech uttered online and the lack of accountability attached to anonymous online speech. Typically, courts have discussed these two characteristics of online speech as a sort of package deal: if online speech, then broader and faster reach *and* increased opportunities for anonymity and therefore for unaccountable speech.<sup>183</sup> However, this presumption is misguided. As Kevin Rose, founder of Digg (discussed below) and investor in Twitter, described: if you want to increase your Twitter followers (that is, if you want to increase the scope of influence of your speech and the speed with which it will be accessed), “[f]ill out your bio.”<sup>184</sup> In other words, do not remain anonymous. Online services such as Twitter complicate courts' presumption that the increased speed and reach of online speech are always accompanied by anonymity and a lack of accountability.

As reflected in the blog example, online speech is actually *not* universally wide, far, or fast reaching; most speech online is read by few and when it is widely disseminated is usually disseminated through platforms that have built-in mechanisms for verifying or holding the speech accountable. And there are often tradeoffs made between speed and reach of speech and pure anonymity. Even posting partially-identifying information, such as occupation or location, without disclosing one's name can increase accountability and increase the reach of this anonymous speech.

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183. *See* Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1213 (D. Nev. 2008); *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 238 (Cal. Ct. App. 2008).

184. Kevin Rose, *10 Ways to Increase Your Twitter Followers*, TECHCRUNCH (Jan. 25, 2009), <http://techcrunch.com/2009/01/25/kevin-rose-10-ways-to-increase-your-twitter-followers/>.

### C. SOCIAL NETWORKING PLATFORMS

Social networking platforms are another kind of online space in which individuals can publish personal thoughts, expressions, and creative content. Unlike blogs, where the platform is relatively neutral, social networking platforms have more complex interfaces and incorporate a sharing and interactive component into both the use of and access to the information contained on these sites. Common to all social networking services is that in order for others to access posted information, they must be registered users of the service (and therefore bound by terms of service agreements). They also must access the information within the password-protected and regulated-via-company policy space of the social networking platform. Not only is the reach of individual speech uttered within a social networking platform thereby limited to users who will see their posts and information, users who do see this information can respond through integrated voting components such as “like” buttons or post responsive comments. In this way, individual speech can be verified, corrected, or flagged to other readers as potentially offensive or inaccurate.

However, though social networking sites are de facto (at least for users adhering to terms of service) not anonymous online platforms, information from these sites can be replicated outside of the social networking platform and posted or distributed anonymously. For example, information from a social networking site could be copied and disseminated via email, posted on blog platforms or repeated in message boards. When this happens, quotes from friends can be taken out of the context of a conversation post made in relation to a friend’s published link. A comment could seem particularly malicious even though it was original uttered as an inside joke between friends. Or it could lose some extra-accountability mechanisms—for example, a “like” button added to the comment could be deleted, thereby removing the fact that others verified the comment. In such situations, the originally uttered, but now decontextualized speech could be widely disseminated, causing harm that would not have been caused had the speech remained contextualized. This is one good example of the nuanced analysis courts would have to take in determining whether to unmask the anonymous speaker, and, if so, who to unmask—the original speaker who uttered the speech within a closed, non-anonymous but password-protected online platform, or the anonymous disseminator of that speech. Nonetheless, information posted through these social networking sites are most often either accessed within the original context of its posting or retain characteristics that identify it as uttered within a social networking space.

## D. COMMUNITY SITES, MESSAGE BOARDS, AND CHAT ROOMS

Community sites, message boards, and chat rooms are specific online sites organized around a specific interest or subject. The subject of the particular community site, message board, or chat room is determined by the administrator or creator of the message board or chat room. For example, Yahoo! maintains message boards devoted to financial information of companies<sup>185</sup> and AOL maintains chat rooms for users of various interests.<sup>186</sup> Similarly, community organizations or local newspapers often maintain sites for community members to post opinions, events, and other community-related speech.<sup>187</sup>

More than blogs (where bloggers choose if and how much anonymity they want) and social networking sites (where most sites' terms of service agreements require accurate identifying information in order to use the service), community sites, message boards, and chat rooms generally allow pseudonymous or anonymous users. These anonymous users can start conversation threads and post responses to others' posts (message boards), have real-time conversations with a number of other users (chat rooms), post opinions regarding community issues (political, commercial, educational, or social fora), share links to other sources, or provide factual information regarding community events (community sites).

These kinds of free-for-all posting sites have resulted in a number of situations involving harmful speech.<sup>188</sup> Though later users generally have an opportunity to correct or mitigate harmful or hateful remarks, there is no guarantee that these later users will be successful. For example, if there is a presumption that the users are connected online by interests but are otherwise geographically dispersed, there may be no incentive to heed corrections to harmful speech. By contrast, participants of community sites in which most users are expected to share a geographic area may be more

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185. See *Finance Message Boards*, YAHOO!, [http://messages.yahoo.com/yahoo/Business\\_Finance/](http://messages.yahoo.com/yahoo/Business_Finance/) (last visited Feb. 21, 2011).

186. See *AOL Help Desk*, AOL, <http://help.aol.com/help/microsites/microsite.do?cmd+displayKCPopup&docType=kc&externalId=223492> (last visited Mar. 7, 2011) (creating your own AOL chat room).

187. See, e.g., MY COMMUNITY NOW, <http://www.mycommunitynow.com/> (last visited April 17, 2011); COMMUNITY NEWSPAPERS, <http://www.communitynewspapers.com/> (last visited April 17, 2011); MERCURY NEWS, <http://www.mercurynews.com/my-town> (last visited April 17, 2011); PORTLAND TRIBUNE, <http://www.portlandtribune.com/news/index.php> (last visited April 17, 2011).

188. Zhou, *supra* note 43 (citing examples regarding anonymous comments posting hateful comments on the online tribute page of a 17-year-old suicide victim).

sensitive to corrections from users who are connected to the anonymous poster by both interest and geographic location.

Even if “corrective” posts by other users are successful, the “feeling” of the particular message board takes on a particular tone that may discourage continued correction of the harmful or hateful postings.<sup>189</sup> In some cases, this has led administrators or the sites’ hosts to explicitly intervene when an anonymous user interferes with the norm of civility or cooperation the administrator and the users desire in that online space.<sup>190</sup> In others, proprietors of certain companies or services badmouthed in online forums have responded to concerns and criticisms with helpful, more accurate information.<sup>191</sup> In many cases, hosts of certain online services make clear, in their terms of service, that a particular level of discourse is expected within the community space online.<sup>192</sup> If users fail to comply with these standards and codes of conduct, the host reserves the right to censor the anonymous speaker’s comments, independent of any legal action.<sup>193</sup>

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189. LESSIG, *supra* note 7, at 104–06 (describing a scenario where an anonymous user posted “vicious” attacks on a student, the victim responded, but then, when the anonymous poster continued, the harmful speech changed the feeling of the online conversation).

190. *See, e.g.*, Ellyn Angelotti, *Feedback Overload: Handling User Comments on the Shootings*, POYNTER (Apr. 17, 2007, 6:22 PM, updated Mar. 3, 2011, 5:16 PM), <http://www.poynter.org/latest-news/top-stories/81834/feedback-overload-handling-user-comments-on-the-shootings/> (describing *The Roanoke Times*’ efforts to monitor comments on a message board dedicated to the Virginia Tech shootings); Lizzie Davis, *Moderated by the Guardian*, MANAGING ONLINE COMMUNITIES (Feb. 28, 2011, 9:36 AM), <http://managingcommunities.wordpress.com/2011/02/28/online-community-guardian-moderation/> (describing author’s own experience of having a message board comment moderated); *see also infra* Part III.F.

191. *See* David H. Freedman, *Responding to Reader Comments*, N.Y. TIMES (Oct. 15, 2010, 12:22 AM), <http://boss.blogs.nytimes.com/2010/10/15/tech-talk-responding-to-reader-comments/>.

192. *See* LESSIG, *supra* note 7, at 91–92 (“AOL explains in its Community Guidelines that . . . AOL enjoys the unfettered discretion to censor constitutionally-protected speech in its discussion forums and other online spaces”) (internal citations omitted); *see also* Richard Perez-Pena, *News Sites Rethink Anonymous Online Comments*, N.Y. TIMES, April 12, 2010 at B1, *available at* <http://www.nytimes.com/2010/04/12/technology/12comments.html>.

193. *See* Marci Alboher, *Some Comments About Reader Comments*, N.Y. TIMES, Aug. 14, 2009, 7:35 PM, <http://shiftingcareers.blogs.nytimes.com/2008/08/14/some-comments-about-reader-comments/>; *see also* LESSIG, *supra* note 7, at 91–92. Nonetheless, this is not to say that host of online chat rooms are enemies of free speech; in fact, AOL defended its users right to anonymous speech in an early free speech case. *See In re Subpoena Duces Tecum to AOL, Inc.*, No. 40570, 2000 WL 1210372, at \*5 (Va. Cir. Ct. Jan. 31, 2000) (reasoning that because if the OSP “did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that subscribers would look to AOL’s competitors for anonymity”).



Unfortunately, though anonymity on these message boards and chat rooms may lead to harmful or hateful speech (perhaps because they can offer a volatile mix of lack of accountability and ability to start any thread topics or conversations), most courts have found comments on such sites to be mere opinion and rarely actionable.<sup>194</sup> Though revised legal standards may be one remedy for victims of harmful online speech currently lacking means for redress, addressing comments on these sites within the online context may allow courts to more accurately assess the kind of speech uttered and find actionable speech in warranted situations. For example, perhaps some message boards are actually sites for underground information posted by anonymous industry leaders. Or perhaps, if some kind of speech that would look like opinion had it been uttered in a more institutionalized print source (for example, a post replete with misspellings, swearing, name-calling) was *relied on* by readers of a chat room as fact—not opinion—and if the poster reasonably knew this would be the case, then this speech should actually be assessed as an actionable assertion of fact. It might also be the case that a particular pseudonymous user or anonymous user with distinctive posts or grammar has established expertise in a certain area that regular users of that message board appreciate, but that no reasonable person outside of the particular message board community would think of as factual because of the informality of the speech.<sup>195</sup>

Furthermore, depending on the subject at issue, some topics may encourage more fact-based comments (say, a chat room for mothers with children having particular diseases) while others may necessarily invite mere opinion (say, celebrity gossip sites). As such, determining the nature, meaning, and potential harmfulness of the speech depends on a nuanced and extremely pointed assessment of the particular online context as well as the content of the speech itself and the understanding of speech in that space by the reasonable online user (who may be different than a reasonable offline person reading this speech out of the online context). It is necessary, though

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194. *See* Doe v. Cahill, 884 A.2d 451 (Del. 2005); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

195. *But see* Lidsky, *supra* note 6, *cited with approval in In re Anonymous Online Speakers*, No. 09-71205, 2011 WL 61635, at \*6 (9th Cir. Jan. 7, 2011). It is as inaccurate to characterize online speech as inherently more informal as it is to characterize online speech as inherently faster and further spread than real-world speech. Some online spaces allow for certain informalities (some email, some chat rooms); however, others develop their own kind of formality that *looks* different from real-world formality but services similar purposes (i.e., signifying expertise, authoritativeness, etc.).

insufficient, to assess the anonymous speech as uttered within a community site, message board, or chat room. Beyond this, courts must look to the norms and expectations of the speech uttered in these spaces as created and understood by the users themselves, the terms of service agreements, other means of correction by the host of the sites, and self-help opportunities for harmed plaintiffs to respond to false information.

E. RATINGS SITES AND OTHER AGGREGATING INFORMATION SITES

Ratings sites and tools for ranking various companies, services, and businesses present complications for anonymous online speech similar to the complications for community sites, message boards, and chat rooms described above. On ratings sites, such as Yelp,<sup>196</sup> users post reviews of businesses using objective measures (assigning one to five stars) as well as subjective measures (comments describing the experience, service, or product). Ratings tools like Digg,<sup>197</sup> by contrast, provide primarily an objective measure, although sometimes accompanied by users' subjective assessments. If an anonymous user "diggs" an article, a business, or a site, then that, when combined with other users' "diggs," propels that article, business, or site to the top of the relevant section on the Digg website. Unlike the online spaces described above, the accurateness of ratings sites is more dependent upon the aggregate evaluation (by anonymous, pseudonymous, and non-anonymous users) of the company or service at issue, and less on individual posts.<sup>198</sup> Other aggregated information sites, such as Wikipedia or other wiki pages, are created and corrected by anonymous contributors, unidentifiable to the readers of the wiki site.<sup>199</sup> And though there are live editors who assess posts, as well as tools enabling users to "flag" certain posts, most Yelp users (and this would likely extend to the reasonable online user) would first look to the average objective rating (inherently anonymous because it is an aggregation of individual anonymous users). Next, the Yelp user would look to individual postings, objective

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196. YELP, <http://www.yelp.com> (last visited April 17, 2011).

197. DIGG, <http://www.digg.com> (last visited April 17, 2011).

198. Ratings tools pose an interesting problem in assessing potentially harmful online speech. It is unclear whether the act of "digging" would count as speech (independent from any accompanying speech).

199. Though anonymous, there is not a free-for-all character to Wikipedia. Similar to norms governing certain message boards, *see supra* note 190, Wikipedia's "contributing to Wikipedia" guide suggests helpful ways in which anonymous contributors can provide helpful information and contributions. *See Contributing to Wikipedia*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Wikipedia:About#Contributing\\_to\\_Wikipedia](http://en.wikipedia.org/wiki/Wikipedia:About#Contributing_to_Wikipedia) (last visited Feb. 21, 2011).

ratings, and comments. Often the Yelp user can distinguish between helpful and unhelpful posts, either because the posts focus on an aspect of the business that is not important to him or her, or because the content of the post seems more like airing a grudge than a measured review.

However, comments on ratings sites are not uniformly opinion, nor uniformly unreliable. Certain individual posts may be rejected by the Yelp user as unreliable while others may persuade the Yelp user whether to try the product or service being reviewed. As such, the meaning or effect of an individual post within an aggregated ratings site, though perhaps word-for-word identical to a posting on a message board discussing the same company, may be different. A particularly vicious post on a message board can, with some work on the part of the user, be identified as an outlier in the overall conversation of the message board. However, comparing the aggregated objective rating of the company or service with drastically opposite ratings may be discredited, in practice, from assessments of the reliability of the overall rating. For example, overly enthusiastic ratings with little factual information may be identified as posted by company representatives themselves; similarly, overly invective ratings may be identified as mere anomalies in service or reactions from an overly sensitive patron.

Ratings sites and aggregated information sites also pose a challenge to underlying presumptions of speech on the Internet as spreading fast and far. Reviews are contained within the particular site, and even within the particular page of the company or service being reviewed. In recent years, collective efforts (often of anonymous contributors and posters, for example Wikipedia) have proved to be as accurate if not more accurate in a variety of situations.<sup>200</sup> As such, it is often not difficult for the truth to catch up to the lie; in fact, the point of these contained aggregation sites is to *encourage* verification, correction, and legitimacy of anonymously-contributed information. Furthermore, in such instances, what may have begun as an individual user's opinion may, through repeated verification by fellow users, be relied upon as fact. Finally, collective action may depend on the option of anonymity—the publicly-valuable speech recognized by the Court may be chilled if individuals were required to be identifiable for their contributions to aggregation sites. And also, corrective posts or responses to previous-posted material may be preempted if the critics were forced to be identifiable. For

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200. *See generally* SUROWIECKI, *supra* note 148; SHIRKY, *supra* note 148.

example, this may especially be true on particularly volatile political wiki pages or even on honest reviews of commercial companies or services.

Online spaces enable large aggregates of users to contribute their speech to a particular whole. In the offline world, the ability for large-scale aggregation is limited because of geography, operation and monitoring costs, and organizational hurdles. Online aggregated information sites were originally described as doomed; it was impossible, so it was thought, for a world of anonymous speakers to collaborate in a civil and collaborative way to produce accurate information.<sup>201</sup> These early naysayers of the plausibility of wiki-type speech and resulting accurately created information seemed to embrace the presumption that anonymous speech is unaccountable speech; a free-for-all forum for online speech would only encourage the worst in persons. However, Wikipedia's and other wiki-type sites' successes reveals that anonymous speech in particular online spaces can actually be more productive of truth and accurate information than speech attributable to a source (albeit with a Terms of Service-type agreement similar to the AOL service agreement described above).

#### F. COMMENTS

Most blogs, news sites, and social networking sites have the option for online readers to post comments. Though often similar in content and form as posts on community sites, message boards, chat rooms, and ratings sites, comments in response to already-published speech is itself speech that can have harmful effects. Derogatory or unfounded anonymous comments, or "trolling,"<sup>202</sup> have been criticized for being particularly harmful and uncivil. Similar to presumptions of online speech being inherently unaccountable, some commentators charge online anonymity as "increas[ing] unethical behavior" resulting in a sort of "online disinhibition effect."<sup>203</sup>

However, not all anonymous comments are derogatory; additionally, more so than many critics of online speech seem to recognize, online sites

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201. See Charles Cazabon, *Why Wikipedia Can't Work*, PYROPUS TECHNOLOGY, <http://pyropus.ca/personal/writings/wikipedia.html>.

202. See Zhou, *supra* note 43. There is a history of the use of the word "trolling" in patents, referring to persons who challenge, without foundation, lawful patent holders in order to force a settlement (which is less costly than legal fees). This misuse of patents, similar to the "misuse" of anonymous commenting online, is also facing reform. See generally Robert Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1584 (2009).

203. See Zhou, *supra* note 43.

are already developing technological solutions to trolling.<sup>204</sup> For example, many online spaces have extensive and developed technological mechanisms to protect against and correct trolling comments.<sup>205</sup> In some cases, the comment period is opened only for a limited time. In others, readers are encouraged to “flag” inappropriate posts. Similarly, some sites have readers rating the comments to push the most helpful (according to the other readers of the site) comments to the top of the site, and the least helpful toward the bottom.<sup>206</sup>

Furthermore, the online contexts within which these anonymous comments are posted already govern the nature, meaning, and effect of these comments. For example, comments on a news story, if completely irrelevant, are often rejected by fellow readers as unfounded; by contrast, invective though relevant remarks could result in harmful effects by connecting the trolling comments to a subject of interest for the readers. Also, comments accompanying already-published speech are secondary to the original posting; as such, the authoritative voice is already established prior to any trolling comments. Different than vitriolic comments on message boards and chat rooms (in which all comments exist on an equal plane), comments to already-published stories are less authoritative than the original posting (often because the original posting is name- or otherwise reputation-identified).

#### G. FUTURE IMPLICATIONS

What does understanding the differences between these online spaces mean for courts? How should courts use this information? The online spaces mentioned above are by no means exhaustive of the kinds of online experiences available to Internet users. Online innovation is characteristic of the growth in popularity and use of the Internet; undoubtedly, new platforms and services will develop that will provide the opportunity for anonymous

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204. See e.g., Jason Kincaid, *Facebook Rolls Out Overhauled Comments System (Try Them on TechCrunch)*, TECHCRUNCH.COM (Mar. 1, 2011), <http://techcrunch.com/2011/03/01/facebook-rolls-out-overhauled-comments-system-try-them-now-on-techcrunch/> (discussing Facebook’s comment monitoring system); Kaushik, *Use Shutup.css to remove comments from websites*, INSTANTFUNDAS.COM (Feb. 4, 2011), <http://www.instantfundas.com/2010/02/use-shutupcss-to-remove-comments-from.html>. See also DISQUS, <http://www.disqus.com> (last visited April 17, 2011) (“Discus is a comments platform that helps you build an active community from your website’s audience.”); ECHO, <http://www.aboutecho.com> (last visited April 17, 2011) (providing “real-time commenting” service, including “[s]pam and bad word filtering, advanced monitoring[,] and more”).

205. See Alboher *supra* note 193; Freedman, *supra* note 191.

206. See Perez-Pena, *supra* note 192 (outlining examples of a number of news sites revising their comments policy).

online speech and will require courts to assess the characteristics of that anonymous speech within these new contexts.

This Note urges courts to examine the publication forum, embedded context, and governing norms of the online speech, and not merely the fact that the speech occurred online, in order to correctly and accurately assess the rights of the anonymous speakers balanced against the rights of the harmed parties to seek redress. Without such acknowledgment, the mistaken apprehension of anonymous speech on the Internet being spread so quickly that the truth cannot catch up to the lie will prejudice the application of standards against defendants. In commercial cases, this could grossly favor the commercial interests of plaintiffs (large companies) over critical, en masse consumer speech. And in the political speech context, this could weigh in favor of political insiders and effectively silence oppositional online speech. In both situations, this could chill publicly-valuable, critical speech that could improve consumer products and hold political actors accountable. Similarly, examining the online context of the speech could determine the meaning or nature of the speech as fact, rather than opinion, thereby granting otherwise barred plaintiffs' access to redress.

As such, in the marketplace of ideas, the more and more varied opinions of many users will vet false ideas and reveal the truth.<sup>207</sup> The integrity of such a marketplace depends on anonymous speakers—we want varied speech in such contexts so that the false statements can be vetted by true statements and public debate. Therefore, the balancing test in anonymous online speech cases is between the benefit of the marketplace (which depends on anonymous speakers) and the supposed harm resulting from the anonymous commercial speech. If the Ninth Circuit had examined the context of the online speech in *Anonymous Online Speakers*, and distinguished between Internet infrastructure and online spaces, services, applications, and platforms, it could have more accurately assessed the harmfulness of the questionable speech. Adopting such an approach, the court likely would have remanded the motions for more fact-finding; there is no indication in either the district court or Ninth Circuit opinions of the particular content of the speech, of the context of the speech within each blog, or of the larger context of the blog postings (as the courts examined in *McIntyre* and *Cahill*).<sup>208</sup> Furthermore, it is likely the Ninth Circuit would have incorporated the fact that the speech occurred online into whatever standard or inquiry it

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207. See *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

208. See *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

undertook as opposed to assessing it as a separate factor to balance along with the right to anonymity and the right to redress. Instead of attributing certain standards to different kinds of speech (political versus commercial), the Ninth Circuit could have incorporated both the limited protections of commercial speech and the sometimes heightened potential for harm of online speech in creating online contexts and circumstances into its standard or balancing test. However, without the actual content of the allegedly defamatory blog postings, and without any knowledge of the characteristics of the particular blogs, it is nearly impossible to assess the accuracy of the Ninth Circuit's holding.

#### IV. CONCLUSION

Courts' worries surrounding anonymity seem to be motivated by a mistaken presumption: that identifying information is the *only* source of accountability for harmful online speech. This constructs a false choice between anonymity and civility. Either online speech is accurate (or at least good-faith opinion), civil, and publicly valuable *or* it is vitriolic, unfounded, and full of lies. The argument is that the supposedly inherent underlying characteristics of the Internet—its capacity for quick and wide-reaching dissemination of information—only make the benefits of anonymous speech more beneficial (i.e. a larger, free-of-charge, completely open platform for publicly valuable, otherwise unpopular or minority speech) and the harmful speech more harmful (i.e. a larger, free-of-charge, completely open platform for derisive and derogatory speech). However, as shown above, this narrative is inaccurate for two main reasons: (1) speech occurs, not on “the Internet,” but rather in a variety of online spaces with differing characteristics (some of which encourage fast and wide-reaching dissemination of content; others encouraging highly regulated speech contained within a particular platform or application); and (2) just as the supposedly inherent characteristics of the Internet are a product of engineering choices, the characteristics governing speech in online spaces are the result of choices by space designers and of norms developed within the particular online space by the users themselves. As online speech becomes a more integral part of the social, political, commercial, educational, and artistic landscape, it is essential that courts correctly understand the characteristics governing online speech and user experiences in these spaces.

Although the Supreme Court has yet to address the issue of anonymous online speech, its anonymous speech jurisprudence has long recognized the importance of context in weighing the competing interests of speakers and audience. In *Meyer*, *McIntyre*, and *Buckley*, the Court highlighted the context of

anonymous speech in determining its level of First Amendment protection.<sup>209</sup> The Court continued to recognize the importance of context when it addressed online speech in *Reno*.<sup>210</sup> It concluded that online speech deserves the same level of protection as real world speech. The *Reno* opinion applauded the equality of online speech with real world speech by listing a variety of real world platforms for speech alongside similarly varied online counterparts.<sup>211</sup> The Court did not describe online speech as an undifferentiated, virtual expanse where previously silent individuals have a free space where their voices can be heard, nor did the Court describe it as a dangerous, monolithic desert where no checks or balances restrain even the most malicious of speech. Instead, the Court, even in its first case recognizing the equal protection afforded to online speech, described a variety of online spaces, one where anyone could become a pamphleteer or public orator.<sup>212</sup> Nevertheless, identifying *Reno* as an understanding of online speech occurring not on “the Internet” but rather on a variety of online platforms, services, and communities lays the groundwork for other courts to follow and actively engage in understanding online speech as occurring in specific and varied contexts.

Courts’ appreciation of the varied context of online spaces is essential, not only to accurately apply discovery standards in civil cases involving the unmasking of anonymous speakers, but also to soundly adjudicate future cases involving online behavior. The reasonable person may soon become the reasonable online user. And though no reasonable online user would likely rely on anonymous message board posts on a gripe site containing misspellings and juvenile name-calling, a reasonable online user may rely on well-reasoned, persuasive anonymous reviews of a repeat-poster on a commercial site. Courts cannot, in other words, use the kind of online space as a proxy for the kind of speech uttered in the space. Instead, courts must look at the online context within which the speech was uttered and the technological and user norms governing the particular online space. Online, anyone can be a town crier. But, like the real world, some town criers expose publicly valuable information. Others merely utter their own opinions. As in the real world, the context and content of the speech in online spaces, and

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209. See *McIntyre*, 514 U.S. 334, 347; *Meyer v. Grant*, 486 U.S. 414, 423 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

210. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

211. See *id.*

212. See *id.*



not the mere fact that the speaker is a town crier, determine whether the reasonable person will listen.

